No. 17-1107, 17-1108, 17-1109, 17-1110, 17-1111, 18-1092, 18-1669, 18-1670, 18-1671, 18-2943 & 18-3335

In the
United States Court of Appeals
For the Third Circuit

PROMETHEUS RADIO PROJECT, et al.

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF OF CITIZEN PETITIONERS PROMETHEUS RADIO PROJECT, MEDIA MOBILIZING PROJECT, FREE PRESS, OFFICE OF COMMUNICATION, INC. OF THE UNITED CHURCH OF CHRIST, NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS-COMMUNICATIONS WORKERS OF AMERICA AND COMMON CAUSE

Cheryl Leanza
Best Best & Krieger LLP
2000 Pennsylvania Avenue N.W., Suite 5300
Washington, DC 20006
Phone (202) 785-0600
COUNSEL CONTINUED ON NEXT PAGE

Andrew Jay Schwarzman
Angela J. Campbell
James T. Graves
Institute for Public Representation
Georgetown Law
600 New Jersey Avenue, N.W., Suite 312
Washington, DC 20001

Jessica J. González
Free Press
1025 Connecticut Avenue, NW, Suite 1110
Washington, DC 20036

Yosef Getachew
Common Cause
805 15th Street, NW, Suite 800
Washington, DC 20005
(202) 833-1200

Counsel for Citizen Petitioners,
Prometheus Radio Project, Media Mobilizing Project, Free Press, Office of Communication, Inc. of the United Church of Christ, National Association of Broadcast Employees and Technicians-Communications Workers of America and Common Cause

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

Federal Cases

Federal Statutes

Rules

Regulations

Constitutional Provisions

Other Authorities

SUMMARY OF ARGUMENT

The FCC and Intervenors act like this is the first—not the fourth—time this Court has addressed these issues. Petitioners have standing. The FCC and Intervenors ignore Petitioners' core points and this Court's mandate about the agency's obligation under the public interest standard in Section 202(h). The FCC tries to have it both ways—claiming it has addressed race/gender ownership diversity yet insisting it cannot. Neither is true: the FCC must heed its obligation to at minimum do no harm to race/gender diversity by apprising itself of knowable facts. The FCC cannot justify reliance on an insubstantial record and deserves no deference. Petitioners' request for a master to oversee the ministerial correction of flawed data and expert recommendations to the FCC are fully justified.

I. PETITIONERS HAVE STANDING.

Remarkably, after three rounds of litigation among essentially the same parties, opposing briefs contest Petitioners' standing. While Petitioners' standing is self-evident, the attached declarations establish each Petitioner's standing for each component of the challenged decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)(party invoking federal jurisdiction should set forth facts by affidavit or other evidence); *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997)(accepting declarations in support of standing,

where Article III standing not required in agency proceedings); *U.S. Magnesium, LLC v. EPA*, 690 F.3d 1157, 1164-65 (10th Cir. 2012)(same).

Standing comprises: (1) injury-in-fact (2) fairly traceable to the challenged conduct (3) likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Injury-in-fact must be concrete and particular as well as actual or imminent. *Id.*

A. Petitioners Have Organizational Standing.

Organizations have standing if challenged actions "perceptibly impair" their mission. *Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers*, 141 F.3d 71, 76 (3d Cir. 1998). This can be shown through a diversion of resources injurious to the organization's mission. *Id.*

1. Injury-in-Fact is Concrete and Particular.

As a labor union representing 10,000 broadcast employees working at local television stations, whose mission is to improve its members' "wages, working conditions and job security," NABET-CWA unquestionably suffers concrete and particular harm. Braico, ¶¶4-5(SA-1). The Reconsideration Order permits more jointly owned or operated stations, which cuts NABET-CWA jobs, infringing job security, and results in lower member salaries, increased staff time negotiating contracts and more resources dedicated to organizing new bargaining units. *Id.*,

¶7-12(SA-1-2). Harm to their organizing capacity gives unions organizational standing. *AFGE Local 1 v. Stone*, 502 F.3d 1027, 1032-33 (9th Cir. 2007); *EEOC v. AT&T*, 556 F.2d 167, 173 (3d Cir. 1977).

