

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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FEDERAL COMMUNICATIONS COMMISSION, )  
ET AL., )  
Petitioners, )  
v. ) No. 19-1231

PROMETHEUS RADIO PROJECT, ET AL., )  
Respondents. )

- - - - -  
NATIONAL ASSOCIATION OF )  
BROADCASTERS, ET AL., )  
Petitioners, )  
v. ) No. 19-1241

PROMETHEUS RADIO PROJECT, ET AL., )  
Respondents. )

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14       PROMETHEUS RADIO PROJECT, ET AL., )  
15                       Respondents. )  
16       - - - - -  
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18                       Washington, D.C.  
19                       Tuesday, January 19, 2021  
20  
21                       The above-entitled matter came on for  
22       oral argument before the Supreme Court of the  
23       United States at 10:00 a.m.  
24  
25

1 APPEARANCES:

2

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4 Department of Justice, Washington, D.C.;

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8 RUTHANNE M. DEUTSCH, ESQUIRE, Washington, D.C.;

9 on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument first this morning in Case 19-1231,  
5 Federal Communications Commission versus  
6 Prometheus Radio Project, and the consolidated  
7 case.

8 Mr. Stewart.

9 ORAL ARGUMENT OF MALCOLM L. STEWART  
10 ON BEHALF OF THE PETITIONERS IN 19-1231

11 MR. STEWART: Mr. Chief Justice, and  
12 may it please the Court:

13 Section 202(h) of the  
14 Telecommunications Act of 1996 reflects  
15 Congress's conclusion that in light of  
16 intervening competitive developments, broadcast  
17 cross-ownership restrictions adopted in an  
18 earlier era may no longer be warranted. To  
19 ensure that such restrictions do not remain in  
20 force simply through inertia, Congress required  
21 the FCC to reexamine those rules every four  
22 years and to repeal or modify any rules that no  
23 longer serve the public interest.

24 After reconsidering its ownership  
25 rules, in accordance with Section 202(h) as

1 mandate, the FCC determined in 2017 that its  
2 newspaper, broadcast, and radio television rules  
3 should be repealed entirely and that its local  
4 television rules should be relaxed.

5           The Commission explained that the  
6 profusion of new media outlets, particularly  
7 through cable and the Internet, alleviated the  
8 -- the viewpoint diversity concerns that had  
9 originally justified the restrictions. It  
10 further found that the rules disserved the  
11 public interest by preventing economically  
12 efficient combinations that would provide  
13 consumers better broadcast service.

14           The court of appeals did not find  
15 fault with that analysis. Indeed, the court in  
16 2004 had sustained the FCC's determination that  
17 the blanket newspaper/broadcast cross-ownership  
18 ban no longer served the public interest.

19           The court nevertheless vacated the  
20 FCC's rule changes on the ground that the agency  
21 had not adequately assessed the changes' likely  
22 effect on minority and female ownership levels.  
23 The court's elevation of that single factor has  
24 no basis in the governing statute, and the court  
25 failed to show adequate respect for the agency's

1 predictive judgments and its balancing of  
2 competing policy objectives. The Third  
3 Circuit's judgment should be reversed.

4 CHIEF JUSTICE ROBERTS: Mr. Stewart,  
5 was the FCC required to consider the impact on  
6 minority and female ownership in the 2017  
7 reconsideration order?

8 MR. STEWART: We don't think anything  
9 in the statute required the FCC to consider that  
10 factor. The court of appeals, in what we refer  
11 to as Prometheus III, its prior decision in this  
12 line of cases, had included a footnote that  
13 directed the FCC, when it next re-evaluated its  
14 cross-ownership rules, to consider that factor.

15 And the analysis that the FCC did in  
16 the reconsideration order was in compliance with  
17 the court's mandate. But --

18 CHIEF JUSTICE ROBERTS: So it could  
19 have --

20 MR. STEWART: -- we don't think --

21 CHIEF JUSTICE ROBERTS: -- it could  
22 have said nothing about that at all in -- in  
23 changing the focus of its regulations?

24 MR. STEWART: Yes. Historically, when  
25 the Commission has adopted cross-ownership rules

1 of various sorts, it has been to promote  
2 viewpoint diversity and -- and localism, to  
3 ensure that there is as much of a plethora as  
4 possible of distinct voices within the local  
5 community.

6 And it has not historically taken into  
7 account impacts on minority and female ownership  
8 in conducting that analysis. And nothing in  
9 202(h) would have required the Commission to  
10 start doing that in its quadrennial reviews.

11 CHIEF JUSTICE ROBERTS: What scrutiny  
12 would apply when the Commission simply shifts  
13 priorities? Let's say that there were -- was  
14 consideration of female/minority ownership and  
15 the -- cross-ownership rules and it just  
16 decided, well, we think the latter is more  
17 important than the former, so we're going to  
18 focus solely on the -- on the latter?

19 MR. STEWART: I think it's really  
20 rational basis review; that is, if the FCC had  
21 decided to adopt an explicitly race- or  
22 gender-conscious standard, that is, give a  
23 preference to members of racial minorities or to  
24 women as such, then it would be required to  
25 satisfy heightened scrutiny, but it would be no



1       --

2                   CHIEF JUSTICE ROBERTS:  Thank you,  
3       counsel.

4                   Justice Thomas.

5                   JUSTICE THOMAS:  Thank you, Mr. Chief  
6       Justice.

7                   Mr. Stewart, you indicate that the  
8       landscape in the area of viewpoint diversity has  
9       changed over the years.  Could you talk a bit  
10      about that?  Particularly, I'm interested  
11      particularly in the effect mentioned in your  
12      briefs and some of the others with -- as a  
13      result of some of the new Internet-based  
14      platforms.

15                  MR. STEWART:  I -- I think the idea is  
16      that when the rules were first adopted, in many  
17      local communities, there might be three  
18      broadcast stations and one local newspaper and  
19      -- basically, four independent voices within the  
20      community providing local news coverage and --  
21      and -- and other forms of coverage.  And if two  
22      of those outlets were owned by the same entity,  
23      that would be a substantial diminution in  
24      potential viewpoint diversity.

25                  Now, when you have a plethora of

1 Internet-based platforms, cable stations that  
2 can also provide local news coverage, the  
3 reduction in viewpoints within the broadcast  
4 sphere specifically is not going to be nearly so  
5 significant in light of the profuse -- profusion  
6 of different viewpoints that will be available  
7 to the consumer.

8 JUSTICE THOMAS: So do you have -- is  
9 there any sort of structural program or  
10 requirement such as we have here that is  
11 specific to these alternative platforms?

12 MR. STEWART: There really -- we  
13 really are not talking in this case about  
14 regulation of the Internet or regulation of  
15 cable. I think the justification for enhanced  
16 regulation of the broadcast media has always  
17 been that the broadcast spectrum is scarce, not  
18 as many people can broadcast on the frequencies  
19 as would like to, and, therefore, it's necessary  
20 to have a federal agency that allocates the  
21 spectrum and decides how it can best be used to  
22 serve the public interest.

23 And there -- there isn't the same sort  
24 of need with respect to cable and the Internet  
25 because one person's voice doesn't crowd out

1 another's.

2 JUSTICE THOMAS: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Breyer.

5 JUSTICE BREYER: I'm thinking of it  
6 solely as a -- the anti-merger part, in -- in  
7 anti-merger law, merger law, generally, I think,  
8 has a theory, and the theory is beyond a certain  
9 point and other things being equal, you have  
10 fewer companies in a market, the harder it is to  
11 enter, and it's particularly harder for smaller  
12 firms.

13 And, here, smaller firms are heavily  
14 correlated or more likely to be correlated with  
15 women and minorities. All right? The opposite  
16 view, which is what the FCC has now chosen, is  
17 -- is they want to move or allow to be moved  
18 towards more concentration.

19 So what's the theory that that  
20 wouldn't hurt the minorities and women or  
21 smaller businesses? What's the theory the  
22 opposite way, in other words? I'm not asking  
23 for data. I'm asking for a theory.

24 MR. STEWART: Well -- well, let -- let  
25 me take the -- the two points you made in -- in

1 order. The first is, with respect to possible  
2 advantages to small entities, the FCC has  
3 devised other programs, like the incubator  
4 program and the eligibility -- eligible entity  
5 definition, that are intended to give certain  
6 regulatory advantages to small entities.

7 And -- and these may -- those rules  
8 may incidentally benefit female and minority  
9 owners or prospective owners even though they're  
10 not limited to -- to those people.

11 The second thing is the -- the theory  
12 behind what the FCC did was in part the data  
13 don't show it, but in part, with respect to some  
14 of these rules, the intuition really isn't there  
15 once you unpack things.

16 For example, with respect to the  
17 newspaper broadcast cross-ownership rule, the  
18 rule that a single entity can't own both a  
19 newspaper and a -- a broadcast station, the FCC  
20 found that if that rule was eliminated, the most  
21 likely consequence is that broadcast stations  
22 would buy newspapers rather than the reverse,  
23 because --

24 JUSTICE BREYER: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice Alito.

1 JUSTICE ALITO: Mr. Stewart, you said  
2 earlier that the Commission was not required by  
3 the statute to consider minority and female  
4 ownership, but the Commission did that. And,  
5 therefore, could we reverse the court of appeals  
6 on the ground that the Commission simply wasn't  
7 required to consider this factor at all, and  
8 does it matter that the panel had previously  
9 indicated that the Commission had to consider  
10 that factor?

11 MR. STEWART: I -- I think, if you  
12 concluded that the statute actually barred the  
13 Commission from considering that factor, you  
14 could reverse the court of appeals on that  
15 basis.

16 I think, if you simply concluded that  
17 the Commission was either allowed to do it or  
18 not as it chose, you might think that you need  
19 to analyze the Commission's assessment of that  
20 factor at least a little bit in light of the  
21 fact that the Commission analyzed it.

22 But even the court of appeals didn't  
23 say that the Commission ignored the weight of  
24 the data or that the data affirmatively  
25 demonstrated that female and minority ownership

1 levels would be reduced. It simply said the  
2 Commission hasn't amassed enough data to reach  
3 an informed conclusion one way or the other.

