No. 11-698

IN THE
Supreme Court of the United States

NATIONAL ASSOCIATION OF BROADCASTERS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Respondents oppose the Petition on the grounds that the decision below "does not conflict with any decision of … any other court of appeals" and involves merely a "garden-variety issue of administrative law." Gov't Opp. 9. They are wrong on both counts. The Third Circuit's decision creates a direct split of authority with the D.C. Circuit, which disapproved the very same rule that the Third Circuit upheld. And this is no "garden-variety issue of administrative law." Rather, this case presents an important issue of statutory interpretation that profoundly affects the regulation of a multi-billion-dollar industry. This Court should grant the Petition.

ARGUMENT

I. There Is A Split Of Authority Between The Third Circuit And The D.C. Circuit.

1. Respondents argue that there is no conflict between the Third Circuit's decision upholding the local-television ownership rule and the D.C. Circuit's decision finding the same rule violative of § 202(h), because an agency can "reexamine[] the problem, recast its rationale and reach[] the same result." Gov't Opp. 10 (quotation marks omitted). Here, however, the agency neither "reexamined the problem" nor "recast its rationale" in any meaningful way – and yet the Third Circuit still permitted the rule to stand. That is the epitome of a circuit split: two courts presented with the same issue reaching opposite conclusions.

As the Petition recounts, in the 1999 Order reviewed in *Sinclair*, the D.C. Circuit found that it was arbitrary and capricious for the FCC to exclude certain media voices from consideration in one local ownership rule but not another. *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 164 (D.C. Cir. 2002). Almost a decade later, the FCC issued an order re-adopting the same inconsistent rules. The FCC attempted to justify its inconsistency by ignoring decades of its own precedent and simply announcing that the local-television ownership rule and the radio-television cross-ownership rule now served different purposes. In making this bald assertion and retaining the local-television ownership rule that had already been rejected by the D.C. Circuit, the Commission relied upon nothing more than vague generalities – not reasoned analysis, economic theory, or marketplace evidence. The Third Circuit nonetheless upheld the rule.

Though the Government attempts to differentiate the 2008 Order from what came before by arguing that the Commission "provided the adequate explanation that the D.C. Circuit found lacking," Gov't Br. 10, the reality is that the Commission did nothing more than assert that it could continue to take the same inconsistent approach rejected by the D.C. Circuit simply by substituting the word "competition" for "diversity." *See, e.g.*, Pet. App. 218a-19a ("[W]e include only full-power television stations in counting voices because our primary goal in preserving the rule is to foster competition among local television stations. We conclude that the local television ownership rule is no longer necessary to

foster diversity."). The Government cannot disguise the fact that in upholding an FCC decision that was not meaningfully distinguishable from the decision rejected in *Sinclair*, the Third Circuit created a direct and acute conflict with the D.C. Circuit.[1]

The Third Circuit's decision is particularly extraordinary given the explosion of competition in local media markets in the last decade. As Congress presciently anticipated, competition in local markets today is vastly greater than in 1999. Approximately 50% more households receive video programming today from cable, satellite, or other multichannel video programming distributors than in 1999, Pet. 26, yet the exact same local-television ownership rule is still in effect. Had this proceeding been before the D.C. Circuit rather than the Third Circuit, there is little question that the court would have rejected as wholly insufficient the Commission's flimsy justification for retaining an outmoded rule.

2. It is not surprising that the Third Circuit and the D.C. Circuit reached such different results, because they approach § 202(h) very differently. The Third Circuit gives § 202(h) no deregulatory force – according to that Court, the provision mandates periodic proceedings, but does not otherwise differ from basic administrative law pursuant to which an agency must dispense with a rule if "time and

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[1] The Non-Governmental Respondents' attacks on this proposition – as a "farfetched . . . conspiracy theory" and an exercise of "imagination," Non-Gov't Opp. 11, 17 n.32 – are mystifying. The FCC's failure to meaningfully change its justification is not a "conspiracy"; but it is certainly a failing, and one relevant to the existence of a split.

