

# RETHINKING *ADARAND* AFTER PROMETHEUS: A RATIONAL (BASIS) SOLUTION TO FCC MINORITY OWNERSHIP POLICY

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## ABSTRACT

For the last several decades, the FCC has been in a stalemate with media activist organizations about the lack of diversity in broadcast media ownership. Women own less than 10 percent of broadcast television and AM/FM radio stations, and racial minorities own less than six percent. We argue that this inequity is due to the Commission's misperception that policies that put stations in the hands of historically underrepresented groups must pass strict scrutiny. In 1990, the Supreme Court ruled in *Adarand Contractors, Inc. v. Peña* that any laws or regulations that showed preferential treatment to people based solely on their race would subsequently need to withstand strict scrutiny. This prompted the FCC to avoid embedding race (or gender) based preferences into media ownership regulations, despite repeated instructions from the Third Circuit Court of appeals to address the racial and gender imbalance in broadcast ownership. In *FCC v. Prometheus Radio* (2021), the Supreme Court had an opportunity to address the question of whether strict scrutiny was an appropriate level of review for broadcast regulatory decisions. Rather than tackling the issue of ownership head-on, the Court concentrated its decision on how much discretion administrative agencies have regarding changes to their initiatives. Had the Court focused exclusively on the ownership question, we believe it would have come to the same conclusion that we do here: a rational

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basis of review should be used for regulatory decisions. We believe this shift is needed to break the nearly two decades-long legal, policy, and regulatory deadlock over media ownership policy.

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### I. INTRODUCTION

Although charged with serving in the public's interest, the FCC has struggled to put forth a coherent media ownership policy that promotes ownership by women or minorities.<sup>1</sup> The agency's efforts have been plagued by a range of procedural issues and a lack of empirical evidence which became a central issue in decisions in which the Third Circuit Court of Appeals remanded media ownership decisions to the FCC four times between 2004 and 2019.<sup>2</sup> When the Supreme Court examined media ownership in early 2021, the Court largely avoided much of the history of media ownership policy, and in a unanimous but narrow opinion, ruled that the FCC had not acted outside

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1. *See, e.g.*, 47 U.S.C. §§ 302(a), 307(d), 309(a), 316(a) (1934). In both the 1927 Radio Act and the 1934 Communications Act, Congress indicated that the public interest supersedes a station's interest. Both laws say that federal regulation is to be guided by "public interest, convenience, and necessity." Despite the market-driven model of current U.S. media, these laws indicate that public interest must be considered. As half of the public, this means women's interests must be considered.

2. *See* *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) [hereinafter *Prometheus I*]; *Prometheus Radio Project v. FCC*, 652 F.3d 431, 483 (3d Cir. 2011) [hereinafter *Prometheus II*]; *Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016) [hereinafter *Prometheus III*]; *FCC v. Prometheus Radio Project*, 939 F.3d 567 (3d Cir. 2019) [hereinafter *Prometheus IV*].

a zone of reasonableness because of a lack of empirical evidence on minority ownership. Despite the ruling, the question of how to deal with an actual lack of diversity among broadcast owners and the impact that has on the public remains unanswered and is problematic.

The FCC's implementation of the ownership limits contained in the Telecommunications Act and the repeated failure of the agency to develop a functional minority ownership policy has resulted in trivial control and ownership of media properties by women and minorities. According to the 2017 data released by the FCC in 2020, women own less than ten percent of all television and AM/FM radio stations and racial minorities own less than six percent.<sup>3</sup> Empirical evidence suggests that smaller media organizations in the control of minority owners are more likely to create content that directly targets minorities, however the agency continues to allow for greater convergence, minimizing opportunities for women and people of color.<sup>4</sup> By allowing the media ownership environment to degrade to this point, the FCC has limited the political participation of these groups, one of which—women—represents more than half of the U.S. population.

Throughout this process, the FCC had failed, even at the most basic of levels, to meaningfully address the lack of empirical evidence on minority ownership policy.<sup>5</sup> Prior to the 1996 Telecommunications Act, however, the FCC had been responsive to the “nexus” principle that minority voices should have access to the airwaves.<sup>6</sup> Prompted, at least in part, by the changes brought about by the Civil Rights movement, in 1965, the FCC said that its two objectives when awarding its highly coveted broadcast television and radio licenses were to provide the best possible service to the public and to promote diversity in control of the mass media.<sup>7</sup> Under this framework, race, and, later, gender could be considered in comparative hearings, and preferential treatment was given to diverse applicants. In order to promote the public

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3. INDUS. ANALYSIS DIV., FCC, FOURTH REPORT ON OWNERSHIP OF BROADCAST STATIONS 6 (2017) [hereinafter FOURTH REPORT ON OWNERSHIP]. See FCC, FCC FORM 323: INSTRUCTIONS FOR OWNERSHIP REPORT FOR COMMERCIAL BROADCAST STATIONS (2017) [hereinafter 2017 323 REPORT].

4. Christopher Terry & Caitlin Ring Carlson, *Hatching Some Empirical Evidence: Minority Ownership Policy and the FCC's Incubator Program*, 24 COMM. L. & POL'Y 403, 407 (2019).

5. *Id.*

6. David Honig, *How the FCC Suppressed Minority Broadcast Ownership, and How the FCC Can Undo the Damage It Caused*, 12 S.J. POL'Y & JUST. 44 (2018).

7. 1965 FCC Pol'y Statement on Comparative Broad. Hearings, *Public Notice*, 1 F.C.C. 2d 393, 394 (1965).

interest, the FCC developed policies designed, at least nominally, to expand minority ownership.<sup>8</sup>

Over the ensuing decades, media organizations repeatedly challenged these rules as part of a larger agenda that promoted the consolidation of ownership of broadcast stations. In response, the U.S. Supreme Court established in 1990 in *Metro Broadcasting v. FCC* that racial preferences for awarding broadcast licenses must withstand intermediate scrutiny.<sup>9</sup>

However, just five years later, the Supreme Court held in *Adarand Constructors, Inc. v. Peña* that the presumption of a disadvantage based on race alone as a justification for preferred treatment was discriminatory and violated the Due Process Clause of the Fifth Amendment.<sup>10</sup> Thus, any laws or regulations that showed preferred treatment to people based solely on their race would subsequently need to withstand strict scrutiny.<sup>11</sup>

Arguing that any initiative it developed could not meet the requirements of strict scrutiny, the FCC has avoided embedding preferences based on race (or gender) into regulations of media ownership since the *Adarand* decision. During the running legal battle with Prometheus Radio Project and the citizen petitioners, the agency even argued that the *Adarand* decision makes the entire process of assessing minority ownership, much less developing a policy to enhance it, functionally impossible.<sup>12</sup> As a result, the number of women and people of color who own broadcast media outlets remains abysmally small according to data released by the FCC.<sup>13</sup> Over the last two decades, the FCC was unable (and largely unwilling) to meet the Third Circuit's remands to better address the efficacy of their minority ownership policies, in large part because the agency's approach to the problem has arguably been based on flawed reasoning. Rather than being paralyzed by the strict scrutiny requirement put forth by *Adarand*,<sup>14</sup> the FCC should be arguing that broadcast regulations have traditionally been subject only to a rational basis review, a position the

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8. Honig, *supra* note 6, at 51.

9. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 606 (1990).

10. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

11. *Id.* at 227.

12. The FCC adopted the Small Business Administration's revenue-based definition of eligible entities and defended it as a legally supportable means of promoting minority and female ownership because the requirements were content neutral. 2014 Quadrennial Regul. Rev.—Rev. of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, *Second Report and Order*, 31 FCC Rcd 9864 (2016) [hereinafter *2016 Second Report and Order*].

13. 2017 323 REPORT, *supra* note 3.

14. *Adarand Constructors*, 515 U.S. at 227.

Supreme Court upheld in *FCC v. Pacifica Foundation* in 1978.<sup>15</sup> There is significant historical precedent for treating licensed broadcasters differently in regulatory terms. In *NBC v. United States*, the Supreme Court said the FCC was more than a traffic officer, and that it had an obligation to determine the nature of the traffic on the airwaves.<sup>16</sup> Likewise, in *Red Lion v. FCC*, the Court unanimously declared that the FCC did not infringe on the First Amendment rights of broadcasters by keeping the airwaves open through regulation, and that the rights of the listeners were paramount.<sup>17</sup>

Not only does increasing ownership diversity (and the likelihood for a corresponding increase in content) benefit would-be station owners, this type of regulation does not infringe on broadcasters First Amendment Rights.<sup>18</sup> Moreover, broadcast regulations designed to put more stations in the hands of women and people of color also directly serves the interests of listeners and viewers, which has been the traditional standard used to judge the outcomes of the FCC's broadcast policy. The law has required that the FCC act in the public's interest for nearly ninety years. However, the agency has failed to do so legally, functionally, and empirically, even using its own metrics meet this goal.<sup>19</sup>

This article will explore the role of minority ownership policy within the larger context of media ownership regulation, focusing on the implications of the Adarand decision. Adarand has become the FCC's most useful scapegoat for the agency's failed attempts to resolve the four remands from the Third Circuit Court of Appeals; Adarand also could have played an important role in the Supreme Court's decision, had the Court chosen to address the issue of minority ownership head-on rather than focusing their decision on issues surrounding administrative agencies' discretion regarding their actions and initiatives.<sup>20</sup> The article then argues that the historical application of rational basis review of broadcast regulations should be employed as an option to break the nearly two decade long legal, policy, and regulatory deadlock over media ownership policy. In anticipation of the FCC's future ownership review

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15. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (stating that “of all forms of communications, it is broadcasting that has received the most limited First Amendment protection.”).

