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

REPLY BRIEF FOR INDUSTRY PETITIONERS

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RULE 29.6 STATEMENT

The Rule 29.6 disclosure statement in the brief for Industry Petitioners remains accurate.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page(s)**

TABLE OF AUTHORITIES
(CONTINUED)

CASES (*continued*) **Page(s)**

TABLE OF AUTHORITIES
(CONTINUED)

CASES (*continued*) **Page(s)**

STATUTES

TABLE OF AUTHORITIES
(CONTINUED)

STATUTES (*continued*) **Page(s)**

ADMINISTRATIVE PROCEEDINGS

REPLY BRIEF FOR INDUSTRY PETITIONERS

INTRODUCTION

In the *Reconsideration Order*, the Commission did exactly what Congress told it to do in Section 202(h). The Commission evaluated the current media marketplace, concluded that some of its decades-old ownership limits no longer made sense in light of vast competitive changes, and repealed or modified those rules. Respondents never challenged that conclusion. Yet the Third Circuit once again blocked the Commission's regulatory reforms based solely on its conclusion that the agency failed adequately to consider the effect of its rule changes on minority and female ownership. Consequently, the broadcast and newspaper industries continue to struggle under the dead weight of those rules.

Respondents fail to show that the Third Circuit's judgment was consistent with Section 202(h). Congress directed the Commission to consider whether its rules were "necessary in the public interest *as the result of competition*," 1996 Act, § 202(h) (emphasis added), not to consider minority and female ownership or the public interest in a vacuum. Competition must drive the Commission's entire analysis; it is no mere "*input*" to be trumped by atextual policy concerns. Resp.Br.27. Respondents' interpretation permitting the Commission to retain, repeal, or even tighten ownership restrictions based on any factor under the sun would gut Section 202(h) and wrench it out of its pro-competitive, deregulatory context. And Respondents' contention that the Commission can retain ownership limits for the sole purpose of promoting minority and female ownership finds no support in the statute's text—and raises

constitutional concerns that are hardly "unfounded." Resp.Br.26 n.7.

Respondents' attempt to characterize the *Order* as inconsistent with the Commission's obligations under *Motor Vehicle Manufacturers Ass'n of the United States* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983), is a red herring. The Commission has never bound itself to consider minority and female ownership in Section 202(h) reviews, let alone treat that as a dispositive threshold requirement. The Third Circuit imposed that obligation on its own say-so, citing only its opinions as the source of that purported duty before landing on *State Farm*. As Respondents' sources show, the Commission historically has not addressed minority and female ownership through structural ownership limits but targeted measures in separate proceedings.

In any event, Respondents' microscopic critique of the *Order*'s statistical analysis does not show that the Commission failed adequately to consider minority and female ownership. The Commission relied primarily on the absence of any record evidence that the ownership limits increase minority and female ownership. And it openly acknowledged the problems with the available data, which played a minor role in the analysis. The Commission's determination that it could not retain long-outdated rules under Section 202(h) based on the unsubstantiated hope they might promote minority and female ownership was correct. The Third Circuit's 15-year blockade of reasonable reforms, based on its atextual policy preferences, must now come to an end.

ARGUMENT

I. RESPONDENTS FAIL TO JUSTIFY THE THIRD CIRCUIT'S ELEVATION OF POLICY CONCERNS OVER THE COMPETITION ANALYSIS CONGRESS SPECIFICALLY REQUIRED.

Section 202(h) instructs the FCC, as part of "its regulatory reform review," to regularly update ownership rules that are no longer "necessary in the public interest *as the result of competition*." 1996 Act, § 202(h) (emphasis added). Respondents do not dispute that the FCC properly analyzed the effects of competition here, nor did the Third Circuit. Instead, Respondents contend that "the public interest" requires the agency to promote minority and female ownership and that this requirement trumps the competition analysis Congress expressly mandated. Central to this theory is the claim that competition is not the "primary" consideration under Section 202(h). Resp.Br.27. But text, context, and purpose prove otherwise: Congress commanded a new deregulatory approach that turns on competition.

Respondents attack a straw man by asserting that Section 202(h) does not "require a competition-*only* standard." Resp.Br.30 (emphasis added). Rather, Industry Petitioners contend that the Third Circuit erred by engrafting a requirement to consider minority and female ownership onto the statute. Section 202(h) does not expressly require the Commission to consider that factor. Nor is it implicitly required by the "public interest," which in the context of the ownership rules has historically included competition, localism, and viewpoint diversity—not race and gender ownership diversity. Even assuming that minority and female ownership is a *permissible* factor in Section 202(h) reviews, that

atextual policy goal, standing alone, cannot justify retaining rules that are otherwise no longer necessary in light of competition.