changing circumstances" warrant. *NBC v. United States*, 319 U.S. 190, 225 (1943); *see also* Pet. App. 52a (requiring FCC to do nothing more than "give a rational reason for retaining existing limits as necessary in the public interest"); *Prometheus Radio Project v. FCC*, 373 F.3d 372, 441-45 (3d Cir. 2004) (Scirica, C.J., dissenting) (concluding that Third Circuit majority wrongly rejected argument that § 202(h) "overlays a deregulatory tenor on our review"). As a result of this interpretation, the court did not scrutinize the FCC's analysis or acknowledge the clear record evidence of competition in local markets; rather, it simply accepted as "rational" the FCC's conclusory assertions that its rules remain necessary, even where the best justification the agency could muster was that the local-television rule does not "*threaten[]*" the public interest. Pet. App. 223a (emphasis added); *see also* Gov't Opp. 12 ("ordinary test applicable to most agency actions" applies).

In sharp contrast, the D.C. Circuit has repeatedly ruled that § 202(h) places a deregulatory thumb on the scale and requires a hard look at whether – as Congress expected – increased competition in media markets has rendered existing rules outdated. The D.C. Circuit has thus explained that § 202(h) was enacted "in order to continue the process of deregulation" that Congress "set in motion," *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1033 (D.C. Cir. 2002) ("*Fox I*"); that "§ 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules," *Sinclair*, 284 F.3d at 159 (quoting *Fox I*); and that Congress's mandated

"approach to the deregulation of broadcast ownership" is best "likened to Farragut's order at the battle of Mobile Bay ('Damn the torpedoes! Full speed ahead.')," *Fox I*, 280 F.3d at 1044. With this understanding, the D.C. Circuit has rigorously analyzed the state of competition and has struck down or remanded *all* of the ownership rules it has considered under § 202(h) for lack of an adequate explanation why further deregulation was not warranted. *See, e.g.*, *Fox I*, 280 F.3d at 1041-42, 1044 ("the Commission has no valid reason to think" a rule "is necessary to safeguard competition"); *id.* at 1043 (§ 202(h) "imposed upon the Commission a duty to examine [a rule] critically"); *Sinclair*, 284 F.3d 161-65; *id.* at 170 (Sentelle, J., concurring and dissenting) (while "[t]he FCC offers us only truisms, stating that it has struck the right balance," it may not "simply cry 'diversity!' and thus avoid meaningful appellate review").

No reader of *Fox I*, *Sinclair*, and the decision below could reasonably come away with the impression that the D.C. Circuit and the Third Circuit "have approached Section 202(h) consistently." Gov't Opp. 11. Respondents insist that the courts of appeals are on the same path as a result of the D.C. Circuit's rehearing decision in *Fox* ("*Fox II*") and its later decision in *Cellco* about a different statutory provision. But neither of these decisions does anything to alter the conclusion that the Third Circuit and the D.C. Circuit have fundamentally diverged.

First, *Fox II* chose to leave *all* of the language quoted above from *Fox I* about § 202(h)'s deregulatory mandate completely untouched. The court changed only a single paragraph of *Fox I* regarding whether the term "necessary" in § 202(h) means indispensable or useful – a distinction that *Fox I* "did not turn at all upon," and that was not yet ripe for decision. *Fox II*, 293 F.3d at 540.[2] As the *Fox II* court suggested, *see id.*, the meaning of "necessary" does not control the broader question of whether § 202(h) embodies a deregulatory mandate. The issues are distinct: § 202(h) can put a deregulatory thumb on the scale and require a searching examination of whether ownership rules should be left in place in the face of increased competition, even if those rules do not have to be *essential* in order to be retained. The Petition argues that the circuits have taken different approaches to the broader issue of § 202(h)'s import, not to the narrower issue of what "necessary" means. Indeed, the Petition pointed out that the D.C. Circuit had not yet ruled on the meaning of "necessary" in § 202(h). Pet. 21-22 n.5 (citing *Fox II* and *Cellco*).