Free Press' mission is to "change the media to transform democracy to realize a just society." Aaron, ¶2(SA-3). On behalf of its 1.4 million members, Free Press seeks to increase the quantity, quality and responsiveness of local news on TV, radio and in newspapers, particularly for racial minorities and women. *Id.*, ¶¶2-4(SA-3). In the last five years, Free Press has invested millions of dollars in its "News Voices" project in two states to bridge gaps in local news coverage, developing solutions such as a 2018 New Jersey statute allocating journalism funding. *Id.*,¶8(SA-5-6). Free Press diverted resources to achieve its mission, hiring an additional full-time News Voices staffer who will identify locations where the Reconsideration Order causes the greatest harm and thus where new programs should be located. *Id.* Finally, Free Press has diverted approximately 800 person-hours to correcting the FCC's inadequate research, data, and analysis, and must do so again if the FCC does not. *Id.*, ¶7(SA-4-5).

Prometheus Radio Project, Media Mobilizing Project and United Church of Christ, OC Inc. similarly have organizational standing. Bame, 1(SA-8); Sassaman, 1-2(SA-9-10); Williams, ¶¶3-12(SA-11-13).

2. Injury-In-Fact is Actual or Imminent, Traceable to the Reconsideration Order and Remediable.

While injury-in-fact must be "actual or imminent, not conjectural or hypothetical," imminence is "somewhat elastic," *NJ Physicians v. President of U.S.*, 653 F.3d 234, 238 (3d Cir. 2011), and "the hurdle raised by the injury element of established standing principles is not a high one." *Fair Housing*, 141 F.3d at 80. "[T]he injury required for standing need not be actualized." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). This Circuit has made clear that "a third party's action may be necessary to complete the complained-of harm." *NCAA v. Governor of New Jersey*, 730 F.3d 208, 222 (3d Cir. 2013), rev'd on other grounds, *Murphy v. NCAA*, 138 S. Ct. 1461 (2018); *The Pitt News v. Fisher*, 215 F.3d 354, 360-61 (3d Cir. 2000); *see also Stilwell v. OTS*, 569 F.3d 514, 516 (D.C. Cir. 2009)(several steps between regulatory action and petitioner harm sufficient to show standing).

The Reconsideration Order permits consolidation in local markets by allowing mergers in markets with less than eight voices, and allowing more local JSAs, local television/radio combinations and local newspaper/broadcast combinations. This consolidation is very likely to occur and cause harm to both organizations and individuals. Copps, ¶¶6-18(SA-14-18), *infra* I.B. At least one previously-prohibited merger has been approved under the new rules, several have

been proposed, and many more are expected, if the Reconsideration Order is upheld by this Court. *Id.*, ¶¶11-15(SA-16-17). Industry members pressed for these changes to take advantage of relaxed FCC rules. *Id.*, ¶17(SA-18). There is a "realistic chance—or a genuine probability" that injuries caused by consolidation will occur. *NJ Physicians*, 653 F.3d at 238. Reversal will prevent this harm from taking place.

B. Petitioners Have Associational Standing.

Associations have standing when (a) members would have standing in their own right; (b) the interests they seek to protect are germane to the organization's purpose; and (c) neither the claim nor relief require participation of individual members. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Pennsylvania Prison Soc. v. Cortés*, 508 F.3d 156 (3d Cir. 2007). Prongs (b) and (c) are self-evident in this case: Petitioners' missions are closely intertwined with this suit, *see, e.g.*, Braico, ¶5(SA-1), Kapur, ¶1(SA-20), Williams, ¶¶3-4(SA-11), and neither the claim nor relief is dependent on individual members.

1. NABET-CWA, Free Press and Common Cause Have Associational Standing from Economic Injury.

Economic harm is the most widely-recognized, but not the only, injury-in-fact. *Spokeo*, 136 S. Ct. at 1549; *Taha v. Cty. of Bucks*, 862 F.3d 292, 302 (3d Cir. 2017).

NABET-CWA members Jenkins and Bohen are likely to suffer concrete economic injury by losing their jobs, as the Reconsideration Order permits previously proscribed consolidation or joint operation in Flint and Erie. Jenkins, ¶¶9-11(SA-23-24), 17-23(SA-25-26); Bohen, 1(SA-27). For example, in Flint, Sinclair and Meredith are likely to combine or develop joint news operations resulting in job losses. Jenkins, ¶¶22-23(SA-25). Both have personally observed job and salary losses as the result of prior mergers. *Id.*, ¶¶12-13(SA-24); Bohen, 2(SA-28). *PA Prison Soc. v. Cortes*, 622 F.3d 215, 229 (3d Cir. 2010); *Int'l Union v. Brock*, 477 U.S. 274, 284 (1986).

