

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

FEDERAL COMMUNICATIONS COMMISSION,)
ET AL.,)
 Petitioners,)
 v.) No. 19-1231
PROMETHEUS RADIO PROJECT, ET AL.,)
 Respondents.)

NATIONAL ASSOCIATION OF)
BROADCASTERS, ET AL.,)
 Petitioners,)
 v.) No. 19-1241
PROMETHEUS RADIO PROJECT, ET AL.,)
 Respondents.)

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18 Washington, D.C.

19 Tuesday, January 19, 2021

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21 The above-entitled matter came on for

22 oral argument before the Supreme Court of the

23 United States at 10:00 a.m.

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25

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2
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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 19-1231,
5 Federal Communications Commission versus
6 Prometheus Radio Project, and the consolidated
7 case.

8 Mr. Stewart.

9 ORAL ARGUMENT OF MALCOLM L. STEWART
10 ON BEHALF OF THE PETITIONERS IN 19-1231

11 MR. STEWART: Mr. Chief Justice, and
12 may it please the Court:

13 Section 202(h) of the
14 Telecommunications Act of 1996 reflects
15 Congress's conclusion that in light of
16 intervening competitive developments, broadcast
17 cross-ownership restrictions adopted in an
18 earlier era may no longer be warranted. To
19 ensure that such restrictions do not remain in
20 force simply through inertia, Congress required
21 the FCC to reexamine those rules every four
22 years and to repeal or modify any rules that no
23 longer serve the public interest.

24 After reconsidering its ownership
25 rules, in accordance with Section 202(h) as

1 mandate, the FCC determined in 2017 that its
2 newspaper, broadcast, and radio television rules
3 should be repealed entirely and that its local
4 television rules should be relaxed.

5 The Commission explained that the
6 profusion of new media outlets, particularly
7 through cable and the Internet, alleviated the
8 -- the viewpoint diversity concerns that had
9 originally justified the restrictions. It
10 further found that the rules disserved the
11 public interest by preventing economically
12 efficient combinations that would provide
13 consumers better broadcast service.

14 The court of appeals did not find
15 fault with that analysis. Indeed, the court in
16 2004 had sustained the FCC's determination that
17 the blanket newspaper/broadcast cross-ownership
18 ban no longer served the public interest.

19 The court nevertheless vacated the
20 FCC's rule changes on the ground that the agency
21 had not adequately assessed the changes' likely
22 effect on minority and female ownership levels.
23 The court's elevation of that single factor has
24 no basis in the governing statute, and the court
25 failed to show adequate respect for the agency's

1 predictive judgments and its balancing of
2 competing policy objectives. The Third
3 Circuit's judgment should be reversed.

4 CHIEF JUSTICE ROBERTS: Mr. Stewart,
5 was the FCC required to consider the impact on
6 minority and female ownership in the 2017
7 reconsideration order?

8 MR. STEWART: We don't think anything
9 in the statute required the FCC to consider that
10 factor. The court of appeals, in what we refer
11 to as Prometheus III, its prior decision in this
12 line of cases, had included a footnote that
13 directed the FCC, when it next re-evaluated its
14 cross-ownership rules, to consider that factor.

15 And the analysis that the FCC did in
16 the reconsideration order was in compliance with
17 the court's mandate. But --

18 CHIEF JUSTICE ROBERTS: So it could
19 have --

20 MR. STEWART: -- we don't think --

21 CHIEF JUSTICE ROBERTS: -- it could
22 have said nothing about that at all in -- in
23 changing the focus of its regulations?

24 MR. STEWART: Yes. Historically, when
25 the Commission has adopted cross-ownership rules

1 of various sorts, it has been to promote
2 viewpoint diversity and -- and localism, to
3 ensure that there is as much of a plethora as
4 possible of distinct voices within the local
5 community.

6 And it has not historically taken into
7 account impacts on minority and female ownership
8 in conducting that analysis. And nothing in
9 202(h) would have required the Commission to
10 start doing that in its quadrennial reviews.

11 CHIEF JUSTICE ROBERTS: What scrutiny
12 would apply when the Commission simply shifts
13 priorities? Let's say that there were -- was
14 consideration of female/minority ownership and
15 the -- cross-ownership rules and it just
16 decided, well, we think the latter is more
17 important than the former, so we're going to
18 focus solely on the -- on the latter?

19 MR. STEWART: I think it's really
20 rational basis review; that is, if the FCC had
21 decided to adopt an explicitly race- or
22 gender-conscious standard, that is, give a
23 preference to members of racial minorities or to
24 women as such, then it would be required to
25 satisfy heightened scrutiny, but it would be no

1 --

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas.

5 JUSTICE THOMAS: Thank you, Mr. Chief
6 Justice.

7 Mr. Stewart, you indicate that the
8 landscape in the area of viewpoint diversity has
9 changed over the years. Could you talk a bit
10 about that? Particularly, I'm interested
11 particularly in the effect mentioned in your
12 briefs and some of the others with -- as a
13 result of some of the new Internet-based
14 platforms.

15 MR. STEWART: I -- I think the idea is
16 that when the rules were first adopted, in many
17 local communities, there might be three
18 broadcast stations and one local newspaper and
19 -- basically, four independent voices within the
20 community providing local news coverage and --
21 and -- and other forms of coverage. And if two
22 of those outlets were owned by the same entity,
23 that would be a substantial diminution in
24 potential viewpoint diversity.

25 Now, when you have a plethora of

1 Internet-based platforms, cable stations that
2 can also provide local news coverage, the
3 reduction in viewpoints within the broadcast
4 sphere specifically is not going to be nearly so
5 significant in light of the profuse -- profusion
6 of different viewpoints that will be available
7 to the consumer.

8 JUSTICE THOMAS: So do you have -- is
9 there any sort of structural program or
10 requirement such as we have here that is
11 specific to these alternative platforms?

12 MR. STEWART: There really -- we
13 really are not talking in this case about
14 regulation of the Internet or regulation of
15 cable. I think the justification for enhanced
16 regulation of the broadcast media has always
17 been that the broadcast spectrum is scarce, not
18 as many people can broadcast on the frequencies
19 as would like to, and, therefore, it's necessary
20 to have a federal agency that allocates the
21 spectrum and decides how it can best be used to
22 serve the public interest.

23 And there -- there isn't the same sort
24 of need with respect to cable and the Internet
25 because one person's voice doesn't crowd out

1 another's.

2 JUSTICE THOMAS: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Breyer.

5 JUSTICE BREYER: I'm thinking of it
6 solely as a -- the anti-merger part, in -- in
7 anti-merger law, merger law generally, I think,
8 has a theory, and the theory is, beyond a
9 certain point and other things being equal, you
10 have fewer companies in a market, the harder it
11 is to enter, and it's particularly harder for
12 smaller firms. And, here, smaller firms are
13 heavily correlated or more likely to be
14 correlated with women and minorities. All
15 right?

16 The opposite view, which is what the
17 FCC has now chosen, is -- is they want to move
18 or allow to be moved towards more concentration.

19 So what's the theory that that
20 wouldn't hurt the minorities and women or
21 smaller businesses? What's the theory the
22 opposite way, in other words? I'm not asking
23 for data. I'm asking for a theory.

24 MR. STEWART: Well -- well, let -- let
25 me take the -- the two points you made in -- in

1 order. The first is, with respect to possible
2 advantages to small entities, the FCC has
3 devised other programs, like the incubator
4 program and the eligibility -- eligible entity
5 definition, that are intended to give certain
6 regulatory advantages to small entities.

7 And -- and these may -- those rules
8 may incidentally benefit female and minority
9 owners or prospective owners even though they're
10 not limited to -- to those people.

11 The second thing is the -- the theory
12 behind what the FCC did was in part the data
13 don't show it, but in part, with respect to some
14 of these rules, the intuition really isn't there
15 once you unpack things.

16 For example, with respect to the
17 newspaper broadcast cross-ownership rule, the
18 rule that a single entity can't own both a
19 newspaper and a -- a broadcast station, the FCC
20 found that if that rule was eliminated, the most
21 likely consequence is that broadcast stations
22 would buy newspapers rather than the reverse,
23 because --

24 JUSTICE BREYER: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice Alito.

1 JUSTICE ALITO: Mr. Stewart, you said
2 earlier that the Commission was not required by
3 the statute to consider minority and female
4 ownership, but the Commission did that. And,
5 therefore, could we reverse the court of appeals
6 on the ground that the Commission simply wasn't
7 required to consider this factor at all, and
8 does it matter that the panel had previously
9 indicated that the Commission had to consider
10 that factor?

11 MR. STEWART: I -- I think, if you
12 concluded that the statute actually barred the
13 Commission from considering that factor, you
14 could reverse the court of appeals on that
15 basis.

16 I think, if you simply concluded that
17 the Commission was either allowed to do it or
18 not as it chose, you might think that you need
19 to analyze the Commission's assessment of that
20 factor at least a little bit in light of the
21 fact that the Commission analyzed it.

22 But even the court of appeals didn't
23 say that the Commission ignored the weight of
24 the data or that the data affirmatively
25 demonstrated that female and minority ownership

1 levels would be reduced. It simply said the
2 Commission hasn't amassed enough data to reach
3 an informed conclusion one way or the other.

4 And -- and we think that was certainly
5 error, that most of the --

6 JUSTICE ALITO: Well, on -- on -- on
7 that point, the Court clarified in Fox
8 Television that the APA doesn't require
9 "obtaining the unobtainable" when it comes to
10 data supporting a decision but that the agency
11 might be required to analyze data that "can be
12 readily obtained."

