Nos. 19-1231, 19-1241

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
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 OF AMICUS CURIAE PHOENIX CENTER FOR ADVANCED LEGAL & ECONOMIC PUBLIC POLICY STUDIES IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* PHOENIX CENTER FOR ADVANCED LEGAL & ECONOMIC PUBLIC POLICY STUDIES

The Phoenix Center for Advanced Legal & Economic Public Policy Studies ("Phoenix Center") submits this brief as *amicus curiae* in support of petitioners. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

The Phoenix Center is a non-profit 501(c)(3) research organization that studies the law and economics of the digital age. The primary mission of the Phoenix Center is to produce rigorous academic research to inform the policy debate. To this end, our work has been frequently cited by the Federal Communications Commission as well as by other government entities. The Phoenix Center, therefore, has an established interest in the outcome of this proceeding and we believe that our perspective will assist the Court in resolving this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

As Chief Justice Roberts observed in his dissent in *City of Arlington*, the federal bureaucracy now

"wields vast power and touches almost every aspect of daily life." As a result, some have argued (including several members of this Court) that the broad judicial deference accorded to administrative agencies under *State Farm,* along with the wide judicial deference accorded to administrative agencies under *Chevron,* have contributed to the expansion—rather than the constraint—of the administrative state.

Accordingly, the central question in this case is what are the proper boundaries for how a court should review an agency action under the "arbitrary and capricious" standard? Both logic and the Constitution itself dictate that whenever an administrative agency seeks to impose a new rule, the American people are well-served when appellate courts are vigilant to ensure that the agency's actions are not arbitrary and capricious. Still, "too much" deference by a court permits regulators to run rogue, while "too strict" a review improperly substitutes a court's policy judgement for that of the expert agency. Regardless of where this Court may draw the precise line between overly deferential and unduly strict judicial review of agency actions, the Third Circuit's decision in this case was inappropriate.

Indeed, the Third Circuit went well beyond "strict" review of the Commission's actions, instead improperly substituting its own policy judgement by holding the agency to an impossible standard to which it could never comply. Not only did the Third Circuit over-emphasize the FCC's purported lack of adequate consideration of a non-statutory factor, but the court stymied the Commission's efforts to modernize its media ownership rules as directed by Congress until the

agency conducts new empirical research which meets with the court's satisfaction. As a result, while the Internet flourishes but local broadcasters and newspapers struggle to survive in this dynamic environment, the Commission's seventeen-year odyssey to keep pace with the market remains stuck in the mud. This outcome satisfies neither Congress' express intent for deregulation as repeatedly declared in the Telecommunications Act of 1996 nor serves the American public. Accordingly, we join with Petitioners and ask this Court to reverse the Third Circuit's ruling below.

ARGUMENT

I. Background

As Chief Justice Roberts observed in his dissent in *City of Arlington*, the federal bureaucracy now "wields vast power and touches almost every aspect of daily life." *City of Arlington, Texas v. FCC,* 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (quotation marks omitted). Given this regulatory expansion, over the past three decades there has been a concerted effort to force administrative agencies to bring more analytical rigor to their decisionmaking. *See e.g.,* OMB CIRCULAR A-4 (September 17, 2003); *In the Matter of Establishment of the Office of Economics and Analytics,* FCC 18-7, ORDER, 33 FCC Rcd. 1539 (rel. January 31, 2018) (requiring the Commission to conduct a cost/benefits analysis for every rulemaking deemed to have an annual effect on the economy of $100 million or more). While many agencies take this task seriously, sometimes the siren call of regulation is too great to ignore and agencies choose to sweep the

economics under the rug. *C.f.,* G.S. Ford and L.J. Spiwak, *The Unpredictable FCC: Politicizing Communications Policy and its Threat to Broadband Investment,* PHOENIX CENTER POLICY PERSPECTIVE NO. 14-05 (October 14, 2014). And when regulators take analytical shortcuts and fail to engage in sound policymaking, parties look to the courts as the ultimate backstop, hoping that a dispassionate judiciary will see as clearly as the petitioners the "arbitrary and capricious" nature of the regulator's decision. Administrative Procedure Act, 5 U.S.C. § 706.