4 And -- and we think that was certainly  
5 error, that most of the --

6 JUSTICE ALITO: Well, on -- on -- on  
7 that point, the court clarified in Fox  
8 Television that the APA doesn't require  
9 "obtaining the unobtainable" when it comes to  
10 data supporting a decision but that the agency  
11 might be required to analyze data that "can be  
12 readily obtained."

13 There's a big gap between those two  
14 poles. Where should we draw the line?

15 MR. STEWART: I -- I don't -- I think,  
16 here, it's not a matter of the data could  
17 readily be obtained. That is, the deficiencies  
18 in the data don't result from the agency's  
19 current data collection practices.

20 What the agency was trying to do was  
21 assess the potential consequences of relaxing  
22 the ownership rules by looking at arguably  
23 analogous regulatory changes that had occurred  
24 in 1996 and 1999 and asking what happened after  
25 that.

1                   And so the deficiencies in the data  
2           are really deficiencies in the data that  
3           predated those regulatory changes, and it --

4                   CHIEF JUSTICE ROBERTS:   Justice  
5           Sotomayor.

6                   JUSTICE SOTOMAYOR:   Mr. Stewart, I'm  
7           -- I'm a bit confused.   It seems to me that the  
8           FCC for decades has been saying that minority  
9           and women ownership is in -- consideration of it  
10          is in the public interest.

11                   And I don't see anything in the ruling  
12          below that was subject to review by the Circuit  
13          that said otherwise.   It may have said that it  
14          didn't think the changes would affect that  
15          issue.   It said other things, but I don't think  
16          the FCC has ever disavowed that that --  
17          consideration of that factor should be given in  
18          its review.

19                   MR. STEWART:   The agency has never --  
20          has -- has frequently said that this is a factor  
21          that may take -- be taken into account in its  
22          public interest analysis generally.

23                   JUSTICE SOTOMAYOR:   All right.   So may  
24          --

25                   MR. STEWART:   And --

1 JUSTICE SOTOMAYOR: Let's stop there.

2 That's exactly what it said. And I saw the  
3 Circuit Court saying that's what you said, but  
4 your consideration was inadequate because you  
5 really didn't -- you didn't explain it.

6 And we have a legion of -- couldn't  
7 adequately explain it. We have a legion of  
8 cases that say you don't have to rule in favor  
9 of one point of view or another, but when you're  
10 rejecting something, you should give it adequate  
11 consideration.

12 Isn't that what we're judging?

13 MR. STEWART: I -- I -- I think there  
14 are two things I would say about that. The  
15 first is that, although the agency has  
16 historically looked at enhanced female and  
17 minority ownership as a goal to be achieved  
18 through some means, it has not historically  
19 looked at that criteria as a basis for its  
20 cross-ownership restrictions. In adopting those  
21 restrictions, it's looked at other factors.

22 The second thing is that the court of  
23 appeals chided the agency not for conducting an  
24 inadequate analysis of the data that were  
25 available but for having inadequate data.



1                   And I think we've made a strong  
2           showing that there were no better data available  
3           with respect to the -- the demographic  
4           composition of the ownership group pre-1996,  
5           pre-1999.

6                   JUSTICE SOTOMAYOR:   Thank you,  
7           counsel.

8                   CHIEF JUSTICE ROBERTS:   Justice Kagan.

9                   JUSTICE KAGAN:   Mr. Stewart, if I  
10          could continue in that vein, as -- as -- as I  
11          understand it now, you're saying that female and  
12          minority ownership has not really been a factor  
13          in 202(h) determinations, but I -- that's not  
14          the way I read your brief.

15                  And I think it's not the way I read  
16          past actions by the FCC under 202(h), so I'm --  
17          I'm wondering, what are you saying here?   Are  
18          you saying that this is a new thing that those  
19          things are not considered or that they've never  
20          been considered under 202(h), which is not what  
21          your brief says?   What -- what are you saying?

22                  MR. STEWART:   I mean, what I was  
23          really talking about was the era well before  
24          Section 202(h) was enacted in 1996, the era back  
25          in 1975, for instance, when the Commission first

1     adopted the newspaper broadcast cross-ownership  
2     ban and -- and the years since then when it had  
3     retained that ban and when it had adopted rules  
4     dealing with radio and television  
5     cross-ownership.

6             In -- in that era, the rules were  
7     justified by considerations of viewpoint  
8     diversity, but what the Commission meant was  
9     it's better to have more independent outlets in  
10    the community rather than --

11            JUSTICE KAGAN: I guess I'm still not  
12    really understanding you, Mr. Stewart, so I'll  
13    just ask, you -- you -- you -- in your brief you  
14    say the agency has traditionally treated this  
15    form of broadcast diversity, meaning minority  
16    and female ownership, as an element in its  
17    multi-factor public interest analysis.

18            Are you still sticking to that  
19    statement?

20            MR. STEWART: It -- it -- it has often  
21    said that. And it has tried to devise ways that  
22    that objective may be achieved other than the  
23    cross-ownership rules.

24            So, for instance, with the--

25            JUSTICE KAGAN: So --

1 MR. STEWART: -- eligibility --

2 JUSTICE KAGAN: -- okay. If you look  
3 at this, in this rule-making, were you saying,  
4 look, we don't think that the changes in these  
5 rules will affect female and minority ownership  
6 or were you saying something more like we don't  
7 have evidence of this and we're not going to let  
8 speculative arguments get in the way of what we  
9 want to do otherwise?

10 MR. STEWART: We were saying the  
11 evidence is fragmentary but based on the  
12 evidence we have, our best assessment is there  
13 will not be a substantial effect.

14 And the mere possibility that there  
15 could be such an effect is not a sufficient  
16 basis for foregoing regulatory changes that we  
17 would otherwise deem to be very desirable. But  
18 --

19 CHIEF JUSTICE ROBERTS: Justice --  
20 Justice Gorsuch.

21 JUSTICE GORSUCH: Good morning, Mr.  
22 Stewart.

23 The parties dispute the propriety of  
24 the Third Circuit holding on to this case and  
25 all of its various iterations for the last, I

1     don't know, 17 or so years. I'm curious what  
2     the government's position on that is.

3                 MR. STEWART: In -- in succeeding  
4     stages of this litigation, there have been  
5     petitions for review filed in other circuits,  
6     and there have then been requests to transfer  
7     the cases to the Third Circuit.

8                 The government in the past has not  
9     opposed those requests. I think we're a little  
10    skeptical that the Third Circuit's repeated  
11    statements that it is retaining jurisdiction  
12    really have operative legal effect. That is, if  
13    the next time around a petition for review is  
14    filed in some other circuit that would otherwise  
15    be an appropriate venue, that circuit can decide  
16    for itself whether to transfer the case to the  
17    Third Circuit, but we don't think that that  
18    circuit would be under an obligation to do so  
19    simply because the Third Circuit has included  
20    this language about retaining its -- retaining  
21    jurisdiction in its prior order.

22                 JUSTICE GORSUCH: Thank you.

23                 CHIEF JUSTICE ROBERTS: Justice  
24    Kavanaugh.

25                 JUSTICE KAVANAUGH: Thank you. And

1 good morning, Mr. Stewart.

2 To follow up on Justice Sotomayor and  
3 Justice Kagan, to make sure I'm clear, under the  
4 statute and the public interest standard, does  
5 the FCC have to consider the effect of relaxing  
6 the rules on women and minority ownership?

7 MR. STEWART: No, we don't believe so.  
8 The -- the fact that it is a public interest  
9 consideration that could be taken into account  
10 in making other sorts of decisions doesn't mean  
11 that we have to consider it in making every  
12 single regulatory decision we make, including  
13 relaxation of the cross-ownership rules.

14 JUSTICE KAVANAUGH: Do you agree that  
15 the FCC did consider it here?

16 MR. STEWART: It considered it, and if  
17 the FCC had concluded there was likely to be an  
18 adverse impact on female and minority ownership,  
19 it would then have had to decide how do we  
20 balance that against the identified benefits of  
21 the rule.

22 JUSTICE KAVANAUGH: Having --

23 MR. STEWART: The FCC never got to  
24 that point.

25 JUSTICE KAVANAUGH: Having considered

1     it, doesn't the FCC have to justify how it  
2     considered it?

3             MR. STEWART: I think the -- the very  
4     most you could say that the FCC has to do is  
5     provide a reasonable, not necessarily a view  
6     that the court deems correct, but a reasonable  
7     view of the evidence that is before it.

8             It doesn't have to amass additional  
9     evidence simply to be able to pronounce with a  
10    higher degree of confidence.

11            JUSTICE KAVANAUGH: And to follow up  
12    on Justice Breyer's question, what's the theory  
13    for why it wouldn't hurt women and minority  
14    ownership? The theory he asked. Can you  
15    continue your answer there?

16            MR. STEWART: Yes, with respect to  
17    newspaper/broadcast cross-ownership, for  
18    instance, the -- the Commission found that the  
19    most likely consequence of eliminating the ban  
20    is that broadcast stations will buy newspapers  
21    rather than the reverse, because the newspaper  
22    industry is in such trouble.

23            And if a broadcast station buys a  
24    newspaper, that doesn't affect any form of  
25    centralization or consolidation of ownership

1 within the broadcast industry. The existing  
2 broadcast owners remain the same. It's just one  
3 of them has bought a newspaper and that may  
4 allow it to achieve economies of scale and  
5 provide better service to the community.

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Barrett.

9 JUSTICE BARRETT: Mr. Stewart, I want  
10 to go back to the questions that Justices  
11 Sotomayor and Kagan were asking you. I  
12 understood your brief to be saying that the FCC  
13 -- or to -- to be conceding that the FCC had  
14 long taken minority and women ownership into  
15 account, but then you pivoted a little bit and  
16 said that it took into account because the Third  
17 Circuit's opinion required it to.

