

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 THE LEADERSHIP CONFERENCE ON
CIVIL AND HUMAN RIGHTS, THE LEADERSHIP
EDUCATION FUND, AND 16 OTHER PUBLIC
INTEREST ORGANIZATIONS AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICI CURIAE*¹

Amici are 18 organizations that strongly support greater ownership diversity in broadcast and other media. *Amici* are a diverse group of organizations that support civil rights, community engagement, equality, and economic opportunity. They recognize that media ownership by members of historically disadvantaged groups including people of color and women is vital in multiple respects, including to telling the stories of those who otherwise would not have their stories told and building and sustaining a well-informed and fully representative democracy.

The Leadership Conference on Civil and Human Rights (“The Leadership Conference”) is a coalition of more than 200 member organizations committed to promoting and protecting full equality for all persons in the United States. Since its founding 70 years ago, The Leadership Conference has grown to become the nation’s largest and most diverse civil and human rights coalition. Members differ in size, scope, and structure, but share a common commitment to building a nation of equal justice and equal opportunity. Many *amici* are members of The Leadership Conference.

The Leadership Conference Education Fund (“The Education Fund”) is the research, education, and communications arm of The Leadership Conference. The Education Fund focuses on documenting discrimination in American society, monitoring efforts to enforce civil rights

¹ No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

legislation, and fostering better public understanding of issues of prejudice.

The Leadership Conference regularly submits comments to the Federal Communications Commission (“FCC” or “Commission”) in connection with the agency’s periodic review of its broadcast ownership rules and diversity initiatives. Across multiple review cycles, The Leadership Conference has encouraged the FCC to prioritize ownership diversity when it assesses the public interest. The Leadership Conference has also urged the FCC to take steps to improve transparency and accountability. Because of The Leadership Conference’s active and longstanding role in the FCC’s administrative process, it has an informed and useful perspective to share with the Court.

SUMMARY OF ARGUMENT

In evaluating its rules for ownership of local broadcast media, the FCC has said that it considers an important policy goal: ownership diversity. In the order under review, the FCC expressly determined that its sweeping changes to those rules “will not have a material impact on minority and female ownership.” Pet. App. 117a. The FCC’s supporting analysis, however, is “so insubstantial that it would receive a failing grade in any introductory statistics class.” Pet. App. 38a. A straightforward application of settled principles for judicial review of agency action thus warrants affirmance.

The FCC’s support is so weak that, in this Court, the FCC suggests that its express finding was merely a “stray” statement. U.S. Br. 38. Really, the FCC now claims, all it meant to say was that “the record evidence did not affirmatively suggest any connection between the

ownership rules and female and minority ownership levels.” U.S. Br. 39.

The FCC cannot rewrite its order to survive judicial review. This Court, like the court below, should hold the agency accountable to support the determination it actually made. That is what basic principles of transparency and accountability require. *Cf. Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1907 (2020) (“It is a foundational principle of administrative law that judicial review of agency action is limited to the grounds that the agency invoked when it took the action.” (quotation marks omitted)).

Amici address two critical points. Together, they show why the court below correctly required the FCC to make a determination supported by competent evidence.

First, for decades the FCC has adopted ownership diversity as an important public interest consideration. The FCC is not charged with considering competition only. It has incorporated diversity of local broadcast media ownership into the periodic reviews it conducts under Section 202(h) of the Telecommunications Act of 1996, as amended, 47 U.S.C. § 303 note (2010), which requires the FCC to evaluate local broadcast ownership rules to determine what is in the “public interest.” And there is no deregulatory presumption in Section 202(h) until *after* the public interest is established.²

² Any suggestion by the Industry Petitioners to the contrary is wrong. Ind. Pet’rs’ Br. 7-8. Their reliance on the D.C. Circuit’s ruling in *Fox TV Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir.), opinion modified on reh’g, 293 F.3d 537 (D.C. Cir. 2002), is misplaced. In *Fox TV Stations*, although “not convinced [that] Congress required” the FCC’s “‘incremental’ approach to the deregulation of broadcast own-

Because The Leadership Conference, with the support of many stakeholders, actively participated in the FCC's periodic reviews and other dockets, *amici* are particularly well suited to rebut petitioners' assertion that the court below substituted its judgment for the FCC's. *See* U.S. Br. 36; Ind. Pet'rs' Br. 24-25. *Amici* have seen firsthand a repeated pattern from the FCC: it pays lip service to ownership diversity as a stated goal, but does virtually nothing to assess or advance that goal. The court below did not decide that the FCC should consider ownership diversity. Rather, it required the FCC to actually do what it claims to have done: make a finding supported by record evidence regarding the likely impact of the regulatory change on ownership diversity.

Second, the Court should give no weight to the FCC's arguments regarding the supposed lack of empirical data; that is a problem of the FCC's own making. Throughout this regulatory process, the FCC has consistently reiterated the importance of ownership diversity to the public

ership" pursuant to § 202(h), the Court nevertheless *rejected* the network's challenge to the incremental approach as inconsistent with other recent FCC decisions. 280 F.3d at 1044. The Court did not hold that § 202(h) *required* deregulation—certainly not without assessing the public interest. *Id.* Separately, the D.C. Circuit agreed that the FCC had provided too little analysis to justify its decision. *Id.* (“[W]e agree with the networks that the Commission ‘failed even to address meaningfully the question that Congress required it to answer.’”). In *Cellco Partnership*, the D.C. Circuit noted “the different regulatory context” of § 202(h) from § 11 of the 1996 Act, rejected “the position that § 11 embodies a presumption in favor of deregulation,” and held that “[t]he Commission reasonably concluded that the deregulatory presumption arises only after it has determined under § 11(a) that a regulation is no longer necessary in the public interest.” *Cellco P’ship v. FCC*, 357 F.3d 88, 98-99 (D.C. Cir. 2004).

interest and vowed to collect and analyze accurate data. But it has failed to act on that commitment. And the ownership situation remains as the FCC has described it: “dismal.” *In re Promoting Diversification of Ownership*, 24 FCC Rcd. 5896, ¶ 1 (2009) (“the overall level of minority and female ownership in the broadcast industry remains dismal”); *Summary of Federal Communications Commission Biennial Commercial Broadcast Ownership Data, 2009-2017*, Compiled By The Leadership Conference (Dec. 2020), <http://civilrightsdocs.info/pdf/FCC-v-Prometheus-Charts.pdf> (incomplete data reflecting that women own at most 9.3% and African Americans at most 3% of any category of local broadcast media).