16. *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 215–16 (1943).

17. *Red Lion Broad. v. FCC*, 395 U.S. at 375, 390 (1969) (holding that the “fairness doctrine” as applied to the RTNDA “enhance[d] rather than abridg[ed]” First Amendment liberties).

18. *Id.* at 390.

19. 47 U.S.C. §§ 302a(a), 309(a), 316(a).

20. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1152 (2021).

proceedings, the article concludes with a simple proposal to increase racial and gender diversity among media owners.

## II. THE FCC, MEDIA OWNERSHIP, AND THE ISSUE OF MINORITY OWNERSHIP

Some scholars have argued that the media ownership policy dispute goes back to the 1920s,<sup>21</sup> and others have argued that the implementation of the 1996 Telecommunications Act was the defining moment for media ownership policy.<sup>22</sup> In reality, however, the inception point for modern media ownership theory was the six-year long FCC proceeding between 1969 and 1975, which resulted in the agency's ban on Newspaper-Broadcast Cross Ownership.<sup>23</sup> During the lengthy review, the FCC developed a rule that restricted the ability of a single entity to own and operate broadcast stations and a daily newspaper in the same market.<sup>24</sup>

Since the agency's passage of the newspaper-broadcast cross ownership ban in 1975,<sup>25</sup> the FCC has relied on a regulatory premise that conceptually ties the ownership of stations to the level of content diversity available to citizens at the market level.<sup>26</sup> While the conceptual premise that ownership and content are directly related has become the "touchstone premise" of FCC regulation of broadcaster ownership for more than fifty years,<sup>27</sup> the body of empirical evidence supporting this regulatory premise has been inconsistent at best.<sup>28</sup> At the base level, the debate over media ownership represents a policy conflict between increasing the economic efficiency of media companies and the

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21. See ROBERT W. MCCHESENEY, *TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING, 1928–1935* 13 (1993).

22. See Bruce E. Drushel, *The Telecommunications Act of 1996 and Radio Market Structure*, 11 J. Media Econ. 3 (1998).

23. See Christopher Terry, *Localism as a Solution to Market Failure: Helping the FCC Comply with the Telecommunications Act*, 71 FED. COMM. L.J. 327, 334–35 (2019).

24. Multiple Ownership of Standard, FM, & TV Broad. Stations, *Second Report and Order*, 50 F.C.C. 2d 1046, 1084 (1975).

25. *Id.*

26. The FCC has employed a range of methodologies ranging from voice counts to Congressional mandated ownership limits, but defends the use of quantitative limits as a proxy protection for diversity. See *Sinclair Broad. Grp., Inc. v. FCC*, 284 F.3d 148, 154 (D.C. Cir. 2002).

27. 2002 Biennial Regul. Rev., Rev. of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomm. Act of 1996, *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13620, para. 6 (2003) [hereinafter *2002 Biennial Review*].

28. Adam Candebub, *Media Ownership Regulation, the First Amendment, and Democracy's Future*, 41 U.C. DAVIS L. REV. 1547, 1603 (2008).

traditional societal goals associated with citizen access to diverse information.<sup>29</sup> Despite the lack of support for the conceptual relationship this approach is based on, the FCC has repeatedly attempted to implement media ownership policy through numerical ownership limits (as the policy implementation) as a proxy for assessing the diversity of media content (the agency's stated policy goal).<sup>30</sup>

While relying heavily on a regulatory philosophy which promotes economic competition and a corresponding policy implementation that favors quantitative assessments of diversity using proxy measurements, the FCC continues to recognize that access to a wide range of "diverse and antagonistic" viewpoints is essential.<sup>31</sup> While there is little debate that substantial viewpoint diversity exists in the modern media environment, the problem for regulators requires developing policy that results in public access to viewpoint diversity at the same time that it allows for an assessment of competition.<sup>32</sup> In the context of minority ownership's policy objectives, the access to viewpoints from underrepresented groups includes not just racial or ethnic minorities, but also women.<sup>33</sup>

In defense of the FCC's efforts, as well as its failures, media ownership policy is a complex issue that incorporates a range of economic, regulatory and social objectives, many of which are in direct conflict with one another. But the agency has done itself no favors in a continuing effort to simultaneously regulate media based on three policy objectives: competition, localism, and diversity. Favoring competition through the implementation of structural limits on numerical broadcast station ownership,<sup>34</sup> the FCC launched a

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29. See MCCHESENEY, *supra* note 21, at 16.

30. See, e.g., 2014 Quadrennial Regul. Rev. – Rev. of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, *Order on Reconsideration and Notice of Proposed Rulemaking*, 32 FCC Rcd 9802, para. 15 (2017) [hereinafter *2017 Ownership NPRM*] (These changes eliminated the newspaper/ broadcast cross-ownership rule, the radio / television cross-ownership rule, and the eight-voices test). *2016 Second Report and Order*, *supra* note 12, at para. 7 (This report contained no data regarding the diversity of broadcast media content.).

31. *2016 Second Report and Order*, *supra* note 12, at para. 207.

32. See Terry, *supra* note 23, at 329–30.

33. Phillip Napoli proposes that providing diversity is worthless without exposure. Content, especially informational content is a necessity, but consumption of the content is also required. Philip M. Napoli, *Deconstructing the Diversity Principle*, 49 J. COMM. 7, 9 (1999).

34. Rev. of the Comm'n's Reguls. Governing TV Broad., *Further Notice of Proposed Rulemaking*, 10 FCC Rcd 3524, para. 60 (1995) ("The principal means by which the Commission has fostered diversity of viewpoints is through the imposition of ownership restrictions.... [D]iversity of ownership as a means to achieving viewpoint diversity has been found to serve a legitimate government interest, and has, in the past, been upheld under rational-basis review."). See also Rev. of the Comm'n's Broad. Ownership Rules and Other

localism and broadcasting initiative which involved a formal notice and comment proceeding on broadcasting and localism.<sup>35</sup> Additionally, in a vain effort to ensure diversity which the FCC repeatedly claims to be important,<sup>36</sup> the Commission has struggled to follow a consistent regulatory path when developing and reviewing its media ownership rules.<sup>37</sup>

Within the larger structure of media ownership policy is a related issue: the ownership of broadcast stations by women and minorities. Minority ownership has proven to be a problematic aspect of the FCC's broadcast licensing efforts for some time.<sup>38</sup> The FCC granted licenses exclusively to non-minority applicants for radio stations until 1949 and for television stations until 1973.<sup>39</sup> This process continued beyond these origination dates as the agency tended to favor applicants with existing broadcast industry experience in cases where there were competitive and comparative hearings for licenses.<sup>40</sup> Consequently, as late as 1971, minorities owned only ten of the nearly 7500 radio stations in the U.S.<sup>41</sup>

The FCC established a Minority Ownership Task Force with the intent of researching options to increase not only minority ownership, but minority employment in the broadcasting industry as well, arguing, "representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience."<sup>42</sup> In 1978, the task force released a report that concluded that the best option to increase minority representation was to increase the number of minority owners, arguing that both minority populations and the general public were being deprived the access of minority viewpoints.<sup>43</sup>

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Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, *Notice of Proposed Rule Making*, 17 FCC Rcd 18503, paras. 36–55 (2002) [hereinafter *2002 Ownership Rules*].

35. The FCC's localism task force was created in 2003, but it has taken only limited actions in the eight years since its inception, and it has taken no formal action since April of 2008. See FCC, BROADCASTING AND LOCALISM, [https://transition.fcc.gov/localism/Localism\\_Fact\\_Sheet.pdf](https://transition.fcc.gov/localism/Localism_Fact_Sheet.pdf) [<https://perma.cc/ZSN8-6P3A>].

36. *2002 Biennial Review*, *supra* note 27, at paras. 18-53.

37. Christopher R. Terry, *Minority Ownership: An Undeniable Failure of FCC Media Ownership Policy*, WIDENER J.L., ECON. & RACE, 2013, at 18, 32 (2011).

38. See Caitlin Ring Carlson, *Half the Spectrum: A Title IX Approach to Broadcast Ownership Regulation*, 23 COMM. L. & POL'Y 221, 227-28 (2018).

39. W. LaNelle Owens, *Inequities on the Air: The FCC Media Ownership Rules - Encouraging Economic Efficiency and Disregarding the Needs of Minorities*, 47 HOW. L.J. 1037, 1055 (2004).

40. *Id.* at 1045.

41. *Id.* at 1044.

42. Neal Devins, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 144 n.132 (1990) (quoting Statement of Policy on Minority Ownership of Broadcasting Facilities, *Public Notice*, 68 F.C.C. 2d 979, 981 (1978)).