13 There's a big gap between those two
14 poles. Where should we draw the line?

15 MR. STEWART: I -- I don't -- I think,
16 here, it's not a matter of the data could
17 readily be obtained. That is, the deficiencies
18 in the data don't result from the agency's
19 current data collection practices.

20 What the agency was trying to do was
21 assess the potential consequences of relaxing
22 the ownership rules by looking at arguably
23 analogous regulatory changes that had occurred
24 in 1996 and 1999 and asking what happened after
25 that.

1 And so the deficiencies in the data
2 are really deficiencies in the data that
3 predated those regulatory changes, and it --

4 CHIEF JUSTICE ROBERTS: Justice
5 Sotomayor.

6 JUSTICE SOTOMAYOR: Mr. Stewart, I'm
7 -- I'm a bit confused. It seems to me that the
8 FCC for decades has been saying that minority
9 and women ownership is in -- consideration of it
10 is in the public interest.

11 And I don't see anything in the ruling
12 below that was subject to review by the Circuit
13 that said otherwise. It may have said that it
14 didn't think the changes would affect that
15 issue. It said other things, but I don't think
16 the FCC has ever disavowed that that --
17 consideration of that factor should be given in
18 its review.

19 MR. STEWART: The agency has never --
20 has -- has frequently said that this is a factor
21 that may take -- be taken into account in its
22 public interest analysis generally.

23 JUSTICE SOTOMAYOR: All right. So may
24 --

25 MR. STEWART: And --

1 JUSTICE SOTOMAYOR: Let's stop there.
2 That's exactly what it said. And I saw the
3 circuit courts saying that's what you said, but
4 your consideration was inadequate because you
5 really didn't -- you didn't explain it.

6 And we have a legion of -- couldn't
7 adequately explain it. We have a legion of
8 cases that say you don't have to rule in favor
9 of one point of view or another, but when you're
10 rejecting something, you should give it adequate
11 consideration.

12 Isn't that what we're judging?

13 MR. STEWART: I -- I -- I think there
14 are two things I would say about that.

15 The first is that, although the agency
16 has historically looked at enhanced female and
17 minority ownership as a goal to be achieved
18 through some means, it has not historically
19 looked at that criteria as a basis for its
20 cross-ownership restrictions. In adopting those
21 restrictions, it's looked at other factors.

22 The second thing is that the court of
23 appeals chided the agency not for conducting an
24 inadequate analysis of the data that were
25 available but for having inadequate data.

1 And I think we've made a strong
2 showing that there were no better data available
3 with respect to the -- the demographic
4 composition of the ownership group pre-1996,
5 pre-1999.

6 JUSTICE SOTOMAYOR: Thank you,
7 counsel.

8 CHIEF JUSTICE ROBERTS: Justice Kagan.

9 JUSTICE KAGAN: Mr. Stewart, if I
10 could continue in that vein, as -- as -- as I
11 understand it now, you're saying that female and
12 minority ownership has not really been a factor
13 in 202(h) determinations, but I -- that's not
14 the way I read your brief.

15 And I think it's not the way I read
16 past actions by the FCC under 202(h), so I'm --
17 I'm wondering, what are you saying here? Are
18 you saying that this is a new thing that those
19 things are not considered or that they've never
20 been considered under 202(h), which is not what
21 your brief says? What -- what are you saying?

22 MR. STEWART: I mean, what I was
23 really talking about was the era well before
24 Section 202(h) was enacted in 1996, the era back
25 in 1975, for instance, when the Commission first

1 adopted the newspaper broadcast cross-ownership
2 ban and -- and the years since then when it had
3 retained that ban and when it had adopted rules
4 dealing with radio and television
5 cross-ownership.

6 In -- in that era, the rules were
7 justified by considerations of viewpoint
8 diversity. But what the Commission meant was
9 it's better to have more independent outlets in
10 the community rather than --

11 JUSTICE KAGAN: I guess I'm still not
12 really understanding you, Mr. Stewart, so I'll
13 just ask, in -- in -- in your brief, you say the
14 agency has traditionally treated this form of
15 broadcast diversity, meaning minority and female
16 ownership, as an element in its multifactor
17 public interest analysis.

18 Are you still sticking to that
19 statement?

20 MR. STEWART: It -- it -- it has often
21 said that, and it has tried to devise ways that
22 that objective may be achieved other than the
23 cross-ownership rules.

24 So, for instance, with the --

25 JUSTICE KAGAN: So --

1 MR. STEWART: -- eligibility --

2 JUSTICE KAGAN: -- okay. If you look
3 at this, in this rule-making, were you saying,
4 look, we don't think that the changes in these
5 rules will affect female and minority ownership,
6 or were you saying something more like we don't
7 have evidence of this and we're not going to let
8 speculative arguments get in the way of what we
9 want to do otherwise?

10 MR. STEWART: We were saying the
11 evidence is fragmentary, but based on the
12 evidence we have, our best assessment is there
13 will not be a substantial effect.

14 And the mere possibility that there
15 could be such an effect is not a sufficient
16 basis for foregoing regulatory changes that we
17 would otherwise deem to be very desirable. But
18 --

19 CHIEF JUSTICE ROBERTS: Justice --
20 Justice Gorsuch.

21 JUSTICE GORSUCH: Good morning, Mr.
22 Stewart. The parties dispute the propriety of
23 the Third Circuit holding onto this case and all
24 of its various iterations for the last, I don't
25 know, 17 or so years. I'm curious what the

1 government's position on that is.

2 MR. STEWART: In -- in -- in
3 succeeding stages of this litigation, there have
4 been petitions for review filed in other
5 circuits, and there have then been requests to
6 transfer the cases to the Third Circuit.

7 The government in the past has not
8 opposed those requests. I think we're a little
9 skeptical that the Third Circuit's repeated
10 statements that it is retaining jurisdiction
11 really have operative legal effect. That is, if
12 the next time around a petition for review is
13 filed in some other circuit that would otherwise
14 be an appropriate venue, that circuit can decide
15 for itself whether to transfer the case to the
16 Third Circuit. But we don't think that that
17 circuit would be under an obligation to do so
18 simply because the Third Circuit has included
19 this language about retaining its -- retaining
20 jurisdiction in its prior order.

21 JUSTICE GORSUCH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh.

24 JUSTICE KAVANAUGH: Thank you.

25 And good morning, Mr. Stewart. A

1 follow-up on Justice Sotomayor and Justice Kagan
2 to make sure I'm clear. Under the statute and
3 the public interest standard, does the FCC have
4 to consider the effect of relaxing the rules on
5 women and minority ownership?

6 MR. STEWART: No, we don't believe so.
7 The -- the fact that it is a public interest
8 consideration that could be taken into account
9 in making other sorts of decisions doesn't mean
10 that we have to consider it in making every
11 single regulatory decision we make, including
12 relaxation of the cross-ownership rules.

13 JUSTICE KAVANAUGH: Do you agree that
14 the FCC did consider it here?

15 MR. STEWART: It considered it, and if
16 the FCC had concluded there was likely to be an
17 adverse impact on female and minority ownership,
18 it would then have had to decide how do we
19 balance that against the identified benefits of
20 the rule.

21 JUSTICE KAVANAUGH: Having --

22 MR. STEWART: The FCC never got to
23 that point.

24 JUSTICE KAVANAUGH: Having considered
25 it, doesn't the FCC have to justify how it

1 considered it?

2 MR. STEWART: I think the -- the very
3 most you could say that the FCC has to do is
4 provide a reasonable, not necessarily a view
5 that the court deems correct, but a reasonable
6 view of the evidence that is before it.

7 It doesn't have to amass additional
8 evidence simply to be able to pronounce with a
9 higher degree of confidence.

10 JUSTICE KAVANAUGH: And a follow-up on
11 Justice Breyer's question. What's the theory
12 for why it wouldn't hurt women and minority
13 ownership? The theory he asked, can you
14 continue your answer there?

15 MR. STEWART: Yes. With respect to
16 newspaper/broadcast cross-ownership, for
17 instance, the -- the Commission found that the
18 most likely consequence of eliminating the ban
19 is that broadcast stations will buy newspapers
20 rather than the reverse because the newspaper
21 industry is in such trouble.

22 And if a broadcast station buys a
23 newspaper, that doesn't affect any form of
24 centralization or consolidation of ownership
25 within the broadcast industry. The existing

1 broadcast owners remain the same. It's just one
2 of them has bought a newspaper and that may
3 allow it to achieve economies of scale and
4 provide better service to the community.

5 JUSTICE KAVANAUGH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett.

8 JUSTICE BARRETT: Mr. Stewart, I want
9 to go back to the questions that Justices
10 Sotomayor and Kagan were asking you. I
11 understood your brief to be saying that the FCC
12 -- or to -- to be conceding that the FCC had
13 long taken minority and women ownership into
14 account, but then you pivoted a little bit and
15 said that it took into account because the Third
16 Circuit's opinion required it to.

17 And I -- I wasn't entirely clear which
18 position you had settled on. So could you
19 clarify that for me?

20 MR. STEWART: I think what I meant to
21 say was it -- it has long identified minority
22 and female ownership, an increase in ownership
23 levels or a -- a decrease in the current
24 underrepresentation, as a good that would serve
25 the public interest.

