No. 19-1231

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA, PETITIONERS

v.

PROMETHEUS RADIO PROJECT, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
MAKAN DELRAHIM
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
MICHAEL F. MURRAY
Deputy Assistant Attorney General
AUSTIN L. RAYNOR
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

THOMAS M. JOHNSON, JR.
General Counsel
ASHLEY S. BOIZELLE
Deputy General Counsel
JACOB M. LEWIS
Associate General Counsel
JAMES M. CARR
WILLIAM SCHER
Attorneys
Federal Communications Commission
Washington, D.C. 20554

QUESTION PRESENTED

In Section 202(h) of the Telecommunications Act of 1996, as amended, 47 U.S.C. 303 note, Congress directed the Federal Communications Commission (FCC or Commission) to review its rules concerning common ownership of media outlets every four years to "determine whether any of such rules are necessary in the public interest as the result of competition," and to "repeal or modify any regulation [the FCC] determines to be no longer in the public interest." Since 2003, the Commission has repeatedly determined that certain ownership rules are no longer necessary in light of dramatically changed market conditions and accordingly has sought to relax those rules, but the same divided panel of the United States Court of Appeals for the Third Circuit has vacated each of those efforts in substantial part. In the decision below, the panel majority vacated the FCC's revised ownership rules and other regulatory changes solely on the ground that the agency had not adequately analyzed their potential effect on minority and female ownership of broadcast stations, without contesting the Commission's core findings on competition. The question presented is as follows:

Whether the court of appeals erred in vacating as arbitrary and capricious the FCC orders under review, which, among other things, relaxed the agency's ownership restrictions to accommodate changed market conditions.

PARTIES TO THE PROCEEDING

Petitioners were respondents in the court of appeals. They are the Federal Communications Commission and the United States.

Respondents were petitioners and intervenors in the court of appeals. They are: Benton Institute for Broadband and Society, Bonneville International Corporation, Common Cause, Connoisseur Media LLC, Free Press, Fox Corporation, Independent Television Group, Media Alliance, Media Council Hawaii, Movement Alliance Project (f/k/a Media Mobilizing Project), Multicultural Media, Telecom and Internet Council, National Association of Black-Owned Broadcasters, National Association of Broadcast Employees and Technicians-Communications Workers of America, National Association of Broadcasters, National Hispanic Media Coalition, National Organization for Women Foundation, News Corporation, News Media Alliance, Nexstar Broadcasting, Inc., Office of Communication Inc. of the United Church of Christ, Prometheus Radio Project, Scranton Times L.P., and Sinclair Broadcast Group Inc.[*]

[*] The petition for a writ of certiorari did not list National Hispanic Media Coalition (NHMC) as a party to the proceeding because, due to a docketing error, it did not appear on the dockets below. That error has since been corrected. The brief in opposition did list NHMC as a party. In contrast, although the petition listed Cox Media Group LLC as a party, that entity has since filed a letter declining to participate in further proceedings before this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Cases—Continued: Page

Statutes:

Statutes—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 19-1231

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

PROMETHEUS RADIO PROJECT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-56a) is reported at 939 F.3d 567. The orders of the Federal Communications Commission are reported at 31 FCC Rcd 9864 (J.A. 101-576), 32 FCC Rcd 9802 (NAB Pet. App. 64a-310a), and 33 FCC Rcd 7911 (J.A. 577-704).[1]

JURISDICTION

The judgment of the court of appeals was entered on September 23, 2019 (Pet. App. 280a-282a). The court of appeals entered an amended judgment on September 27, 2019 (Pet. App. 283a-285a). Petitions for rehearing were denied on November 20, 2019 (Pet. App. 277a-279a). On February 12, 2020, Justice Alito extended the time within which to file a petition for a writ of certiorari

[1] NAB Pet. App. refers to the petition appendix in consolidated case No. 19-1241.

to and including March 19, 2020. On March 11, 2020, Justice Alito further extended the time to and including April 18, 2020, and the petition was filed on April 17, 2020. The petition for a writ of certiorari was granted on October 2, 2020. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

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

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

Other relevant statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-8a.

STATEMENT

Congress has vested the Federal Communications Commission (FCC or Commission) with broad authority to regulate broadcast markets in the public interest. Pursuant to that authority, the FCC has long acted to promote competition and viewpoint diversity by restricting the ability of broadcasters to own multiple outlets in a single market. In Section 202(h) of the Telecommunications Act of 1996, as amended, 47 U.S.C. 303 note, Congress has directed the FCC to review its ownership rules every four years to "determine whether any of such rules 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." *Ibid.*

This case concerns the FCC's repeated efforts over a period of 17 years—thwarted by a series of decisions by the same divided panel of the United States Court of Appeals for the Third Circuit—to loosen ownership restrictions that the agency has determined are no longer necessary in light of dramatic changes to the media landscape. In the decision below, the panel majority did not question the agency's findings that the restrictions' original competition and viewpoint-diversity rationales no longer justified their retention. It nevertheless vacated the revised rules solely on the ground that the agency had not adequately analyzed the rules' likely effect on minority and female ownership of broadcast stations.

A. Statutory Background

For more than 85 years, the Commission has possessed broad statutory authority to regulate broadcasters in the public interest, both by issuing individual licenses and by promulgating rules. See 47 U.S.C. 303(f); 47 U.S.C. 309(a). Before the Internet existed, when the media marketplace was dominated by a small number of print and broadcast sources of information, the FCC exercised that authority by limiting common ownership of multiple media outlets. For example, the Commission limited the number of broadcast stations a single entity could own, see *National Broad. Co.* v. *United States*, 319 U.S. 190, 208 (1943); *United States* v. *Storer Broad. Co.*, 351 U.S. 192, 193 (1956), and banned common ownership of a daily newspaper and broadcast station located in the same community, see *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775, 779

(1978) (*NCCB*). These restrictions were designed to prevent undue economic concentration and promote viewpoint diversity. See *Prometheus Radio Project* v. *FCC*, 373 F.3d 372, 382-386 (3d Cir. 2004), as amended (June 3, 2016) (*Prometheus I*), cert. denied, 545 U.S. 1123 (2005). The FCC historically reviewed its regulatory approach as needed to ensure that it continued to promote the public interest. See, *e.g.*, *Telocator Network of Am.* v. *FCC*, 691 F.2d 525, 550 n.191 (D.C. Cir. 1992).

Against this backdrop, the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, established "a pro-competitive, de-regulatory national policy framework" that Congress viewed as better suited to the rapidly evolving communications market. S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996). Consistent with that framework, Section 202(h) of the 1996 Act regularized the FCC's traditional review processes. As amended, Section 202(h) directs the FCC to reevaluate its ownership rules every four years to determine whether they remain "necessary in the public interest as the result of competition." 47 U.S.C. 303 note.[2] If the Commission determines that any of the ownership rules are "no longer in the public interest," it "shall repeal or modify" them. *Ibid.* "The text and legislative history of the 1996 Act indicate that Congress intended periodic reviews to operate as an 'ongoing mechanism to ensure that the Commission's regulatory framework would

[2] The 1996 Act originally required biennial review but was later amended to require quadrennial review. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-199, Div. B, Tit. VI, § 629(3), 118 Stat. 100.

keep pace with the competitive changes in the marketplace.'" *Prometheus I*, 373 F.3d at 391 (quoting *In re The 2002 Biennial Regulatory Review*, 18 FCC Rcd 4726, 4732 (2003) (2003 Report)).

B. 2002 Biennial Review

1. In its 2002 biennial review proceeding, the Commission identified "diversity, competition, and localism" as the "policy goals" that would guide its analysis of the "public interest" under Section 202(h). *In re 2002 Biennial Regulatory Review*, 18 FCC Rcd 13,620, 13,645 (2003) (2002 Review); 47 U.S.C. 303 note. It further identified five relevant types of diversity: "viewpoint, outlet, program, source, and minority and female ownership diversity." 2002 Review, 18 FCC Rcd at 13,627; see *id.* at 13,627-13,645. Of the five, the Commission deemed viewpoint diversity "a paramount objective," "because the free flow of ideas under-girds and sustains our system of government." *Id.* at 13,631.

In analyzing whether its "current broadcast ownership rules [we]re necessary to achieve these goals," 2002 Review, 18 FCC Rcd at 13,627, the FCC confronted a media landscape in which "[t]here [we]re far more types of media available," "far more outlets per-type of media," and "far more news and public interest programming options available to the public * * * than ever before," *id.* at 13,667. Given this changed environment, the Commission determined that wide-ranging regulatory reforms were needed. Among other things, the FCC eliminated its ban (originally adopted in 1975) on common ownership of daily newspapers and broadcast stations in a single market. *Id.* at 13,748; see *In re Amendment of Sections 73.34, 73.240, & 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, & Television Broad. Stations*, 50 FCC

2d 1046, 1075, amended on reconsideration, 53 FCC 2d 589 (1975) (Multiple Ownership). The Commission found that the ban was no longer necessary to promote competition or viewpoint diversity given the proliferation of new media sources, 2002 Review, 18 FCC Rcd at 13,748-13,754, 13,760-13,767, and that the efficiencies resulting from cross-ownership could promote localism, *id.* at 13,753-13,760. The FCC replaced the blanket ban with new, market-specific limits. *Id.* at 13,775. The Commission also repealed the Failed Station Solicitation Rule (FSSR), which had required certain owners of failed television stations to attempt to secure out-of-market buyers for their stations before selling to in-market buyers. *Id.* at 13,708.

