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

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, a consumer-advocacy organization with members and supporters nationwide, works before Congress, administrative agencies, and courts for the enactment and enforcement of laws protecting consumers, workers, and the public. Much of Public Citizen's research and policy work focuses on regulatory matters, and Public Citizen is often involved in litigation both challenging and defending agency action. Frequently, those cases involve application of this Court's seminal precedents concerning judicial review of agency action, including *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), which sets forth the standard for arbitrary-and-capricious review under the Administrative Procedure Act (APA), and the decisions in *SEC v. Chenery*, 318 U.S. 80 (1943), and *SEC v. Chenery*, 332 U.S. 194 (1947), which recognize that reviewing courts cannot uphold agency action on grounds that the agency did not articulate when undertaking that action.

Those foundational doctrines undergird modern administrative law, appropriately balancing the need to provide agencies with the flexibility to decide how best to implement their statutory responsibilities with the need to hold agencies accountable when they exercise that discretion unreasonably. When properly applied, those doctrines do not systematically favor any particular policy agenda or regulatory philosophy,

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[1] This brief was not written in whole or in part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for all parties have consented to the filing of this amicus brief.

but require agencies to justify their decisions to alter regulatory rights and responsibilities or otherwise depart from the status quo.

These doctrines thus are as relevant to agency actions challenged by Public Citizen as to agency actions supported by it, and Public Citizen has a strong interest in their proper application given their centrality in cases of significance to Public Citizen's mission. Public Citizen is concerned that arguments presented by the government and industry petitioners, if adopted, would alter the traditionally even-handed application of bedrock administrative law principles. Such an outcome would harm Public Citizen's efforts to encourage agencies to regulate corporate activity to protect consumers, workers, and the public. Public Citizen accordingly submits this brief to urge the Court to reject petitioners' arguments to the extent they would improperly put a judicial thumb on the scale in favor of deregulatory agency actions.

SUMMARY OF ARGUMENT

In the orders on review, the Federal Communications Commission (FCC) relaxed its broadcast ownership rules based on its determination that those rules no longer served the public interest. As part of its public-interest analysis, the FCC found that its actions would not have a negative effect on ownership of broadcast outlets by minorities and women—a consideration that the FCC continued to recognize as one component of its public-interest analysis. On judicial review, the court of appeals concluded that the FCC's orders were arbitrary and capricious under the APA because the FCC's analysis of the impact of its rule changes on minority and female ownership was not the product of reasoned decisionmaking.

I. The court of appeals' decision was correct and should be affirmed. The APA requires that final agency action be supported by reasoned decisionmaking. If the agency fails at that task, a reviewing court may set the agency action aside, requiring the agency to start afresh. A reviewing court is not permitted to uphold agency action on grounds that the agency did not advance when it took the action under review.

The court of appeals' decision is faithful to that principle. The FCC's broadcast-ownership rules implement its statutory charge to regulate broadcasting in the public interest. The FCC has long-recognized that one component of the public interest is diverse ownership of broadcast outlets, including by minorities and women, and that its ownership rules further that goal.

In the orders on review, the FCC did not alter its determination that diverse ownership of broadcast licenses is in the public interest. It purported to find, however, that relaxing the broadcast-ownership rules would not have a negative impact on minority and female ownership. As the court of appeals and respondents have explained, that conclusion was not supported by a reasoned analysis. Accordingly, the court of appeals correctly determined that the FCC's actions were arbitrary and capricious under the APA.

Contrary to the FCC's argument, the court of appeals did not give undue weight to the goal of promoting minority and female ownership. The FCC itself has defined the public interest to encompass ownership diversity. The court of appeals did nothing more than require the agency to address that component of its public-interest analysis in a reasoned way.

Before this Court, the FCC seeks to avoid that responsibility by minimizing the relevance of its finding that its rule changes would not harm minority and female ownership. The FCC's current stance, however, is not consistent with the agency's reasoning in the orders on review and, therefore, cannot be a basis for upholding the FCC's actions.