1 It has not historically taken that
2 particular public interest factor into account
3 in determining whether particular
4 cross-ownership restrictions specifically should
5 be adopted or retained. For example, it
6 achieved -- attempts to achieve that goal
7 through other means, such as preferences through
8 small businesses that are race- and
9 gender-neutral but may incidentally help
10 minority and female owner -- owners. Now --

11 JUSTICE BARRETT: Mr. Stewart, can I
12 just interrupt and ask another question before
13 my time elapses? Do you see a difference
14 between a stated goal of enhancing minority and
15 female ownership and not harming minority and
16 female ownership, and if so, which is the FCC's?

17 MR. STEWART: I -- I think it is both.
18 I think the FCC would be cognizant of either
19 argument -- again, outside the cross-ownership
20 context, either of arguments that an existing
21 regulatory change is good because it will
22 increase minority and female ownership levels or
23 a proposed regulatory change is bad because it
24 would decrease them.

25 I think the FCC would be open to

1 either form of argument. And, again, what we're
2 talking about is race- and sex-neutral measures,
3 not race or sex preferences.

4 JUSTICE BARRETT: Thank you, counsel.

5 CHIEF JUSTICE ROBERTS: A minute to
6 wrap up, Mr. Stewart.

7 MR. STEWART: Thank you, Mr. Chief
8 Justice.

9 I -- I think it's easy to lose sight
10 of what extensive analysis the FCC did here
11 because so much of that analysis is undisputed.
12 The FCC concluded that because a variety of
13 alternative media voices are now available to
14 consumers, the viewpoint diversity concerns that
15 originally prompted the cross-ownership rules
16 were far less acute today.

17 The FCC also explained that if the
18 ownership restrictions were repealed or relaxed,
19 owners could achieve economies of scale. For
20 instance, a broadcast station, by buying a local
21 newspaper, could use resources with respect to
22 the gathering and the dissemination of local
23 news on both platforms, and it could thereby
24 provide better broadcast service to its
25 consumers by using the resources of the

1 newspaper.

2 Thank you, Mr. Chief Justice.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Ms. Walker.

6 ORAL ARGUMENT OF HELGI C. WALKER
7 ON BEHALF OF THE PETITIONERS IN 19-1241

8 MS. WALKER: Thank you, Mr. Chief
9 Justice. May it please the Court:

10 In this case, the FCC decided that
11 broadcasters should not have to operate under
12 ownership restrictions dating back to the
13 Roosevelt administration. I'd like to focus on
14 the statutory reasons why that was lawful.

15 202(h) was meant to drive real reform
16 with a focus on competition. Here, the
17 Commission's statutorily required findings that
18 the rules are no longer in the public interest
19 as a result of competition are unchallenged.

20 Yet, the Third Circuit vacated the
21 order because the Commission failed to
22 adequately consider minority and female
23 ownership. The statute does not say one word
24 about that issue. And the APA does not require
25 the FCC to consider it either. The Third

1 Circuit has no basis, other than its own policy
2 preferences, to make that a mandatory, much less
3 controlling, factor in all 202(h) reviews.

4 The FCC properly did the job Congress
5 gave it. That is what matters, and the order
6 can and should be upheld on that ground.

7 I welcome the Court's questions.

8 CHIEF JUSTICE ROBERTS: Ms. Walker,
9 are you saying that it would have been arbitrary
10 and capricious for the Commission to consider
11 the impact on minority and female ownership?

12 MS. WALKER: No, but it was not
13 required, as you asked Mr. Stewart, Mr. Chief
14 Justice. And, in fact, under the Commission's
15 analysis of the order, the outcome of the
16 minority and female ownership discussion
17 couldn't have changed the outcome because the
18 FCC decided, for instance, that the
19 newspaper/broadcast cross-ownership rule was no
20 longer in the public interest and had to be
21 repealed before it even got to the minority and
22 female ownership discussion.

23 CHIEF JUSTICE ROBERTS: Well, given
24 that the Commission had considered minority and
25 female ownership for some time, wasn't it under

1 some obligation, under State Farm, for example,
2 to explain why it was not focusing or -- or even
3 weighing that interest in the 2017 order?

4 MS. WALKER: No, Your Honor, because
5 the Commission never relied on minority and
6 female ownership as a basis for the structural
7 ownership rules, which are the subject of 202(h)
8 and what this entire case is about.

9 The Commission has alluded to that as
10 a policy but never in the context of these
11 rules. In fact, it has said the opposite, that
12 these rules are an inappropriate vehicle because
13 they don't really work to promote minority and
14 female ownership. It said that in the 2014
15 review, in the 1985 order, and in the order on
16 review here.

17 CHIEF JUSTICE ROBERTS: Is the -- to
18 what extent, if any, do you -- does your
19 position -- inconsistent -- is your position
20 inconsistent with the Solicitor General's
21 position?

22 MS. WALKER: On the question of what
23 the Commission has historically done, not
24 inconsistent. We're just being more specific to
25 say that policy has never been advanced with

1 respect to the ownership limits. And I heard
2 Mr. Stewart say this morning that he agrees with
3 that.

4 We would like the Court to resolve
5 this case on statutory grounds and not merely
6 decide that the Commission's consideration of
7 the minority and female ownership issue was
8 adequate.

9 CHIEF JUSTICE ROBERTS: Justice
10 Thomas.

11 JUSTICE THOMAS: Thank you, Mr. Chief
12 Justice.

13 Ms. Walker, to follow up on your last
14 answer, can you think of any example of -- of an
15 instance in which the FCC has used a structural
16 ownership rule such as this one to advance
17 minority or female ownership?

18 MS. WALKER: I do not believe, after
19 my extensive work on this case, that there is a
20 single example of that. And, again, the
21 Commission has said the exact opposite. It has
22 said that structural ownership limits are not an
23 appropriate means to promote minority and female
24 ownership because there is no evidence or any
25 demonstrable indicia that those rules actually

1 promote those interests.

2 The Commission has therefore chosen
3 direct means, Justice Thomas, like tax
4 certificates and distress sales. That's how the
5 Commission has promoted those interests.

6 And it just has never done that ever
7 with respect to the structural ownership limits,
8 and that is what this case is about.

9 JUSTICE THOMAS: So do -- what do you
10 think, other than diversity of viewpoint, what
11 other interests are being advanced by this rule?

12 MS. WALKER: The traditional public
13 interest rationales for these rules, Your Honor,
14 are viewpoint diversity, localism, and
15 competition. Those three rationales underlay
16 the adoption of the rule, and the Commission has
17 consistently relied on those.

18 We think those are appropriate
19 factors, but on our proffered reading of the
20 public interest in this statute, we don't think
21 the Commission or commenters can draw in
22 brand-new rationales as an excuse to keep
23 outdated rules or, worse, to make more rules.
24 That turns the statute completely upside down.

25 JUSTICE THOMAS: So have this interest

1 -- have these interests become somewhat less
2 important with the rise of other platforms,
3 particularly the Internet platforms?

4 MS. WALKER: Yes, Your Honor. And --
5 and I think -- I think your question draws out
6 the fact that the broadcasters' competitors, all
7 these new platforms, all these new social media
8 formats, are completely unregulated, yet
9 broadcasters labor under these rules that
10 literally go back to the 1940s.

11 That makes no sense and is extremely
12 unfair as a competitive matter, which is why the
13 Commission reasonably decided to free
14 broadcasters of these archaic rules.

15 CHIEF JUSTICE ROBERTS: Justice --

16 JUSTICE THOMAS: Thank you.

17 CHIEF JUSTICE ROBERTS: -- Justice
18 Breyer.

19 JUSTICE BREYER: Thank you. I'm going
20 to oversimplify. But earlier commissions,
21 before this particular last effort, I read it as
22 saying, look, television, radio, newspaper,
23 they're all in the business of providing news.
24 They're all somewhat competitive. And we want
25 to stop them from being concentrated, so we have

1 our rules. And one thing about those rules, one
2 thing only, is that they will not hurt small
3 businesses. They will tend to help small
4 businesses enter more easily, and small
5 businesses tend to be correlated with women and
6 minorities.

7 Now we have a change, and the change
8 seems to be that we don't see any effect, okay?
9 Now, normally, when an agency changes its rules,
10 it has to explain why. Just a question of
11 explaining it.

12 Well, it's the same question I asked
13 before. What's the theory? Where is the
14 explanation?

15 MS. WALKER: Well, with respect,
16 Justice Breyer, the earlier Commission never
17 said it was keeping the rules for the purpose of
18 promoting minority and female ownership.

19 JUSTICE BREYER: No, I'm not saying
20 for purpose. I am doing it the opposite way.
21 There is no negative effect on small businesses.
22 In fact, it's positive. And looking at the
23 public interest generally, there's no negative,
24 and it's a positive for women and minorities.

25 Then they change. Okay? Where's the

1 explanation?

2 MS. WALKER: Well, but, with respect,
3 Justice Breyer, I don't think the Commission
4 ever said what you are hypothesizing. They --
5 they have never said even in the 2016 order that
6 predated the reconsideration order that the
7 rules would help. The structural ownership
8 rules, it's important that we be specific, that
9 that would help small businesses, new entrants,
10 minorities and -- and women by correlation.

11 They -- they did say that with respect
12 to the diversity order, that the Third Circuit
13 without any explanation threw out, but the 2016
14 order that predated the order on review actually
15 never said that the ownership limits would
16 advance the interests of even new entrants.

17 CHIEF JUSTICE ROBERTS: Justice Alito.

18 JUSTICE BREYER: Thank you.

19 JUSTICE ALITO: To paint a picture of
20 what this case means in real-world -- real-world
21 terms, can you give me a concrete example of
22 some beneficial development that would occur if
23 the Commission's rule is sustained but that will
24 be prevented if it is not sustained?