The FCC's failure to consider its rules impact on race/gender ownership harms Kapur, a South Asian entrepreneur and Free Press member who focuses on producing programming for underserved communities. Kapur ¶¶5-9(SA-20). The Reconsideration Order will make it more difficult for Kapur to acquire new stations and to compete in markets where he does own stations by permitting consolidation that competitively disadvantages his business. Kapur, ¶¶11-14(SA-21), 16-20(SA-22). It also ends the JSA attribution rule which previously enabled Kapur to acquire a station. *Id.*, ¶¶16-17(SA-22). Kapur reasonably expects imminent harm. *Id.*, ¶¶12-19(SA-22-23); *supra* I.A.2. The FCC's failure to consider the impact of the spectrum auction harms Kapur because owners that

served the Asian community would have been likely to sell to Kapur if not for the auction. *Id.*, ¶10(SA-21).

Similarly, consolidation from the Reconsideration Order harms the business interests of Common Cause and Free Press members Nelson, Hardman and Washington as highly qualified African-American entrepreneurs seeking—but thus far unable—to acquire radio or TV stations to serve African-American audiences and other underserved communities in impacted markets. Hardman, 1-2(SA-29-30), Washington 1-2(SA-31-32), Nelson, 1-2(SA-33-34). For example, Hardman sought to buy a television station in Oklahoma City, but lost out to a large group owner. Hardman 1(SA-29). The too-broad eligible-entity definitions mean that Nelson must compete with many more businesses for the benefits associated with those definitions than if the FCC had adopted a better-targeted definition. Nelson 2(SA-34).

2. Free Press, Common Cause, and UCC OC Inc. Have Associational Standing Based on Reduced Access to Local News and Information.

The FCC's media ownership rules promote competition, localism and diversity—including robust access to local news and information, which is recognized as a First Amendment right. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). Damage to this access is a cognizable injury. *See Spokeo*, 136 S. Ct. at 1549 (First Amendment "intangible injuries can…be concrete.").

Courts exercise maximum leniency with regard to First Amendment injury-in-fact. *See, e.g.*, *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013).

The Reconsideration Order will harm Free Press and UCC members Conybeare and Miller because it has already permitted, Conybeare, ¶¶14-17(SA-37-38), or will permit, Miller, ¶¶11-16(SA-87), consolidation and JSAs likely to reduce access to local news. *See, e.g.*, Conybeare, ¶¶ 13-17(SA-37-38) (inadequate coverage of local and state elections); Miller,¶¶11-16(SA-87) (loss of LGBTQ news, inability to track and respond to local power line proposal). In Dayton, the Reconsideration Order permits transfer of Cox's newspaper/broadcast combination to a new buyer whereas, previously, the properties would have become independent from each other. Valeri, ¶¶14-15(SA-90-91). Free Press member Valeri reasonably fears he will lose, *inter alia*, access to journalism covering industrial pollution to his water supply by the local Air Force base. *Id.*, ¶¶18-19(SA-91).

II. THE FCC MUST ANALYZE THE IMPACT OF ITS ACTION ON RACE/GENDER DIVERSITY.

The opposition briefs do not address Petitioners' central argument that the FCC failed to effectuate its statutory obligation, and instead address issues Petitioners did not raise.

A. The FCC Must Promote, Not Harm, Race/Gender Diversity.

The FCC concedes, FCC Br.10, 67-68, that it is statutorily obligated to promote race/gender diversity. Pet Br. II.A. The Supreme Court has found broadcast diversity "important" and the FCC's minority ownership policies "substantially related" to achieving it. FCC Br. 67.[1]

But the FCC and Intervenors don't contest, and in fact barely mention, this Court's mandate to consider how FCC decisions' impact race/gender diversity, Pet. Br. II.B (ownership rules), and promote such diversity in some manner, *id*. II.D (incubator program, eligible entity definition). *Prometheus III*, 824 F.3d at 54 n.13.