II. The Court should reject the arguments of the FCC and petitioners National Association of Broadcasters, *et al.* (NAB) seeking a heightened level of APA deference to the FCC's decision to relax its ownership rules in proceedings under § 202(h) of the Telecommunications Act of 1996. Nothing in § 202(h) insulates the FCC from traditional APA review standards.

Section 202(h), which does not mention the APA, requires the FCC to review its ownership rules quadrennially, determine whether they are necessary in the public interest, and repeal or modify any rules that the FCC determines are no longer in the public interest. Because § 202(h) does not expressly supersede the APA, the APA applies with full force to the FCC's actions under § 202(h). And although the FCC is entitled to deference when it comes to defining the public interest, this Court has made clear that the FCC's actions in implementing its public-interest charge are to be reviewed under the APA's arbitrary-and-capricious standard.

The FCC errs in suggesting that § 202(h) affects the application of these bedrock APA principles. The FCC's argument wrongly assumes that the court of appeals required the agency to gather "perfect data" before implementing § 202(h); the court did not do so. The FCC also emphasizes that § 202(h) requires a review of the ownership rules every four years, but

nothing about that requirement grants the FCC authority to depart from the traditional APA standard of reasoned decisionmaking.

The FCC and NAB wrongly attempt to shift the responsibility to commenters to provide greater support for retaining existing ownership rules. Contrary to the FCC's assertion, the greater leeway an agency enjoys when denying a petition for rulemaking has no relevance to judicial review of final agency action amending an existing rule. Likewise, the FCC's suggestion that its obligation to engage in reasoned decisionmaking when it relaxes a rule extends only to the "original rationales" for a rule has no support in the APA or this Court's precedents.

The NAB likewise errs in arguing that commenters who supported the original rule bore a burden of justifying the existing rule, such that the FCC was not required to conduct a reasoned analysis of its decision to relax its ownership rules. Contrary to the NAB's assertion, § 556(d) of the APA does not apply to informal rulemakings, and, in any event, that section would place the burden on commenters seeking the rule change—not on commenters seeking to maintain the status quo. In addition, nothing in § 202(h)'s text or in the D.C. Circuit cases on which the NAB relies suggests either that the FCC must presume that broadcast-ownership rules should be relaxed, or that the burden is on commenters to justify maintaining the status quo. Even if § 202(h) were viewed as reflecting a deregulatory purpose, this Court has made clear that reviewing courts should apply the same APA review standard regardless of the direction in which the agency moves.

ARGUMENT

This case involves the application of well-established principles of judicial review of agency action to a decision by the FCC to relax its regulations governing common ownership of newspapers and broadcast stations and of multiple broadcast stations. The FCC's actions rested in material part on the agency's determination that loosening its ownership rules would not have a negative impact on ownership of broadcast outlets by women and minorities. As respondents have explained and as discussed below, the FCC's determination is not supported by reasoned decisionmaking and, therefore, is arbitrary and capricious under the APA, 5 U.S.C. § 706(2)(A).

Asking this Court to hold otherwise, the FCC and the NAB urge the Court to grant a heightened level of deference to the agency's analysis of the impact of its rule changes on women and minority ownership. The Court should reject petitioners' arguments. Section 706(2)(A) of the APA establishes a uniform standard of judicial review for all agency actions to which it applies, and Congress did not depart from that uniform standard when it directed the FCC to review its ownership rules periodically to assess whether they continue to serve the public interest.

I. The FCC's orders are arbitrary and capricious under bedrock administrative law principles governing judicial review of agency action.

