No. _____

IN THE
Supreme Court of the United States

NATIONAL ASSOCIATION OF BROADCASTERS, *ET AL.*,

Petitioners,

v.

PROMETHEUS RADIO PROJECT, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 202(h) of the Telecommunications Act of 1996 directs the Federal Communications Commission to review its media ownership rules every four years and to "repeal" or "modify" any rule that is no longer "necessary in the public interest as the result of competition." In its most recent review, the Commission modified or eliminated a number of decades-old ownership rules that substantial competitive changes in the media marketplace had rendered unnecessary. No party challenged the Commission's statutorily mandated competition analysis. Yet the Third Circuit vacated all of the rule changes solely because it concluded that the Commission inadequately considered the effect of those changes on minority and female ownership—even though Section 202(h) says nothing about that issue—and it ordered the Commission to collect additional statistics on ownership diversity. The same divided Third Circuit panel has repeatedly elevated its policy concerns over the statutory text and purported to retain jurisdiction over the FCC's Section 202(h) orders, blocking review by any other court.

The question presented is:

Whether under Section 202(h) the Commission may repeal or modify media ownership rules that it determines are no longer "necessary in the public interest as the result of competition" without statistical evidence about the prospective effect of its rule changes on minority and female ownership.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Bonneville International Corporation, Connoisseur Media LLC, Fox Corporation, the National Association of Broadcasters, News Corporation, News Media Alliance, Nexstar Broadcasting, Inc., The Scranton Times L.P., and Sinclair Broadcast Group, Inc.

Respondents that were petitioners in the Third Circuit are Prometheus Radio Project, Media Mobilizing Project, Office of Communication, Inc. of the United Church of Christ, National Association of Broadcast Employees and Technicians-Communications Workers of America, Common Cause, Multicultural Media, Telecom and Internet Council, National Association of Black Owned Broadcasters, Inc., Independent Television Group, and Free Press.

Respondent that was intervenor petitioner in the Third Circuit is Cox Media Group LLC.

Respondents that were intervenor respondents in the Third Circuit are Benton Foundation and National Organization for Women Foundation.

Respondents that were respondents in the Third Circuit are the Federal Communications Commission and the United States of America.

Pursuant to this Court's Rule 29.6, petitioners state that:

Bonneville International Corporation is a privately held Utah corporation. Bonneville's sole shareholder is Deseret Management Corporation, which, in turn, is privately held by the DMC Reserve Trust. There are three individual trustees, who are

appointed by The First Presidency of The Church of Jesus Christ of Latter-day Saints.

Connoisseur Media LLC is a limited liability company organized in the State of Delaware. Connoisseur is owned by Connoisseur Media Holdings, LLC, which is in turn controlled by CM Broadcast Management, LLC.

Fox Corporation is a media corporation that owns and operates broadcasting operations, and provides programming in markets nationwide. Fox Corporation has no parent corporation and no publicly held company has a ten percent or greater ownership interest in the company.

National Association of Broadcasters is a nonprofit, incorporated association of radio and television stations and broadcast networks. It has no parent company, and has not issued any shares or debt securities to the public; thus no publicly held company owns ten percent or more of its stock.

News Corporation is a publicly held company consisting of businesses across a range of media, including news and information services, book publishing, and digital real estate services. It has no parent company, and no publicly held company owns ten percent or more of News Corporation's stock.

News Media Alliance is a not-for-profit trade association representing nearly 2,000 companies engaged in all aspects of the news media industry in the United States and Canada. Alliance members account for nearly 90 percent of the daily newspaper circulation in the United States, as well as a range of online, mobile and non-daily publications. News Media Alliance was known as the Newspaper Association of America until September 2016. News

Media Alliance has no parent company, and no publicly held company has a ten percent or greater ownership interest in the News Media Alliance.

Nexstar Broadcasting, Inc. is a media corporation that owns and operates commercial broadcast television stations. Nexstar is wholly owned by Nexstar Media Group, Inc., which is a publicly held corporation. No publicly held corporation has a ten percent or greater ownership interest in the stock of Nexstar Media Group, Inc.

The Scranton Times L.P. is controlled by its general partner, The Times Partner, L.L.C., a Pennsylvania limited liability company, which is in turn privately held and controlled by its four individual members.

Sinclair Broadcast Group, Inc. is a media corporation that owns, operates, and provides programming and sales services to television stations in various cities across the country. Sinclair has no parent company and no publicly traded company owns more than ten percent of Sinclair's stock.

STATEMENT OF RELATED PROCEEDINGS

The proceeding directly related to this petition is:

Prometheus Radio Project v. *FCC*, Nos. 17-1107, 17-1109, 17-1110, 17-1111, 18-1092, 18-1669, 18-1670, 18-1671, 18-2943 & 18-3335 (3d Cir. Sept. 23, 2019), *en banc & panel reh'g denied* (3d Cir. Nov. 20, 2019)

Other proceedings that are not directly related to this petition but that involved many of the same parties and the FCC's Section 202(h) reviews are:

Prometheus Radio Project v. *FCC*, Nos. 03-3388, 03-3577, 03-3578, 03-3579, 03-3580, 03-3581, 03-3582, 03-3651, 03-3665, 03-3675, 03-3708, 03-3894, 03-3950, 03-3951, 03-4072, 03-4073 & 04-1956 (3d Cir. June 24, 2004), *panel reh'g denied* (3d Cir. Sept. 3, 2004)

FCC v. *Prometheus Radio Project*, No. 04-1168 (U.S. cert denied June 13, 2005)

Media Gen., Inc. v. *FCC*, No. 04-1020 (U.S. cert denied June 13, 2005)