A regulatory agency with the FCC’s resources and expertise should not come to this Court pleading an inability to assess basic facts about the entities it regulates. Analysis of the actual and likely effect of regulatory changes should be data driven. The Leadership Conference and its members have urged the FCC to take modest steps necessary to ensure compliance with mandatory reporting requirements; analyze and permit meaningful review by others of the data it has collected; and gather and review better data regarding ownership diversity. For years, the FCC has failed on all counts.

The present case is yet another chapter in the FCC’s cyclical failure to live up to its diversity policy commitments. With respect to local media ownership by women, the FCC did not consider data—at all. As for ownership by people of color, the FCC engaged in a scant, spurious discussion, using the *same data* it had invoked just over a year earlier to reach the *opposite conclusion*. For all the limitations of that data, assuming the futility of a more precise statistical analysis was like deciding to perform

cataract surgery with no measurements at all just because the laser interferometer was down: indefensible.

This Court should not endorse the FCC's failure to meaningfully consider its own policy objectives and support its factual findings. If the FCC's true determination is that it has no idea how the rule change will affect ownership diversity and no interest in gathering relevant data, it should have been open and transparent about that position. Public comment and judicial review could then focus on whether *that* position satisfies the FCC's obligations. But no agency should be permitted to adopt policy objectives and make express findings regarding those objectives without supporting evidence. Allowing that outcome would distort the regulatory process and undermine any pretense of accountability.

The Third Circuit correctly vacated as arbitrary and capricious the FCC's revised ownership rules on the ground that the agency did not adequately consider the likely effect of the regulatory changes on ownership of broadcast stations by women or people of color. The FCC gave no reasoned basis for its rule changes. Nor is there a path to justify its broken promises that "may reasonably be discerned." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30 (1983) (explaining that agency must "examine the relevant data and articulate a satisfactory explanation for its action"). This Court should affirm.

ARGUMENT

I. The FCC expressly adopted ownership diversity as an important policy consideration.

Contrary to petitioners' claims, the court below did not impose diversity as a consideration from on high or substitute its judgment for the agency's.³ This case is about holding the FCC accountable for its own longstanding policy objective. For decades, the FCC has recognized ownership diversity as an important public interest consideration and policy goal. Its public statements have been consistent and unwavering. Over the course of multiple Section 202(h) review processes, the agency solicited and received extensive public comments, and repeatedly committed to analyzing the effect of its rules on ownership by women and people of color. In so doing, the FCC also committed, publicly and repeatedly, to obtaining the requisite information to support data-driven determinations about the likely effect of policy changes on ownership diversity.

1. From the outset of the periodic review process, the FCC assured the public of its commitment to ownership diversity as an important policy consideration. *See, e.g., In re 2002 Biennial Regulatory Review*, 18 FCC Rcd. 13620, 13627, 13634 & n. 68 (stating that “[e]ncouraging minority and female ownership historically has been an important Commission objective”); *id.* at 13635-37 (issuing separate notice of proposed rulemaking specifically to consider proposals to promote ownership diversity). It emphasized the importance of this policy goal and requested feedback to

³ The FCC itself *was* the authority. *See Prometheus II*, 652 F.3d at 469 (3d Cir. 2011) (recognizing that stated goal of this rulemaking proceeding was ownership diversity). The Third Circuit did not lack or fail to cite authority in *Prometheus II*, or in the present case.

enable the agency to understand and study the effect of regulatory change on ownership diversity—meaningfully.

Public statements by FCC officials confirmed that the agency put a priority on record support and research about ownership diversity. Consider, for example, the 2003 remarks of a senior FCC economist attending Fordham University’s media diversity conference: “[t]he agency’s primary goal is, of course, to make a decision that best serves the public interest, and it is important that the decision be well-reasoned and supported in order to withstand court review.” *Statement of Jonathan D. Levy, Deputy Chief Economist, FCC, to the Fordham University Conference on Media Diversity and Localism: Meaning Metrics, and the Public Interest*, 2-3 (Dec. 15-16, 2003), <https://transition.fcc.gov/ownership/materials/already-released/statement120003.pdf>. Dr. Levy continued: “[w]e want to do it right and we are eager for help from the public, including academic researchers, in making sure that we are asking the right questions and getting the right answers.” *Id.* at 4.

2. *Amici* know that the FCC has publicly and expressly acknowledged ownership diversity as a goal because many *amici* are part of a coalition that has actively engaged with the FCC on this issue for years. *Amicus* The Leadership Conference and its stakeholders advocate for greater ownership diversity as a critical civil rights issue. Historically disadvantaged groups, including people of color and women, have long been shut out of ownership positions in media. That exclusion impairs viewpoint diversity, economic advancement, and the democratic process.