A. "The APA 'sets forth the procedure by which federal agencies are accountable to the public and their actions subject to review by the courts.'" *DHS v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (quoting *Franklin v. Massachusetts*, 505 U.S. 788, 796

(1992)). To advance these goals, the APA "requires agencies to engage in 'reasoned decisionmaking,'" *id.* (quoting *Michigan v. EPA*, 576 U.S. 743, 750 (2015)), and "directs that agency actions be 'set aside' if they are 'arbitrary' or 'capricious,'" *id.* (quoting 5 U.S.C. § 706(2)(A)). "[I]n ensuring that agencies have engaged in reasoned decisionmaking," a court must "examin[e] the reasons for [an] agency decision[ ]" and assess "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Judulang v. Holder*, 565 U.S. 42, 53 (2011) (internal quotation marks omitted). An agency's action is arbitrary and capricious if the reasons for its decisions are not "logical and rational." *Michigan*, 576 U.S. at 750 (internal quotation marks omitted).

If an agency fails to engage in reasoned decisionmaking, "[t]he reviewing court should not attempt itself to make up for [the agency's] deficiencies." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Under a "foundational principle of administrative law" predating and incorporated into the APA, "a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan*, 576 U.S. at 758 (citing *SEC v. Chenery*, 318 U.S. 80, 87 (1943) (*Chenery I*)). As applied here, that foundational principle requires evaluating the FCC's rule changes based solely on the reasoning the agency set forth in the agency orders on review. If the Court determines that the FCC's orders do not reflect reasoned decisionmaking, the appropriate remedy is to direct the agency to "'deal with the problem afresh' by taking *new* agency action" and "comply[ing] with the procedural requirements" associated therewith.

Regents of Univ. of Cal., 140 S. Ct. at 1908 (quoting *SEC v. Chenery*, 332 U.S. 194, 201 (1947) (*Chenery II*)).

B. The FCC's broadcast-ownership rules implement the agency's statutory charge to regulate the nation's airwaves in the "public interest." 47 U.S.C. §§ 309(a), 303(f); *see also Nat'l Broad. Co. v. United States*, 319 U.S. 190, 215 (1943) (*NBC*); *United States v. Storer Broad. Co.*, 351 U.S. 192, 203 (1956); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978). This Court has accorded the FCC's "judgment regarding how the public interest is best served … substantial judicial deference." *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981). Exercising its statutory charge, the FCC has determined that the public interest is served when ownership of broadcast media is diverse. *See*, *e.g.*, NAB Pet. App. 69a ("[T]he present record supports adoption of an incubator program to promote ownership diversity[.]"). The FCC has explained that ownership diversity encompasses the goal of "facilitating the acquisition and operation of broadcast stations by small businesses, new entrants, and minority- and female-owned businesses," and that its "broadcast ownership rules … help further this purpose." JA 335–36; *see also id.* at 171, 180, 214.

In the orders on review, the FCC did not disavow its view that the public interest is served by diverse ownership of broadcast outlets, including by minorities and women. Rather, in each relevant instance where the FCC repealed or modified its broadcast-ownership rules, it rested on a finding that its actions would not have an adverse impact on the public interest in fostering minority or female ownership. *See* NAB Pet. App. 87a–88a ("[W]e find that eliminating

the [newspaper/broadcast cross-ownership] rule will have no material effect on minority and female broadcast ownership."); 128a ("[W]e find that elimination of the [radio/television cross-ownership] rule is not likely to have a negative impact on minority and female ownership."); 142a ("We find that these modifications to the Local Television Ownership Rule are not likely to have a negative impact on minority and female ownership.").

