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 FOR RESPONDENTS PROMETHEUS RADIO PROJECT, ET AL.

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QUESTION PRESENTED

Section 202(h) of the Telecommunications Act directs the Federal Communications Commission to periodically review its broadcast ownership rules to "determine whether any of such rules are necessary in the public interest as the result of competition." Based on that public-interest determination, the Commission must "repeal or modify any regulation … no longer in the public interest." For decades, including in its most recent review at issue here, the Commission has maintained that ownership diversity—including race- and gender-ownership diversity—is a component of the public interest that it must consider when evaluating its ownership rules. The question presented is:

Whether the Third Circuit correctly deferred to the Commission's consistent interpretation that ownership diversity is an important aspect of the public interest served by its broadcast ownership rules, and correctly held that the Commission acted arbitrarily and capriciously in repealing most of those rules without any reasoned analysis of the repeal's likely impact on ownership diversity.

PARTIES TO THE PROCEEDINGS

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

All other parties to the proceedings are detailed in the Opening Brief in No. 19-1241 (at ii-iv).

RULE 29.6 DISCLOSURE

There are no parent companies, and no publicly held corporation owns 10 percent or more of any Respondent's stock.

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STATUTORY AND REGULATORY PROVISIONS

Section 202(h) of the Telecommunications Act of 1996, as amended, 47 U.S.C. § 303 note, provides:

> The [Federal Communications] Commission shall review its rules adopted pursuant to this section and all of its ownership rules quadrennially as

> part of its regulatory reform review under section 11 of the Communications Act of 1934 [47 U.S.C. § 161] and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

Other relevant statutory provisions are reproduced in an addendum to this brief. Add. 1a-10a.

INTRODUCTION

Section 202(h) tasks the Commission with determining whether marketplace changes have rendered its local broadcast ownership rules no longer necessary for the public interest. The Commission has long recognized that fostering ownership diversity is a key component of the public interest served by those rules. That policy was reinforced, not renounced, in the 1996 Act that added § 202(h).

In this latest installment of § 202(h) reviews, the Commission did not change its consistent articulation of the public interest—including the importance of ownership diversity. The Commission first concluded that largely retaining local rules was necessary for the public interest. One year later, upon reconsideration of the same record after a change in Commissioners, the Commission reversed course.

The Commission did not purport to base that reversal on any change in ownership-diversity *policy*. Instead, the new Commission majority justified its action based on an arbitrary analysis of the same *facts*: It asserted that wholesale deregulation would not harm this public-interest goal—even though any

reasonable analysis of the record showed that past deregulation caused harm.

Because the Commission provided no reasoned analysis on this issue—which could have changed the Commission's mind about repeal—the Third Circuit correctly vacated the Commission's orders. That vacatur leaves the agency free to reach the same result on remand if it provides a reasoned basis for its assessment.

STATEMENT OF THE CASE

I. Legal Background.

"Congress delegate[d] broad authority to the Commission to allocate broadcast licenses in the 'public interest,'" *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 815 (1978) (*NCCB*), and to regulate broadcast licensees as "public convenience, interest, or necessity requires," 47 U.S.C. § 303.

Under this mandate, the Commission has limited the number of radio or television stations a single party may own nationally or in local markets, and limited cross-ownership of broadcast stations and other media in defined markets. *See, e.g.*, *United States v. Storer Broad. Co.*, 351 U.S. 192, 202-05 (1956); *NCCB*, 436 U.S. at 793-802.

The Commission has modified these rules over time to serve the public interest. *See Review of the Commission's Regulations Governing Television Broadcasting*, 10 F.C.C.R. 3524, 3526-29 (1995) (1995 Television Rule) (summarizing changes). Ownership limits have always aimed to "avoid overconcentration of broadcasting facilities," *Storer Broad.*, 351 U.S. at

193, because "diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power." *NCCB*, 436 U.S. at 780. The Commission's public-interest mandate regarding broadcast ownership is reflected in three "traditional goals": "competition, diversity, and localism in broadcast services." *2002 Biennial Regulatory Review*, 18 F.C.C.R. 13620, 13624 (2003) (2002 Review).

A. The Historic Public Interest in Broadcast Ownership Diversity.

1. The "public interest" "necessarily invites reference to First Amendment principles," *NCCB*, 436 U.S. at 795, including "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," *Associated Press v. United States*, 326 U.S. 1, 20 (1945). Ensuring diversity "in the material presented over the airways," then, has been "[t]raditionally[] at least as important as the Commission's concern about undue economic concentration among broadcast stations." 1995 Television Rule, 10 F.C.C.R. at 3547. The Commission's ownership rules provide a content-neutral means of promoting viewpoint diversity. *See NCCB*, 436 U.S. at 801-02.

The Commission has consistently recognized that "the public interest is served by increasing economic opportunities for minorities and women to own communications facilities." *Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, 10 F.C.C.R. 2788, 2788-90 (1995)

(1995 Ownership Diversity). This is consistent with "core" Commission goals: "maximizing the diversity of points of view available to the public over the mass media," and "promoting competition" which is fostered by new market entrants with different perspectives. *Id.* The Commission continues to espouse the principle that "our media landscape should be diverse because our population is diverse." JA104.

2. Often at Congress's direction, the Commission has adopted rules to foster diverse ownership opportunities. *See, e.g.,* 1995 Ownership Diversity, 10 F.C.C.R. at 2788-90 (describing "incentives to owners of broadcast and cable television properties to sell their stations to minorities"); 47 U.S.C. § 309(j)(4)(C) (requiring measures to "promote … economic opportunity for a wide variety of applicants, including ... businesses owned by members of minority groups and women" in spectrum auctions); *id.* § 309(i)(3)(A).

The Commission's ownership rules—particularly its local rules—are key instruments for its ownership-diversity goal. Such "local ownership limits," as opposed to national ones, are most "pertinent to assuring a diversity of views," because the "most important idea markets are local." *Amendment of Section 73.3555 [formerly Sections 73.35, 73.240 and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 FCC 2d 74, 82 (1985) (1985 National Television Rule).

In setting local ownership rules (like those at issue here), the Commission has consistently considered not only the effect of new media forms on competition, *e.g.,* 1995 Television Rule, 10 F.C.C.R. at 3531, but also the effect of any proposed consolidation

on ownership diversity. *See, e.g.*, *id.* at 3584 (seeking comment on the effects of proposed changes "on ownership of TV stations by minorities and women, and how … the Commission [should] deal with such effects"); *id.* at. 3572 (noting that "relaxing local ownership limits could increase the price of broadcast television stations," which "concerns us when we consider the ability of minorities and women to purchase TV stations").

3. The Commission has never abandoned its ownership-diversity goals. *See 2018 Quadrennial Regulatory Review*, 33 F.C.C.R. 12111, 12116-17, 12127, 12138-39 (2018); JA582 (Incubator Order). But the limited data available show halting progress. When the Commission first addressed these issues in the late 1970s, after decades of neglect (or worse), the data then available showed that people of color controlled less than 1% of the nation's commercial broadcast stations in 1978, rising to about 3% by 1994. Female ownership was roughly 7% in 1988. *See* 1995 Ownership Diversity, 10 F.C.C.R. at 2789; *see also, e.g.*, David Honig, *How the FCC Suppressed Minority Broadcast Ownership, and How the FCC Can Undo the Damage It Caused*, 12 S. J. Pol'y & Just. 44 (2018).

The 2020 Commission report on ownership diversity, working with 2017 data, reveals a better, but still discouraging, picture. Ownership rules have provided some protection against total concentration of licenses in incumbent broadcasters' hands. Despite periodic setbacks (as in the 1990s), incomplete data suggest that people of color now own about 6% of full-power television stations, and up to 16% of low-power stations (the highest level of minority ownership). *See Fourth Report on Ownership of Broadcast Stations*, 35

F.C.C.R. 1217, 1225-1227 (2020), https://docs.fcc.gov/public/attachments/DA-20-161A1_Rcd.pdf. For women, the picture is bleaker, ranging from 5% of full-power television stations to 9% of AM radio stations (the highest level of female ownership). *See id.*; *see also* Leadership Conf. on Civil & Human Rights, *Summary of FCC Data* (Dec. 2020), http://civilrightsdocs.info/pdf/FCC-v-Prometheus-Charts.pdf (Data Summary).[1] As Commissioner Starks explained, the Commission has "much work to do," and it starts with "implement[ing] a data program that would help understand the impact of our regulatory efforts on the ability of women and people of color to own stations." *Commissioner Starks Statement on Fourth Broadcast Station Ownership Report* (Feb. 14, 2020), https://docs.fcc.gov/public/attachments/DOC-362497A1.pdf.

B. Section 202(h) Periodic Review.

In § 202 of the 1996 Act, Congress significantly loosened several local broadcast ownership rules. Pub. L. No. 104-104, § 202(a)-(f), 110 Stat. 56, 110-11; *see also Fox Television Stations, Inc. v. FCC,* 280 F.3d 1027, 1033 (D.C. Cir.) *(Fox I) modified on reh'g,* 293 F.3d 537 (D.C. Cir. 2002) *(Fox II).* Section 202(h) directed the Commission to review "all of its [broadcast] ownership rules" periodically "as part of its regulatory reform review under section 11." 110 Stat. at 111. The Commission must "determine whether any of such rules are necessary in the public interest as the result of competition," and then "repeal or modify any

[1] Data are drawn from the Commission's Form 323 licensee-reporting data, which omits hundreds of stations that failed to file, impairing its accuracy.

regulation … no longer in the public interest." *Id.* at 112.