2. A divided three-judge panel of the Third Circuit vacated and remanded the FCC's order in substantial part. *Prometheus I*, *supra*. The panel unanimously held that "reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest." 373 F.3d at 398; see *id.* at 398-400. Two judges concluded, however, that the FCC had not adequately justified the specific substitute limits it had selected. *Id.* at 402-411. The panel also vacated and remanded the FCC's repeal of the FSSR. The court noted that "preserving minority ownership was the purpose of the FSSR," and it concluded that the agency had acted arbitrarily and capriciously by failing to "mention anything about the effect this change would have on poten-

tial minority station owners." *Id.* at 420. The panel retained jurisdiction over the remand proceedings. *Id.* at 435.[3]

Chief Judge Scirica dissented in part. He concluded that the panel majority had impermissibly "second-guess[ed]" the FCC's "reasoned policy judgments" and had failed to accord proper deference to the Commission's "predictive judgments," particularly "[g]iven the dynamic nature of the industry." *Prometheus I*, 373 F.3d at 435, 439. He viewed it as more "prudent" to permit the new rules to take effect, "monitor the resulting impact on the media marketplace, and allow the Commission to refine or modify its approach in its next quadrennial review." *Id.* at 439. Chief Judge Scirica warned that the court was "[s]hort-circuiting the statutory review process," thereby "depriv[ing] both the Commission and Congress [of] the valuable opportunity to evaluate the new rules and the effects of deregulation on the media marketplace." *Id.* at 438.

C. 2006 Quadrennial Review

1. Following the Third Circuit's remand, the Commission initiated its 2006 quadrennial review with a notice of proposed rulemaking intended in part to address the issues raised in the panel's opinion. See *In re 2006 Quadrennial Regulatory Review*, 21 FCC Rcd 8834, 8835 (2006). The FCC "urge[d] commenters to explain the effects, if any, that their ownership rule proposals will have on ownership of broadcast outlets by minorities, women and small businesses." *Id.* at 8837.

---

[3] The panel also noted that the FCC had "deferred consideration" of a number of "other proposals for advancing minority and disadvantaged businesses and for promoting diversity in broadcasting." *Prometheus I*, 373 F.3d at 421 n.59. It directed the Commission to address those proposals on remand. *Ibid.*

In its final rulemaking, the Commission noted the continued evolution of media markets. *In re 2006 Quadrennial Regulatory Review*, 23 FCC Rcd 2010, 2022 (2008). It observed that "[t]he steep reduction in newspaper circulation in recent years has triggered a cascade of negative impacts," and that regulatory changes were appropriate to ensure that cross-ownership restrictions would "not unduly stifle efficient combinations that are likely to preserve or increase the amount and quality of local news available to consumers via newspaper and broadcast outlets." *Id.* at 2026, 2030. The FCC further explained that the proliferation of media sources meant that certain "combinations no longer pose[d] the same threat to diversity that they once did." *Id.* at 2032; see *id.* at 2031-2032. In light of these changes, the FCC again sought to "relax the 32-year-old newspaper/broadcast cross-ownership ban," this time in favor of a case-by-case approach guided by presumptions and a four-factor test. *Id.* at 2030; see *id.* at 2018-2019.

In a separate order designed to promote broadcast-ownership diversity, including ownership by women and minorities, the FCC adopted various measures to increase opportunities for "eligible entities," which it defined to include certain small businesses. *In re Promoting Diversification of Ownership in the Broad. Servs.*, 23 FCC Rcd 5922, 5925 (2008); see *id.* at 5925-5927. The Commission also sought comment on whether it should adopt an expressly race-conscious definition of "eligible entit[y]," noting that any such definition would need to satisfy strict scrutiny. *Id.* at 5950; see *id.* at 5950-5951.

2. On review, the same divided Third Circuit panel again vacated the Commission's regulatory changes in significant part. *Prometheus Radio Project* v. *FCC*, 652

F.3d 431, 470 (2011) (*Prometheus II*), cert. denied, 567 U.S. 951 (2012). The majority invalidated the FCC's repeal of the blanket newspaper/broadcast cross-ownership ban on the ground that the agency had not provided adequate notice and opportunity for comment. *Id.* at 445-454. The court also invalidated the "eligible entity" definition as arbitrary and capricious. Noting that the definition was designed to "increas[e] broadcast ownership by minorities and women," *id.* at 469, the court faulted the Commission for failing to "explain how the eligible entity definition adopted would" achieve that goal, *id.* at 470, and ordered the agency to consider a race-based definition on remand, *id.* at 471 & n.42. The court retained jurisdiction over the remanded issues. *Id.* at 472.

Judge Scirica again dissented in part. *Prometheus II*, 652 F.3d at 472-475. He would have held that the agency had complied with notice-and-comment requirements, and he criticized the majority for "preserv[ing] an outdated and twice-abandoned ban" on newspaper/broadcast cross-ownership. *Id.* at 472; see *id.* at 472-473. Judge Scirica also dissented from the court's decision to retain jurisdiction over the remand proceedings. *Id.* at 473.

D. 2010 and 2014 Quadrennial Reviews

1. a. The FCC began the 2010 quadrennial review with a series of workshops, including one on "how the media ownership rules affect the Commission's goal of promoting minority and female ownership and other issues relating to diversity in broadcasting." *In re 2010 Quadrennial Regulatory Review*, 26 FCC Rcd 17,489, 17,492 n.10 (2011) (2011 Notice). In subsequent notices of inquiry and then of proposed rulemaking, the agency sought public input on the effect of the media ownership

rules on minority and female ownership, and it "invite[d] commenters to support their comments with sound empirical evidence demonstrating a link between structural rules and our diversity goal." *In re 2010 Quadrennial Regulatory Review*, 25 FCC Rcd 6086, 6106 (2010); see, *e.g.*, *id.* at 6100, 6108-6109; 2011 Notice, 26 FCC Rcd at 17,494, 17,511, 17,518, 17,532, 17,538. The FCC also invited comment on 11 peer-reviewed studies that it had commissioned "[t]o provide data on the impact of market structure on the Commission's policy goals of competition, localism and diversity." 2011 Notice, 26 FCC Rcd at 17,556; see *id.* at 17,561-17,564 (describing "studies relating to diversity" and "minority and women ownership issues") (capitalization and emphasis omitted).

The agency subsequently consolidated the 2010 and 2014 quadrennial reviews and issued a further notice of proposed rulemaking. See *In re 2014 Quadrennial Regulatory Review*, 29 FCC Rcd 4371 (2014) (2014 Review) (excerpted at J.A. 58-100); see also J.A. 60. In the 2014 Review, the Commission observed that it did "not believe the record evidence shows that the [newspaper/broadcast] cross-ownership ban has protected or promoted minority or female ownership of broadcast stations in the past 35 years, or that it could be expected to do so in the future." J.A. 83; see J.A. 97 (same for radio/television cross-ownership rule). The FCC further noted that it did "not believe that a study could extrapolate with any degree of confidence the effect that changing the Commission's cross-ownership rules would have on minority and female ownership levels, and any attempt to do so would be misleading." J.A. 95

n.595. The agency nevertheless sought further comment on these issues. See, *e.g.*, J.A. 83, 90, 95 n.595, 97.[4]

In 2016, the FCC promulgated a final order. See 31 FCC Rcd 9864 (2016 Order) (J.A. 101-576). The Commission relaxed certain discrete aspects of the newspaper/broadcast cross-ownership rule, concluding that the record "fail[ed] to demonstrate" that doing so was "likely to result in harm to minority and female ownership." J.A. 292; see J.A. 291-292 (summarizing modifications to rule). The agency otherwise generally retained the newspaper/broadcast cross-ownership rule, as well as the radio/television cross-ownership rule and the local television ownership rule, which restricts the television stations an entity can own in a single market. It did so for the stated purposes of "promot[ing] competition" and "viewpoint diversity," and "not with the purpose of preserving or creating specific amounts of minority and female ownership"—though it found that the rules "promote opportunities for diversity" as a general matter. J.A. 171-172, 293, 310.

The FCC rejected the argument that tightening the local television ownership rule would "promote increased opportunities for minority and female ownership," describing that contention as "both speculative and unsupported by existing ownership data." J.A. 174. In reaching that conclusion, the FCC relied in part on a comparison of minority ownership levels before and after prior

---

[4] In 2015, interested parties petitioned for review, arguing (among other things) that the Commission had unreasonably delayed in adopting a new definition of "eligible entity." *Prometheus Radio Project* v. *FCC*, 824 F.3d 33, 37 (3d Cir. 2016). The same Third Circuit panel agreed and remanded with an order for the FCC to act promptly, again emphasizing the Commission's "obligation to promote ownership by minorities and women." *Id.* at 48; see *id.* at 37. The panel retained jurisdiction over the remanded issues. *Id.* at 60.

relaxations of certain ownership rules in the 1990s. That comparison showed a long-term increase in minority ownership levels. See J.A. 174-176 (comparing historical National Telecommunications and Information Administration (NTIA) data and recent FCC Form 323 data); see also J.A. 214-216.