25 MS. WALKER: For example, Justice

1 Alito, a local broadcaster might buy a failing
2 newspaper. That would be a very good thing.

3 As the record shows and many of our
4 amici explain, newspapers have been in a
5 downward spiral for decades. A local
6 broadcaster could buy that newspaper, help get
7 it back up and running, and be providing more
8 local news and more local content for the
9 community.

10 That would be an excellent thing that
11 would not be allowed to happen if the Third
12 Circuit is not reversed. And on that point,
13 Justice Alito, if I might, it's important to
14 note that Respondents have not even challenged
15 the Commission's statutorily required
16 competitive findings. Why? Because there
17 really is no serious argument that these rules
18 still are necessary.

19 JUSTICE ALITO: Well, is that a
20 realistic possibility? Can you point to a
21 real-world example of a local -- a local
22 television station buying a failing newspaper
23 and keeping it in business?

24 MS. WALKER: I believe the amicus
25 brief of the affiliates lays out in detail a lot

1 of examples where television stations have been
2 able to do that or buy another television
3 station in the same market, pool resources, and
4 create more local programming. So I'd refer you
5 to those amicus briefs.

6 But, Justice Alito, another real-world
7 point is that, for instance, Amazon gets to own
8 The Washington Post today. Nobody thinks that's
9 the end of democracy. It's surely not the end
10 of democracy if a local broadcaster can buy a
11 local newspaper and keep it alive.

12 JUSTICE ALITO: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor.

15 JUSTICE SOTOMAYOR: Counsel, the way
16 you want us to rule requires us to go through
17 the FCC's history with this issue, starting
18 presumably in the 1970 and now going over close
19 to 50 years practically.

20 You're encouraging us not to look at
21 what might be a simple issue, which is: Was the
22 explanation given adequate? I don't know what
23 -- why either you or the Solicitor General need
24 to go that far.

25 Could you explain to me if there's a

1 simpler reason why we should go to the more
2 complex reason?

3 MS. WALKER: Well, I actually think
4 the statutory reason is not as complex, but I'll
5 get to that next. The reason why we, the
6 broadcasters, are asking for statutory relief is
7 because it took us 17 years to get to this
8 Court, 17 years of litigation where the Third
9 Circuit was distorting the statute the entire
10 time.

11 We badly need a course correction, and
12 I think the lower courts --

13 JUSTICE SOTOMAYOR: Well, but part of
14 that problem is not with what the Third Circuit
15 did. It's with what the government did. The
16 government was acceding to the Third Circuit's
17 jurisdiction up until this moment, meaning at
18 every moment in which there had been a -- a
19 motion to transfer the case, the government
20 agreed to it.

21 MS. WALKER: Yes, looking at the --

22 JUSTICE SOTOMAYOR: So I don't think
23 you can blame the Third Circuit or the fact that
24 it retained jurisdiction for what the government
25 encouraged.

1 MS. WALKER: Well, it was the Third
2 Circuit's dilution of 202(h) that's also the
3 problem, but you're right, Justice Sotomayor,
4 we've not been aligned with the government at
5 all steps, and that's why we're here trying to
6 protect those interests of --

7 JUSTICE SOTOMAYOR: So I put another
8 question in where have -- you have not told me
9 or given me a line to draw as to when it's
10 appropriate or inappropriate for a circuit to
11 retain jurisdiction in a complex case.

12 MS. WALKER: I don't think you need to
13 draw a hard line, but, here, it was clear we're
14 way outside of anything appropriate. One panel
15 of the Third Circuit has retained jurisdiction
16 for 15 years over four successive, separate
17 quadrennial review orders. That's excessive, I
18 think, by any standard.

19 CHIEF JUSTICE ROBERTS: Justice Kagan.

20 JUSTICE KAGAN: Ms. Walker, I'd like
21 you to assume with me that in applying its
22 public interest standard, generally, the FCC has
23 always thought of -- of -- of one factor, not
24 the only factor, obviously, but one factor is
25 minority and female ownership.

1 And I'd further like you to assume,
2 and I understand that you can test this as a
3 factual matter, but I just want you to assume
4 with me now that that historic practice has been
5 true in the 202(h) context, as well as in
6 rule-making or license-giving or anything else
7 that the FCC does.

8 If you assume those things, what
9 obligation does the -- would the FCC have to say
10 why it was not taking that consideration into
11 account here?

12 MS. WALKER: Well, we think the
13 statute actually would preclude consideration of
14 that factor here even if the Commission wanted
15 to. I draw your attention to our statutory
16 theory, which is that the public interest here
17 has to be cabined in some way.

18 And so we read the statute as asking
19 the Commission to go back to the original public
20 interest rationales for whatever rules they are
21 reviewing under 202(h), and, here, everybody
22 agrees that would not include minority and
23 female ownership.

24 JUSTICE KAGAN: So you're saying that
25 --

1 MS. WALKER: So --

2 JUSTICE KAGAN: I'm sorry, if I just
3 -- make sure I understand. You're saying that
4 even if the -- even -- even though the FCC can
5 use minority and female ownership as a factor in
6 -- in -- in doing rules generally and in giving
7 licenses, when it comes to 202(h) review, they
8 affirmatively cannot?

9 MS. WALKER: Not if it was not an
10 original basis for the rule. And why does that
11 make sense, Justice Kagan? Because it keeps the
12 Commission to the task of reviewing what it has
13 done before, not coming up with new rules or new
14 rationales to even add ownership restrictions.

15 JUSTICE KAGAN: I think your -- your
16 -- your -- well, I think my time is up, so I'll
17 -- I'll quit there.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch.

20 JUSTICE GORSUCH: Good morning. I
21 wanted to return to a question Justice Sotomayor
22 raised, and that is, what's at stake here
23 between your rationale and the FCC's?

24 I guess you ask us to rule on the
25 statutory basis. The FCC asks us to rule on its

1 reasoned decision-making basis. I -- I would
2 have thought perhaps a win is a win from your
3 client's perspective, and I -- I -- I -- I'd
4 like to understand why that's not the case.

5 MS. WALKER: Well, as a practical
6 matter, Justice Gorsuch, if this Court doesn't
7 clarify what the statute requires or doesn't
8 require, we're going to be back in this very
9 same morass in the next quadrennial review, the
10 2018 quadrennial review that's on ice pending
11 the outcome of this Court's decision.

12 If the Court merely holds that the
13 Commission adequately explained a completely
14 atextual factor that the Third Circuit imposed
15 unilaterally on the Commission, we haven't made
16 much practical progress because that might even
17 embolden courts to add other atextual factors.

18 Today, it's minority --

19 JUSTICE GORSUCH: Well -- well, let --

20 MS. WALKER: -- and female ownership,
21 tomorrow it's --

22 JUSTICE GORSUCH: -- let me -- let me
23 interrupt you there. I mean, if -- if this
24 quadrennial review is allowed to go forward and
25 the experiment is allowed to play out and data

1 is obtained, presumably, you have confidence in
2 the results, they'll show great public benefit.

3 Why wouldn't that be sufficient today?

4 MS. WALKER: I think the problem -- I
5 think the problem, Justice Gorsuch, is that
6 Respondents' theory of the statute would allow
7 the Commission to add totally new theories as a
8 reason for keeping rules, so we'll never have
9 any regulatory reform, or, worse, tightening the
10 ownership restrictions. Congress definitely did
11 not think that 202(h) was supposed to be a
12 vehicle for tightening the ownership.

13 JUSTICE GORSUCH: Well, on -- on that,
14 I mean, you know, you -- you play by the sword,
15 you die by the sword. And if you -- if you
16 adopt and permit a statute as broad as public
17 interest, you -- you can't be surprised when it
18 winds up including nothing or everything or
19 something in between.

20 MS. WALKER: But this statute doesn't
21 just say the public interest; it says the public
22 interest as a result of competition. And we've
23 offered a reading that ties that, anchors it in
24 the purpose of the statute, which is regulatory
25 reform.

1 This is not a free-standing reference
2 to the public interest like there is in other
3 parts of the Communications Act and elsewhere in
4 the federal law. It says "as the result of
5 competition." And those words have to mean
6 something.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh.

9 JUSTICE KAVANAUGH: Thank you, Chief
10 Justice.

11 And good morning, Ms. Walker. What do
12 you do with the next sentence of the statute,
13 which does refer to "public interest" in
14 isolation?

15 MS. WALKER: That sentence textually
16 links back to the first sentence. The first
17 sentence tells the Commission that it shall
18 determine whether any of the rules are necessary
19 in the public interest as the result of
20 competition.

21 The second sentence tells the
22 Commission what to do if it makes that
23 determination that certain rules are no longer
24 necessary. If it makes that determination, it
25 has to repeal or modify them.

1 So the determination referenced in the
2 second sentence is the same determination
3 referenced in the first sentence, so they
4 textually link to each other, and it would have
5 been pedantry for Congress to have to repeat "as
6 the result of competition" after the words "the
7 public interest" in the second sentence of the
8 statute.

9 JUSTICE KAVANAUGH: Do you agree that
10 if the term is "public interest" in isolation,
11 that an agency has discretion to interpret that
12 to encompass effects on women and minority
13 ownership?

14 MS. WALKER: I think it could, but it
15 never did that here. And so the Third Circuit
16 was wrong to say that that was a requirement
17 under State Farm.

