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

REPLY BRIEF FOR THE PETITIONERS

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After the Federal Communications Commission (FCC or Commission) adopted comprehensive reforms of outdated media ownership rules, the court below vacated those reforms solely on the ground that the Commission had not adequately assessed their anticipated effects on ownership by minorities and women. The court ordered the FCC 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 directive is untenable. Although the FCC has traditionally treated (and continues to treat) minority and female ownership as a relevant criterion in its assessment of the public interest, neither the governing statute nor the Commission accords that factor controlling weight. The court's approach was especially unwarranted because the agency

had adopted the challenged rule changes based on considerations *other than* minority and female ownership—namely, the changes' beneficial effects (undisputed here) on competition and localism.

In defending the decision below, respondents decontextualize the FCC's assessment of minority and female ownership, treating it as a motivating factor rather than (as the Commission did) as a potential reason for caution in reforming the ownership rules. Respondents flyspeck the FCC's evidentiary analysis, pointing to irrelevant materials that the Commission purportedly overlooked and ignoring the agency's cautious approach to a complicated question on an imperfect record. And respondents do not defend the court of appeals' remand instruction. The decision below should be reversed.

I. THE FCC POSSESSES BROAD DISCRETION TO REGULATE MEDIA OWNERSHIP IN THE PUBLIC INTEREST

"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). Consistent with that principle, this Court has repeatedly affirmed the FCC's broad discretion to regulate in the public interest and to make predictive judgments based on imperfect information. See, *e.g.*, *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775 (1978) (*NCCB*); see also *Stilwell* v. *Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (Kavanaugh, J.) ("The [Administrative Procedure Act, 5 U.S.C. 701 *et seq.* (APA),] imposes no general obligation on agencies to produce empirical evidence.").

Judicial deference is particularly appropriate when the Commission acts pursuant to Section 202(h) of the

Telecommunications Act of 1996, 47 U.S.C. 303 note, which establishes an "iterative process" through which the FCC keeps pace with market developments by taking "a fresh look at its rules every four years" and reassessing "how its rules function in the marketplace." Pet. App. 48a (Scirica, J., concurring in part and dissenting in part). Section 202(h)'s quadrennial-review mandate demands predictive judgments based on imperfect information, while mitigating any harmful effects of agency policy choices by requiring frequent reappraisal. Gov't Br. 26-27.

A. Respondents acknowledge the FCC's broad statutory authority and the need for judicial deference to the agency's rational predictive judgments and weighing of competing policies. See Resp. Br. 32, 44 (referring to these principles as "undisputed" and "uncontroverted"). They dispute the agency's leeway to make predictive judgments under Section 202(h), however, arguing that the statute "focus[es] the inquiry on the past and present," not the future. *Id.* at 48. That claim misapprehends the mandate that Section 202(h) imposes.

To determine whether a particular ownership rule is "no longer in the public interest," 47 U.S.C. 303 note, the FCC must assess the rule's actual and projected impact under present and future conditions. To be sure, historical experience will often be a critical consideration in determining whether a rule continues to serve the public interest and will do so in the future. But when changed conditions prevent an ownership rule from continuing to serve beneficial purposes, Section 202(h) requires the agency to repeal or modify the rule accordingly, even if the rule has advanced the public interest

in the past. The agency's analysis under Section 202(h) is thus necessarily predictive.

Respondents also contend that a "wrong call on public-interest harm * * * cannot readily be undone even if rules are later restored." Resp. Br. 49. Although respondents correctly note the FCC's "entrenched policies limiting divestiture," *ibid.*, the Commission retains the authority to order divestiture in cases where prior mergers threaten to work serious harm, and it has exercised this authority in the past. See, *e.g.*, *NCCB*, 436 U.S. at 779 (adopting limited divestiture policy). And to the extent a revised rule produces unexpected adverse consequences, the Commission can minimize further harm by amending the rule prospectively in a subsequent quadrennial review proceeding.