Accordingly, there is no basis for the Non-Governmental Respondents' assertion that the Petition's description of the D.C. Circuit's caselaw is "fictionalize[d]." Non-Gov't Opp. 7. Indeed, it is the Non-Governmental Respondents who have

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[2] The affected paragraph was "the first full paragraph on page 1050" of *Fox I*. *Id.* at 541. The *Fox II* court also made two "minor modifications" of a few words "to conform the opinion to th[at] change." *Id.*

misunderstood the decisions of that court. The Non-Governmental Respondents are flatly wrong to claim that on rehearing the *Fox* panel deleted the reference in its initial opinion to a "presumption in favor of repealing or modifying" media-ownership rules. *Id.* It did no such thing. *Fox II*, 293 F.3d at 540. Also false is the Non-Governmental Respondents' assertion that the relevant discussion in *Sinclair* relied on the paragraph of *Fox* that was amended by *Fox II*. Non-Gov't Opp. 8. In fact, the *Sinclair* court never *once* cited that paragraph, and its discussion of *Fox I* relied only on the mass of deregulatory language that *Fox II* expressly declined to alter. *Sinclair*, 148 F.3d at 152, 159, 164.

Second, the D.C. Circuit's later decision in *Cellco* did nothing to change the Circuit's interpretation of § 202(h). *Cellco* was focused *exclusively* on the meaning of "necessary." *Cellco P'ship v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004). It had nothing to do with whether § 202(h) has a deregulatory overlay or mandates a particularly hard look at the state of competition. Thus, the discussion in *Cellco* of a "presumption" is directed at ascertaining whether such a presumption dictates a particular view of the meaning of "necessary." *See id.* at 97-98. Anything else is merely dicta.[3]

More broadly, *Cellco* was construing the term "necessary" in a different statutory provision – not

[3] To the extent that *Cellco* suggests that *Fox I* and *Sinclair* saw § 202(h) as deregulatory only with respect to remedies, that is incorrect. *See Fox I*, 280 F.3d at 1033, 1036, 1043-44, 1048; *Sinclair*, 284 F.3d at 152, 159, 164.

§ 202(h), which does not contain the word "necessary" in its requirement to repeal or modify any media-ownership regulation "no longer in the public interest." Indeed, the D.C. Circuit took pains to point out how much the interpretation of that "chameleon-like word" is influenced by its statutory context. *Id.* at 96. Because the court was not considering § 202(h), its decision does not mention the many contextual indications that § 202(h) must be read with a deregulatory overlay – including the fact that virtually every subsection of § 202 reversed FCC ownership restrictions (including many that had been in place for decades) in an effort to *expand* common ownership, realize the benefits of competition, and redirect the Commission's efforts away from regulation.

It is clear that the result in this case would have been different in the D.C. Circuit – the result actually *was* different in the D.C. Circuit. The difference in the courts' approaches to § 202(h) is an important part of the analysis, and has very serious implications for future periodic review of the media-ownership rules.[4] Without certainty about the basic standard to be applied, future review proceedings will fail to carry out Congress's directives or achieve the deregulatory benefits that Congress anticipated.

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[4] If the Non-Governmental Respondents believe that there is no difference in approach between the courts of appeals, it is difficult to understand why they have striven to avoid review by the D.C. Circuit – by filing multiple petitions in other circuits, then seeking transfer to the Third Circuit and vigorously opposing transfer to the D.C. Circuit.

See, e.g., *Federal Power Comm'n v. Conway Corp.*, 426 U.S. 271, 275-76 (1976).

II. This Court's Review Is Critical Now.

1. These issues merit this Court's attention now. The rules addressed by the Petition are currently in effect. Those rules govern a multi-billion-dollar sector of the economy on which the public heavily relies, and review of those rules is among the most significant tasks that the Commission carries out, as is clear from the scope and the level of participation in the FCC proceedings below. The proper interpretation of § 202(h) – and a consistent application of that provision to the same set of rules – is therefore critically important. *See, e.g.*, William Fishman, *Comments on the FCC's Recent Mass Media Ownership Decision*, 53 AM. U. L. REV. 583, 583 (2004) (describing media-ownership review as "one of the most important [determinations] in the FCC's history"); *cf. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999) (reviewing telecommunications provisions of 1996 Act that "profoundly affect[ed] a crucial segment of the economy worth tens of billions of dollars").