18 And if it is a free-standing public
19 interest standard, Justice Kavanaugh, I think
20 that raises non-delegation problems. We've
21 offered a reading that ties the public interest
22 to the task and the unique context of this
23 particular statute. And NBC says we have to pay
24 attention to statutory context here.

25 And the text, the context, and the

1 purpose of this entire statute all point in the
2 direction that Congress meant this to be a
3 vehicle for deregulation, not more regulation.

4 JUSTICE KAVANAUGH: Thank you,
5 Ms. Walker.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett.

8 JUSTICE BARRETT: So, Ms. Walker,
9 given that Congress wanted this statute to be a
10 vehicle for deregulation, not more regulation,
11 is it your position that the word "modify" in
12 202(h), when it requires the Commission to
13 modify or repeal as part of its quadrennial
14 review, that a modification can never be an
15 additional regulatory requirement?

16 MS. WALKER: Yes, we agree with that
17 reading of "modify."

18 JUSTICE BARRETT: Is it your --

19 MS. WALKER: We think --

20 JUSTICE BARRETT: Oh, go ahead,
21 Ms. Walker. Please finish.

22 MS. WALKER: I am finished. We agree.

23 JUSTICE BARRETT: Okay. Then let's
24 talk about the public interest and how it might
25 affect a repeal or modification of a rule.

1 Let's imagine that the Commission finds that a
2 rule no longer promotes competition but believes
3 the rule promotes viewpoint diversity and
4 localism.

5 In that event, is it your position
6 that 202(h) requires the FCC to repeal or modify
7 the rule?

8 MS. WALKER: No. The Commission gets
9 to balance the traditional public interest
10 factors on our reading of what the public
11 interest means. Those are all three factors
12 that underlie these rules. The viewpoint
13 diversity, competition, and localism, the
14 Commission gets to balance those, but it can't
15 make up brand-new -- brand-new reasons.

16 And I just want to reemphasize,
17 Justice Barrett, that in this order, if you read
18 carefully, you'll see that the Commission had
19 already made the public interest determination
20 required by the first sentence by the time it
21 got to the discussion of minority and female
22 ownership. At that point, the Commission had no
23 choice but to repeal or modify the rules because
24 the second sentence makes that mandatory.

25 JUSTICE BARRETT: Thank you,

1 Ms. Walker.

2 CHIEF JUSTICE ROBERTS: A minute to
3 wrap up, Ms. Walker.

4 MS. WALKER: Thank you, Mr. Chief
5 Justice.

6 Section 202(h) was enacted 25 years
7 ago. Since then, the ownership rules have
8 barely changed. That is not what Congress had
9 in mind. And it took us, as I mentioned, 17
10 years of litigation to get to this Court. Now
11 that we are here, we respectfully ask the Court
12 to provide guidance on what the statute does and
13 does not require. Absent that guidance, we're
14 going to be stuck most likely in the same morass
15 in the very next review, and Congress's intent
16 could be thwarted for another 25 years.

17 We thus respectfully ask that you
18 clear the way for the statute to finally operate
19 as intended: as a mechanism for meaningful
20 reform, with a focus on competition that does
21 not allow atextual factors to trump the
22 Commission's expressly required competitive
23 findings, which, again, are here completely
24 unchallenged.

25 For these reasons, we ask the Court to

1 reverse the judgment of the court of appeals and
2 instruct it to deny the petitions for review.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Ms. Deutsch.

7 ORAL ARGUMENT OF RUTHANNE M. DEUTSCH
8 ON BEHALF OF THE RESPONDENTS

9 MS. DEUTSCH: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 This is an APA case about whether the
12 agency engaged in reasoned decision-making. The
13 government agrees that promoting broadcast
14 ownership by women and people of color has long
15 been the Commission's own public interest goal,
16 one that is fully consistent with the statute
17 and is not a command imposed by the Third
18 Circuit. The government also agrees that the
19 agency must reasonably weigh all competing
20 aspects of the public interest that it has
21 identified in its quadrennial reviews.

22 The problem here is that the
23 reconsideration order fails this basic
24 requirement of administrative accountability.
25 Based on zero information about female ownership

1 and a nonsensical analysis of badly flawed data
2 on minority ownership, the agency repeatedly
3 assured the public that consolidation would do
4 no harm to either.

5 The government now asks for deference.
6 It says that the uncertainty was acknowledged,
7 prediction is hard, and it argues essentially
8 that because no harm was shown, there was
9 nothing to be waived.

10 But because the no-harm findings here
11 were wholly arbitrary, to defer on this record
12 would only encourage agencies to do sloppy work
13 to avoid making tough choices.

14 Ultimately, if the Commission wants to
15 give less weight to ownership diversity or even
16 abandon the goal entirely, nothing in the Third
17 Circuit's ruling stands in its way. But what
18 the Commission cannot do under time-honored
19 principles of administrative law is mask
20 important policy changes behind such unreasoned
21 analysis.

22 Thank you, and I welcome your
23 questions.

24 CHIEF JUSTICE ROBERTS: Counsel, let's
25 -- let's say the Commission -- there are --

1 there are sort of two different priorities, you
2 know, priority A and priority B, and the
3 Commission is going along, focusing on priority
4 B, and then, I mean, there's a change in the
5 Commission membership or whatever, and the
6 Commission says, well, we're now going to --
7 we're now going to focus on A. Nothing to do
8 with the record or findings or inadequacies on
9 -- on issue B. We just think that issue A is
10 more important.

11 How is -- how is that subject to APA
12 review?

13 MS. DEUTSCH: I -- at the minimum,
14 there needs to be, as this Court said in Fox, an
15 acknowledgment that there's been a change in
16 policy and then an -- an explanation of why.

17 Here, of course, there was no stated
18 change in the policy goal of promoting minority/
19 female ownership and there were repeated
20 assurances that the deregulatory measures going
21 forward would not harm that goal. And --

22 CHIEF JUSTICE ROBERTS: Is it enough
23 -- is it enough for the agency to say, well, you
24 may have noticed we're no longer talking about
25 B, we're talking about A, and the reason is

1 we -- we think A is more important than B? Is
2 that enough?

3 MS. DEUTSCH: I don't believe that's
4 enough, Your Honor. I think they would have to
5 say why it was more important.

6 CHIEF JUSTICE ROBERTS: Well, how do
7 you do that, I mean, if they're -- they're, you
8 know -- you know, apples and oranges, but, you
9 know, life is short, they only have so much
10 time?

11 MS. DEUTSCH: So --

12 CHIEF JUSTICE ROBERTS: And they think
13 cross-ownership is more important than minority
14 and female ownership. Those are two --

15 MS. DEUTSCH: Well --

16 CHIEF JUSTICE ROBERTS: -- different
17 things.

18 MS. DEUTSCH: Well, one thing they
19 could have done here, for example, is to say, no
20 matter what the harm to this other long-standing
21 policy goal, which we have said on many
22 occasions that our broadcast ownership rules are
23 to promote -- and I would point you to JA 335
24 and also the 2002 order cited on 32 of the NAB
25 brief -- they could say, no matter the harm to

1 this -- this goal, it's really hard to measure,
2 it's too uncertain, and we're willing to go
3 forward for these other public interest goals
4 because they are more important, but they did
5 not say that here.

6 CHIEF JUSTICE ROBERTS: Well, if -- if
7 their -- their action focuses on a different set
8 of priorities -- in other words, you -- you seem
9 to be suggesting that as a matter of policy, as
10 opposed to what the record shows about a
11 particular priority, they have to justify a
12 determination that A is more important than B,
13 when reasonable people can differ -- disagree on
14 that.

15 They can't -- they can't just say, you
16 know, yes, this is an -- female and minority
17 ownership is a very important thing, but so is
18 cross-ownership, and we can only -- you know, as
19 I said, we don't have resources to devote to
20 both and we're going to focus on
21 cross-ownership?

22 MS. DEUTSCH: I think they would also
23 have to say that we're willing to do that no
24 matter the harm to something that we have
25 repeatedly said is one of the goals of these

1 rules.

2 CHIEF JUSTICE ROBERTS: What is the
3 basis for the Third Circuit's ruling you -- if
4 you're going to shift, you have to say that it
5 maximizes the benefit to the priority that
6 you're no longer pursuing?

7 MS. DEUTSCH: I don't believe the
8 Third Circuit went so far. They said that you
9 had to weigh the effects and left the Commission
10 ample space to weigh those effects and -- and
11 come out in favor of deregulation and balance as
12 they saw fit.

13 CHIEF JUSTICE ROBERTS: Justice
14 Thomas.

15 JUSTICE THOMAS: Thank you, Mr. Chief
16 Justice.

17 Counsel, I'm just a bit confused.
18 Petitioners indicate that in the past, these
19 structural ownership rules simply did not
20 include minority and female ownership
21 considerations.

22 Could you address that? And include
23 in that at what point did those considerations
24 -- I'm not talking about the standalone rules,
25 such as, you know, tax preferences, et cetera,

1 but just these structural rules -- they -- they
2 seem to indicate that these rules are different
3 from those standalone rules on minority and
4 female preferences or diversity.

5 MS. DEUTSCH: Sure, Justice Thomas.
6 I'm happy to point you to several places.

7 Starting in 1995 in a local TV rule
8 that was -- predated Section 202(h), the
9 Commission recognized that the potential for
10 increased prices from the relaxing ownership
11 limits and concerns considering the ability of
12 minorities and women and committed to studying
13 the effects of that at JA -- and the 2002 order,
14 I guess, is where I would go next. That's on
15 the NAB brief at page 32. The Commission stated
16 how it "had historically used the ownership
17 rules to foster ownership by diverse groups,
18 such as minorities, women, and small
19 businesses."

