No. 19-1241

IN THE
Supreme Court of the United States

NATIONAL ASSOCIATION OF BROADCASTERS, *ET AL.*,

Petitioners,

v.

PROMETHEUS RADIO PROJECT, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statements included in the petition for a writ of certiorari remain accurate, except for the following:

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page(s)**

TABLE OF AUTHORITIES
(continued)

CASES (*continued*) **Page(s)**

STATUTES

OTHER AUTHORITY

REPLY BRIEF FOR PETITIONERS

Industry petitioners present an important statutory question with major ramifications for the future of American media: Whether under Section 202(h) of the Telecommunications Act of 1996 the Federal Communications Commission may repeal or modify media ownership rules that it determines are no longer "necessary in the public interest as the result of competition" without statistical evidence about the prospective effect of its rule changes on minority and female ownership.

Under the plain text of the statute, the answer to that question must be "yes." Pet. 14-22. Yet a divided panel of the Third Circuit vacated the Commission's attempts in the *Reconsideration Order* to repeal or modify archaic rules solely because it concluded that the FCC's analysis of ownership diversity was insufficiently robust. That same panel has for nearly *two decades* repeatedly elevated its own policy concerns over the statutory text. It has accomplished that feat by purporting to retain jurisdiction over the FCC's Section 202(h) orders, consistently blocking essential regulatory reform nationwide.

Meanwhile, the media marketplace has changed dramatically, with the advent of smartphones, social media, and streaming video and audio, as well as the widespread availability of cable television and satellite radio and television—all of which are less regulated than the broadcast and newspaper industries. Pet. 23-25. Although Section 202(h) explicitly instructs the FCC to account for these competitive changes, the Third Circuit continues to block its efforts to do so.

Respondents never challenged the FCC's statutorily required competition analysis and make no serious effort to confront the statutory text. Instead, because they prefer the Third Circuit's elevation of policy preferences over the language Congress adopted, they insist that this Court cannot even interpret Section 202(h) unless the Commission first determines whether the statute requires consideration of diversity. That argument is beside the point because the question presented here is whether the *Third Circuit* correctly interpreted Section 202(h) in setting aside the *Reconsideration Order*, not whether the FCC correctly interpreted the statute. The argument is also inconsistent with bedrock principles of constitutional and administrative law and foreclosed by this Court's precedent.

Respondents' repeated refrain that there is no circuit split on the interpretation of Section 202(h) provides no reason to deny review. That is true only because the panel has purported to retain jurisdiction over successive appeals under Section 202(h), foreclosing any other avenue for obtaining judicial review and rendering further percolation of the question presented impossible.

Respondents' insistence that petitioners can and should simply present their statutory arguments to the Commission during the next quadrennial review and hope that the Commission accepts their position despite the Third Circuit's ruling is equally flawed. Petitioners' statutory arguments are properly before this Court now, and they have waited long enough—almost 20 years—for the regulatory relief that Congress envisioned under Section 202(h). The outdated rules the Third Circuit restored continue to

have a severe, negative impact on America's broadcast and newspaper industries and on the public. This Court's review is needed now.

REASONS FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT HAS PERSISTENTLY REJECTED THE COMPETITION ANALYSIS MANDATED BY CONGRESS AND REPLACED IT WITH ITS OWN ATEXTUAL POLICY CONCERNS ABOUT OWNERSHIP DIVERSITY.

Respondents assert there is "no question of statutory interpretation" at issue in this case. Br. in Opp. 19 (capitalization altered). They are mistaken. This Court should grant certiorari precisely because the Third Circuit has persistently replaced a clear statutory command with its own policy considerations. And this Court does not need to wait for the Commission to conclude the 2018 quadrennial review before reviewing the Third Circuit's interpretation of Section 202(h).

A. The Third Circuit Panel's Decision Conflicts With Section 202(h).

Section 202(h) directs the FCC to "repeal" or "modify" any broadcast ownership rule that is no longer "in the public interest as the result of competition." Despite the statute's express—and sole—focus on competition, the Third Circuit panel vacated the *Reconsideration Order* for not sufficiently examining the potential effect of the FCC's rule changes on minority and female ownership, a subject mentioned nowhere in the statutory text. Pet. 14-22.