Section 202(h) did not alter the Commission's longstanding interpretation of the public interest. "[N]othing in § 202(h) signals a departure from [the] historic scope" of the Commission's public-interest authority, including the public-interest inquiry's "historical[] embrace[] of diversity (as well as localism)." *Fox I,* 280 F.3d at 1042. The statute "mandates that a rule [determined] necessary 'in the public interest'—including the public interest in diversity—be retained." *Id.* at 1041. Elsewhere in the 1996 Act, Congress confirmed the breadth of the public-interest mandate and its commitment to race and gender diversity. *See* 47 U.S.C. §§ 151, 257.

Nor does § 202(h) require deregulation at all costs. For § 202(h), like the cross-referenced § 11, any "deregulatory presumption arises only after [the Commission] has determined … that a regulation is no longer necessary in the public interest." *Cellco P'ship v. FCC*, 357 F.3d 88, 99 (D.C. Cir. 2004). In both provisions, the Commission must first "determine whether its then-extant rules remain useful in the public interest; if no longer useful, they must be repealed or modified." *Prometheus Radio Project v. FCC*, 373 F.3d 372, 395 (3d Cir. 2004) (*Prometheus I*); *accord Fox I*, 280 F.3d at 1043-44; *Sinclair Broad. Grp., Inc. v. FCC*, 284 F.3d 148, 162-64 (D.C. Cir. 2002).

Section 202(h) thus does not operate as a "one-way ratchet," *Prometheus I*, 373 F.3d at 394. Despite its "admittedly deregulatory tenor, the statute does not foreclose the possibility of increased regulation" during the review process "if the Commission finds

such action in the public interest." *Id.* at 444 (Scirica, J., partially concurring). Whether the Commission repeals, modifies, or retains a rule, "it must do so in the public interest and support its decision with a reasoned analysis." *Id.* at 395.

C. The FCC's Continued Commitment to Diversity within § 202(h) Reviews.

Four local ownership rules are relevant here: the local television rule, which governs how many stations may be jointly owned in the same local market, 47 C.F.R. § 73.3555(b) (2017); the local radio rule, which does the same for radio, *id.* § 73.3555(a); the newspaper/broadcasting cross-ownership rule, which limits ownership of a daily newspaper and broadcast station in the same local market, *id.* § 73.3555(d); and the radio/television cross-ownership rule, which caps the number of same-market television and radio stations that may be jointly owned, *id.* § 73.3555(c).

Whether opting to retain, tighten, or relax these limits, the statutory public-interest standard has, as the text demands, been the Commission's polestar. Through every § 202(h) review, the Commission's stated commitment to ownership diversity as part of the public interest—in service of viewpoint diversity and competition, and to better serve local communities by fostering more representative use of the spectrum—has been unwavering.

1. First Reviews. In 1999-2000, the Commission completed two reviews: one for local television, mandated by Congress in § 202(c); the second, its first (then-biennial) review under § 202(h).

The § 202(c) review relaxed the local television and television/radio cross-ownership rules. *Review of the Commission's Regulations Governing Television Broadcasting*, 14 F.C.C.R. 12903, 12907-08 (1999) (1999 Television Review). "[S]har[ing] the[] concerns" that "greater consolidation of ownership in broadcasting makes it more difficult for new entrants," "particularly … for minorities and women," *id.* at 12909-10, the Commission promised to monitor the effect of relaxing the rules on ownership diversity. *Id.* at 12910. The Commission also adopted the failing station solicitation rule, conditioning certain ownership-limit waivers on the seller soliciting out-of-market buyers, to give "minorities and women … an opportunity to bid." *Id*. at 12936-37.

The first § 202(h) review largely retained the remaining pre-existing rules. *See 1998 Biennial Regulatory Review*, 15 F.C.C.R. 11058, 11061 (2000) (2000 Order). The Commission noted "a drop in the number of minority-owned broadcast stations" following deregulatory changes. *See id.* at 11073. It also reiterated the need for further study of how ownership limits affected ownership diversity. *Id.* at 11084.

The D.C. Circuit found that aspects of both reviews failed to meet APA standards. *See Fox I*, 280 F.3d at 1043-44; *Sinclair Broad.*, 284 F.3d at 162.

2.a. 2002 Review. The 2002 Review left the local radio rule largely unchanged but relaxed limits on local television ownership. 18 F.C.C.R. at 13668, 13712. For cross-ownership, the Commission replaced the newspaper/broadcast and radio/television rules with new "cross-media" limits that prohibited, limited, or permitted cross-ownership based on market size. *Id.*

at 13747. The failing station solicitation rule was also eliminated. *Id*. at 13708.

These changes were adopted to further the "traditional goals of promoting competition, diversity, and localism in broadcast services." *Id.* at 13624. The Commission explained that five interrelated types of diversity served the public interest: "viewpoint, outlet, program, source, and minority and female ownership diversity." *Id.* at 13627; *id.* at 13629 (ownership limits promote viewpoint diversity); *id.* at 13774-75 (ownership diversity fosters viewpoint diversity). The rulemaking reaffirmed that "encouraging minority and female ownership" was "historically … an important Commission objective," *id.* at 13634, with "the potential to strengthen competition and diversity in communications markets," *id.* at 13637.

b. Petitions for review of the 2002 Review were assigned by lottery to the Third Circuit. *Prometheus I*, 373 F.3d at 389. That court upheld the Commission's new cross-ownership approach but remanded for a reasonable explanation of specific market-size limits given the Commission's "unjustified assumption that media outlets of the same type make an equal contribution to diversity and competition in local markets." *Id.* at 406-08, 418-19, 435.

As for elimination of the requirement to solicit an out-of-market buyer for a failing station, the court noted that "preserving minority ownership was the purpose of the" rule and repealing it "without any discussion of the effect … on minority television station ownership" lacked the "reasoned analysis" necessary to support that change. *Id.* at 420-21. The court also directed the Commission to consider other diversity-related proposals on remand. *Id.* at 421 n.59.

Judge Scirica joined the majority in affirming the Commission's public-interest focused interpretation of § 202(h) reviews, *see id.* at 446, but thought the Commission had adequately explained its new ownership limits, *id.* at 464-80.

3.a. 2006 Review. The 2006 review abandoned the cross-media approach (that the Third Circuit had largely upheld), generally reinstating the local television, radio, and radio/television cross-ownership rules as they existed before the 2002 Review. *See 2006 Quadrennial Regulatory Review*, 23 F.C.C.R. 2010, 2011-13 (2008) (2006 Review). To ensure no "negative[] impact [on] minority owners," the Commission readopted the failing station solicitation rule. *Id.* at 2068. The Commission made a "modest change" to the newspaper/broadcast cross-ownership rule, with "the primary effect of presuming that certain limited combinations … in the largest markets are in the public interest." *Id.* at 2018. While recognizing the growth of the Internet and non-broadcast media, the Commission was unable to "conclude that other voices are major sources of local news or information," as the "data reflects only that most consumers primarily rely on newspapers and broadcast television for local news." *Id.* at 2043-44.

The Commission again "reaffirm[ed]" the "longstanding policies of competition, diversity, and localism," noting plans to "enhance diversity by promoting entry of small businesses, including those owned by women and minorities." *Id.* at 2016-17. In a contemporaneous order, the Commission adopted measures for "eligible entities," as defined by revenue, to "expand[] opportunities for new entrants and small businesses, including minority- and women-owned

businesses" to "strengthen the diverse and robust marketplace of ideas." *Promoting Diversification of Ownership in the Broadcasting Services*, 23 F.C.C.R. 5922, 5924-25 (2008) (Diversity Order).

b. In *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) (*Prometheus II*), the Third Circuit unanimously upheld the FCC's decisions regarding the local television, local radio, and radio/television cross-ownership rules. The panel majority found, however, that the Commission failed to adequately notice its changes to the newspaper/broadcast cross-ownership rule. *Id.* at 445-46, 453.

Given the FCC's avowed purpose—"increasing broadcast ownership by minorities and women," *id.* at 469—the unanimous court also held that the Diversity Order had not reasonably explained how the revenue-based eligible-entity definition would further that goal. *Id.* at 471. The court noted that the Commission referenced virtually no data on ownership by women and people of color because, "as the Commission has since conceded, it has no accurate data to cite." *Id.* at 470.

Because "[p]romoting broadcast ownership by minorities and women is, in the FCC's own words, 'a long-standing policy goal of the Commission,'" the Third Circuit urged the Commission to "gather[] the information required to address these challenges." *Id.* at 472. Judge Scirica agreed, dissenting only on the newspaper/broadcast cross-ownership notice issue. *Id.* at 473-75.

II. The 2010/2014 Quadrennial Review.

A. Commission Delay.

The FCC failed to produce a decision in the 2010 Quadrennial Review. Instead, in 2014, the FCC initiated the 2014 Review and rolled the 2010 Review into that proceeding. *2014 Quadrennial Regulatory Review*, 29 F.C.C.R. 4371 (2014) (2014 Notice) (excerpts at JA58-100). Petitions for review were originally assigned to the D.C. Circuit. After reviewing the briefs, and with the Commission's support, the D.C. Circuit transferred the case to the Third Circuit. *Prometheus Radio Project v. FCC*, 824 F.3d 33, 39 (3d Cir. 2016) (*Prometheus III*).

The Third Circuit heard challenges to the Commission's delay in completing the 2010 Review, including delay in reconsidering the eligible-entity definition remanded in *Prometheus II*. The court also reviewed, and vacated, the FCC's rule tightening ownership limits by expanding its ownership attribution policy (which treats certain contractual arrangements as controlling ownership interests), because such tightening could not lawfully occur until after the mandated public-interest determination under § 202(h). *Id.* at 59-60.