In reviewing the FCC's actions, the court of appeals remained faithful to the APA principles discussed above and appropriately focused its analysis on whether the agency had "justif[ied] its rule with a reasoned explanation." NAB Pet. App. 40a (quoting *Stilwell v. Off. of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009)). The court correctly concluded that the FCC had not met that burden. As the court determined, the FCC's conclusions on the effect of its rule changes on minority and female ownership did not rest on "its general expertise" or "support from commenters" (except with respect to the newspaper/broadcast cross-ownership rule), and the agency did not offer "any theoretical models or analysis of what the likely effect of consolidation on ownership diversity would be." *Id.* Instead, the FCC "confined its reasoning to an insubstantial statistical analysis of unreliable data" of minority ownership, and on even less with respect to female ownership. *Id.*

In reaching that conclusion, the court of appeals did not curtail the FCC's authority to regulate broadcast stations in the public interest. To the contrary, the court recognized that the FCC "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 41a. The FCC, however, "ha[d] not done so," choosing instead to "proceed[] on the basis that consolidation will not harm ownership diversity." *Id.*

C. As respondents have explained, the court of appeals correctly applied well-established administrative-law principles to conclude that the FCC's actions were not supported by reasoned decisionmaking. This brief adds a few additional points in response to the FCC's and the NAB's criticisms of the court of appeals' analysis.

At the outset, the FCC mischaracterizes the court of appeals' decision by asserting that the court maintained an "exclusive focus on racial and gender diversity," FCC Br. 33; regarded such diversity as a "threshold, dispositive consideration," *id.*, and "elevat[ed] … a single public-interest factor" over other public-interest considerations, *id.* at 34. Relatedly, the NAB argues that the FCC has discretion not to consider minority and female ownership in its public-interest analysis in proceedings conducted under § 202(h) of the Telecommunications Act of 1996, as amended, 47 U.S.C. § 303 note. *See* NAB Br. 33, 37–38. These arguments are misplaced. The court of appeals' determination that the FCC failed to engage in reasoned decisionmaking with respect to a single public-interest factor does not improperly give that factor undue weight. Rather, it enforces the APA's command that agency action may be set aside if it is arbitrary or capricious. The FCC has defined the public interest to encompass diverse ownership, and it has purported to consider that aspect of the public

interest in its § 202(h) proceedings. *See*, *e.g.*, FCC Br. 31 (expressing the FCC's commitment to evaluating data on minority and female ownership "in determining whether future rule changes are warranted"). Having done so, the FCC is subject to the APA's requirement of reasoned decisionmaking in analyzing the impact of its actions on minority and female ownership. The agency lacks discretion to rely on a flawed analysis of the impact of its rule change on minority and female ownership, just as the FCC would lack discretion to rely on a flawed analysis of the impact of its rule change on competition in the broadcast market. The question whether the FCC could redefine the public interest to exclude consideration of minority and female ownership is not before this Court because the agency did not rest its actions on those grounds. *See*, *e.g.*, *Michigan*, 576 U.S. at 758. A reviewing court's responsibility under the APA is to identify any error in the analysis that the agency actually conducted so that the agency can "deal with the problem afresh." *Chenery II*, 332 U.S. at 201. That is what the court of appeals did.

Further, in doing so, the court of appeals did not, as the FCC contends, impose procedures on the agency beyond those found in the APA "as a prerequisite to any change" in the ownership rules. *See* FCC Br. 35 (citing *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978)). In *State Farm*, this Court explained that *Vermont Yankee* is not "a talisman under which any decision is by definition unimpeachable" and that holding agency action arbitrary is not "to dictate to the agency the procedures it is to follow." 463 U.S. at 50. Here, the court of appeals directed the FCC to "provide a substantial basis and justification for its actions

whatever it ultimately decides," NAB Pet. App. 42a, which amounts to no more than requiring that the FCC engage in reasoned decisionmaking. The court's reference to "new empirical research *or* an in-depth theoretical analysis," *id.* at 41a (emphasis added), recognizes that the FCC may rely on theory if reliable evidence is unobtainable. *See also id.* at 40a (explaining that the FCC failed to offer even a "theoretical model[] or analysis of what the likely effect of consolidation on ownership diversity would be").