18 And I wasn't entirely clear which  
19 position you had settled on. So could you  
20 clarify that for me?

21 MR. STEWART: I think what I meant to  
22 say was it -- it has long identified minority  
23 and female ownership, an increase in ownership  
24 levels or a -- a decrease in the current  
25 under-representation, as a good that would serve

1 the public interest.

2 It has not historically taken that  
3 particular public interest factor into account  
4 in determining whether particular  
5 cross-ownership restrictions specifically should  
6 be adopted or retained. For example, it  
7 achieved -- it attempts to achieve that goal  
8 through other means, such as preferences through  
9 small businesses that are race and gender  
10 neutral but may incidentally help minority and  
11 female owner -- owners. Now --

12 JUSTICE BARRETT: Mr. Stewart, can I  
13 interrupt and ask another question before my  
14 time elapses? Do you see a difference between a  
15 stated goal of enhancing minority and female  
16 ownership and not harming minority and female  
17 ownership? And if so, which is the FCC's?

18 MR. STEWART: I -- I think it is both.  
19 I think the FCC would be cognizant of either  
20 argument -- again, outside the cross-ownership  
21 context, either of arguments that an existing  
22 regulatory change is good because it will  
23 increase minority and female ownership levels or  
24 a proposed regulatory change is bad because it  
25 would decrease them.



1           I think the FCC would be open to  
2     either form of argument. And, again, what we're  
3     talking about is race- and sex-neutral measures,  
4     not race or sex preferences.

5           JUSTICE BARRETT: Thank you, counsel.

6           CHIEF JUSTICE ROBERTS: A minute to  
7     wrap up, Mr. Stewart.

8           MR. STEWART: Thank you, Mr. Chief  
9     Justice.

10          I -- I think it's easy to lose sight  
11     of what extensive analysis the FCC did here,  
12     because so much of that analysis is undisputed.  
13     The FCC concluded that because of a variety of  
14     alternative media voices are now available to  
15     consumers, the viewpoint diversity concerns that  
16     originally prompted the cross-ownership rules  
17     were far less acute today.

18          The FCC also explained that if the  
19     ownership restrictions were repealed or relaxed,  
20     owners could achieve economies of scale. For  
21     instance, a broadcast station, by buying a local  
22     newspaper, could use resources with respect to  
23     the gathering and the dissemination of local  
24     news on both platforms. And it could thereby  
25     provide better broadcast service to its

1 consumers by using the resources of the  
2 newspaper.

3 Thank you, Mr. Chief Justice.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Ms. Walker.

7 ORAL ARGUMENT OF HELGI C. WALKER

8 ON BEHALF OF THE PETITIONERS IN 19-1241

9 MS. WALKER: Thank you, Mr. Chief  
10 Justice. May it please the Court:

11 In this case, the FCC decided that  
12 broadcasters should not have to operate under  
13 ownership restrictions dating back to the  
14 Roosevelt administration. I'd like to focus on  
15 the statutory reasons why that was lawful.

16 202(h) was meant to drive real reform  
17 with a focus on competition. Here, the  
18 Commission's statutorily required findings that  
19 the rules are no longer in the public interest  
20 as a result of competition are unchallenged.

21 Yet, the Third Circuit vacated the  
22 order because the Commission failed to  
23 adequately consider minority and female  
24 ownership. The statute does not say one word  
25 about that issue. And the APA does not require

1 the FCC to consider it either. The Third  
2 Circuit has no basis, other than its own policy  
3 preferences, to make that a mandatory, much less  
4 controlling, factor in all 202(h) reviews.

5 The FCC properly did the job Congress  
6 gave it. That is what matters and the order can  
7 and should be upheld on that ground.

8 I welcome the Court's questions.

9 CHIEF JUSTICE ROBERTS: Ms. Walker,  
10 are you saying that it would have been arbitrary  
11 and capricious for the Commission to consider  
12 the impact on minority and female ownership?

13 MS. WALKER: No, but it was not  
14 required, as you asked Mr. Stewart, Mr. Chief  
15 Justice. And, in fact, under the Commission's  
16 analysis of the order, the outcome of the  
17 minority and female ownership discussion  
18 couldn't have changed the outcome because the  
19 FCC decided, for instance, that the  
20 newspaper/broadcast cross-ownership rule was no  
21 longer in the public interest and had to be  
22 repealed before it even got to the minority and  
23 female ownership discussion.

24 CHIEF JUSTICE ROBERTS: Well, given  
25 that the Commission had considered minority and

1 female ownership for some time, wasn't it under  
2 some obligation, under State Farm for example,  
3 to explain why it was not focusing or -- or even  
4 weighing that interest in the 2017 order?

5 MS. WALKER: No, Your Honor, because  
6 the Commission never relied on minority and  
7 female ownership as a basis for the structural  
8 ownership rules, which are the subject of  
9 202(h), and what this entire case is about.

10 The Commission has alluded to that as  
11 a policy, but never in the context of these  
12 rules. In fact, it has said the opposite, that  
13 these rules are an inappropriate vehicle because  
14 they don't really work to promote minority and  
15 female ownership. It said that in the 2014  
16 review, in the 1985 order, and in the order on  
17 review here.

18 CHIEF JUSTICE ROBERTS: Is the -- to  
19 what extent, if any, do you -- does your  
20 position -- inconsistent -- is your position  
21 inconsistent with the Solicitor General's  
22 position?

23 MS. WALKER: On the question of what  
24 the Commission has historically done, not  
25 inconsistent. We're just being more specific to

1 say that policy has never been advanced with  
2 respect to the ownership limits. And I heard  
3 Mr. Stewart say this morning that he agrees with  
4 that.

5 We would like the Court to resolve  
6 this case on statutory grounds and not merely  
7 decide that the Commission's consideration of  
8 the minority and female ownership issue was  
9 adequate.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Thomas.

12 JUSTICE THOMAS: Thank you, Mr. Chief  
13 Justice.

14 Ms. Walker, to follow up on your last  
15 answer, can you think of any example of -- of an  
16 instance in which the FCC has used structural  
17 ownership rules such as this one to advance  
18 minority or female ownership?

19 MS. WALKER: I do not believe, after  
20 my extensive work on this case, that there is a  
21 single example of that. And, again, the  
22 Commission has said the exact opposite.

23 It has said that structural ownership  
24 limits are not an appropriate means to promote  
25 minority and female ownership because there is

1 no evidence or any demonstrable indicia that  
2 those rules actually promote those interests.

3 The Commission has therefore chosen  
4 direct means, Justice Thomas, like tax  
5 certificates and distress sales. That's how the  
6 Commission has promoted those interests.

7 And I think it just has never done  
8 that ever with respect to the structural  
9 ownership limits. And that is what this case is  
10 about.

11 JUSTICE THOMAS: So do -- what do you  
12 think, other than diversity of viewpoint, what  
13 other interests are being advanced by this rule?

14 MS. WALKER: The traditional public  
15 interest rationales for these rules, Your Honor,  
16 are: Viewpoint diversity, localism, and  
17 competition. Those three rationales underlay  
18 the adoption of the rule and the Commission has  
19 consistently relied on those.

20 We think those are appropriate  
21 factors, but on our proffered reading of the  
22 public interest in this statute, we don't think  
23 the Commission or commenters can draw and brand  
24 new rationales as an excuse to keep outdated  
25 rules or, worse, to make more rules. That turns

1 the statute completely upside down.

2 JUSTICE THOMAS: So have this interest  
3 -- have these interests become somewhat less  
4 important with the rise of other platforms,  
5 particularly the Internet platforms?

6 MS. WALKER: Yes, Your Honor. And --  
7 and I think -- I think your question draws out  
8 the fact that the broadcasters' competitors, all  
9 these new platforms, all these new social media  
10 formats, are completely unregulated, yet  
11 broadcasters labor under these rules that  
12 literally go back to the 1940s.

13 That makes no sense and is extremely  
14 unfair as a competitive matter, which is why the  
15 Commission reasonably decided to free  
16 broadcasters of these archaic rules.

17 CHIEF JUSTICE ROBERTS: Just --  
18 Justice Breyer.

19 JUSTICE BREYER: Thank you. I'm going  
20 to oversimplify. But earlier commissions before  
21 this particular last effort, I read it as  
22 saying, look, television, radio, newspaper,  
23 they're all in the business of providing news.  
24 They're all somewhat competitive. And we want  
25 to stop them from being concentrated, so we have

1     our rules.

2                   And one thing about those rules, one  
3     thing only, is that they will not hurt small  
4     businesses. They will tend to help small  
5     businesses enter more easily and small  
6     businesses tend to be correlated with women and  
7     minorities.

8                   Now, we have a change. And the change  
9     seems to be we don't see any effect, okay? Now,  
10    normally when an agency changes its rules, it  
11    has to explain why. Just a question of  
12    explaining it.

13                  Well, it's the same question I asked  
14    before. What's the theory? Where is the  
15    explanation?

16                  MS. WALKER: Well, with respect,  
17    Justice Breyer, the earlier Commission never  
18    said it was keeping the rules for the purpose of  
19    promoting minority and female --

20                  JUSTICE BREYER: No, I'm not saying  
21    for purpose. I'm doing it the opposite way.  
22    There is no negative effect on small businesses.  
23    In fact, it's positive. And looking at the  
24    public interest, generally, there's no negative  
25    and it's a positive for women and minorities.



1                   Then they change. Okay? Where's the  
2                   explanation?

3                   MS. WALKER: With respect, Justice  
4                   Breyer, I don't think the Commission ever said  
5                   what you are hypothesizing. They -- they have  
6                   never said even in the 2016 order that predated  
7                   the reconsideration order, that the rules would  
8                   help. The structural ownership rules, it's  
9                   important that we be specific, that that would  
10                  help small businesses, new entrants, minorities  
11                  and -- and women by correlation.

12                  They -- they did say that with respect  
13                  to the diversity order, that the Third Circuit  
14                  without any explanation threw out, but the 2016  
15                  order that predated the order on review actually  
16                  never said that the ownership limits would  
17                  advance interests of even new entrants.