As to the eligible-entity definition, the court instructed the Commission to "act promptly" to finally determine "whether to adopt a new definition," stating, "[i]f it needs more data to do so, it must get it." *Id.* at 49. The court disclaimed any "inten[t] to prejudge the outcome of this analysis; we only order that it must be completed." *Id.* at 49. The court also instructed the Commission to "consider how the

ongoing broadcast incentive auction affects minority and female ownership." *Id.* at 54 n.13.[2]

B. The Record Before the Commission.

Responding to the 2014 Notice, commenters explained that longstanding problems with the Commission's data on ownership diversity made it difficult to analyze trends over time. The Commission had itself in 2009 recognized major flaws in data drawn from Form 323, the agency's mandatory licensee reporting form. *See Promoting Diversification of Ownership in the Broadcasting Services*, 24 F.C.C.R. 5896, 5897-98 (2009). Commenters elaborated that the data continued to have significant gaps; exhorted the FCC to enforce existing data-submission requirements and expand the requirements to non-commercial stations; and urged that the data be made available to the public in a usable format. *See, e.g.*, CA3JA944-46.

Commenters also pointed to existing studies that had made reasonable efforts to correct the data, urging the Commission to do the same. *See, e.g.*, Comments of Nat'l Hispanic Media Coalition, FCC Dkt. 14-50, at 17 (Aug. 6, 2014). One study, undertaken by Free Press, evaluated how loosening local television rules in the 1990s affected ownership diversity. CA3JA548.[3] Free

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[2] The incentive auction was designed to free spectrum for wireless data companies. JA176. Participating broadcasters could relinquish their spectrum for an incentive payment and either go off air or share a single channel with another station. Remaining stations were relocated to clear spectrum bands. *Id.*

[3] S. Derek Turner & Mark Cooper, *Out of the Picture 2007: Minority & Female TV Station Ownership in the United States* (Oct. 2007), https://www.freepress.net/policy-library/free-press-report-out-picture.

Press corrected both 1990s-era data from the National Telecommunications and Information Administration (NTIA) and more recent FCC Form 323 data, and then compared percentages of station ownership over time. CA3JA559; CA3JA568. Trend analysis of this corrected data showed that full-power television station ownership by people of color dropped sharply following the 1999 relaxation, not recovering to roughly pre-1999 levels until seven years later. CA3JA569. Tracing post-relaxation transactions, CA3JA570, showed that 1990s relaxation of television rules "indirectly or directly contribut[ed] to the loss of 40 percent of the stations that were minority-owned in 1998." CA3JA551.

Other Free Press studies in the record evaluated the interplay between market concentration and ownership diversity. "[E]ven when holding market and station characteristics constant, as a market becomes more concentrated, a station is significantly less likely to be minority-owned." CA3JA573; *see also* CA3JA502 (finding same for radio, for both minority-owned and woman-owned stations).[4] As comments emphasized, these studies indicated that loosening ownership restrictions would harm ownership diversity. *See, e.g.*, CA3JA1019-20.

Commenters also explained how the then-pending incentive auction was already disproportionately leading to the sale, and likely closure, of stations owned by women and people of color, urging the Commission to take that auction's likely impacts into

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[4] S. Derek Turner, *Off The Dial: Female and Minority Radio Station Ownership in the United States* (June 2007), https://www.freepress.net/sites/default/files/legacy-policy/off_the_dial.pdf.

account. *See, e.g.*, CA3JA955-56; CA3JA987-88; CA3JA1051-52.

C. Orders Under Review.

1. Two months after the Third Circuit decided *Prometheus III*, the FCC issued the 2016 Order, the first of the three orders here under review. JA101-576. There, the FCC found that "the public interest is best served by retaining [the] existing rules, with some minor modifications," JA104, and that particularly for "local news and public interest programming," traditional media outlets like television and radio "continu[e] to serve as the primary sources on which consumers rely," JA103. National non-broadcast video sources, the Commission concluded, "do not serve as meaningful substitutes for local broadcast television," and "local news and information available online usually originates from traditional media outlets." JA123-24; JA235-36.

As in every prior review, the Commission reaffirmed that its "broadcast ownership rules … help further" the goal of ownership diversity, and "thereby foster a diversity of voices, by facilitating the acquisition and operation of broadcast stations by small businesses, new entrants, and minority- and female-owned businesses." JA335. The Commission found that retaining each of the rules was "consistent with the Commission's goal to promote minority and female ownership." *See* JA171 (local television); JA214 (local radio); JA234 (newspaper/broadcast cross-ownership); JA296 (radio/television cross-ownership).

In rejecting a request to tighten rather than merely retain its ownership rules, the Commission

attempted to examine the effect of relaxing its ownership rules in the 1990s, working with two datasets: 1990s-era data from the NTIA and the Commission's own Form 323 data from a decade later, but with no attempt to make the different data sets comparable. *See* JA174-75 (television); JA215-16 (radio). For both radio and television, the raw data showed a steep decline in ownership by people of color following relaxation of the ownership limits. *Id.* The Commission failed to acknowledge the diversity drop following relaxation (and ignored the Free Press study on that point), focusing only on how Form 323 data showed higher station ownership by people of color many years later. *Id.*

The FCC recognized that drawing trends from the disparate datasets was unreliable, as changes in the data did not necessarily reflect "actual changes in the marketplace," JA174 n.211, and there was no NTIA "data on female ownership," *id.*; *see also* JA215 nn.325-26. While still using this analysis to justify refusing to *tighten* its rules, the FCC concluded the analysis did not support *relaxing* them, because there was "no evidence in the record that would permit [it] to infer" that the 1990s relaxation caused the eventual increase in diverse ownership. JA176; JA216-17. Ultimately, considering the record as a whole, the FCC concluded that retaining the rules was necessary for the public interest and would promote ownership diversity. *See, e.g.*, JA171-72.

Conceding continued data flaws, the FCC described efforts that it hoped would "improve the quality of its broadcast ownership data" going forward. JA361-69. Buttressing the Commission's decision to largely retain the ownership rules was its recognition

that the broadcasting industry was "on the precipice of great change" given the ongoing incentive auction that would change licensees' use of broadcast television spectrum. JA104.

The 2016 Order re-adopted the same revenue-based eligible-entity definition, explicitly broadening its purpose to foster entry by all small businesses. JA105.

2. Fifteen months later, a newly composed FCC issued the Reconsideration Order, App.65a-310a, relying upon the "same facts used by th[e] Commission just over a year ago to reach the exact opposite conclusions." App.284a (Commissioner Clyburn, dissenting).[5] The Commission eliminated the cross-ownership limits entirely and significantly relaxed the local television ownership rules. App.68a-69a.[6]

The FCC did not alter its view that diversity, including ownership diversity, remained an important aspect of the public interest. *See, e.g.*, App.86a-87a & n.49. To the contrary, the Commission affirmed its policy goals of "viewpoint diversity, localism, and competition," and declined to consider "arguments that ownership does not influence viewpoint." *Id.*

Rather than disavowing its long-held ownership-diversity goal, the new Commission rested its decision on a changed assessment of the same record. The 2016 Order had concluded that retaining the rules would

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[5] App. cites are to the Petition Appendix in No. 19-1241.

[6] Local television rule relaxations eliminated the prohibition allowing ownership of two same-market television stations only if eight independent voices would remain, App.147a-48a, and the rule counting certain television joint sales agreements as ownership (referred to as "attribution"), App.69a.

promote ownership diversity. The newly composed Commission found—based on the exact same race/gender ownership data—that retaining the rules would not help ownership diversity and loosening them would not cause any harm. *See* App.120a n.138; App.139a n.201.

Finally, "to promote ownership diversity," the Commission announced its intent to adopt a new "incubator program" "to help facilitate station ownership for a certain class of new owners" to be defined later. App.69a; App.207a-08a; App.216a.

3. The Commission's subsequent Incubator Order adopted a radio-only program, defining eligible entities by revenue and new-entrant status. JA596-97; JA603-04. The program permitted incumbent radio broadcasters to obtain ownership-cap waivers in large markets after helping new broadcasters in much smaller markets. JA647. Commissioner Rosenworcel's dissenting statement echoed various commenters' concerns that the order's "scope is too narrow, its consequences too small, and its impact on markets too muddled," and that it was not "meaningful action[] to address the shameful lack of racial and gender diversity in broadcast station ownership." JA703.

III. The Third Circuit's Decision.

Petitions for review of the Reconsideration Order and the Incubator Order, initially assigned to the D.C. Circuit, were transferred by that court without opposition to the Third Circuit. The Third Circuit consolidated the cases with pending petitions for review of the 2016 Order.

The Third Circuit unanimously affirmed substantial elements of the agency's decisions. But relaxation of the ownership rules was fatally flawed, the court concluded, because the FCC "did not adequately consider the effect its sweeping rule changes will have on ownership of broadcast media by women and racial minorities." App.10a. The FCC's data analysis was "so insubstantial that it would receive a failing grade in any introductory statistics class." App.38a.

The court identified two main problems. First, the FCC's analysis of changes in ownership by people of color was "insubstantial." *Id.* The agency compared two data sets "created using entirely different methodologies," an "exercise in comparing apples to oranges," which it did not make "any effort to fix." *Id.* Further, even if the data were taken at face value, the Commission "did not actually make any estimate" of the impact of past deregulation. App.39a. Second, "any ostensible conclusion as to female ownership was not based on *any* record evidence" at all. App.37a (emphasis in original).