Ultimately, it is beside the point whether Section 202(h) supplants "settled judicial review standards" with "more lenient scrutiny." Resp. Br. 48-49. At a minimum, the quadrennial-review scheme is plainly relevant to determining the level of certainty needed before the agency may modify its ownership rules to better serve the public interest.

B. Petitioners in No. 19-1241 (Industry Petitioners) also seek to limit the FCC's statutory discretion, albeit in a different manner. In their view, "[b]ecause competitive findings and judgments are the only ones Congress specifically instructed the Commission to make, the FCC's competition analysis *required* it to modify or repeal the rules it did in the Reconsideration Order." Industry Pet. Br. 36 (emphasis altered). Although the statute undoubtedly emphasizes competition, Industry Petitioners are wrong in suggesting that competition must be dispositive in all Section 202(h) proceedings.

The agency possesses general rulemaking powers to regulate in the public interest, see 47 U.S.C. 303; 47 U.S.C. 309(a), and nothing in Section 202(h) curtails the scope of that authority. Section 202(h) requires the agency to review its ownership rules quadrennially to determine whether they "are necessary in the public interest as the result of competition," and to "repeal or modify any regulation it determines to be no longer in the public interest." 47 U.S.C. 303 note. That language requires the Commission to determine at regular intervals whether an ownership rule continues to serve the public interest in light of changed competitive conditions. But while the statute identifies competition as a criterion the FCC must consider, the agency's ultimate determination whether the rule promotes the public interest encompasses additional considerations. See Gov't Br. 5.

II. RESPONDENTS IDENTIFY NO SOUND BASIS FOR THE COURT OF APPEALS' VACATUR OF THE CHALLENGED FCC ORDERS

In the three Orders under review, the FCC carefully considered the record evidence, acknowledged gaps in the available data, and reached reasonable policy conclusions in light of both the record and the agency's own extensive experience. In the Reconsideration Order, Industry Pet. App. 64a-310a, the Commission rationally determined that repeal of certain ownership rules could produce valuable public benefits, and that the original purposes of the repealed rules—preserving competition and promoting viewpoint diversity—no longer apply. It further concluded that the record evidence did not suggest that repealing those rules would harm minority and female ownership such that the rules should be retained despite repeal's competitive benefits. Gov't Br.

28-31. In the 2016 and Incubator Orders, J.A. 101-576, 577-704, the Commission adopted eligibility criteria designed to promote the success of new entrants and small businesses in broadcast markets, a goal that no party denies is in the public interest. Gov't Br. 32. Respondents identify no sound basis for the court of appeals' vacatur of those Orders.

A. The Court Of Appeals Disregarded The Statutory Text

Section 202(h) reflects the Commission's authority to regulate in the "public interest." 47 U.S.C. 303 note. That language vests the FCC with "broad discretion in determining how much weight should be given to" goals like racial and gender diversity, "and what policies should be pursued in promoting" those goals. *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 600 (1981). The court of appeals did not question the reasonableness of the FCC's competition-based affirmative rationales for overhauling its ownership rules. The court nevertheless vacated the challenged agency orders and held that "[o]n remand 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." Pet. App. 34a. That holding displaces the Commission's wide-ranging public-interest analysis and imposes an extra-statutory obligation in violation of *Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978).

Respondents make no serious effort to defend this remand instruction. Instead, they contend that the decision below permits the Commission to "transparently re-weigh competing public-interest considerations," thus "obviating the need for extensive analysis of own-

ership diversity, should the Commission decide to explicitly abandon the goal." Resp. Br. 55. But the court's opinion says no such thing. Rather, it unambiguously directs the Commission to conduct an intensive analysis of minority and female ownership as a *prerequisite* to rulemaking. See Pet. App. 34a.