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

Section 202(h) does not expressly direct the FCC to consider minority and female ownership, and "the public interest" cannot be understood as implicitly requiring the Commission to do so. Industry.Br.25-33. Whatever the outer bounds of the public-interest standard in this context, Congress plainly intended competition to play a starring role, not second fiddle, in regulatory reform reviews.

1. Respondents distort Section 202(h) by characterizing "[c]ompetition" as a mere "*input* in the required analysis." Resp.Br.27. But competition is not just any policy goal under this statute. It is the *only* factor Congress specifically identified, and that singular status indicates its preeminence as the driver of the entire statutory analysis. Although Respondents stress the "public interest," that language is not free-standing: The Commission must determine whether the ownership rules "are necessary in the public interest *as the result of competition*." 1996 Act, § 202(h) (emphasis added). Competition is the lens through which the public-interest need for the rules must be viewed—not the other way around.[1]

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[1] Respondents and their *amici* point to the two-sentence structure of Section 202(h), suggesting the second sentence empowers the Commission to consider the public interest unbounded by competition. Resp.Br.26; Congressional.Br.11-13. The two sentences work together and should be read accordingly. Congress had no need to repeat "as the result of competition" in

In their effort to downplay Congress' objective of ensuring the FCC actually updates its rules, Respondents misquote the statute. Claiming "the text [of] § 202(h) mandates 'regulatory *review*,'" Respondents assert the statute asks the FCC only to "review, not repeal" regulations. Resp.Br.27. The statute does not require review for review's sake. It demands "regulatory *reform* review," and directs that the FCC "*shall* repeal or modify" any regulation rendered unnecessary by competition. 1996 Act, § 202(h) (emphases added). Section 202's other provisions, which eliminated or relaxed various ownership rules, provide strong contextual evidence of Section 202(h)'s deregulatory bent. *See Fox TV Stations, Inc.* v. *FCC*, 280 F.3d 1027, 1033 (D.C. Cir. 2002) (Congress enacted Section 202(h) "to continue the process of deregulation"). The purpose of the 1996 Act—to "promote competition" and "reduce regulation"—drives that conclusion home. 1996 Act, Preamble. The point of Section 202(h) is not just *review* but *reform*, with the focus squarely on competition.

Respondents' interpretation also "encounter[s] a superfluity problem." *Republic of Sudan* v. *Harrison*, 139 S. Ct. 1048, 1058 (2019). If Section 202(h) imposes the same standard as "any other" grant of rulemaking authority, Resp.Br.24, and "the public interest as the result of competition" just means "the public interest," *see* Resp.Br.27, Section 202(h) is nearly meaningless. The Communications Act already instructs "the Commission from time to time" to "[m]ake such rules and regulations" as will serve

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the second sentence, because the "determin[ation]" identified there is the determination required by the first sentence, which is cabined by "the result of competition." 1996 Act, § 202(h).

"the public interest." 47 U.S.C. §§ 303(r), 309(a). And the Commission already is legally bound to reevaluate its rules as "time and changing circumstances" demand. *Nat'l Broad. Co.* v. *United States*, 319 U.S. 190, 225 (1943); *see ACLU* v. *FCC*, 823 F.2d 1554, 1565 (D.C. Cir. 1987) (APA requires the Commission "carefully [to] monitor the effects of its regulations and [to] make adjustments where circumstances so require").

Under Respondents' view, then, Section 202(h) would do nothing more than impose a timing requirement on the Commission to take a general look at the ownership rules every four years, with no different orientation than in a typical rulemaking. But Congress knew how to instruct the Commission to review ownership rules without pursuing a deregulatory purpose or giving primacy to a specific factor. That is what Congress did in Section 202(c), ordering the FCC to "conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate" its Local Television Rule. 1996 Act, § 202(c)(2). Congress' choice of differing language in Section 202(h) compels the conclusion that Section 202(h) reviews must center on competition—and achieve meaningful reform.

2. Because Section 202(h) expressly identifies "competition" without mentioning minority and female ownership, Respondents cast about for other statutory hooks. What they come up with is irrelevant or merely confirms that Congress knows how to direct the Commission to consider their preferred policy goal when it wants to.[2]

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[2] Respondents' theory is not entirely clear. They sometimes appear to argue that Section 202(h) requires the Commission to consider minority and female ownership. Resp.Br.23, 29-30.