The court found that the Commission's own historical embrace of ownership diversity as an essential component of the public interest made it "an important aspect of the problem." App.41a (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Still, the Third Circuit recognized that the Commission "might well be within its rights to adopt a new deregulatory framework (even if the rule changes would have some adverse effect on ownership diversity) if it gave a meaningful evaluation of that effect and then explained why it believed the trade-off was justified for other policy

reasons." *Id.* But because the Commission rested the rule changes here on the premise that "consolidation will not harm ownership diversity," the court held, the Commission could not rely on a facially inadequate analysis to support that premise. *Id.*

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

Judge Scirica agreed that ownership diversity was a component of the "values that guide the FCC's 'public interest' analysis under Section 202(h)." App.49a. But he concluded that the "FCC reasonably predicted on the record before it that the new rules would not diminish or harm minority and women ownership." App.57a.

SUMMARY OF THE ARGUMENT

The Third Circuit's decision is a straightforward application of two bedrock principles of administrative law: Agency action must be reviewed based on the agency's stated rationale, and that rationale must satisfy basic requirements of reasoned decision-making. Far from imposing an extra-statutory obligation, the Third Circuit took the agency at its word that its reconsideration decision to jettison most local broadcast ownership rules hinged on a finding that the change would not harm the agency's long-standing goal of fostering ownership diversity. And after careful review, the Third Circuit rightly concluded that this essential premise was wholly unreasoned.

I. Industry Petitioners contend, without support from the Government, that § 202(h) requires the Commission to consider only "competition, not minority and female ownership." Br. 20. But § 202(h)'s text shows otherwise: It requires the Commission to determine whether its rules remain "necessary in the public interest *as the result of* competition." That text requires the Commission to consider the *effect* of "competition"—that is, market conditions. But the lodestar of the inquiry remains the broader "public interest."

In the orders under review, the Commission hewed to its settled view that § 202(h) requires it to determine whether, as markets change, ownership rules remain necessary to serve the public interest—including the public-interest goal of ownership diversity. Section 202(h) plainly authorizes this longstanding interpretation, which Congress blessed when amending the statute without change to the public-interest standard in 2004.

II. The Commission has long recognized that diverse ownership promotes competition and fosters greater diversity in viewpoints and programming—central goals of broadcast regulation. Ownership diversity, including diversity by race and gender, is not ancillary to the quadrennial review. It is central to the undertaking as the Commission has permissibly defined it.

A. The Third Circuit's decision permits the FCC to abandon this long-held view—if it does so with transparency and reasoned analysis. But the Commission cannot avoid accountability for a choice to deregulate regardless of public-interest harm by hiding behind a deeply flawed conclusion that

deregulation will not harm its long- (and still-) avowed ownership-diversity goal.

B. The Commission's conclusion that radical relaxation would not harm ownership diversity rests on three fundamental errors: an arbitrarily simplistic assessment of past rule changes that ignores record evidence; a complete failure to evaluate important aspects of the problem, including female ownership and the effect of the incentive auction; and a wholly unexplained change in position from its 2016 conclusion that the rules promote ownership diversity to the 2017 assertion on the same record that they do not.

C. Deference to unreasoned predictions or excuses that the data were too difficult to produce cannot sustain the Commission's orders. The agency's failure here is not a failure of omniscience, but of thoroughness and rationality. Any "prediction" rested solely on an irrational no-harm finding grounded in the Commission's own choice to rely on faulty data. Better analysis was possible based on the existing record: Commenters submitted well-reasoned empirical evidence (which the Commission ignored).

D. Nothing about § 202(h) reviews justifies treating them differently from any other agency action. Section 202(h) mandates a primarily retrospective analysis, not a purely prospective one, and thus surely does not permit the Commission to change first and assess public-interest necessity later. Nor does the four-year cycle mitigate all harm caused by the Commission getting it wrong. Eggs cannot be unscrambled, and harm is not meaningfully ameliorated by a reversal in position four years (or, more likely, nearly a decade) later.

III. The Third Circuit properly vacated the orders given the seriousness of the defects in the Commission's analysis and the disruption that would have resulted without vacatur, sensibly extending this standard APA remedy to all three interrelated orders. Any change in position regarding the effect of repeal on ownership diversity, following a reasoned analysis, would necessarily implicate not only the ownership rules but also programs implementing or varying those rules. Likewise, the Third Circuit's retention of jurisdiction over the remand was consistent with settled practice. It does not conflict with venue provisions and does not consign review of future quadrennial reviews to the Third Circuit.

Instructing agencies to re-do their irrational analyses is an administrative law commonplace—not a new impermissible procedural requirement. On remand, the Commission is free to decide that ownership diversity should no longer be part of the public interest under § 202(h), or that no matter how bad the effect on ownership diversity, other goals require repeal of its ownership rules. All the Third Circuit requires is what the APA demands: transparent policy choices and reasoned explanations.

ARGUMENT

I. The Plain Object Of § 202(h) Review Is The Public Interest.

Whether retaining, enhancing, or relaxing its ownership rules, every § 202(h) review to date has recognized the centrality and breadth of the statute's express public-interest goal. Industry Petitioners'

contrary understanding runs headlong into the statute's text and purpose, and this settled practice.

Industry Petitioners' atextual competition-focused statutory argument also cannot surmount the foundational rule of *SEC v. Chenery*, 318 U.S. 80, 87 (1943), that "a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 576 U.S. 743, 758 (2015). While repeatedly insisting that § 202(h) does not *require* consideration of ownership diversity (*e.g.*, Br. 33), Industry Petitioners never dispute that the statute's public-interest mandate plainly *authorizes* consideration of the ownership-diversity goal, a goal that the Commission has consistently reaffirmed in the broadcast-ownership context. Because no precedent "require[s]" a crabbed competition-only reading, and D.C. Circuit and Third Circuit decisions refute it, *Chenery* firmly applies. *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 544 (2008).[7]

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[7] Industry Petitioners refer in passing to unfounded constitutional concerns that were neither pressed nor passed on below (Br. 31-32 & n.11), are therefore not presented, and in any event do not undermine the Commission's longstanding interpretation of the public interest. "Non-blinkered" interpretation confirms the constitutionality of the broad public-interest delegation here. *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2020) (citing *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 214, 216 (1943)). And no precedent casts doubt on the Commission's authority to adopt race- and gender-neutral rules that serve the public interest by fostering ownership diversity. The Commission has questioned only whether it could adopt race-*conscious* measures to do so. *See* 2002 Review, 18 F.C.C.R. at 13636. Such measures are not at issue here.

A. Section 202(h)'s Text Confirms that the Public Interest Is Paramount.

Beginning with the text, § 202(h) mandates "regulatory *review*," and doubles down on the public-interest focus of that review. The Commission must first determine whether ownership rules remain "necessary in the public interest," if circumstances have changed "as the result of competition." Any modification is made only after a determination that the rules are "no longer in the public interest." *See Prometheus I*, 373 F.3d at 391 (majority); *id*. at 443 (Scirica, J. partial concurrence); *Cellco,* 357 F.3d at 99 (similarly interpreting parallel language in 47 U.S.C. § 161).

Competition is thus an *input* in the required analysis, but the object of the analysis is the public interest. The Commission must consider how competition has affected the need for a regulation to achieve the public interest. But nothing in the text transforms competition into the sole (or even primary) public-interest goal.

Section 202(h) thus mandates review, not repeal, and nowhere compels the unswerving march toward further deregulation that Industry Petitioners and their *amici* urge. Br. 25-27. Quite the contrary, that "asserted limitation is found nowhere in the statute." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2380 (2020). Plus, the D.C. Circuit has explicitly rejected Industry Petitioners' argument (Br. 36) that § 202(h) limits the Commission to a static competition-only conception of the public interest. *See Fox I*, 280 F.3d at 1052.

The larger context of the 1996 Act confirms that Congress did not pursue deregulation at all costs. While passing various deregulatory measures, *see id.* at 1033, Congress also reaffirmed the "national policy" of "favoring diversity of media voices," in a newly enacted provision mandating review of barriers to entry for small businesses, 47 U.S.C. § 257(b). And Congress augmented the Commission's guiding directive to provide communication services to "all the people of the United States," by including a mandate that services be provided "without discrimination on the basis of race, color, religion, national origin, or sex." *Id*. § 151.

Elsewhere, in provisions predating but surviving the 1996 Act, Congress explicitly prioritized ownership diversity. For spectrum auctions, Congress required the FCC to "promote economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women," 47 U.S.C. § 309(j)(4)(C), and to "consider the use of … bidding preferences" for "minority groups and women," *id.* § 309(j)(4)(D); *see also id.* § 309(i)(3)(A) (requiring preference for minority owners under now-defunct program where licenses were assigned by lottery).[8]

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[8] In passing that provision, Congress recognized the need to "remedy[] the past economic disadvantage to minorities … while promoting the primary communications policy objective of achieving a greater diversification of the media of mass communications." H.R. Rep. No. 97-765, at 44 (1982) (Conf. Rep.).

Industry Petitioners argue that these express targeted measures bar consideration of ownership diversity within § 202(h)'s public-interest inquiry. Br. 28-29. But specific measures do not implicitly constrain the Commission's rulemaking authority in other broadly written provisions. This Court has rejected similar attempts at "interpretative gerrymander[ing]." *Michigan*, 576 U.S. at 754-55 (holding that specific provisions mentioning costs did not make cost irrelevant to a broad standard "encompassing multiple relevant factors (which include but are not limited to costs)").