18                  CHIEF JUSTICE ROBERTS: Justice Alito.

19                  JUSTICE ALITO: Two -- paint a picture  
20                  of what this case means in real -- real-world  
21                  terms. Can you give me a concrete example of  
22                  some beneficial development that would occur if  
23                  the Commission's rule is sustained but that will  
24                  be prevented if it is not sustained?

25                  MS. WALKER: For example, Justice

1 Alito, a local broadcaster might buy a failing  
2 newspaper. That would be a very good thing.

3 As the record shows, and many of our  
4 media explains, newspapers have been in a  
5 downward spiral for decades. A local  
6 broadcaster could buy that newspaper, help get  
7 it back up and running, and be providing more  
8 local news and more local content for the  
9 community.

10 That would be an excellent thing.  
11 That would not be allowed to happen if the Third  
12 Circuit is not reversed. And on that point,  
13 Justice Alito, if I might, it's important to  
14 note that Respondents have not even challenged  
15 the Commission's statutorily required  
16 competitive findings.

17 Why? Because there really is no  
18 serious argument that these rules still are  
19 necessary.

20 JUSTICE ALITO: Is that a realistic  
21 possibility? Can you point to a real-world  
22 example of a local -- a local television station  
23 buying a failing newspaper and keeping it in  
24 business?

25 MS. WALKER: I believe the amicus

1     brief of the affiliates lays out in detail a lot  
2     of examples where television stations have been  
3     able to do that or buy another television  
4     station in the same market, pool resources and  
5     create more local programming.

6             So I'd refer you to those amicus  
7     briefs. But, Justice Alito, another real-world  
8     point is that, for instance, Amazon gets to own  
9     The Washington Post today. Nobody thinks that's  
10    the end of democracy. It's surely not the end  
11    of democracy if a local broadcaster can buy a  
12    local newspaper and keep it alive.

13            JUSTICE ALITO: Thank you.

14            CHIEF JUSTICE ROBERTS: Justice  
15    Sotomayor.

16            JUSTICE SOTOMAYOR: Counsel, the way  
17    you want us to rule requires us to go through  
18    the FCC's history with this issue, starting  
19    presumably in the 1970s, and now going over  
20    close to 50 years, practically.

21            You're encouraging us not to look at  
22    what might be a simple issue, which is: Was the  
23    explanation given adequate? I don't know what  
24    -- why either you or the Solicitor General need  
25    to go that far.

1           Could you explain to me if there's a  
2   simpler reason why we should go to the more  
3   complex reason?

4           MS. WALKER: Well, I actually think  
5   the statutory reason is not as complex, but I'll  
6   get to that next. The reason why we, the  
7   broadcasters, are asking for statutory relief is  
8   because it took us 17 years to get to this  
9   Court, 17 years of litigation where the Third  
10   Circuit was distorting the statute the entire  
11   time.

12           We badly need a course correction, and  
13   I think --

14           JUSTICE SOTOMAYOR: Well, but part of  
15   that problem is not with what the Third Circuit  
16   did. It's with what the government did. The  
17   government was acceding to the Third Circuit's  
18   jurisdiction up until this moment, meaning at  
19   every moment in which there had been a -- a  
20   motion to transfer the case, the government  
21   agreed to it.

22           MS. WALKER: Yes, but I --

23           JUSTICE SOTOMAYOR: So I don't think  
24   you can blame the Third Circuit or the fact that  
25   it retained jurisdiction for what the government

1 encouraged.

2 MS. WALKER: Well, it was the Third  
3 Circuit's dilution of 202(h) that's also the  
4 problem but you're right, Justice Sotomayor,  
5 we've not been aligned with the government in  
6 all steps. And that's why we're here trying to  
7 protect those --

8 JUSTICE SOTOMAYOR: So, I'll put  
9 another question. In where have -- you have not  
10 told me or given me a line to draw as to when  
11 it's appropriate or inappropriate for a circuit  
12 to retain jurisdiction in a complex case.

13 MS. WALKER: I don't think you need to  
14 draw a hard line but here it was clear we're way  
15 outside anything appropriate. One panel of the  
16 Third Circuit has retained jurisdiction for 15  
17 years over four successive, separate quadrennial  
18 review orders. That's excessive, I think, by  
19 any standard.

20 CHIEF JUSTICE ROBERTS: Justice Kagan.

21 JUSTICE KAGAN: Ms. Walker, I'd like  
22 you to assume with me that in applying its  
23 public interest standard, generally, the FCC has  
24 always thought of -- of -- of one factor, not  
25 the only factor, obviously, but one factor is

1 minority and female ownership.

2           And I'd further like you to assume,  
3 and I understand that you can test this as a  
4 factual matter, but I just want you to assume it  
5 with me now, that that historic practice has  
6 been true in the 202(h) context, as well as in  
7 rule-making or license-giving or anything else  
8 that the FCC does.

9           If you assume those things, what  
10 obligation does the -- would the FCC have to say  
11 why it was not taking that consideration into  
12 account here?

13           MS. WALKER: Well, we think that  
14 statute actually would preclude consideration of  
15 that factor, here, even if the Commission wanted  
16 to. I draw your attention to our statutory  
17 theory, which is that the public interest here  
18 has to be cabined in some way.

19           And so we read the statute as asking  
20 the Commission to go back to the original public  
21 interest rationales for whatever rules they are  
22 reviewing under 202(h), and here, everybody  
23 agrees that would not include minority and  
24 female ownership. So --

25           JUSTICE KAGAN: I'm sorry, if I just

1 -- make sure I understand, you're saying that  
2 even if the -- even though the FCC can use  
3 minority and female ownership as a factor in --  
4 in doing rules generally and in giving licenses,  
5 when it comes to 202(h) review, they  
6 affirmatively cannot?

7 MS. WALKER: Not if it was not an  
8 original basis for the rule. And why does that  
9 make sense, Justice Kagan? Because it keeps the  
10 Commission to the task of reviewing what it has  
11 done before, not coming up with new rules or new  
12 rationales to even add ownership restrictions.

13 JUSTICE KAGAN: I think your -- your  
14 -- well, I think my time is up, so I'll -- I'll  
15 quit there.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Gorsuch.

18 JUSTICE GORSUCH: Good morning. I  
19 wanted to return to the -- a question Justice  
20 Sotomayor raised, and that is what's at stake  
21 here between your rationale and the FCC's?

22 I guess you ask us to rule on the  
23 statutory basis. The FCC asks us to rule on its  
24 reasoned decision-making basis. I -- I would  
25 have thought perhaps a win is a win from your

1 client's perspective.

2 And I -- I'd like to understand why  
3 that's not the case.

4 MS. WALKER: Well, as a practical  
5 matter, Justice Gorsuch, if this Court doesn't  
6 clarify what the statute requires or doesn't  
7 require, we're going to be back in this very  
8 same raft in the next quadrennial review, the  
9 2018 quadrennial review that's on ice pending  
10 this outcome of this Court's decision.

11 If the Court merely holds that the  
12 Commission adequately explained a completely  
13 atextual factor that the Third Circuit imposed  
14 unilaterally on the Commission, we haven't made  
15 much practical progress because that might even  
16 embolden courts to add other atextual factors.

17 Today it's minority --

18 JUSTICE GORSUCH: Well -- well, let  
19 me --

20 MS. WALKER: -- and female ownership,  
21 tomorrow it's --

22 JUSTICE GORSUCH: -- let me -- let me  
23 interrupt you there. I mean, if -- if this  
24 quadrennial review is allowed to go forward and  
25 the experiment is allowed to play out and data



1 is obtained, presumably you have confidence in  
2 the results, they'll show great public benefit.

3 Why wouldn't that be sufficient today?

4 MS. WALKER: I think the problem -- I  
5 think the problem, Justice Gorsuch, is that  
6 Respondents' theory of the statute would allow  
7 the Commission to add totally new theories as a  
8 reason for keeping rules, so we'll never have  
9 any regulatory reform, or, worse, tightening the  
10 ownership restrictions.

11 Congress definitely did not think that  
12 202(h) was supposed to be a vehicle for  
13 tightening restrictions.

14 JUSTICE GORSUCH: Well, on -- on that,  
15 I mean, you know, you -- you play by the sword,  
16 you die by the sword. And if you -- if you  
17 adopt and permit a statute as broad as public  
18 interest, you -- you can't be surprised when it  
19 winds up including nothing or everything or  
20 something in between.

21 MS. WALKER: This statute doesn't just  
22 say the public interest; it says the public  
23 interest as a result of competition. And we've  
24 offered a reading that ties that, anchors it in  
25 the purpose of the statute, which is regulatory

1 reform.

2           This is not a free-standing reference  
3 to the public interest like there is in other  
4 parts of the Communications Act and elsewhere in  
5 the federal law. It says as "the result of  
6 competition." And those words have to mean  
7 something.

8           CHIEF JUSTICE ROBERTS: Justice  
9 Kavanaugh.

10           JUSTICE KAVANAUGH: Thank you, Chief  
11 Justice. And good morning, Ms. Walker.

12           What do you do with the next sentence  
13 of the statute, which does refer to public  
14 interest in isolation?

15           MS. WALKER: That sentence textually  
16 links back to the first sentence. The first  
17 sentence tells the Commission that it shall  
18 determine whether any of the rules are necessary  
19 in the public interest as the result of  
20 competition.

21           The second sentence tells the  
22 Commission what to do if it makes that  
23 determination, that certain rules are no longer  
24 necessary. If it makes that determination, it  
25 has to repeal or modify them.

1                   So the determination referenced in the  
2     second sentence is the same determination  
3     referenced in the first sentence, so they  
4     textually link to each other, and it would have  
5     been pedantry for Congress to have to repeat "as  
6     the result of competition" after the words "the  
7     public interest" in the second sentence of the  
8     statute.

9                   JUSTICE KAVANAUGH: Do you agree that  
10    if the term is "public interest" in isolation,  
11    that an agency has discretion to interpret that  
12    to encompass effects on women and minority  
13    ownership?