The Leadership Conference has consistently encouraged the FCC to prioritize ownership diversity when assessing the public interest during quadrennial reviews. For example, The Leadership Conference conducted hearings in 2005 and 2007 on the importance of diversity in media. As The Leadership Conference informed the FCC, the participating experts reached a unanimous conclusion: there is a pressing need for the FCC to identify and work to eliminate barriers to participation of women and people of color in radio and television. *See* Comment of The Leadership Conference, MB Dkt. 09-182 (filed Nov. 15, 2011), <https://ecfsapi.fcc.gov/file/7021747520.pdf>. Reiterating these points in 2011, The Leadership Conference urged the FCC:

[T]o make diversity a central focus of its upcoming Quadrennial Media Ownership Rule Review, by evaluating the impact of media ownership rules on ownership opportunities for women and people of color. The civil rights community has long regarded the expansion of minority and female ownership in media as an important goal because of the powerful role the media plays in the democratic process, as well as in shaping perceptions about who we are as individuals and as a nation.

Id.

Additional comments by *amici* and others have emphasized the importance of ownership diversity—both as a goal in and of itself, and as essential to furthering other public interest policy considerations the FCC historically

assesses, such as viewpoint and program diversity.⁴ As The Leadership Conference noted in 2016, ownership diversity is interwoven with viewpoint diversity and program diversity: “[t]he importance of television ownership in changing the national conversation is well-understood.” Wade Henderson and Nancy Zirkin Letter, MB Dkt. 14-50, at 1 (filed Mar. 21, 2016), <https://ecfsapi.fcc.gov/file/60001548414.pdf> (citing *Review of the Literature Regarding Critical Information Needs of the American Public*, Univ. of S. Calif. Annenberg S. for Comm’n & Journalism & Univ. of Wisconsin-Madison, at 54-60 and *Local News in a Digital Age*, Pew Res. Ctr., 124 (Mar. 2015), <https://www.journalism.org/2015/03/05/local-news-in-a-digital-age/> (describing the difference in coverage from independent outlets or outlets serving a particular community)). Diverse ownership is more likely to yield programming that negates stereotypes, portrays positive and important dimensions of the lives of people of color and

⁴ Historically, the FCC has considered localism and five different types of diversity: “viewpoint, outlet, program, source, and minority and female ownership diversity.” *In re 2002 Biennial Regulatory Review*, 18 FCC Rcd. 13620, 13627 (2003) (“2002 Review”). *See id.* at 13627-13645. This statement is but one example that puts the lie to Industry Petitioners’ suggestions that minority and female ownership has historically not been a public interest consideration (Ind. Pet’rs’ Br. 20), and that the FCC “generally did not consider minority and female ownership when reviewing its structural ownership rules under § 202(h) until the Third Circuit ordered it to do so,” (Ind. Pet’rs’ Br. 22). Tellingly, the government does not endorse Industry Petitioners’ mistaken historical perspective. *See* U.S. Br. 34 (explaining that the FCC historically has treated ownership diversity as “one aspect of its multifactor public interest inquiry”).

women such as parenthood and work, and covers topics of importance to their communities.⁵

As The Leadership Conference has also explained to the FCC in the administrative process, the internet is no substitute for broadcast media. Millions of Americans lack internet access.⁶ Many overwhelmingly still get their news

⁵ See, e.g., *When They See Us: Improving the Media's Coverage of Black Men and Boys*, The Opportunity Agenda, <https://www.opportunityagenda.org/explore/resources-publications/when-they-see-us-media> (last visited Dec. 19, 2020) (“Research by The Opportunity Agenda reviewing hundreds of studies over several years found: that news coverage and other media depictions overrepresent Black boys and men in stories of violence, crime, and poverty; underreport important dimensions of Black males’ lives, such as fatherhood and work; and lack coverage of systemic barriers facing members of this group.”); JA 172-173 (2016 Order at n. 206) (discussing and quoting Scott J. Savage and Donald M. Waldman, *Consumer Valuation of Media as a Function of Local Market Structure* 0 (2011) at 49, which “examines the effects of media market structure on consumer demand and welfare, finding that the representative consumer values different viewpoints in the reporting of information on news and current affairs, more information on community news, and more information that reflects the interests of women and minorities” (internal quotation marks omitted)).

⁶ See Comment of The Leadership Conference, MB Dkt. 18-349, at 7-8 (filed Apr. 29, 2019), <https://ecfsapi.fcc.gov/file/10429280917704/20190429-Q4%20Comments%20FINAL.pdf> (citing *2018 Broadband Deployment Report*, Fed. Communic’ns Comm’n, <https://www.fcc.gov/reports-research/reports/broadband-progress-reports/2018-broadband-deployment-report> (Feb. 2, 2018) and Carrie Mihalcik, *Microsoft: FCC’s broadband coverage maps are way off: The tech giant says more than 160 million Americans aren’t using the internet at broadband speeds*, CNet, <https://www.cnet.com/news/microsoft-fccs-broadband-coverage-maps-are-way-off/> (Apr. 9, 2019) (explaining that at least 24 million and up to 160 million Americans lack access to broadband internet and that lower income communities

from local broadcast sources.⁷ And to this day, content distributed through the internet is often *created* by broadcast sources.⁸

Unlike Industry Petitioners and several other *amici* with their own economic interests at stake, The Leadership Conference participated in the administrative process to advocate solely for the public, which continues to rely heavily on broadcast media. The March 22, 2016 letter pointed out that local broadcast television continues to dominate national political and cultural conversations,⁹ all

and communities of colors are disproportionately affected by lack of access to broadband at home)).

⁷ Comment of The Leadership Conference, MB Dkt. 18-349, at 5-6 (filed Apr. 29, 2019), <https://ecfsapi.fcc.gov/file/10429280917704/20190429-Q4%20Comments%20FINAL.pdf> (explaining that 86% of Americans get local news from local TV stations, only 23% get their news from online-only sources, and 90% of the population listens to the radio every week).