Before this Court, the FCC seeks to escape its obligation to engage in reasoned decisionmaking by recasting the nature of its public-interest analysis. The FCC argues that it "did not overhaul its ownership restrictions *because of* the effect that step was projected to have on minority and female ownership" but, instead, "discussed the [Reconsideration] Order's potential effect on minority and female ownership only in the course of analyzing whether possible *adverse* impacts on such ownership should dissuade the agency from taking a deregulatory step that it otherwise viewed as highly desirable." FCC Br. 37. That distinction, however, does not excuse the FCC from engaging in reasoned decisionmaking. An agency is not free to dismiss possible adverse impacts of its action on an arbitrary-and-capricious basis, any more than it may rely on arbitrary-and-capricious rationales to support its action. *See United Keetoowah Band of Cherokee Indians in Okla. v. FCC*, 933 F.3d 728, 740 (D.C. Cir. 2019) (holding FCC's public-interest analysis was arbitrary where "[t]he Commission did not adequately address the harms of deregulation or justify its portrayal of those harms as negligible").

The FCC, moreover, cites nothing in the orders on review that purports to adopt such a novel burden-shifting approach to its public-interest analysis. Neither the court of appeals nor respondents dispute that the FCC has discretion to weigh various public-interest factors when deciding what action to take. *See* NAB Pet. App. 41a; Resp't Br. 31. But that is not what the FCC did: "Instead, it … proceeded on the basis that consolidation will not harm ownership diversity." Pet. App. 41a. If that finding is not supported by a reasoned analysis, the FCC's actions necessarily fail the arbitrary-and-capricious standard. *See Chenery I*, 318 U.S. at 93–94 ("Its action must be measured by what the Commission did, not by what it might have done.").

The FCC acknowledges that "certain statements in the Orders suggest a conclusion that the rule changes *would not* reduce female (and minority) ownership." FCC Br. 38. The FCC does not defend those statements. Instead, it cites other statements that it contends represent its "bottom-line conclusion" that "the record evidence did not affirmatively suggest any connection between ownership rules and female and minority ownership levels." *Id.* at 39. This argument is triply flawed. First, what the agency now characterizes as "stray FCC statements," FCC Br. 38, were in fact presented in the order on reconsideration as the bottom-line conclusions that supported its actions. *See supra* p.8 (quoting NAB Pet. App. 87a–88a, 128a, 142a). Second, the "orderly functioning" of judicial review "requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *Chenery I*, 318 U.S. at 94. If the true basis for the FCC's action is muddled, this Court cannot conclude that the agency's decision "was

the product of reasoned decisionmaking." *State Farm*, 463 U.S. at 52. Third, the FCC's current litigating position is arbitrary on its own terms because it does not explain why the agency departed from its prior view that "broadcast ownership rules … help further" the goal of "facilitating the acquisition and operation of broadcast stations by … minority- and female-owned businesses." JA 335–36; *see also id.* at 171, 180, 214. If the FCC now believes that no connection can been shown between its ownership rules and minority and female ownership of broadcast outlets, it must acknowledge the change and provide "good reasons for it." *FCC v. Fox Tele. Stations, Inc.*, 556 U.S. 502, 515 (2009). The FCC has not done so.

II. The Court should not fashion a more deferential APA standard of review for the FCC's decision to relax its ownership rules.

Perhaps recognizing that the orders on review cannot satisfy the APA's traditional reasoned-decisionmaking standard, the FCC and NAB suggest that the Court apply a heightened level of deference in reviewing the agency's decision. Their pleas are largely grounded in the quadrennial-review requirement in § 202(h) of the Telecommunications Act of 1996, as amended, 47 U.S.C. § 303 note. Section 202(h), however, does not override or alter the APA's reasoned-decisionmaking standard or otherwise suggest that courts should place a judicial thumb on the scale whenever the FCC relaxes its ownership rules. The FCC's actions under § 202(h), like any other action taken by it, remain subject to bedrock APA review principles that apply uniformly to federal agency actions generally.