In response to the Third Circuit's remand, the agency also analyzed the possibility of adopting a race- or gender-specific "eligible entity" definition. It concluded that the record evidence did not satisfy the exacting constitutional standards for adopting such an approach. J.A. 389-429. The FCC instead reinstituted the revenue-based definition from its prior order. J.A. 370-388. Rather than justify this definition on the ground that it would promote minority and female ownership, the agency explained that the definition was indisputably well-tailored to promote media ownership by small businesses and new entrants—a different, but also worthy, diversity goal. J.A. 375-376, 378-388. The agency predicted that the definition would further both competition and viewpoint diversity. J.A. 379.

b. On reconsideration motions filed by various parties, the Commission determined that changed market conditions justified a broader overhaul of its ownership rules. See 32 FCC Rcd 9802 (Reconsideration Order) (NAB Pet. App. 64a-310a). Among other things, the agency repealed its newspaper/broadcast cross-ownership and radio/television cross-ownership rules and modified the local television ownership rule. NAB Pet. App. 68a-69a.[5] In support of these modifications, the agency cited

[5] The agency's primary modification to the local television ownership rule was its repeal of the "Eight-Voices Test," which had previously required "that at least eight independently owned television

extensive changes to the media landscape, including the substantially increased number of broadcast voices; the newspaper industry's continued decline; radio's diminished importance in contributing to viewpoint diversity; and the explosive growth of nontraditional media outlets such as independent, online news outlets and cable and satellite programming. *Id.* at 88a-107a, 127a-138a, 142a-147a. The FCC explained that each of these developments had reduced the likelihood that consolidation would lead to diminished viewpoint diversity and had increased the potential for certain combinations to generate economic efficiencies and help preserve traditional media outlets. See, *e.g.*, *id.* at 77a-78a.

The FCC also addressed in detail the potential impact of its changes on minority and female ownership. Examining the record developed "[a]fter seeking public comment on this topic a number of times," NAB Pet. App. 117a, and recognizing the limitations of existing data, see, *e.g.*, 2016 Order, J.A. 214-216, the FCC again noted that prior relaxations of media ownership restrictions had not led to an overall decline in minority-owned stations, Reconsideration Order, NAB Pet. App. 119a-120a, 138a-139a, 161a-162a. The Commission further observed that no commenter had produced meaningful evidence showing a likely negative impact on minority and female ownership, *id.* at 117a-121a, 138a-139a, 161a-162a, and that "two organizations representing minority media owners" had sought "relief from the [newspaper/broadcast cross-ownership] rule's restrictions," *id.* at 117a. Acknowledging the 2016 Order's observation that the ownership rules "promote[ ] oppor-

---

stations must remain in the market after combining ownership of two stations in a market." NAB Pet. App. 140a.

tunities for diversity," J.A. 172, 293, 310, the FCC explained that this statement "did not indicate a belief that the rule[s] would promote minority and female ownership specifically, but rather that the rule[s] would promote ownership diversity generally by requiring the separation of [media] station ownership," Reconsideration Order, NAB Pet. App. 122a; see *id.* at 139a-140a, 162a. The Commission ultimately concluded that nothing in the record suggested the Order's changes were likely to produce an adverse effect on minority and female ownership of broadcast stations, and that the existing rules could not "be justified based on the unsubstantiated hope that [they] will promote minority and female ownership." *Id.* at 162a; see *id.* at 117a-122a, 138a-140a.

In a separate order, the FCC established a new "incubator program" to promote further its ownership-diversity goals by pairing aspiring broadcast-station owners with established broadcasters. J.A. 578-579; see 33 FCC Rcd 7911 (Incubator Order) (J.A. 577-704). The Commission declined to adopt race- or gender-based eligibility criteria for the program for the same reasons it had given in the 2016 Order. J.A. 605 & n.55. Instead, it adopted criteria based on applicant size, designed to foster entry into the broadcasting sector by entrepreneurs and small businesses. J.A. 592-598. The Commission noted that related eligibility criteria had previously "increased successful participation of small businesses owned by women and minorities" in auctions for broadcast construction permits, and it predicted similar effects for the incubator program. J.A. 598; see J.A. 598-603.

2. On petitions for review, the same divided panel again vacated the Commission's regulatory action in

significant part. Pet. App. 1a-56a. The majority did not challenge the agency's core findings that market developments had rendered the repealed ownership rules unnecessary (and even harmful) with respect to competition, viewpoint diversity, and localism. Instead, it held that the FCC's determination that the revised rules would "have minimal effect on female and minority ownership" was "not adequately supported by the record" and therefore was arbitrary and capricious. *Id.* at 27a.

In support of that holding, the court cited the absence of any historical data pertaining specifically to the effect of prior rule changes on female ownership. Pet. App. 30a. It deemed the historical data pertaining to minority ownership insufficiently precise, and it criticized the agency for not performing a more sophisticated statistical analysis. *Id.* at 30a-32a. Although the court acknowledged that "[t]he APA imposes no general obligation on agencies to produce empirical evidence," *id.* at 33a (quoting *Stilwell* v. *Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (Kavanaugh, J.) (brackets in original)), it found that principle inapplicable here, stating that "the reasoned explanation given by the Commission rested on faulty and insubstantial data." *Ibid.*

The court of appeals vacated both the Reconsideration Order and the Incubator Order in full, as well as the 2016 Order's definition of "eligible entity." Pet. App. 34a. The court directed that "[o]n remand the Commission must ascertain on record evidence the likely effect of any rule changes it proposes and whatever 'eligible entity' definition it adopts on ownership by women and minorities, whether through new empirical research or an in-depth theoretical analysis." *Ibid.* It further held that, "[i]f [the FCC] finds that its proposed

definition for eligible entities will not meaningfully advance ownership diversity, it must explain why it could not adopt an alternate definition that would do so." *Ibid.* The panel again retained jurisdiction over the remanded issues. *Id.* at 38a.

Judge Scirica again dissented in part. Pet. App. 39a-56a. He observed that "[n]o party identifies any reason to question the FCC's key competitive findings and judgments." *Id.* at 48a. With respect to the new rules' likely effects on ownership of broadcast stations by women and minorities, he concluded that the agency had reasonably determined—"based on its understanding of the broadcast markets, the evidence in the record, and the only data submitted—that repeal of the [pre-existing] rules was unlikely to harm ownership diversity." *Id.* at 50a. He emphasized "that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference," *id.* at 48a (quoting *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 596 (1981)), and that "complete factual support in the record for the Commission's judgment or prediction is not possible or required," *id.* at 51a (quoting *NCCB*, 436 U.S. at 814). In his view, "[t]he FCC's lack of some data relevant to one of [multiple] considerations 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.* at 52a. Judge Scirica stated that he "would allow the rules to take effect and direct the FCC to evaluate their effects on women- and minority-broadcast ownership in its 2018 quadrennial review." *Id.* at 40a.

SUMMARY OF ARGUMENT

For the past 17 years, the same divided Third Circuit panel has repeatedly prevented the Commission from fulfilling Section 202(h)'s mandate that the agency "shall" repeal or modify any ownership rule that the agency determines is no longer "necessary in the public interest as the result of competition." 47 U.S.C. 303 note. The decision below flouts well-established principles of judicial deference to the Commission's reasonable policy judgments and freezes in place outdated regulations, to the detriment of broadcast markets nationwide.

I. Background principles of administrative law require deference to predictive agency judgments made after a thorough review of available data. Deference is particularly appropriate in the present statutory context, where Congress has conferred broad authority on the Commission to regulate in the public interest. This Court has repeatedly recognized the breadth of the FCC's discretion to make informed inferences based on incomplete data and to balance competing values in promulgating rules. See, *e.g.*, *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775 (1978). Judicial deference to agency discretion is also critical to the proper operation of Section 202(h), which establishes an iterative process by which the FCC evaluates the public interest in light of the available data, revises its rules accordingly, and then monitors the effects of the amended rules until the next quadrennial review.

II. Under these principles, the Orders at issue here should be sustained. The FCC solicited extensive public input, reviewed voluminous record materials, and drew on its decades of regulatory experience. It acknowledged gaps in the data and drew cautious inferences

where it could. In the Reconsideration Order, it concluded that substantial benefits to competition and localism, coupled with the absence of record evidence suggesting harm to minority and female ownership, justified overhaul of the ownership rules. In the 2016 and Incubator Orders, the FCC adopted programs designed to promote market entry and defined the applicable eligibility criteria accordingly. Those policy judgments fell well within the scope of the agency's statutory discretion.

III. In the decision below, the panel majority did not challenge the core findings on competition that underlay the FCC's affirmative rationale for modifying its ownership rules. The court instead vacated each of the Orders in whole or in part based solely on its conclusion that the agency had not adequately analyzed the Orders' effects on minority and female ownership. The court directed 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." Pet. App. 34a. That holding was erroneous in multiple respects.