Respondents assert that the "Commission's reasoned judgment has been that ownership diversity serves the public interest," both "in its own right, and because of its 'potential to strengthen competition and [viewpoint] diversity' through greater participation by small businesses, 'including those owned by minorities and women.'" Resp. Br. 31 (quoting *In re 2002 Biennial Regulatory Review*, 18 FCC Rcd 13,620, 13,637 (2003) (2002 Review)) (brackets in original). The FCC has long recognized that a regulatory policy's likely impact on minority and female ownership may be relevant to the agency's determination whether that policy would serve the public interest. It does not follow, however, that the agency must generate new data or studies to quantify that impact whenever it decides for other reasons that regulatory changes are warranted.

Respondents' repeated use of the term "ownership diversity" also elides the fact that levels of minority and female ownership are only one measure of the extent to which ownership of broadcast stations is "diverse." The FCC has recognized ownership by small businesses and new entrants as another desirable form of ownership diversity. And the agency has historically sought to foster, as a salutary form of ownership diversity, the presence of multiple independently owned stations in a single market. See, *e.g.*, 2002 Review, 18 FCC Rcd at 13,637; 2016 Order, J.A. 230-231. Indeed, the longstanding ownership rules that the agency sought to

overhaul in the Reconsideration Order were originally adopted to promote that more generalized form of ownership diversity, not to facilitate ownership by any particular type of individual or entity. See, *e.g.*, *NCCB*, 436 U.S. at 786.

Respondents similarly exaggerate the relationship between minority and female ownership and viewpoint diversity. Resp. Br. 31-32. The FCC has traditionally focused on ownership diversity writ large—not minority and female ownership specifically—as conducive to viewpoint diversity. See, *e.g.*, 2002 Review, 18 FCC Rcd at 13,630; 2016 Order, J.A. 172 & n.206, 230-231. In the 2016 Order the Commission noted, in the course of concluding that any nexus between minority and female ownership and viewpoint diversity was insufficient to satisfy constitutional requirements for race- or sex-based government actions, that "[t]he two recent studies that directly address the impact of minority ownership on viewpoint diversity find almost no statistically significant relationship between such ownership and their measure of viewpoint diversity." J.A. 397-398.

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

In assessing the likely effect of its rule changes on minority and female ownership, the Reconsideration Order reached cautious, reasonable conclusions that were consistent with the record evidence and with the Commission's own prior conclusions on the subject. The court of appeals' critiques of that analysis lack merit and disregard the substantial deference owed to the FCC's predictive judgments. See, *e.g.*, *NCCB*, 436 U.S. at 813-814 (noting that, when the "factual determinations" "involved in the Commission's decision * * * [a]re primarily of a judgmental or predictive nature,"

"complete factual support in the record for the Commission's judgment or prediction is not possible or required"). Respondents' defenses of the decision below are similarly unpersuasive.

1. The court of appeals ignored relevant context

The Reconsideration Order's overhaul of the ownership rules was driven by the FCC's findings that the original rationales for those rules no longer apply, and that modifying or repealing those rules would substantially further competition and localism in the broadcast industry. See, *e.g.*, Reconsideration Order, Industry Pet. App. 87a ("We affirm the Commission's longstanding determination that the [newspaper/broadcast cross-ownership] rule does not advance localism and competition goals, and find today that it is no longer necessary to promote viewpoint diversity."). The court of appeals did not question those findings, which were supported by robust analysis and a wealth of data. See Gov't Br. 28-30.

Contrary to respondents' contention, the Commission did *not* "rely[ ] on the data [pertaining to minority and female ownership] to justify relaxing the rules." Resp. Br. 35. Rather, the FCC discussed the Order's potential effect on minority and female ownership only in the course of analyzing whether possible *adverse* impacts in that regard should dissuade the agency from making changes that were otherwise highly beneficial. If the agency had believed that revamping the rules would likely cause a reduction in minority and/or female ownership, it would have had to balance that adverse effect against the competitive benefits of the contemplated changes. But the absence of affirmative evidence suggesting an adverse impact on minority or female ownership obviated the need for any such balancing.

Based on that lack of evidence, and taking due account of predictive uncertainty and the imperfections of the available data, the agency concluded 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, Industry Pet. App. 140a; see *id.* at 122a, 162a (similar).