⁸ Comment of The Leadership Conference, MB Dkt. 18-349, at 6-7 (filed Apr. 29, 2019), <https://ecfsapi.fcc.gov/file/10429280917704/20190429-Q4%20Comments%20FINAL.pdf> (citing *2018 Quadrennial Notice of Proposed Rulemaking*, 33 FCC Rcd. 12111, at ¶3) (explaining that much of the content Americans consume online consists of uploaded broadcast television content, and that the vast majority of the video Americans watch consists of live and time-shifted television). *See also* Reply Comment of The Leadership Conference, MB Dkt. 18-349, at 4-6 (filed Sept. 5, 2019), <https://ecfsapi.fcc.gov/file/10905224557031/20190905-Leadership%20Conference-2018%20QR%20Reply%20final.pdf>.

⁹ Studies repeatedly show, the letter noted, that local news is still the main news source for many people in the U.S., and that 20 percent of U.S. households, led by younger people and people of color, rely on over-the-air television. Wade Henderson and Nancy Zirkin Letter, MB Dkt. 14-50, at 3 (filed Mar. 21, 2016), <https://ecfsapi.fcc.gov/file/60001548414.pdf> (citing *Local News in a Digital Age*, Pew Res. Ctr., at 39, <https://www.journalism.org/2015/03/05/local->

the while presenting an incomplete picture by failing to cover communities of color as full and equal participants. Wade Henderson and Nancy Zirkin Letter, MB Dkt. 14-50, at 3-4 (filed Mar. 21, 2016), <https://ecfsapi.fcc.gov/file/60001548414.pdf>. That letter also explained that the media does so, for example, by featuring African Americans in crime and sports stories and little else. *Id.* (citing *Portrayal and Perception: Two Audits of New Media Reporting on African American Men and Boys*, The Heinz Endowments' African American Men and Boys Task Force, 5 (Nov. 2011), <https://www.heinz.org/userfiles/library/aamb-mediareport.pdf> (studying local news media and finding that “[o]f the nearly 5,000 stories studied in both print and broadcast, less than 4 percent featured an African American male engaged in a subject other than crime or sports.”)). The tension between the importance of broadcast media, particularly for communities of color, and its often incomplete and skewed portrayals of nonwhite communities persists to this day.¹⁰

[news-in-a-digital-age/](#) (Mar. 2015) and *Local Watch: Where You Live and Its Impact on Your Choices*, Nielsen (Jan. 2016), <https://www.nielsen.com/us/en/insights/report/2016/january-2016-local-watch-report-where-you-live-and-its-impact-on-your-choices/>).

¹⁰ See, e.g., *When They See Us: Improving the Media's Coverage of Black Men and Boys*, The Opportunity Agenda, <https://www.opportunityagenda.org/explore/resources-publications/when-they-see-us-media> (last visited Dec. 19, 2020); Sara Atske et al., *7 facts about black Americans and the news media*, Pew Res. Ctr. (Aug. 7, 2019), <https://www.pewresearch.org/fact-tank/2019/08/07/facts-about-black-americans-and-the-news-media/>; Travis L. Dixon, *A Dangerous Distortion of Our Families: Representations of Families, By Race, in News and Opinion Media*, Color of Change & Family Story, Findings 1-5, https://colorofchange.org/dangerousdistortion/#key_findings (last visited Dec. 11, 2020) (finding, inter alia, that news and opinion

3. The FCC did not dismiss these extensive public comments or take the position that promoting competition simply outweighed any potential concern regarding ownership diversity. To the contrary, over the years and across administrations, the FCC has consistently recognized the importance of diversity in broadcast ownership and assured the public of its ongoing commitment to ownership diversity. For example, in 2008 (during the Bush administration), the FCC imposed non-discrimination requirements in advertising sales and in the sale of commercially operated broadcast stations. *See In re Promoting Diversification of Ownership in the Broad. Servs.*, 23 FCC Red. 5922. The FCC did not commit to considering ownership diversity lightly or in passing. Nor did the FCC abandon this goal. Far from it; the agency continues publicly to acknowledge and prioritize ownership diversity.

In 2016, for example, the FCC stated that it remained “mindful of the potential impact of consolidation . . . on

media “overrepresent poor families as being black . . . [,] welfare recipient families as black . . . [, and] black families as associated with criminality”); Michael Barthel, Elizabeth Grieco & Elisa Shearer, *Older Americans, Black Adults and Americans with Less Education More Interested in Local News*, Pew Res. Ctr. (Aug. 14, 2019), <https://www.journalism.org/2019/08/14/older-americans-black-adults-and-americans-with-less-education-more-interested-in-local-news/> (“Black Americans show a stronger connection to local news” than other demographic groups and “express a far greater preference than their counterparts for getting local news through the TV set rather than online, in print or on the radio”). *See also*, *The Status of Women in U.S. Media 2019*, Women’s Media Ctr. (Feb. 21, 2019), <https://www.womensmediacenter.com/reports/the-status-of-women-in-u-s-media-2019>; *How the News Media Covered Religion in the General Election*, Pew Res. Ctr. (Nov. 20, 2008), <https://www.pewforum.org/2008/11/20/how-the-news-media-covered-religion-in-the-general-election/>.

ownership opportunities for . . . minority- and women-owned businesses, and *we will continue to consider the implications in the context of future quadrennial reviews.*” JA217 (2014 Quadrennial Regulatory Review, Second Report and Order, 31 FCC Rcd. 9864 (2016) (“2016 Report & Order”), ¶ 128) (emphasis added). The 2016 Report & Order was loud and clear on this point:

Ideally, our media landscape should be diverse because our population is diverse, and retaining the existing media ownership rules is one way in which the Commission can help to promote such diversity. The record in this proceeding leads us to conclude that retaining the existing rules is the best way to promote our policy goals in local markets at this time.