For nearly forty years, application of the arbitrary and capricious standard has been guided by this Court's ruling in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company,* 463 U.S. 29 (1983). As this Court held, "an agency rule would be arbitrary and capricious 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." *Id.* at 43; *see also FERC v. Electric Power Supply Ass'n,* 136 S.Ct. 760, 784 (2016) ("Our important but limited role is to ensure that [the agency] engaged in reasoned decisionmaking—that it weighed competing views, selected [an approach] with adequate support in the record, and intelligibly explained the reasons for making that choice.").

The central question in this case is what are the proper boundaries for how a court should apply that reviewing standard? "Too much" deference by a court

permits regulators to run rogue, while "too strict" a review improperly substitutes a court's policy judgement for that of the expert agency. *C.f., Chevron, U.S.A., Inc. v. Natural Res. Defense Council,* 467 U.S. 837, 866 (1984) ("The responsibilities for assessing the wisdom of … policy choices and resolving the struggle between competing views of the public interest are not judicial ones".). Regardless of where this Court may draw the precise line between overly deferential and unduly strict judicial review of agency actions, the Third Circuit's decision in this case was inappropriate.

No one doubts that the Federal Communications Commission's media ownership policies are a vestige of a bygone era when newspapers, radio, and broadcast television dominated, if not monopolized, the conveyance of news and information to Americans and, therefore, the FCC's attempts to modernize its rules are long overdue. The media market now includes a near immeasurable number of sources for news and information from widely disparate viewpoints. Traditional media are a shadow of their former glory. Since 2004, near the dawn of the Information Age, communities have lost approximately 2,100 newspapers (about one-quarter), and the audience share of broadcast television has plummeted. D.A. McIntyre, *The Death of Journalism? Here's How Many Newspapers Have Shut Down in Past 15 Years,* USATODAY (July 24, 2019); *see also* P.M. Abernathy, *News Deserts and Ghost Newspapers: Will Local News Survive?* Hussman School of Journalism and Media - University of North Carolina at Chapel Hill (2020).

Petitioners contend the FCC made a reasoned judgement to justify the modernization of its media ownership rules which satisfied the criteria this Court set out in *State Farm*. *See, e.g.,* Government Petitioners Brief at 17-32. The Third Circuit disagreed. But instead of applying an appropriate—even if "strict"—review, the Third Circuit improperly substituted its policy judgement for that of the Commission's, holding the agency to an impossible standard to which it could never comply. Not only did the Third Circuit over-emphasize the FCC's purported lack of adequate consideration of a non-statutory factor, but the court stymied the Commission's efforts to modernize its media ownership rules as directed by Congress until the agency conducts new empirical research which meets with the court's satisfaction. *Prometheus Radio Project v. FCC,* 939 F.3d 567 (3rd Cir. 2019) ("*Prometheus IV*"). By crossing the line between a proper strict review and policy judgement substitution, the Third Circuit's ruling below merits a reversal by this Court.

II. To Determine Whether an Administrative Agency Engages in Arbitrary and Capricious Decisionmaking, a Reviewing Court Must Focus on the Clear Text of the Statute

The first step to determine whether a reviewing court stepped over the line from an appropriate (even if strict) review to an inappropriate policy judgement substitution is to ask whether the court followed the enabling statute. The Third Circuit plainly crossed this line in this case.

Under the express terms of Section 202(h), when the Commission reviews its media ownership rules every four years the Commission "shall determine whether any of such rules are necessary in the public interest as the result of competition." If the Commission finds that a regulation is "no longer in the public interest," then Commission "shall repeal or modify" said regulation. Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996); *see also* Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004). Significantly, the requirement to evaluate specifically the effects of repeal or modification on minority and female ownership appears nowhere in the text of Section 202(h). Instead, this inquiry is simply one of many (and discretionary) policy considerations which the agency has sometimes utilized in the past to make a "public interest" determination. *Cf. generally Federal Communications Commission v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) (noting that programming "diversity is not the only policy the Commission must consider in fulfilling its responsibilities under the Act").