Most significantly, the court of appeals erred in giving exaggerated weight to the bare possibility that the challenged orders might affect minority and female ownership levels in the broadcast industry. Although the statute does not specifically identify minority or female ownership as a criterion the FCC must consider in applying Section 202(h), the agency has traditionally treated this form of broadcast diversity as an element in its multi-factor public-interest analysis. But the Commission has broad discretion to determine how much weight to accord different aspects of the public

interest and how best to advance minority and female ownership. See *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 600 (1981). That is particularly so where, as here, the agency determines that a regulatory change is warranted for reasons unrelated to minority or female ownership. The panel majority's holding flouts these principles. And by directing the FCC to conduct a particular analysis on remand, the court also improperly imposed an atextual procedural requirement on agency decision-making. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978).

In addition, the panel majority impermissibly "substitut[ed] its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The court faulted the Commission for failing to cite any evidence concerning the effect of prior rule changes on female ownership. But as the FCC had explained, despite repeated requests for comment on this subject, no such information exists. The panel also criticized the Commission for relying on disparate data sets in assessing the effects of historical rule changes, as well as for failing to conduct a more sophisticated statistical analysis. But the Commission relied on the evidence available, while acknowledging potential inadequacies in the data. Given the undisputed competitive benefits of the proposed rule changes, the agency reasonably determined that the changes were in the public interest despite the bare possibility that they might reduce minority and female ownership.

The court of appeals' requirement of a high degree of empirical certainty *before* revising any ownership rules also impairs the operation of Section 202(h). That

requirement effectively prevents the Commission from updating its rules to accord with undisputed changes to the competitive landscape. As a result, broadcast markets nationwide remain saddled with outdated regulations that prevent struggling traditional outlets from entering transactions that might allow them to retain economic vitality. And by preventing the FCC's revised rules from taking effect, the panel's decision forecloses the agency from acquiring data concerning the rules' actual impact on minority and female ownership—data that could otherwise have been considered during the *next* quadrennial review to determine whether further regulatory amendments are warranted.

Finally, the court of appeals compounded these errors with a dramatically overbroad remedy. Although the court analyzed only the reasoning that underlay the ownership rules, it vacated the Reconsideration and Incubator Orders in full, as well as the "eligible entity" definition from the 2016 Order. It further held that, if the Commission finds on remand "that its proposed definition for eligible entities will not meaningfully advance ownership diversity, it must explain why it could not adopt an alternate definition that would do so." Pet. App. 34a. But nothing in the statutory framework suggests that the FCC is foreclosed from pursuing one form of broadcast diversity in a particular regulatory program unless that program will further a different form of diversity as well. The court's eligible-entity directive also disregards the record, which contains extensive analysis explaining these aspects of the FCC's policy choices and its rejection of alternative approaches.

ARGUMENT

I. THE FCC HAS BROAD STATUTORY AUTHORITY TO REGULATE MEDIA OWNERSHIP IN THE PUBLIC INTEREST

Bedrock administrative-law principles require courts to defer to agencies' reasoned policy choices and predictive judgments. Those background principles carry heightened force in this context. This Court has repeatedly affirmed the Commission's broad authority to regulate in the public interest, and judicial deference is critical to the practical operation of Section 202(h).

A. The APA Requires Judicial Deference To Reasoned Agency Judgments

The Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, authorizes courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). To satisfy judicial scrutiny, an agency need only "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Ibid.* (quoting *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962)).

In evaluating whether an agency action is arbitrary and capricious, "[a] court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC* v. *Electric Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). Instead,

agency action typically will be deemed arbitrary and capricious only "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43.

The arbitrary-and-capricious standard accords agencies substantial leeway to draw inferences from incomplete evidence and to make reasonable policy judgments in the face of empirical uncertainty. "The APA imposes no general obligation on agencies to produce empirical evidence," *Stilwell* v. *Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (Kavanaugh, J.), and "[i]t is not infrequent that the available data do not settle a regulatory issue," *State Farm*, 463 U.S. at 52. In that circumstance, an agency must "exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion." *Ibid.*

If the agency "justif[ies]" that policy conclusion "with a reasoned explanation," its decision is entitled to deference. *Stilwell*, 569 F.3d at 519; see *State Farm*, 463 U.S. at 52 (agency action is not "arbitrary and capricious simply because there was no evidence in direct support of the agency's conclusion"). That principle is especially apt when the relevant data are difficult or impossible to obtain, see *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009) ("It is one thing to set aside agency action under the [APA] because of failure to adduce empirical data that can readily be obtained. * * * It is something else to insist upon obtaining the unobtainable."), or when the relevant policy determinations require "value-laden decisionmaking and the

weighing of incommensurables under conditions of uncertainty," *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2571 (2019).

B. Judicial Deference Is Especially Warranted When The FCC Regulates In The Public Interest Under Section 202(h)

The background principles of judicial deference that inform all review under the APA carry heightened force when, as in this case, a court evaluates the FCC's policy judgments about whether broadcast-ownership rules continue to serve the public interest.

1. Virtually since the Commission's inception, this Court has recognized the agency's broad statutory authority to regulate in the public interest, which includes the discretion to draw reasonable inferences from the available evidence and to weigh competing priorities. See 47 U.S.C. 303 & note; 47 U.S.C. 309(a).[6] The Court has reaffirmed that authority repeatedly across the decades.

In *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943) (*NBC*), plaintiffs challenged FCC rules that regulated contractual arrangements between networks and local broadcasting stations. *Id.* at 224. In rejecting that challenge, the Court observed that "[i]t is not for us to say that the 'public interest' will be furthered or retarded by the" regulations, and the Court's "duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by

[6] The meaning of "public interest" is the same whether the Commission is promulgating a new rule or repealing an existing rule under Section 202(h). See *Prometheus Radio Project* v. *FCC*, 373 F.3d 372, 394 n.17 (3d Cir. 2004), as amended (June 3, 2016), cert. denied, 545 U.S. 1123 (2005).

Congress." *Ibid.* The Court further explained that "the wisdom of any action [the Commission] took would have to be tested by experience," and "[i]f time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations." *Id.* at 225.

The Court reaffirmed and amplified these principles in a subsequent decision involving one of the very same ownership rules—the newspaper/broadcast cross-ownership rule—at issue here. In *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), the Court rejected challenges to the rule, which, at the time, prospectively limited combinations between newspapers and broadcast stations and required limited divestiture of existing combinations. *Id.* at 779. The challengers argued that "the rulemaking record did not conclusively establish that prohibiting common ownership of co-located newspapers and broadcast stations would in fact lead to increases in the diversity of viewpoints." *Id.* at 796. In rejecting that attack, the Court acknowledged "the inconclusiveness of the rulemaking record." *Ibid.* The Court observed, however, that "evidence of specific abuses by common owners is difficult to compile," and "'the possible benefits of competition do not lend themselves to detailed forecast.'" *Id.* at 797 (quoting *FCC* v. *RCA Commc'ns, Inc.*, 346 U.S. 86, 96-97 (1953)). The Court concluded that, "[i]n these circumstances, the Commission was entitled to rely on its judgment, based on experience." *Ibid.*

In *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582 (1981), this Court clarified that the Commission not only has broad discretion to promote the public interest, but also has wide latitude in prioritizing competing aspects

of the public interest. In that case, the Court rejected a challenge to an FCC policy pertaining to programming diversity. *Id.* at 585. Emphasizing "that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference," *id.* at 596, the Court observed that "diversity is not the only policy the Commission must consider in fulfilling its responsibilities under the Act." *Ibid.* Although the Court "approved of the Commission's goal of promoting diversity in radio programming," it noted that the FCC was "vested with broad discretion in determining how much weight should be given to that goal and what policies should be pursued in promoting it." *Id.* at 600. The Court ultimately concluded that the challenged policy "reflect[ed] a reasonable accommodation" of competing interests. *Id.* at 596.

2. There is no cause for departing from this Court's broad conception of FCC authority in the context of Section 202(h) reviews. To the contrary, judicial deference to agency discretion is indispensable to both the structure and practical operation of Section 202(h). See *Prometheus Radio Project* v. *FCC*, 824 F.3d 33, 40 (3d Cir. 2016) (*Prometheus III*) (acknowledging that Section 202(h) "affects our standard of review").

"The text and legislative history of the 1996 Act indicate that Congress intended periodic reviews to operate as an 'ongoing mechanism to ensure that the Commission's regulatory framework would keep pace with the competitive changes in the marketplace.'" *Prometheus Radio Project* v. *FCC*, 373 F.3d 372, 391 (3d Cir. 2004), as amended (June 3, 2016) (quoting 2003 Report, 18 FCC Rcd at 4732), cert. denied, 545 U.S. 1123 (2005). Congress "[r]ecogniz[ed] that competitive changes in

the media marketplace could obviate the public necessity for some of the Commission's ownership rules," and it accordingly "require[d] the Commission to 'monitor the effect of competition and make appropriate adjustments' to its regulations." *Ibid.* (quoting 2003 Report, 18 FCC Rcd at 4727) (ellipses omitted). The statutory requirement that the Commission conduct quadrennial reviews is critical to the proper functioning of this process. If the agency waits too long between rule appraisals, the competitive landscape may quickly outpace the existing regulatory structure.