The court of appeals misapprehended the Reconsideration Order's logic, largely ignoring the Commission's findings on competition and localism and consistently overstating the significance of predicted effects on minority and female ownership. Respondents repeat that error here. See, *e.g.*, Resp. Br. 22 (arguing that the Order "*hinged on a finding* that the change would not harm the agency's longstanding goal of fostering ownership diversity") (emphasis added). Respondents thus focus on a single public-interest consideration, without attention to the broader context in which the FCC analyzed that factor. And they identify nothing in the Reconsideration Order suggesting that the Commission would have retained the prior ownership rules had it reached a different conclusion as to the likely effect of repeal on minority and female ownership. Contra *id.* at 36.

Contrary to respondents' contention, the government does not "seek[] to distance itself" from the FCC's determination that its rule changes would likely "'have no material effect on minority and female ownership.'" Resp. Br. 33-34 (citation omitted). Rather, our point is simply that the FCC (a) recognized that the available evidence did not definitively resolve the question of likely impact on minority and female ownership, and (b) decided that the existing ownership rules should be overhauled for reasons independent of that impact. See

Gov't Br. 38-39. As the FCC explained with respect to the newspaper/broadcast cross-ownership rule, "*[t]he 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." Reconsideration Order, Industry Pet. App. 122a (emphasis added). That characterization of the record was eminently reasonable, as was the Commission's decision that modification of the rules would produce substantial benefits to competition and localism.

2. The court of appeals' specific critiques of the Commission's analysis were misplaced

The court of appeals accused the FCC of failing to set forth data specific to female ownership and of conducting an insufficiently rigorous analysis of minority ownership. Respondents repeat those charges here. Resp. Br. 37-40. But the Commission repeatedly solicited input on this point, and when commenters failed to submit meaningful evidence, see Pet. App. 33a, 45a, the agency drew reasonable inferences from the available data, while acknowledging many of the analytical gaps that respondents now highlight. See, *e.g.*, 2016 Order, J.A. 215 nn.325-326.

a. As to female ownership, respondents acknowledge the absence of historical data, but contend that "the Commission had other options." Resp. Br. 40. They point to a decade-old study that purports to identify an inverse relationship between market consolidation and minority and female radio-station ownership. But that study expressly disclaimed any effort to "examine historical trends in female and minority radio station ownership." C.A. App. 502. Respondents also cite (Br. 40) a comment letter suggesting that the FCC should study

the effects of the repeal and subsequent reinstatement of the Failed Station Solicitation Rule, which requires certain owners of failed television stations to attempt to secure out-of-market buyers for their stations before selling to in-market buyers. See C.A. App. 1076; 2002 Review, 18 FCC Rcd at 13,708. But that rule does not directly limit the number of broadcast stations that a particular entity may own, and respondents do not explain its relevance.

In any event, there is no legal basis for respondents' contention that commenters can effectively require the FCC to investigate new rationales for preexisting rules before it can repeal those rules. Proposing new rationales for an old rule that no longer serves its original purpose is analogous to proposing a new rule. And in that context, the burden is plainly on the submitter to offer evidence in support of its proposal. See *Massachusetts* v. *EPA*, 549 U.S. 497, 527-528 (2007); *Capital Network Sys., Inc.* v. *FCC*, 3 F.3d 1526, 1533 (D.C. Cir. 1993); Gov't Br. 30-31. Rather than dispute this point, respondents contend that "it is the *Commission's* burden to determine whether its rules are necessary for the public interest." Resp. Br. 47-48. But the Commission did precisely that. Respondents' real argument is that the agency was *not allowed* to make a public-interest determination without first gathering additional data, but they identify no source of law suggesting that commenters can hold FCC rulemakings hostage simply by identifying purportedly fruitful areas for new research.

b. With respect to minority ownership, respondents criticize (Br. 37-39) the Commission's analysis of historical ownership data. Those data reflect a short-term decrease in minority ownership levels, followed by a long-

term increase in the number of minority-owned broadcast stations, after certain ownership restrictions were relaxed in the late 1990s. See Resp. Br. 37. Respondents observe that the long-term increase in minority ownership after those rule changes does "not disprove that relaxation [of ownership restrictions] harms ownership diversity." *Id.* at 38. To be sure, the fact that minority ownership levels have risen since the prior ownership-rule changes were adopted does not eliminate the possibility that the increase would have been even greater if those changes had not been made. But the sequence of events described above at least casts substantial doubt on respondents' hypothesis that the rule changes systematically suppressed minority ownership.

