Nos. 19-1231 & 19-1241

In the
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,

v.

PROMETHEUS RADIO PROJECT, *ET AL.*,
Respondents.

NATIONAL ASSOCIATION OF BROADCASTERS, *ET AL.*,
Petitioners,

v.

PROMETHEUS RADIO PROJECT, *ET AL.*,
Respondents.

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

BRIEF *AMICI CURIAE* OF FORMER FCC COMMISSIONERS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are all proud to have previously served the country as Chairs or Commissioners of the Federal Communications Commission: Chairman Newton Minow (1961-1963); Commissioner Nicholas Johnson (1966-1973); Commissioner Tyrone Brown (1977-1981); Chairman Reed Hundt (1993-1997); Chairman William Kennard (1997-2001); Commissioner Gloria Tristani (1997-2001); Commissioner Jonathan Adelstein (2002-2009); Chairman Julius Genachowski (2009-2013); and Chairman Tom Wheeler (2013-2017).

In the aggregate, our service includes time at the Commission during each of the last six decades—from the 1960s into the twenty-first century. We each recognized the public interest standard as the lodestar of the broadcasting provisions of the Communications Act. We understood the importance of exercising that standard consistent with fundamental democratic principles to ensure the "widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). Fostering viewpoint diversity thereby promoted our nation's First Amendment values. We further understood that ensuring diverse broadcast ownership, including

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties have provided consent to the filing of this *amici curiae* brief.

ownership by women and members of minority groups, is important to achieving that goal.

Over the years, the Commission has continuously maintained such an understanding of the public interest, up to and including the present day. Congress both shared the Commission's view and reinforced it. For example, three years prior to the enactment of the statutory provision at the center of this case, Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (1996) ("Section 202(h)"), Congress directed the Commission to ensure, while adopting rules to use auctions to distribute spectrum licenses, that "businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services . . . ." 47 U.S.C. § 309(j)(4)(D). In short, during our collective tenure, the Commission and Congress considered minority and female ownership to be a central component of the public interest standard.

Accordingly, the Industry Petitioners' claims to the contrary deeply trouble us. For example, they claim that "[h]istorically, . . . the Commission interpreted the public interest—in the specific context of structural ownership rules—to include competition, localism, and viewpoint diversity, *not* minority and female ownership." Indus. Pet'rs' Br. at 20 (emphasis in original). That is simply incorrect. Similarly, the claim that the Third Circuit's decision in this case followed from "judge-made policy concerns" is equally incorrect. *Id.* at 21. Each of us understood the Commission, often at Congress's direction, to be obligated to ascertain the effect of its rules on ownership by women and minorities. Congress

enacted Section 202(h) against that backdrop, and we continually interpreted the references to the public interest in Section 202(h) to require such an inquiry.

Amici have substantial experience with judicial review of the agency's rulemaking processes. We are also well aware of the expertise that the Commission, through its members and in particular its multifaceted, cross-disciplinary staff, brings to exercising its congressionally mandated tasks. We are also deeply familiar with the exacting statutory requirement to engage in reasoned analysis leading to each and every rulemaking. It is therefore with some disappointment that we find ourselves agreeing with the Third Circuit here. In finding no harm from its relaxation of media ownership rules, the Commission's analysis was "so insubstantial that it would receive a failing grade in any introductory statistics class." *Prometheus Radio Project v. FCC*, 939 F.3d 567, 586 (3d Cir. 2019) ("*Prometheus IV*"); Indus. Pet'rs' App. at 38a. The importance of the questions presented here and our experience together motivate us to express our views.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. For more than 85 years, Congress has mandated that the Commission regulate broadcasters in the public interest. *See, e.g.*, 47 U.S.C. §§ 303(f), 309(a). Throughout the intervening decades, in accordance with direction from both the courts and Congress, the Commission has continuously exercised its public interest authority to advance our nation's core First Amendment principles, including by ensuring that

broadcasters be "diverse and antagonistic." *Associated Press*, 326 U.S. at 20.

In so doing, the Commission has long held that the public interest is served by promoting media diversity, including minority and female media ownership—both as a catalyst for other forms of diversity and as a diversity objective in its own right. *See, e.g.*, *2002 Biennial Regulatory Review—Review of the Comm'n's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, Report & Order, 18 FCC Rcd. 13,620, 13,627 (2003) ("*2002 Biennial Regulatory Review Report*") ("There are five types of diversity pertinent to media ownership policy: viewpoint, outlet, program, source, and minority and female ownership diversity."). The fundamental thesis is that ownership correlates to point of view, and point of view correlates to audience. Thus, with respect to the forms of media ownership Congress has directed the Commission to regulate in the public interest, the Commission has sought to inform, engage, and bring into collective discourse the entirety of the nation. *See id.* at 13,774 ("[F]ostering the availability of diverse viewpoints remains an important policy goal, and . . . diversity of ownership promotes diversity of viewpoints."). To that end, in 1995, the Commission unequivocally stated: "We believe that the public interest is served by increasing economic opportunities for minorities and women to own communications facilities." *Policies & Rules Regarding Minority & Female Ownership of Mass Media Facilities*, Notice of Proposed Rulemaking, 10 FCC Rcd. 2788, 2789 (1995) ("*Policies & Rules re Minority & Female Ownership*").