Contrary to suggestions in the opposing briefs, FCC Br. 25-26, Int. Br. 56-59, the Prometheus mandate was *not* limited to the eligible entity definition. The prior *Prometheus* opinions focused on this definition because it was the FCC's primary vehicle for promoting race/gender diversity. In the orders under review here, the FCC tries to dodge the *Prometheus* remands by concluding, for the first time, that its rules were *not* adopted "with the purpose of" promoting race/gender diversity. Second R&O, 31 F.C.C.Rcd. 9864, 9980-81, 9987 (eligible entity),

[1] *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 355 (D.C. Cir. 1998), cited by the FCC at 68 n.28, is inapposite. It involved diversity in employment at a single radio station, not diversity in broadcast station ownership nationwide.

9911, 9944, 9951-51 (ownership rules)(JA__); Reconsideration Order, 32 F.C.C.Rcd. 9802, 9824, 9831, 9839-40 (ownership rules)(JA___).

In so doing, the FCC is left only with the Incubator Program to meet its obligation, whose eligible entity definition is without "a sufficient analytical connection" to the statutory goal of race/gender diversity. *Prometheus II* at 471; Pet. Br. 39-43; *infra* III.D.

While Intervenors make the radical claim that the FCC has no obligation to consider race/gender diversity at all, Int. Br. 25-28, 32, this Court cannot consider arguments not in the decision under review. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). Section 1 of the Communications Act, 47 U.S.C. §151, plainly governs all FCC decision-making, and would not apply only to the repeal of a previously-adopted pro-diversity measure as Intervenors claim, Int. Br. 25-26.

Intervenors' attack on Section 309(j) and this Court's reliance on that statute, *id*. 26-30, fares no better. The FCC agrees Section 309(j)(4)(D) is binding, FCC Br. 63,[2] and the *Prometheus III* Court cited Section 309(j) as a specific Congressional directive implementing that obligation. *Prometheus III*, 824 F.3d at 40-41. Just last year Congress reiterated support for the national "policies and

[2] The FCC cites Section 309(j)(4)(D) to justify targeting its Incubator Program on small businesses, FCC Br. 63, which also directs the FCC to ensure "businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. §309(j)(4)(D).

purposes of this chapter favoring diversity of media voices," RAY BAUM'S Act, Pub. L. 115-141, codified at 47 U.S.C. §163(d)(3)(citing §257(b)).

B. *Adarand* and Strict Scrutiny Do Not Preclude—and in fact require—the FCC to study the impact of its Race/Gender Neutral Rules on Race/Gender Diversity.

Petitioners nowhere contest the FCC's decision not to adopt race/gender-conscious rules in the decision under review. As such, FCC Brief sections III.B, C, and Int. Br. 58-59 are beside the point. The FCC did not have to employ race/gender-conscious rules, but it must, at least, do no harm to its statutory goals and collect data necessary to assess its progress or lack thereof. *Adarand* is not an excuse for doing nothing, *Prometheus III*, 824 F.3d at 44: it strongly *supports* the need for data and study.[3]

III. THE FCC'S FLAWED RECORD VIOLATES THE APA.

The FCC failed to meet even the low bar of the APA's arbitrary and capricious standard.

[3] *Adarand*'s progeny establish the success or failure of race-neutral alternatives as a key factor in considering whether race/gender diversity policies are narrowly tailored. AAJC Comments at 14 (Aug. 7, 2014)(citing *Fisher v. University of Texas at Austin*, 570 U.S. 297, 312 (2013)(JA __).

A. The FCC Erroneously Ignored a Component of Section 202(h)'s Public Interest Obligation.

The competence of the FCC's economic or competition analysis is irrelevant because the FCC ignored its race/gender diversity goal. FCC Br. 32-33, 45; Int. Br. 25-32.

The FCC recognizes the public interest standard includes "competition, diversity, and localism" including race/gender ownership diversity. FCC Br. 10. Thus, under *Chenery*, *supra* II.A, Intervenors' attempt to confine the scope of Section 202(h) to competitive factors alone, Int. Br. 25-32, is not properly before the Court. Moreover, Intervenors' proposed interpretation contravenes the statute. Section 202(h) requires the FCC to consider whether media ownership rules "are necessary in the *public interest* as the result of competition," Pub. L. No. 104-104 (1996)(emphasis added). But the FCC did not include a balanced consideration of the whole standard, FCC Br. 30-33, instead placing its entire focus on competition and concluding neither the ownership rules nor the Second R&O's eligible entity definition were intended to promote race/gender diversity, s*upra* II.A. The Incubator Program cannot meet these goals either, even if the FCC were clear about whether the program is intended to promote race/gender diversity, which it is not. *Infra* III.D.