B. Congress Accepted a Broad Public-Interest Standard when Amending § 202(h).

Both before and after passage of § 202(h), including in every § 202(h) review to date, the Commission has steadfastly affirmed that ownership diversity serves the public interest. *See supra* at 4-13.

Against this settled regulatory backdrop, when Congress enacted § 202(h), it nowhere even intimated an interest in cabining the breadth of the public-interest inquiry. And in amending §202(h) in 2004, Congress left intact the public-interest mandate, shortly after the Commission had reaffirmed that "diversity, competition, and localism" were "longstanding goals that would continue to be core agency objectives" in evaluating ownership rules, including "minority and female ownership diversity." *2002 Review*, 18 F.C.C.R. at 13627. "Congress is presumed to be aware of an administrative … interpretation of a statute and to adopt that interpretation when it re-enacts a statute without

change." *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018).

And Congress was certainly aware here. While cementing the Commission's interpretation of its public-interest mandate by leaving the key language intact, Congress's 2004 amendment to § 202(h) *tightened* the caps on national television ownership rules from the Commission's proposed 45% down to 39%, and removed those rules from the § 202(h) process. *See Prometheus I*, 373 F.3d at 388-89 (describing 2004 legislation). These legislative changes belie any Congressional endorsement of a deregulation-*uber-alles* approach or rejection of the Commission's settled public-interest goals in § 202(h).

As the Government agrees (Br. 18-19), nothing in the public-interest standard requires the Commission to give a single policy—including competition—"controlling weight in all circumstances." *NCCB*, 436 U.S. at 810. Section 202(h) cannot plausibly be read to require a competition-only standard that the Commission has never endorsed.

II. The Commission's About-Face Conclusion That Relaxing Ownership Rules Would Not Harm Ownership Diversity Was Arbitrary And Capricious.

When the Commission jettisoned a large swath of its rules, it rejected its own determination a year earlier—on the same record—that retaining the rules would promote ownership diversity. That about-face was arbitrary and capricious for multiple reasons.

A. The Reconsideration Order Rests on an Unreasoned Reinterpretation of the Same Facts, Not a Transparent and Reasoned Policy Choice.

1. Respondents agree that courts should defer to "implementation of the public-interest standard, when based on a rational weighing of competing policies." *FCC v. WNCN Listeners Guild,* 450 U.S. 582, 596 (1981). From long before the Third Circuit spilled its first drop of ink in the *Prometheus* cases through today, the Commission's reasoned judgment has been that ownership diversity serves the public interest.

It does so in its own right, and because of its "potential to strengthen competition and [viewpoint] diversity" through greater participation by small businesses, "including those owned by minorities and women." 2002 Review, 18 F.C.C.R. at 13637; *see also* Diversity Order, 23 F.C.C.R. at 5924 (facilitating ownership diversity "strengthen[s] the diverse and robust marketplace of ideas").

The 2016 Order pointed to "ample evidence … that ownership can affect viewpoint," JA230-31, highlighted evidence showing a positive correlation between minority ownership and minority-oriented programming, JA216, and reiterated how ownership diversity promotes "a diversity of voices," *e.g.*, JA335; JA171-72; JA214.[9]

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[9] Contrary to the broad assertion that there is no meaningful connection between ownership and viewpoint diversity (*see* Industry Br. 39 n.12 (quoting App.14a)), the Commission found only that the record on that connection might not satisfy strict scrutiny. JA397-98. And while Industry Petitioners harp on the 1985 National Television Rule's statement that it would be

The Reconsideration Order expressly declined to consider "arguments that ownership does not influence viewpoint." App.86a-87a n.49. Nowhere did it disavow the Commission's "goal of promoting minority and female ownership." JA117 (2016 Order); *see* JA582 (Incubator Order). The Commission's grounds for, and stated commitment to, the public interest in ownership diversity did not waver.

The Commission might one day opt to transparently renounce or demote this longstanding goal and, if it does so, be publicly accountable for that stance. But unless and until it does change its stated goals, reasoned and non-arbitrary consideration of ownership diversity is mandatory under basic principles of administrative decision-making.

2. The Government devotes pages (Br. 21-27) to the undisputed proposition that courts must defer to the Commission's "rational weighing of competing policies." *WNCN*, 450 U.S. at 596. But the Commission did not purport to rest on any such reasoned weighing. Instead, it relied on a patently flawed premise that relaxing ownership rules would not harm ownership diversity. The Third Circuit rightly found that conclusion arbitrary and capricious, while expressly leaving open the possibility that the FCC could engage

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"inappropriate to retain multiple ownership regulations for the sole purpose of promoting minority ownership" (*e.g.*, Br. 30-31 (quoting 100 FCC 2d at 94)), that assertion involved a national rule. That rule also explained that local ownership limits, not national ones, were where diversity mattered most, because the "most important idea markets are local." 100 FCC 2d at 82. And the Commission still concluded that "national multiple ownership rules [could] play a role in fostering minority ownership," adopting a rule to do just that. *Id.* at 94.

in a rational (re)weighing of policies here: "The Commission might well be within its rights to adopt a new deregulatory framework (even if the rule changes would have some adverse effect on ownership diversity) if it … explained why it believed the trade-off was justified for other policy reasons." App.41a.

In short, to re-shuffle its policy goals, the Commission must be reasonable and transparent. That is not what happened here.[10]

Rather than transparently declaring ownership diversity less important than other goals, the Commission altered its rules on the (irrational) finding that ownership diversity would not be harmed, based on an "analysis" that failed several tests of reasonableness and "rest[ed] upon a factual premise … unsupported by substantial evidence." *Ctr. for Auto Safety v. Fed. Highway Admin.,* 956 F.2d 309, 314 (D.C. Cir. 1992) (Thomas, J.).

3. Before this Court, the Government seeks to distance itself from a central element of the decision on review. Citing "empirical uncertainty" on ownership diversity and substantial benefits for other aspects of the public interest, the Government now contends that the FCC simply made a "discretionary policy judgment" that the rules could not be retained based on "'unsubstantiated hope that [they] will promote minority and female ownership.'" Br. 39

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[10] The Government highlights (Br. 30) a statement within the 2014 Notice tentatively declining to tighten local radio rules in part because ownership diversity was merely one of several competing goals and tightening purportedly would harm the others. JA79-80. That passage merely highlights the absence of any similar balancing in the Reconsideration Order.

(quoting App.140a). But the FCC's decision is inextricably linked to its unreasoned no-harm findings, which are not "stray FCC statements taken out of context" (Br. 38), as the Government now says.

The Reconsideration Order is strewn with assertions that repeal would "have no material effect on minority and female ownership." App.88a; App.117a (same); App.138a ("record fails to demonstrate that eliminating the Radio/Television Cross-Ownership Rule is likely to harm minority and female ownership"); App.161a ("not likely to harm minority and female ownership"). Before the Third Circuit, the FCC insisted that it had "analyzed the question at length and determined that its rule changes were not likely to harm ownership diversity." CA3 FCC Br. at 46-47. Everyone understood the order to make—and rest upon—this no-harm finding. *E.g.*, Industry Br. 43; App.57a (Scirica, J.).

In any event, the order is no less arbitrary when recast as a judgment that only "unsubstantiated hope," App.140a, could link the rules with ownership diversity. Today's "unsubstantiated hope" that retaining the rules would not foster ownership diversity was found true in 2016—on the same record. *E.g.*, JA171-72 (although the rules were not retained "with the purpose of preserving or creating specific amounts of minority and female ownership, we find that retaining the existing rule[s] nevertheless promotes opportunities for diversity in local television ownership"); JA293; JA310 (same for cross-ownership rules). The "unsubstantiated hope" judgment thus contradicts the record just as the no-harm finding does—and is equally irrational.

Ultimately, there can be no reasoned weighing of competing policy goals if one factor has not been rationally considered. *See WNCN*, 450 U.S. at 595-96 (Commission's position "reflect[ed] a reasonable accommodation" of two competing policy goals where it had "assessed the benefits and the harm likely to flow" from a proposed course of action); *NCCB*, 436 U.S. at 805-08 (deferring to a "rational prediction").

And if, because of faulty and incomplete data, "uncertainty is so profound that it precludes [the agency] from making a reasoned judgment … [the agency] must say so." *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007). In retaining the rules, the 2016 Commission *did* acknowledge data problems that precluded it from relying on the data to justify relaxing the rules. *E.g.*, JA176. But there was no equivalent "say so" on reconsideration and the 2017 Commission's jettisoning of the rules did not rest on "empirical uncertainty." SG Br. 39. Instead, the FCC made an (arbitrary) judgment that repeal would not harm ownership diversity. The Government cannot retroactively transform that finding into a transparent reweighing of policy goals by invoking uncertainty.

If the Commission's view is that the ownership rules must go—no matter the effect on ownership diversity—because other benefits outweigh even the worst possible harm to diversity, it must reach that conclusion openly and rationally to survive APA review. Precisely because the "public interest" standard is a "supple instrument for the exercise of discretion," *WNCN*, 450 U.S. at 593, administrative accountability demands transparency when an agency redefines the contours of that standard.

Agencies may receive deference when they have "political accountability." *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019). But there can be no accountability—to the public or to the courts—if agencies obfuscate what they are doing. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019). Deferring to unspoken policy choices hidden behind patently irrational reasoning "would defeat the purpose of the enterprise." *Id.* at 2576.