But what exactly is the "public interest"? While there is an old joke among telecom lawyers that the "public interest" means whatever gets you three votes on the Eighth Floor at the Commission, over the years the courts have provided some important guidance to the agency. *C.f.,* T.M. Koutsky and L.J. Spiwak, *Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of the "Public Interest" Standard,* 18 COMMLAW CONSPECTUS 329 (2010).

Perhaps a good place to start is with this Court's opinion in *NAACP v. Federal Power Commission*, 425

U.S. 662 (1976). Writing for this Court, Justice Stewart noted that "the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather the words take meaning from the purposes of the regulatory legislation." *Id.* at 669.

In *NAACP*, the question before this Court was whether the Federal Power Commission must affirmatively promote equal employment opportunity and nondiscrimination in the employment practices of the firms it regulates under the Federal Gas and Power Acts. As Justice Stewart reasoned, the question was "not whether the elimination of discrimination from our society is an important national goal. It clearly is." *Id.* at 665. Moreover, wrote Justice Stewart, the "question is not whether Congress could authorize the Federal Power Commission to combat such discrimination. It clearly could." *Id.* Rather, the correct inquiry was "simply whether or to what extent Congress [granted] the Commission that authority." *Id.* Looking at the "purposes for which the Acts were adopted", this Court found that the "use of the words 'public interest' in the Gas and Power Acts is not a directive to the Commission to seek to eradicate discrimination, but, rather, is a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates." *Id.* at 669-670. Thus, ruled this Court, the Federal Power Commission was "authorized to consider the consequences of discriminatory employment practices on the part of its regulatees only insofar as such consequences are directly related to the Commission's establishment of just and reasonable rates in the public interest." *Id.* at 671.

Applying this Court's logic in *NAACP* to the case at bar provides some important insights.

First, the text of the Communications Act makes clear the primary purpose of the law is not to promote affirmatively women and minority media ownership; instead, as Section 1 of the Communications Act plainly states, the purpose of the law is "*to make available,* so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and *radio communication service with adequate facilities* at reasonable charges…" 47 U.S.C. § 151 (emphasis supplied). In other words, Congress emphasized the promotion of non-discriminatory infrastructure *deployment* to all Americans; not upon the non-discriminatory promotion of who owns the infrastructure itself.

Equally as important, had Congress wanted the Commission to promote specifically diversity ownership as part of its calculus under Section 202(h), it could have provided for it explicitly in the statute. It did not. This omission is similar to the language contained in Section 307 of the Communications (47 U.S.C. § 307), which governs the allocation of broadcast licenses. All Congress asks of the Commission in that section is to allocate "licenses, frequencies, hours of operation, and of power *among the several States and communities* as to provide a fair, efficient, and equitable distribution of radio service to each of the same." 47 U.S.C. § 307(b) (Emphasis supplied.) Again, Congress in Section 307 chose to emphasize

deployment, not ownership. This conspicuous absence of a specific Congressional directive to promote minority and women ownership in Section 202(h) stands in stark contrast to other provisions in the Communications Act such as 47 U.S.C. § 309(j)(3)(B), where Congress specifically instructed the Commission to disseminate spectrum licenses "among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women" when conducting spectrum auctions.

This is not to say that promoting diversity is not a worthy social goal or that the Commission may not consider ownership diversity—along with of host of other public interest factors—when carrying out its mandate required by 202(h). As this Court recognized over forty years ago, "'[d]iversification of control of the media of mass communications' has been viewed by the Commission 'as a factor of primary significance'" as part of its public interest inquiry. That said, this Court also made it clear that diversification of ownership is not "the sole consideration thought relevant to the public interest…" *Federal Communications Commission v. National Citizens Committee for Broadcasting,* 436 U.S. 775, 781-82 (1978).