Nat'l Ass'n of Broadcasters v. *FCC*, No. 04-1033 (U.S. cert denied June 13, 2005)

Newspaper Ass'n of Am. v. *FCC*, No. 04-1045 (U.S. cert denied June 13, 2005)

Sinclair Broad. Grp., Inc. v. *FCC*, No. 04-1177 (U.S. cert denied June 13, 2005)

Tribune Co. v. *FCC*, No. 04-1036 (U.S. cert denied June 13, 2005)

Prometheus Radio Project v. *FCC*, Nos. 08-3078, 08-4454, 08-4455, 08-4456, 08-4457, 08-4458, 08-4459, 08-4461, 08-4462, 08-4463, 08-4464,

08-4465, 08-4467, 08-4468, 08-4470, 08-4471, 08-4472, 08-4475, 08-4477, 08-4478 & 08-4652 (3d Cir. July 7, 2011), *en banc & panel reh'g denied* (3d Cir. Sept. 6, 2011)

Media Gen., Inc. v. *FCC*, No. 11-691 (U.S. cert. denied June 29, 2012)

Nat'l Ass'n of Broadcasters v. *FCC*, No. 11-698 (U.S. cert. denied June 29, 2012)

Tribune Co. v. *FCC*, No. 11-696 (U.S. cert denied June 29, 2012)

Prometheus Radio Project v. *FCC*, Nos. 15-3863, 15-3864, 15-3865 & 15-3866 (3d Cir. May 25, 2016)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners the National Association of Broadcasters, Bonneville International Corporation, Connoisseur Media LLC, Fox Corporation, News Corporation, News Media Alliance, Nexstar Broadcasting, Inc., The Scranton Times L.P., and Sinclair Broadcast Group, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Third Circuit (Pet. App. 1a-63a) is reported at 939 F.3d 567. The order of the Third Circuit denying rehearing (Pet. App. 311a-314a) is unreported. The order of the Federal Communications Commission under review in this Court (Pet. App. 64a-310a) is reported at 32 FCC Rcd. 9802. Other orders of the Federal Communications Commission that were under review in the Third Circuit are reported at 31 FCC Rcd. 9864 and 33 FCC Rcd. 7911.

JURISDICTION

The Third Circuit entered judgment on September 23, 2019, and denied a timely petition for rehearing on November 20, 2019. On February 12, 2020, Justice Alito extended the time for filing a petition for a writ of certiorari to and including March 19, 2020. On March 12, 2020, Justice Alito further extended the time for filing a petition for a writ of certiorari to and including April 18, 2020. On March 19, 2020, this Court issued a standing order that also extended the time for filing a petition for a writ of certiorari to and

including April 18, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996), as amended by Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004), provides:

SEC. 202. BROADCAST OWNERSHIP.

* * *

(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 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.

STATEMENT

Congress enacted Section 202(h) in 1996 to require the Federal Communications Commission to review its rules restricting ownership of television stations, radio stations, and newspapers periodically, and to "repeal" or "modify" any regulation that is no longer in the public interest "as the result of competition." Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996); *see also* Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004). Despite Congress's clear command to modernize the FCC's ownership rules and eliminate outdated restrictions, a single panel of the Third Circuit has—for more than 15 years—

prevented the FCC from fulfilling its duty and blocked any other court from weighing in.

When Congress enacted Section 202(h), the FCC's ownership rules were already relics from a time when traditional television and radio broadcasts and print newspapers were virtually the only means by which Americans received news, as well as the dominant forms of video and audio entertainment. By 1996, technological changes had sparked an "explosion of video distribution technologies and subscription-based programming sources" that gave consumers new media options and challenged the dominance of newspapers and "free over-the-air broadcasting." H.R. Rep. No. 104-204, at 55 (1995). Yet a quarter century later, FCC rules fashioned when the Internet and outlets such as satellite television and radio were in their infancy—or did not even exist—continue to govern the media marketplace.

Despite Congress's mandate, those long-outdated rules are still in force because the same divided panel of the Third Circuit has purported to retain jurisdiction over all FCC ownership reviews and—time and again—prevented the FCC from implementing the reforms Section 202(h) requires. *See* Pet. App. 46a (Scirica, J., dissenting).[1] In the *Reconsideration Order* under review, the FCC made necessary adjustments to its ownership rules by repealing certain provisions and modifying others that the FCC concluded no longer served the public

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[1] *See Prometheus Radio Project* v. *FCC*, 652 F.3d 431, 472 (3d Cir. 2011) ("*Prometheus II*") (Scirica, J., dissenting); *Prometheus Radio Project* v. *FCC*, 373 F.3d 372, 435 (3d Cir. 2004) ("*Prometheus I*") (Scirica, C.J., dissenting); *see also Prometheus Radio Project* v. *FCC*, 824 F.3d 33, 60 (3d Cir. 2016) ("*Prometheus III*") (Scirica, J., dissenting).

interest in light of "dramatic changes in the marketplace." Pet. App. 67a (alteration omitted). The Third Circuit, however, vacated the *Reconsideration Order* in its entirety, thus reinstating *all* the prior rules. *Id.* at 41a.

The Third Circuit's decision was not based on the rules' merits or on any defect in the competition analysis Congress directed the FCC to perform; indeed, no party disputed any aspect of that analysis. Instead, the Third Circuit's decision was based solely on the panel majority's atextual policy concerns about ownership diversity.

Making matters worse, the same panel of the Third Circuit once "again retain[ed] jurisdiction over the remanded issues," Pet. App. 45a, just as it had in 2016, 2011, and 2004, *see Prometheus III*, 824 F.3d at 60, in 2011, *Prometheus II*, 652 F.3d at 472, *Prometheus I*, 373 F.3d at 435. As a result, no other court of appeals (or even any other panel of the Third Circuit) has been able to address whether ownership diversity is a necessary consideration under Section 202(h)—let alone one that trumps the statute's express metric of competition—or indeed to exercise any judicial review of the FCC's ownership reviews for the last 15 years.