43. See *id.* at 134, 151.



In a critical case, *TV 9, Inc. v. FCC*, the idea that a nexus between minority ownership and increased viewpoint diversity was established and quickly became the conceptual basis for minority ownership policy, which the FCC expanded on in the Newspaper Broadcast-Cross Ownership proceeding.<sup>44</sup> In the *TV 9* case, the FCC had chosen not to award a minority, but corporate, candidate merit in a comparative hearing for a license.<sup>45</sup> The D.C. Circuit Court overturned the FCC, arguing “[m]inority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded.”<sup>46</sup>

In 1978, following *TV 9*, the FCC adopted two new policies designed to expand minority representation on the airwaves. The first was a tax certificate program to help new entrants.<sup>47</sup> Likewise, the second policy, a distressed station sale program, was adopted to help direct station licenses towards minority applicants by giving broadcast licensees the opportunity to sell a station to a minority-owned entity at a reduced price of 75 percent of fair market value.<sup>48</sup>

The FCC’s 1978 minority ownership enhancement policies were challenged and were initially upheld in *Metro Broadcasting Inc. v. FCC*.<sup>49</sup> Metro Broadcasting was involved in a comparative bidding proceeding for the rights to construct and operate a new UHF television station in Orlando, Florida.<sup>50</sup> The FCC awarded the license and construction permit to a competitor, Rainbow Broadcasting. The FCC had given a substantial enhancement to Rainbow because its ownership was 90%Hispanic, while Metro had only one minority partner.<sup>51</sup> The FCC ruled that the minority enhancement awarded to Rainbow outweighed the local residence and civic participation advantage that Metro had demonstrated in the proceeding.<sup>52</sup>

In a related case, Shurberg Broadcasting challenged the FCC’s distress sale policy after filing a construction permit to build a station in Hartford, Connecticut.<sup>53</sup> At the time, the permit was mutually exclusive with a station already on the air, which the owner, Faith Center, was trying to sell under the

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44. *TV 9, Inc. v. FCC*, 495 F.2d 929, 938 (D.C. Cir. 1973); Multiple Ownership of Standard, FM, and TV Broad. Stations, *Second Report and Order*, 50 F.C.C. 2d 1046, 1074 (1975).

45. *TV 9*, 495 F.2d at 938.

46. *Id.*

47. Owens, *supra* note 39, at 1045-46.

48. *Id.*

49. *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990).

50. *Id.* at 558.

51. *Id.* at 559.

52. *Id.*

53. *Id.* at 562-63.

distress sale policy.<sup>54</sup> The FCC approved the transfer of the station under the distress sale policy in 1980, but the applicant faced financing problems that caused the transfer to be abandoned.<sup>55</sup> In June of 1984, the FCC approved a second transfer of the station's license under the distress sale policy to minority applicant Astroline Communications.<sup>56</sup> Shurberg then petitioned the FCC to hold a comparative license hearing to examine the mutually exclusive applications.<sup>57</sup> The FCC denied the hearing request, rejected Shurberg's challenge as without merit, and awarded the license to Astroline.<sup>58</sup>

At the Circuit level, both the *Metro* and *Shurberg* challenges were focused on an argument that the FCC's 1978 policies violated the equal protection clause.<sup>59</sup> On review, the D.C. Circuit upheld the FCC's decision regarding Metro Broadcasting but overturned the agency's sale to Astroline, ruling in favor of Shurberg.<sup>60</sup> In the *Shurberg* decision, the circuit court ruled that the distress sale policy was not, "... narrowly tailored to remedy past discrimination or to promote programming diversity."<sup>61</sup> The cases were consolidated for review in front of the Supreme Court.<sup>62</sup>

In reviewing the dispute in *Metro*, the Supreme Court examined a number of empirical studies that supported the conceptual "nexus" between minority ownership and viewpoint diversity.<sup>63</sup> Of the research examined, the conclusions contained in a Congressional Research Service study, "Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?" proved important.<sup>64</sup> The research concluded, based on FCC survey data, that increasing minority ownership in a market led to an increase in diversity of the available programming content.<sup>65</sup>

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54. *Id.*

55. *Id.*

56. *Id.* at 562 (citing App'n of Faith Ctr., Inc., *Memorandum Opinion and Order*, 99 F.C.C. 2d 1164, 1171 (1984)).

57. *Id.* at 562.

58. *Id.* See also App'n of Faith Ctr., Inc., *Memorandum Opinion and Order*, 99 F.C.C. 2d 1164, 1171 (1984).

59. See *Shurberg Broad. of Hartford, Inc. v. FCC*, 876 F.2d 902 (D.C. Cir. 1989); *Winter Park Comm., Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989).

60. *Metro Broad.*, 497 U.S. at 562; *Shurberg Broad. of Hartford*, 876 F.2d at 907-08.

61. *Metro Broad.*, 497 U.S. at 563.

62. *Id.* at 552.

63. *Id.* at 569-70.

64. *Id.* at 578-79; see also Allen S. Hammond, IV, *Measuring the Nexus: The Relationship Between Minority Ownership and Broadcast Diversity After Metro Broadcasting*, 51 FED. COMM. L.J. 627 (1999).

65. Hammond, *supra* note 64.

In the *Metro v. FCC* decision, the Supreme Court held that both of the FCC's minority enhancement policies could withstand "intermediate" scrutiny of the Fifth Amendment's equal protection clause.<sup>66</sup> The decision proposed five significant reasons for reducing the level of protection from strict to intermediate scrutiny in this area.<sup>67</sup> First, the minority ownership policies at issue in *Metro* served an important government objective, as all audiences, not just those made up of minorities are served by an increase in the diversity of viewpoints minority owners were likely to provide.<sup>68</sup> On a second, related point, the Court added that the policies were directly related to the long standing goal of content diversity.<sup>69</sup> Justice Brennan argued that the robust exchange of ideas that minorities were able to engage in as a result of the minority enhancement policies resulted in positive influence for news production while promoting diversity in the hiring practices of existing media outlets.<sup>70</sup> Justice Brennan also said that the FCC's previous policies to promote minority access, including community ascertainment, had failed to provide adequate minority content to listeners.<sup>71</sup> Therefore, the policies under review in *Metro* served an important governmental objective, but were also substantially related to the government's interest.

Importantly, Justice Brennan also noted the "overriding significance" of the fact that the FCC's enhancement and distress sale policies had been specifically mandated and approved by Congress.<sup>72</sup> In light of these factors, the Court ruled that the substantial government interest in promoting diversity outweighed any equal protection violations, adding that the petitioners were free to bid on any other stations that became available.<sup>73</sup> In practical terms, the majority employed an intermediate standard of review in *Metro* relying on a "substantial" rather than "compelling" interest.

### III. ADARAND, STRICT SCRUTINY AND MINORITY OWNERSHIP

Despite the decision in *Metro*, in 1995, the protections for the FCC's licensing enhancement and distress sale programs were overturned in a non-broadcast case, *Adarand Constructors Inc. v. Pena*.<sup>74</sup> In *Adarand*, the four dissenters

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66. *Metro Broad.*, 497 U.S. at 566.

67. *Id.*

68. *Id.* at 567.

69. *Id.* at 567-68.

70. *Id.* at 569-70.

71. *Id.* at 586-87.

72. *Id.* at 563.

73. *Id.* at 596.

74. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

in the *Metro* Court and the newly appointed Justice Clarence Thomas, who had ruled against a gender-based enhancement in *Lamprecht v. FCC* while on the D.C. Circuit,<sup>75</sup> struck down a federal program granting preferences to minorities bidding on public works projects.<sup>76</sup> In *Adarand*, the majority found that the Court should have applied a strict scrutiny test to the policies at issue in *Metro*.<sup>77</sup>

A dispute over preference given to a minority business as part of a Small Business Administration (SBA) minority preference program for contractors was at the center of the dispute in the case.<sup>78</sup> *Adarand Constructors* challenged the preference policy after failing to win a government bidding process for a contract to construct highway rail guards in Colorado.<sup>79</sup> *Adarand* was otherwise qualified complete the work and had even submitted the lowest bid on the project.<sup>80</sup> The Court held that *Adarand* had standing to bring its suit, and that all programs for federal, state, and local entities should be reviewed under a strict scrutiny standard, thus resolving the difference between the federal and state reviews upheld in *Metro* and *City of Richmond v. J.A. Croson Co.*<sup>81</sup>

As part of this newer, more tailored approach to judicial review of government preference programs, the majority decision proposed that strict scrutiny was not “. . . strict in theory and fatal in fact,”<sup>82</sup> and applied three principles to a review: First, race-based criterion should always be treated with skepticism.<sup>83</sup> Second, equal protection should be consistently applied and not depend on race for the group benefitting or being burdened by the program.<sup>84</sup>

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75. *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992).

76. *Adarand Constructors*, 515 U.S. at 227.

77. *Id.* (“[W]e hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled”).

78. *Id.*

79. *Id.*

80. *Id.*

81. Justice O’Connor’s opinion in *Croson* also applied strict scrutiny to a quota based system, and in overturning the City’s provision requiring 30% of city building contracts went to Minority Business Entity subcontractors, explained that rules designed as a remedy for past discrimination did not reach a compelling government interest. “The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989).

82. *Adarand Constructors*, 515 U.S. at 237.