14                  MS. WALKER: I think it could, but it  
15    never did that here. And so the Third Circuit  
16    was wrong to say that that was a requirement  
17    under State Farm.

18                  And if it is a freestanding public  
19    interest standard, Justice Kavanaugh, I think  
20    that raises non-delegation problems. We've  
21    offered a reading that ties the public interest  
22    to the task and the unique context of this  
23    particular statute. And NBC says we have to pay  
24    attention to statutory context here.

25                  And the text, the context, and the

1 purpose of this entire statute all point in the  
2 direction that Congress meant this to be a  
3 vehicle for deregulation, not more regulation.

4 JUSTICE KAVANAUGH: Thank you,  
5 Ms. Walker.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Barrett.

8 JUSTICE BARRETT: So, Ms. Walker,  
9 given that Congress wanted the statute to be a  
10 vehicle for deregulation, not more regulation,  
11 is it your position that the word "modify" in  
12 202(h), when it requires the Commission to  
13 modify or repeal as part of its quadrennial  
14 review, that a modification can never be an  
15 additional regulatory requirement?

16 MS. WALKER: Yes, we agree with that  
17 reading of "modify."

18 JUSTICE BARRETT: Is it your --

19 MS. WALKER: We think --

20 JUSTICE BARRETT: Go ahead,  
21 Ms. Walker. Please finish.

22 MS. WALKER: I am finished. We agree.

23 JUSTICE BARRETT: Okay. Then let's  
24 talk about the public interest and how it might  
25 affect a repeal or modification of a rule.

1 Let's imagine that the Commission finds that a  
2 rule no longer promotes competition but believes  
3 the rule promotes viewpoint diversity and  
4 localism.

5 In that event, is it your position  
6 that 202(h) requires the FCC to repeal or modify  
7 the rule?

8 MS. WALKER: No. The Commission gets  
9 to balance the traditional public interest  
10 factors, on our reading of what the public  
11 interest means. Those are all three factors  
12 that underlie these rules. The viewpoint  
13 diversity, competition, and localism. The  
14 Commission gets to balance those. But it can't  
15 make up brand-new -- brand-new reasons.

16 And I just want to reemphasize,  
17 Justice Barrett, that in this order, if you read  
18 carefully, you'll see that the Commission had  
19 already made the public interest determination  
20 required by the first sentence by the time it  
21 got to the discussion of minority and female  
22 ownership.

23 At that point, the Commission had no  
24 choice but to repeal or modify the rules because  
25 the second sentence makes that mandatory.

1 JUSTICE BARRETT: Thank you,  
2 Ms. Walker.

3 CHIEF JUSTICE ROBERTS: A minute to  
4 wrap up, Ms. Walker.

5 MS. WALKER: Thank you, Mr. Chief  
6 Justice.

7 Section 202(h) was enacted 25 years  
8 ago. Since then, the ownership rules have  
9 barely changed. That is not what Congress had  
10 in mind.

11 And it took us, as I mentioned, 17  
12 years of litigation to get to this Court. Now  
13 that we are here, we respectfully ask the Court  
14 to provide guidance on what the statute does and  
15 does not require. Absent that guidance, we're  
16 going to be stuck most likely in the same raft  
17 in the very next review. And Congress's intent  
18 could be thwarted for another 25 years.

19 We thus respectfully ask that you  
20 clear the way for the statute to finally operate  
21 as intended: as a mechanism for meaningful  
22 reform with a focus on competition that does not  
23 allow atextual factors to trump the  
24 Commissions's expressly required competitive  
25 findings, which, again, are here completely

1       unchallenged.

2                   For these reasons, we ask the Court to  
3       reverse the judgment of the court of appeals and  
4       instruct it to deny the petitions for review.

5                   Thank you.

6                   CHIEF JUSTICE ROBERTS:   Thank you,  
7       counsel.

8                   Ms. Deutsche.

9                   ORAL ARGUMENT OF RUTHANNE M. DEUTSCH  
10                   ON BEHALF OF THE RESPONDENTS

11                   MS. DEUTSCH:   Thank you, Mr. Chief  
12       Justice, and may it please the Court.

13                   This is an APA case about whether the  
14       agency engaged in reasoned decision-making.   The  
15       government agrees that promoting broadcast  
16       ownership by women and people of color has long  
17       been the Commission's own public interest goal,  
18       one that is fully consistent with the statute  
19       and is not a command imposed by the Third  
20       Circuit.   The government also agrees that the  
21       agency must reasonably weigh all competing  
22       aspects of the public interest that it has  
23       identified in its quadrennial reviews.

24                   The problem here is that the  
25       reconsideration order fails this basic

1 requirement of administrative accountability.

2 Based on zero information about female ownership  
3 and a nonsensical analysis of badly flawed data  
4 on minority ownership, the agency repeatedly  
5 assured the public that consolidation would do  
6 no harm to either.

7 The government now asks for deference.

8 It says that the uncertainty was acknowledged,  
9 prediction is hard, and it argues essentially  
10 that because no harm was shown, there was  
11 nothing to be waived.

12 But because the no harm findings here  
13 were wholly arbitrary, to defer on this record  
14 would only encourage agencies to do sloppy work  
15 to avoid making tough choices.

16 Ultimately, if the Commission wants to  
17 give less weight to ownership diversity or even  
18 abandon the goal entirely, nothing in the Third  
19 Circuit's ruling stands in its way. But what  
20 the Commission cannot do under time-honored  
21 principles of administrative law is mask  
22 important policy changes behind such unreasoned  
23 analysis.

24 Thank you, and I welcome your  
25 questions.



1                   CHIEF JUSTICE ROBERTS: Counsel, let's  
2    -- let's say the Commission -- there are --  
3    there are sort of two different priorities, you  
4    know, priority A and priority B. And the  
5    Commission is going along, focusing on priority  
6    B, and then, I mean, there's a change in the  
7    Commission membership or whatever and the  
8    Commission says, well, we're now going to --  
9    we're now going to focus on A. Nothing to do  
10   with the record or findings or inadequacies on  
11   -- on issue B. We just think that issue A is  
12   more important.

13                  How -- how is that subject to APA  
14   review?

15                 MS. DEUTSCH: I -- at the minimum  
16   there needs to be, as this Court said in Fox, an  
17   acknowledgment that there's been a change in  
18   policy and then an explanation of why.

19                 Here, of course, there was no stated  
20   change in the policy goal of promoting  
21   minority/female ownership and there were  
22   repeated assurances that the deregulatory  
23   measures going forward would not harm that goal.  
24   And --

25                 CHIEF JUSTICE ROBERTS: Is it enough

1     -- is it enough for the agency to say, well, you  
2     may have noticed, we're no longer talking about  
3     B, we're talking about A, and the reason is  
4     we -- we think A is more important than B? Is  
5     that enough?

6             MS. DEUTSCH: I don't believe that's  
7     enough, Your Honor. I think they would have to  
8     say why it was more important.

9             CHIEF JUSTICE ROBERTS: Well, how do  
10    you do that? I mean, if there -- there -- you  
11    know -- you know, apples and oranges, but, you  
12    know, life is short. They only have so much  
13    time.

14            MS. DEUTSCH: So --

15            CHIEF JUSTICE ROBERTS: And they think  
16    cross-ownership is more important than minority  
17    and female ownership. Those are two different  
18    things.

19            MS. DEUTSCH: Well, one thing they  
20    could have done here, for example, is to say, no  
21    matter what the harm to this other long-standing  
22    policy goal, which we have said on many  
23    occasions that our broadcast ownership rules are  
24    to promote -- and I would point you to JA 335  
25    and also the 2002 order cited on 32 -- they

1     could say, no matter the harm to this -- this  
2     goal, it's really hard to measure, it's too  
3     uncertain, and we're willing to go forward for  
4     these other public interest goals because they  
5     are more important, but they did not say that  
6     here.

7                 CHIEF JUSTICE ROBERTS: Well, if -- if  
8     their -- their action focuses on a different set  
9     of priorities, in other words, you -- you seem  
10    to be suggesting that as a matter of policy, as  
11    opposed to what the record shows about a  
12    particular priority, they have to justify a  
13    determination that A is more important than B,  
14    when reasonable people can differ -- disagree on  
15    that.

16                They can't -- they can't just say, you  
17    know, yes, this is an -- female and minority  
18    ownership is a very important thing, but so is  
19    cross-ownership, and we can only -- you know, as  
20    I said, we don't have resources to devote to  
21    both and we're going to focus on  
22    cross-ownership?

23                MS. DEUTSCH: I think they would also  
24    have to say that we're willing to do that no  
25    matter the harm to something that we have

1 repeatedly said is one of the goals of these  
2 rules.

3 CHIEF JUSTICE ROBERTS: What is the  
4 basis for the Third Circuit's ruling, you -- if  
5 you're going to shift, you have to say that it  
6 maximizes the benefit to the priority that  
7 you're no longer pursuing?

8 MS. DEUTSCH: I don't believe the  
9 Third Circuit went so far. They said that you  
10 had to weigh the effects and left the Commission  
11 ample space to weigh those effects and -- and  
12 come out in favor of deregulation and balance as  
13 they saw fit.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Thomas.

16 JUSTICE THOMAS: Thank you, Mr. Chief  
17 Justice.

18 Counsel, I'm just a bit confused.  
19 Petitioners indicate that in the past, these  
20 structural ownership rules simply did not  
21 include minority and female ownership  
22 considerations.

23 Could you address that? And include  
24 in that at what point did those considerations  
25 -- I'm not talking about the standalone rules,

1     such as, you know, tax preferences, et cetera,  
2     but on just these structural rules, they -- they  
3     seem to indicate that these rules are different  
4     from those standalone rules on minority and  
5     female preferences or diversity.

6             MS. DEUTSCH:   Sure, Justice Thomas.  
7     I'm happy to point you to several places.  
8     Starting in 1995 in a local TV rule that was --  
9     predated Section 202(h), the Commission  
10    recognized that the potential for increased  
11    prices from the relaxing ownership limits and it  
12    concerns us considering the ability of  
13    minorities and women and committed to studying  
14    the effects of that at JA -- and the 2002 order,  
15    I guess, is where I would go next.  That's on  
16    the NAB brief at page 32.  The Commission stated  
17    how it "had historically used the ownership  
18    rules to foster ownership by diverse groups such  
19    as minorities, women, and small businesses."