20 In JA 335, the Commission, again, says
21 that it has a long history of promoting rules
22 and regulations intending to promote diversity
23 of ownership among broadcast licensees,
24 including minority and female ownership-owned
25 businesses, and as explained above, the

1 Commission's broadcast ownership rules help
2 further this purpose.

3 So, while there's not targeted
4 measures, they create the underlying structural
5 -- and I have many other examples, but those are
6 -- those are the highlights. And the federal --

7 JUSTICE THOMAS: Well, what's the
8 difference between what you just said and the
9 idea or the notion that the object of this -- of
10 this rule is to promote a program, a diversity
11 viewpoint, and these other benefits are
12 collateral benefits?

13 And as I hear the argument, the
14 Petitioners suggest that you don't sacrifice or
15 you don't veer away from the central purpose of
16 viewpoint diversity for these collateral
17 benefits, though they may be worthy.

18 What's your response to that?

19 MS. DEUTSCH: Well, the Commission has
20 talked about fostering diversity by historically
21 underrepresented groups both as a free-standing
22 interest in terms of having fair and equitable
23 allocation of the scarce broadcast spectrum and
24 one that is intertwined and supports the other
25 public interest goals.

1 Not only viewpoint diversity, and
2 there's record evidence on that at JA 335 again,
3 JA 397, but also a -- a -- a benefit to other
4 public goals, like localism and the NAB brief of
5 23 states puts that evidence there.

6 CHIEF JUSTICE ROBERTS: But can you
7 promote -- I'm sorry to interrupt you, but can
8 you -- what if -- if focusing on the collateral
9 benefits impedes disposing of the primary goal
10 object, which is, again, as the Petitioners
11 argue, viewpoint diversity?

12 MS. DEUTSCH: If -- if the Commission
13 reached that conclusion after a reasonable
14 weighing, that would be fine. But that simply
15 didn't happen here. There was --

16 JUSTICE THOMAS: Thank you.

17 MS. DEUTSCH: -- no weighing
18 whatsoever.

19 CHIEF JUSTICE ROBERTS: Justice
20 Breyer.

21 JUSTICE BREYER: All right. You read
22 the briefs. On the other side, there's an
23 amicus brief that explains, economically
24 speaking, why they want to get rid of the rules.
25 It's a combination of failing-company argument,

1 economies of scale. So they -- they have that
2 before them, the FCC.

3 Now they didn't say they were
4 abandoning the minority/women policy. They
5 didn't say that, or the small business policy.

6 What they said is there's no evidence
7 in this record to convince us that if we do what
8 these kinds of briefs say, that it will hurt our
9 efforts there, and besides, we have two new
10 things called incubator and we have something
11 called eligibility, and we're trying to preserve
12 and encourage minority and women ownership that
13 way. Okay?

14 What's wrong with that? And you heard
15 me ask the other side --

16 MS. DEUTSCH: Well, they're --

17 JUSTICE BREYER: -- are they changing
18 their policy? And the other side says no, no,
19 there's nothing you'd said in the past that
20 the -- the policy is different than that.

21 MS. DEUTSCH: So, I mean, the main
22 thing wrong with that is that their -- the
23 assertions that are strewn throughout the
24 reconsideration order that the deregulatory
25 moves will not harm minority and female

1 ownership --

2 JUSTICE BREYER: But that isn't what
3 they -- they said there's no evidence, they have
4 a couple of sentences there, which you've read.

5 MS. DEUTSCH: Yes, but they also say
6 --

7 JUSTICE BREYER: Now why in heaven's
8 name did you not, or groups that support you,
9 given the tremendous number of people who I'm
10 happy are interested in this -- why aren't there
11 some studies or something? There are 10,000 law
12 professors and economics professors who look for
13 studies to do. Why isn't there something?

14 MS. DEUTSCH: Well, there is something
15 on this issue which they ignored, even as they
16 cited one --

17 JUSTICE BREYER: Okay, what?

18 MS. DEUTSCH: The Free Press study.

19 JUSTICE BREYER: Free Press.

20 MS. DEUTSCH: Why did they ignore it
21 or?

22 JUSTICE BREYER: Okay, that's -- the
23 free. Is there anything other than that?

24 MS. DEUTSCH: Yes.

25 JUSTICE BREYER: What?

1 MS. DEUTSCH: They have their own
2 study that's titled "Whose Spectrum Is It
3 Anyway" that was cited in comments in -- in the
4 2014 further notice of proposed --

5 JUSTICE BREYER: Okay. Okay, I'll
6 look at those.

7 MS. DEUTSCH: Yeah. And -- and I
8 would just say that there -- there's a lot of
9 wiggle room in the reconsideration order
10 especially, but I would point you to the
11 statement that the rule -- the repeal of the
12 NDCO rule will have no material effect on
13 minority and female ownership, the repeal --
14 that's at 87A.

15 The TV rule repeal is not likely to
16 harm minority and female ownership, will have no
17 negative impact. That's 128A. And, again,
18 these statements about them, they are -- they
19 are framed as findings and determinations.

20 And when you look at what they're
21 actually based on, it's that listing of numbers
22 on page 37 of our brief that has nothing on
23 women, and as for the minority data, the
24 American Statistical Association is here telling
25 you that it is worse than doing no analysis at

1 all to draw -- draw the conclusions that they
2 drew.

3 JUSTICE BREYER: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice Alito.

5 JUSTICE ALITO: In your briefing, you
6 argue that the Petitioners forfeited any
7 constitutional argument that the FCC could not
8 consider minority or female ownership.

9 Would you, therefore, agree that there
10 is no need for the Court to consider that
11 constitutional question?

12 MS. DEUTSCH: Absolutely. And I would
13 also point to this Court's decision in the first
14 Fox case, where it recognized that until the
15 administrative law analysis of whether the
16 underlying decision to be made is a reasoned one
17 and you've addressed any arbitrary and
18 capricious concerns, then it's premature to
19 reach the constitutional question.

20 JUSTICE ALITO: All right. Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor.

23 JUSTICE SOTOMAYOR: Counsel, you're
24 relying on the Free Press data. Could you give
25 me your best authority for the idea that the FCC

1 was required to utilize the Free Press data?

2 MS. DEUTSCH: I would point you to the
3 administrative --

4 JUSTICE SOTOMAYOR: And is there any
5 -- and -- and -- and let me just follow up. And
6 is there any requirement for it to have needed
7 to explain why it didn't rely on it?

8 MS. DEUTSCH: I -- I don't have a case
9 at hand, Justice Sotomayor, other than the --
10 the bedrock cases, like State Farm, but, you
11 know, having cited one of the Free Press data
12 points in its listing of numbers and then having
13 ignored the results from that study that at
14 least attempted to do a more reasoned analysis
15 of the exact same question that the FCC
16 purported to analyze in that listing is -- it's
17 a little bit like throwing stones from glass
18 houses for the agency now to be here saying that
19 the Free Press study had its own problems.

20 And so, you know, I think it -- it's
21 just bedrock bad law that they need to, at the
22 very least, explain why their analysis was
23 better than the Free Press study, which they
24 patently could not do.

25 JUSTICE SOTOMAYOR: Finally, I don't

1 think you're disputing that the agency gets to
2 decide how important it thinks minority and
3 female ownership is in the context of any given
4 rule-making. And I don't think the agency has
5 changed its position that its ownership rules
6 are not primarily intended to promote minority
7 and female ownership. So how do we reconcile
8 that with your position?

9 MS. DEUTSCH: I -- I think it's --
10 again, it's just -- this is standard arbitrary
11 and capricious review, which we told the Court
12 at the petition stage.

13 The agency gets to set the goals,
14 consistent with the statute. And a reviewing
15 court can only look and -- and -- and see
16 whether they did what they said they were going
17 to do and offered a reasoning explanation.

18 The -- the government here admits that
19 if harm had been found, they would have had to
20 weigh that harm. It would have -- you know, to
21 the extent to see whether it cautioned against
22 the consolidation it wanted to go forward with.

23 And, you know, we disagree that --
24 that they -- you know, that there was no harm to
25 be found on this record. They didn't,

1 especially for women, where --

2 JUSTICE SOTOMAYOR: Thank you,
3 counsel. I think you've gone over my time.

4 MS. DEUTSCH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice Kagan.

6 JUSTICE KAGAN: Ms. Deutsch, you began
7 your argument today by saying that the
8 government agrees with you that minority and
9 female ownership should be taken into account in
10 decision-making like this. But as I understand
11 what the government has done this morning is to
12 say that we -- that they don't agree with you.

13 I mean, this is unlike in their
14 briefs, but, at argument, the government has
15 said, well, with respect to 202(h)
16 determinations, we've never taken into account
17 female and minority ownership.

18 And Justice Thomas asked you a similar
19 question, but I just wanted to make sure that
20 you had the opportunity to respond to that
21 assertion of the government, that it had
22 historically not taken female and minority
23 ownership into account in the 202(h) context
24 specifically.

25 MS. DEUTSCH: I didn't -- it's a

1 better question for Mr. Stewart. I -- I agree
2 that it hasn't been the only factor or a primary
3 factor, but to the extent that Mr. Stewart was
4 saying that it had never been considered as a
5 factor, I think that's just not consistent with
6 history. And then --

7 JUSTICE KAGAN: Well, I guess I'm --
8 I'm really giving you an opportunity to tell me
9 what to look to to decide whether you or
10 Mr. Stewart is right on that question.