The problem in this case is that the Third Circuit vacated both the FCC's *Order on Reconsideration* and the *Incubator Order* on the specific ground that the FCC failed to demonstrate adequately how its proposed deregulatory efforts would affect one type of diversity (*i.e.,* female and minority ownership). *Prometheus IV,* 39 F.3d at 584-588. In so doing, the

Third Circuit in effect elevated the promotion of minority and female ownership from a mere public interest policy consideration into a *de facto* statutory mandate in Section 202(h). This it may not do.

As this Court recently held in *Rotkiske v. Klemm,* 140 S.Ct. 355 (2019), it is "a fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by the courts.' To do so 'is not a construction of a statute, but, in effect, an enlargement of it by the court.'" *Id.* at 360-61 (citations omitted). Indeed, while it is "common ground that the [Communications] Act does not define the term "public interest", *Federal Communications Commission v. WNCN Listeners Guild,* 450 U.S. at 593, the "weighing of policies under the 'public interest' standard is a task that Congress delegated in the first instance" to the FCC. *Id.* at 596 (citations omitted).

III. If an Administrative Agency is Entitled to Judicial Deference When Imposing Regulation, then it Follows that an Agency Should Also be Accorded Deference When Removing Regulation

As a general proposition, both logic and the Constitution itself dictate that whenever an administrative agency seeks to impose a new rule, the American people are well-served when appellate courts are vigilant to ensure that the agency's actions are not arbitrary and capricious. Did the agency appropriately identify a market failure? Did the agency conduct a thorough cost/benefit analysis? Was there adequate notice and comment? Was the record complete? If the

agency imposed a regulated price, was the rate confiscatory in violation of the Fifth Amendment? And, of course, did the agency adhere to its enabling statute and follow the relevant case law?

But because regulation can be both complex and arcane, it is not irrational for a generalist reviewing court to be reluctant to do the deep dive into the analytics, often preferring to defer to the agency even when the agency's underlying rationale for expansive regulation is had little (or no) grounding in economic theory. (*See, e.g., USTelecom v. FCC,* 825 F.3d 674, 697 (2016), *reh'g en banc denied*, 855 F.3d 381 (2017); *cert. denied sub nom.,* 139 S.Ct. 453 (2018) (a reviewing court sits as "a panel of generalist judges", not as a "panel of referees on a professional economics journal."); *but c.f.,* T. Brennan, *Is the Open Internet Order an "Economics-Free Zone"?* FREE STATE FOUNDATION (June 28, 2018); G.S. Ford, *Bait-and-Switch—Or Why the FCC's 'Virtuous Circle' Theory is Nonsense*, BLOOMBERG BNA (May 18, 2015); L.J. Spiwak, *USTelecom and its Aftermath,* 71 FEDERAL COMMUNICATIONS LAW JOURNAL 39 (2019).) As a result, some have argued (including several members of this Court) that the broad judicial deference accorded to administrative agencies under *State Farm,* along with the wide judicial deference accorded to administrative agencies under *Chevron, supra,* have contributed to the expansion—rather than the constraint—of the administrative state. *See, e.g.,* Chief Justice Roberts detailed dissent in *City of Arlington, Texas v. Federal Communications Commission*, *supra.*

The fact pattern in this case presents this Court with the opposite side of that coin. How much deference should a reviewing court accord an administrative agency when it seeks to *remove* a regulation? If an agency is entitled to significant judicial deference when imposing regulation, then it should follow that an agency is also entitled to significant judicial deference when, as here, Congress has expressed a clear preference for deregulation. The reviewing agency, not the court, is best able to balance the wide range of tradeoffs presented by regulating and deregulating, especially in the absence strong (or any) empirical evidence that deregulation would be harmful. *See, e.g., Consumer Electronics Ass'n v. FCC,* 347 F.3d 291, 303 (D.C. Cir. 2003) (Roberts, J.), *quoting Center for Auto Safety v. Peck,* 751 F.2d 1336, 1342 (D.C. Cir. 1985) (Scalia, J.) (stating that the Supreme Court's direction that a court is not to substitute its judgement for that of the agency is "especially true when the agency is called upon to weigh the costs and benefits of alternative policies").