JA104-105 (2016 Report & Order, ¶ 3). *See also* JA170, JA171 (2016 Report & Order, ¶¶ 73, 75) (reaffirming “the Commission’s goal to promote minority and female ownership of broadcast television stations”).

Most recently before the Third Circuit, the FCC again acknowledged the importance of promoting race and gender diversity. *See* FCC & U.S. Br. 10, 68-69, *Prometheus v. FCC*, 939 F.3d 567 (3rd Cir. 2019) (“*Prometheus IV*”) (No. 17-1107), 2019 WL 2022282 (May 3, 2019) (recognizing that Supreme Court has found broadcast diversity important and FCC’s minority ownership policies substantially related). Even the dissent noted that the FCC “intends to take up a variety of diversity-related proposals in its 2018 quadrennial review,” and would have directed “it to follow through on its announcement as well as study

the effects of the latest rules on ownership diversity.” *Pro-metheus IV*, 939 F.3d at 595 (Scirica, J., concurring in part and dissenting in part) (emphasis added).

The FCC has thus publicly and clearly committed itself to ownership diversity as an important policy goal. Unfortunately, as explained next, the FCC has failed to back up its clear statements with action. Agencies must be transparent and candid about their objectives, and then live up to their commitments. The FCC’s pattern of inaction and unsupported findings has epitomized arbitrary and capricious agency action.

II. For years the FCC has failed competently to collect, let alone analyze, basic ownership diversity data.

The FCC defends its woefully insufficient record by claiming that there is no reliable data to assess trends in ownership diversity. U.S. Br. 37-38. Any absence of data, however, rests squarely upon the FCC. It has embraced and announced the need for better data collection. The agency’s deeds failed to live up to its words. At minimum, the FCC should have obtained and released complete, reliable, and accurate ownership data in a timely manner to facilitate analysis and public comments. Complete and accurate information is crucial to understand and meaningfully evaluate the effects of regulatory change on diversity of the “media landscape.” JA 216-217.

The FCC, however, did not even gather that data—despite repeated public comments explaining the need to improve the agency’s data collection processes. The FCC began collecting race and gender broadcast ownership data, via Form 323, in 2000. *In re 1998 Biennial Review, Report*

& Order, 13 FCC Rcd. 23056, 23093-95 (1998).¹¹ The filing requirement is prescribed by rule. 47 C.F.R. § 73.3615. See also 47 C.F.R. §§ 73.6026, 74.797.

Form 323 requests basic ownership information, including name, address, citizenship, gender, ethnicity, race information, and interest percentages for each station. As explained below, for nearly two decades, public comments have identified significant flaws in the FCC’s Form 323 data collection. See *Prometheus Radio Project v. FCC*, 652 F.3d 431, 470-71 (3d Cir. 2011) (“*Prometheus II*”). The FCC itself has acknowledged the flaws in its data collection. See, e.g., *In re 2010 Quadrennial Regulatory Review, Notice of Proposed Rulemaking*, 26 FCC Rcd. 17489, 17550 (2011) (acknowledging data incompleteness and insufficiency and plans to take action including “to improve our data collection so that we and the public may more easily identify the diverse range of broadcast owners,” and “[c]ommission appropriately-tailored research and analysis on diversity of ownership”). The FCC has made some minor improvements. See, e.g., *In re Promoting Diversity of Ownership*, 24 FCC Rcd. 5896 (2009) (broadening mandatory filers). But it has failed to take necessary steps to make its data collection process reliable and useful, even though the changes would be simple and impose little burden on the agency or industry. See *infra* 26-27.

To be clear: this is not an instance of an agency exercising reasonable policy judgment in the face of empirical uncertainty. Here, the agency *caused* the uncertainty and

¹¹ With exceptions, licensees of AM, FM, full-power television, Class A television, and low power television stations, as well as entities with attributable interests in such stations, are to file Form 323 every two years. *Biennial Form 323 FAQs*, Fed. Commc’ns Comm’n, <https://www.fcc.gov/node/208978#1> (last visited Dec. 20, 2020).

thereby precluded any meaningful attempt to live up to its diversity commitments. The relevant evidence was “difficult to compile” precisely and only because the FCC failed to compile it.

Industry, for its part, has opposed the prospect of better data collection at every turn. For example, in 2009 the National Association of Broadcasters (“NAB”) actively opposed and sought reconsideration of two efforts to improve data collection by the FCC, arguing that expanded reporting requirements were too burdensome. *See* Pet. for Recon. of the Nat’l Ass’n of Broadcasters, MB Docket No. 07-294 (filed Jun. 26, 2009), <https://www.nab.org/documents/filings/OwnershipReportingReconPetition062609.pdf>. It asked the FCC to reconsider its decisions (1) to collect biennial filings from sole proprietors, *id.* at 2, and (2) to require Form 323 reporting from certain “nonattributable” interests—“holders of equity interests in a licensee that would be attributable but for the single majority shareholder exemption and from holders of interests that would be attributable but for the higher Equity/Debt Plus (“EDP”) thresholds adopted in the Diversity Order & FNPRM.” *Id.* at 5. The NAB’s opposition to including non-attributable interests as part of the Form 323 data collection process remains a common thread in its public comments over time. *See e.g.*, Comments of the Nat’l Ass’n of Broadcasters, MB Docket No. 07-294, at 2-8 (Feb. 14, 2013), <https://www.nab.org/documents/filings/OwnershipDiversityComments021413.pdf>. *See also* Comments of Beasley Broadcast Grp., Inc., et al., MB Docket No. 07-294 (filed Feb. 14, 2013), <https://ecfsapi.fcc.gov/file/7022121738.pdf>.