This Court's review is needed to restore Congress's plan for the FCC to update the media ownership rules under Section 202(h) to keep pace with changes in the competitive marketplace. Congress expressly directed the FCC to repeal or modify any media ownership rule that it found no longer "necessary in the public interest as the result of competition," not to lock in place rules adopted decades ago absent exhaustive evidence demonstrating their impact (or lack thereof) on

ownership diversity. By vacating the *Reconsideration Order*'s long-overdue changes, the Third Circuit undermined Congress's goals, rejected the FCC's expertise, harmed the broadcast and newspaper industries, and once again froze in place an obsolete regulatory regime. Moreover, the Third Circuit panel's assertion of perpetual jurisdiction has prevented any other court from construing Section 202(h)—meaning that further review must come from this Court, or not at all.

The proper interpretation of Section 202(h) is an important and recurring question. Unless rectified by this Court, the Third Circuit's misguided interpretation and unworkable evidentiary standards will continue to distort every future quadrennial review of the FCC's ownership rules. In the meantime, the Third Circuit panel's ossification of the FCC's rules has had a concrete and negative impact on America's broadcast and newspaper industries—represented by petitioners here—by hampering their ability to compete with existing and emerging media sources (including multichannel video providers, social media networks, and online video and audio platforms) that are not governed by comparable restrictions. In sum, this petition presents a question of indisputable national importance on which there is no possibility of a circuit split. This Court's review is needed now.

A. Congress Mandates Periodic Review Of FCC Media Ownership Rules.

The Commission's rules restrict ownership of multiple local television stations or local radio stations, as well as "cross-ownership" of different types of local media outlets. *See* 47 C.F.R. § 73.3555. Section 202(h) requires the FCC to review those rules

every four years to determine whether they "are necessary in the public interest as the result of competition," and to "repeal or modify any regulation it determines to be no longer in the public interest." Pub. L. No. 104-104, § 202(h), *as amended*.

Despite seismic shifts in the competitive landscape, these FCC ownership rules have remained virtually unchanged for decades. Today, they exist as relics from a time when Americans had access to a limited number of sources of information, and ownership regulations were designed to manage the perceived scarcity of radio spectrum. For example, the FCC adopted the Newspaper/Broadcast Cross-Ownership Rule, 47 C.F.R. § 73.3555(d)—which prohibits an entity from owning a daily newspaper and one full-power radio or television station in the same market—in 1975. *See Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, 50 FCC 2d 1046, 1075 (1975).

By 1996, technological innovation had already rendered that regulatory approach obsolete. "On the cusp of an unprecedented revolution in communication technologies, Congress set in motion [a] statutorily-prescribed process of media deregulation based on the conviction that increased competition in the media marketplace would best serve the public interest." *Prometheus I*, 373 F.3d at 438 (Scirica, J., dissenting). In this newly "competitive environment, arbitrary limitations on broadcast ownership" were "no longer necessary" to protect consumers and instead were harmful to "the industry's ability to compete effectively in a

multichannel media market." H.R. Rep. No. 104-204, at 55.

The solution, Congress determined, was to adopt reforms compelling the FCC "to depart from the traditional notions of broadcast regulation and to rely more on competitive market forces." H.R. Rep. No. 104-204, at 55. Congress began this process itself by specifically directing the relaxation or elimination of several ownership rules. *See* Pub. L. No. 104-104, § 202(a), (b), (c)(1), (e), (f)(1), (i), 110 Stat. 56, 110-12. And it enacted Section 202(h) to ensure that the FCC would continue to update the ownership rules in light of ongoing technological change and increased competition.

Despite Congress's mandate that the FCC's structural ownership rules accurately reflect the *current* media marketplace—and not the marketplace from decades earlier when the rules were first adopted—many outdated ownership restrictions remain in place today. Even so, as the FCC observed, the media landscape is rapidly evolving, largely as a result of increased competition from Internet-based services. *See*, *e.g.*, Pet. App. 92a-98a ("the Internet has transformed the American people's consumption of news and information"). In particular, broadcast stations and newspapers face significant online competition for audiences and advertising dollars—competition that did not exist when the rules were adopted. *See*, *e.g.*, *id.* at 98a-100a & n.80.

B. The Third Circuit Blocks Necessary Reforms.

Over the last two decades, the FCC has attempted to modernize its broadcast ownership rules through its quadrennial reviews. Yet on multiple occasions,

the same divided panel of the Third Circuit has prevented the FCC from doing so.

In its 2002 review, for example, the Commission decided to repeal the Newspaper/Broadcast Cross-Ownership Rule and to replace it with cross-media limits that varied based on the size of the relevant market. *See Prometheus I*, 373 F.3d at 387, 397-98. That Rule was no longer necessary, the FCC concluded, because—among other reasons—it "undermines localism by preventing efficient combinations that would allow for the production of high-quality local news." *Id.* at 398; *see also id.* at 450 (Scirica, J., dissenting) (explaining that "[s]ynergies and cost-reductions of cross-ownership could also translate into increased competition"). On review, the Third Circuit *agreed* "that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest." *Id.* at 398 (majority opinion). Nonetheless, the divided panel remanded the FCC's deregulatory reform because it identified certain flaws in the analysis underlying the FCC's replacement limits. *See id.* at 402-12, 435. Similarly, despite the FCC's finding that competitive developments supported allowing greater flexibility in local television ownership and the panel's own determination that common ownership "can improve local programming," *id.* at 415, the Third Circuit remanded the revised Local Television Ownership Rule due to supposed inconsistencies in the FCC's reasoning, *see id.* at 418-20.[2] Over Judge Scirica's