Even assuming a causal relationship between the ownership rules and minority ownership levels, the more natural inference from the temporary dip in minority ownership is that the rule changes facilitated voluntary sales by minority owners, without imposing any barriers to entry for new minority owners. The Commission does not have a policy of preventing owners from voluntarily leaving the market. See, *e.g.*, *In re 2014 Quadrennial Regulatory Review*, 29 FCC Rcd 4371, 4456 (2014) (2014 Review), J.A. 87 ("Even assuming that some minority-owned stations would become acquisition targets if the rule were loosened, we do not believe that such a possibility necessarily would preclude rule modifications that are otherwise consistent with our statutory mandate."). Rather, the Commission's diversity initiatives have reasonably emphasized removing barriers to entry for new station owners, including minority owners. See, *e.g.*, 2002 Review, 18 FCC Rcd at 13,634-13,635 (focusing on "'provid[ing]

minorities and women with greater opportunities to enter the mass media industry'" and on "the nature of market entry barriers") (citation omitted). Respondents do not show that historical changes to the ownership rules disserved *that* goal.

Respondents further contend that "a better analysis was in the record," citing a study purporting to show "that the 1990s television rule changes contributed to the loss of 40% of the previously minority-owned stations." Resp. Br. 39. That conclusion is both flawed and inapposite. The study examined two rule changes: a modification of the local television ownership rule and a modification of the national television ownership cap. C.A. App. 570. The national cap has minimal relevance to the Orders at issue in this case, which involve local ownership rules. Of the 17 transfers of minority-owned stations to non-minority owners that the study identifies as occurring after the rule changes, 12 would have been permitted under the prior version of the local television ownership rule. *Ibid.* And even with respect to the other five sales, the minority owners of the relevant stations might have sold to *other* non-minority buyers if the prior version of the rule had remained in effect. Cf. 2014 Review, J.A. 88 ("[A] station owner that wishes to exit the market is not prevented from selling its station under the current [newspaper/broadcast cross-ownership] ban, which merely eliminates newspaper owners as potential buyers.").

As the study notes, moreover, minority buyers *acquired* 26 stations following the rule changes, for a net gain in minority ownership. C.A. App. 570 n.37; see Reconsideration Order, Industry Pet. App. 120a ("[T]he record provides no evidence that minority- and female-owned stations will be singled out for acquisition.").

The study is thus fully consistent with the hypothesis described above: that prior rule changes at most facilitated the voluntary departure of certain minority owners from the market, without impeding long-term market entry by minority buyers.[1]

In all events, respondents overstate the centrality of the historical ownership data to the Commission's analysis. Resp. Br. 43-44. As Judge Scirica recognized below, "[e]ven 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 (concurring in part and dissenting in part). Respondents find it "odd" that the government would question the probative force of these data, given that "it was the Commission that concluded the historical data was probative in the first place." Resp. Br. 45. But the FCC recognized the flaws in those data, see 2016 Order, J.A. 215 nn.325-326, and analyzed their implications cautiously and out of necessity, see, *e.g.*, Reconsideration Order, Industry Pet. App. 139a (noting that the data "*suggest* that previous relaxations of [certain ownership] rules have not resulted in reduced levels of minority and female ownership") (emphasis added).