A. Section 202(h) directs the FCC to take three specific actions. The FCC must "review … all of its ownership rules quadrennially," "determine whether any of such rules are necessary in the public interest as a 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. This Court has long assumed that, "[i]f time and changing circumstances reveal that the 'public interest' is not served by application of the [agency's] Regulations, … the Commission will act in accordance with its statutory obligations" to advance the public interest. *NBC*, 319 U.S. at 225. By enacting § 202(h), Congress directed the FCC to undertake that inquiry on a regular schedule.

Section 202(h), however, does not affect the application of APA strictures to the FCC's decisions to "repeal or modify" a regulation that it has determined no longer serves the public interest. Thus, the FCC may only repeal or modify its ownership rules through notice-and-comment procedures. 5 U.S.C. § 553. Similarly, the FCC's actions under § 202(h) are subject to arbitrary-and-capricious review under the APA, 5 U.S.C. § 706(2)(A). Indeed, the APA provides that its provisions cannot be superseded by a "[s]ubsequent statute," such as § 202(h), "except to the extent that it does so expressly." 5 U.S.C. § 559. Because § 202(h) does not expressly supersede the APA, the APA applies with full force to the FCC's actions taken as part of its quadrennial review.

B. The FCC recognizes that "background principles of judicial deference … inform all review under the APA," but argues that those principles "carry heightened force" in reviewing "the FCC's policy judgments about whether broadcast-ownership rules

continue to serve the public interest." FCC Br. 23. None of the three decisions of this Court on which the agency relies, however, suggests that the FCC's decisions enjoy a heightened level of deference in arbitrary-and-capricious review. *See WNCN Listeners Guild*, 450 U.S. at 594 n.30 (recognizing application of the APA's arbitrary-and-capricious standard to FCC's public-interest determinations); *Nat'l Citizens Comm. for Broad.*, 436 U.S. at 802–03, 809 (applying the APA's arbitrary-and-capricious standard in reviewing the FCC's decision to "grandfather" combinations violating the newly promulgated newspaper/broadcast cross-ownership rule); *NBC*, 319 U.S. at 224 (pre-APA decision holding that FCC regulations were not arbitrary and capricious because they were "based upon findings supported by evidence"). To be sure, the FCC may exercise its judgment to decide how best to advance the public interest. Its judgment, however, like that of any other agency implementing its statutory charge, is subject to being set aside when not supported by reasoned decisionmaking.

Nonetheless, the FCC argues that "judicial deference to agency discretion is indispensable to both the structure and practical operation of Section 202(h)." FCC Br. 25. Specifically, the FCC argues that § 202(h)'s "iterative process would be infeasible" if the agency were required "to gather perfect data." *Id.* at 26; *see also id.* at 43. Section 202(h) is not unique in that respect: If "perfect data" were required, *no* agency rulemaking would be feasible. But the court of appeals did not require "perfect data" from the FCC; the court set aside the FCC's actions because they "rested on faulty and insubstantial data." NAB Pet. App. 40a. And the FCC does *not* contend that it must be

permitted to rely on faulty or insubstantial data to make the § 202(h) process feasible.

The FCC also relies on the requirement that § 202(h) requires the agency to review its ownership rules every four years. FCC Br. 26–27, 45–46. That requirement has no impact on the requirement of reasoned decisionmaking or the arbitrary-and-capricious standard of review. The FCC asserts that "[t]he gap between Section 202(h) proceedings enables the agency to study the practical effects of any recent rule modifications" and "adjust the rules accordingly in the next quadrennial review." *Id*. at 26–27. But the desire to conduct real-world experiments with different regulatory regimes is, again, not one that is unique to the FCC. This Court's seminal decision on the arbitrary-and-capricious standard recognized that "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances"; nonetheless, "an agency changing its course must supply a reasoned analysis." *State Farm*, 463 U.S. at 57 (quoting *Greater Boston Tele. Corp. v. FCC*, 444 F.2d 841, 852 (1970)). Established standards for reasoned decisionmaking thus accommodate the need for agency flexibility while ensuring that agency action is "logical and rational." *Michigan*, 576 U.S. at 750 (internal quotation marks omitted). Congress's decision to require periodic review of the FCC's ownership rules, rather than leave the timing to the agency's discretion, does not lessen the FCC's obligation to support its actions with reasoned decisionmaking.