By its nature, the Section 202(h) review process thus *requires* the FCC to make predictive judgments on the basis of imperfect information. To comply with its statutory mandate, the Commission must evaluate recent changes to the marketplace in a relatively short period of time and revise its rules accordingly. The statute contemplates a rolling series of public-interest assessments, conducted on the basis of the available evidence, to ensure that the ownership rules remain generally in line with competitive realities. See Pet. App. 52a (Scirica, J., concurring in part and dissenting in part) ("The FCC must 'repeal or modify' rules that cease to serve the public interest even when it lacks optimal data.") (quoting 47 U.S.C. 303 note). If the Commission were required to gather perfect data, including perfect data concerning every potential subsidiary effect of a rule change, that iterative process would be infeasible.

The four-year review cycle also ensures that suboptimal rules will have a limited shelf-life. The gap between Section 202(h) proceedings enables the agency to study the practical effects of any recent rule modifications. See Pet. App. 48a (Scirica, J., concurring in part

and dissenting in part) ("Congress prescribed an iterative process; the FCC must take a fresh look at its rules every four years. This process assumes the FCC can gain experience with its policies so it may assess how its rules function in the marketplace."). If the Commission's predictive judgments turn out to be imperfect or incomplete, it can—and, indeed, must—adjust the rules accordingly in the next quadrennial review. Cf. *NBC*, 319 U.S. at 225; *FPC* v. *Hope Nat. Gas Co.*, 320 U.S. 591, 615 (1944) (approving agency action in part because "[t]his is not an order for all time," and "[t]he Act contains machinery for obtaining rate adjustments").

In short, Section 202(h) compels agency decisionmaking under conditions of uncertainty while mitigating any harmful effects that erroneous forecasts may produce. Judicial deference to agency judgments is crucial to the proper functioning of this process.

II. IN FASHIONING THE ORDERS AT ISSUE IN THIS CASE, THE COMMISSION MADE REASONABLE POLICY JUDGMENTS BASED ON THE AVAILABLE FACTS

Under the principles set forth above, the Orders at issue here easily survive review. The FCC solicited extensive public input, reviewed voluminous record materials, and adopted policies that reasonably accommodated competing interests, taking account of both the record and the agency's decades of experience. In the challenged Orders, the FCC "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action[s] including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington*, 371 U.S. at 168).

A. The Reconsideration Order

In the Reconsideration Order, the Commission relaxed its cross-ownership and local-television-ownership restrictions after amassing extensive evidence regarding the changed media landscape. The industry developments that informed the FCC's regulatory choices included a dramatic increase in broadcasting voices; a diminution in the significance of newspaper and radio; and an explosive growth of nontraditional media outlets. NAB Pet. App. 88a-107a, 128a-135a, 146a-147a. As a result of these competitive changes, and based on a balancing of the relevant considerations—including potential effects on minority and female ownership—the Commission reasonably concluded that the regulations no longer served the public interest.

With respect to the newspaper/broadcast cross-ownership rule, the FCC found that "the limited benefits for viewpoint diversity of retaining the rule * * * are outweighed by the costs of preventing traditional news providers from pursuing cross-ownership investment opportunities to provide news and information in a manner that is likely to ensure a more informed electorate." NAB Pet. App. 78a; see *id.* at 101a-102a ("[E]liminating the [rule] will allow both broadcasters and newspapers to seek out new sources of investment and operational expertise, increasing the quantity and quality of local news and information they provide in their local markets."). The Commission similarly concluded that it could "no longer justify retention of the [radio/television cross-ownership] rule in light of broadcast radio's diminished contributions to viewpoint diversity and the variety of other media outlets that contribute to viewpoint diversity in local markets." *Id.* at

123a-124a. And with respect to the local television ownership rule, the FCC pointed to evidence that the Eight-Voices test (see p. 12 n.5, *supra*) "lacks any economic support, is inconsistent with the realities of the television marketplace, and prevents combinations that would likely produce significant public interest benefits." NAB Pet. App. 151a-152a.

The FCC also evaluated the impact its revisions might have on minority and female ownership. Its analysis on this subject was the product of an intensive, multi-year investigation. After soliciting comment in 2006 (and repeatedly thereafter), the Commission in 2014 proposed to relax the cross-ownership rules, concluding that the record evidence did not show the rules had "protected or promoted minority or female ownership of broadcast stations" or "could be expected to do so in the future." 2014 Review, J.A. 83, 97.

In the 2016 Order, following additional public comment, the Commission concluded that the record "fail[ed] to demonstrate" that relaxing the newspaper/broadcast cross-ownership rule was "likely to result in harm to minority and female ownership." J.A. 292. Although the agency otherwise largely retained the ownership rules, it did so to further "competition" and "viewpoint diversity," and "not with the purpose of preserving or creating specific amounts of minority and female ownership." J.A. 171-172, 293, 310. The FCC recognized certain limitations in the record evidence, but explained that the agency "must rely on the available data, and our findings herein are consistent with the data." J.A. 174 n.211; see J.A. 215 n.325.

On reconsideration, the FCC reaffirmed its view that the record failed to demonstrate either that the ownership rules "promote or protect minority and female

ownership," NAB Pet. App. 117a, or "a causal connection between modifications" to the rules "and minority and female ownership levels," *id.* at 161a-162a; see *id.* at 138a-139a; see also *id.* at 117a (noting that "organizations representing minority media owners seek relief from" the newspaper/broadcast cross-ownership rule). Given the dramatic changes to the competitive landscape, and the Commission's own prior observation that minority and female ownership is merely "one of many—sometimes competing—goals that [the agency] must balance when setting [its] numerical ownership limits," 2014 Review, J.A. 79, the FCC concluded that the existing ownership restrictions could not "be justified based on the unsubstantiated hope that [they] will promote minority and female ownership," Reconsideration Order, NAB Pet. App. 162a; see *id.* at 122a, 140a.

That conclusion was especially reasonable in light of the Commission's determination that the original rationales for the repealed rules—namely, preserving competition and promoting viewpoint diversity—no longer apply. See, *e.g.*, Multiple Ownership, 50 FCC 2d at 1074 (promulgating newspaper/broadcast cross-ownership rule). If the Commission had not previously adopted any ownership restrictions, and private parties had urged the agency to do so now in order to promote minority and female ownership of broadcast stations, the burden clearly would have been on the proponents to identify evidence that the proposed restrictions would have the desired effect. See *Massachusetts* v. *EPA*, 549 U.S. 497, 527-528 (2007) (review of denials of rulemaking petitions is "'extremely limited' and 'highly deferential'") (citation omitted); *Capital Network Sys., Inc.* v. *FCC*, 3 F.3d 1526, 1533 (D.C. Cir. 1993) ("The FCC may * * * decline to initiate rulemaking proceedings

up until the moment when indisputable evidence of the need for such proceedings has been presented to it."). Once an existing rule has ceased to serve its original purpose, it is similarly reasonable to expect commenting parties who advance new rationales for that rule to support their positions with evidence. Respondents failed to do so here. See Pet. App. 33a.

Finally, the Commission's longstanding data-collection efforts have reduced the likelihood of predictive error. See Pet. App. 52a (Scirica, J. concurring in part and dissenting in part) (noting "measures that could make the FCC's data more reliable, benefiting future quadrennial reviews"). The Commission began to collect race and gender data from broadcasters in 1998, and it has periodically revised its collection processes since that time to improve the data's accuracy and utility. See, *e.g.*, 2016 Order, J.A. 364 (noting "improvements [that] address the Third Circuit's directive that the Commission obtain more and better data concerning broadcast ownership to support its rulemaking decisions"); *id.* at 355-369; *In re Promoting Diversification of Ownership in the Broad. Servs.*, 24 FCC Rcd 5896, 5897-5898 (2009). The Commission currently collects detailed ownership information from both television and radio stations in each odd-numbered year, allowing it to produce "'snapshots' of the status of minority and female ownership in the broadcast industry taken every two years." *Fourth Report on Ownership of Broad. Stations*, 35 FCC Rcd 1217, 1220 (2020). These data will assist the Commission in evaluating the impact of any revised rules on minority and female ownership and in determining whether future rule changes are warranted.

B. The 2016 And Incubator Orders

The Commission's policy judgments in the 2016 and Incubator Orders likewise deserve judicial deference. In the 2016 Order, the FCC examined potential race- or gender-conscious definitions of "eligible entity" and concluded that any such definition likely would not satisfy constitutional requirements. See J.A. 397-429. To avoid this issue and advance the separate, but equally valid, goal of promoting small businesses and new entrants, the agency adopted a revenue-based definition. J.A. 378-388.

Similarly in the Incubator Order, the Commission instituted a program "with the goal of creating ownership opportunities for new entrants and small businesses, thereby promoting competition and diversity in the broadcast industry." J.A. 578. To achieve that end, the program is designed to mitigate such barriers as "lack of access to capital" and the need for "operational, managerial, and technical support." J.A. 595. The program's eligibility criteria, centering on participant size and revenue, are reasonably calculated to assist the new and diverse entities that are the program's intended beneficiaries. J.A. 592-612.

III. THE COURT OF APPEALS' CONTRARY HOLDING REFLECTS SERIOUS ANALYTIC FLAWS

In finding the Commission's reforms to be arbitrary and capricious, the court of appeals took issue with virtually none of the agency's policy judgments, or with the agency's underlying reasoning or evidence. Instead, the court identified a single public-interest consideration —the potential effect of various regulatory changes on minority and female ownership of broadcast stations— and invalidated all three Orders in whole or in part based on the FCC's purportedly inadequate analysis of

that factor. That approach flouted the statutory text, substituted the court's judgment for that of the agency, and undermined the basic purposes of Section 202(h). The court then compounded these errors with a dramatically overbroad remedy.

