No. 19-1231

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

PROMETHEUS RADIO PROJECT, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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After the Federal Communications Commission (FCC or Commission) adopted comprehensive reforms of outdated media ownership rules, the court below vacated those reforms solely on the ground that the Commission had not adequately assessed their anticipated effects on ownership by minorities and women. The court ordered the FCC on remand to "ascertain on record evidence the likely effect of any rule changes it proposes * * * on ownership by women and minorities, whether through new empirical research or an in-depth theoretical analysis." Pet. App. 34a. That directive is untenable. Although the FCC has traditionally treated (and continues to treat) minority and female ownership as a relevant criterion in its assessment of the public interest, neither the governing statute nor the Commission accords that factor controlling weight. The court's approach was especially unwarranted because the agency

had adopted the challenged rule changes based on considerations *other than* minority and female ownership—namely, the changes' beneficial effects (undisputed here) on competition and localism.

In defending the decision below, respondents decontextualize the FCC's assessment of minority and female ownership, treating it as a motivating factor rather than (as the Commission did) as a potential reason for caution in reforming the ownership rules. Respondents flyspeck the FCC's evidentiary analysis, pointing to irrelevant materials that the Commission purportedly overlooked and ignoring the agency's cautious approach to a complicated question on an imperfect record. And respondents do not defend the court of appeals' remand instruction. The decision below should be reversed.

I. THE FCC POSSESSES BROAD DISCRETION TO REGULATE MEDIA OWNERSHIP IN THE PUBLIC INTEREST

"The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Consistent with that principle, this Court has repeatedly affirmed the FCC's broad discretion to regulate in the public interest and to make predictive judgments based on imperfect information. See, *e.g.*, *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775 (1978) (*NCCB*); see also *Stilwell* v. *Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (Kavanaugh, J.) ("The [Administrative Procedure Act, 5 U.S.C. 701 *et seq.* (APA),] imposes no general obligation on agencies to produce empirical evidence.").

Judicial deference is particularly appropriate when the Commission acts pursuant to Section 202(h) of the

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