[2] The Local Television Ownership Rule limits the number of television stations that an entity may own in any market, prohibits common ownership of more than one top-four ranked television station in all markets, and effectively prevents

dissent, the panel also announced that it would continue to stay the revised rules and "retain[ ] jurisdiction" over issues it remanded to the FCC, and stated—in a footnote—that the Commission "should also consider" specific "proposals for enhancing ownership opportunities for women and minorities." *Id.* at 435 & n.82. This Court denied FCC and industry petitions for writs of certiorari. *See FCC* v. *Prometheus Radio Project*, 545 U.S. 1123 (2005); *Media Gen., Inc.* v. *FCC*, 545 U.S. 1123 (2005); *Nat'l Ass'n of Broadcasters* v. *FCC*, 545 U.S. 1123 (2005); *Newspaper Ass'n of Am.* v. *FCC*, 545 U.S. 1123 (2005); *Sinclair Broad. Grp., Inc.* v. *FCC*, 545 U.S. 1123 (2005); *Tribune Co.* v. *FCC*, 545 U.S. 1123 (2005).

During its 2006 review, the FCC tried again to repeal its ban on newspaper-broadcast cross-ownership, this time intending to review cross-ownership proposals on a case-by-case basis. *See Prometheus II*, 652 F.3d at 441. Once again, the same divided Third Circuit panel vacated the Commission's attempted reform, not because it found the Newspaper/Broadcast Cross-Ownership Rule was necessary in light of competition, but because the FCC supposedly failed to provide proper notice of its rule changes. *See id.* at 453. Once again, Judge Scirica dissented from the majority's decision to "preserve[ ] an outdated and twice-abandoned ban." *Id.* at 472 (Scirica, J., dissenting). And once again, the panel declared that it would "retain[ ] jurisdiction over the remanded issues." *Id.* (majority opinion). Reviewing a separate order specifically addressing minority and

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common ownership of more than one station in mid-sized and small markets.

female ownership issues,[3] the panel majority criticized the FCC for failing "to consider the effect of its rules on minority and female ownership." *Id.* at 471. Although the panel said that "ownership diversity is an important aspect of the overall media ownership regulatory framework," it did not cite any authority for the proposition that the Commission must consider minority and female ownership as part of its Section 202(h) reviews. *Id.* at 472. This Court again denied industry petitions for certiorari. *See Media Gen., Inc.* v. *FCC*, 567 U.S. 951 (2012); *Nat'l Ass'n of Broadcasters* v. *FCC*, 567 U.S. 951 (2012); *Tribune Co.* v. *FCC*, 567 U.S. 951 (2012).

The Commission failed to complete its 2010 review in a timely fashion. *See Prometheus III*, 824 F.3d at 38. On review, the same Third Circuit panel majority "remind[ed] the Commission of its obligation to complete its Quadrennial Review responsibilities," *id.* at 60, and used the Newspaper/Broadcast Cross-Ownership Rule as "a telling example of why the delay [wa]s so problematic," *id.* at 51. Because of the court's two prior decisions, it explained, "the 1975 ban remains in effect to this day even though the FCC determined more than a decade ago that it is no longer in the public interest." *Id.* "This has come at a significant expense to parties that would" otherwise be able "to engage in profitable combinations." *Id.* at 51-52. In a footnote, the panel majority "note[d] that, in addition to § 202(h)'s requirement to review the rules to see if they are necessary in light of competition, the Quadrennial Review must also, per our previous decisions, include a determination about

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[3] The Third Circuit had consolidated its review of this separate order with review of the FCC order concluding the 2006 media ownership review.

'the effect of [the] rules on minority and female ownership.'" *Id.* at 54 n.13 (second alteration in original). Again, the panel majority did not cite any authority other than its own prior decisions for this supposed mandate. And, for the third time, the "panel retain[ed] jurisdiction over the remanded issues." *Id.* at 60.

C. The FCC Adopts The *Reconsideration Order*.

The FCC concluded its 2010 and 2014 reviews by failing to adopt reforms necessary to address the seismic marketplace changes over the past decades. *See* CA3 JA27-225 (the "*Second R&O*"). Despite a well-developed record demonstrating the need for deregulation due to increased competition, the FCC maintained several legacy ownership restrictions—including the Newspaper/Broadcast Cross-Ownership Rule—and even increased restrictions on local television ownership.

Given the still pressing need for regulatory reform, petitioners National Association of Broadcasters, Nexstar, and Connoisseur petitioned the FCC for reconsideration. They explained that the record was devoid of studies, serious research, or new arguments explaining why the decades-old broadcast-only ownership rules should remain in place; that the Commission's retention of these archaic rules failed to account for the rise of alternative media providers, including cable, satellite, and the Internet; and that the rules as applied fundamentally misunderstood the actual workings of the media marketplace.

The FCC agreed, and granted the reconsideration petitions in part. The *Reconsideration Order* eliminated the Newspaper/Broadcast Cross-Ownership Rule, the Radio/Television Cross-

Ownership Rule, 47 C.F.R. § 73.3555(c),[4] and the TV Joint Sales Agreement Attribution Rule, Note 2(k)(2) to 47 C.F.R. § 73.3555.[5] Pet. App. 76a-77a, 193a-95a. The FCC also modified the Local Television Ownership Rule, 47 C.F.R. § 73.3555(b). *Id.* at 140a. And the FCC established a presumptive waiver of the Local Radio Ownership Rule, 47 C.F.R. § 73.3555(a), for parties seeking approval of a limited number of transactions involving radio stations in markets that contain multiple "embedded" markets (i.e., New York City and Washington, D.C.). *Id.* at 175a-78a. These revisions to the FCC's rules were necessary to ensure that broadcasters and newspapers have "a greater opportunity to compete and thrive in the vibrant and fast-changing media marketplace." *Id.* at 67a. The FCC specifically determined that each of the changes to its ownership rules would not have a material impact on ownership diversity. Pet. App. 117a-22a, 138a-40a, 161a-62a.