B. The Commission's Ownership-Diversity Findings Are Irrational.

The Government concedes that "adverse impacts" on ownership diversity might have "dissuade[d] the agency from taking a deregulatory step that it otherwise viewed as highly desirable." Br. 37. In other words, it mattered to the Commission whether repealing the ownership rules would help or harm ownership diversity. Yet, the Commission "confined its reasoning [on diversity] to an insubstantial statistical analysis of unreliable data" and "not … even that much as to the effect of its rules on female ownership." App.40a. As the Third Circuit held, this facially insufficient "analysis" failed to meet basic markers of administrative reasonableness.

The Reconsideration Order "proceeded on the basis that consolidation will not harm ownership diversity" for women or people of color. App.41a. That conclusion was largely based—and for relaxing the local television rule, exclusively based—on a finding that relaxation of the local television and radio rules in the 1990s "did not have a negative impact on overall minority ownership levels." *See, e.g.*, App.161a. This "analysis" runs counter to record evidence, fails to

consider important aspects of the problem, and represents an unexplained reversal in position. The APA demands more.

1. Administrative decision-making must rest on a reasoned explanation that does not "run[] counter to the evidence before the agency." *State Farm*, 463 U.S. at 43. The record flatly contradicted the agency's conclusion here.

The Commission set out to consider the impact of previous rule relaxations on ownership diversity. Its entire "analysis" involved listing these numbers:

Year	Number of Minority-Owned Stations
1998 – NTIA data	32
1999 – local TV rule relaxed	
2000 – NTIA data	23
2007 – Free Press corrected 323 data	43
2009 – Form 323 data	60
2011 – Form 323 data	70
2013 – Form 323 data	69[11]

See JA174-75 & nn.214-215.[12]

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[11] Form 323 data for 2013 nominally listed 83 stations, but that number was artificially inflated. JA175 n.214.

[12] When percentages are considered—a basic step the FCC did not bother with—the recovery is even slower and weaker. Free Press corrected data (available through 2007) showed 3.31% stations owned by people of color in 1998, declining to 2.72% in 1998, before increasing to 3.15% in 2007. CA3JA569.

A similar radio station listing showed the same pattern—an immediate decrease after Congress relaxed the local radio rules in 1996 and higher numbers only years later. *See* JA215-16.

From this mere listing of raw numbers drawn from disparate data sets, the FCC concluded that "minority ownership has grown since that [pre-1999 local television] rule was eliminated." JA175. Even assuming (counterfactually) reliable data—that statement is true only in the same way that it is true that the economy has grown since the Great Depression. Any eventual improvements in ownership diversity after decimation following the 1990s rule changes do not disprove that relaxation harms ownership diversity. As the Third Circuit explained, the agency's no-harm finding was arbitrary because the agency failed to assess "how many minority-owned stations there would have been in 2009 had there been no deregulation." App.39a.

Contrary to the Government's argument (Br. 42-43), no sophisticated regression analysis or other methodology is needed to understand why the agency's simplistic conclusion is wrong. The rule change precipitated a decline, a simple fact the Commission has acknowledged in the past. *See* 2000 Order, 15 F.C.C.R. at 11084 (noting "a drop in the number of minority-owned broadcast stations" following deregulatory changes). Down does not mean up, and an increase years later does not erase the initial decline.

If anything, the (slow) increase, during a period when some ownership limits remained in place as a bulwark against consolidation, could reinforce the importance of the local ownership rules for fostering

ownership diversity. And a better analysis was in the record. Free Press's tracing analysis concluded that the 1990s television rule changes contributed to the loss of 40% of the previously minority-owned stations. CA3JA551. The Commission did not discredit this analysis; it simply ignored the Free Press study—a particularly egregious omission given that it cited the study for one of its data points. *See* JA175 & n.215.

2. Even when operating under a statutory standard that grants it flexibility, the Commission may not "entirely fai[l] to consider an important aspect of the problem." *Michigan,* 576 U.S. at 752 (quoting *State Farm*, 463 U.S. at 43). Yet that is exactly what it did regarding female ownership (which it did not analyze) and the incentive auction (which it refused to consider).

a. However irrational the Commission's "analysis" of ownership data for people of color, the panel below correctly observed that the Commission did "not offer[] even that much as to the effect of its rules on female ownership." App.40a.

The Commission concluded that its rule changes "are not likely to harm … female ownership," App.161a, based entirely on its assessment of data on ownership by people of color. *See* JA174-75 n.212. The FCC did not give *any* explanation of how this judgment about female ownership derived from data about something else. That silence is particularly troubling because the Commission's own data show different patterns in ownership trends between women and people of color. *See, e.g.*, CA3JA948-49; Data Summary, *supra* (ownership levels have not moved in lockstep for women and people of color).

The Commission's *only* assessment of the likely effect of rule changes on female ownership was its unsupported conclusion that there would be none. That is no assessment at all; it is a wholesale failure to consider the entire problem. "[D]eference cannot fill the lack of an evidentiary foundation" for an agency's conclusions. *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 643 (1986).

The Government responds (Br. 37-38) that there was no 1990s-era data on female ownership, and that studying the effect of the cross-ownership restrictions, specifically, would have been impractical. But the Commission had other options. Studies in the record pointed to alternatives, *see, e.g.*, CA3JA502 (showing that, all else equal, female radio-station ownership declines when market concentration increases), and comments urged the Commission to undertake studies of other "natural experiments" using the Commission's own post-1990s Form 323 data that did cover women, *see, e.g.*, CA3JA1076 (urging study of ownership before and after the Commission reinstated the failing station solicitation rule in 2008). To suggest that no alternatives were available is simply wrong.

Purported difficulties in studying cross-ownership specifically, *see* SG Br. 42-43, are irrelevant. The Commission itself relied on local-ownership data when it found that repealing cross-ownership rules would not harm ownership diversity. App.120a, 139a.

b. The Commission also failed to consider the effect of the incentive auction despite receiving comments that the auction was reducing ownership by women and people of color, and an express instruction

from the Third Circuit to consider the auction's effect. *Prometheus III*, 824 F.3d at 54 n.13.

Even before the auction's conclusion, evidence suggested that the auction was disproportionately leading people of color to exit broadcasting. *See, e.g.*, CA3JA980-83. Commenters urged the Commission to take this into account or, if the effect could not yet be determined, noted that it would be premature to relax the ownership rules while the industry was, as the 2016 Order acknowledged, "on the precipice of great change." JA104; *see, e.g.*, CA3JA955; CA3JA1051-52.

In 2016, the Commission was unable to determine the auction's effect, in part because it was not yet known which stations would go dark and which would move or share a channel with another station (which digital technology makes possible). JA176-78. By the time of the Reconsideration Order, the auction had finished, and stations had made these choices, although with time still to make changes. App.163a-64a & n.248. The Commission refused to consider these readily available preliminary results when finding that relaxing the local television rule was "not likely to harm minority and female ownership." App.161a.

The Commission's refusal to grapple with the disproportionate, and likely devastating, effect of the auction on ownership diversity failed the fundamental requirement that agencies cannot close their eyes to critically important considerations. *Michigan*, 576 U.S. at 752.

3. The 2016 Order properly found that retaining the current rules would foster ownership diversity. The Reconsideration Order found, on the same record,

that retaining the rules would not help and jettisoning them would do no harm. This unexplained about-face is yet another arbitrary aspect of the Commission's repeal. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

The Reconsideration Order attempted to square the circle by decreeing that the Commission's original 2016 statement that the rules "promote[] opportunities for diversity in … ownership," JA172, meant only that retaining the rules "would promote ownership diversity generally"—not "minority and female ownership specifically," *e.g.*, App.162a.

This re-interpretation blinks reality. For starters, the 2016 Order flat-out said that retaining the rules was "consistent with the Commission's goal to promote minority and female ownership." *E.g.*, JA171. And while explaining that retaining the rules "promot[ed] opportunities for diversity in broadcast … ownership," the Commission disclaimed only any explicit "purpose to preserve or create specific *amounts* of minority and female ownership." JA310; *see also* JA171-72; JA293. This disclaimer would have been nonsensical if the clause about "promot[ing] opportunities for diversity" was not about race/gender ownership diversity. Adjacent statements in the same paragraphs further confirm that the 2016 Order was discussing race/gender ownership diversity. *E.g.*, JA310 ("No commenters dispute that radio is a key entry point for minority and female ownership in the broadcast industry."); JA171; JA293.

In contrast, when the 2016 Order meant to say that retaining a rule would not affect race/gender ownership diversity, it said so. *See* JA331 ("[W]e do not believe that this [dual network] rule would be expected

to have any meaningful impact on minority and female ownership levels."). It plainly said the opposite for the local television, radio, and cross-ownership rules.

Stripped of its contrived re-interpretation of the 2016 Order, the Reconsideration Order's about-face on whether the existing ownership rules promote race- and gender-ownership diversity is wholly unexplained, indeed, unacknowledged. When an agency changes course, it "must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars*, *LLC*, 136 S. Ct. at 2126 (quoting *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009)). The Commission knows how to do so, and has transparently explained changes in position on other aspects of the rules. *E.g.*, App.67a-69a. But nothing explains how—with no change in the record—the 2016 finding that the rules promote ownership by women and people of color became an "unsubstantiated hope" within the space of a year.

C. The Commission's Decision Rested on an Arbitrary Assessment of the Past, Not a Reasoned Predictive Judgment.

Judicial deference to difficult predictive judgments cannot salvage the Commission's unreasoned conclusions.

1. The Government argues that agencies have substantial leeway to reach reasonable judgments and need not produce empirical evidence if it is difficult to do so. *See* Br. 22, 36 (citing *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009)). But the Third Circuit held the agency only to the

requirement of a "reasoned explanation." *Stilwell*, 569 F.3d at 519. It is uncontroverted, including by the Third Circuit, that the Commission could lawfully make a predictive judgment about the effect of relaxing its rules by relying on its experience and reasoned judgment. *See* App.40a; *NCCB*, 436 U.S. at 796-97.