83. *Id.*

84. *Id.*

Finally, an analysis of equal protection demanded “congruence” under both the Fifth and Fourteenth Amendments.<sup>85</sup>

As a result of *Adarand*, all minority preferences, including programs designed to correct “benign discrimination,” required narrow tailoring to meet a compelling governmental interest.<sup>86</sup> The decision explicitly overturned the holding in *Metro* that the FCC’s “benign” minority ownership policies need only meet intermediate scrutiny.<sup>87</sup> Arguably, the Court’s majority no longer supported diversity as sufficient to justify race-based classifications in public contracting.<sup>88</sup> Functionally, after *Adarand*, a preferential government program requires empirical statistical evidence to (1) demonstrate previous discrimination, and, (2) show that the program under review meets a narrow tailoring test which assesses if the policy will correct that discrimination.<sup>89</sup>

After *Adarand*, the mandate imposing stringent justifications for preferential programs led the FCC to discontinue the distress sale policy: first, by refusing to extend the policy to women, and then by refusing to extend a preferential policy during spectrum auctions.<sup>90</sup> But *Adarand* would bring even more complications to the FCC’s policymaking process and regulatory objectives following the passage of the 1996 Telecommunications Act, which lingered in the background until the Third Circuit Court of Appeals decision in *Prometheus Radio Project v. FCC (Prometheus I)* in 2004.

#### IV. **LAMPRECHT, INTERMEDIATE SCRUTINY, AND WOMEN’S OWNERSHIP**

Initially, minority and female ownership were viewed as separate issues. However, in the *Mid-Florida Television Corp.* case (1978), the Second Circuit Court of Appeals held that merit for female broadcast ownership and participation is warranted upon essentially the same basis as the merit given for black participation and ownership.<sup>91</sup> The court said that the need for diversity and sensitivity reflected in the structure of a broadcast station is “not so pressing with respect to women as it is to black people because women have

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85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. While awaiting a decision from the Supreme Court in the *Shurberg* and *Metro* cases, the Commission closed down a rulemaking proceeding that could have expanded the Distress Sale policy to new categories of participants, including women. See Distress Sale Pol’y of Broad. Licensees, *Order*, 5 FCC Rcd 397, para. 2 (1990).

91. App’ns of Mid-Fla. TV Corp., *Decision*, 69 F.C.C. 2d 607, 652 (1978), *set aside on other grounds*, 87 F.C.C. 2d 203 (1981).

not been excluded from mainstream society as have black people.”<sup>92</sup> At a subsequent comparative hearing the board said it was “obliged to consider minority (and presumably, female) ownership and participation as qualitative attributes of and management.”<sup>93</sup> Thus, female preference grew out of a presumption.<sup>94</sup>

Like with minority preferences, the FCC’s efforts to demonstrate favorable treatment for women in the distribution of broadcast licenses was also challenged. The first of these challenges was brought by a male applicant who was denied a license in favor of a woman, despite having substantial industry experience.<sup>95</sup> The D.C. Circuit Court found that the FCC’s rationale for the claim that gender preferences in comparative hearings and the subsequent ownership of media by women fostered a diversity of viewpoints was unconfirmed.<sup>96</sup> The court held that the premise had not been critically examined in this case and also ran counter to the constitutional principle that race, sex, and national origin are not valid factors on which to base government policy.<sup>97</sup> Judge Patricia Wald, who was the only woman on the court and the only dissenting judge in the case, wrote that ownership diversity was the only way the FCC could influence diverse content as it was prohibited from mandating the broadcast of particular moral, social, or political viewpoints.<sup>98</sup> Moreover, “[w]omen having ownership interest and policy making roles in the media are likely to enhance the probability that varying perspectives and viewpoints of women will be fairly represented by the broadcast media.”<sup>99</sup>

The D.C. Circuit Court took up the relationship between viewpoint diversity and promoting women (and minority) ownership again in *Lamprecht v. FCC*.<sup>100</sup> Here, the court held that the FCC “cited nothing that might support its predictive judgment that women owners will broadcast women’s or minority or any other underrepresented type of programming at any different rate than men will”;<sup>101</sup> the court was right. Very little research existed to examine whether and how women’s broadcast ownership led to diverse programming. Once again, the court relied on the 1988 study, “Minority

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92. *Id.*

93. Lorna Veraldi & Stuart A. Shorenstein, *Gender Preferences*, 45 FED. COMM. L.J. 219, 223 (1993).

94. *See id.*

95. *Steele v. FCC*, 770 F.2d 1192, 1192 (D.C. Cir. 1985).

96. *Id.* at 1199.

97. *Id.*

98. *Id.* at 1202 (Wald, J., dissenting).

99. *Id.* at 1209.

100. *Lamprecht v. FCC*, 958 F.2d 382, 399 (D.C. Cir. 1992).

101. *Id.*

Broadcast Station Ownership and Broadcast Programming: Is there a Nexus?”<sup>102</sup> The court wrote that because the study did not establish a statistically meaningful link between women’s broadcast ownership and “women’s programming,” the FCC could not prove that the regulation was substantially related to achieving their important objective of viewpoint diversity.<sup>103</sup> This time, the FCC’s gender preference did not meet the requirements of intermediate scrutiny and was struck down.<sup>104</sup> Perhaps most notably, the D.C. Circuit reaffirmed that the standard of review for gender-based preferences was intermediate scrutiny while strict scrutiny continued to be used for race-based preferences.<sup>105</sup>

## V. THE THIRD CIRCUIT AND PROMETHEUS RADIO PROJECT

The FCC launched the first of the mandated biennial reviews for media ownership rules under section 202(h) on March 12, 1998.<sup>106</sup> At the time, the agency was adjudicating many proposed mergers and license transfers made possible by ownership rules contained in the Telecom Act. Anticipating that the biennial review process would result in additional changes to those rules, the FCC had already granted a series of conditional waivers to various owners.<sup>107</sup> By continuing to grant waivers, even conditionally, the FCC openly

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102. *Id.* at 396.

103. *Id.* at 398.

104. *Id.* at 396.

105. *Id.* at 390.

106. The FCC already began the process of reviewing two ownership rules. The first, the television duopoly rule prevented a party from owning, operating, or controlling two or more broadcast television stations with overlapping “Grade B” signal contours, essentially preventing the ownership of more than one television station in a market. Additionally, the FCC launched a review of the “one-to-a-market” rule, which prohibited the common ownership of a television and a radio station in the same market. 1998 Biennial Regul. Rev.—Rev. of the Comm’n’s Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomm. Act of 1996, *Notice of Inquiry*, 13 FCC Rcd 11276, paras. 1, 9 (1998) [hereinafter *1998 Notice of Inquiry*].

107. *App’n of Concrete River Assocs., Memorandum Opinion and Order*, 12 FCC Rcd 6614, paras. 108-10 (1997), assigning a license to QueenB Radio and granting QueenB’s request for waiver, “Because the present case also proposes a commonly owned television station, we must next determine whether to waive our one-to-a-market rule. In considering the current request for a permanent waiver we will follow the policy established in recent one-to-a-market waiver cases where the radio component to a proposed combination exceeds those permitted prior to the adoption of the Telecommunications Act of 1996. . . . In such cases, the [FCC] declined to grant permanent waivers of the one-to-a-market rule, and instead granted temporary waivers conditioned on the outcome of related issues raised in the television ownership rulemaking proceeding. . . . Similarly, we conclude that a permanent, unconditional

encouraged further ownership consolidation to occur at a rate faster than the agency could empirically assess the results of its freshly approved mergers.<sup>108</sup>

At the conclusion of the first biennial review in August of 1999, the FCC chose to use the required 2000 Biennial Review to build a framework to “form the basis for further action.”<sup>109</sup> Mergers were occurring at a rapid pace, and the FCC argued that it needed more time to understand the effects the rules were having.<sup>110</sup>

At the launch of the biennial review in 2000, the FCC proposed building a working framework for future reviews under section 202 (h), most notably for the review scheduled to begin in 2002.<sup>111</sup> As a result of the agency-wide review commenced in 2000, the FCC proposed retaining, but modifying, three of its media ownership rules while eliminating a fourth.<sup>112</sup> The FCC then launched rulemaking inquiries to amend the dual network rule,<sup>113</sup> the definition of local radio markets,<sup>114</sup> and the newspaper-broadcast cross-ownership rule.<sup>115</sup> The agency also proposed to eliminate its restriction on multiple ownership of experimental broadcast stations.<sup>116</sup> Ultimately, each of these individual proceedings would become elements of the next required review under section 202(h), the 2002 Biennial Review.

The FCC’s lengthy legal struggles on media ownership policy began with the judicial review of the its media ownership decision released in June of 2003.<sup>117</sup> In *Prometheus Radio Project v. FCC*, the FCC suffered the first in a long of a series of setbacks that have continued to limit its ability to alter media ownership policy.<sup>118</sup> Groups of both “citizen petitioners”<sup>119</sup> and “deregulatory

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waiver would not be appropriate here. QueenB has, however, demonstrated sufficient grounds for us to grant a temporary waiver conditioned on the outcome of the rulemaking proceeding.”

108. *Id.*

109. 2000 Biennial Regul. Rev., *Report*, 15 FCC Rcd 1207, para. 13 (2001) [hereinafter *2000 Biennial Review*]. While the review was of existing regulations agency wide, media ownership rules were reviewed by the Media Bureau staff during the 2000 proceeding. *See* Biennial Reg. Rev. 2000 Staff Rpt., *Public Notice*, 15 FCC Rcd 21142, para. 43 (2000) [hereinafter *2000 Staff Report*].

110. *Id.* at para. 127.

111. *Id.* at paras. 14-17.

112. *Id.* at para. 30.

113. *Id.* at para. 127.

114. *Id.* at paras. 118-19.

115. *Id.* at paras. 122-24.