The Commission's 1995 conclusion that diversity in ownership advances the public interest reflected Congress's repeated instructions to advance minority and female ownership. For example, as explained below, in 1982, 1987, and 1993, Congress enacted legislation requiring the Commission to focus on ownership by women and minorities when distributing broadcast licenses by various means. *See* 47 U.S.C. § 309(i)(3)(A) (lotteries); Pub. L. No. 100-202, 101 Stat. 1329 (1987) (distress sales and tax certificates); 47 U.S.C. § 309(j)(4)(D) (auctions). As also illustrated below, courts, including this Court, recognized and approved the Commission's concern for advancing minority and female ownership as part of its public interest analysis. *See, e.g.*, *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 557 (1990), *overruled in part by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *W. Mich. Broad. Co. v. FCC*, 735 F.2d 601, 612 (D.C. Cir. 1984).

This longstanding history confirms Respondents' view that Section 202(h) did nothing to change the Commission's public interest mandate. Section 202(h) requires the Commission to:

> review its rules adopted pursuant to this section and all of its ownership rules [quadrennially] as part of its regulatory reform review under section 11 of the Communications Act of 1934 and . . . 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.

In enacting Section 202(h), Congress did not jettison, but retained—with dual references—the "public interest" as the lodestar guiding the Commission's regulation of media ownership. Nothing in the text or otherwise suggests that Congress intended to change the Commission's long understanding of its public interest duty to advance media diversity, including minority and female ownership. Had Congress wanted to work such a fundamental change in the Commission's well-established approach, it would have done so more clearly.

Nor has the Commission understood the statute that way. To the contrary, as the Government Petitioners themselves explain, "[a]lthough 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." Gov't Br. at 18. Indeed, the Commission has continuously and repeatedly considered ownership diversity along these lines in the quadrennial review context ordered by Section 202(h), and has never disavowed that understanding, up to—and including—the orders under review.

II. Here, the Commission understood its duties, but did not fulfill them. In the Reconsideration Order on review, the Commission recognized that it was necessary to analyze the effect of its rule changes on ownership by women and members of minority

groups, but jumped to the conclusion that those changes would not adversely affect diversity on the basis of badly flawed data and analysis. *See, e.g.*, *2014 Quadrennial Regulatory Review—Review of the Comm'n's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, Order on Reconsideration, 32 FCC Rcd. 9802, 9810-11, 9826-27, 9832, 9839-40 (2017) ("Reconsideration Order"); Indus. Pet'rs' App. at 86a-88a, 127a-128a, 142a, 161a-162a. As the Third Circuit noted, the Commission had no data concerning ownership by women. *Prometheus IV*, Indus. Pet'rs' App. at 35a-37a. It had only flawed data concerning minority ownership, and it engaged in deeply flawed analysis of that data. *See id.* at 38a-39a. For example, the Commission analyzed only the total number of stations owned by minority groups, rather than determining the effect of prior deregulation on the percentage of stations owned by minorities. *See id.* The Government contends that the Third Circuit "demand[ed] empirical certainty" and suggests that it required the Commission to perform a "regression analysis." Gov't Br. at 42, 46. Not so. The court merely—and correctly—required the Commission to conduct a reasoned analysis consistent with the Administrative Procedure Act.

ARGUMENT

I. THE COMMISSION HAS LONG HELD THAT THE PUBLIC INTEREST IS SERVED BY PROMOTING MEDIA DIVERSITY—INCLUDING MINORITY AND FEMALE OWNERSHIP.

Industry Petitioners erroneously contend that the statute requires the "Commission to consider competition, not minority and female ownership, in conducting Section 202(h) reviews." Indus. Pet'rs' Br. at 5. Industry Petitioners also mischaracterize and deride minority and female ownership as "judge-made policy concerns" and "non-statutory policy goal[s]" the Third Circuit has wrongly imposed upon the agency. *See* Indus. Pet'rs' Br. at 9, 21, 35. But the fact that Congress directed the Commission to review the impact of "competition" on the "public interest" did not work such a fundamental change in the Commission's public interest mandate or otherwise invalidate the Commission's understanding of how diversity, including minority and female ownership, serves the public interest. To the contrary, Congress plainly distinguished between competition and the public interest, and ordered the Commission to consider the effect of competition on the factors the Commission considered as part of its public interest analysis. And far from being a Third Circuit invention foisted upon the agency, promoting diversity, including minority and female media ownership, has been and remains a well-established and important component of the Commission's public interest review.