20            In JA 335, the Commission, again, says  
21    that it has a long history of promoting rules  
22    and regulations intending to promote diversity  
23    of ownership among broadcast licensees,  
24    including minority and female ownership-owned  
25    businesses, and as explained above, the

1 Commission's broadcast ownership rules helped  
2 further this purpose.

3           So while they're not targeted  
4 measures, they create the underlying structural  
5 -- and I have many other examples -- but those  
6 are -- those are the highlights. And the --

7           JUSTICE THOMAS: Well, what's the  
8 difference between what you just said and the  
9 idea or the notion that the object of this -- of  
10 this rule is to promote a diversity viewpoint,  
11 and these other benefits are collateral  
12 benefits?

13           And as -- as I hear the argument, the  
14 Petitioners suggest that you don't sacrifice or  
15 you don't veer away from the central purpose of  
16 viewpoint diversity for these collateral  
17 benefits, though they may be worthy.

18           What's your response to that?

19           MS. DEUTSCH: Well, the Commission has  
20 talked about fostering diversity by historically  
21 underrepresented groups both as a freestanding  
22 interest in terms of having fair and equitable  
23 allocation of the scarce broadcast spectrum and  
24 one that is intertwined and supports the other  
25 public interest goals.

1           Not only viewpoint diversity, and  
2       there's record evidence on that at JA 335,  
3       again, JA 397, but also a -- a -- a benefit to  
4       other public goals like localism and the MAAD  
5       brief of 23 states puts that evidence there.

6           CHIEF JUSTICE ROBERTS: Again, you  
7       promote -- I'm sorry to interrupt you, but can  
8       you -- what if -- if focusing on the collateral  
9       benefits impedes disposing of the primary goal  
10      object, which is, again, as the Petitioners  
11      argue, viewpoint diversity?

12          MS. DEUTSCH: If -- if the Commission  
13      reached that conclusion after a reasonable  
14      weighing, that would be fine. But that simply  
15      didn't happen here. There is --

16          JUSTICE THOMAS: Thank you.

17          MS. DEUTSCH: -- no weighing  
18      whatsoever.

19          CHIEF JUSTICE ROBERTS: Justice  
20      Breyer.

21          JUSTICE BREYER: All right. Well, you  
22      read the briefs on the other side, there's an  
23      amicus brief that explains, economically  
24      speaking, why they want to get rid of the rules.  
25      It's a combination of failing-company argument,

1 economies of scale.

2               So they -- they have that before them,  
3 the FCC. Now, they didn't say they were  
4 abandoning the minority/women policy. They  
5 didn't say that or the small business policy.

6               What they said is there's no evidence  
7 in this record to convince us that if we do what  
8 these kinds of briefs say, that it will hurt our  
9 efforts there and besides, we have two new  
10 things called incubator and we have something  
11 called eligibility, and we're trying to preserve  
12 and encourage minority and women ownership that  
13 way. Okay?

14              What's wrong with that. And you heard  
15 me ask the other side --

16              MS. DEUTSCH: Well, there's --

17              JUSTICE BREYER: -- are they changing  
18 their policy? And the other side says no, no,  
19 there's nothing that said in the past that  
20 the -- the policy is different than that.

21              MS. DEUTSCH: So, I mean, the main  
22 thing wrong with that is that their -- the  
23 assertions that are strewn throughout the  
24 reconsideration order that the deregulatory  
25 moves will not harm minority and female



1 ownership --

2 JUSTICE BREYER: That isn't what they  
3 -- they said there's no evidence, they have a  
4 couple of sentences there, which you've read.

5 MS. DEUTSCH: Yes, but they also say  
6 --

7 JUSTICE BREYER: Why in heaven's name  
8 did you not or groups that support you, given  
9 the tremendous number of people who I'm happy  
10 are interested in this, why aren't there some  
11 studies or something? There are 10,000 law  
12 professors and economics professors who look for  
13 studies to do. Why isn't there something?

14 MS. DEUTSCH: Well, there is something  
15 on this issue which they ignored, even as they  
16 cited --

17 JUSTICE BREYER: Okay, what?

18 MS. DEUTSCH: The Free Press study.

19 JUSTICE BREYER: Free Press.

20 MS. DEUTSCH: Why did they ignore it?

21 JUSTICE BREYER: Okay, that's -- the  
22 free. Is there anything other than that?

23 MS. DEUTSCH: Yes.

24 JUSTICE BREYER: What?

25 MS. DEUTSCH: They have their own

1 study that's titled Whose Spectrum is It Anyway,  
2 that was cited in comments in the 2014 further  
3 notice of --

4 JUSTICE BREYER: Okay. Okay, I'll  
5 look at those.

6 MS. DEUTSCH: Yeah. And -- and I  
7 would just say that there -- there's a lot of  
8 wiggle room in the reconsideration order  
9 especially, but I would point you to the  
10 statement that the -- the repeal of the NDCO  
11 rule have no material effect on minority and  
12 female ownership, the repeal -- that's at 87A.

13 The TV rule repeal is not likely to  
14 harm minorities and female ownership, will have  
15 no negative impact. That's 128A. And again,  
16 these statements about them, they are -- they  
17 are framed as findings and determinations.

18 And when you look at what they're  
19 actually based on, it's that listing of numbers  
20 on page 37 of our brief that has nothing on  
21 women, and as for minority data, the American  
22 Statistical Association is here telling you that  
23 it is worse than doing no analysis at all to  
24 drew -- draw the conclusions that they drew.

25 JUSTICE BREYER: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice Alito.

2 JUSTICE ALITO: In -- in your  
3 briefing, you argue that the Petitioners  
4 forfeited any constitutional argument that the  
5 FCC could not consider minority or female  
6 ownership.

7 Would you, therefore, agree that there  
8 is no need for the Court to consider that  
9 constitutional question?

10 MS. DEUTSCH: Absolutely. And I would  
11 also point to this Court's decision in the first  
12 Fox case, where it recognized that until the  
13 administrative law analysis of whether the  
14 underlying decision to be made is a reasoned  
15 one, and you've addressed any arbitrary and  
16 capricious concerns, then it's premature to  
17 reach the constitutional question.

18 JUSTICE ALITO: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Sotomayor.

21 JUSTICE SOTOMAYOR: Counsel, you're  
22 relying on the Free Press data. Could you give  
23 me your best authority for the idea that the FCC  
24 was required to utilize the Free Press data?

25 MS. DEUTSCH: I would point you to the

1 administrative --

2 JUSTICE SOTOMAYOR: And is there any  
3 -- and -- and let me just follow up. And is  
4 there any requirement for it to have needed to  
5 explain why it didn't rely on it?

6 MS. DEUTSCH: I -- I don't have a case  
7 at hand, Justice Sotomayor, other than the --  
8 the bedrock cases like State Farm, but, you  
9 know, having cited one of the Free Press data  
10 points in its listing of numbers and then having  
11 ignored the results from that study that at  
12 least attempted to do a more reasoned analysis  
13 of the exact same question that the FCC  
14 purported to analyze in that listing is -- it's  
15 a little bit like throwing stones from glass  
16 houses for the agency now to be here saying that  
17 the Free Press study had its own problems.

18 And so, you know, I think it -- it's  
19 just bedrock bad law that they need to, at the  
20 very least, explain why their analysis was  
21 better than the Free Press study, which they  
22 patently could not do.

23 JUSTICE SOTOMAYOR: Finally, I don't  
24 think you're disputing that the agency gets to  
25 decide how important it thinks minority and

1 female ownership is in the context of any given  
2 rule-making.

3 And I don't think the agency has  
4 changed its position that its ownership rules  
5 are not primarily intended to promote minority  
6 and female ownership. So how do we reconcile  
7 that with your position?

8 MS. DEUTSCH: I -- I think it's --  
9 again, it's just -- this is standard arbitrary  
10 and capricious review, which we told the Court  
11 at the petition stage.

12 The agency gets to set the goals,  
13 consistent with the statute. And a reviewing  
14 court can only look and -- and -- and see  
15 whether they did what they said they were going  
16 to do and offered a reasoning explanation.

17 The -- the government here admits that  
18 if harms had been found, they would have had to  
19 weigh that harm. It would have -- you know, to  
20 the extent to see whether it cautioned against  
21 the consolidation it wanted to go forward with.

22 And, you know, we disagree that --  
23 that they -- you know, that there was no harm to  
24 be found on this record. They didn't,  
25 especially for women --

1 JUSTICE SOTOMAYOR: Thank you,  
2 counsel. I think you've gone over my time.

3 MS. DEUTSCH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice Kagan.

5 JUSTICE KAGAN: Ms. Deutsch, you began  
6 your argument today by saying that the  
7 government agrees with you that minority and  
8 female ownership should be taken into account in  
9 decision-making like this. But as I understand  
10 what the government has done this morning is to  
11 say that we -- that they don't agree with you.

12 I mean, this is unlike in their  
13 briefs, but at argument, the government has  
14 said, well, with respect to 202(h)  
15 determinations, we've never taken into account  
16 female and minority ownership.

17 And Justice Thomas asked you a similar  
18 question, but I just wanted to make sure that  
19 you had the opportunity to respond to that  
20 assertion of the government's, that it had  
21 historically not taken female and minority  
22 ownership into account in the 202(h) context  
23 specifically.

24 MS. DEUTSCH: I didn't -- it's a  
25 better question for Mr. Stewart. I -- I agree

1     that it hasn't been the only factor or a primary  
2     factor, but to the extent that Mr. Stewart was  
3     saying that it had never been considered as a  
4     factor, I think that's just not consistent with  
5     -- with history. And then --

6                 JUSTICE KAGAN: Well, I guess I'm --  
7     I'm really giving you an opportunity to tell me  
8     what to look to, to decide whether you or  
9     Mr. Stewart is right on that question.