Respondents rely on 47 U.S.C. § 257. Resp.Br.8, 28. That provision does not mention race or gender and is not even about broadcasting. It required the FCC to adopt regulations eliminating market entry barriers "for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services." 47 U.S.C. § 257(a). And Congress' directive to "promote . . . diversity of media voices, vigorous economic competition, technological advancement, *and* promotion of the public interest" in that context, *id.* § 257(b) (emphasis added), underscores its decision in Section 202(h) to specifically identify only competition, not other factors, and to tie the "public interest" to competition, not leave it free-standing.

Section 1 of the Communications Act does not help Respondents either. Resp.Br.8, 28. There, Congress explained it established the FCC to make communications services available "to all the people of the United States, without discrimination on the basis of race . . . or sex." 47 U.S.C. § 151. But a nondiscrimination policy for the availability of services is not an affirmative mandate to favor certain groups as station owners. *See*, *e.g.*, *Schuette* v. *Coal. to Defend Affirmative Action*, 572 U.S. 291, 313-14 (2014) (plurality opinion) (Equal Protection Clause does not require racial preferences). Section 1 provides no support for the conclusion that Section 202(h) requires the Commission to promote minority and female ownership.

The same goes for Section 309(i) and 309(j). Congress instructed the FCC to consider minority and

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Other times, they suggest that Section 202(h) merely "*authorizes*" the Commission to do so. Resp.Br.26, 32-33.

female preferences in lotteries and auctions to assign initial spectrum licenses. 47 U.S.C. § 309(i), (j). Congress terminated the Commission's lottery authority in 1997, *id.* § 309(i)(5), and expressly limited the preference in Section 309(j) to auctions, *id.* § 309(j)(6). Those provisions have nothing to do with Section 202(h), and demonstrate that Congress knows how to direct the Commission to pursue minority and female diversity but did not do so here.

3. Lacking textual footing, Respondents argue that Congress "cement[ed]" the view that "the public interest" necessarily includes minority and female ownership when it amended Section 202(h) and left the operative language unchanged. Resp.Br.29-30 (citing Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 and *In re 2002 Biennial Regulatory Review*, 18 FCC Rcd. 13620, 13627 (2003)). While this Court has "recognized congressional acquiescence to administrative interpretations of a statute in some situations," it has done so "with extreme care." *Solid Waste Agency of N. Cook Cty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169-70 (2001). Respondents fail to identify "overwhelming evidence of acquiescence," *id.* at 169 n.5, to any "settled" construction endorsing their view, *Jama* v. *ICE*, 543 U.S. 335, 351 (2005).

The 2004 appropriations rider was narrowly targeted: It decreased the frequency of Section 202(h) reviews from "biennially" to "quadrennially," § 629(3), and raised the national television ownership cap (not at issue here) from 35% to 39%, § 629(1)-(2). It did not "comprehensively revise[] [the] statutory scheme." *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001). Thus, even if the FCC had previously adopted Respondents' understanding of Section 202(h), the

2004 rider's "isolated amendments" could not have ratified that interpretation. *Id.*

In fact, the FCC had *not* adopted Respondents' understanding. As the sole basis for their ratification theory, Respondents rely on a statement from the 2002 review describing "minority and female ownership diversity" as one of "five types of diversity pertinent to media ownership policy." *In re 2002 Biennial Regulatory Review*, 18 FCC Rcd. at 13627. One sentence in one Section 202(h) review does not establish a "consensus so broad and unquestioned" that this Court "must presume Congress knew of and endorsed it." *Jama*, 543 U.S. at 349. Moreover, the FCC never referred to minority and female ownership when it went on to actually review the ownership limits; instead, the agency discussed that policy goal separately and issued a notice of proposed rulemaking to consider other types of proposals to advance ownership diversity. Industry.Br.39-40.

These actions did not establish a settled administrative interpretation of "the public interest" requiring review of minority and female ownership under Section 202(h), let alone making that factor dispositive. If Congress ratified anything in 2004, it was the Commission's decision *not* to base its Section 202(h) reviews on minority and female ownership.

4. Respondents wave away the serious constitutional problems their interpretation of Section 202(h) raises by asserting those "concerns" are "not presented." Resp.Br.26 n.7. The canon of constitutional avoidance, however, is always relevant to statutory interpretation. *See Clark* v. *Martinez*, 543 U.S. 371, 380-81 (2005) (courts interpreting statutes must consider constitutional problems "whether or not those constitutional problems pertain

to the particular litigant before the [c]ourt"); *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) ("the court . . . retains the independent power to identify and apply the proper construction of governing law").