To correct the Industry Petitioners' unfounded contentions, we trace below the FCC's historical interpretation of the public interest mandate as it relates to diversity generally, and to minority and female ownership specifically—both before and after the 1996 Act. This history conclusively demonstrates that the FCC itself—and not the Third Circuit—has long interpreted the "public interest" to include protecting and promoting media diversity, including

minority and female ownership, and that Congress did nothing to change that in Section 202(h).

A. Diversity Considerations Have Always Been a Bedrock of the Commission's Public Interest Mandate.

From its genesis, the Commission has placed significant focus on serving the interests of minority populations both to advance broader conceptions of diversity and as a stand-alone diversity objective. As the Commission has explained, "[d]iversity of ownership fosters diversity of viewpoints, and thus advances core First Amendment principles . . . by assuring that the programming and views available to the public are disseminated by a wide variety of speakers." *1998 Biennial Regulatory Review—Review of the Comm'n's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, Biennial Review Report, 15 FCC Rcd. 11,058, 11,062 (2000) ("*1998 Biennial Regulatory Review Report*").

As early as 1946, the Commission noted that "[i]t has long been an established policy of . . . the Commission that the American system of broadcasting must serve significant minorities among our population." FCC, *Report on Public Service Responsibility of Broadcast Licensees* 15 (1946). The Commission furthered this goal in 1953 by enacting its first regulation of multiple ownership. *Amendment of Sections 3.35, 3.240 & 3.636 of the Rules & Regulations Relating to Multiple Ownership of AM, FM & Television Broad. Stations*, Report & Order, 18 F.C.C. 288, 291 (1953). The Commission enacted this regulation in part based on its "view that the

operation of broadcast stations by a large group of diversified licensees will better serve the public interest than the operation of broadcast stations by a small and limited group of licensees." *Id.*

The Commission's focus on diversity and the advancement of minority interests began to evolve, with judicial guidance, to specifically promote the interest of *racial* minorities and women around the time of the civil rights movement. In a seminal 1966 case, the D.C. Circuit considered a decision by the Commission to renew the license of a Mississippi broadcaster who engaged in a pattern of promoting pro-segregation viewpoints to the exclusion of contrary positions. *Office of Commc'n of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). The Commission recognized that the broadcaster's past behavior "would preclude the statutory finding of public interest necessary for license renewal." *Id.* at 1007. But the Commission elected to renew the license for one year, rather than three, because there was only one other radio station serving the area, a decision then-Judge Burger described as "elect[ing] to post the Wolf to guard the Sheep in the hope that the Wolf would mend his ways because some protection was needed at once and none but the Wolf was handy." *Id.* at 1008. The court held that it was error for the Commission to renew the license. *Id.* at 1009. As this Court later noted, the court's decision in *United Church of Christ* established the Commission's "obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *See NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 670 n.7 (1976). It also

foreshadowed a shift towards prioritizing the identity of broadcasters over broadcaster multiplicity.

In 1967, President Lyndon Johnson appointed a committee to study the racial unrest across the country throughout the 1960s and to provide recommendations for remedying racial tensions. Nat'l Advisory Comm'n on Civil Disorders, *The Kerner Report* 16-30 (Princeton Univ. Press 2016) (1968). The so-called "Kerner Report," a reference to its chairman, Illinois Governor Otto Kerner, identified the lack of minority representation in mainstream media as an underlying cause of racial unrest. *Id.* The Report advised that "[t]he news media must publish newspapers and produce programs that recognize the existence and activities of the Negro, both as a Negro and as part of the community." *Id.* at 21. Additionally, the Kerner Report recommended that the media "[r]ecruit more Negroes into journalism and broadcasting and promote those who are qualified to positions of significant responsibility." *Id.* Although the Kerner Report did not state minority ownership as an explicit goal, the committee members made clear that they expected minority leadership in media to positively affect programming diversity.