B. The FCC's Decision to De-link Ownership Rules and Race/Gender Diversity Is Unsupported and Deserves No Deference.

The FCC arbitrarily relied on the same data to justify eliminating and relaxing the ownership rules in the Reconsideration Order that it found too unreliable to justify eliminating or relaxing the rules in the Second R&O. Pet. Br. 8, 31. The FCC claims that it treated the data consistently, judging it to be insufficient to support either outcome. FCC Br. 43-44, n.18. But the FCC cannot have it both ways: either the data is reliable enough to justify severing a decades-old connection between ownership rules and race/gender diversity, or it is too flawed to justify reliance at all.

The FCC concedes, FCC Br.41, that it did not control for exogenous data (such as U.S. population changes) invalidating its conclusion that ownership rules do not impact race/gender diversity. Pet Br. 28, 29. And it offers no reason to ignore racial ownership diversity declines after consolidation increases in 1996 and 1999, while incorrectly claiming Petitioners accede to its flawed conclusions. FCC Br. 41-42, 43.

The FCC points to language in the Further Notice (not the orders under review), and engages in impermissible *post-hoc* rationalization, claiming that it "never structured its rules to discourage owners from voluntarily selling their stations." FCC Br. 41, n.17. Even if this proffered explanation were rightfully

before the Court, it is wholly unresponsive. Certainly, FCC rules do not *require* owners to sell stations, but it is still reversible error to change rules without reviewing their likely impact on the FCC's duty to promote race/gender ownership diversity. The FCC acted despite the fact that it had extraordinarily flawed race data and *no* gender data at all, precisely why this Court reversed in *Prometheus II*. *See also Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002); *cf.* FCC Br. n.14, n.16.

As to its treatment of Free Press' reports, the FCC resorts to yet another impermissible *post-hoc* rationalization. For the first time, the FCC claims to have rejected the radio study because it did not track changes over time. FCC Br. n.17. But the FCC fails to acknowledge that Free Press was unable to consider changes over time because *there was no valid data available to make such a comparison*.[4] Instead of explaining how the record supports its action, the FCC merely claims that it should be afforded deference. FCC Br. 43.

The present case is unlike agency deference cases cited by the opposition briefs, FCC Br. 39-40, Int. Br. 34-35. Unlike *Kennecott Greens Creek Mining Co. v. MSHA*, 476 F.3d 946, 956 (D.C. Cir. 2007), the FCC did not use its unique (or

[4] As explained above, the FCC's rejection of Free Press' television study because FCC policy does not disfavor voluntary sale of stations, FCC Br. n.17, is non-responsive. *Supra*, 13-14.

any) expertise on sampling or measurement. It made basic math errors such as ignoring that an increase in total stations (in the denominator) will reduce the percentage of diversely owned stations. Pet. Br. 26-30. It used incomplete data that *the Court had directed it to fix*, *Prometheus II*, 652 F.3d at 470-71, *Prometheus III*, 824 F.3d at 44-45, to overturn decades of FCC and judicial findings contrary to the agency conclusions under review here. Pet Br. 16-17, 24-25.

Nor was the FCC using data to confirm predictions regarding inherently unknowable or speculative facts.[5] Here, the FCC concluded here that, *in the past*, ownership rules had not impacted race/gender diversity when the record shows the opposite. For these reasons, *Council Tree III* and *IV* are not on point: in those cases, the accuracy of the record was not in question and the court upheld the FCC's prediction and line-drawing. *Council Tree Comm'ns, Inc. v. FCC*, 619 F.3d 235, 252-53 (3d Cir. 2010) ("*Council Tree III*"); *Council Tree Investors, Inc. v. FCC*, 863 F.3d 237, 243 (3d Cir. 2017)("*Council Tree IV*"). *Council Tree IV*, in fact, presages the present case: an FCC decision could be "irrational" if "its impact

[5] All cases cited by the opposition affirm that a court must review whether an agency finding—even a predictive one—is reasonable and justified with substantial evidence. *See, e.g., FCC v. WNCN Listeners' Guild*, 450 U.S. 582, 593-94 (1981); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 793-94 (1978).