In addition, as respondents acknowledge (Br. 45), the historical data did not form the sole basis for the Commission's conclusion as to likely impact on minority

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[1] Respondents also note that the cited study attempted to "correct[]" the NTIA data, and they argue that the FCC should have done the same. Resp. Br. 46-47. But the authors of the study conceded that their time-intensive, ad hoc efforts—such as "interviews with station representatives"—had not produced "a rigorous census of all stations." C.A. App. 568.

and female ownership. "[T]wo organizations representing minority media owners"—including one of the respondents in this case—"s[ought] relief from the [newspaper/broadcast cross-ownership] rule's restrictions." Reconsideration Order, Industry Pet. App. 117a; see *id.* at 118a ("NABOB has reversed its long-held opposition to the elimination of the ban on newspaper/radio cross-ownership, arguing that the broadcast industry—particularly NABOB's minority-owned member stations—should not be constrained from competing for audience share and advertising revenue."). The Reconsideration Order also noted comments suggesting that "some minority media owners may be poised to pursue cross-ownership acquisition and investment opportunities," *id.* at 120a, and observed that background "constraints of the Local Radio Ownership Rule" would help preserve "broadcast radio" as "an important entry point into media ownership," *id.* at 138a-139a.

c. Respondents also advance an argument that the court of appeals did not address: that the Commission failed to consider the effects of the television "incentive auction," under which broadcasters who voluntarily relinquish their spectrum rights may receive incentive payments to make certain portions of the spectrum available for new uses. Resp. Br. 40; see *In re Expanding the Economic & Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd 6567, 6570 (2014). Respondents do not explain how the incentive auction is relevant to evaluating the effects of the ownership rules on minority and female ownership. And even assuming that some such causal link could exist, the Commission observed that "it is still too soon to

evaluate [the auction's] impacts on the television marketplace," though the agency anticipated being able to do so "in the forthcoming 2018 Quadrennial Review proceeding." Reconsideration Order, Industry Pet. App. 164a. The FCC further noted that "the initial results of the auction suggest that the auction may not have a significant impact in the context of the Local Television Ownership Rule." *Id.* at 164a n.248.

* * *

Setting aside their specific critiques of the FCC orders at issue here, respondents' defense of the court of appeals' decision reflects a pervasive failure to accord sufficient weight to the agency's factual findings and policy judgments. See *State Farm*, 463 U.S. at 43. In advancing the public interest, the Commission may "rely on its judgment, based on experience," "notwithstanding the inconclusiveness of the rulemaking record"—particularly when the relevant evidence "is difficult to compile" and the potential effects of the rule changes do "'not lend themselves to detailed forecast.'" *NCCB*, 436 U.S. at 796-797 (citation omitted); see *National Broad. Co.* v. *United States*, 319 U.S. 190, 224 (1943) ("It is not for us to say that the 'public interest' will be furthered or retarded by the [regulations]."); *WNCN*, 450 U.S. at 600. Respondents are of course correct that "no precedent provides agencies free rein to premise their predictions on irrational evaluations of past events." Resp. Br. 44. But here, the Commission made rational judgments while acknowledging uncertainty on a single public-interest factor that was not the affirmative basis for the rule changes. The APA requires no more.

3. In the Reconsideration Order, the FCC adequately explained its reasons for departing from the 2016 Order

In arguing that the FCC behaved in an arbitrary and capricious manner, respondents assert that the Reconsideration Order reflects an "unexplained about-face" from the 2016 Order. Resp. Br. 42. Respondents characterize the 2016 Order as "f[i]nd[ing] that retaining the current rules would foster ownership diversity," and they describe the Reconsideration Order as "f[i]nd[ing], on the same record, that retaining the rules would not help and jettisoning them would do no harm." *Id.* at 41-42. Respondents' claim of unexplained inconsistency—which the court of appeals did not adopt, see Pet. App. 27a—rests on a misreading of the 2016 Order.

The 2016 Order largely retained the three major ownership rules at issue here: the newspaper/broadcast cross-ownership rule, the radio/television cross-ownership rule, and the local television ownership rule. 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." J.A. 171-172, 293, 310.