The canon applies with particular force here. In *National Broadcasting Co.*, this Court held that "the public interest" must "be interpreted by its context" to prevent "an unconstitutional delegation of legislative power." 319 U.S. at 209-10, 216. Respondents' reading of the "public interest" would unmoor it from the competition-centric text, context, and purpose of Section 202(h) and allow the FCC to retain, repeal, or even "tighten," Resp.Br.9, any media ownership rule based on any policy goal whatsoever, with no apparent limiting principle.

Respondents' interpretation would also create constitutional problems by enabling the Commission to retain structural ownership rules for the *sole* purpose of promoting minority and female ownership. In the *Reconsideration Order*, the Commission made the unchallenged conclusions that the rules at issue were no longer necessary to promote competition, localism, or viewpoint diversity. Accordingly, the only basis on which the Commission could have retained them—on Respondents' view—would be if it intended that they would result in more minorities and women owning broadcast stations. Interpreting Section 202(h) to permit that result would raise serious constitutional difficulties, even if the rules themselves are facially "race- and gender-neutral." Resp.Br.26 n.7; *see Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2496 (2019) ("Laws . . . that are race neutral on their face but are unexplainable on grounds other than race, are of course presumptively invalid."); *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 213 (1995)

(noting "the additional difficulties posed by laws that, although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose").

These constitutional concerns are hardly "unfounded." Resp.Br.26 n.7; Southeastern.Legal. Found.Amicus.Br.9-16.

5. In light of these concerns and Congress' clear intent to create a meaningful "regulatory reform review" process driven by competition in Section 202(h), the best reading of "the public interest" is that the FCC must examine whether the public-interest grounds upon which it initially based a particular ownership rule still support the rule under current competitive conditions. Industry.Br.32-33; *see* Resp.Br.24 (conceding that "Section 202(h) mandates a primarily retrospective analysis").[3] Thus, the FCC should test the rule's *original* public interest rationale against competition to assess its continued necessity, not invent new public interest rationales for keeping (or tightening) the rule despite competitive changes.

Even if the Commission could rely on new public interest rationales, Resp.Br.27, it still must focus primarily on competition in analyzing whether the ownership rules remain necessary. In Section 202(h), Congress specifically chose "competition" to guide the FCC's analysis, *see supra* 4-6, and this Court should honor that express limitation on the agency's "public interest" authority under Section 202(h).

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[3] Industry Petitioners do not endorse Respondents' view that the retrospective nature of the inquiry means the Commission cannot make "predictive judgment[s]" in assessing the effects of rule changes. Resp.Br.44.

At bottom, Respondents ask this Court to uphold the Third Circuit's decision freezing in place ownership limits enacted in another technological age and to adopt an interpretation of Section 202(h) that would gut the statute. That request is inconsistent with any plausible interpretation of Section 202(h).

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

The *Reconsideration Order* fully complied with Congress' instruction to "review" and "repeal" or "modify" ownership rules that it determines are no longer "necessary in the public interest as the result of competition." 1996 Act, § 202(h); Industry.Br.34-37.

Respondents never challenged the FCC's competition analysis, and they *still* do not dispute it. They now describe the analysis as a "close policy call" that "was maybe (at least arguably) reasonably explained." Resp.Br.50-51. Far from an assertion of error, that statement borders on a concession of lawfulness. Regardless, Respondents have long since forfeited any challenge to the Commission's competition findings. They offer no citation to support the claim they "consistently argued that the rules are still necessary in the public interest writ large." Resp.Br.50. *But see* Pet.App.55a (Scirica, J., dissenting) ("[Respondents] leave untouched the FCC's core determination that the ownership rules have ceased to serve the 'public interest'" and identify no "reason to question the FCC's key competitive findings and judgments"). And they do not deny that the Commission must repeal or modify rules that it determines are no longer necessary in the public interest. Resp.Br.8.

Thus, Respondents' lone argument for overturning the *Order* is that the Commission did not adequately consider the supposed "ownership-diversity factor." Resp.Br.50-51. But that judicially created factor cannot outweigh the unchallenged competitive judgments Congress explicitly directed the Commission to make. Industry.Br.35-37; *see also Vt. Yankee Nuclear Power Corp.* v. *Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) ("Administrative decisions should be set aside . . . only for substantial procedural or substantive reasons as mandated by statute, not simply because the court is unhappy with the result reached." (citation omitted)). Because the *Order* complied with all the requirements of the statute, the Third Circuit had no warrant to invalidate the rule changes.