The Communications Act, as amended, not only contains several statements of policy that express a clear Congressional preference for deregulation, but the Act also contains several provisions that provide the Commission with the authority to carry out this Congressional policy goal. We can start with the preamble of the Telecommunications Act of 1996, which states that the purpose of the Act is to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." 110 Stat. 56 Public Law 104–104 (February 8,

1996). There is also Section 230(b), which expressly provides that it shall be the policy of the United States that the Internet shall be "unfettered by Federal or State regulation." 47 U.S.C. § 230(b). Moreover, to remedy legislative shortcomings, Congress took the bold step in the Telecommunications Act of 1996 to provide the Commission both with the explicit authority to forbear from applying onerous statutes and regulations in Section 10 (47 U.S.C. 160) along with delineated authority in Section 253 (47 U.S.C. § 253) to preempt certain state laws and regulations that can act as a barrier to entry. And, of course, Congress enacted Section 202(h) which is at the heart of the dispute in this case.

Despite this stated Congressional policy, over the twenty-five years since the passage of Telecommunications Act of 1996, the FCC's deregulatory efforts nonetheless have received mixed treatment by the courts. Some courts have accepted the FCC's analysis, *see, e.g., Comptel v. Federal Communications Commission,* No. 19-1164 (D.C. Cir. November 3, 2020); *Mozilla v. FCC,* 940 F.3d 1 (D.C. Cir. 2019), *reh'g en banc denied*, (D.C. Cir. 18-1051) (February 6, 2020)); other courts have resisted FCC efforts to comply with congressional intent. *See* G.S. Ford and L.J. Spiwak, *Section 10 Forbearance: Asking the Right Questions to Get the Right Answers*, 23 COMMLAW CONSPECTUS 126 (2014). The Third Circuit's actions in this case fall into this latter category.

As petitioners detail, for over seventeen years the FCC has attempted to carry out its statutory charge in Section 202(h) to modernize its media ownership

rules to keep pace with a rapidly changing marketplace but the same panel at Third Circuit has thwarted the agency at every turn. *See, e.g.*, Industry Petitioners' Brief at 9-14. With the effects of the Internet on the media landscape fully underway when *Prometheus I* was decided back in 2004, *see generally Prometheus Radio Project v. FCC,* 373 F.3d 372 (3rd Cir. 2004), it should be obvious to all that we now live in a very different media landscape and that something must be done to preserve the health of the broadcast and newspaper industries.

Take, for example, the Third Circuit's criticism that the FCC lacked adequate evidence to determine that modernizing its media rules would not harm minority and female ownership. *See Prometheus IV,* 939 F.3d at 585-86. Indeed, the evidence was scant (which itself may suggest that the effects of regulation are *de minimis*). Given the lack of evidence, the Third Circuit contends that "[t]he only 'consideration' the FCC gave to the question of how its rules would affect female ownership was the conclusion there would be no effect" and that "this alone is enough to justify remand." *Id.* at 586. By the Third Circuit's own reasoning, this is an improper interpretation of the FCC's actions. As the Third Circuit itself recognizes, "[t]he APA imposes no general obligation on agencies to produce empirical evidence." *Id.* at 587 (citing *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (Kavanaugh, J.)).

A more reasoned assessment of the scene is that the FCC predicted, based on its expertise and discussed in the *Reconsideration Order*, that the change

in the media ownership rules would not negatively affect minority ownership, and the Third Circuit acknowledged that the Commission "solicited evidence on this issue during the notice-and-comment period." *See Prometheus IV,* 939 F.3d at 587. As the *Reconsideration Order* repeatedly states, no party filed any substantive analysis one way or the other into the record, s*ee, e.g., Reconsideration Order* at ¶¶ 44, 48 and 64. Had such a study been filed, then under the requirements of *State Farm* the Commission would have been obligated to address it. Yet, the Third Circuit acknowledges that the FCC "did not receive any information of higher quality than the NTIA/Form 323 data." *Prometheus IV, id.* As such, the record contained no evidence that would permit the Commission to reject its null hypothesis of "no effect," leaving it only to accept that prediction.