C. The FCC and the NAB also seek to circumvent standards for review of allegedly arbitrary-and-capricious agency action by placing the onus on commenters to provide greater support for retention of an

existing ownership rule. Their arguments cannot be reconciled with the APA, § 202(h), or this Court's precedents.

1. The FCC faults *respondents* for "fail[ing]" to "advance new rationales" for any rule that the FCC has determined "has ceased to serve its original purpose." FCC Br. 31. The FCC analogizes its actions here to an agency action on a petition for rulemaking filed by a private party. *Id.* at 30. This Court has held that judicial review of "[r]efusals to promulgate rules … is 'extremely limited' and 'highly deferential.'" *Massachusetts v. EPA*, 549 U.S. 497, 527–28 (2007) (quoting *Nat'l Customs Brokers & Forwarders Ass'n of Am. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989)). According to the FCC, "[i]f the Commission had not previously adopted any ownership restrictions, and private parties had urged the agency to do so now in order to promote minority and female ownership of broadcast stations, the burden clearly would have been on the proponents to identify evidence that the proposed restrictions would have the desired effect." FCC Br. 30.

The FCC offers no rationale for its analogy. Agency action denying a petition for rulemaking has been accorded a high level of deference because the decision whether to grant or deny such a petition implicates the agency's "broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities." *Massachusetts*, 549 U.S. at 527. No such considerations are presented here, where § 202(h) requires the FCC to conduct a quadrennial review of its ownership rules and the APA requires the FCC to use notice-and-comment rulemaking if it decides to repeal or modify a rule that it determines no longer serves the public interest.

The FCC's analogy to petitions for rulemaking is especially inapt because § 202(h) does not presume that existing ownership rules should be repealed or modified absent an affirmative determination by the agency to retain them. Rather, § 202(h) "says that it is for the Commission to decide" whether an ownership rule no longer serves the public interest and, if so, to decide how to repeal or modify it. *Fox Tele. Stations, Inc. v. FCC*, 280 F.3d 1027, 1043 (D.C. Cir.), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002). Section 202(h), thus, places the onus on the FCC, not commenters, to support its decision to alter the status quo.

The FCC also provides no authority for its apparent view that an agency's responsibility to engage in reasoned decisionmaking extends only to the "original rationales for the repealed rules." FCC Br. 30. That is, according to the FCC, a court reviewing an agency's change in policy would first need to distinguish between the agency's "original rationales" for the policy and any "new" rationales that support retention of that policy, and then apply different standards of review to each. Such an outcome cannot be reconciled with the APA. "If Congress established a presumption from which judicial review should start, that presumption … is not *against* … regulation, but *against* changes in current policy that are not justified by the rulemaking record." *State Farm*, 463 U.S. at 42. Thus, in *FCC v. Fox Television*, this Court explained that the FCC is not "subjected to more searching review" when it alters its prior policy, because the APA "makes no distinction … between initial agency action and subsequent agency action undoing or revising that action." 556 U.S. at 514–15. Here, that principle means that the FCC must justify its decision in this case based on the record that was before it in

this proceeding, not the record that was before it when it first adopted the rule that it is now repealing.

2. The NAB argues that commenters supporting retention of an ownership rule have the burden to provide evidence "in support of that position." NAB Br. 45. The NAB does not analogize to petitions for rulemaking, but rather grounds its argument in 5 U.S.C. § 556(d) and "the deregulatory presumption imposed by Section 202(h)." *Id.* This argument is likewise incorrect.