C. *Chenery* Is No Bar To This Court's Reliance On Statutory Grounds.

Nothing in *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), bars this Court from upholding the *Reconsideration Order* under the correct interpretation of Section 202(h). Resp.Br.26.

The question on the table is whether the *Third Circuit* correctly construed Section 202(h) in setting aside the *Order* based on the panel's policy preferences about minority and female ownership. The Constitution assigns "to the judiciary the duty of interpreting [laws] and applying them in cases properly brought before the courts." *Patchak* v. *Zinke*, 138 S. Ct. 897, 904 (2018) (plurality opinion); *see also* 5 U.S.C. § 706 ("the reviewing court shall . . . interpret . . . statutory provisions"). Under *Chenery*, courts refrain from making policy judgments "exclusively entrusted to an administrative agency," 318 U.S. at 88; but they can and must make "determination[s] of

law" about what the agency was—or was not—required to do in the first place, *id*. at 94.

Moreover, "[t]he *Chenery* doctrine has no application" where an agency lacks discretion, even if it "provided a different rationale for the necessary result." *Morgan Stanley Capital Grp.* v. *Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 544-45 (2008). That well-established exception applies here because the Commission's unchallenged competition findings precluded it from lawfully retaining the rules it repealed or modified solely to promote minority and female ownership. Industry.Br.36-37. Even if the FCC's analysis of that issue were found deficient, remand "would be an idle and useless formality," *Morgan Stanley*, 554 U.S. at 545, because the FCC lacks "discretion" to overcome the statutorily required competition determination based "on reasoning divorced from the statutory text," *Massachusetts* v. *EPA*, 549 U.S. 497, 532-33 (2007); *see also* 5 U.S.C. § 706 ("due account shall be taken of the rule of prejudicial error").

In any event, *Chenery* is satisfied here. That case instructs that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." 318 U.S. at 87. The FCC *did* rely on statutory grounds in concluding it was obligated to repeal or modify ownership rules, separate and apart from *any* findings regarding the effect of those changes on minority and female ownership. For example, the Commission found that "[i]n light of the significantly expanded media marketplace" and its determination that the Newspaper/Broadcast Cross-Ownership Rule was "not necessary to promote viewpoint diversity, competition, or localism[,] . . . immediate repeal is

required by Section 202(h)." Pet.App.115a (emphasis added). Similarly, the Commission concluded that the Radio/Television Cross-Ownership Rule "is no longer in the public interest under Section 202(h)" and must be jettisoned because it harmed localism "without providing meaningful offsetting benefits to viewpoint diversity." Pet.App.137a-138a & n.197; *see also* Pet.App.150a-151a (modified portion of the Local Television Rule "does not serve the public interest" and "must be eliminated"). The *Order* was based upon—and should be judged upon—those grounds.

That the Commission also complied with the Third Circuit's mandate to "include a determination about 'the effect of [the] rules on minority and female ownership,'" *Prometheus Radio Project* v. *FCC*, 824 F.3d 33, 54 n.13 (3d Cir. 2016) ("*Prometheus III*") (alteration in original), makes no difference. The Commission made clear that it was ultimately acting pursuant to Section 202(h), concluding it could not "justify retaining the [Radio/Television Cross-Ownership Rule] under Section 202(h) based on the unsubstantiated hope that the rule will promote minority and female ownership." Pet.App.140a; *see also* Pet.App.162a ("Under Section 202(h), however, we cannot" retain "aspects of the Local Television Ownership Rule that can no longer be justified based on the unsubstantiated hope that these restrictions will promote minority and female ownership.").

This Court can and should reverse the Third Circuit on the ground that the *Order* fully complied with Section 202(h).