11 MS. DEUTSCH: Thank you. So, again, I
12 would look to the earlier orders cited at page 6
13 and -- and 10 on our brief that are -- predate
14 202(h), and then the first 202 review, 2002
15 review, under 202(h) defines the policy goals
16 and said, "We will first define our goals so we
17 can then assess whether our current broadcast
18 ownership rules are necessary to achieve these
19 goals."

20 Then talks about the five types of
21 diversity, which include minority and female
22 ownership as one goal, and says -- and this is
23 at 18 FCCR at 13634 -- "encouraging minority and
24 female ownership historically has been an
25 important Commission objective, and we affirm

1 that goal here."

2 And then, again, JA 335 talks about
3 how the Commission's broadcast ownership rules
4 help further this purpose of promoting minority
5 and female ownership.

6 JUSTICE KAGAN: So, Ms. Deutsch,
7 suppose that that's right, and the -- the
8 Commission has historically considered this as
9 -- as one factor in its broader public interest
10 analysis, but, here, the Commission says
11 something along the lines of: Look, there's
12 actually not a lot of data about how this rule
13 will affect minority and female ownership. To
14 the extent that we have data, we think it's --
15 it -- it shows that it won't have an impact, and
16 -- and so we're going to go with this new rule.

17 Why -- why isn't that enough?

18 MS. DEUTSCH: Because it would be an
19 important break with past commitments, not only
20 the repeated promise to -- to collect data and
21 analyze this problem, which, as I said, goes
22 back to the 1995 TV rule, but --

23 JUSTICE KAGAN: Well, are you saying
24 that the Commission has a free-standing
25 obligation to go out and collect data itself

1 with respect to this? The Commission can't rely
2 on the notice-and-comment process to -- to
3 provide it with data?

4 MS. DEUTSCH: The Commission has its
5 own data already that it collects in the Form
6 323, for instance. So, no, I'm not saying that,
7 but I think what was wrong with your first
8 formulation or how it might have been, you know,
9 more passable was if the Commission had said:
10 We can't figure it out. It's too uncertain.
11 Put to one side our promises about figuring it
12 out better. But we're willing to move forward
13 no matter the harm to this goal, even though we
14 still think this goal is important, but we -- we
15 just -- you know, we're throwing up our hands.

16 JUSTICE KAGAN: Thank you.

17 MS. DEUTSCH: We can't do it.

18 JUSTICE KAGAN: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Gorsuch.

21 JUSTICE GORSUCH: I'd like to pick up
22 there. As I understand it, it would be okay for
23 the Commission to say we're -- we're going to
24 try this no matter the harm to other goals. Why
25 isn't what they did better than that?

1 And what are we supposed to do about
2 it? The 1970s -- we have 1970s rules governing
3 cross-ownership still today, and the one thing
4 we know about the '96 Act is it -- it -- it had
5 a deregulatory impulse. And yet that impulse
6 has never been exercised.

7 The idea, I think, was to have
8 experiments every four years and see how it
9 goes. And the agency sought all the data it can
10 get, and as Judge Sirica pointed out, maybe --
11 you know, one can -- one can parse it and
12 complain and flyspeck it, but isn't the best
13 source of data an experiment? And isn't the
14 agency in something of a Catch-22 position,
15 Judge Sirica wonders.

16 What do you -- what do you say to
17 those thoughts?

18 MS. DEUTSCH: I have a bunch of
19 responses. First, it's hardly flyspecking
20 evidence to assert that there will not be no
21 harm, for example, to female ownership when you
22 have zero --

23 JUSTICE GORSUCH: Well, the --

24 MS. DEUTSCH: -- information on --

25 JUSTICE GORSUCH: -- but -- but, as

1 you know on that, they say there just isn't --
2 there isn't good data available. And -- and in
3 response to a prior Third Circuit order, they --
4 they publicly solicited all the data anybody in
5 the country could provide.

6 MS. DEUTSCH: Well, there were
7 analyses --

8 JUSTICE GORSUCH: What do we do about
9 that?

10 MS. DEUTSCH: -- of that, but -- but
11 going to the larger point of the -- the
12 Commission's being stuck, you know, the FCC has
13 much to do with the delays here. I mean,
14 Prometheus III, for example, was the Third
15 Circuit simply telling the agency to hurry up.

16 And we're here in 2020 looking at an
17 order cycle that began in 2010. And that --

18 JUSTICE GORSUCH: I -- I -- that
19 doesn't address my fundamental question, though.
20 We're stuck with rules from the 1970s that, 20
21 years ago, 25 years ago, Congress said were
22 outdated. And --

23 MS. DEUTSCH: Well --

24 JUSTICE GORSUCH: -- when -- when is
25 the FCC going to be able to try an experiment?

1 And if it says in its best considered judgment
2 after multiple rounds of remands and multiple
3 rounds of data collection and public comment
4 that it earnestly believes that these rules
5 aren't going to negatively impact anyone and
6 might actually affirmatively benefit most
7 people, when exactly is it allowed to see and --
8 and experiment with that for four years and then
9 collect the data and see what actually happened?

10 MS. DEUTSCH: Well, a few things.

11 First, the -- the agency tomorrow
12 could issue a separate rule-making on the -- the
13 NBCO rule, for example, apart from the 202(h)
14 process, and nothing impedes that.

15 Second, there's no experiment-now-and-
16 see-what-happens, I think, reasonable reading of
17 202(h) which requires the agency to assess, as
18 competition has changed, whether the rules are
19 necessary in the public interest at that moment.

20 It isn't a license to move forward no
21 matter the harm to one of your own public
22 interest goals and then, you know, sort it out
23 later, particularly because, as we argue in our
24 brief, the sorts of harms here from unwarranted
25 consolidation cannot easily be undone.

1 JUSTICE GORSUCH: Let me ask you a --
2 a question about the retention of jurisdiction
3 here.

4 I understand that courts obviously
5 have the practice of sometimes deferring to --
6 to another court and -- and -- and consolidating
7 matters voluntarily, but what authority is there
8 for the Third Circuit to have retained
9 jurisdiction over not one rule-making but now
10 three over the course of 15 years?

11 That does seem a little unusual in its
12 duration and in the number of rule-makings
13 involved. I think Judge Williams called it
14 contrary to the goals of Congress.

15 MS. DEUTSCH: Well, Justice Gorsuch,
16 our -- our view is that it's a proper exercise
17 of that court's jurisdiction, and the government
18 never challenged it below.

19 It -- it happens sometimes, although
20 not frequently, for -- for similar cases that
21 have long and complicated histories and also a
22 history of agency delay. And, you know, of
23 course, the Court could modify that ruling to
24 the extent that it sees fit.

25 You know, we -- but it doesn't

1 undermine the -- the core problem here, which is
2 the arbitrariness of the reconsideration order.
3 And on that basis, certainly, the Third Circuit
4 should be affirmed.

5 CHIEF JUSTICE ROBERTS: Justice
6 Kavanaugh.

7 JUSTICE KAVANAUGH: Thank you, Chief
8 Justice.

9 And good morning, Ms. Deutsch. You've
10 referred, I think quite rightly, to
11 administrative law basics a few times in your
12 answers, and I want to get your reaction to one
13 way to look at this.

14 Courts, obviously, review agency legal
15 interpretations to make sure the agency is not
16 departing from the law enacted by Congress, and
17 on that front, reviewing the law, our review
18 is -- is usually pretty tight, pretty stringent,
19 putting aside whether there's an ambiguity in
20 the law.

21 On the other hand and critically,
22 federal courts do not make the policy calls. We
23 defer to agency policy judgments within the
24 constraints imposed by Congress.

25 And, here, it's the broadest possible

1 language that Congress uses, public interest,
2 not much of a constraint at all, a broad and Ms.
3 Walker alluded to arguably too broad a
4 delegation.

5 But that doesn't give us much to work
6 with. And then arbitrary and capricious review
7 -- and Judge Sirica said this many times -- is
8 highly deferential to the agency's policy
9 judgments.

10 And -- and there's a lot of case law,
11 as you know, in the FCC context, Justice White's
12 opinion for the Court in the WNCN case, that
13 predictive judgments made by the agency get
14 especially significant judicial deference.

15 And so, in the -- at the end here,
16 it's deferential in the policy, the public
17 interest standard, they made a predictive
18 judgment. How can we sitting here second-guess
19 all that?

20 MS. DEUTSCH: Well, a few things, Your
21 Honor. I -- I agree completely that the
22 agency's reasoned predictive judgments are
23 afforded deference, and that's, you know, APA
24 101. But, here, there -- there's no reasoned
25 judgment to defer to. There is nothing there on

1 women, no data and no explanation even or
2 attempt to explain why the no-harm finding
3 that's arbitrary on its own terms as they drew
4 for minority ownership would also transfer
5 automatically to women.

6 In cases like WNCN, NCCB, Fox, in
7 every one of those cases, there is at the very
8 least a reasoned decision tree set out by the
9 agency of why they're doing what they're doing
10 and how they're weighing the pros and cons. The
11 government --

12 JUSTICE KAVANAUGH: Well, isn't -- go
13 ahead.

14 MS. DEUTSCH: -- agrees to weigh, but
15 -- and they say, well, we don't have to weigh
16 because we don't have any evidence of harm. But
17 ignoring evidence of harm doesn't make it go
18 away.

19 JUSTICE KAVANAUGH: And what -- what
20 do you say -- and you -- you might have
21 indicated this to Justice Breyer -- but what do
22 you say is the absolute best evidence in the
23 record for you that scaling back these rules
24 will negatively affect women and minority
25 ownership?