A. The Court Of Appeals Disregarded The Statutory Text

1. The court of appeals' exclusive focus on racial and gender diversity in station ownership reflects a failure to appreciate the substantial discretion that the statutory scheme grants the FCC in regulating broadcast markets. Section 202(h) requires the FCC to review existing ownership regulations quadrennially to determine "whether any of such rules are necessary in the public interest as the result of competition." 47 U.S.C. 303 note. Here, neither the court of appeals nor any party "identifie[d] any reason to question the FCC's key competitive findings and judgments" that the ownership rules were both obsolete and potentially harmful. Pet. App. 48a (Scirica, J., concurring in part and dissenting in part).

Instead, the panel treated minority and female ownership as a threshold, dispositive consideration in all FCC quadrennial-review proceedings. Pet. App. 34a (holding that "the Commission must 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"). In so doing, the court effectively displaced the Commission's traditional approach to regulating in the public interest, which emphasizes competition and viewpoint diversity while also taking into account a broad range of additional considerations, including localism and other types of diversity. See 2002 Review, 18 FCC Rcd at 13,627.

The Third Circuit's elevation of a single public-interest factor, in circumstances where the data concerning that factor were inconclusive and the agency had made its decision for other reasons, cannot be squared with the statute or with this Court's precedent. Section 202(h) does not even mention, let alone single out as dispositive, racial and gender diversity in the ownership of broadcast stations. Although the FCC has long treated minority and female ownership as one aspect of its multifactor public-interest inquiry, the FCC's authority to regulate in the public interest includes "broad discretion in determining how much weight should be given to" various potentially competing objectives "and what policies should be pursued in promoting" those goals. *WNCN*, 450 U.S. at 600.

Nothing in the statute requires that every FCC rule must advance each of the agency's public-policy objectives. And when the Commission determines that a regulatory change will advance one public-interest objective, it can implement that change without definitively ruling out any possibility that the change will disserve some other policy goal. The goal of preserving and increasing minority and female ownership of broadcast stations has long been an element of the Commission's public-interest determinations, but it is not an exception to these principles.

2. The Third Circuit's directive that the FCC must "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," Pet. App. 34a, also improperly imposes a procedural requirement above and beyond those that the APA and Section 202(h) establish. "Time and again, [this Court has] reiterated

that the APA 'sets forth the full extent of judicial authority to review executive agency action for procedural correctness.'" *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 101-102 (2015) (quoting *Fox*, 556 U.S. at 513). "Beyond the APA's minimum requirements, [a] court[ ] lack[s] authority 'to impose upon [an] agency its own notion of which procedures are "best" or most likely to further some vague, undefined public good.'" *Id.* at 102 (quoting *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978)) (fourth set of brackets in original). This Court has accordingly "rejected courts' attempts to impose 'judge-made procedur[es]' in addition to the APA's mandates." *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2385 (2020) (quoting *Perez*, 575 U.S. at 102) (brackets in original).

The decision below violates these principles by requiring, as a prerequisite to any change in the Commission's ownership rules, that the agency must determine with some unstated degree of precision the likely effect of the contemplated change on minority and female ownership. Pet. App. 34a. The court did not simply direct the agency to consider the existing record and public comments more carefully, but effectively required the FCC to supplement that record "through new empirical research or an in-depth theoretical analysis." *Ibid.* Neither Section 202(h) nor the APA imposes any such requirement. "That the [Third] Circuit would have struck the balance differently does not permit" it "to overturn Congress' contrary judgment." *Perez*, 575 U.S. at 102-103.

B. The Court Of Appeals Substituted Its Judgment For That Of The Agency

The court below also erred in holding that the FCC had not adequately explained the rationales for its Orders. See *State Farm*, 463 U.S. at 43. While acknowledging that an agency need only "justify its rule with a reasoned explanation" and is not subject to any "general obligation * * * to produce empirical evidence," Pet. App. 33a (quoting *Stilwell*, 569 F.3d at 519), the court vacated the Orders as purportedly "rest[ing] on faulty and insubstantial data" pertaining to minority and female ownership, *ibid.* It remanded with instructions for the agency to conduct "new empirical research" or an unspecified "in-depth theoretical analysis." *Id.* at 34a; see pp. 34-35, *supra*.

That reasoning reflects a fundamental misunderstanding of the principles that govern judicial review of agency action. The APA does not require perfect data, especially on issues other than those that motivated the rulemaking under review. Instead, when "the available data do not settle a regulatory issue," an agency may "exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion." *State Farm*, 463 U.S. at 52; see *NCCB*, 436 U.S. at 814 (explaining, in the specific context of the FCC's public-interest determinations, that "complete factual support in the record for the Commission's judgment or prediction is not possible or required"). "To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available" would seriously constrict the agency's statutory authority to regulate in the public interest. *RCA Commc'ns,* 346 U.S. at 96. The court of appeals' critiques of the agency's reasoning ran afoul of these principles.

1. In issuing the Reconsideration Order, the FCC did not overhaul its ownership restrictions *because of* the effect that step was projected to have on minority and female ownership. Rather, as its affirmative justification for the deregulatory approach it adopted, the agency determined that the original rationales for the ownership restrictions no longer applied, and that the Reconsideration Order would substantially further competition and localism in the broadcast industry. The court of appeals did not dispute the reasonableness or the empirical grounding of that aspect of the Commission's analysis.

The FCC discussed the Order's potential effect on minority and female ownership only in the course of analyzing whether possible *adverse* impacts on such ownership should dissuade the agency from taking a deregulatory step that it otherwise viewed as highly desirable. The agency's response to evidentiary gaps and predictive uncertainty must be assessed in light of that overall decision-making process. The court of appeals' insistence on more conclusive evidence and agency findings concerning this factor was especially unwarranted here, since the FCC did not invoke racial or gender diversity as its rationale for the challenged Orders.

2. The court below primarily faulted the agency for failing to cite any evidence regarding the effects that the proposed rule changes would have on "gender diversity." Pet. App. 30a. But as the FCC explained in the 2016 Order, no such evidence has been identified. See J.A. 174 n.212, 215 n.325. Rather, the NTIA data represent "the only data from [the relevant] time period that are available for purposes of comparison and evaluation of claims that relaxation" of prior ownership rules affected minority and female ownership. J.A. 174

n.212. And the NTIA data sets do "not include separate data on female ownership." *Ibid.*

The FCC further explained that, even if it had access to historical data pertaining to female ownership, "any attempt to conduct an empirical study of the relationship between cross-ownership restrictions and minority and female ownership would face obstacles that likely would make such study impractical and unreliable." 2014 Review, J.A. 95 n.595. And despite multiple requests for "comment on both study design and the likely connection" between the ownership rules and minority and female ownership, see pp. 7, 9-11, *supra*, "[n]o commenter introduced evidence" demonstrating "that changing the rules would [ ]likely affect ownership diversity." Pet. App. 45a (Scirica, J., concurring in part and dissenting in part); see Reconsideration Order, NAB Pet. App. 117a, 138a, 161a.

In rejecting the FCC's explanations for the dearth of probative evidence on this issue, the court of appeals emphasized certain statements in the Reconsideration Order to the effect that elimination of the ownership rules would "not have a material impact on minority and female ownership." NAB Pet. App. 117a; see Pet. App. 30a; Br. in Opp. 31, 33 (advancing same argument). In the court's view, "any ostensible conclusion as to female ownership was not based on *any* record evidence," Pet. App. 30a, and the Commission therefore acted improperly by "proceed[ing] on the basis that consolidation will not harm ownership diversity," *id.* at 34a.

This critique, premised on stray FCC statements taken out of context, was misplaced. To be sure, certain statements in the Orders suggest a conclusion that the rule changes *would not* reduce female (and minority) ownership. See, *e.g.*, NAB Pet. App. 117a. But those

statements must be read in the context of the agency's broader analysis and its repeated acknowledgements of limitations in the available evidence. The agency's bottom-line conclusion, repeated throughout the rulemaking, was simply that the record evidence did not affirmatively suggest any connection between the ownership rules and female and minority ownership levels. See, *e.g.*, Reconsideration Order, NAB Pet. App. 122a ("The record does not suggest that restricting common ownership of newspapers and broadcast stations promotes minority and female ownership of broadcast stations, and there is evidence in the record that tends to support the contrary."); *id.* at 138a ("[T]he record fails to demonstrate that eliminating the Radio/Television Cross-Ownership Rule is likely to harm minority and female ownership."); *id.* at 161a-162a ("[T]he record does not support a causal connection between modifications to the Local Television Ownership Rule and minority and female ownership levels."). The court of appeals did not take issue with that judgment.