II. RESPONDENTS FAIL TO JUSTIFY THE THIRD CIRCUIT'S JUDGMENT BASED ON ADMINISTRATIVE LAW PRINCIPLES.

A. The FCC Has Never Bound Itself To Consider Minority And Female Ownership In Section 202(h) Reviews.

Respondents suggest it does not matter whether Section 202(h) requires the Commission to assess the effect of rule changes on minority and female ownership because the Commission's prior "commitment[s]" made that assessment "mandatory" under the APA's principle of reasoned decisionmaking. Resp.Br.32. Respondents' premise is wrong: The Commission has never treated minority and female ownership as a mandatory factor in Section 202(h) reviews, much less a dispositive one. Industry.Br.38-42. Thus, this issue was not "'an important aspect of the problem'" that the Commission "must consider" in Section 202(h) reviews, Pet.App.41a (quoting *State Farm*, 463 U.S. at 43); it was, at most, an ancillary one.[4]

Historically, the Commission has promoted minority and female ownership directly through targeted measures, not indirectly through structural ownership limitations. Industry.Br.33, 39-40. Consistent with that practice, *none* of the ownership rules at issue here was adopted to advance minority and female ownership. They were founded on the traditional public interest goals of competition, localism, and viewpoint diversity. Industry.Br.33.

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[4] Elsewhere, the Third Circuit simply cited itself as the source of this purported obligation, which it manufactured by reading language from its prior decisions out of context. Pet.App.34a (citing *Prometheus III*, 824 F.3d at 54 n.13); Industry.Br.34-35.

The Commission explained long ago that "it would be inappropriate to retain multiple ownership regulations for the sole purpose of promoting minority ownership." *In re Amend. of Sec. 73.3555*, 100 FCC 2d 74, 94 (1985) ("1985 Order").[5] And until the Third Circuit dictated otherwise, the FCC typically did not address minority and female ownership in reviewing structural ownership limits under Section 202(h). Industry.Br.39-40. Even after the Third Circuit so dictated, the Commission still did not purport to treat that issue as dispositive in the *Reconsideration Order*. *See supra* 14-15; Industry.Br.40-41. In sum, the Commission has treated minority and female ownership as at most an "ancillary" part of Section 202(h) reviews. Resp.Br.23.

Unsurprisingly, therefore, no authority supports Respondents' assertion that "[t]he Commission's ownership rules . . . are key instruments" to foster minority and female ownership. Resp.Br.5. Respondents' historical sources address either separate initiatives distinct from the structural ownership limits (such as the *Diversity Order* and *Incubator Order*, Resp.Br.31, 32), or viewpoint diversity, not minority and female ownership diversity.

Respondents' own sources show the FCC has promoted minority and female ownership directly through targeted measures such as "awarding a

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[5] Respondents dismiss the Commission's statement as "involv[ing] a national rule," not a local rule. Resp.Br.32 n.9. Even if that distinction were relevant to "'diversity of views,'" Resp.Br.5 (citation omitted), it has no bearing on the relevance of minority and female ownership to structural ownership limits. That is why the Commission's 2002 review cited the 1985 Order as precedent on this point. 18 FCC Rcd. at 13634 & n.68.

minority preference in comparative broadcast hearings," instituting "minority tax certificate and distress sale policies," and "adopt[ing] minority ownership incentives" in the 1985 Order. *In re Policies & Rules Regarding Minority & Female Ownership of Mass Media Facilities*, 10 FCC Rcd. 2788, 2788-89 (1995) ("1995 Ownership Diversity"). Indeed, the Commission explained in kicking off the 2014 review that "[t]o the extent that governmental action to boost ownership diversity is appropriate and in accordance with the law," it did "not believe that any such action should be in the form of indirect measures that have no demonstrable effect on minority ownership and yet constrain all broadcast licensees." *In re 2014 Quadrennial Regulatory Review*, 29 FCC Rcd. 4371, 4456-57 (2014). So, while "the Commission has adopted *rules* to foster diverse ownership opportunities," Resp.Br.5 (emphasis added), it has not adopted *structural ownership limits*—the object of Section 202(h)—to promote that goal.

Respondents further muddy the historical record by selectively quoting sources that address *viewpoint* diversity, rather than *minority and female ownership* diversity. *See*, *e.g.*, Resp.Br.4 (citing *FCC* v. *Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 793-802 (1978); *United States* v. *Storer Broad. Co.*, 351 U.S. 192, 202-05 (1956); and *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945)).[6] Of these two concepts, only viewpoint diversity is an aspect of the public

[6] Similarly, when the D.C. Circuit noted "'the public interest' has historically embraced diversity" as a "permissible" consideration under Section 202(h), it referred to "diversity of viewpoints." *Fox TV*, 280 F.3d at 1034, 1036, 1042-43. *Contra* Resp.Br.8.