on other statutory obligations was…unassessed (or negative)." *Id.* at 243 (citing *Prometheus II*). As in *Cellular Telephone Co. v. Zoning Bd. of Adjustment of Ho-Ho-Kus*, 197 F.3d 64, 73 (3d Cir. 1999), the court must evaluate expert evidence to determine whether it is substantial enough to support an agency finding. *See also Ogden Fire Co. No. 1 v. Upper Chichester TP*, 504 F.3d 370, 382-92 (3d Cir. 2007); *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 493 (9th Cir. 2011); *Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 923 (D.C. Cir. 1998).

C. The FCC Ignored the Auction's Impact.

The FCC did not evaluate the impact of the incentive auction on race/gender diversity even though it also claimed the auction might help diversity by offering owners access to capital. FCC Br. 50-51, n.22. If the FCC knew the overwhelming majority of licensees would remain on the air, it could also determine (if its ownership data were adequate) their race and gender and whether they did obtain access to capital, regardless of whether they stayed on the air.

D. The FCC's Radio Incubator Program Used Flawed Data and Will Not Promote Race/Gender Diversity.

The FCC's claim that its incubator will encourage new entrants and small businesses, including minority and female applicants, FCC Br. 76-79, is illogical and unsupported by the record. First, the *radio* incubator program will not impact harm from *television* consolidation at all. Second, as petitioners showed, the FCC

based its definition of eligible entity on a "mere tally," which deserves no deference, and the data was unverifiable since it was based on *voluntary* submissions. Pet Br. 40-41. Even taking the data at face value, no one disputes that 81 to 88 percent of entities under the FCC's definition are neither racial minorities nor women. *Id*. The definition does not advance the statutory goals. The FCC's brief reveals further inconsistency and confusion on this point, claiming in one place the program is intended to increase race/gender diversity, FCC Br. 22, and elsewhere that it isn't, *id.*, 77.

E. Notice was Inadequate.

The FCC incorrectly claims, FCC Br. 37-39, that Free Press' use of NTIA and FCC data meant Petitioners had sufficient notice. Petitioners could not foresee the FCC's blatantly illegitimate data analysis. Nor could Petitioners imagine that data the FCC previously deemed inadequate to support repeal and relaxation would later be found adequate. The FCC incorrectly claims, FCC Br. 38, Petitioners did not attempt to criticize the data in the reconsideration cycle. They did. Leanza Nov. 2017 Letter (JA___). But the FCC ignored them, rendering *NARUC v. FCC*, 737 F.2d 1095, 1121 (D.C. Cir. 1984) inapposite.[6] *See also National Black Media*

[6] Moreover, Petitioners' response to the draft order's release three weeks before the FCC's vote does not cure notice. FCC Br. 38. This claim, closely resembling the artifice rejected in *Prometheus II*, 652 F.3d at 449-454, has been rebuffed by two

Coalition v. FCC, 791 F.2d 1016, 1023 (2d Cir. 1986)(studies first appended to a final order do not provide notice).

IV. THE REQUESTED RELIEF IS JUSTIFIED.

A. The FCC Must Not Withhold Accurate Data.

The linchpin of the FCC's statutory obligation is the administrative task of collecting accurate data about race/gender ownership diversity. Meaningful consideration is impossible until the raw inputs are available. The FCC acknowledges that this Court has repeatedly directed it to improve its data and analysis. *See, e.g., 2010 Quadrennial Review*, NPRM, 26 F.C.C.Rcd. 17489, 17550 (2011)(JA__). Rather than fixing and analyzing its ownership data as promised, the FCC gave up on race/gender diversity altogether. In fact, the FCC repeatedly justifies using flawed data because it is the only data available, FCC Br. 39-40, ignoring that curing the defect is within its own control.

Since the Section 202(h) review is mandated by statute and governed by previous mandates of this Court, Petitioners have asked this Court to direct the FCC to meet the minimum criteria needed to satisfy the statute. Petitioner Free Press, a small non-profit, was able to correct the 2006 data in 800 hours. Aaron,

---

other circuits. *National Lifeline Association v. FCC*, 915 F.3d 19, 34-35 (D.C. Cir. 2019); *Citizens Telecommunications Company of Minnesota, LLC v. FCC*, 901 F.3d 991, 1005-1006 (8th Cir. 2018).