D. The Third Circuit Again Blocks Reform.

On September 23, 2019, the same divided Third Circuit panel vacated the *Reconsideration Order* in its entirety. *See* Pet. App. 41a. The panel did not criticize any aspect of the FCC's competition analysis; indeed,

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[4] The Radio/Television Cross-Ownership Rule restricts certain common ownership of radio and television stations in local markets. Pet. App. 122a-24a.

[5] A joint sales agreement "is an agreement that authorizes one station (the broker or the brokering station) to sell some or all of the advertising time on another station (the brokered station)." Pet. App. 179a. Under the TV Joint Sales Agreement Attribution Rule, a station subject to a joint sales agreement is considered to be owned by the party selling the advertising time for purposes of the Local Television Ownership Rule.

no party challenged "the FCC's core determination that the ownership rules have ceased to serve the 'public interest.'" *Id.* at 55a (Scirica, J., dissenting). Instead, the panel majority faulted the Commission for failing to "adequately consider the effect its new rules would have on ownership of broadcast media by women and racial minorities." *Id.* at 34a (majority opinion). The court proclaimed that "promoting ownership diversity" is "something the Commission must consider" and is "an important aspect of the problem." *Id.* at 40a. Yet the Third Circuit once again cited no authority in support of that proposition other than its own prior statements. *See id.* at 34a (citing *Prometheus III*, 824 F.3d at 54 n.13). Nonetheless, the panel majority ordered the Commission on remand to "ascertain on record evidence the likely effect of any rule changes it proposes . . . on ownership by women and minorities, whether through new empirical research or an in-depth theoretical analysis." *Id.* at 41a. And it "retain[ed] jurisdiction over the remanded issues." *Id.* at 45a.

Once again, Judge Scirica dissented. Pet. App. 46a. He explained that "[n]o party identifie[d] any reason to question the FCC's key competitive findings and judgments." *Id.* at 55a. And he noted that "neither Section 202(h) nor the [Administrative Procedure Act] requires the FCC to quantify the future effects of its new rules as a prerequisite to regulatory action." *Id.* In assessing the public interest under Section 202(h), he reasoned, "the FCC considers five types of diversity, not to mention competition and localism." *Id.* at 59a. "The FCC's lack of some data relevant to one of these considerations," he concluded, "should not outweigh its reasonable predictive judgments, particularly in

the absence of any contrary information, such that its entire policy update is held up." *Id.*

On November 20, 2019, the Third Circuit denied rehearing and rehearing en banc. Pet. App. 314a.

REASONS FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT HAS PERSISTENTLY REJECTED THE COMPETITION ANALYSIS MANDATED BY CONGRESS AND REPLACED IT WITH ATEXTUAL CONCERNS ABOUT OWNERSHIP DIVERSITY.

The Court should grant certiorari because the Third Circuit has consistently replaced a clear statutory command with policy considerations. Section 202(h) of the 1996 Act directs the FCC to "repeal" or "modify" any broadcast ownership rule that is no longer "in the public interest as the result of competition." Despite the statute's explicit focus on competition, the Third Circuit vacated the *Reconsideration Order* for not sufficiently examining the potential effect of its rule changes on minority and female ownership, a subject not mentioned anywhere in the statutory text.

This was not the first instance of the court's refusal to adhere to the congressional plan. The same Third Circuit panel has repeatedly elevated its atextual policy concerns above the statutory language and now, for the fourth time, has blocked review by any other court, turning itself into the national media ownership review board. And this Court has twice denied certiorari. Because the statute directs the FCC to conduct a Section 202(h) review every four years, the Third Circuit's misguided interpretation of this important federal statute will reverberate through

successive agency proceedings for years to come absent intervention by this Court.

A. The FCC Properly Amended Its Broadcast Ownership Rules Based Upon Competitive Changes In The Media Marketplace.

The text of Section 202(h) is clear. The FCC must evaluate, every four years, the need for its broadcast ownership rules and "repeal" or "modify" any rule no longer "in the public interest as the result of competition." The purpose of Section 202(h) is "to continue the process of deregulation" "Congress set in motion" through the 1996 Act, *Fox Television Stations, Inc.* v. *FCC*, 280 F.3d 1027, 1033 (D.C. Cir. 2002), by ensuring that deregulation "would keep pace with the competitive changes in the marketplace," *Prometheus I*, 373 F.3d at 391; *Prometheus III*, 824 F.3d at 50.

The FCC followed the statutory mandate in the *Reconsideration Order* on review here. The agency "built a substantial record" regarding competition in the media marketplace and the role of broadcast stations in local communities. CA3 JA28 (*Second R&O* ¶ 1). Ultimately, the FCC determined based on that record that "dramatic changes in the marketplace" rendered several broadcast ownership rules unnecessary or ineffective at promoting the public interest values of localism, competition, and viewpoint diversity. Pet. App. 67a-69a (alteration omitted); *see also id.* at 76a-122a (Newspaper/Broadcast Cross-Ownership Rule), 122a-40a (Radio/Television Cross-Ownership Rule), 140a-64a (Local Television Ownership Rule), 164a-78a (Local Radio Ownership Rule), 178a-99a (TV Joint Sales Agreement Attribution Rule).