Following *United Church of Christ* and the Kerner Report, the Commission took further steps towards fulfilling its public interest duties regarding minority representation. In 1971, the Commission required that a broadcast applicant must "submit such data as is necessary to indicate the minority, racial, or ethnic breakdown of the community." *Primer on Ascertainment of Cmty. Problems by Broad. Applicants, Part i, Sections IV-A & IV-B of FCC*

Forms, Report & Order, 27 F.C.C.2d 650, 662 (1971). This data allowed an applicant to complete a "study of the composition of his community," *id.*, and thereby, upon approval, plan his "program schedules to meet the needs and interests of the communities they are licensed to serve," *Application of Time-Life Broad., Inc. for Renewal of License of KLZ-TV, Denver, Colo.*, Memorandum Opinion & Order, 33 F.C.C.2d 1081, 1093 (1972). In requiring this consideration, the Commission was explicit that "[t]he problems of minorities must be taken into consideration." *Id.*

B. By 1996, Minority and Female Ownership Was an Unambiguous, Independent, and Established Component of the Public Interest Mandate.

For decades, the courts, Congress, and the Commission have understood the Commission's public interest mandate to include consideration of minority ownership interests. In its 1971 decision in *Citizens Communications Center v. FCC*, for example, the D.C. Circuit stated that:

> As new interest groups and hitherto silent minorities emerge in our society, they should be given some stake in and chance to broadcast on our radio and television . . . frequencies. According to the uncontested testimony of petitioners, no more than a dozen of 7,500 broadcast licenses issued are owned by racial minorities. . . . [Accordingly,] [d]iversification is a factor properly to be weighed and balanced with other important factors, including the renewal

> applicant's prior record, at a renewal hearing.

447 F.2d 1201, 1213 n.36 (D.C. Cir. 1971), *clarified by Citizens Commc'ns Ctr. v. FCC*, 463 F.2d 822 (D.C. Cir. 1972). Notably, *Citizens Communications Center* did not connect minority ownership to viewpoint diversity, but rather implied that simply allowing minorities a voice within the broadcasting space, whatever content they chose to air, is in the public interest.

The D.C. Circuit's 1973 decision in *TV 9, Inc. v. FCC* confirmed the relationship between minority ownership and the public interest. 495 F.2d 929, 936 (D.C. Cir. 1973). There, the court considered a dispute over the Commission's decision to award applicant Mid-Florida Television Corporation a construction permit to broadcast on Channel 9 in Orlando, Florida. *Id.* at 931. Comint Corporation, one of the denied applicants, argued that it should have received preference in the application process because two African-American men served in ownership and management positions with the company. *Id*. at 935. The Commission had declined to award Comint any preference on this basis, stating that "Black ownership cannot and should not be an independent comparative factor . . . rather, such ownership must be shown on the record to result in some public interest benefit." *Id.* at 936 (omission in original).

The court determined that the Commission had misinterpreted the public interest standard. The court explained that minority ownership is in the public interest whenever there is a "[r]easonable expectation" that diverse ownership will increase

content diversity. *Id.* at 938. Minority ownership need only be "likely," not certain, to increase diversity of content to support a Commission preference within the application process. *Id.* No "advance demonstration" is necessary to make that showing. *Id.*

Following *TV 9*, the Commission convened a conference on minority ownership policies. *Metro Broad.*, 497 U.S. at 555 (citing FCC Minority Ownership Task Force, *Report on Minority Ownership in Broadcasting* 4-6 (1978)). The next year, it issued a Statement of Policy on Minority Ownership of Broadcasting Facilities. *Statement of Policy on Minority Ownership of Broad. Facilities*, Public Notice, 68 F.C.C.2d 979 (1978). In this policy statement, the Commission stressed that "the present lack of minority representation in the ownership of broadcast properties is a concern to us. We believe that diversification in the areas of programming and ownership—legitimate public interest objectives of this Commission—can be more fully developed through our encouragement of minority ownership of broadcast properties." *Id.* at 981. In reaching this conclusion, the Commission extensively cited both *Citizens Communications Center* and *TV 9*, stating that the court had "made plain that minority ownership and participation in station management is in the public interest both because it would inevitably increase the diversification of control of the media and because it could be expected to increase the diversity of program content." *Id.* at 982. Embracing this conception of the public interest standard, the Commission enacted several programs to increase diversity, including tax certificates and the transfer of licenses at reduced "distress sale prices" to minority

applicants. *Id.* at 983-84. The Commission also emphasized the independent significance of minority ownership, apart from the potential to increase viewpoint diversity:

> [A]n increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum. And, of course, we have long been committed to the concept of diversity of control because "diversification . . . is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities."

Id. at 981 (quoting *Policy Statement on Comparative Broad. Hearings*, Public Notice, 1 F.C.C.2d 393, 394 (1965)).