10                MS. DEUTSCH: Thank you. So, again, I  
11     would look to the earlier orders cited at page 6  
12     and -- and 10 on our brief that are -- predate  
13     202(h), and then the first 202 review, 2002  
14     review, under 202(h) defines the policy goals  
15     and said, "We will first define our goals so we  
16     can then assess whether our current broadcast  
17     ownership rules are necessary to achieve these  
18     goals."

19                Then talks about the five types of  
20     diversity, which include minority and female  
21     ownership as one goal. And says -- and this is  
22     at 18 FCCR at 13,634 -- "encouraging minority  
23     and female ownership historically has been an  
24     important Commission objective and we affirm  
25     that goal here."

1                   And then, again, JA 335 talks about  
2                   how the Commission's broadcast ownership rules  
3                   help further this purpose of promoting minority  
4                   and female ownership.

5                   JUSTICE KAGAN: So, Ms. Deutsch,  
6                   suppose that that's right, and the -- the  
7                   Commission has historically considered this as  
8                   -- as one factor in its broader public interest  
9                   analysis, but here the Commission says something  
10                  along the lines of: Look, there's actually not  
11                  a lot of data about how this rule will affect  
12                  minority and female ownership. To the extent  
13                  that we have data, we think it's -- it shows  
14                  that it won't have an impact. And -- and so  
15                  we're going to go with this new rule.

16                  Why isn't that enough?

17                  MS. DEUTSCH: Because it would be an  
18                  important break with past commitments, not only  
19                  the repeated promise to -- to collect data and  
20                  analyze this problem, which, as I said, goes  
21                  back to the 1995 TV rule, but --

22                  JUSTICE KAGAN: Well, are you saying  
23                  that the Commission has a freestanding  
24                  obligation to go out and collect data itself  
25                  with respect to this? The Commission can't rely



1 on the notice-and-comment process to -- to  
2 provide it with data?

3 MS. DEUTSCH: The Commission has its  
4 own data already that it collects in the Form  
5 323, for instance. No, I'm not saying that, but  
6 I think what was wrong with your first  
7 formulation or how it might have been, you know,  
8 more passable was if the Commission had said:  
9 We can't figure it out. It's too uncertain.  
10 Put to the one side our promises about figuring  
11 it out better. But we're willing to move  
12 forward no matter the harm to this goal, even  
13 though we still think this goal is important,  
14 but we just -- you know, we're throwing up our  
15 hands.

16 JUSTICE KAGAN: Thank you --

17 MS. DEUTSCH: We can't do this.

18 JUSTICE KAGAN: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Gorsuch.

21 JUSTICE GORSUCH: I'd like to pick up  
22 there. As I understand it, it would be okay for  
23 the Commission to say we -- we're going to try  
24 this no matter the harm to other goals. Why  
25 isn't what they did better than that?

1           And what are we supposed to do about  
2     it? The 1970s -- we have 1970s rules governing  
3     cross-ownership still today. And the one thing  
4     we know about the '96 Act is it -- it had a  
5     deregulatory impulse. And yet that impulse has  
6     never been exercised.

7           The idea, I think, was to have  
8     experiments every four years and see how it  
9     goes. And the agency sought all the data it can  
10    get, and as Judge Sirica pointed out, maybe --  
11    you know, one can -- one can parse it and  
12    complain and fly-spec it, but isn't the best  
13    source of data an experiment? And isn't the  
14    agency in something of a Catch-22 position,  
15    Judge Sirica wonders.

16           What do you -- what do you say to  
17    those thoughts?

18           MS. DEUTSCH: I have a bunch of  
19    responses. First, it's hardly wide speculating  
20    evidence to assert that there will not be no  
21    harm, for example, to female ownership when you  
22    have zero --

23           JUSTICE GORSUCH: Well, the --

24           MS. DEUTSCH: -- information on --

25           JUSTICE GORSUCH: -- but as you know

1 on that, they say there just isn't, there isn't  
2 good data available. And -- and in response to  
3 a prior Third Circuit order, they -- they  
4 publicly solicited all the data anybody in the  
5 country could provide.

6 MS. DEUTSCH: But -- well, there were  
7 analyses of --

8 JUSTICE GORSUCH: What do we do about  
9 that?

10 MS. DEUTSCH: -- of that, but -- but  
11 going to the larger point of the -- the  
12 Commission's being stuck, you know, the FCC has  
13 much to do with the delays here. I mean,  
14 Prometheus III, for example, was the Third  
15 Circuit simply telling the agency to hurry up.

16 And we're here in 2020 looking at an  
17 order cycle that began in 2010. And that --

18 JUSTICE GORSUCH: I -- that doesn't  
19 address my fundamental question, though. We're  
20 stuck with rules from the 1970s that, 20 years  
21 ago, 25 years ago, Congress said were outdated.  
22 And --

23 MS. DEUTSCH: Well --

24 JUSTICE GORSUCH: When -- when is the  
25 FCC going to be able to try and experiment? And

1     if it says in its best considered judgment after  
2     multiple rounds of remands and multiple rounds  
3     of data collection and public comment that it  
4     earnestly believes that these rules aren't going  
5     to negatively impact anyone, it might actually  
6     affirmatively benefit most people, when exactly  
7     is it allowed to see and -- and -- and  
8     experiment with that for four years and then  
9     collect the data and see what actually happened?

10           MS. DEUTSCH: Well, a few things.

11           First, the -- the agencies tomorrow  
12     could issue a separate rule-making on the -- the  
13     NBCO rule, for example, apart from the 202(h)  
14     process, and nothing impedes that.

15           Second, there's no experiment-now-and-  
16     see-what-happens, I think, reasonable reading of  
17     202(h) which requires the agency to assess, as  
18     competition has changed, whether the rules are  
19     necessary in the public interest at that moment.

20           It isn't a license to move forward no  
21     matter the harm to one of your own public  
22     interest goals and then, you know, sort it out  
23     later, particularly because, as we argue in our  
24     brief, the sorts of harms here from unwarranted  
25     consolidation cannot easily be undone.

1 JUSTICE GORSUCH: Let me ask you a --  
2 a question about the retention of jurisdiction  
3 here.

4 I understand that courts obviously  
5 have the practice of sometimes deferring to --  
6 to another court and -- and -- and consolidating  
7 matters voluntarily, but what authority is there  
8 for the Third Circuit to have retained  
9 jurisdiction over not one rule-making but now  
10 three over the course of 15 years?

11 That does seem a little unusual in its  
12 duration and in the number of rule-makings  
13 involved. I think Judge Williams called it  
14 contrary to the goals of Congress.

15 MS. DEUTSCH: Well, Justice Gorsuch,  
16 our -- our view is that it's a proper exercise  
17 of that court's jurisdiction, and the government  
18 never challenged it below.

19 It -- it happens sometimes, although  
20 not frequently, for -- for similar cases that  
21 have long and complicated histories and also a  
22 history of agency delay. And, you know, of  
23 course, the Court could modify that ruling to  
24 the extent that it sees fit.

25 You know, we -- but it doesn't

1     undermine the -- the core problem here, which is  
2     the arbitrariness of the reconsideration order.  
3     And on that basis, certainly, the Third Circuit  
4     should be affirmed.

5                   CHIEF JUSTICE ROBERTS:   Justice  
6     Kavanaugh.

7                   JUSTICE KAVANAUGH:   Thank you, Chief  
8     Justice.

9                   And good morning, Ms. Deutsch.   You've  
10    referred, I think quite rightly, to  
11    administrative law basics a few times in your  
12    answers, and I want to get your reaction to one  
13    way to look at this.

14                   Courts, obviously, review agency legal  
15    interpretations to make sure the agency is not  
16    departing from the law enacted by Congress, and  
17    on that front, reviewing the law, our review  
18    is -- is usually pretty tight, pretty stringent,  
19    putting aside whether there's an ambiguity in  
20    the law.

21                   On the other hand and critically,  
22    federal courts do not make the policy calls.   We  
23    defer to agency policy judgments within the  
24    constraints imposed by Congress.

25                   And, here, it's the broadest possible

1 language that Congress uses, public interest,  
2 not much of a constraint at all, a broad and Ms.  
3 Walker alluded to arguably too broad a  
4 delegation.

5 But that doesn't give us much to work  
6 with. And then arbitrary and capricious review  
7 -- and Judge Scirica said this many times -- is  
8 highly deferential to the agency's policy  
9 judgments.

10 And -- and there's a lot of case law,  
11 as you know, in the FCC context, Justice White's  
12 opinion for the Court in the WNCN case, that  
13 predictive judgments made by the agency get  
14 especially significant judicial deference.

15 And so, in the -- at the end here,  
16 it's deferential in the policy, the public  
17 interest standard, they made a predictive  
18 judgment. How can we sitting here second-guess  
19 all that?

20 MS. DEUTSCH: Well, a few things, Your  
21 Honor. I -- I agree completely that the  
22 agency's reasoned predictive judgments are  
23 afforded deference, and that's, you know, APA  
24 101, but, here, there -- there's no reasoned  
25 judgment to defer to. There is nothing there on

1 women, no data and no explanation even or  
2 attempt to explain why the no harm finding  
3 that's arbitrary on its own terms as they drew  
4 for minority ownership would also transfer  
5 automatically to women.

6 In cases like WNCN, NCCB, Fox, in  
7 every one of those cases, there is at the very  
8 least a reasoned decision tree sent out by the  
9 agency of why they're doing what they're doing  
10 and how they're weighing the pros and cons. The  
11 government --

12 JUSTICE KAVANAUGH: Well, isn't -- go  
13 ahead.

14 MS. DEUTSCH: -- agrees to weigh, but  
15 -- and they say, well, we don't have to weigh  
16 because we don't have any evidence of harm, but  
17 ignoring evidence of harm doesn't make it go  
18 away.

19 JUSTICE KAVANAUGH: And what -- what  
20 do you say -- and you -- you might have  
21 indicated this to Justice Breyer -- but what do  
22 you say is the absolute best evidence in the  
23 record for you that scaling back these rules  
24 will negatively affect women and minority  
25 ownership?