Compounding its own poor data collection and analysis, the FCC also inexplicably hindered public access to

the data. It failed to release what data it had gathered on a timeline or in a format that would have permitted meaningful analysis by anyone.

1. There can be no serious debate that the FCC has the authority and resources to gather the relevant data. It employs divisions of economists and statisticians. In December 2018, for example, the FCC announced a new Office of Economics and Analytics. *FCC Opens Office of Economics and Analytics*, FCC News, <https://docs.fcc.gov/public/attachments/DOC-355488A1.pdf> (Dec. 11, 2018). The FCC also spends billions annually to achieve its strategic goals: in FY 2015 alone, for example, it spent over \$7 billion to promote competition. *2015 Summary of Performance & Financial Information FY2015*, Fed. Commc'ns Comm'n, at 34, <https://docs.fcc.gov/public/attachments/DOC-337724A1.pdf> (last visited Dec. 20, 2020). The FCC's Media Bureau, which "develops, recommends, and administers the policy and licensing programs for the regulation of media," spends over \$26 million annually in personnel and other costs. *See, e.g. Fiscal Year 2016 Budget Estimates Submitted to Congress February 2015*, Fed. Commc'ns Comm'n, at 64, <https://docs.fcc.gov/public/attachments/DOC-331817A1.pdf>.

The FCC regularly relies on data-driven analysis of complex market trends. It is the "primary authority for communications law, regulation and technological innovation" in the United States.¹² That role requires sophisticated and in-depth knowledge of a major sector of the U.S. economy. Yet it claims that it simply cannot figure out a

¹² *What We Do*, Fed. Commc'ns Comm'n, <https://www.fcc.gov/about-fcc/what-we-do> (last visited Dec. 20, 2020).

way to collect and review reliable data regarding ownership diversity in broadcast media. That position is not credible and should be given no weight by this Court.¹³

2. A point that bears emphasis is that the FCC has persisted with its flawed data collection process for 20 years even though its deficiencies and shortcomings are well known. In 2000, the FCC began a belated attempt to collect ownership data by requiring certain industry participants to file the Form 323 and disclose basic ownership diversity information. For the ensuing twenty years, The Leadership Conference and others including the General Accounting Office have identified serious problems with the Form 323 process and urged the FCC to correct them.

Critical flaws in the FCC's data collection and sharing process are well-established. Take, for example, the tracking numbers filers use to submit data, which have proven unreliable. *See* Citizen Br. 16, *Prometheus IV*, 939 F.3d

¹³ As respondents informed the Third Circuit, by devoting approximately 800 person-hours, Free Press reviewed and corrected the FCC's and NTIA's historical data, and submitted comments and studies based upon the corrected data during the 2006 review. Citizen Br. 19, *Prometheus IV*, 939 F.3d 567 (No. 17-1107), 2019 WL 2090485 (May 3, 2019) (citing S. Derek Turner & Mark Cooper, *Out of the Picture 2007: Minority & Female TV Station Ownership in the United States* (Oct. 2007), <https://ecfsapi.fcc.gov/file/7020456517.pdf>; S. Derek Turner & Mark Cooper, *Off the Dial: Female and Minority Radio Station Ownership in the United States* (Jun. 2007), <https://ecfsapi.fcc.gov/file/6520204538.pdf>); Citizen Reply Br. 3, *Prometheus IV*, 939 F.3d 567 (No. 17-1107), 2019 WL 2090482 (May 3, 2019). It is simply untrue that there was a "complete absence of any record evidence showing that changing the rules would have any adverse effect on minority and female ownership." Industry Pet'rs' Br. 44.

567 (No. 17-1107), 2018 WL 6734902, (May 3, 2019) (“Citizen Br.”). The tracking numbers are automatically generated with no verifying information, and in many cases one individual can use multiple numbers or multiple individuals can use the same number. *In re Promoting Diversification of Ownership, Report & Order*, 31 FCC Rcd. 398, 412 (2016). As a result, the FCC does not track individual filers over time and cannot readily assess whether changes in the number of filers mean that certain filers merely failed to file Form 323 or exited the market.

Further, the data is woefully incomplete. *See* Citizen Br. 16. One reason for the paucity is that the FCC does not ensure that all broadcasters file Form 323. Instead of requiring universal submission, the agency exempts several categories of owners, such as sole proprietors and partnerships of natural persons, from filing Form 323 and permits group owners to file only Form 323 for all their stations. Of the licensees required to file, many either do not file or file incomplete data. As one illustration, nearly 20% of AM and FM radio stations do not file Form 323.¹⁴ Year after year, the FCC has not taken steps to ensure that licensees comply with the filing requirement. In addition, some broadcasters file in some years but not in others, which impedes analysis of trends between years. *See* Citizen Br. 17-18.

The public record shows that the FCC is well aware of the problems with its data collection and analysis and has not taken the necessary steps to fix those problems. Over

¹⁴ *See Summary of Federal Communications Commission Biennial Commercial Broadcast Ownership Data, 2009-2017*, Compiled By The Leadership Conference, <http://civilrightsdocs.info/pdf/FCC-v-Prometheus-Charts.pdf> (Dec. 2020).

and over again, public comments have urged the FCC to do a better job in collecting and analyzing data. Commenters have specifically addressed problems with Form 323, exemptions from the filing requirement, and the FCC's delays in analyzing and releasing data. Comments of Nat'l Org. for Women Found., et al., MB Dkt. 06-121, at 6-9 (filed Oct. 21, 2007), <https://ecfsapi.fcc.gov/file/6519743189.pdf> (urging the FCC to do a better job at collecting and analyzing ownership data, identifying insufficiencies, and discussing history of efforts to improve Form 323 process); Comments of Off. of Commc'n of United Church of Christ, Inc., et al., MB Dkt. 06-121, at 11-13 (filed Sept. 30, 2007), <https://ecfsapi.fcc.gov/file/6519738905.pdf> (urging FCC to "immediately cure its chronic failure to collect and analyze information on the level of minority and women ownership"); Comments of Off. of Commc'n of United Church of Christ, Inc., et al., MB Dkt. 06-121, at 39-40 (filed Oct. 22, 2006) <https://ecfsapi.fcc.gov/file/6518535278.pdf> (noting deficiencies in data-collection methodology, criticizing exemptions from Form 323 filing requirement, and objecting to FCC's delays in publishing data).