Consistent with Section 202(h)'s directive, the FCC eliminated or relaxed the rules that it found no longer served the public interest as a result of competition.

With respect to the Local Television Ownership Rule, for example, the FCC found that the video marketplace had changed "substantially" since the Rule's adoption in 1999. Pet. App. 145a. Broadcasters face increased competition from the "ever-growing video programming options" available to consumers, including multichannel video programming distributors, "the Internet, and mobile devices." *Id.* at 146a. In the online video distribution industry, in particular, new entrants—such as Netflix and Hulu—are providing both "on-demand access to vast content libraries" and "original programming and/or live television offerings." *Id.* at 147a. Although the FCC believed it was still important to promote competition among television stations, it concluded that some changes were necessary so that broadcasters could "achieve economies of scale and improve their ability to serve their local markets in the face of an evolving video marketplace." *Id.* at 146a-47a. Accordingly, the FCC revised the Local Television Ownership Rule by (1) eliminating the requirement that at least eight independently owned television stations remain after any combination of two stations in a market, and (2) permitting applicants to request a case-by-case examination of proposed combinations otherwise prohibited by the FCC's bar against owning two of the top-four ranked stations in a market. *See id.* at 140a.

The FCC similarly recognized that the four-decade-old Newspaper/Broadcast Cross-Ownership Rule, which prohibits owning a daily print newspaper and one full-power television or radio station in the same local market, reflected "a time long

past when consumers had access to only a few sources of news and information in the local market." Pet. App. 77a. Today, there are more than twice as many full-power radio and television broadcast stations as there were when the Rule was adopted in 1975, as well as thousands of low-power stations and an ever-growing cadre of independent, digital-only news outlets "with a local or hyperlocal focus" that did not exist at that time. *Id.* at 90a-94a. The FCC found that the emergence of these alternative local news sources, coupled with the serious decline of the local newspaper industry, meant that the Rule was no longer effective in promoting viewpoint diversity. In fact, the record showed that the Rule "prevent[ed] local news outlets from achieving efficiencies by combining resources needed to gather, report, and disseminate local news and information." *Id.* at 101a; *accord Prometheus III*, 824 F.3d at 51-52. The FCC thus concluded that Section 202(h) required repeal of the Newspaper/Broadcast Cross-Ownership Rule.

Similar findings underpinned the FCC's decision to eliminate the Radio/Television Cross-Ownership Rule, which imposed additional limits—beyond the separate Local Television and Radio Ownership Rules—on common ownership of radio and television stations in the same market. As with the Newspaper/Broadcast Cross-Ownership Rule, the wide selection of alternative news sources available to consumers in the modern marketplace undercut the original rationale for the Radio/Television Cross-Ownership Rule. Pet. App. 128a-29a, 135a. Moreover, the FCC found that its other local ownership limits would protect against undue concentration of broadcast ownership. *Id.* at 135a-36a. Thus, the FCC determined that the Radio/Television Cross-Ownership Rule no longer

served the public interest in light of the changes wrought by competition and that its elimination was warranted. *Id.* at 137a-38a.

No party below disputed that the FCC properly conducted the competition analysis required by Section 202(h). Nor did the Third Circuit. Because the statutory mandate is "limited to a review for whether ownership rules remain necessary in light of competition in the broadcast industry," *Prometheus III*, 824 F.3d at 38, the Third Circuit should have accepted the FCC's competition analysis and upheld the much-needed reforms of its broadcast ownership rules.

B. The Third Circuit's Race- And Gender-Based Concerns Cannot Replace The Competition Analysis Expressly Mandated In Section 202(h).

Instead of finding fault with the competition-based analysis required by Section 202(h), the Third Circuit vacated the *Reconsideration Order* based on its finding that the FCC inadequately considered the panel's own prior instructions to "'include a determination about the effect of the rules on minority and female ownership.'" Pet. App. 34a (quoting *Prometheus III*, 824 F.3d at 54 n.13); *see id.* at 37a ("we instructed [the FCC] to consider the effect of any rule changes on female as well as minority ownership"). That analysis is fatally flawed and raises important issues requiring this Court's intervention.

To begin with, a court-created obligation to focus on certain kinds of ownership diversity cannot displace Section 202(h)'s specific command to repeal or modify rules that no longer serve the public interest

in light of competition. That is so even if "the public interest, broadly conceived," Pet. App. 26a, might arguably include race- and gender-based diversity considerations. "[I]t is a commonplace of statutory construction that the specific governs the general." *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 941 (2017) (alteration in original). This "is particularly true where"—as under Section 202(h)—"Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012). Here, Congress expressly instructed the FCC to analyze competition—not minority and female ownership—in its required Section 202(h) reviews. The Third Circuit, therefore, was not free to elevate its own conception of "the public interest" above the clear statutory mandate.

The Third Circuit's "atextual judicial supplementation" of Section 202(h) was "particularly inappropriate" here given that "Congress has shown that it knows how to adopt" provisions designed to promote minority and female ownership. *Rotkiske* v. *Klemm*, 140 S. Ct. 355, 361 (2019) (capitalization altered). When, for example, Congress authorized the FCC to auction initial spectrum licenses, including broadcast, it instructed the agency to "consider the use of . . . bidding preferences" or other procedures for "minority groups and women." 47 U.S.C. § 309(j)(1), (4)(D).[6] But Congress limited those diversity

[6] The FCC fulfilled this Section 309(j) diversity obligation in 1998, when it adopted designated entity rules for use in auctions of initial spectrum licenses. *See Competitive Bidding Proceeding*, 63 Fed. Reg. 2315, 2316-17 (1998). Those designated entity rules are distinct from the broadcast ownership rules at issue here. *Compare* 47 C.F.R. § 1.2110 (rules for "designated entities," including "businesses owned by members of minority groups

preferences to auctions among competing applicants for initial licenses, *see id.* § 309(j)(6) ("Nothing in this subsection . . . shall . . . affect the requirements of . . . any other provision of this chapter."), and pointedly excluded any similar diversity instruction from Section 202(h). The Third Circuit thus overstepped when it "enlarge[d]" Section 202(h) to encompass "what was omitted," *Nichols* v. *United States*, 136 S. Ct. 1113, 1118 (2016) (citation omitted), effectively overturning the "value judgments made by Congress," *Rotkiske*, 140 S. Ct. at 361. As this Court has "often admonish[ed], only Congress can rewrite" the Communications Act. *La. Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 376 (1986).