In particular, the local-television rule upheld below is imperiling local stations and their ability to provide the local news, emergency information, and entertainment programming on which the public relies. Pet. 29-31. The Government's response is to point to the policy permitting waiver of that rule for failed or failing stations. Gov't Opp. 14-15. But that policy is so extraordinarily draconian that it does not lessen the problem. A "failed" station can obtain a

waiver only when it has gone into *involuntary* bankruptcy or has not operated at all for at least four months – and to NAB's knowledge no such waiver has *ever* been granted. NAB Comments, *In re 2010 Quadrennial Regulatory Review*, MB Docket No. 09-182, at 84-85 (July 12, 2010); 14 F.C.C.R. 12,903, 12,936-40 (1999). A "failing" station may apply for a waiver if it has been losing money for at least three years and has an all-day audience share of four percent or less – but a several-year wait for a waiver erases any benefit, and many financially troubled local stations are unable to meet this test in any event given the relative popularity of their network programming. *See id.* Moreover, even if waivers issue in a few extreme cases,[5] that does nothing to help struggling stations that avoid financial default by cutting back on local news and other valued programming – thus directly harming the public.

Similarly irrelevant is new legislation permitting some station owners to surrender spectrum to the Government and receive certain auction proceeds in return. Gov't Opp. 15. That law – pursuant to which no auctions need take place for nine years, *see* 126 Stat. 156, 225, § 6403 – is designed to facilitate reallocation of spectrum to wireless services and does not address the FCC's media-ownership regime in any way.

2. That the Commission will soon be reviewing its ownership rules again is no reason to deny the Petition. *See* Gov't Opp. 15. The Government should

[5] Research reveals that the FCC has granted about *one* failing-station waiver per year since the policy went into effect in 1999.

not be permitted to permanently evade review in this Court just because Congress has identified the media-ownership rules as so important that they must be revisited every four years. In addition, the next ownership-review order from the Commission is still far in the future. The Commission has only just received the first round of comments on its notice of proposed rulemaking in the *2010* quadrennial review – which proposes to retain yet again the *same* local-television rule that has been in effect since 1999 and that the D.C. Circuit has rejected. *See 2010 Quadrennial Regulatory Review*, 77 Fed. Reg. 2868 (Jan. 19, 2012). A decision from this Court would guide the Commission in issuing its next order as well as judicial review of that order. It would also guide future FCC ownership proceedings.

Indeed, it is precisely *because* the Commission must undertake these regular proceedings that this Court's review is urgent. Respondents have not denied that the current state of affairs encourages gaming of the congressionally created lottery system that governs which court of appeals will hear challenges to the FCC's orders. Pet. 31-32. Respondents also have not addressed the Petition's explanation that the Third Circuit's asserted retention of jurisdiction is deeply problematic – a state of affairs that has locked a highly important industry into a never-ending remand proceeding that contravenes Congress's venue-selection mechanisms and its intent in enacting § 202(h). The Third Circuit has *never* permitted a deregulatory change adopted by the FCC to survive review, but has upheld the FCC's orders to the extent that they

maintain or even *increase* regulation of media ownership. If this Court turns this case away, there is no reason to believe that Congress's deregulatory purposes will ever be fulfilled.

Finally, the vague "possibility of future changes in the television industry," Gov't Opp. 16, does not counsel against review. As noted above, the new spectrum-auction legislation, enacted only last month, is unrelated to the questions in this proceeding. Local television is unquestionably essential, and unquestionably will remain so far into the future. The legal regime governing ownership of television stations (as well as other media in local markets) is therefore critically important, and this Court should ensure that the courts of appeals are enforcing it consistently and in accordance with congressional intent.

CONCLUSION

For the foregoing reasons, the Petition should be granted.[6]

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[6] The Government argues there is no reason to grant or hold this Petition in light of the other petitions submitted in this case. *See* Gov't Opp. 16 n.6. But if the Court finds suspect the FCC's constitutional authority to regulate media ownership, that would certainly affect the rules that are the subject of this Petition. Thus, the Court should, at a minimum, hold this Petition pending disposition of the others.

Respectfully submitted,

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