¶7(SA-4-5). The FCC, with divisions of economists and statisticians, clearly has the capacity to correct the ownership data.[7] Petitioners do not, as Intervenors claim, call for a new method or procedure. Int. Br. 76-77. Petitioners seek a mandate ensuring that the FCC will stop unlawfully withholding minimally accurate data.

The FCC essentially disputes this Court's prior remands by citing to agencies' discretion to decide what data to collect. FCC Br. 33, 47. The Commission claims that inviting comments and "bas[ing] its prediction on the record that developed in response" is sufficient. FCC Br. 48. But once this Court issued a clear mandate for the FCC to get data, *Prometheus III*, 824 F.3d at 49, and said it needed to promote race/gender diversity, *supra* II.A, the FCC has no such discretion.

Cases cited by the FCC actually support the proposition that courts may direct agencies to collect data, in situations such as this, where the data is readily obtainable. *E.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009)(contrasting deference when "empirical evidence…*can readily be obtained"* with "obtaining the unobtainable")(emphasis added).

[7] Indeed, the FCC just created the new Office of Economics and Analytics, FCC Press Release, https://docs.fcc.gov/public/attachments/DOC-355488A1.pdf.

None of the FCC's cited cases involved federal agencies under a 15-year judicial mandate where the agency has failed to follow its own prescription for implementing a statutory mandate.[8] In fact, in *Massachusetts v. EPA*, the Supreme Court *did* review an agency's refusal to conduct a rulemaking despite flexibility granted to agencies with regard to enforcement decisions. *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007).

B. The JSA Attribution, Local TV, Radio/TV and Newspaper/Broadcast Rules are Properly Before the Court.

Contrary to Intervenors' claim, Int. Br. 62-66, Petitioners clearly challenged all of the FCC's ownership rules impacted by the Second R&O and Reconsideration Order. Petitioners' brief refers to all the "ownership rules" in those orders. *See, e.g.*, Pet Br. 21-22, 31-33. And it clearly seeks reversal of all

[8] In *Perez*, the Supreme Court invalidated a wholly new notice-and-comment rulemaking imposed beyond the APA's requirements. *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). *Stilwell* addressed a new problem for which there was no data. *Stilwell*, 569 F.3d at 519 (D.C. Cir. 2009). In *Texas Oil and Gas Ass'n v. EPA*, the EPA confirmed its initial findings in a second analysis, 161 F.3d 923, 935 (5th Cir. 1998). *Melcher* is wholly inapplicable, as the robust record supported the unremarkable prediction that local incumbents would offer less competition to themselves than independent companies. *Melcher v. FCC*, 134 F.3d 1143, 1151 (D.C. Cir. 1998). In *NAACP*, challengers sought to compel broadcasters and potential investors to testify about the effect of a policy on their investment decisions. *NAACP v. FCC*, 682 F.2d 993, 1001 (D.C. Cir. 1982), abrogated on other grounds, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

rules that rely on the same flawed data analysis, which includes the local TV, newspaper/broadcast and radio/TV rules, as the FCC acknowledges, FCC Br. 44, n.18. Not only did Petitioners cite the JSA attribution rule at Pet. Br. 11, *cf.* FCC Br. n.41, Int. Br. 24, 63-65, but under *Prometheus I* and *Prometheus III*, JSA attribution is not severable from the local TV rule to which it applies. *Prometheus III*, 824 F.3d at 59 (citing *Prometheus I*).

C. *Prometheus III* Holds Complete Vacatur is Justified.

The FCC does not directly question vacatur as an appropriate remedy if this court finds Petitioners' substantive arguments have merit, but it opposes vacatur, as outside Petitioners' claims, of the JSA attribution repeal and a presumption favoring embedded radio market waivers. FCC Br. n.41. Intervenors' challenge to vacatur at 63-65 relies on the severability of provisions they incorrectly claim Petitioners did not challenge, *supra* IV.B.

Prometheus II, 652 F.3d at 53, explained vacatur would be appropriate where the court had "twice remanded the issue" and the FCC had nonetheless "delayed action for six years" after the second remand "analogous to the Commission's delays on the eligible entity definition." Here, the FCC has been on notice for 15 years. And vacatur would not result in a "temporary free-for-all" as was the concern for vacatur in that case. *Id*. at 52; *Council Tree III*, 619 F.3d at 258.