116. *Id.* at para. 128.

117. *Prometheus I*, 373 F.3d 372, 381 (3d Cir. 2004).

118. *Id.* at 381-82.

119. In the *Prometheus* ruling, the court assigned the various petitioners to two groups. The first was referred to as the “Citizen Petitioners.” “Prometheus Radio Project, Media Alliance, National Council of the Churches of Christ in the United States, Fairness and Accuracy in



petitioners”<sup>120</sup> challenged the FCC’s 2003 Order on media ownership in multiple federal circuit courts, and the Judicial Panel on Multidistrict Litigation consolidated the petitions.<sup>121</sup> Unlike *Sinclair Broadcasting Group, Inc. v. FCC* and *Fox TV Stations, Inc. v. FCC*, two earlier cases that dealt with ownership reviews undertaken by the agency which were reviewed by the D.C. Circuit Court of Appeals,<sup>122</sup> the multidistrict panel sent the case to the Third Circuit Court of Appeals, consolidating the challenges under lead plaintiff in that circuit, Prometheus Radio Project.<sup>123</sup> After a preliminary hearing, the Third Circuit stayed implementation of the FCC’s 2003 rules pending review.<sup>124</sup>

The Third Circuit remanded most of the FCC’s 2003 Order.<sup>125</sup> Among the primary reasons for remand was the FCC’s arbitrary and capricious decision-making process and the lack of supporting evidence for its decisions in the record.

[W]e have identified several provisions in which the [FCC] falls short of its obligation to justify its decisions to retain, repeal, or modify its media ownership regulations with reasoned analysis. The [FCC]’s derivation of new Cross-Media Limits, and its modification of the numerical limits on both television and radio station ownership in local markets, all have the same essential flaw: an unjustified

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Reporting, Center for Digital Democracy, Consumer Union and Consumer Federation of America, Minority Media and Telecommunications Council (representing numerous trade, consumer, professional, and civic organizations concerned with telecommunications policy as it relates to racial minorities and women), and Office of Communication of the United Church of Christ (“UCC”) (intervenor). The Network Affiliated Stations Alliance, representing the CBS Television Network Affiliates Association, the NBC Television Affiliates, and the ABC Television Affiliates, and Capitol Broadcasting Company, Inc. (intervenor) also raised anti-deregulatory challenges to the national television ownership rule.” *Prometheus I*, 373 F.3d at 381 n.1.

120. *See id.* at 381-82 n.2 (stating that the “Deregulatory Petitioners,” included: “Clear Channel Communications, Inc.; Emmis Communications Corporation; Fox Entertainment Group, Inc.; Fox Television Stations, Inc.; Media General Inc.; National Association of Broadcasters; National Broadcasting Company, Inc.; Paxson Communications Corporation; Sinclair Broadcast Group; Telemundo Communications Group, Inc.; Tribune Company; Viacom Inc.; Belo Corporation (intervenor); Gannett Corporation (intervenor); Morris Communications Company (intervenor); Millcreek Broadcasting LLC (intervenor); Nassau Broadcasting Holdings (intervenor); Nassau Broadcasting II, LLC (intervenor); Newspaper Association of America (intervenor); and Univision Communications, Inc. (intervenor)”.) *Id.*

121. *Id.* at 382.

122. *Sinclair Broad. Grp., Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002); *Fox TV Stations, Inc. v. FCC*, 280 F.3d 1027, 1033, 1048 (D.C. Cir. 2002).

123. *Prometheus I*, 373 F.3d at 382.

124. *Id.* at 389.

125. *Id.* at 435; *See also 2002 Biennial Review, supra* note 27, at para. 327 (describing the cross-ownership rulemaking by the FCC — with foregoing explanation — with which the Third Circuit found fault).

assumption that media outlets of the same type make an equal contribution to diversity and competition in local markets. We thus remand for the [FCC] to justify or modify its approach to setting numerical limits.<sup>126</sup>

The Third Circuit was extremely skeptical of the FCC's new approach to regulating media ownership using the Diversity Index.<sup>127</sup> The court's opinion suggested that the FCC's assumption of equal market shares was inconsistent with the intended approach of the agency's new metric.<sup>128</sup> This inconsistency generated a set of unrealistic assumptions about the relative contributions of media outlets to viewpoint diversity within local markets. Local news production, which the FCC functionally applied as a quantitative assessment of its localism objective, factored heavily into the majority decision, which stated the record lacked basic evidence to support the agency's premise of independent news websites producing local news.<sup>129</sup>

After the Third Circuit issued the remand in 2004, the FCC took minimal action on media ownership policy beyond adjudicating merger actions that were permitted by existing ownership limits.<sup>130</sup> A new FCC chairman, Kevin Martin, took charge in March 2005,<sup>131</sup> and the agency launched into the first now quadrennial review scheduled for 2006 under the amended section 202(h) of the Telecommunications Act.<sup>132</sup> At the launch of the review process, the FCC suggested it had designed the assessment to resolve any procedural issues from the *Prometheus I* remand.<sup>133</sup>

The late release of data developed during the 2002 Biennial Review surfaced in a hearing in front of Congress, and the FCC was now unable to put the genie back in the bottle concerning the consolidation of the radio industry which had occurred between 1998–2005; the FCC acted to conclude

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126. *Prometheus I*, 373 F.3d at 435.

127. *See id.* at 411.

128. *Id.* at 420.

129. *Id.* at 406.

130. *See* App'ns of AT&T Wireless Servs., Inc. & Cingular Wireless Corp., *Memorandum Opinion and Order*, 19 FCC Rcd 21522 (2004); *see, e.g.*, App'ns for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Comm. Act from NextWave Personal Comm., Inc., *Memorandum Opinion and Order*, 19 FCC Rcd 2570 para. 1 (2004).

131. Neda Ulaby, *Kevin Martin's Contentious Turn at Helm of FCC*, NPR (Feb. 5, 2009), <https://www.npr.org/templates/story/story.php?storyId=18711487> [<https://perma.cc/47MX-SCMH>].

132. 2006 Quadrennial Regul. Rev. – Rev. of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, *Further Notice of Proposed Rulemaking*, 21 FCC Rcd 8834, paras. 1, 7-8 n.10 (2006) [hereinafter *2006 Further Notice of Proposed Rulemaking*].

133. *See id.*

its 2006 Quadrennial Review in late 2007, and it proposed modest rule alterations.<sup>134</sup> The FCC proposed revising only one ownership rule, a partial repeal of the 1975 prohibition on newspaper-broadcast cross-ownership, but only in the top 20 media markets.<sup>135</sup> Although minority ownership represented an insignificant aspect of the FCC's stated diversity assessments since the implementation of the Telecommunications Act,<sup>136</sup> the FCC also released a new minority ownership policy developed in a parallel proceeding to the 2006 Quadrennial Review in response to the remand on the issue in *Prometheus I*.<sup>137</sup>

In the December 2007 proposal, the FCC adopted Small Business Administration financial standards based on gross sales revenue for a radio or television company creating a class of license applicants called "Eligible Entities."<sup>138</sup> The Eligible Entity policy was implemented as part of a larger FCC effort to increase the number of small independent owners of media properties, but did not provide any mechanism to directly promote ownership by women or minorities.<sup>139</sup> Relying instead on the central premise of the FCC's belief in a relationship between ownership and content diversity,<sup>140</sup> the Commission argued that increasing the number of small media owners (owners who operate either a single or small group of stations), would result in an increase in the diversity of programming content, including programming content targeted at minorities.<sup>141</sup>

Despite the agency's stated goal of diversity enhancement, FCC Commissioner Adelstein argued that after *Adarand*, the type of minority

134. Press Release, Mary Diamond, Chairman Kevin J. Martin Proposes Revision to the Newspaper/Broadcast Cross-Ownership Rule 2 (Nov. 13, 2007), [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-278113A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278113A1.pdf) [<https://perma.cc/3PEX-582T>]; see also 2006 Quadrennial Regul. Rev.—Rev. of the Comm'n's Broad. Ownership Rules and other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, *Report and Order on Reconsideration*, 23 FCC Rcd 2010, para. 13 (2007).

135. *Id.*

136. Prior to the Eligible Entity proposal, the FCC had not put forward a direct minority ownership proposal since the decision in *Metro*.

137. Promoting Diversification of Ownership in the Broad. Servs., *Report and Order and Third Further Notice of Proposed Rule Making*, 23 FCC Rcd 5922, para. 3 (2008) [hereinafter 2007 *Minority Ownership Order*].

138. *Id.* para. 6 ("The eligible entity must hold: (1) 30 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license; or (2) 15 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast licenses, provided that no other person or entity owns or controls more than 25 percent of the or (3) more than 50 percent of the voting power of the corporation if the corporation that holds the broadcast licenses is a publicly traded company.").