Respondents contend that the Third Circuit's interpretation of Section 202(h) did not "elevate 'atextual' concerns above textual ones." Br. in Opp. 21. Yet they do not identify any text on which the

Third Circuit purportedly relied for its command that the agency elevate ownership-diversity considerations above the statutorily mandated competition analysis. Neither did the panel majority, which cited only its own prior instruction to "'include a determination about the effect of the rules on minority and female ownership.'" Pet. App. 34a (quoting *Prometheus Radio Project* v. *FCC*, 824 F.3d 33, 54 n.13 (3d Cir. 2016) ("*Prometheus III*")); *see id.* at 37a ("we instructed [the FCC] to consider the effect of any rule changes on female as well as minority ownership"). In fact, the Third Circuit has *never* identified any statute or regulation requiring the FCC to consider ownership diversity in conducting its Section 202(h) reviews. Pet. 21. The explanation for this failure is straightforward: Neither respondents nor the Third Circuit cite any statutory text to support their preferred policy, because there is none.

Failing to identify any instruction from Congress that supports their favored approach to Section 202(h) reviews, respondents turn to the FCC. They say that "the Commission expressly endorsed the goal of ownership diversity" in the *Reconsideration Order*. Br. in Opp. 21-22. Not so. The cited portions of the *Reconsideration Order* endorsed "viewpoint diversity" and found that any reduction resulting from elimination of the NBCO Rule would "be mitigated by the multiplicity of alternative sources of local news and information available in the marketplace." Pet. App. 87a. Contrary to respondents' position, the Commission expressly did "not reach arguments" about the effects of ownership diversity on viewpoint diversity. *Id.* at 86a-87a n.49.

Respondents also highlight the FCC's statement during the ongoing 2018 quadrennial review that its

"local radio ownership rule" is "'consistent with'" the promotion of minority and female ownership. Br. in Opp. 23 n.5 (quoting *2018 Quadrennial Regulatory Review*, NPRM, 33 FCC Rcd. 12111, 12116 ¶ 9 (2018)). Even if that statement concerned an aspect of a rule repealed or modified by the *Reconsideration Order*—which it does not—it would not support respondents' position, because the context makes clear that "[t]he Commission's *primary* rationale for maintaining the rule has been to promote *competition*"—not diversity. 33 FCC Rcd. at 12116 ¶ 9 (emphasis added). Thus, the statement simply highlights the Commission's recognition that competition is the most important consideration under Section 202(h).

In all events, the Third Circuit did not find that "the Commission's own historical embrace of ownership diversity as an essential component of the public interest made it 'an important aspect of the problem.'" Br. in Opp. 14 (quoting Pet. App. 41a). The passage of the Third Circuit's opinion respondents cite did not even mention the FCC's supposed policy goals. *See* Pet. App. 34a-42a. Instead, the court relied solely on its *own* prior instruction that the Commission's ongoing ownership reviews "must 'include a determination about the effect of the rules on minority and female ownership.'" *Id.* at 34a (quoting *Prometheus III*, 824 F.3d at 54 n.13). And that instruction was premised entirely on the Third Circuit's prior opinions and policy preferences. *See* Pet. 20-22.

Even if respondents could come up with an FCC statement supporting their view that promotion of minority and female ownership should outweigh competition in Section 202(h) reviews, the agency could not "abandon the statutory text." *Bostock* v.

Clayton Cty., 140 S. Ct. 1731, 1749 (2020). The Commission "literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 374 (1986). That is why the question a court faces "when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority." *City of Arlington* v. *FCC*, 569 U.S. 290, 297 (2013) (emphasis omitted).

Here, Congress instructed the Commission to consider "the result of competition" in its Section 202(h) reviews. Whatever else the Commission may lawfully consider when it conducts such reviews, it may not overcome the competition analysis through "reasoning divorced from the statutory text." *Massachusetts* v. *EPA*, 549 U.S. 497, 532-35 (2007). The Third Circuit thus overstepped when it "enlarge[d]" Section 202(h) to encompass "what was omitted," *Nichols* v. *United States*, 136 S. Ct. 1113, 1118 (2016) (citation omitted), and respondents are mistaken when they contend that the Third Circuit's decision does not implicate the statutory text.