interest as historically interpreted by this Court and the Commission. For example, in a 1995 rulemaking addressing structural ownership rules, the FCC noted that its "concern for ensuring diversity of *viewpoints*" had "[t]raditionally" been as important a factor as preventing "undue economic concentration." *In re Review of the Commission's Regulations Governing Television Broadcasting, Further Notice of Proposed Rule Making*, 10 FCC Rcd. 3524, 3547 (1995) ("1995 Television Review") (emphasis added).[7] And the Commission enumerated "viewpoint, outlet and source diversity"—not minority and female ownership—as "the three types of diversity that [its] rules ha[d] attempted to foster." *Id.*; *accord In re 1998 Biennial Regulatory Review*, 15 FCC Rcd. 11058, 11062 (2000) ("Our diversity analysis focuses upon . . . the three types of diversity (i.e., *viewpoint, outlet and source*) that our broadcast ownership rules have attempted to foster." (emphasis added)).

Neither the Commission's past efforts to promote minority and female ownership outside the context of structural ownership limits, nor its emphasis on viewpoint diversity in that context, provides any basis for the Third Circuit's finding that minority and female ownership is an "'important aspect of the problem'" that the Commission was bound to consider as a matter of administrative law. Pet.App.41a. The

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[7] In the 1995 Television Review, the Commission expressed concern that "relaxing local ownership limits could increase the price of broadcast television stations," which could affect "the ability of minorities and women to purchase TV stations," but addressed that issue in a separate proceeding. 10 FCC Rcd. at 3572; *id.* at 3584 ("[c]omments relating to the effects of [certain attribution rules] on ownership of broadcast stations by minorities and women[] should be directed to" the 1995 Ownership Diversity proceeding).

APA, like Section 202(h), did not require the Commission to engage in this analysis in the *Reconsideration Order*.

B. The FCC Adequately Considered Minority And Female Ownership.

Because the Third Circuit's view that the Commission must assess the impact of rule changes on minority and female ownership was legally baseless, this Court need not decide whether the Commission adequately did so. In any event, the Commission's consideration of that issue easily meets the standard for reasoned decisionmaking. Industry.Br.42-46.

Respondents focus myopically on purported flaws in the Commission's data analysis but fail to show anything irrational. Echoing the Third Circuit, Respondents assert that "the Commission '*confined* its reasoning [on diversity] to an insubstantial statistical analysis of unreliable data.'" Resp.Br.36 (alteration in original; emphasis added) (quoting Pet.App.40a). That assertion is patently incorrect. With respect to the Newspaper/Broadcast Cross-Ownership Rule, the Commission relied chiefly on the *absence* of record evidence linking minority and female ownership levels to the Rule. *See* Pet.App.122a. Similarly, the Commission concluded that "the record *fail[ed] to demonstrate* that eliminating the Radio/Television Cross-Ownership Rule is likely to harm minority and female ownership." Pet.App.138a (emphasis added). The Commission likewise found that "the record *does not support* a causal connection between modifications to the Local Television Ownership Rule and minority and female ownership levels." Pet.App.161a-162a (emphasis added). In each instance, the Commission

offered a reasoned explanation based primarily on the absence of record evidence, with only a passing reference to the contested data. Pet.App.120a, 139a, 161a.

Respondents resort to nitpicking the Commission's statistical analysis because they cannot and do not challenge the broader conclusions supporting the Commission's rule changes. *See supra* 12-13. But *State Farm* grants no authority to second-guess agency decisions by deconstructing stray lines in the administrative record. *See* 463 U.S. at 43 (courts will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned" (citation omitted)).

Respondents' criticisms of the Commission's statistical analysis are also overblown. The only data in the record showed that the number of minority-owned television stations doubled between 1998 (the year before the Commission relaxed the Local Television Rule) and 2013. *See* JA174-175 & nn.214-215. Although the data were imperfect—which the Commission candidly acknowledged, *see* JA176—the data still reasonably "suggest[ed]" that prior rule changes had "not resulted in reduced levels of minority and female ownership," Pet.App.139a.

The Commission adequately considered the data it had, and was under no obligation to conduct "new empirical research or an in-depth theoretical analysis," Pet.App.41a, or to "correct[]" that data, Resp.Br.46. Industry.Br.45; *Vt. Yankee*, 435 U.S. at 524.[8] Nor was a "better analysis" available.

[8] Respondents' *amici* go so far as to suggest that the Commission should have obtained more data by digging through its archives,

Resp.Br.39. Respondents point to studies by Free Press, but these studies are stale, dating from 2007—a decade before the *Reconsideration Order*. CA3.JA472, 548. Besides, those studies' "corrected" data, like the data the Commission cited, indicated a decline in minority-owned television stations between 1998 and 2000, followed by an overall increase (in absolute and percentage terms) by 2006. CA3.JA569.