139. *Id.*

140. See 2002 *Ownership Rules*, *supra* note 34, at para. 8.

141. See 2007 *Minority Ownership Order*, *supra* note 137, at para. 41.

enhancements at issue in *Metro* must now be subjected to strict scrutiny.<sup>142</sup> Therefore, for a new minority ownership policy to bypass any constitutional barriers, the policy must be implemented as “race neutral.”<sup>143</sup> Rather than providing ownership enhancements to minorities directly, as the policies at issue in *Metro* had done, the FCC argued that the policy could (eventually) include women and minorities as Eligible Entities.<sup>144</sup> In crafting the new policy, the FCC relied on the empirically unsupported contention at the cornerstone of media ownership theory, that internal and external competition between stations will increase diversity.<sup>145</sup> As such, the Eligible Entity policy was promoted as a mechanism that could increase the number of independently owned media outlets. The FCC claims that independently owned outlets are more likely to have ties to a local community, and, by extension, are better able to meet the needs of the local audience.<sup>146</sup>

The Eligible Entity designation was adopted from a previous FCC definition of a station (or stations) with minority ownership.<sup>147</sup> The FCC had previously defined minority ownership of a broadcast outlet as a situation in which the ownership reports identify one or more minorities which, in aggregate, have a greater than 50% voting interest in the broadcast licensee entity.<sup>148</sup> To become an Eligible Entity, an applicant had to meet SBA standards as defined by total annual sales of an organization or its parent company. For radio, the qualifying limit was \$6.5 million and for television it was \$13 million.<sup>149</sup> In addition, an Eligible Entity must hold:

30 percent or more of the stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast license; or (2) 15 percent or more of the

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142. *Id.* at paras. 5-6.

143. The FCC believed that by implementing the new policy on a race-neutral basis, and avoiding constitutional scrutiny on equal protection grounds, the policy can be implemented, and have demonstrable results much quicker. *Id.* at para. 9.

144. The Commission was seeking comment on whether a special category of “eligible entity” should be created to assist minorities and women with the acquisition of media outlets, but for now the diversity policy will remain race and gender neutral. *Id.* at para. 39.

145. The FCC believes that competition that creates diversity does not always come from external competitors. As more local stations are commonly owned, there is also an incentive for diverse programming to reduce “internal competition.” This premise does not account for an economic reality that media companies will target the most valuable audience demographics even if forced to compete for that audience, a process known as rivalrous imitation. *Id.* at para. 17; see John Dimmick & Daniel G. McDonald, *Network Radio Oligopoly 1926-1956: Rivalrous Imitation and Program Diversity*, 14 J. MEDIA ECON. 197, 201 (2001).

146. See 2007 *Minority Ownership Order*, *supra* note 137, at para. 7.

147. *Id.* at para. 6.

148. *Id.*

149. *Id.*

stock/partnership shares and more than 50 percent voting power of the corporation or partnership that will hold the broadcast licenses, provided that no other person or entity owns or controls more than 25 percent of the outstanding stock or partnership interests; or (3) more than 50 percent of the voting power of the corporation if the corporation that holds the broadcast licenses is a publicly traded company.<sup>150</sup>

A legal battle over jurisdiction delayed the judicial review of the FCC's 2006 and 2007 proposals.<sup>151</sup> The Third Circuit claimed that it retained jurisdiction over the FCC's response to the remand issued in *Prometheus I*, while both the FCC and members of the deregulatory petitioner group attempted to move the review to the D.C. Circuit.<sup>152</sup> The petitions failed, and oral arguments occurred in front of the Third Circuit panel on February 11, 2011, ultimately resulting in another significant legal setback for the FCC in a decision released in July.<sup>153</sup> Judge Ambro's opinion included another remand which undermined the FCC's 2007 decisions on media ownership, citing the agency's continuing series of procedural and evidentiary problems.<sup>154</sup> The majority also incorporated the FCC's Eligible Entry program when examining the largely unresolved remand of the minority ownership issue in *Prometheus I*.<sup>155</sup> Suggesting that the agency had "in large part punted" on the minority ownership issue,<sup>156</sup> the second *Prometheus* decision provided a clearly stated

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150. *See id.*

151. 2006 Quadrennial Regul. Rev., *Consolidation Order*, 73 Fed. Reg. 9481, 1-2 (2008).

152. Order at 1-2, *Media All. v. FCC*, No. 6695769 (9th Cir. Nov. 4, 2008), ECF No. 43; *see* Final Brief of Petitioners Tribune Co. & Fox Television Stations, Inc. at \*14 n.8, *Prometheus Radio Project v. FCC*, 2010 WL 1133326 (3d Cir. Mar. 23, 2010) (No. 08-3078), 2010 WL 3866781.

153. Petition for Review at 1-2, *Prometheus Radio Project v. FCC*, No. 003147340 (3d Cir. Feb. 26, 2008).

154. *Prometheus II*, *supra* note 2, at 437 (3d Cir. 2011) ("[T]he [FCC] failed to meet the notice and comment requirements of the Administrative Procedure Act. We also remand those provisions of the Diversity Order that rely on the revenue-based 'eligible entity' definition, and the FCC's decision to defer consideration of other proposed definitions (such as for a socially and economically disadvantaged business, so that it may adequately justify or modify its approach to advancing broadcast ownership by minorities and women.)."

155. The Third Circuit overturned the FCC's 2003 Order in *Prometheus I*. *See Prometheus I*, *supra* note 2, at 435.

156. "Despite our prior remand requiring the [FCC] to consider the effect of its rules on minority and female ownership, and anticipating a workable SDB definition well before this rulemaking was completed, the [FCC] has in large part punted yet again on this important issue. While the measures adopted that take a strong stance against discrimination are no doubt positive, the [FCC] has not shown that they will enhance significantly minority and female ownership, which was a stated goal of this rulemaking proceeding. This is troubling, as the [FCC] relied on the Diversity Order to justify side-stepping, for the most part, that goal in its 2008 Order." *Prometheus II*, *supra* note 2, at 471-72.

mandate to the FCC: address the issue of minority ownership policy before the completion of the agency's already in-progress 2010 Quadrennial Review.<sup>157</sup>

The eligible entity definition adopted in the Diversity Order lacks a sufficient analytical connection to the primary issue that Order intended to address. The [FCC] has offered no data attempting to show a connection between the definition chosen and the goal of the measures adopted—increasing ownership of minorities and women. As such, the eligible entity definition adopted is arbitrary and capricious, and we remand those portions of the Diversity Order that rely on it. We conclude once more that the FCC did not provide a sufficiently reasoned basis for deferring consideration of the proposed SDB definitions and remand for it to do so before it completes its 2010 Quadrennial Review.<sup>158</sup>

The ruling also signaled that the FCC had strained the majority's patience with another failure to develop a rational minority ownership policy. The panel suggested that the FCC should stop stalling, and instructed the agency to resolve the minority ownership issue, regardless of the challenges presented by the precedent from the *Adarand* decision.<sup>159</sup>

Stating that the task is difficult in light of *Adarand* does not constitute considering proposals using an SDB definition. The FCC's own failure to collect or analyze data, and lay other necessary groundwork, may help to explain, but does not excuse, its failure to consider the proposals presented over many years. If the [FCC] requires more and better data to complete the necessary *Adarand* studies, it must get the data and conduct up-to-date studies, as it began to do in 2000 before largely abandoning the endeavor.<sup>160</sup>

In the wake of *Prometheus II*, the FCC nominally continued to conduct the ongoing 2010 Quadrennial Review required under section 202(h).<sup>161</sup> However, the FCC's 2010 Quadrennial Review process quickly became bogged down as it was expanded to incorporate the Third Circuit's directive on minority

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157. *Id.*

158. *Id.*

159. *Id.* at 483.

160. *Id.* at 484, n.42.

161. See 2014 Quadrennial Reg. Rev.—Rev. of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, *Further Notice of Proposed Rulemaking and Report and Order*, 29 FCC Rcd. 4371, para. 1 (2014) [hereinafter *2014 Further Notice of Proposed Rulemaking and Report and Order*].

ownership.<sup>162</sup> The FCC's efforts to conclude the review process or to propose a new minority ownership policy were essentially non-existent.<sup>163</sup> Eventually, the agency was able to run out the clock on the 2010 Quadrennial Review without making another decision.<sup>164</sup> Instead, the FCC incorporated the uncompleted 2010 review process – the agency's response to the remands issued by the Third Circuit in both 2004 and 2011 – into the launch of the 2014 Quadrennial Review.<sup>165</sup> But even after the restart, the agency's public commitment to the new proceeding was minimalist (at best), and after a period of apparent inaction by the agency, collectively the deregulatory petitioners, the citizen petitioners, and the FCC returned to the Third Circuit for *Prometheus III* in April 2016.<sup>166</sup> During a hostile oral argument, the judges on the panel pressed the FCC for a straight answer as to when the agency would conclude the open proceedings by taking some type of formal action.<sup>167</sup> Although the FCC was reluctant to commit to a timeline for final agency action, agency lawyers told the court that a draft of new rules would be circulated among FCC commissioners before the end of June 2016.<sup>168</sup>

In response, the Third Circuit panel in *Prometheus III* supported the action promised by agency counsel to conclude the 2010 and 2014 proceedings and reminded the FCC they were under obligation to deliver a new minority ownership policy.<sup>169</sup> The court argued that the FCC's ongoing delays "keeps five broadcast ownership rules in limbo."<sup>170</sup> The court also observed that the FCC's delay "hamper[ed] judicial review because there is no final agency action to challenge."<sup>171</sup> The FCC's ongoing failure to develop a policy to increase the ownership of stations by women and minorities had also clearly tested the Third Circuit's patience.

The FCC presents two arguments for why we should not order relief. Both fail. The first is that it is not yet in violation of *Prometheus II*

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162. Christopher Terry, Stephen Schmitz & Eliezer (Lee) Joseph Silberberg, *The Score is 4-0: FCC Media Ownership Policy, Prometheus Radio Project, and Judicial Review*, 73 FED. COMM. L. J. 99, 128 (2021).