Next, the Third Circuit erred in concluding that the FCC's reliance on its competition analysis showed a failure to consider "an important aspect of the problem." Pet. App. 40a (citation omitted). Despite the absence of any statutory obligation to do so, the FCC *did* consider the impact of its rule changes on ownership diversity. *See*, *e.g.*, *id.* at 117a-22a, 138a-40a, 161a-62a. The panel majority believed this examination should have been more rigorous, but the FCC considered the available data as one part of its multifaceted analysis. The panel majority's insistence that the agency should do more relies on "reasoning divorced from the statutory text." *Massachusetts* v. *EPA*, 549 U.S. 497, 532-35 (2007); *see also Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 467 (2001) (agency may *not* "find implicit in ambiguous sections"

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and/or women," in spectrum auctions), *and id.* §§ 73.5007, 73.5008 (rules for "new entrants" applicable to competitive bidding for initial broadcast licenses), *with id.* § 73.3555 (media ownership rules at issue in this case).

authorization to consider factors "expressly" addressed elsewhere).

The Third Circuit was also mistaken when it relied on its own past decisions to "read in" to Section 202(h) a general principle that the FCC must always give priority to ownership-diversity concerns. *Rotkiske*, 140 S. Ct. at 361. The Third Circuit has never identified any statute or regulation that requires the FCC to consider ownership diversity in conducting its Section 202(h) reviews. Rather, the panel here insisted that the FCC was required to consider ownership diversity based on a footnote in its own opinion in *Prometheus III*. *See* Pet. App. 34a (quoting *Prometheus III*, 824 F.3d at 54 n.13). That footnote, in turn, quoted language from *Prometheus II* directing the FCC to determine "the effect of [the] rules on minority and female ownership." 824 F.3d at 54 n.13 (brackets in original) (quoting *Prometheus II*, 652 F.3d at 471). But *Prometheus II*'s direction did not even pertain to a Section 202(h) analysis, but rather concerned an "eligible entity definition" the FCC adopted to promote ownership diversity separate and apart from its media ownership rules. *See* 652 F.3d at 470-72 (citing *Prometheus I*, 373 F.3d at 420-21). And *Prometheus I*, relied upon in *Prometheus II*, held that repeal of a specific "regulatory provision that promoted minority television station ownership" required "discussion of the effect of its decision on minority television station ownership," *not* that the FCC had to take minority and female ownership into account in any, let alone all, of its Section 202(h) decisions. 373 F.3d at 421 & n.58.

Nothing in those prior decisions justifies the Third Circuit's elevation of non-statutory policy considerations over Section 202(h)'s specific command

to consider competition. Rather, those decisions (at most) applied the basic administrative-law principle that, when considering measures specifically directed at ownership diversity, the FCC must rationally consider their effect on ownership diversity. That principle is not implicated here, because the ownership rules were "*not*" adopted to "promote or protect minority and female ownership," as the order on review makes clear. Pet. App. 117a (emphasis added); *see also*, *e.g.*, *id.* at 122a, 139a-40a, 161a-62a; CA3 JA56-57, 107, 114-15 (*Second R&O* ¶¶ 75, 197, 215) (retaining rules to promote competition or viewpoint diversity and "not with the purpose of preserving or creating specific amounts of minority and female ownership"). The Third Circuit was therefore wrong to rely on its prior opinions as a basis for finding a general principle that the FCC must always give priority to ownership-diversity concerns.

In sum, the Third Circuit has never identified a statutory basis for the dispositive importance it has repeatedly placed on ownership diversity. Rather, during each successive review, the Third Circuit has removed its discussion of ownership diversity further and further from any statutory command.

This Court should restore the proper interpretation of this important provision of federal law to keep pace with competition in the modern media marketplace for the benefit of consumers, including those who depend on free broadcasting services. Congress's clear command to consider competition must take precedence over the Third Circuit's non-statutory policy considerations, however well intentioned.

II. THIS QUESTION IS IMPORTANT AND RECURRING.

The proper interpretation of Section 202(h) is vitally important to the broadcast industry, newspapers, and the public. As Judge Scirica explained, the "need for regulatory reform became palpable as the Internet emerged" more than a quarter century ago, "transforming how Americans receive news and entertainment." Pet. App. 48a (Scirica, J., dissenting). Even then, "[r]apid technological change had left the framework regulating media ownership ill-suited to the marketplace's needs." *Id.* Section 202(h) thus demands "that the broadcast ownership rules stay in sync with the media marketplace." *Id.* at 49a. "What is in the 'public interest' changes over time as the marketplace evolves, so the FCC must reassess competitive conditions to set appropriate regulations." *Id.*

Since Congress enacted Section 202(h), the media marketplace has changed dramatically, with the advent of smartphones, social media, and streaming video and audio, as well as the widespread availability of satellite television and radio. These "technological innovation[s] and fundamental changes to the media marketplace have eroded many of the assumptions underlying the ownership rules," which were designed for a world in which broadcast media was paramount and "daily print newspapers constituted a predominant voice in local news." Pet. App. 50a-51a (Scirica, J., dissenting). "The rules have thus ceased serving the public interest." *Id.* at 50a.