1 MS. DEUTSCH: Well, certainly, the
2 Free Press study which is cited in our brief and
3 cited by the government in its analysis. And I
4 would also point you to one of the early reviews
5 where the Commission itself represent --
6 recognized the drop in minority and female
7 ownership after the consolidation in the late
8 '90s, and that's cited in our brief at 10 at 15
9 FCCR at 11084.

10 And also, the Free Press study, in
11 addition to doing the historical trend analysis
12 for minority, also did a cross-sectional
13 analysis for both people of color and
14 women-owned stations and showed that the more
15 consolidated the market, the less likely there
16 was to be representation by these groups --

17 JUSTICE KAVANAUGH: And last --

18 MS. DEUTSCH: -- in --

19 JUSTICE KAVANAUGH: -- last question.

20 To what extent, if any, should we take into
21 account that during the pendency of this
22 litigation the local news industry has been
23 decimated?

24 MS. DEUTSCH: Well, it's, I think --
25 I'm not sure that's in the record, but, you

1 know, I think, to the extent you want to take
2 account of what's happening after this record
3 has closed, there's a -- a much easier path
4 forward, which is to affirm the Third Circuit
5 and let the already delayed 2018 review move
6 forward, including analyzing the results of the
7 incentive option, which is another area where
8 the data indicated that women and people of
9 color were disproportionately --

10 CHIEF JUSTICE ROBERTS: Justice --

11 MS. DEUTSCH: -- entering the market.

12 CHIEF JUSTICE ROBERTS: -- Justice
13 Barrett.

14 JUSTICE BARRETT: Ms. Deutsch, I have
15 a question about the Free Press study. So
16 whether -- and maybe I -- I'm -- maybe I'm not
17 fully understanding its scope, but I thought the
18 Free Press study was largely backward-looking.

19 So, for example, on page 39 of your
20 brief, you talk about how its tracing concluded
21 that the 1990s television rule changes
22 contributed to the loss of 40 percent of the
23 previously minority-owned stations.

24 Was it entirely backward-looking,
25 looking at the effects of rule changes in the

1 past, or did it have a predictive component?

2 MS. DEUTSCH: The trend analysis was
3 backward-looking, just like the government's
4 analysis of -- of the numbers was. It just did
5 it better by using better numbers that were
6 corrected for the problems in tracing.

7 But, as I said, they also did a
8 cross-sectional analysis, so taking a snapshot
9 in time, showing that the more consolidated the
10 market, the less likely there were to be women
11 and people of color owners.

12 JUSTICE BARRETT: And -- and so, to be
13 sure that I understand that, you're saying that
14 they did make a predictive judgment? It offered
15 predictive analysis like, if you make this
16 change, then this is the likelihood that this
17 will happen, this being the decrease in minority
18 and women-based ownership?

19 MS. DEUTSCH: I -- I don't think it
20 went so far as that, but it was an inference
21 that could be drawn from that analysis.

22 JUSTICE BARRETT: Well, if it's just
23 an inference that could be drawn from that
24 analysis, why isn't the Commission correct that
25 there was no evidence in the record that showed

1 there would be harm?

2 MS. DEUTSCH: Because its -- its own
3 numbers, even, you know, without any correction,
4 showed that there was harm from past
5 consolidation, and there's no reason to -- to
6 think that that wouldn't happen from future.

7 Plus, as I said, there's this other
8 study called "Whose Spectrum Is It Anyway?"
9 It's cited in the -- the Notice of Proposed
10 Rule-making in 2014 and in some of the comments
11 that interviewed about 100 market participants
12 that chronicled the difficulties faced by more
13 diverse owners under consolidation --

14 JUSTICE BARRETT: So -- and is that
15 used --

16 MS. DEUTSCH: -- and how price would
17 be --

18 JUSTICE BARRETT: -- in the sense you
19 were talking -- you talked in your briefs about
20 the need for statistical evidence and the fact
21 that the government had no evidence at all in
22 the record about the effect on women ownership,
23 as opposed to the minority evidence, which you
24 say that it ignored.

25 But if there's no statistical

1 evidence, and I hear you saying you're talking
2 about the backward-looking Free Press study,
3 you're talking about interviews, is there
4 anything in the record that's actually a
5 statistical analysis that shows the likely
6 impact of these changes on the relevant minority
7 and women community?

8 MS. DEUTSCH: Other than the sources
9 I've mentioned, no.

10 JUSTICE BARRETT: Thank you, counsel.
11 I don't have any other questions.

12 CHIEF JUSTICE ROBERTS: A minute to
13 wrap up, Ms. Deutsch.

14 MS. DEUTSCH: Thank you, Your Honor.
15 I have three points. I'll try to go fast.

16 Minority and female ownership, I just
17 want to reiterate, has long been baked into the
18 public interest standard in this context. I've
19 read you some of the quotes. Industry
20 petitioners are up against the government,
21 former commissioners, and history in contending
22 otherwise.

23 Second, the government agrees that a
24 reasonable weighing of all public interest goals
25 that they have defined in this context is

1 necessary, and that simply didn't happen here.
2 On this record, there's no reasoned predictive
3 judgment to defer to on gender or on minority
4 ownership trends. And the agency didn't make,
5 much less attempt to explain, its decision to
6 deregulate no matter the harm to its own public
7 interest goal.

8 And just the opposite, there are
9 unfounded statements that permeate the
10 reconsideration order about how the rule repeals
11 will have no material effect or will not likely
12 harm minority and female ownership.

13 And although they talk a lot about the
14 newspaper/broadcast cross-ownership rule, for
15 the local TV changes, for example, that is the
16 only evidence that they rely on for no harm, is
17 this listing of numbers on page 37 of our brief.

18 Finally, I would note that the
19 remedial concerns don't undercut the Third
20 Circuit's core conclusion here that the
21 Commission undertook dramatic regulatory repeal
22 without reasonably considering an aspect of the
23 public interest I think it continues to espouse,
24 the -- the -- the colloquy with Mr. Stewart
25 notwithstanding.

1 The Court can tweak the remedy as it
2 sees fit, but the best course is to allow the
3 Commission to consider these questions afresh in
4 its 2018 review, where it can analyze the better
5 data, including the full results of the
6 incentive auction, to reach a reasoned decision
7 on whether deregulation is actually in the
8 public interest.

9 For these reasons and others in our
10 brief, the Third Circuit should be affirmed.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Rebuttal, Mr. Stewart?

14 REBUTTAL ARGUMENT OF MALCOLM L. STEWART
15 ON BEHALF OF THE PETITIONERS IN 19-1231

16 MR. STEWART: Thank you, Mr. Chief
17 Justice.

18 Let me first clarify our position with
19 respect to the potential impact of minority and
20 female ownership data on the cross-ownership
21 rules. My primary point is that when those
22 rules were first adopted, they were adopted for
23 reasons other than their potential effects on
24 minority and female ownership, and so the
25 Commission, in deciding whether to retain those

1 rules, has naturally focused on whether the
2 original justification continued to apply.

3 Now, in the era of post-1996, the
4 enactment of the two -- Section 202(h), you can
5 find documents that list basically the full
6 range of public interest considerations as
7 potentially relevant to the 202(h) reviews, but
8 I'm not aware of any instance, even under
9 Section 202(h), in which the FCC has actually
10 amended, repealed, or retained a cross-ownership
11 rule for the stated reason of its impact on
12 minority and female ownership. It just
13 historically, either before or after 1996, has
14 not been a factor that has animated the
15 Commission's decision with respect to the
16 ownership rule.

17 Second, I think the most
18 straightforward path to decide the case is to
19 follow the one that the Commission itself laid
20 out in the reconsideration order. It said the
21 historical reasons for the cross-ownership rules
22 no longer apply; allowing cross-ownership will
23 likely benefit consumers. It acknowledged that
24 incomplete data left uncertainty as to the
25 likely effects of repeal and amendment on women

1 and minorities. But the agency's best estimate
2 was that there would be no harm. And the bare
3 possibility of harm was not a -- was not a
4 sufficient ground for foregoing changes that the
5 agency otherwise considered highly beneficial.

6 The -- the Court has said numerous
7 times that it will "uphold a decision of less
8 than ideal clarity" if the agency's path may
9 reasonably discern -- be discerned. And I
10 believe the agency's path can reasonably be
11 discerned here.

12 And, third, I'd like to focus again on
13 the quadrennial review scheme that Section 202
14 lays out. People have referred to the
15 deregulatory thrust of the 1996 Act, and that's
16 correct, but the principal purpose of
17 Section 202(h) was to ensure that
18 cross-ownership rules didn't remain on the books
19 through inertia, that if they remained in place,
20 it was because the Commission had reexamined
21 them and had made a fresh determination that
22 they continued to serve the public interest.

23 And the Third Circuit's approach
24 really thwarts that. If the cross-ownership
25 amendments had been allowed to go in effect --

1 into effect in an earlier year, we would now
2 have more data on the potential effects of those
3 rule changes on minority and women.

4 The -- the effect of the court of
5 appeals' decision is that the periodic review
6 process can be derailed by commenters who
7 identify possible countervailing effects and
8 insist that the agency perform new research
9 before it can amend the rules that are already
10 in place. That has been the very effect that
11 Congress attempted to forestall in requiring
12 quadrennial reviews.

13 Thank you, Mr. Chief Justice.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel. The case is submitted.

16 (Whereupon, at 11:21 a.m., the case
17 was submitted.)

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