It was the Commission's choice to rely on historical ownership data in making that prediction. And having chosen to rely on statistics in this way, the Commission did "not have free rein to use inaccurate data," *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 56 (D.C. Cir. 2015) (emphasis omitted). The resulting (unreasoned) conclusion that past relaxations did not harm ownership diversity is a factual finding about a past event—not a prediction of how regulated parties will behave in the future. That retrospective analysis—which § 202(h) demands, as Industry Petitioners agree (Br. 32)—was the primary basis for any predictive judgment.

The Government makes much of the proposition that when the Commission makes judgments "of a predictive nature," "complete factual support … is not possible or required." *NCCB*, 436 U.S. at 813-14. But no precedent provides agencies free rein to premise their predictions on irrational evaluations of past events. Because the Commission's "no harm" projection is predicated on its irrational assessment of past data, it, too, is arbitrary. Especially when predictive judgments underpin drastic course reversals, they "must be based on some logic and evidence, not sheer speculation." *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014).

2. In an odd turn, the Government now claims (Br. 41) that the Third Circuit, not the Commission, "seriously overestimated" the probative force of the historical station count, because the market has changed since the 1990s. But it was the Commission that concluded the historical data was probative in the first place. *See, e.g.*, App.161a. The Third Circuit merely explained that the conclusion drawn from that data was arbitrary.

In its discussion of the newspaper/broadcast cross-ownership rule, the Reconsideration Order also relied on the 2014 Notice's tentative conclusion that proposed modifications would not likely harm ownership diversity. App.117a; JA82; *see also* SG Br. 29. But that 2014 proposed rule was far less drastic than total repeal. And the 2016 Order repudiated that conclusion. *See* JA221; JA293.

Nor does the purported support of two groups representing diverse owners let the agency off the hook. App.117a-18a; *see also* SG Br. 30. The few comments supporting relaxation of the newspaper/broadcast cross-ownership rule (to the extent they even do), only underscore how barren the record was of support for repealing or relaxing the *other* rules without harming ownership diversity.

For the radio/television cross-ownership rule, the Commission again cited the invalid station-count comparison, adding that the local radio rule would prevent "significant additional consolidation." App.138a-39a. But the Commission nowhere denies the likelihood of some additional radio consolidation, which is particularly damaging to ownership diversity because—as even the Commission agrees—"broadcast

radio remains an important entry point into media ownership." *Id.*

Finally, for the local television rule, the *only* evidence supporting the Commission's no-harm finding was the station-count listing that fails Statistics 101. *See* App.161a-62a. The Commission's own proclamations about its policy goals and basic requirements of reasoned decision-making require more.

3. The Government argues (Br. 41) that just acknowledging the station count's flaws was good enough. But even taking the flawed data cited by the Commission at face value, they show the opposite of what the Commission claims for people of color and *nothing* about women. Beyond that, the Commission ignored common-sense corrections that would have made the historical data more reliable. This failure to adopt ready fixes to long-acknowledged serious data problems only makes the Commission's action more arbitrary, not less.

One fundamental problem with both the NTIA and the FCC Form 323 data sets is that they are so incomplete that they have historically undercounted minority-owned stations, something commenters repeatedly pointed out. *See* JA174-75 n.212; *supra* at 15-17. That means that, in any trend analysis, it is impossible to know how much of what appears to be an increase is actually just better counting over time. *See* JA215 (half of "growth" in one year's NTIA data was attributed to better counting); CA3JA944-45 (same problem persists with Form 323 data).

The Commission claimed it had no other choice but to use raw numbers, *e.g.*, JA174 n.211, and the

Government repeats that refrain here (Br. 40-41). Not so. The agency could have *corrected* the data, as Free Press did in 2007. *See* CA3JA560; CA3JA568-69. The FCC did not even try, even though it knows (better than anyone else) who owns each station and when it changed hands.[13] Uncertainties from flawed data might be excused if the Commission had "actually adjusted the [data] to account for … objections and demonstrated that the outcome of the final rule would not have changed." *See Sierra Club v. Costle*, 657 F.2d 298, 335 (D.C. Cir. 1981). Failure to even try is no excuse.

The Commission acknowledged that Form 323 data inadequacies had long "impaired the ability of the Commission and interested parties to study and analyze" the relevant issues. JA355-56. Commenters noted that problems persisted and urged fixes. *See, e.g.*, CA3JA955-56.

The Government now touts its belated implementation of some improvements, while faulting the public for purportedly not meeting its burden to supply more evidence in favor of retaining the rules. Br. 30-31. But it is the *Commission's* burden to determine whether its rules are necessary for the

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[13] Because there was inadequate notice that the Commission planned to compare the NTIA and Form 323 data, commenters had no opportunity to "point out where … the agency may be drawing improper conclusions," between those two data sets, specifically. *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1121 (D.C. Cir. 1984). Nonetheless, commenters repeatedly held the Free Press studies up to the Commission as a model. *See, e.g.*, Comments of Nat'l Hispanic Media Coalition, *supra*, at 17. And on reconsideration they explained why the Commission's comparison was invalid. *See, e.g.*, CA3JA1383-84.

public interest, which includes ownership diversity. And commenters *did* submit extensive empirical analysis on the question, evidence that the Commission ignored.

D. Nothing in § 202(h) Exempts the Commission from the Ordinary APA Requirement to Show Its Work.

Effectively claiming that future reviews will be hampered by the Third Circuit's application of basic administrative law principles, the Government seeks (Br. 24-27, 43-47) special deference to its § 202(h) decisions, arguing that the statute demands predictive judgments based on imperfect information and the short life cycle of any review mitigates the harmful effects of wrong decisions. Both rationales for straying from settled judicial review standards miss the mark.

1. The Commission's conception of § 202(h) as predominantly requiring predictive judgments, and thereby mandating more deferential review, misunderstands the statutory inquiry. Section 202(h) requires the Commission to determine whether, "as the result of competition," its rules remain useful in the public interest, and to repeal those that "no longer" are. These phrases focus the inquiry on the past and present. Any predictive element is premised on a reasoned analysis of past events—the statute provides no license to experiment and see what happens, as the Government argues. *See* Br. 46-47. The agency had (and has) many other plausible options to reasonably evaluate whether its ownership rules remain necessary in the public interest. *See supra* at 38-40.

Nor is the Government's let's-try-it-and-see explanation plausible: The Commission here did not claim this justification or dip a toe into the deregulatory waters; it jettisoned two rules entirely, substantially loosened a third, and undercut the last standing radio rule by adopting an incubator program that weakens it. That extra-statutory need-to-experiment rationale might arguably justify a relaxation or repeal of one rule (if grounded in rational findings), but the Commission deregulated broadcast-ownership wholesale.

2. Hope of future correction does not relieve the Commission of its statutory obligation to meet ordinary reasoned decision-making standards when assessing whether rules remain necessary in the public interest. A wrong call on public-interest harm (as here) cannot readily be undone even if rules are later restored. Beyond the practical difficulty of unscrambling the eggs once mergers take place, complete restoration is unlikely because of entrenched policies limiting divestiture. *See NCCB*, 436 U.S. at 811-12. And, as the 40% drop in minority ownership of full-power television stations following the 1990s relaxation shows, even if ownership diversity arguably recovers, it can take years. *See* CA3JA551; CA3JA568-69 (Free Press study). Four years between reviews (or more, given the Commission's history of delays) is far too late to put the genie back in the bottle.

In urging more lenient scrutiny, the Government also argues (Br. 44-45) that the panel's requirement of a reasoned explanation "with respect to a single public-interest factor" has frozen outdated ownership rules in place for decades and subjected broadcasters to harm. *See also* Industry Br. 8-9.

But any purported "freezing" of ownership rules is the Commission's doing, not the Third Circuit's. The Commission itself re-adopted most of its rules in 2008 and 2016. The Commission (until now) declined to repeal the newspaper/broadcast cross-ownership rule entirely, and the Commission took nearly ten years between this "quadrennial" review and the last one. *See supra* at 14-15; 17-19.

In any event, asserting broadcaster harm from delay (much like the Commission's analysis) ignores that the public-interest inquiry is multi-faceted. Petitioners repeatedly insist that Respondents have not contested the Commission's analysis of competition. But that misses the point. The statutory charge is to regulate in the public interest, not the broadcasters' competitive interest. Respondents have consistently argued that the rules are still necessary in the public interest writ large, and that harms to the public interest caused by repeal outweigh any benefit.

Beyond that, the Reconsideration Order's analysis of competition and localism is hardly universally accepted. Just a year before, on the same record, the Commission found that notwithstanding "broadband Internet and other technological advances," "[t]raditional media outlets … are still of vital importance," and the rules are necessary to "promote competition and a diversity of viewpoints in local markets." JA103-04.

Ultimately, the competition analysis was a contested and close policy call, with the new Commission majority reversing course on reconsideration to conclude that jettisoning the ownership rules would not harm competition. This about-face was maybe (at least arguably) reasonably

explained. But the no-harm finding on the interrelated ownership-diversity factor was plainly arbitrary. And that important aspect of the public interest cannot be so easily segregated from other public interest goals, or discounted, particularly when the Commission continues to espouse it. The stakes are too high for courts to relax the standard by which the (un)reasonableness of the Commission's analysis of its own stated goals is judged.