163. *Prometheus II*, *supra* note 2, at 465.

164. See 2014 *Further Notice of Proposed Rulemaking and Report and Order*, *supra* note 161, para. 74 in which the FCC explains it disagreed with the Third Circuit's holdings that the agency's rulemaking procedures and outcomes on media ownership were insufficient.

165. See 2014 *Further Notice of Proposed Rulemaking and Report and Order*, *supra* note 161, paras. 1, 7.

166. *Prometheus III*, *supra* note 2, at 37.

167. See *id.* at 51.

168. See *id.* at 53-54.

169. See *id.* at 53-54, 60.

170. *Id.* at 51.

171. *Id.* at 40.

because we instructed it to address the eligible entity definition during the 2010 Quadrennial Review, which is still ongoing. This contention improperly attempts to use one delay (the Quadrennial Review) to excuse another (the eligible entity definition). By this logic, the [FCC] could delay another decade or more without running afoul of our remand. Simply put, it cannot evade our remand merely by keeping the 2010 review open indefinitely.<sup>172</sup>

In response, in August 2016, the FCC released an Order that concluded the open 2010 and 2014 Quadrennial Reviews while serving as the agency's formal response to the *Prometheus III* and *Prometheus II* remands.<sup>173</sup> Most notably, after more than six years without a decision, the FCC decided to do nothing.<sup>174</sup> The agency proposed maintaining all of the existing media ownership rules without any revisions or adjustments.<sup>175</sup> "We affirm our tentative conclusion that the current rule remains consistent with the Commission's goal to promote minority and female ownership of broadcast radio stations."<sup>176</sup> Additionally, the FCC's August 2016 order ignored the directions of the decision in *Prometheus II* and the decision in *Prometheus III* to develop a rational minority ownership policy. Instead, the FCC attempted to recycle the Eligible Entity program proposed in 2007.

[W]e disagree with arguments that the *Prometheus II* decision requires that we adopt a race- or gender-conscious eligible entity standard in this quadrennial review proceeding or that we continue this proceeding until the [FCC] has completed whatever studies or analyses that will enable it to take race- or gender-conscious action in the future consistent with current standards of constitutional law.<sup>177</sup>

Unsurprisingly, a host of legal challenges to the FCC's non-action quickly followed. But before those challenges reached oral argument, the 2016 presidential election changed the FCC's leadership structure.<sup>178</sup> Under the new leadership of Ajit Pai, in November of 2017, the FCC released a new media ownership policy as an Order on Reconsideration.<sup>179</sup> The Order on Reconsideration, unlike the Second Report and Order from August 2016, did

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172. *Id.* at 48-49.

173. 2017 *Ownership NPRM*, *supra* note 30, at para. 15. *See also* 2016 *Second Report and Order*, *supra* note 12, at paras. 2-4.

174. 2017 *Ownership NPRM*, *supra* note 30, at para. 15.

175. *Id.*

176. *Id.* at para. 125.

177. *Id.* at para. 313.

178. *See* Jim Puzzaghera, *Trump Names New FCC Chairman*, L.A. TIMES (Jan. 23, 2017) <https://www.latimes.com/business/la-fi-pai-fcc-chairman-20170123-story.html>.

179. 2017 *Ownership NPRM*, *supra* note 30.



not address the Third Circuit's mandate to develop a viable minority ownership policy.<sup>180</sup>

While consolidated cases challenging the original 2016 Order and 2017 Order on Reconsideration were pending in *Prometheus IV*, the FCC released its initial proposal for a new minority ownership policy, called the "Incubator" program.<sup>181</sup> The Incubator program provided for additional ownership consolidation, including opportunities to exceed the limits set by Congress in the Telecommunications Act for companies that would be willing to "incubate" a startup through assistance for new entrant radio broadcasters.<sup>182</sup> Under the Incubator program, existing operators would provide a range of financial, operational, and technical guidance to new entities and in return, would be granted a waiver of the existing ownership limits which could be applied to station acquisitions in other media markets.<sup>183</sup> The Incubator program was released in August 2018 just ahead of the Third Circuit's order to the FCC to respond to the challenges to the 2016 and 2017 decisions.<sup>184</sup>

The program we implement today will apply in the radio market, as radio has traditionally been the more accessible entry point for new entrants and small businesses seeking to enter the broadcasting industry, and a waiver of the local radio rules provides an appropriate reward for incubation. Owning and operating a radio station requires a lower capital investment and less technical expertise than owning and operating a television station, and it also requires less overhead to operate. In addition, we believe that the [FCC]'s existing ownership limitations on local radio markets provide a sufficient incentive for incumbent broadcasters to participate in an incubator program with the promise of obtaining a waiver to acquire an additional station in a market.<sup>185</sup>

To be eligible to participate in the "Incubator" program, an entity was required to meet two criteria. First, eligibility was tied to an update of the FCC's entrant bidding credit standard.<sup>186</sup> To meet this new standard, the incubating entity could not own or have an attributable interest in more than

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180. *See id.* at para. 7 (noting the Prometheus Radio Project line of cases involve, "various diversity-related decisions, certain media ownership rules and the decision not to attribute SSAs" without mentioning the majority's remand on a functional minority ownership rule).

181. *See id.* at para. 126.

182. *See id.* at para 121.

183. *See id.* at paras. 121-45.

184. Rules & Pol'ys to Promote New Entry & Ownership Diversity in the Broad. Servs., *Report and Order*, 33 FCC Rcd 7911 (2018).

185. *Id.* at para. 7.

186. *See Prometheus IV*, *supra* note 2, at 576.

three full-service AM or FM radio stations, and it could not have any attributable interest in any broadcast television stations.<sup>187</sup>

The second requirement for an “Incubator” designation required the entity to meet the criteria for the FCC’s 2007 and 2016 Eligible Entity proposals, despite the Third Circuit’s explicit remand of that designation in *Prometheus II*.<sup>188</sup> Notably, both the FCC’s August 2016 Second Report and Order<sup>189</sup> and the November 2017 proposal for the “Incubator” program<sup>190</sup> used the exact same language and criteria first proposed by the FCC in 2007.<sup>191</sup>

Beyond the potential issue in recycling the already remanded Eligible Entity designation, the FCC’s new “Incubator” proposal included two significant and potentially fatal omissions.<sup>192</sup> The FCC made no allocation of additional spectrum for more radio stations, nor did the agency mandate license transfers.<sup>193</sup> As a result, the Incubator program would require that existing radio stations be “donated” from their current owners.<sup>194</sup> Second, and perhaps more importantly, the FCC’s Incubator proposal did not resolve the central dilemma of minority ownership policy: the need to explain how the agency would ensure new start-ups end up in the hands of underrepresented groups like minorities and women.<sup>195</sup>

A consolidated challenge to all of the 2016, 2017, and 2018 Orders on media ownership returned to the Third Circuit for oral arguments in June of 2019. During oral arguments, the panel again appeared skeptical of the FCC’s decision making. One of the attorneys representing a group of the deregulatory petitioners even used her available time to argue for limiting the scope of a potential remand rather than supporting the FCC’s proposals.<sup>196</sup> In late September of 2019, the Third Circuit handed down the fourth *Prometheus*

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187. *Id.*

188. *Prometheus III*, *supra* note 2, at 454.

189. *2016 Second Report and Order*, *supra* note 12.

190. *2017 Ownership NPRM*, *supra* note 30, at para. 121.

191. *2007 Minority Ownership Order*, *supra* note 137, at para. 68.

192. *See 2017 Ownership NPRM*, *supra* note 30, at paras. 121-45.

193. *See id.*

194. *See id.*

195. The SDB standard is based on the definition employed by the SBA. To qualify for this program, a small business must be at least 51 percent owned and controlled by a socially and economically disadvantaged individual or individuals. *See Small Disadvantaged Businesses*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/contracting/government-contracting-programs/small-disadvantaged-businesses> [<https://perma.cc/65CY-KCSZ>].

196. Oral Argument at 16:45, 37:19, 1:05:25, *Prometheus IV*, *supra* note 2 (Nos. 17-1107 17-1109 17-1110, 17-1111 18-1092 18-1669 18-1670 18-1671 18-2943 & 18-3335) <https://www2.ca3.uscourts.gov/oralargument/audio/17-1107PrometheusRadioProjectv.FCC,etal.mp3>.

decision. In another 2-1 decision penned by Judge Ambro, the panel undermined the FCC's regulatory decisions on media ownership for the entire period between 2011 to 2019 including the 2016 Report and Order, the 2017 Order on Reconsideration, and the 2018 Incubator program.<sup>197</sup>

Here we are again. After our last encounter with the periodic review by the [FCC] of its broadcast ownership rules and diversity initiatives, the [FCC] has taken a series of actions that, cumulatively, have substantially changed its approach to regulation of broadcast media ownership. First, it issued an order that retained almost all of its existing rules in their current form, effectively abandoning its long-running efforts to change those rules going back to the first round of this litigation. Then it changed course, granting petitions for rehearing and repealing or otherwise scaling back most of those same rules. It also created a new "incubator" program designed to help new entrants into the broadcast industry. The [FCC], in short, has been busy.<sup>198</sup>

The majority ruled the FCC had still failed to resolve the two core issues it had remanded to the agency in the previous cases: the need to provide empirical evidence to support a rational policy decision and propose a policy that would increase ownership by women and minorities.