Yet the same divided panel of the Third Circuit, for more than 15 years, has frozen the FCC's rules in place, despite Congress's command that outdated

rules must be repealed or modified. And attempts by the Commission to comply with that statutory mandate have been vacated for reasons that have nothing to do with the merits of the rules themselves. As matters now stand, the broadcast and newspaper industries—unlike their marketplace competitors—are subject to ownership rules adopted as long ago as the 1970s, before most or all of this Court's law clerks were born and a time when the Internet and other media sources now part of our everyday lives did not even exist.

The resulting regulatory straightjacket has harmed television and radio stations and newspapers. "The Internet boom has ushered in rivals that enjoy competitive advantages vis-à-vis broadcasters," rivals that are not forced by outdated rules to compete with one hand tied behind their backs. Pet. App. 50a-51a (Scirica, J., dissenting). "The ownership rules impede broadcasters' ability to engage in procompetitive transactions without offering compensating benefits to the public." *Id.* at 51a. For example, television stations are severely competitively hampered by the panel majority's rejection of attempts to modify the Local Television Ownership Rule—a decades-old rule that another court found arbitrary and capricious *in 2002*. *See Sinclair Broad. Grp., Inc.* v. *FCC*, 284 F.3d 148, 162-65 (D.C. Cir. 2002).

Newspapers have been especially hard-hit in this changing landscape. "[P]rint newspaper advertising revenue ha[s] decreased more than 50 percent since 2008 and nearly 70 percent since 2003," while digital advertising has failed to compensate for those losses. Pet. App. 99a; *see also id.* at 94a-97a. This revenue drop has hampered newspapers' ability to invest in their newsrooms. *See id.* at 99a ("newsroom

employees were one-third fewer than at their peak in 1989"). Moreover, 175 newspapers ceased publication between 2007 and 2010, with another 152 closures in 2012, and 114 closures in 2013. *Id.* at 100a. The industry might have been able to avert many of these cut-backs and closures through efficiency-maximizing transactions, if those deals were not prohibited by ancient rules that still govern a marketplace for which they are entirely unsuited.

The Third Circuit's persistent elevation of non-statutory policy considerations over the congressional policy embodied in the text of Section 202(h) affects far more than this case. The statute directs the FCC to conduct a Section 202(h) analysis every four years. The Third Circuit's atextual interpretation will continue to distort those quadrennial reviews until this Court intervenes.

Ordinarily, a challenge to the FCC's analysis could be heard in any of the regional courts of appeals, raising the possibility that another circuit could take a different view going forward. *See* 28 U.S.C. § 2342; 47 U.S.C. § 402(a). Here, however, the Third Circuit has effectively blocked any other avenue for obtaining judicial review by purportedly retaining continuing jurisdiction over successive remands. Because of these actions, no other court—save this Court—may review the FCC's efforts under Section 202(h), and the Third Circuit's misguided interpretation of federal law will continue to control the FCC's ownership reviews.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR ADDRESSING THE QUESTION PRESENTED.

The Third Circuit's emphasis on ownership diversity has grown increasingly pronounced and entrenched with each of its four successive opinions.

In its most recent iteration, ownership diversity was the sole dispositive issue that led the panel majority to vacate the Commission's *Reconsideration Order* wholesale. Before the Third Circuit, "[n]o party identifie[d] any reason to question the FCC's key competitive findings and judgments." Pet. App. 55a (Scirica, J., dissenting). Rather, the only challenge to the FCC's decision to modify or repeal its broadcast ownership rules was "that the Commission did not adequately consider the effect its new rules would have on ownership of broadcast media by women and racial minorities." *Id.* at 34a (majority opinion). And that was the only supposed flaw that the panel majority identified in the Commission's reasoning. *See id.* at 34a-42a. Accordingly, if this Court were to grant certiorari and reverse, it would necessarily allow the Commission's rule changes to go into effect.

To be sure, there is no conflict among the courts of appeals regarding whether the Commission must offer "empirical research or an in-depth theoretical analysis" of the "likely effect of [its] rule changes . . . on ownership by women and minorities" to modify or repeal rules that it concludes no longer serve the public interest as the result of competition. Pet. App. 41a. But that is because the panel majority has blocked any other circuit from construing Section 202(h) for more than a decade and a half by insisting on retaining jurisdiction over the successive remands it has ordered. In fact, the Judicial Panel on Multidistrict Litigation selected the D.C. Circuit in 2014 as the venue for the petitions that ultimately resulted in *Prometheus III*. *See* 824 F.3d at 38-39. But that court transferred the fully briefed petitions to the Third Circuit over the objections of the National Association of Broadcasters, Nexstar, and others, precisely because the panel had previously retained

jurisdiction, in an apparent concession to the panel's asserted power. *See id.* at 39; *see also* Order at 3, *Howard Stirk Holdings, LLC* v. *FCC*, No. 14-1090 (D.C. Cir. Nov. 24, 2015) (statement of Williams, J.) (noting concern, despite the efficiencies of transferring to the Third Circuit "that given the widening circle of interlocked issues, plus the Commission's interminable processes . . . , a vast range of issues may be forever committed to one circuit, contrary to the goals of Congress in authorizing review in 12 different circuits"). By continuing to retain jurisdiction, the Third Circuit panel has ensured that this question cannot percolate in the courts of appeals. Thus, this Court's review is more than warranted now; it is badly needed for there to be any hope of allowing the FCC to modernize its ownership rules and to help ensure that our nation's broadcast and newspaper industries survive in today's marketplace.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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