Far from objecting, Congress reinforced the Commission's view that the public interest included considerations of minority and female ownership. In 1982, Congress passed legislation which required the Commission to grant a "significant preference" to "any applicant controlled by a member or members of a minority group" in the context of 47 U.S.C. § 309 application lotteries. 47 U.S.C. § 309(i)(3)(A). As later described by the D.C. Circuit, this enactment demonstrated that Congress "clearly" shared the Commission's view on the importance of minority and female ownership to the public interest mandate. *W. Mich. Broad. Co.*, 735 F.2d at 612. Pursuant to this legislation, the Commission soon thereafter adopted rules which required that "minority and diversity

preferences be given to certain mass media applicants." *Amendment of the Comm'n's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, Second Report & Order, 93 F.C.C.2d 952, 953 (1983). In enacting these rules, the Commission acted in the public interest to "increase minority ownership and enhance ownership . . . diversity generally." *Id.* at 957.

In essentially the inverse case from *TV 9*, in 1984 the D.C. Circuit considered a challenge to the Commission's award of a "substantial enhancement" to a minority-owned station competing for a construction permit. *W. Mich. Broad. Co.*, 735 F.2d at 603. The non-minority-owned applicant argued that the Commission had erred in applying this preference because, unlike *TV 9*, in which the parties were competing for a permit in the Orlando area, the part of Michigan where the applicants sought to provide service did not have a largely minority population. The lack of minority viewers, the non-minority applicant argued, obviated the public interest rationale for preferring minority ownership.

The Commission argued that "minority ownership promotion policies have never been exclusively premised on the goal of providing particular minority audiences" with programming aimed at their interests. *Id.* at 609. The court agreed with the Commission that pursuing minority ownership was a "generally legitimate" goal under the Commission's public interest mandate, even when not directly linked to meeting "unmet listening needs of minority communities." *Id.* at 611-12. The court also reviewed

prior and related Commission policy, leading it to conclude that "the Commission's position in this case, and the conception of the public interest it embodies, is wholly consistent with the overall policies it has pursued." *Id.* at 612.

The Supreme Court considered similar issues in *Metro Broadcasting*, 497 U.S. 547. There, the Court considered whether minority preferences in comparative proceedings for new licenses and minority distress sales violated equal protection principles. In making its determination, the Court found that "minority ownership policies are . . . substantially related to the goal of promoting broadcast diversity," and are thus supported by the public interest mandate. *Id.* at 584. The Court acknowledged that "there is no ironclad guarantee that each minority owner will contribute to diversity." *Id*. at 579. Still, the Court unambiguously found that minority ownership is an important component of the public interest standard. *See id.* at 597 (discussing "public interest factors such as minority ownership"); *see also Garrett v. FCC,* 513 F.2d 1056, 1061-63 (D.C. Cir. 1975) (explaining that the Commission should take into account ownership diversity because of the reasonable expectation that minority ownership will lead to more diverse and responsive programming).

Although the Commission and the courts discussed female ownership periodically in conjunction with minority ownership, by the late 1980s, female ownership began to gain equal footing with minority ownership as part of the public interest mandate. Congress not only embraced but helped to drive this view. In 1987, the Congressional Committee on

Appropriations stated that "[i]n approving a lottery system for the selection of certain broadcast licensees, the Congress explicitly approved the use of preferences to promote minority and women ownership." S. Rep. No. 100-182, at 76-77 (1987). That year, Congress included in the Commission's appropriations legislation language requiring that the Commission not repeal "distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses." Pub. L. No. 100-202, 101 Stat. 1329 (1987).

In 1993, when Congress amended 47 U.S.C. § 309 to authorize the Commission to assign spectrum by auction rather than lottery, it reaffirmed the importance of such diversity. Congress specifically directed the Commission to ensure that "minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures." 47 U.S.C. § 309(j)(4)(D). Although this provision does not involve broadcast ownership, it reflects a congressional mandate that the interests of minority and female ownership be prioritized. As later summarized by the Commission, in making this amendment, "Congress specifically recognized that it is consistent with the public interest to adopt competitive bidding procedures that promote economic opportunity for a wide variety of applicants, including minorities and women." *Policies & Rules re Minority & Female Ownership* at 2790.

Thus, by the mid-1990s, the Commission's view was well established and unambiguous: the "public

interest" was served by preserving and promoting diversity, including minority and female ownership. The Commission actively sought comment on ways "to provide minorities and women with greater opportunities to enter the mass media industry, specifically including the broadcast, cable, wireless cable, and low power television services." *Id.* at 2788. As the Commission unequivocally stated, "[w]e believe that the public interest is served by increasing economic opportunities for minorities and women to own communications facilities." *Id.* at 2789.

C. Section 202(h) Did Not Alter the Commission's View that the Public Interest Is Served by Diversity, Including Minority and Female Ownership.

The longstanding history described above confirms Respondents' reading of the statute and that Section 202(h) did not, as the Industry Petitioners contend, fundamentally change the Commission's public interest mandate. Rather, Congress adopted Section 202(h) against this historical backdrop.