Respondents emphasize the 2016 Order's statement that the pre-existing ownership rules were "consistent with the Commission's goal to promote minority and female ownership." J.A. 171; see J.A. 293, 310 (similar). Respondents construe that statement as an assertion that the existing ownership rules would affirmatively promote that goal. See Resp. Br. 42. But so long as those ownership rules would not *disserve* the goal of promoting minority and female ownership, retention of the rules could accurately be described as "consistent

with" that objective. On that view, the statement is fully consistent with the Reconsideration Order.

Respondents also emphasize the 2016 Order's observation that the pre-existing ownership rules "promote[] opportunities for diversity." J.A. 172; see J.A. 293, 310 (same). But as the Reconsideration Order explained, this observation "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." Industry Pet. App. 122a; see *id.* at 139a-140a, 162a (similar).

Respondents contend that this supposed "reinterpretation" "blinks reality." Resp. Br. 42. But at a minimum, the Reconsideration Order expressed a reasonable understanding of what the 2016 Order was trying to convey. In explaining *how* the ownership rules "promote[] opportunities for diversity," the 2016 Order noted that the rules "help[] to ensure the presence of independently owned broadcast television stations in the local market, thereby indirectly increasing the likelihood of a variety of viewpoints and preserving ownership opportunities for new entrants." J.A. 172 (local television ownership rule); see J.A. 293 (newspaper/broadcast cross-ownership rule), 310 (radio/television cross-ownership rule). That explanation focused on a form of ownership diversity—*i.e.*, maximizing the number of independent media outlets in a given local market—different from minority and female ownership levels. See p. 7, *supra* (discussing different forms of ownership diversity that the FCC has historically sought to promote).

Other portions of the 2016 Order cite evidence suggesting that the ownership rules do not materially affect minority and female ownership levels. See, *e.g.*, 2016 Order, J.A. 174-175 (finding long-term increase in minority ownership following previous relaxation of local television ownership rule), J.A. 291-292 ("[W]e find that the record fails to demonstrate that the" "modest loosening" of the newspaper/broadcast cross-ownership rule "we adopt today [is] likely to result in harm to minority and female ownership."); see also Pet. App. 27a (majority op.) ("*Both* the 2016 Report & Order and the Reconsideration Order * * * concluded that the broadcast ownership rules have minimal effect on female and minority ownership.") (emphasis added). Indeed, it is unclear on what basis the 2016 Order *could* have found that the rules affirmatively promote minority and female ownership of broadcast stations.

With respect to the general weighing of the competition-related costs and benefits associated with the agency's ownership rules, the Reconsideration Order undoubtedly reflected a substantial departure from the 2016 Order. But the agency explained in detail its reasons for concluding that, in light of extensive changes to the media landscape, the ownership rules no longer served the public interest. See Gov't Br. 28-32. The court below did not find that aspect of the FCC's analysis to be deficient. With respect to the specific issue of the link (or lack thereof) between the ownership rules and minority and female ownership, the Reconsideration Order was neither an "about-face" nor "unexplained." Resp. Br. 42.

C. The Court Of Appeals Disrupted The Proper Functioning Of Section 202(h) Reviews

The court of appeals' analysis is incompatible with the statutory review framework Congress designed. Section 202(h) establishes an iterative process through which the FCC makes frequent assessments of the public interest, revises its rules accordingly, and then monitors the effect of the new rules for possible revision in the next quadrennial review. See Part I.A, *supra*. By requiring a high degree of certainty concerning potential impacts on minority and female ownership before the Commission can act, the decision below impedes the agency's ability to revise its rules in light of competitive changes in the marketplace and prevents the agency from gathering data to inform future quadrennial reviews.