This Court should intervene to eliminate the atextual diversity requirement imposed by the Third Circuit and restore the primacy of the competition analysis that Congress directed.

B. The Question Presented Is Properly Before This Court.

Respondents insist that the "proper forum" to raise arguments about the interpretation of Section 202(h) "is the Commission, not this Court." Br. in Opp. 24. According to respondents, the FCC must first conclude that the statute "requires it to consider

only (or even primarily) competition," before this Court can even consider the question. *Id.*

That argument is beside the point because the question presented is whether the *Third Circuit* correctly interpreted Section 202(h) in setting aside the *Reconsideration Order*, not whether the FCC correctly interpreted the statute. This Court, of course, routinely decides whether lower courts have properly construed federal statutes.

In any event, the argument fails on its own terms because it turns constitutional and administrative law on their heads. The Constitution assigns "'to the judiciary the duty of interpreting [laws] and applying them in cases properly brought before the courts.'" *Patchak* v. *Zinke*, 138 S. Ct. 897, 904 (2018) (plurality opinion) (citation omitted). And under the Administrative Procedure Act ("APA"), "the reviewing *court* shall decide all relevant questions of law" and "interpret constitutional and statutory provisions." 5 U.S.C. § 706 (emphasis added). To be sure, courts may sometimes *defer* to an agency's interpretation of a statute. *See Chevron U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). But there is no authority for respondents' extraordinary proposition that this Court may not correct a lower appellate court's interpretation of a statute unless and until an agency "grapple[s] with the issue" first. Br. in Opp. 23.

Nor is there any merit to respondents' argument that upholding the *Reconsideration Order* based on the correct interpretation of Section 202(h) would violate the *Chenery* doctrine. *See* Br. in Opp. 22-23 (citing *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947)). This Court has explained that "[t]he *Chenery* doctrine *has no application*" in a case where the agency's action

was required by law, even if the agency "provided a different rationale for the necessary result." *Morgan Stanley Capital Grp.* v. *Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 544-45 (2008) (emphasis added). "To remand" in such a case for the agency to articulate the correct proposition of law before necessarily reaching the same result "would be an idle and useless formality" and "convert judicial review of agency action into a ping-pong game." *Id.* at 545.

Here, "[n]o party identifie[d] any reason to question the FCC's key competitive findings and judgments." Pet. App. 55a (Scirica, J., dissenting). Because 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*. *See* Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996), as amended by Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) ("The Commission *shall* repeal or modify any regulation it determines to be no longer in the public interest." (emphasis added)). Thus, the *Chenery* doctrine imposes no obstacle to upholding the *Reconsideration Order*, regardless of the Commission's rationale with respect to minority and female ownership.

Indeed, if the Commission had retained long-outdated ownership rules that are no longer necessary in the public interest as the result of competition "based on the unsubstantiated hope that" they would "promote minority and female ownership," Pet. App. 140a, its action would have been arbitrary and capricious under the APA, as well as contrary to Section 202(h). As this Court has explained, an

agency rule is arbitrary and capricious not only when the agency "fail[s] to consider an important part of the problem," but also when the agency "relie[s] on factors which *Congress has not intended it to consider*." *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (emphasis added).

For all these reasons, the Third Circuit's responsibility was to determine what factors Congress instructed the Commission to consider under Section 202(h) in order to assess the legality of the Commission's decision. Instead, the Third Circuit replaced the competition analysis Congress specified with its own policy considerations from prior panel opinions. That decision is wrong and is squarely before the Court.

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

For almost 20 years, the same divided Third Circuit panel has consistently blocked nationwide the FCC's efforts to reform ownership rules that both the Commission and the Third Circuit have recognized are no longer necessary in the public interest as the result of competition. *See* Pet. 23-25. The resulting regulatory stasis continues to harm the broadcast industry and newspapers—limiting their ability to compete in the digital age—and ultimately the public. *See*, *e.g.*, *id.*; Affiliates Br. 13-19; ICLE Br. 17-21; Gray Television Br. 23-26. And because the Third Circuit panel has once again purported to retain continuing jurisdiction over remanded issues, its misguided analysis will continue to distort the Commission's quadrennial reviews and impede any other circuit from interpreting Section 202(h). *See* Pet. 22-27.