Section 202(h) states:

> The Commission shall review its rules adopted pursuant to this section and all of its ownership rules [quadrennially] as part of its regulatory reform review under section 11 of the Communications Act of 1934 and . . . 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.

"[N]othing in § 202(h) signals a departure from [the] historic scope" of the Commission's public interest mandate. *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1042 (D.C. Cir. 2002). Far from rescinding the Commission's "public interest" standard for media ownership regulation, Congress doubled down on it in Section 202(h) by using the phrase "public interest" two times. To be sure, Section 202(h) directs the Commission to consider whether the rules are necessary in the public interest "as a result of competition." But Section 202(h) preserves the primacy of the Commission's overall "public interest" determination and provides no evidence that Congress intended to change the Commission's authority to interpret that broader term.

Industry Petitioners vehemently contend that, unlike the express reference to "competition," Section 202(h) does not *require* the Commission to consider minority and female ownership as part of the "public interest." Indus. Pet'rs' Br. at 20-21, 27-32. But that is beside the point. The Commission is doubly required to consider the public interest by the statutory text. And nothing in the statute prevented the Commission from continuing to define the "public interest" to include diversity and to consider minority and female ownership consistent with decades of pre-1996-Commission and judicial precedent. Even the Industry Petitioners acknowledge, albeit in a footnote that undermines their text, that minority ownership has long been a factor in the Commission's public interest analysis. *Id.* at 39 n.12. Against that

backdrop, it was clear when Section 202(h) was enacted that ownership by women and members of minority groups was part of the public interest analysis, and whether a regulation remains in the public interest therefore depends in part on its effect on minority and female ownership. Had Congress wanted to work the fundamental change envisioned by Industry Petitioners, it would have done more than add the phrase "as the result of competition" while maintaining—twice over—the public interest as the lodestar of broadcast regulation.

Industry Petitioners also invoke *Adarand* and suggest that it prohibits "consideration of minority and female ownership." Indus. Pet'rs' Br. at 31-32. But while *Adarand*'s strict scrutiny standard may limit the remedies available to increase minority and female ownership, it does not prohibit *consideration* of the effect of Commission rules on minority and female ownership. The Commission's longstanding interpretation of the public interest standard is plainly separate from what steps are appropriate to advance the public interest.

Nor does anything in the statute support restricting the Commission's consideration of the "public interest," as Industry Petitioners propose, *id.* at 32, to the original rationale for adopting an ownership rule. Instead, as the Government explains, "[a]lthough 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." Gov't Br. at 18. Even if Industry

Petitioners' preferred reading of Section 202(h) were permissible, the Commission has never adopted it. To the contrary, in none of its quadrennial reviews—including the one at issue in this case—has the Commission ever disavowed that the public interest is served by diversity, including minority and female ownership.

Pursuant to Section 202(h), as the Commission considers repealing or modifying a rule, it must evaluate all the public interest implications of that decision to determine whether the rule is "no longer in the public interest." The corollary is true: if the Commission considers a specific factor in evaluating whether a rule should be repealed, it does so because that factor is a component of the public interest standard. This is particularly true when a factor is considered time and time again, in multiple contexts and under multiple different administrations. In its quadrennial reviews, the Commission has repeatedly evaluated minority and female ownership in its public interest analysis, demonstrating that such considerations fall squarely within the Commission's conception of the public interest standard.

Respondents' brief ably recounts the Commission's sustained commitment to diversity in carrying out Section 202(h) reviews. Resp'ts' Br. at 5-16. While different Commission reviews have reached different results, the Commission has continuously and repeatedly recognized the critical importance of diversity, including minority and female ownership diversity, to the public interest. *See 1998 Biennial Regulatory Review Report* at 11,062 (explaining that "[d]iversity of ownership fosters diversity of

viewpoints, and thus advances core First Amendment principles"); *id.* at 11,059, 11,073 (considering whether the "elimination of, or increase in, the [National TV Ownership] cap would . . . increase minority ownership by removing the cap as an impediment to broadcasters obtaining attributable equity interests in minority-owned television stations"); *2002 Biennial Regulatory Review Report* at 13,627 (citing "five types of diversity pertinent to media ownership policy: viewpoint, outlet, program, source, and minority and female ownership diversity"); *id.* at 13,634 (explaining that "[e]ncouraging minority and female ownership historically has been an important Commission objective"); *2006 Quadrennial Regulatory Review—Review of the Comm'n's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, Report & Order, 23 FCC Rcd. 2010, 2068 (2008) (reinstating the failed station solicitation rule "[t]o ensure that we do not negatively impact minority owners"); *2014 Quadrennial Regulatory Review—Review of the Comm'n's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, Second Report & Order, 31 FCC Rcd. 9864, 9871 (2016) ("*2014 Quadrennial Review 2nd Report & Order*") ("[T]he Local Television Ownership Rule continues to be consistent with our goal of promoting minority and female ownership of broadcast television stations."); *id.* at 9911 ("We affirm our tentative conclusion that the [Local Radio Ownership Rule] remains consistent with the Commission's goal to promote minority and female ownership of broadcast radio stations."); *id.* at 9917 ("[The Newspaper/Broadcast Cross-Ownership

Rule] does not have a significant impact on minority and female broadcast ownership . . . .").