III. The Third Circuit's Remedy Was Correct.

A. Industry Petitioners (Br. 48-49) contend that the Third Circuit should have remanded without vacatur. But even if remand without vacatur is a permissible remedy, *see Milk Train, Inc. v. Veneman,* 310 F.3d 747, 757-58 (D.C. Cir. 2002) (Sentelle, J., dissenting)—a question this Court has not answered—vacatur is the standard remedy for unlawful agency action*, see* Richard J, Pierce, Jr. & Kristin E. Hickman, *Administrative Law Treatise* § 11.9 (6th ed. 2020) ("Courts use the remand without vacation remedy only in relatively unusual circumstances.").[14]

Vacatur was appropriate here given the "seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly)." *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993). The "disruptive consequences of an interim change that may itself be changed," *id.* at 150-51, likewise favor vacatur.

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[14] The Government does not contest that vacatur was appropriate, arguing only that the vacatur was overbroad. *See* Br. 47 n.7.

A "quintessential disruptive consequence arises when an agency cannot easily unravel a past transaction in order to impose a new outcome." *Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 519 (D.C. Cir. 2020). Unwarranted consolidation could not easily be unraveled if the agency changed its mind. And if the Commission grandfathered transactions, as it often does, it would only cement the loss of ownership opportunities for new entrants.

B. The Third Circuit also properly vacated all three orders, rather than making its own policy judgments to disentangle related pieces and return only parts of the orders to the Commission. "The reality is that the rule changes made in this Order are all interrelated." App.292a.

The Incubator Order and its overly broad "eligible entity" criteria effectively loosen the radio ownership rules by permitting broadcasters to obtain waivers of the existing radio limits. *E.g.,* App.214a (describing commenters' concerns that the incubator program could "create a loophole in the Commission's ownership limits"). And, as some Respondents argued in the Third Circuit, the eligibility criteria for both programs are so expansive as to be virtually meaningless for promoting ownership diversity. CA3 Opening Br. 38-43. The Third Circuit had no need to resolve those claims after establishing that the Commission's ownership rule repeal was arbitrary.[15]

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[15] Industry Petitioners note (Br. 47) that the Third Circuit rejected challenges to the Incubator Order. But that challenge was to the Order's comparable-markets definition. App.30a-34a. The court did not rule on the reasonableness of the eligibility criteria.

If a reasonable assessment of ownership diversity convinces the Commission that tighter ownership limits are needed, it would almost certainly likewise alter the Commission's assessment of how narrowly to draw its eligibility criteria for an incubator program or other ownership limit waivers. Because the ownership rules and programs waiving those rules necessarily must work coherently together, the Third Circuit reasonably returned the entire regulatory scheme to the agency for it to decide based on a reasoned and transparent analysis how to use the tools at its disposal—ownership restrictions (including attribution rules), exceptions for "eligible entities," and incubator programs—to best serve the public interest.[16]

C. Industry Petitioners object to the Third Circuit's decision to retain jurisdiction over the case. Br. 49-51. The Government does not join in, perhaps because it has repeatedly agreed with decisions to return this case to the Third Circuit. *See supra* at 14, 20.

Courts have discretion to retain jurisdiction over agency action on remand to expedite further review and foster judicial economy given familiarity with the issues. *See, e.g.*, *Nat'l Ass'n of Regulatory Util. Comm'rs v. U.S. Dep't of Energy*, 680 F.3d 819, 820 (D.C. Cir. 2012) (retaining jurisdiction to expedite review); *Castañeda-Castillo v. Holder*, 638 F.3d 354,

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[16] Petitioners also object (SG Br. 47 n.7; Industry Br. 47-48) to vacatur of the repeal of the Joint Sales Agreement (JSA) attribution rule for local television and the embedded markets rule for radio. But Industry Petitioners have previously argued that JSA rules effectively "amend the … ownership limits," and the Third Circuit agreed. *Prometheus III*, 824 F.3d at 57. The embedded markets rule does the same for radio.

367 (1st Cir. 2011) (retaining jurisdiction over agency remand in case that had been "ping-ponging" for years). Retention of jurisdiction was not an abuse of discretion here, given the Commission's own delays in completing the 2010/2014 Review and complying with prior remands, *see Prometheus III*, 824 F.3d at 48-51, and the panel's deep knowledge of the issues.[17]

Petitioners have the full choice of venue for any petitions for review of new, distinct agency rulemakings. Intertwined issues have prompted transfer of new quadrennial reviews to the Third Circuit in the past—with the Commission's blessing—in large part because the Commission has combined its remand decisions with its quadrennial reviews. Nothing in the Third Circuit's decision here compels the Commission to do so, however, and Industry Petitioners submit no other reason why retention of jurisdiction is improper.

D. Because the Commission has never purported to abandon ownership diversity as a public-interest goal within § 202(h) reviews, it was proper for the Third Circuit to state that the Commission must, on remand, evaluate the likely effect of its ownership rule changes on race and gender ownership. Direction to correct flawed analysis is an administrative commonplace when an agency arbitrarily assesses or ignores an important aspect of the problem before it. *See, e.g.*, *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020) ("remand[ing] to

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[17] The Hobbs Administrative Orders Review Act, 28 U.S.C. § 2342(1), does not dictate otherwise. It is silent on a court's authority to retain jurisdiction in any given case.

DHS so that it may consider the problem anew" when it "failed to consider [two] conspicuous issues").

This directive to show your work poses no *Vermont Yankee* problem. That case recognized that the APA authorizes a reviewing court to "remand an agency decision because of the inadequacy of the record." *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 544 (1978). And the Third Circuit properly left the agency free "to develop the needed evidence" and determine "how its prior decision should be modified in light of such evidence." *Id.*

There was no unyielding order to the Commission to adduce new evidence; a better analysis would do. App.41a (noting the agency could engage in "new empirical research or an in-depth theoretical analysis"). And that analysis is possible on (and even included in) the existing record. *See supra* at 15-17; 38-40.

Nor does the mandate impair the Commission's discretion to transparently re-weigh competing public-interest considerations (obviating the need for extensive analysis of ownership diversity, should the Commission decide to explicitly abandon the goal). It merely guarantees that so long as the Commission continues to profess a commitment to ownership diversity, it must reasonably implement that commitment. It has not done so.

CONCLUSION

The Third Circuit should be affirmed.

Respectfully submitted.

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ADDENDUM

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47 U.S.C. § 151 Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

47 U.S.C. § 161. Regulatory reform

(a) Biennial review of regulations

In every even-numbered year (beginning with 1998), the Commission--

(1) shall review all regulations issued under this chapter in effect at the time of the review that apply to the operations or activities of any provider of telecommunications service; and

(2) shall determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.

(b) Effect of determination

The Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest.

47 U.S.C. § 257. Market entry barriers proceeding

(a) Elimination of barriers

Within 15 months after February 8, 1996, the Commission shall complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this chapter (other than this section), market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services.

(b) National policy

In carrying out subsection (a), the Commission shall seek to promote the policies and purposes of this chapter favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.

* * * *

47 U.S.C. § 303. Powers and duties of Commission

* * * *

Broadcast Ownership

Act Feb. 8, 1996, P. L. 104-104, Title II, § 202(c), 110 Stat. 110; Jan. 23, 2004, P. L. 108-199, Div B, Title VI, § 629, 118 Stat. 99, provides:

* * * *

"(b) Local radio diversity.

"(1) Applicable caps. The Commission shall revise section 73.3555(a) of its regulations (47 C.F.R. 73.3555) to provide that—

"(A) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);

"(B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);

"(C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial

radio stations, not more than 4 of which are in the same service (AM or FM); and

"(D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.

* * * *

"(c) Television ownership limitations.

"(1) National ownership limitations. The Commission shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations (47 C.F.R. 73.3555)—

"(A) by eliminating the restrictions on the number of television stations that a person or entity may directly or indirectly own, operate, or control, or have a cognizable interest in, nationwide; and

"(B) by increasing the national audience reach limitation for television stations to 39 percent.

"(2) Local ownership limitations. The Commission shall conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or

control, or have a cognizable interest in, within the same television market.

* * * *

"(h) Further Commission review. The Commission shall review its rules adopted pursuant to this section and all of its ownership rules quadrennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 [47 U.S.C. 161] and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

This subsection does not apply to any rules relating to the 39 percent national audience reach limitation in subsection (c)(1)(B).

* * * *

47 U.S.C. § 309. Application for license

* * * *

(i) Random selection.

(1) General authority. Except as provided in paragraph (5), if there is more than one application for any initial license or construction permit, then the Commission shall have the authority to grant such license or permit to a qualified applicant through the use of a system of random selection.

* * * *

(3)

(A) The Commission shall establish rules and procedures to ensure that, in the administration of any system of random selection under this subsection used for granting licenses or construction permits for any media of mass communications, significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications. To further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group.

* * * *

(j) Use of competitive bidding.

(1) General authority. If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted for any initial license or construction permit, then, except as provided in paragraph (2), the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.

* * * *

(3) Design of systems of competitive bidding. For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. The Commission shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding using a contingent combinatorial bidding system that permits prospective bidders to bid on combinations or groups of licenses in a single bid and to enter multiple alternative bids within a single bidding round. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use

of the spectrum and shall seek to promote the purposes specified in section 151 of this Title and the following objectives:

* * * *

> (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

* * * *

(4) Contents of regulations. In prescribing regulations pursuant to paragraph (3), the Commission shall—

> (C) consistent with the public interest, convenience, and necessity, the purposes of this Act, and the characteristics of the proposed service, prescribe area designations and bandwidth assignments that promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and (iii)

investment in and rapid deployment of new technologies and services;

(D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures;

* * * *