D. A Mediator or Master is Lawful, Appropriate and Constitutional.

In a footnote, the FCC suggests without explanation that a special master would be inappropriate here. FCC Br. n.41 (citing *Norton v. Southern Utah Wilderness All.*, 542 U.S. 55, 65 (2004)). *Norton* supports Petitioners' request, as Section 202(h)'s mandate for action under the public interest standard is "legally required." *Id.* at 63. F.R.A.P 48 authorizes masters, which have long been used where "compliance with an enforcement order" is at issue. F.R.A.P. Rule 48, Advisory Committee Notes. Indeed, this Circuit has appointed such masters. *NLRB v. Richard Mellow Elec. Contractors Corp.*, 2002 WL 32093214 (3d Cir. 2002).

Intervenors go much further, claiming Petitioners want to make the FCC "cede control over its decisionmaking process." Int. Br. 74. This is overblown. Petitioners seek only two critical and narrowly limited interventions: (1) correction of data the FCC has been promising to improve; and (2) independent expert *recommendations* with regard to appropriate studies and timeline. Pet. Br. 44-45. The FCC remains free to determine how it should expend resources and consider the probative value of these recommendations and studies if they are undertaken. To be sure, the expert recommendations would be relevant to the reasonableness of FCC conclusions in the upcoming Quadrennial Review. As such, Petitioners' request does not implicate *Vermont Yankee Nuclear Power Corp.*

v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 545 (1978), or any constitutional concerns.

Petitioners are amenable if the FCC agrees to mediation, but if it does not, Petitioners request a special master.

E. Other Relief Is Justified

Intervenors deliberately make a hash of Petitioners' request for relief. Int. Br. 71-72. Petitioners seek reversal and remand of the Second R&O and Incubator Order where they fail to meet the APA for being arbitrary and capricious or action unlawfully withheld, in particular where they fail to meet the FCC's obligation to promote and consider race/gender diversity including the adopted definitions of eligible entity.

CONCLUSION

For reasons stated above and in their initial brief, Petitioners request that their Petition for Review and requested relief be granted.

Dated: April 12, 2019

s/ Cheryl A. Leanza

Cheryl Leanza
Best Best & Krieger LLP
2000 Pennsylvania Avenue N.W., Suite 5300
Washington, DC 20006
Phone (202) 785-0600

Andrew Jay Schwarzman
Angela J. Campbell
James T. Graves
Institute for Public Representation
Communications and Technology Law Clinic
600 New Jersey Avenue, N.W., Suite 312
Washington, DC 20001

Jessica J. González
Free Press
1025 Connecticut Avenue, NW, Suite 1110
Washington, DC 20036

Yosef Getachew
Common Cause
805 15th Street, NW, Suite 800
Washington, DC 20005
(202) 833-1200

Counsel for Citizen Petitioners, Prometheus Radio Project, Media Mobilizing Project, Free Press, Office of Communication, Inc. of the United Church of Christ, National Association of Broadcast Employees and Technicians-Communications Workers of America and Common Cause

CERTIFICATES OF COMPLIANCE

Nos. 17-1107, 17-1108, 17-1109, 17-1110, 17-1111, 18-1092, 18-1669, 18-1670, 18-1671, 18-2943 & 18-3335

Caption: ***Prometheus Radio v. FCC, etc., et al.***

1. I, Cheryl A. Leanza, certify that I am a member of the bar of this Court pursuant to Third Circuit Rules 28.3(d) and 46.1(e).

2. This Reply Brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because this Reply Brief contains 4,966 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

3. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14pt. Times New Roman.

4. I, Cheryl Leanza, hereby certify that on April 12, 2019, I electronically filed the foregoing Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

5. I certify that the text of the electronic brief is identical to the text in the paper copies. I further certify that a virus detection program (Symantec Endpoint Protection version 9.0.1.1000) has been run on the file and that no virus was detected.

Dated: April 12, 2019

s/ Cheryl A. Leanza

Cheryl Leanza
Best Best & Krieger LLP
2000 Pennsylvania Avenue N.W., Suite 5300
Washington, DC 20006
Phone (202) 785-0600

009998.00233\31966042.4