In its Reconsideration Order at issue here, Indus. Pet'rs' App. at 64a-310a, the Commission did not break this interpretive chain. To the contrary, it affirmed the public interest policy goals of "viewpoint diversity, localism, and competition," and declined to consider "arguments that ownership does not influence viewpoint." *See, e.g.*, Reconsideration Order, Indus. Pet'rs' App. at 86a-87a. Nowhere in the Reconsideration Order did the Commission disavow its "goal of promoting minority and female ownership." *See 2014 Quadrennial Review 2nd Report & Order* at 9871, 9897, 9914, 9945, 10,030, 10,031. Rather, the Commission adhered to that historical interpretation of the public interest and purported to consider the evidence of female and minority ownership to reach the conclusion that its decisions would not affect that aspect of diversity. *See, e.g.*, Reconsideration Order, Indus. Pet'rs' App. at 86a-88a, 127a-128a, 142a, 161a-162a.

In short, both before and after the enactment of Section 202(h) in the 1996 Act, the Commission has maintained that the "public interest" is served by promoting media ownership diversity—including minority and female ownership. This is neither new nor contrary to the statute. Nor was it foisted upon the Commission by any Third Circuit policy preference. Rather, the Commission has itself embraced this view for decades, and nothing in Section 202(h) prevented it from continuing to do so in the quadrennial review context.

II. THE THIRD CIRCUIT CORRECTLY HELD THE COMMISSION ACCOUNTABLE FOR FAILING TO CONSIDER IMPORTANT ASPECTS OF MEDIA OWNERSHIP.

In the Reconsideration Order, the Commission retained its long-held view of the public interest described above. Having done so, the Commission needed to determine how its decision to relax the media ownership rules affected ownership by women and minorities. While the Commission is rightly entitled to deference on its policy judgments, it cannot abandon the most fundamental obligation of agency decision-making: supporting those judgments with rational explanation and record evidence. Where an agency fails to meet this obligation, reviewing courts rightly hold them to account, as the Third Circuit did here.

The Administrative Procedure Act (APA) tasks courts with reviewing agency actions and setting aside decisions that are arbitrary and capricious. 5 U.S.C. § 706(2). "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 U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Nevertheless, as the Third Circuit observed, an agency must "examine the relevant data and articulate a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made." *Prometheus IV*, Indus. Pet'rs' App. at 19a (alteration in original) (quoting *State Farm*, 463 U.S. at 43).

Accordingly, by making the public interest paramount in Section 202(h), Congress granted broad discretion to the Commission—but with that discretion came the responsibility to define goals and apply reasoned analysis when weighing such goals. As laid out in *National Broadcasting Co. v. United States*, where the FCC acts in the public interest, the judicial inquiry is relaxed but not toothless. *See* 319 U.S. 190, 224 (1943) ("*NBC*"). The Commission must show it has acted "pursuant to authority granted by Congress" and—importantly—that its action was "based upon findings *supported by evidence*." *Id.* (emphasis added); *see also FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 793 (1978) ("*NCCB*") (noting the Commission's broad power to regulate in the public interest, "so long as [its] view is based on consideration of permissible factors and is otherwise reasonable").

This Court has consistently deferred to the Commission's expertise only where the agency has fully done its job. In *NBC*, the Commission had leeway to create new broadcasting rules, but this followed a "long investigation" into practices leading to media concentration. 319 U.S. at 225. Similarly, in *NCCB*, the Commission enjoyed deference to its decisions on media-ownership rules, but only after the agency had shown its thorough reasoning. *See* 436 U.S. at 785-86 (detailing the Commission's research analysis and how this logically tied into its ultimate policy conclusions). Continuing this pattern, the Court again deferred to the Commission in *FCC v. WNCN Listeners Guild*, this time for a license renewal policy. 450 U.S. 582, 596 (1981). But as before, the Court deferred only after finding that the Commission had

"provided a rational explanation for its conclusion." *Id.* at 595. Echoing *NCCB*, the Court explained that deference hinges upon whether an action is "based on consideration of permissible factors and . . . otherwise reasonable." *Id.* at 594 (quoting *NCCB*, 436 U.S. at 793).