Given this empirical uncertainty and the substantial competitive benefits of repeal, the agency made a discretionary policy judgment that it could not "justify retaining the rule[s] * * * based on the unsubstantiated hope that the rule[s] will promote minority and female ownership." Reconsideration Order, NAB Pet. App. 140a; see *id.* at 122a, 162a (similar). That judgment was eminently reasonable. And, contrary to the court of appeals' conclusion, the FCC did not "entirely fail[ ] to consider an important aspect of the problem." Pet. App. 30a (citation omitted). The agency recognized that evidence suggesting an impact on minority or female ownership would be relevant to its public-interest

analysis; it simply found that no persuasive evidence on that point had been identified. "The FCC's lack of some data relevant to one of [the public-interest] considerations 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.* at 52a (Scirica, J., concurring in part and dissenting in part).

3. The court of appeals also faulted the agency for using disparate data sets in comparing minority ownership rates before and after a prior round of ownership deregulation. Pet. App. 31a. Noting that the "NTIA and Form 323" "data sets were created using entirely different methodologies," the court stated that "[a]ttempting to draw a trendline between the NTIA data and the Form 323 data is plainly an exercise in comparing apples to oranges." *Ibid.* The court asserted, based on that mismatch, that "the FCC's analysis * * * would receive a failing grade in any introductory statistics class." *Id.* at 30a-31a.

Although the court's skepticism of the probative value of the available data was appropriate, its critique of the FCC's analysis was not. The FCC had *recognized* the evidentiary mismatch identified by the court of appeals, acknowledging in the 2016 Order that "combining older data with more recent data * * * introduces potential variation from differences in the way the data were collected rather than actual changes in the marketplace." J.A. 174 n.211; see J.A. 215 n.325; see also J.A. 215 (noting that "NTIA attributes approximately half the growth between 1999 and 1999/2000 to improved methodology for identifying minority owned stations"). And the panel did not contest that, despite "solicit[ing] evidence on this issue during the notice-and-

comment period, [the Commission] did not receive any information of higher quality than the NTIA/Form 323 data." Pet. App. 33a. Nor did the panel identify any plausible way for the agency to obtain more comprehensive or granular information about the precise effects of historical rule changes.

In "the absence of a continuous, unified data source," the Commission had no choice but to "rely on the available data, and [its] findings [were] consistent with [those] data." 2016 Order, J.A. 174 n.211; see J.A. 215 n.325. Particularly given its acknowledgment of the limitations in the record evidence, this was a permissible choice. See, *e.g.*, *Baltimore Gas & Elec. Co.* v. *Natural Res. Def. Council, Inc.*, 462 U.S. 87, 100 (1983) (rejecting arbitrary-and-capricious challenge where the agency neither "ignored [nor] failed to disclose the uncertainties surrounding [a critical] assumption"); *Sierra Club* v. *Costle*, 657 F.2d 298, 334 (D.C. Cir. 1981) (identifying "admission of uncertainties" as a characteristic of reasoned agency decision-making).

In any event, the court of appeals seriously overestimated the probative force of historical ownership data. "Even if the FCC could obtain improved data on these decades-old regulatory changes, that information offers only modest predictive value for the consequences of the FCC's current rules regarding modernization." Pet. App. 51a (Scirica, J., concurring in part and dissenting in part). The competitive landscape has changed dramatically since the agency's relaxation of its ownership rules in the 1990s, and there is no reason to believe that different regulatory modifications today would produce effects similar to those resulting from prior changes.

The court of appeals also suggested that the FCC should have performed a more sophisticated statistical analysis of the available data. Pet. App. 31a-32a. Specifically, the court observed that the FCC's comparison of the "absolute number of minority-owned stations at different times" included "no effort to control for possible confounding variables," such as "the total number of stations." *Id.* at 31a. And it faulted the Commission for failing to "assess the counterfactual scenario" of "how many minority-owned stations there would have been" "had there been no deregulation" in the 1990s. *Id.* at 32a.

That complaint is difficult to take seriously in light of the court of appeals' characterization of the relevant data sets as "apples" and "oranges." Pet. App. 31a. Given the imprecision in the raw data, any attempt to perform a regression analysis would have been futile and misleading—a point the Commission recognized and explained. As the 2014 Review observed with respect to the cross-ownership rules, "[a] rigorous econometric analysis would require that [the FCC] observe a sufficient number of markets in which cross-ownership and/or minority and female ownership levels recently have shown variation." J.A. 95 n.595. Because the cross-ownership restrictions "hav[e] been in place for such a long period of time," and "levels of minority and female ownership" have historically remained "low," "both cross-ownership and minority and female ownership levels show very little variation, making empirical study of the relationship between these multiple variables extremely difficult." *Ibid.* "In addition, any study necessarily would be based on a very small dataset for the same reasons." *Ibid.* A regression analysis therefore could not "extrapolate with any degree of confidence the

effect that changing the Commission's cross-ownership rules would have on minority and female ownership levels, and any attempt to do so would be misleading." *Ibid.*

C. The Decision Below Undermines The Proper Functioning Of Section 202(h) Reviews

The decision below requires a high degree of empirical certainty concerning potential impacts on minority and female ownership before the Commission can modify any of its ownership rules pursuant to Section 202(h). See Pet. App. 34a (ordering the Commission 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," before amending or repealing its rules). The court required that high level of certainty, moreover, with respect to a factor that was not even the FCC's affirmative basis for adopting the deregulatory approach reflected in the Reconsideration Order. See pp. 28-29, *supra*.

The court of appeals' analysis is incompatible with the rolling reviews Congress intended. Section 202(h) contemplates an iterative process by which the FCC makes frequent assessments of the public interest, revises its rules accordingly, and then monitors the effects of the new rules in anticipation of the next quadrennial review. See Part I.B.2, *supra*. The decision below substantially undermines that process, both by impeding the agency's ability to revise its rules in light of competitive changes in the marketplace, and by preventing the agency from gathering data regarding the effects of its rule changes.

1. To keep pace with rapid competitive developments, the FCC must have the leeway to make predictive judgments based on incomplete evidence. "[I]t is virtually impossible for an agency to compile an unchallengeable factual record in support of forward-looking rules designed to anticipate the future development of the marketplace." *Prometheus I*, 373 F.3d at 439 (Scirica, C.J., dissenting in part, concurring in part). Accordingly, "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency." *NCCB*, 436 U.S. at 814 (quoting *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)).

The court of appeals' requirement of a high degree of empirical certainty with respect to a single public-interest factor—a factor that is extremely difficult to measure and forecast—inhibits the Commission's ability to make the necessary predictive judgments and to modify its regulations as needed. The panel's approach has effectively frozen in place ownership rules that have indisputably outlived their competitive usefulness. As the Commission has explained in detail, "technological innovation and fundamental changes to the media marketplace have eroded many of the assumptions underlying the ownership rules." Pet. App. 43a (Scirica, J., concurring in part and dissenting in part) (citing, *e.g.*, Reconsideration Order, NAB Pet. App. 67a-68a, 92a-93a, 97a-98a, 116a-117a, 134a-135a, 144a-148a).

Indeed, as early as 2004, the court below recognized that "reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership [is] no longer in the public interest." *Prometheus I*, 373 F.3d at 398; see also *id.* at 387. That 1975 ban nevertheless remains in effect today, despite two

further FCC efforts to repeal it. See *Prometheus Radio Project* v. *FCC*, 652 F.3d 431, 472 (3d Cir. 2011) (Scirica, J., concurring in part, dissenting in part) ("The decision to vacate and remand the 2008 newspaper/broadcast cross-ownership rule * * * preserves an outdated and twice-abandoned ban."), cert. denied, 567 U.S. 951 (2012); Pet. App. 34a (majority vacating attempted repeal for third time). And with respect to the FCC's relaxation of the other ownership rules, "[n]o party identifies any reason to question the FCC's key competitive findings and judgments." Pet. App. 48a (Scirica, J., concurring in part and dissenting in part).

Retention of these outdated rules has inflicted, and will continue to inflict, competitive harm on broadcast markets. Most significantly, the ownership rules may "prevent[ ] local news outlets from achieving efficiencies by combining resources," which is critical as "the dominance of traditional news outlets diminishes" due to competition from cable and online sources. Reconsideration Order, NAB Pet. App. 93a, 101a; see *id.* at 137a, 147a. The continued existence of the newspaper/broadcast cross-ownership ban thus "come[s] at significant expense to parties that would" otherwise be able "to engage in profitable combinations." *Prometheus III*, 824 F.3d at 52. And because the Orders under review apply to the television, radio, and newspaper industries nationwide, the resulting competitive harm is potentially substantial.

2. Periodic rule revisions pursuant to Section 202(h) not only ensure that the Commission's regulatory approach can adapt to changing competitive realities, but also facilitate *subsequent* quadrennial reviews by enabling the FCC to assess how its rule changes "function

in the marketplace." Pet. App. 48a (Scirica, J., concurring in part and dissenting in part). Where (as here) the Commission confronts an "issue involving expert opinions and forecasts, which cannot be decisively resolved by testimony" or data, "a month of experience will be worth a year of hearings." *American Airlines, Inc.* v. *Civil Aeronautics Bd.*, 359 F.2d 624, 633 (D.C. Cir.) (en banc), cert. denied, 385 U.S. 843 (1966); see *NBC*, 319 U.S. at 225 ("Such problems may be examined again at some future time after the regulations here adopted have been given a fair trial.") (citation omitted); see also 2014 Review, J.A. 95 n.595 ("Variation in ownership structure over time, resulting from additional cross-owned entities, could provide additional data points to study in the future.").