Section 556(d) of the APA provides, in relevant part, that "the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). To begin with, § 556(d) does not apply to informal rulemaking proceedings. *See* 5 U.S.C. § 556(a); *see also Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 128 n.5 (2015) (Thomas, J., concurring); *Verizon v. FCC*, 770 F.3d 961, 967 n.7 (D.C. Cir. 2014). And even if it did, that provision would not place the "burden of proof" on commenters who seek to retain the status quo, but on those who seek to alter it. *See*, *e.g.*, *Minn. Milk Producers Ass'n v. Glickman*, 153 F.3d 632, 642 (8th Cir. 1998) ("[T]he burden in this case is upon the MMPA to show that a change was required, and not upon the Secretary to defend his decision to retain the status quo."); *Gen. Motors Corp. v. EPA*, 738 F.2d 97, 100 (3d Cir. 1984) ("Ford and GM, the parties urging the agency to suspend the combined wastestream formula and initiate a new rulemaking, thus bore the burden of proving to the Administrator that their proposal should have been adopted."). Thus, if it applied, § 556(d) would bar the FCC from relaxing its ownership rules absent sufficient record evidence justifying the change.

NAB also invokes § 202(h)'s "deregulatory presumption" to justify placing a burden on commenters seeking retention of an ownership rule. NAB Br. 45. No such presumption appears on the face of the statute. Section 202(h) provides that the FCC must "*review*" its rules, "*determine* whether [they] are necessary in the public interest," and "*repeal* or *modify*" those that it determines are not. 47 U.S.C. § 303 note (emphasis added). The only required action that carries a deregulatory connotation is "repeal," and that term is coupled with "modify," suggesting that Congress intended to give the FCC the full panoply of regulatory options to address ownership rules that it has determined do not serve the public interest in their current form.

NAB relies on two D.C. Circuit cases to support its view that § 202(h) carries with it a deregulatory presumption, *see* NAB Br. 8, but neither case purports to exempt the FCC from the APA's reasoned decisionmaking requirement when carrying out § 202(h)'s charge or to place any burden on commenters who supported retention of a rule. In *Fox Television v. FCC*, the dicta highlighted by NAB simply states that § 202(h) does not "requir[e]" the FCC to take an "'incremental'" approach to deregulating broadcast ownership. 280 F.3d at 1044. In *Cellco Partnership v. FCC*, 357 F.3d 88 (D.C. Cir. 2004), the court, in interpreting parallel review provisions in 47 U.S.C. § 161, referred to a "deregulatory presumption aris[ing] only after [the FCC] has determined under [§ 161] that a regulation is no longer necessary in the public interest." *Id.* at 99. Nothing in either case suggests that the FCC should enter into the § 202(h) review process with deregulation in mind, much less that a reviewing court should

put its thumb on the scale when deciding whether the FCC's decision to deregulate is arbitrary and capricious. *See id.* at 93–94, 101–03 (applying traditional standards for arbitrary-and-capricious review to the FCC's decision to deregulate partially).

More broadly, even if Congress had a deregulatory purpose in mind when enacting § 202(h), that alone would not be a reason for fashioning a different APA standard of review for § 202(h) decisions. Every agency exercises authority under statutes enacted by Congress—of which some can be characterized as "regulatory," others as "deregulatory," and others as containing a mix of regulatory and deregulatory provisions. If application of the arbitrary-and-capricious review standard turned on how closely the agency's action aligned with a reviewing court's view of the regulatory or deregulatory thrust of a statutory provision, judicial review of agency action would be unpredictable, heightening the risk that a court would improperly "substitute its judgment for that of the agency." *State Farm*, 463 U.S. at 43. Because "the forces of change do not always or necessarily point in the direction of deregulation," this Court has long made clear that "the direction in which an agency chooses to move does not alter the standard of judicial review established by law." *Id.* at 42. Section 202(h) does not alter that principle.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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