The FCC may have stopped there. Instead, armed with what little evidence was available, the Commission did what was feasible, even if allegedly "insubstantial." *See Prometheus IV,* 939 F.3d at 586; *see also Second Report and Order* at ¶ 77. While the data had warts, no doubt, the available evidence indicated no material change in minority ownership between periods of disparate regulatory regimes, and the Third Circuit's admits that no data of "higher quality" was submitted. Moreover, while the Third Circuit complains, "[w]e do not know, for example, whether the *percentage* of stations that are minority-owned went up or down from 1999 to 2009," this ignorance is the court's own fault. In the *Second Report and Order* the Commission states that the "[d]ata provided by Free Press similarly show an increase in minority owner-

ship after the Commission relaxed the Local Television Ownership Rule in 1999." *Second Report and Order* at ¶ 77. In fact, a review of that study reveals that "the *percentage* of stations that are minority-owned went up [ ] from 1999" to 2007, rising from 3.015% to 3.3%. S.D. Turner & M. Cooper, *Out of the Picture 2007: Minority & Female TV Station Ownership in the United States* (October 2007).

While the Third Circuit argues the FCC relied exclusively on an "insubstantial" empirical analysis, this statement is untrue. The FCC recognized explicitly that "no evidence in the record that would permit us to infer causation," thus relying on its general expertise to formulate its prediction. *Second Report and Order* at ¶78. Based on the evidence presented, the Third Circuit concludes "we simply cannot say one way or the other" whether the modification will affect minority ownership. *Prometheus IV,* 939 F.3d at 587. If the Third Circuit "cannot say," then the appropriate response is to defer the expert agency. As this Court ruled in *National Citizens Committee for Broadcasting,* a "complete factual support in the record for the Commission's judgement or prediction is not possible or required." *National Citizens Committee for Broadcasting*, 436 U.S. at 814.

IV. When Congress Provides a Statutory Backstop, the Courts Should Accord Deference to Administrative Agencies' Deregulatory Efforts

As the record revealed, there is little if any empirical basis to measure the effect of the FCC's existing rules on minority ownership. Thus, as Judge Scirica

noted in his dissent in the case below, the "effect the new rules will have on women- and minority-broadcast ownership may remain difficult to uncover until the FCC gains experience with the new rules." *Prometheus IV,* 939 F.3d at 594-95 (Scirica, J. dissenting), *citing National Citizens Committee for Broadcasting*, *supra,* 436 U.S. at 796–97; *Council Tree Investors, Inc. v. FCC*, 619 F.3d 235, 252–53 (3d Cir. 2010), *cert. denied* 131 S.Ct. 1784 (2011). Still, the Third Circuit halted the FCC's reform efforts until it produces evidence that meets with the court's satisfaction which, if Judge Scirica is correct, may be a virtually impossible task. Faced with such a draconian remedy, it is not unreasonable to infer that the Third Circuit believed that the risks of deregulation outweigh the *status quo*.

But the panel majority's fear of deregulation in these circumstances in untenable. Indeed, entirely absent from the Third Circuit's opinion is any recognition that the Communications Act contains numerous regulatory backstops that will protect consumers if the agency's efforts to streamline its media ownership rules ultimately prove adverse.

For example, by its own terms, Section 202(h) is *iterative*. By statute, the Commission "shall review its rules adopted pursuant to this section and all of its ownership rules quadrennially…." As the dissent correctly points out below, "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." *Prometheus IV,* 939 F.3d at 593 (Scirica, J.

dissenting). Unlike the situation where the Commission would simply "set it and forget it", Congress provided a specific statutory backstop to ensure that the Commission continues to monitor industry developments.