By "depriv[ing] both the Commission and Congress [of] the valuable opportunity to evaluate the new rules and the effects of deregulation on the media marketplace," the court below has "[s]hort-circuit[ed] the statutory review process." *Prometheus I*, 373 F.3d at 438 (Scirica, J., dissenting in part, concurring in part). Rather than demanding empirical certainty up front, the court should have deferred to the Commission's reasonable predictive judgments. That approach would have allowed the agency to implement its new rules, "monitor the resulting impact on the media marketplace, and * * * refine or modify its approach in its next quadrennial review." *Id.* at 439.

The court of appeals' holding thus places the Commission in a Catch-22. The court barred the agency from revising its rules in the absence of precise data concerning the effect the revisions would have on minority and female ownership. But it is unclear how the FCC could now collect useful information concerning

the effects of decades-old regulatory changes on minority and female ownership. The agency's only plausible option is to evaluate the effects of its proposed rule changes *after* it implements them—something the panel's decision prevents it from doing. That decision leaves the FCC with no viable path forward.

D. The Court Of Appeals' Remedy Was Overbroad

The court of appeals compounded its analytic errors by issuing a dramatically overbroad remedy. Although the court limited its substantive analysis to the data and reasoning that underlay the ownership-rule changes in the Reconsideration Order, Pet. App. 27a, it vacated both the Reconsideration and Incubator Orders in full, as well as the "eligible entity" definition from the 2016 Order, *id.* at 34a. The court also ordered that "[o]n remand the Commission must ascertain on record evidence the likely effect of * * * whatever 'eligible entity' definition it adopts on ownership by women and minorities." *Ibid.* The court further directed that, "[i]f [the FCC] finds that its proposed definition for eligible entities will not meaningfully advance ownership diversity, it must explain why it could not adopt an alternate definition that would do so." *Ibid.* Those aspects of the court's remedy violate basic administrative-law principles, see pp. 21-23, 33-35, *supra*, and they do not even follow logically from the court's (flawed) analysis of the Reconsideration Order's ownership-rule changes.[7]

---

[7] Vacatur was plainly unjustified as to unrelated portions of the Orders that the court failed to address at all. See, *e.g.*, Reconsideration Order, NAB Pet. App. 164a-165a, 178a (pertaining to embedded local radio markets and joint services attribution).

1. In the 2016 Order, the FCC specifically designed its "eligible entity" definition to promote small-business participation in broadcast markets, *not* minority and female ownership of broadcast stations. See 2016 Order, J.A. 378, 384-387. The decision to pursue that goal represents a valid exercise of the Commission's authority to regulate in the public interest, and the agency explained at length why an explicitly race- or gender-conscious standard likely would not satisfy constitutional scrutiny. J.A. 397-410, 414-429.

The court of appeals failed to address the Commission's analysis underlying its chosen definition. The relevant statutes do not require *every* FCC rulemaking to promote minority and female ownership. In vacating the Reconsideration Order's ownership-rule revisions, the court found that the FCC had not adequately ruled out the possibility that those revisions would *reduce* minority and female ownership levels. With respect to the FCC's "eligible entity" definition, however, "[n]othing in the present record suggests" that the FCC's definition would "*harm* ownership diversity." Pet. App. 54a (Scirica, J., concurring in part and dissenting in part) (emphasis added). Thus, even if it were sound, the court of appeals' rationale for vacating the ownership-rule revisions in the Reconsideration Order would not cast doubt on the eligible-entity definition.

2. In adopting the eligibility criteria for the incubator program, the agency similarly sought to promote ownership opportunities for new market entrants. See Incubator Order, J.A. 578-579. The court of appeals did not suggest that the agency's stated goal was invalid or that the eligibility criteria were inadequately tailored to advance that goal. And while the Commission concluded that a race- or gender-conscious standard would

be unlikely to survive constitutional scrutiny, J.A. 605 n.55, it cited data suggesting that a standard related to the one it proposed to adopt had previously increased successful minority and female participation in auctions for broadcast construction permits, J.A. 598-603.

The court of appeals failed to engage with any of this reasoning. Nor did the court explain how its rationale for overturning the Reconsideration Order's ownership-rule revisions—*i.e.*, the agency's purported failure adequately to consider the possibility that the revisions would *reduce* minority or female ownership of broadcast stations—could apply to the incubator program. This aspect of the court of appeals' remedy therefore likewise could not be sustained, even if the court's vacatur of the ownership-rule revisions was proper.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

THOMAS M. JOHNSON, JR.
General Counsel
ASHLEY S. BOIZELLE
Deputy General Counsel
JACOB M. LEWIS
Associate General Counsel
JAMES M. CARR
WILLIAM SCHER
Attorneys
Federal Communications Commission

JEFFREY B. WALL
Acting Solicitor General
MAKAN DELRAHIM
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
MICHAEL F. MURRAY
Deputy Assistant Attorney General
AUSTIN L. RAYNOR
Assistant to the Solicitor General

NOVEMBER 2020

APPENDIX

1. 5 U.S.C. 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

2. 47 U.S.C. 161 provides:

Regulatory reform

(a) Biennial review of regulations

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

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

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

(b) Effect of determination

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

3. 47 U.S.C. 303 provides in pertinent part:

Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * * *

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: *Provided*, *however*, That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;

* * * * *

BROADCAST OWNERSHIP

Pub. L. 104-104, title II, § 202, Feb. 8, 1996, 110 Stat. 110, as amended by Pub. L. 108-199, div. B, title VI, § 629, Jan. 23, 2004, 118 Stat. 99, provided that:

"(a) NATIONAL RADIO STATION OWNERSHIP RULE CHANGES REQUIRED.—The Commission shall modify section 73.3555 of its regulations (47 C.F.R. 73.3555) by eliminating any provisions limiting the number of AM or FM broadcast stations which may be owned or controlled by one entity nationally.

"(b) LOCAL RADIO DIVERSITY.—

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

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

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

"(C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and

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

"(2) EXCEPTION.—Notwithstanding any limitation authorized by this subsection, the Commission may permit a person or entity to own, operate, or control, or have a cognizable interest in, radio broadcast stations if the Commission determines that such ownership, operation, control, or interest will result in an

increase in the number of radio broadcast stations in operation.

"(c) TELEVISION OWNERSHIP LIMITATIONS.—

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

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

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

"(2) LOCAL OWNERSHIP LIMITATIONS.—The Commission shall conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market.

"(3) DIVESTITURE.—A person or entity that exceeds the 39 percent national audience reach limitation for television stations in paragraph (1)(B) through grant, transfer, or assignment of an additional license for a commercial television broadcast station shall have not more than 2 years after exceeding such limitation to come into compliance with such limitation. This divestiture requirement shall not

apply to persons or entities that exceed the 39 percent national audience reach limitation through population growth.

"(4) FORBEARANCE.—Section 10 of the Communications Act of 1934 (47 U.S.C. 160) shall not apply to any person or entity that exceeds the 39 percent national audience reach limitation for television stations in paragraph (1)(B);[.]

"(d) RELAXATION OF ONE-TO-A-MARKET.—With respect to its enforcement of its one-to-a-market ownership rules under section 73.3555 of its regulations, the Commission shall extend its waiver policy to any of the top 50 markets, consistent with the public interest, convenience, and necessity.

"(e) DUAL NETWORK CHANGES.—The Commission shall revise section 73.658(g) of its regulations (47 C.F.R. 658(g)) to permit a television broadcast station to affiliate with a person or entity that maintains 2 or more networks of television broadcast stations unless such dual or multiple networks are composed of—

"(1) two or more persons or entities that, on the date of enactment of the Telecommunications Act of 1996 [Feb. 8, 1996], are 'networks' as defined in section 73.3613(a)(1) of the Commission's regulations (47 C.F.R. 73.3613(a)(1)); or

"(2) any network described in paragraph (1) and an English language program distribution service that, on such date, provides 4 or more hours of programming per week on a national basis pursuant to network affiliation arrangements with local television broadcast stations in markets reaching more

than 75 percent of television homes (as measured by a national ratings service).

"(f) CABLE CROSS OWNERSHIP.—

"(1) ELIMINATION OF RESTRICTIONS.—The Commission shall revise section 76.501 of its regulations (47 C.F.R. 76.501) to permit a person or entity to own or control a network of broadcast stations and a cable system.

"(2) SAFEGUARDS AGAINST DISCRIMINATION.—The Commission shall revise such regulations if necessary to ensure carriage, channel positioning, and nondiscriminatory treatment of nonaffiliated broadcast stations by a cable system described in paragraph (1).

"(g) LOCAL MARKETING AGREEMENTS.—Nothing in this section shall be construed to prohibit the origination continuation, or renewal of any television local marketing agreement that is in compliance with the regulations of the Commission.

"(h) FURTHER COMMISSION REVIEW.—The Commission shall review its rules adopted pursuant to this section and all of its ownership rules quadrennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 [47 U.S.C. 161] and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest. This subsection does not apply to any rules relating to the 39 percent national audience reach limitation in subsection (c)(1)(B).

"(i) ELIMINATION OF STATUTORY RESTRICTION.—[Amended section 533(a) of this title.]"

* * * * *

4. 47 U.S.C. 309(a) provides:

Application for license

(a) Considerations in granting application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.