1 MS. DEUTSCH: Well, certainly, the  
2 Free Press study which is cited in our brief and  
3 cited by the government in its analysis. And I  
4 would also point you to one of the early reviews  
5 where the Commission itself represent --  
6 recognized the drop in minority and female  
7 ownership after the consolidation in the late  
8 '90s, and that's cited in our brief at 10 at 15  
9 FCCR at 11084.

10 And also, the Free Press study, in  
11 addition to doing the historical trend analysis  
12 for minority, also did cross-sectional analysis  
13 for both people of color and women-owned  
14 stations and showed that the more consolidated  
15 the market, the less likely there was to be  
16 representation by these groups --

17 JUSTICE KAVANAUGH: And last --

18 MS. DEUTSCH: -- in --

19 JUSTICE KAVANAUGH: -- last question.

20 To what extent, if any, should we take into  
21 account that during the pendency of this  
22 litigation the local news industry has been  
23 decimated?

24 MS. DEUTSCH: Well, it's, I think --  
25 I'm not sure that's in the record, but, you

1 know, I think, to the extent you want to take  
2 account of what's happening after this record  
3 has closed, there's a -- a much easier path  
4 forward, which is to affirm the Third Circuit  
5 and let the already delayed 2018 review move  
6 forward, including analyzing the results of the  
7 incentive option, which is another area where  
8 the data indicated that women and people of  
9 color were disproportionately --

10 CHIEF JUSTICE ROBERTS: Justice --

11 MS. DEUTSCH: -- entering the market.

12 CHIEF JUSTICE ROBERTS: -- Justice  
13 Barrett.

14 JUSTICE BARRETT: Ms. Deutsch, I have  
15 a question about the Free Press study. So  
16 whether -- and maybe I -- I'm -- maybe I'm not  
17 fully understanding its scope, but I thought the  
18 Free Press study was largely backward-looking?

19 So, for example, on page 39 of your  
20 brief, you talk about how its tracing concluded  
21 that the 1990s television rule changes  
22 contributed to the loss of 40 percent of the  
23 previously minority-owned stations.

24 Was it entirely backward-looking,  
25 looking at the effects of rule changes in the

1 past, or did it have a predictive component?

2 MS. DEUTSCH: The trend analysis was  
3 backward-looking, just like the government's  
4 analysis of -- of the numbers was. It just did  
5 it better by using better numbers that were  
6 corrected for the problems in tracing.

7 But, as I said, they also did  
8 cross-sectional analysis, so taking a snapshot  
9 in time showing that the more consolidated the  
10 market, the less likely there were to be women  
11 and people of color owners.

12 JUSTICE BARRETT: And -- and so, to be  
13 sure that I understand that, you're saying that  
14 they did make a predictive judgment? It offered  
15 predictive analysis like, if you make this  
16 change, then this is the likelihood that this  
17 will happen, this being the decrease in minority  
18 and women-based ownership?

19 MS. DEUTSCH: I -- I don't think it  
20 went so far as that, but it was an inference  
21 that could be drawn from that analysis.

22 JUSTICE BARRETT: Well, if it's just  
23 an inference that could be drawn from that  
24 analysis, why isn't the Commission correct that  
25 there was no evidence in the record that showed

1       there would be harm?

2                   MS. DEUTSCH:   Because its -- its own  
3       numbers, even, you know, without any correction,  
4       showed that there was harm from past  
5       consolidation, and there's no reason to -- to  
6       think that that wouldn't happen from future.

7                   Plus, as I said, there's this other  
8       study called "Whose Spectrum is It Anyway?"  
9       It's cited in the -- the Notice of Proposed  
10      Rule-making in 2014 and in some of the comments  
11      that interviewed about 100 market participants  
12      that chronicled the difficulties faced by more  
13      diverse owners under consolidation --

14                  JUSTICE BARRETT:   So -- and is that  
15      used --

16                  MS. DEUTSCH:   -- and how price would  
17      be --

18                  JUSTICE BARRETT:   -- in the sense you  
19      were talking -- you talked in your briefs about  
20      the need for statistical evidence and the fact  
21      that the government had no evidence at all in  
22      the record about the effect on women ownership,  
23      as opposed to the minority evidence, which you  
24      say that it ignored.

25                  But if there's no statistical

1 evidence, and I hear you saying you're talking  
2 about the backward-looking Free Press study,  
3 you're talking about interviews, is there  
4 anything in the record that's actually a  
5 statistical analysis that shows the likely  
6 impact of these changes on the relevant minority  
7 and women community?

8 MS. DEUTSCH: Other than the sources  
9 I've mentioned, no.

10 JUSTICE BARRETT: Thank you, counsel.  
11 I don't have any or questions.

12 CHIEF JUSTICE ROBERTS: A minute to  
13 wrap up, Ms. Deutsch.

14 MS. DEUTSCH: Thank you, Your Honor.  
15 I have three points. I'll try to go fast.

16 Minority and female ownership, I just  
17 want to reiterate, has long been baked into the  
18 public interest standard in this context. I've  
19 read you some of the quotes. Industry  
20 Petitioners are up against the government,  
21 former commissioners, and history in contending  
22 otherwise.

23 Second, the government agrees that a  
24 reasonable weighing of all public interest goals  
25 that they have defined in this context is

1     necessary, and that simply didn't happen here.  
2     On this record, there's no reasoned predictive  
3     judgment to defer to on gender or on minority  
4     ownership trends. And the agency didn't make,  
5     much less attempt to explain, its decision to  
6     deregulate no matter the harm to its own public  
7     interest goal.

8             And just the opposite, there are  
9     unfounded statements that permeate the  
10    reconsideration order about how the rule repeals  
11    will have no material effect or will not likely  
12    harm minority and female ownership.

13            And although they talk a lot about the  
14    newspaper/broadcast cross-ownership rule, for  
15    the local TV changes, for example, that is the  
16    only evidence that they rely on for no harm, is  
17    this listing of numbers on page 37 of our brief.

18            Finally, I would note that the  
19    remedial concerns don't undercut the Third  
20    Circuit's core conclusion here that the  
21    Commission undertook dramatic regulatory repeal  
22    without reasonably considering an aspect of the  
23    public interest I think it continues to espouse,  
24    the -- the -- the colloquy with Mr. Stewart  
25    notwithstanding.

1           The Court can tweak the remedy as it  
2       sees fit, but the best course is to allow the  
3       Commission to consider these questions afresh in  
4       its 2018 review, where it can analyze the better  
5       data, including the full results of the  
6       incentive auction, to reach a reasoned decision  
7       on whether deregulation is actually in the  
8       public interest.

9           For these reasons and others in our  
10      brief, the Third Circuit should be affirmed.

11           CHIEF JUSTICE ROBERTS: Thank you,  
12      counsel.

13           Rebuttal, Mr. Stewart?

14           REBUTTAL ARGUMENT OF MALCOLM L. STEWART  
15      ON BEHALF OF THE PETITIONERS IN 19-1231

16           MR. STEWART: Thank you, Mr. Chief  
17      Justice.

18           Let me first clarify our position with  
19      respect to the potential impact of minority and  
20      female ownership data on the cross-ownership  
21      rules. My primary point is that when those  
22      rules were first adopted, they were adopted for  
23      reasons other than their potential effects on  
24      minority and female ownership, and so the  
25      Commission in deciding whether to retain those

1 rules has naturally focused on whether the  
2 original justification continued to apply.

3 Now, in the era of post-1996, the  
4 enactment of the -- Section 202(h), you can find  
5 documents that list basically the full range of  
6 public interest considerations as potentially  
7 relevant to the 202(h) reviews, but I'm not  
8 aware of any instance, even under  
9 Section 202(h), in which the FCC has actually  
10 amended, repealed, or retained a cross-ownership  
11 rule for the stated reason of its impact on  
12 minority and female ownership. It just  
13 historically, either before or after 1996, has  
14 not been a factor that has animated the  
15 Commission's decision with respect to the  
16 ownership rule.

17 Second, I think the most  
18 straightforward path to decide the case is to  
19 follow the one that the Commission itself laid  
20 out in the reconsideration order. It said the  
21 historical reasons for the cross-ownership rules  
22 no longer apply; allowing cross-ownership will  
23 likely benefit consumers. It acknowledged that  
24 incomplete data left uncertainty as to the  
25 likely effects of repeal and amendment on women



1 and minorities. But the agency's best estimate  
2 was that there would be no harm. And the bare  
3 possibility of harm was not -- was not a  
4 sufficient ground for forgoing changes that the  
5 agency otherwise considered highly beneficial.

6 The Court has said numerous times that  
7 it will "uphold a decision of less than ideal  
8 clarity" if the agency's path may reasonably be  
9 discerned. And I believe the agency's path can  
10 reasonably be discerned here.

11 And, third, I'd like to focus again on  
12 the quadrennial review scheme that Section 202  
13 lays out. People have referred to the  
14 deregulatory thrust of the 1996 Act, and that's  
15 correct, but the principal purpose of  
16 Section 202(h) was to ensure that  
17 cross-ownership rules didn't remain on the books  
18 through inertia, that if they remained in place,  
19 it was because the Commission had reexamined  
20 them and had made a fresh determination that  
21 they continued to serve the public interest.

22 And the Third Circuit's approach  
23 really thwarts that. If the cross-ownership  
24 amendment's had been allowed to go in effect --  
25 into effect in an earlier year, we would now

1 have more data on the potential effects of those  
2 rule changes on minority and women.

3 The -- the effect of the court of  
4 appeals' decision is that the periodic review  
5 process can be derailed by commenter's who  
6 identify possible countervailing effects and  
7 insist that the agency perform new research  
8 before it can amend the rules that are already  
9 in place. That has been the very effect that  
10 Congress attempted to forestall in requiring  
11 quadrennial reviews.

12 Thank you, Mr. Chief Justice.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 The case is submitted.

16 (Whereupon, at 11:21 a.m., the case  
17 was submitted.)

18

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