These deference principles lay bare the problems with the argument made by Government Petitioners. Although Government Petitioners cite *NBC*, *NCCB*, and *WNCN* to show the Court's deference to the Commission's policy choices, these opinions all deferred to *reasoned* judgments. Unlike in those cases, the Commission here failed to support its decision with reasoned analysis. It concluded that relaxing the media ownership rules would not harm diversity—without *any* record evidence on female ownership and highly flawed data and analysis on minority ownership. As the Third Circuit explained, the Commission examined no data whatsoever concerning female ownership. *Prometheus IV*, Indus. Pet'rs' App. at 35a-37a. With regard to minority ownership, the Commission's analysis was "so insubstantial that it would receive a failing grade in any introductory statistics class." *Id.* at 38a.

To begin, the Commission overlooked obvious differences between incomparable data sets. *Id.* at 37a-40a. In fact, the seeming increase in minority ownership "is thought to have been caused by largely improved methodology rather than an actual increase in the number of minority-owned stations." *Id.* at 38a; *see also 2014 Quadrennial Review 2nd Report & Order* at 9911-12. Furthermore, the Commission did not acknowledge research in the record that corrected for

inconsistencies between its data sets. *See* Resp'ts' Br. at 15-16. That record evidence concluded that 40% of minority-owned television stations were lost due to relaxing ownership rules. *Id.* at 16. This omission is especially glaring, since the Commission cited this study for data elsewhere. *Id.* at 39.

The problems do not stop there. Even if the data sets could be treated the same, comparing only the absolute number of minority-owned stations at different times is hardly informative. Yet the Commission made exactly this comparison, ignoring the high likelihood that examining the *percentage* of minority-owned stations—which would account for changes in the total number of stations over time—might tell a different story. *Prometheus IV,* Indus. Pet'rs' App. at 38a. Additionally, even if the total number of minority-owned stations has increased—an assumption, again, based on flawed statistics—that scarcely reveals the effect of deregulation. As the Third Circuit pointed out, the Commission "made no attempt to assess . . . how many minority-owned stations there would have been in 2009 had there been no deregulation." *Id* at 39a. Instead, the Commission looked at the seeming increase in minority ownership and concluded simply that deregulation seemed not to have "prevent[ed] an overall increase" in minority ownership. *Id.* Relying on such flawed record evidence to conclude that wholesale relaxation of its media ownership rules was "not likely to harm minority and female ownership," *see, e.g.*, Reconsideration Order, Indus. Pet'rs' App. at 161a, falls far short of reasoned decision-making.

Appropriately, the Commission has received deference where data does not provide a clear answer and where agencies are reasoning prospectively, as Government Petitioners point out. *See* Gov't Br. at 36, 44. But Government Petitioners mischaracterize this deference and how it applies. First, they fail to note that the Commission must still engage in a rational analysis where data is unilluminating. In *NCCB*—where data was inconclusive, and the Commission enjoyed latitude partly on this score—the Court still tracked how the Commission interpreted the data. *See* 436 U.S. at 785-86. In extending deference, the Court noted the Commission relied on its pre-existing policy of promoting diversity and had found no "persuasive countervailing considerations." *Id.* at 786. Here, though, the Commission failed to analyze fundamental flaws with its data and ignored obvious "countervailing considerations" that flowed from these flaws. *See Prometheus IV*, Indus. Pet'rs' App. at 35a-40a. Moreover, the Commission in *NCCB* had been considering a record not previously addressed. Here, by contrast, the Commission examined a record already ruled upon and then reached a conclusion opposite from what it had previously concluded.

Second, although the Court has been generous with granting deference for prospective judgments, the Commission's judgment in this matter required reasoned analysis of the effect of *previous* decisions. That is because how past relaxation of ownership rules affected minority and female ownership is plainly relevant to determining how the changes under consideration would do so. This case, involving a longstanding policy, is therefore distinct from cases involving an entirely new policy, where there may be

no past actions to analyze. *Cf. NCCB*, 436 U.S. at 779, 813-14 (giving deference to the Commission's predictive judgments about the effects of elements of a new cross-ownership rule).

The Commission's many failures show why the Third Circuit was correct to set aside the Commission's decision to relax media ownership rules. An agency's basic obligation is to show a "rational connection" between its actions and the record it considered. *State Farm*, 463 U.S. at 43. In particular, agencies must not "entirely fail[] to consider an important aspect of [a] problem." *Id.* Thus, by performing an analysis of minority ownership riddled with errors—and not even looking at data on female ownership—the Commission failed to fulfill its basic duty to reasonably support its conclusion that relaxing its media ownership rules would not harm minority and female ownership. For this reason, the Third Circuit rightly vacated the Orders on review.

CONCLUSION

The Court should affirm the Third Circuit's judgment.

Respectfully submitted,

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