Respondents contend that "any purported 'freezing' of ownership rules is the Commission's doing, not the Third Circuit's." Resp. Br. 50. Respondents effectively blame the FCC for tinkering with its approach over time rather than "repeal[ing]" the ownership rules "entirely" when Section 202(h) was enacted. *Ibid.* But the Commission's incremental adaptation to changing market conditions and prior experience is a virtue, not a vice. See, *e.g.*, Reconsideration Order, Industry Pet. App. 114a ("The Commission's previous attempts to relax," rather than repeal, "the rule demonstrate the difficulty in designing an approach that works effectively for the range of market circumstances across the country."). And there is no doubt that the Third Circuit's rulings have petrified outdated regulations. The blanket ban on newspaper/broadcast cross-ownership has remained in place since 1975, despite three separate FCC attempts to repeal it in full or in part. See Gov't

Br. 44-45. That broadcast ownership rule adopted 45 years ago cannot plausibly be thought to reflect current market realities. See *Prometheus Radio Project* v. *FCC*, 373 F.3d 372, 398 (3d Cir. 2004), as amended (June 3, 2016), cert. denied, 545 U.S. 1123 (2005).

Respondents dismiss the Commission's findings on competition with the observation that "[t]he statutory charge is to regulate in the public interest, not the broadcasters' competitive interest." Resp. Br. 50. That argument attacks a straw man. Advancing the interests of individual broadcasters is not the Commission's ultimate regulatory objective. But Section 202(h)'s text and history reflect a clear congressional judgment that competition is a critical consideration in promoting the public interest. See Gov't Br. 4.

As the Reconsideration Order explained in painstaking detail, the deregulatory changes to the ownership rules—if permitted to go into effect—are likely to produce broad public benefits. For example, the Commission explained that "eliminating the [newspaper/broadcast cross-ownership 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." Reconsideration Order, Industry Pet. App. 101a-102a. With respect to the local television ownership rule, the FCC similarly noted that "television broadcasters' important role makes it critical for the Commission to ensure that its rules do not unnecessarily restrict their ability to serve their local markets in the face of ever-growing video programming options." *Id.* at 146a. The agency accordingly "adopt[ed] common sense modifications" to the rule "that will help local television broadcasters achieve economies of scale

and improve their ability to serve their local markets in the face of an evolving video marketplace." *Id.* at 147a. Although respondents suggest (Br. 50) that the FCC's findings as to competition and localism are "hardly universally accepted," the court below did not cast doubt on those findings, which are supported by a wealth of record evidence.

Respondents also fault the Commission for undue delay between quadrennial proceedings. Resp. Br. 50. But that criticism ignores the distorting effect of the court of appeals' repeated remands, which have hampered the agency's ability to proceed efficiently, including by requiring it to address regulations other than ownership rules within its Section 202(h) proceedings. See, *e.g.*, *Prometheus Radio Project* v. *FCC*, 652 F.3d 431, 472 (3d Cir. 2011) (requiring the Commission to address the eligible-entity definition "within the course of [its] 2010 Quadrennial Review of its media ownership rules"), cert. denied, 567 U.S. 951 (2012).

D. The Court of Appeals' Remedy Was Overbroad

Although the court of appeals' analysis pertained only to discrete aspects of the Reconsideration Order, see Pet. App. 27a, the court invalidated the Reconsideration and Incubator Orders in full, as well as the "eligible entity" definition from the 2016 Order, *id.* at 34a. That was error.

In defending the court's remedy, respondents speculate that, "[i]f a reasonable assessment of ownership diversity convinces the Commission that tighter ownership limits are needed, it would almost certainly likewise alter the Commission's assessment of how narrowly to draw its eligibility criteria for an incubator program or other ownership limit waivers." Resp. Br. 53. The Third Circuit did not embrace this reasoning, and

respondents cite nothing in the Orders indicating that the eligible-entity definition and eligibility criteria are contingent on the reasoning that underlies the ownership-rule changes. Speculation that an agency might wish to do things differently in light of changed circumstances is not a valid basis for vacating lawful agency action.

Indeed, respondents fail to identify any basis in the APA to set aside any aspect of the 2016 and Incubator Orders. In particular, the court identified no way in which those Orders were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). Accordingly, those Orders must stand, regardless of any defects in the Reconsideration Order.

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For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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