More recent comments, including in the docket under review, echoed the deficiencies in the Form 323 data and urged the FCC to correct them. In 2010, public interest commenters urged the FCC to study and analyze its data to achieve a comprehensive assessment of the impact of its ownership rules on diversity, as well as competition and localism. *See, e.g.*, Comments of Off. of Commc'n of United Church of Christ, Inc., et al., MB Dkt. 09-182 (filed Jul. 6, 2010), <https://ecfsapi.fcc.gov/file/7020515286.pdf>. The Leadership Conference also submitted comments to the FCC in March 2012, December 2012, July 2013, August

2014, July 2016, April 2019, and September 2019 describing deficiencies in the Form 323 process and cautioning the FCC against adopting orders without analyzing (or even releasing) the data.¹⁵

A 2007 publication by the Congressional Research Service (“CRS”) highlighted these same chronic deficiencies in the FCC’s data collection. Cong. Research Serv., RL34271, *The FCC’s 10 Commissioned Economic Research Studies on Media Ownership*, at 46-48 (Dec. 5, 2007). The CRS report found that “the FCC’s databases on minority and female ownership are inaccurate and incomplete and their use for policy analysis would be fraught with risk.” *Id.* at 46. The FCC, it noted, does not even have “an accurate database on minority ownership.” *Id.* at 46. Any “statistical analysis based on those data would not be reliable.” *Id.* at 44. As the CRS report observed, “the FCC staff, commissioned researchers, peer

¹⁵ Comment of The Leadership Conference, MB Dkt. 09-182 (filed Mar. 4, 2012), <https://ecfsapi.fcc.gov/file/7021898213.pdf>; Comment of The Leadership Conference, MB Dkt. 09-182 (filed Dec. 25, 2012), <https://ecfsapi.fcc.gov/file/7022092035.pdf>; Comment of The Leadership Conference, MB Dkt. 09-182 (filed Jul. 22, 2013), <https://ecfsapi.fcc.gov/file/7520933039.pdf>; Comment of The Leadership Conference, MB Dkt. 14-50 (filed Aug. 10, 2014), <https://ecfsapi.fcc.gov/file/7521757748.pdf>; Comment of The Leadership Conference, MB Dkt. 09-182 (filed Jul. 15, 2016), <https://ecfsapi.fcc.gov/file/107152520305123/Leadership%20Conference%20ex%20parte%202016%207%2015.pdf>; Comment of The Leadership Conference, MB Dkt. 18-349 (filed Apr. 29, 2019), <https://ecfsapi.fcc.gov/file/10429280917704/20190429-Q4%20Comments%20FINAL.pdf>; Reply Comment of The Leadership Conference, MB Dkt. 18-349 (filed Sept. 5, 2019), <https://ecfsapi.fcc.gov/file/10905224557031/20190905-Leadership%20Conference-2018%20QR%20Reply%20final.pdf>.

reviewers, and commenting parties have identified continued gaps both in data collection and in data analysis, especially with respect to minority ownership.” *Id.* at 45.

The Government Accountability Office (“GAO”), too, has identified severe deficiencies in the FCC’s data. *See* U.S. Gov’t Accountability Off., GAO-08-383, *Media Ownership: Economic Factors Influence the Number of Media Outlets in Local Markets, While Ownership by Minorities and Women Appears Limited and is Difficult to Assess* 4 (2008). The GAO Report found that the FCC’s data “suffer from three weaknesses: (1) exemptions from filing for certain types of broadcast stations, such as noncommercial stations; (2) inadequate data quality procedures; and (3) problems with data storage and retrieval.” *Id.* at 4, 20. As a result, “reliable government data . . . are lacking.” *Id.* at 4. The GAO Report cites the FCC’s filing exemptions, lack of a verification process, and basic failures to properly store the data it collects. For example, inaccurate Form 323s were not removed from the FCC’s database, and relevant data found in attachments to the forms were never entered in the database in the first place. *Id.* at 22-23. The GAO report recommended that the FCC “identify processes and procedures to improve the reliability of FCC’s data on gender, race, and ethnicity so that these data can be readily used to accurately depict the level, nature, and trends in minority and women ownership.” *Id.* at 33. *See also* U.S. Gov’t Accountability Off., GAO-14-558, *Media Ownership: FCC Should Review the Effects of Broadcaster Agreements on its Policy Goals* 29 (Jun. 2014) (“[The] lack of analysis and information [about Shared Service Agreements] could undermine [the] FCC’s efforts to ensure its media ownership regulations achieve their intended goals.”).

3. Remarkably, the FCC now tries to turn its own failings into an advantage, claiming that its determination must be affirmed because there is no reliable evidence available. U.S. Br. 40-41. The FCC even blames the public for the quality of its own record, arguing that none of the public comments pointed to a less-flawed data source. *Id.* This Court should not countenance the agency's abdication of its responsibilities.