Respondents' attempts to minimize the importance of the question presented—and the need for review now—are unpersuasive. Respondents cite a handful of news reports to suggest that "local ownership limits remain necessary to preserve competition." Br. in Opp. 27-28. But that is the FCC's call to make, not respondents'. And they declined to challenge the *Reconsideration Order*'s conclusion "that the ownership rules have ceased to serve the 'public interest'" or "the FCC's key competitive findings and judgments." Pet. App. 55a (Scirica, J., dissenting). They cannot now dispute the Commission's judgment that repealing or modifying its ownership rules would enable "broadcast stations and newspapers—those media outlets most committed to serving their local communities"—to "better . . . invest in local news and public interest programming and improve their overall service to those communities." *Id.* at 67a-68a.

Respondents are certainly correct that the "industry is always evolving" and that "the quadrennial review process is designed to account for that evolution." Br. in Opp. 27. That is precisely why this Court's review is urgently needed now. Due to the same Third Circuit panel's repeated decisions, ownership rules from decades ago are frozen in place, even as technology "has transformed the American people's consumption of news and information." Pet. App. 92a-98a. Those decisions have blocked the "iterative process" designed by Congress to enable the Commission to "gain experience with its policies so it may assess how its rules function in the marketplace." *Id.* at 55a (Scirica, J., dissenting). And, absent this Court's intervention, the Commission will have no choice but to comply with the Third Circuit's atextual

commands in future reviews and will never be able to "move on and get it right." Br. in Opp. 29.

Respondents' assertion that "[i]f a case filed in the D.C. (or another) Circuit did not fall within the scope of the remand, no court would transfer it" to the Third Circuit is cold comfort. Br. in Opp. 26. As Judge Williams explained five years ago, "the widening circle of interlocked issues" implicated in the Third Circuit's successive remands meant that "a vast range of issues m[ight] be forever committed to one circuit." Order at 3, *Howard Stirk Holdings, LLC* v. *FCC*, No. 14-1090 (D.C. Cir. Nov. 24, 2015). There is nothing "routine" (Br. in Opp. 21 n.4) about the Third Circuit's assertion of perpetual jurisdiction over such a broad range of interrelated issues, when Congress permitted review in any court of appeals. *See* 28 U.S.C. § 2343.

Moreover, the Third Circuit's extraordinary retention of jurisdiction has foreclosed any possibility of a circuit split, rendering respondents' contention that "the standards would be identical in any court of appeals" entirely speculative. Br. in Opp. 26. Respondents cite the D.C. Circuit's decision in *Fox Television Stations, Inc.* v. *FCC*, 280 F.3d 1027 (D.C. Cir. 2002), as supposedly endorsing the Third Circuit's emphasis on ownership diversity. *See* Br. in Opp. 4. But there, one of the "stated purpose[s]" of the relevant "rule was to promote diversification of ownership in order to maximize diversification of program and service viewpoints." *Fox*, 280 F.3d at 1034. Thus, that decision merely applied the basic administrative-law principle that when the Commission adopts a rule to further a particular policy goal, it must consider the effect of the rule on its goal. The D.C. Circuit did not hint that the Commission must always consider the "effect of [its]

rules on minority and female ownership" in its Section 202(h) reviews and can never repeal or modify a rule if its consideration of that factor is insufficiently rigorous, as the Third Circuit has mandated. Pet. App. 34a. In fact, the D.C. Circuit overturned the FCC's retention of a television ownership rule for failing to assess the "state of competition" in the television market and, thus, concluded that the FCC has not met its obligation "to address meaningfully the question that Congress required it to answer." *Fox*, 280 F.3d at 1044.

Unless this Court grants review now, the Third Circuit's misguided interpretation of Section 202(h) will continue to distort the FCC's quadrennial reviews and thwart Congress's intent. And obsolete rules that no one contends are actually necessary in the public interest as the result of competition will remain, harming broadcasters, newspapers, and the public.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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