In the end, Respondents give the game away by insisting that the Commission cannot make *any* rule changes until it obtains and provides a "reasoned analysis" of empirical evidence of "past events." Resp.Br.48. That poses an impossible task: The ownership rules have been preserved in amber for decades as a result of the Third Circuit's decisions, necessarily limiting the probative value of any data from long-past rule changes (if such data exist), especially in light of dramatic intervening marketplace changes. Hamstringing the Commission's ability to achieve reform might serve Respondents' goal of thwarting the least bit of consolidation. But it would disserve Congress' goal of ensuring that the rules keep pace with current competitive conditions, and would impose immense harms on broadcasters, newspapers, and the American public.

III. RESPONDENTS FAIL TO JUSTIFY THE THIRD CIRCUIT'S REMEDY AND RETENTION OF JURISDICTION.

1. Even if the Commission's consideration of minority and female ownership were somehow

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Amicus.Br.Professors 13-15, but the agency was under no duty to do that either.

deficient, the Third Circuit went overboard in its choice of remedies.

First, the Third Circuit improperly vacated the embedded radio markets provision and repeal of the TV Joint Sales Agreement Attribution Rule. The parts of the *Reconsideration Order* addressing those issues do not even include the purportedly deficient analysis, Pet.App.164a-199a, and Respondents do not claim otherwise. Moreover, Respondents do not dispute that they failed to challenge those FCC actions, pointing instead to arguments made by others. *Cf.* Resp.Br.53 n.16. If Respondents believed these actions were unlawful, they needed to say so before the Commission and the Third Circuit. *See United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

Second, the Third Circuit erred in vacating the *Incubator Order* and the *Second R&O*'s eligible-entity definition, which are separate and distinct from the ownership rules and again do not contain the supposedly inadequate analysis. Respondents admit the Third Circuit found no error in the *Incubator Order* or eligible-entity definition, but nevertheless insist that triple vacatur was warranted based on a dissenting Commissioner's view that all three orders are "interrelated." Resp.Br.52 (citing Pet.App.292a). Respondents cite no authority for the proposition that a court may invalidate lawful regulations solely because they are related to another, purportedly unlawful regulation.

Third, the Third Circuit erred in vacating rather than remanding the FCC's actions. Respondents do not deny that the Commission has statutory authority to adopt the *Reconsideration Order*'s reforms, or that the Commission could lawfully "reach the same result

on remand." Resp.Br.3. They merely object to the Commission's *explanation* for its action, based solely on a factor that Section 202(h) says not a word about. An explanatory error on an ancillary consideration would at most justify remand without vacatur. Industry.Br.49.

Respondents' invocation of disruptive consequences is equally unavailing. The Third Circuit's obstruction of the Commission's attempted reforms has frozen in place rules preventing broadcasters and newspapers, unlike their competitors, from obtaining needed "investment[s] and operational expertise." Pet.App.101a-107a. That impasse has wrought significant and irreversible consequences, which Respondents overlook entirely: Retention of unnecessary ownership restrictions has contributed to the closure of hundreds of newspapers and massive revenue losses at stations. Pet.App.98a-101a; *see also* Affiliates.Amicus.Br.12-30; Gray.Amicus.Br.20-34. Those harms are precisely the disruptive consequences Section 202(h) was designed to avert.

2. Respondents also fall short in defending the Third Circuit's assertion of continuing jurisdiction over Section 202(h) proceedings. Although Respondents argue that aggrieved parties may select any venue for challenges to "new, distinct agency rulemakings," Resp.Br.54, that is cold comfort given the Third Circuit's unambiguous decree that "this panel again retains jurisdiction over the remanded issues," Pet.App.45a. Those "issues" effectively implicate any future changes to the ownership rules. The panel clearly intends to maintain its status as the national media ownership review board.

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The Third Circuit required the Commission to treat a policy never mentioned in Section 202(h) as a mandatory and dispositive factor, fly-specked the Commission's analysis, ordered the Commission to collect additional data, entered a triply overbroad remedy, and finished up by reasserting perpetual jurisdiction. This is "judicial intervention run riot." *Vt. Yankee*, 435 U.S. at 557. This Court should clear the way for the FCC finally to achieve the "regulatory reform" Congress set in motion 25 years ago.

CONCLUSION

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

Respectfully submitted.

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