In fact, the FCC has unequivocally acknowledged that its data collection, release, and analysis related to ownership diversity have been deficient. In general, the FCC champions data-driven decision-making. *See, e.g., FCC Launches Data Innovation Initiative*, FCC News, <https://docs.fcc.gov/public/attachments/DOC-299269A1.pdf> (Jun. 29, 2010). Nevertheless, over the years, and across different administrations, it has acknowledged the deficiencies of its data related to ownership diversity. *See, e.g.,* U.S. Br. 40. In 2007, two FCC studies of its Form 323 data found that “the data currently being collected by the FCC is extremely crude and subject to a large enough degree of measurement error to render it essentially useless for any serious analysis” and that “every database supplied by the Video Division of the Media Bureau is noisy or incomplete.” Ari Beresteanu & Paul B. Ellickson, *Minority and Female Ownership in Media Enterprises*, at 2 (Jun. 2007); C. Anthony Bush, *Minority and Women Broadcast Ownership Data at Study 2*, Appendix A, at 18 (Jul. 24, 2007). In 2011 again, the FCC admitted that its data was incomplete and insufficient. *In re 2010 Quadrennial Regulatory Review, Notice of Proposed Rulemaking*, 26 FCC Red. 17489, 17550 (2011) (“Although we would prefer to be able to propose specific actions in response to the Third Circuit’s remand of the

measures relying on the eligible entity definition in this NPRM, we believe that making legally sound proposals would not be possible based on the record before us at this time.”).

The FCC has also acknowledged that it has failed to perform basic analysis on the Form 323 data it obtains and has released it in an unusable manner. *See* Ari Beresteanu & Paul B. Ellickson, *supra*, at 2; C. Anthony Bush, *supra*, at Study 2, Appendix A, at 18. Commissioner Starks acknowledged that the agency’s delay in releasing the 2017 data was an “unacceptable lag.” *See Commissioner Starks Statement on Fourth Broadcast Station Ownership Report*, FCC News, <https://docs.fcc.gov/public/attachments/DOC-362497A1.pdf> (Feb. 14, 2020) (“Starks Ownership Statement”). The FCC consistently takes two to three years to release data. *See Summary of Federal Communications Commission Biennial Commercial Broadcast Ownership Data, 2009-2017*, Compiled By The Leadership Conference, <http://civilrightsdocs.info/pdf/FC-C-v-Prometheus-Charts.pdf> (Dec. 2020). It has collected but not yet released 2019 data. *Id.*

4. The FCC has not only allowed these critical deficiencies to persist instead of taking ameliorative action; it has done so despite publicly proposed workable solutions. At least as early as 2007, commenters have offered viable solutions to address the deficiencies. *See, e.g.,* S. Derek Turner & Mark Cooper, *Out of the Picture 2007: Minority & Female TV Station Ownership in the United States*, at 22 (Oct. 2007), <https://ecfsapi.fcc.gov/file/7020456517.pdf>; S. Derek Turner & Mark Cooper, *Off the Dial: Female and Minority Radio Station Ownership in the United States* (Jun. 2007), <https://ecfsapi.fcc.gov/file/6520204538.pdf>.

The FCC was certainly aware of these studies; it cited to both of them as early as 2009. *See, e.g., In re Promoting Diversification of Ownership*, 24 FCC Rcd. 5896, ¶ 1, n. 2 (2009). But instead of deploying the proposed correction methodologies thirteen years ago, it chose not to act improve its ability to evaluate the effects of its decisions on ownership diversity. The FCC continues to not know who owns what stations.

And the agency opted to let the deficiencies in its released data persist even though it has tools for improvement at its disposal. Some fixes are so obvious that there is no plausible justification for not implementing them. The FCC could improve reporting simply by *enforcing* the Form 323 filing requirement. It should take steps to ensure that all broadcasters file Form 323 annually, including by following up, creating incentives, and imposing fines and penalties if necessary. Further, as The Leadership Conference reiterated last year, the FCC tracks all transactions among broadcasters. It could easily cross-reference and validate ownership data with transaction data. For example, if a station fails to file Form 323 in a given year, but there are no new transaction records for the station, then its ownership has not changed and its data can be updated. Reply Comment of The Leadership Conference, at 8-9, MB Dkt. 18-349 (filed Sept. 5, 2019), <https://ecfsapi.fcc.gov/file/10905224557031/20190905-Leadership%20Conference-2018%20QR%20Reply%20final.pdf>. Further, the FCC could adjust its tracking number system so that it works. By reviewing the Form 323 filings under special-use FCC Registration Numbers (“FRNs”), a single filer would be identifiable throughout the FCC’s

database. These basic steps would enable the FCC to conduct a more educated and accurate assessment of the level of completion of its Form 323 data.

In short, the FCC has known for well over a decade how to make its Form 323 ownership data more complete and accurate. The failure to do so reflects infidelity to its stated commitments, not impossibility.

If, in future quadrennial reviews, the FCC believes it cannot study or consider ownership diversity, it should say so. But the record reflects otherwise: the FCC can and should collect, release, and analyze better data to make good on its policy commitment to ownership diversity.

CONCLUSION

Amici urge the Court to affirm.

Respectfully submitted,

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APPENDIX — LIST OF *AMICI CURIAE*

American Federation of Teachers (AFL-CIO)
American-Arab Anti-Discrimination Committee (ADC)
Asian Americans Advancing Justice - AAJC
Equal Justice Society
Freedom to Read Foundation
Matthew Shepard Foundation
MediaJustice
National Action Network
National Consumer Law Center
National Equality Action Team (NEAT)
National Women’s Law Center
Native American Journalist Association (NAJA)
The Leadership Conference on Civil and Human Rights
The Leadership Conference Education Fund
People For the American Way Foundation
Public Advocacy for Kids (PAK)
UNITED SIKHS
Women Lawyers On Guard Inc.