Moreover, Section 303 (47 U.S.C. § 303)—the provision in the Communications Act which bestows upon the Commission the authority to regulate broadcasting—remains on the books and continues to provide the Commission with authority to issues rules, if necessary, in the sector (provided, of course, that the Commission provides a reasoned explanation for any change in policy. *See, e.g., Federal Communications Commission v. Fox Television Stations,* 556 U.S. 502, 515-16 (2009); *Encino Motorcars LLC v. Navarro,* 136 S.Ct. 2117, 2125-26 (2016)). Accordingly, as it is axiomatic that what one Commission can do a subsequent Commission can undo, there is nothing stopping a future FCC from reinstating in whole or in part any of the rules eliminated by the current FCC's modernization efforts if circumstances require.[1] And, assuming this Court reverses the Third Circuit in this proceeding, then both the Commission and the general public would have access to real-world data of the effect of the rule changes on women and minority

[1] This Court should also note that if Congress wanted to make media ownership rule modernization irrevocable, then it could have used a "sunset" clause. It did not. *C.f.* 47 U.S.C. § 528(c)(5) (providing for the automatic sunset of the agency's program access requirements after ten years unless the Commission finds those provisions necessary "to preserve and protect competition and diversity in the distribution of video programming"); 47 U.S.C. § 549(e) (providing a sunset clause for the FCC's set-top box rules).

ownership to construct a counterfactual, leading to better agency decisionmaking. *See Restoring Internet Freedom,* FCC 17-166, DECLARATORY RULING, REPORT, AND ORDER, 33 FCC Rcd. 311 (rel. January 4, 2018) at ¶ 93, *aff'd Mozilla v. FCC,* 940 F.3d 1 (D.C. Cir. 2019) ("methodologies designed to estimate impacts relative to a counterfactual tend to provide more convincing evidence of causal impacts" of a rule change); *see also* G.S. Ford, *Regulation and Investment in the U.S. Telecommunications Industry,* 56 APPLIED ECONOMICS 6073 (2018)).

V. The Consequences of Overly Strict Judicial Review

As noted above, given the rise in the administrative state, both logic and the Constitution itself dictate that the American people are well-served when appellate courts are vigilant to ensure that any new regulation is not arbitrary and capricious. But there must be a line between "strict" review and situations, such as here, where a court improperly substitutes its policy judgement for that of the agency.

Drawing this line can be a challenge. As Justice Breyer wrote in a law review article nearly thirty-five years ago,

> In reviewing the policy area … the pressures for control of agency power on the one hand, and for proper use of existing institutions on the other hand, are dramatically opposed. One may believe that the more important the policy decision, the greater the need for a check outside the agency. But, for reasons of

> "comparative expertise," increased judicial scrutiny seems less appropriate. *It is this dilemma that makes a stable, appropriate regime for court review of policy a nearly intractable problem.*

S. Breyer, *Judicial Review of Questions of Law and Policy,* 38 ADMINISTRATIVE LAW REVIEW 363, 394 (1986) (emphasis supplied).

Despite these difficulties, Justice Breyer nonetheless warned us about the practical consequences of overly aggressive judicial review, observing that "strict judicial review creates one incentive that from a substantive perspective may be perverse. The stricter the review and the more clearly and convincingly the agency must explain the need for change, the more reluctant the agency will be to change the status quo." *Id.* at 391. As the Justice colloquially put the matter, if he sat as the chair of an administrative agency under such conditions, his response would probably be "Why bother?" *Id.* at 392.

When it comes to the case at bar, Justice Breyer's observations were particularly prescient. The battle between the Commission and this panel of the Third Circuit over media ownership rules has dragged on for seventeen years. Yet as the Internet flourishes and local broadcasters and newspapers struggle to survive in this dynamic environment, the Commission's laudable efforts to keep pace with the market remain stuck in the mud. Absent relief from this Court, the next FCC Chair, faced with launching yet another lengthy proceeding with an appeal limited to the same recalcitrant panel at the Third Circuit, may just adopt

the attitude predicted by Justice Breyer thirty-five years ago: Why bother? Such a result would neither satisfy Congress' intent nor serve the American people well.

CONCLUSION

For the foregoing reasons, we join with Petitioners and ask this Court to reverse the Third Circuit's ruling below.

Respectfully submitted,

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