We do . . . agree with the last group of petitioners, who argue that the [FCC] did not adequately consider the effect its sweeping rule changes will have on ownership of broadcast media by women and racial minorities. Although it did ostensibly comply with our prior requirement to consider this issue on remand, its analysis is so insubstantial that we cannot say it provides a reliable foundation for the [FCC's] conclusions. Accordingly, we vacate and remand the bulk of its actions in this area over the last three years.<sup>199</sup>

Judge Ambro's decisions argued that by any rational analysis, the FCC's effort to support its choices was inadequate.<sup>200</sup> The majority suggested the FCC's decisions would not stand even if they were provided a more deferential review.<sup>201</sup> Most importantly, the decision in *Prometheus IV* suggests that the FCC had failed to even attempt to argue that it followed the Third Circuit's

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197. See *Prometheus IV*, *supra* note 2, at 589 ("We do conclude... that the [FCC] has not shown yet that it adequately considered the effect its actions since *Prometheus III* will have on diversity in broadcast media ownership. We therefore vacate and remand the Reconsideration and Incubator Orders in their entirety, as well as the "eligible entity" definition from the 2016 Report & Order").

198. See *id.* at 572-73.

199. See *id.* at 573.

200. See *id.*

201. See *id.* at 584.

previous instructions.<sup>202</sup> Judge Ambro's decision vacated and remanded the 2017 Reconsideration Order and the incubator program to the FCC. It also vacated and remanded the definition of "eligible entities" in the 2016 Report and Order<sup>203</sup> while retaining jurisdiction over the remanded issues and all other petitions for review.<sup>204</sup>

The only 'consideration' the FCC gave to the question of how its rules would affect female ownership was the conclusion there would be no effect. That was not sufficient, and this alone is enough to justify remand. . . . Even just focusing on the evidence with regard to ownership by racial minorities, however, the FCC's analysis is so insubstantial that it would receive a failing grade in any introductory statistics class.<sup>205</sup>

The FCC and the National Association of Broadcasters (NAB) each requested a rehearing and en banc review on November 7, 2019.<sup>206</sup> Less than two weeks later, on November 20, 2019, Judge Ambro authored another decision denying a review by the full panel.<sup>207</sup> On November 29, 2019, the panel issued a mandate formally implementing the remand.<sup>208</sup> On December 20, 2019, the FCC's Media Bureau responded to the mandate with an order

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202. *Id.* at 585 ("Problems abound with the FCC's analysis. Most glaring is that, although we instructed it to consider the effect of any rule changes on female as well as minority ownership, the [FCC] cited no evidence whatsoever regarding gender diversity. It does not contest this.").

203. *Id.* at 587-88.

204. *Id.* ("Accordingly, we vacate the Reconsideration Order and the Incubator Order in their entirety, as well as the 'eligible entity' definition from the 2016 Report & Order. On remand the [FCC] must ascertain on record evidence the likely effect of any rule changes it proposes and whatever 'eligible entity' definition it adopts on ownership by women and minorities, whether through new empirical research or an in-depth theoretical analysis. If it finds that a proposed rule change would likely have an adverse effect on ownership diversity but nonetheless believes that rule in the public interest all things considered, it must say so and explain its reasoning. If it finds that its proposed definition for eligible entities will not meaningfully advance ownership diversity, it must explain why it could not adopt an alternate definition that would do so. Once again we do not prejudge the outcome of any of this, but the [FCC] must provide a substantial basis and justification for its actions whatever it ultimately decides.").

205. *Id.* at 585-86.

206. Petition of FCC and United States of America for Rehearing en banc at 7-8, Prometheus Radio Project v. FCC, Nos. 17-1107 17-1109 17-1110, 17-1111 18-1092 18-1669 18-1670 18-1671 18-2943 & 18-3335 (3d Cir. Nov. 7, 2019); Petition for Rehearing of Industry Intervenors in Support of Respondents, Prometheus Radio Project v. FCC, No. 003113399507 (3d Cir. Nov. 7, 2019).

207. Opinion of the Court, Prometheus Radio Project v. FCC, No. 03113354897 (3d Cir. Sept. 23, 2019).

208. Amended Judgment, Prometheus Radio Project v. FCC, No. 003113419677 (3d Cir. Nov. 29, 2019).

which concluded the 2014 Quadrennial Review, the 2010 Quadrennial Review, and the Incubator Program.<sup>209</sup> The Media Bureau's Order re-implemented the long-standing newspaper-broadcast cross-ownership ban, radio-television cross-ownership rule, local television ownership rule, local radio ownership rule, and television JSA attribution rules.<sup>210</sup> The FCC marked the 2017 Order on Reconsideration and the incubator program as repealed.<sup>211</sup> Finally, the 2016 Order's reinstatement of the eligible entity designation was also repealed in line with the Third Circuit's remand in *Prometheus IV*,<sup>212</sup> functionally leaving most media ownership rules where they have been since the decision in *Prometheus I* in 2004, and arguably since the implementation of the Telecommunications Act of 1996.

After parallel requests for review were filed by the FCC and the industry petitioners, the Supreme Court granted certiorari and heard oral arguments on the last day of Ajit Pai's chairmanship of the agency, January 19, 2021. At oral arguments, there were functionally three sides: the agency, the industry petitioners led by the NAB, and the citizen petitioners, functionally led by Prometheus.<sup>213</sup>

The FCC argued for relief from the long process and from lengthy obligations from the standing remands from the Third Circuit.<sup>214</sup> The industry petitioners made a more direct argument, proposing that the Third Circuit had replaced its own judgement for that of the agency.<sup>215</sup> The citizen petitioner group built its case primarily on the premise that the agency's lack of evidence was a long standing procedural problem.<sup>216</sup> Of the three sides, the arguments for and against the inclusion of minority ownership only played a significant role in the industry petitioner arguments that minority ownership concerns were not part of the statutory mandates of section 202(h).<sup>217</sup>

A unanimous Court released a narrow opinion written by Justice Kavanaugh, stating that perfect empirical or statistical data to support an

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209. 2010 Quadrennial Reg. Rev.– Rev. of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996, *Notice of Inquiry*, 25 FCC Rcd 6086 (2010); 2007 *Minority Ownership Order*, *supra* note 137; Rules and Policies Concerning Attribution of Joint Sales Agreements In Local TV Markets, *Order*, 19 FCC Rcd 18166 (2004); Rules and Policies To Promote New Entry and Ownership Diversity in the Broadcasting Services, 83 Fed. Reg. 43,773, 43,774 (Aug. 28, 2018).

210. *See id.*

211. *See id.*

212. *Id.*

213. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 n.3 (2021).

214. *Id.* at 1154.

215. *Id.* at 1155.

216. *Id.*

217. *Id.* at 1156.

agency's decision making is unusual in the first place. Justice Kavanaugh's opinion argued that the record, or rather the sparse record on minority and female ownership, meant that the FCC's inability to meet the Third Circuit's remands on the issue did not fall outside the zone of reasonableness for the purposes of the APA.<sup>218</sup>

Pointing out that the FCC had attempted to explore the impacts on minority and female ownership, even seeking public comment on it during multiple 202(h) review processes, Justice Kavanaugh supported the agency's 2017 conclusion that changes to the rules were not likely to harm minority or female ownership.<sup>219</sup> Going further, the decision argues that the Prometheus Challenge to the FCC's 2017 Reconsideration Order targeted the FCC's assessment that altering the ownership rules was not likely to harm minority and female ownership rather than dispute the FCC's conclusion that the existing rules no longer serve the agency's public interest goals of competition, localism, and viewpoint diversity.<sup>220</sup>

Importantly, the court did not resolve an important, and lingering dispute throughout the process: what elements must be included in the review processes mandated by section 202(h). The decision's narrow holding that Third Circuit's judgment should be reversed was only completed by applying ordinary principles of arbitrary and capricious review. Although the agency, the industry petitioners, and the Prometheus-led citizen petitioner group each sought guidance on this unresolved issue from the Third Circuit's remands, in footnote 3, the decision stated:

We need not reach the industry petitioners' alternative argument that the text of Section 202(h) does not authorize (or at least does not require) the FCC to consider minority and female ownership when the Commission conducts its quadrennial reviews. We also need not consider the industry petitioners' related argument that the FCC, in its Section 202(h) review of an ownership rule, may not consider minority and female ownership unless promoting minority and female ownership was part of the FCC's original basis for that ownership rule.<sup>221</sup>

In his concurring opinion, Justice Thomas argued that the FCC has never used its ownership rules to foster ownership diversity.<sup>222</sup> While Justice Thomas's opinion uses some selective quotes to support his contention, the

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218. *Id.* at 1160.

219. *Id.* at 1157.

220. *Id.* at 1160.

221. *Id.* at 1160 n.3.

222. *Id.* at 1162.

FCC has built media ownership around a joint policy implementation on a relationship and diversity as far back as 1975.<sup>223</sup>

Justice Thomas also suggests that the FCC has been focused on consumers rather than on producers since the creation of the agency.<sup>224</sup> While this was formerly true, the FCC expressly changed focus during the Mark Fowler-led deregulation era in the 1980's, who has argued in multiple cases that benefits to the ownership of stations, like economy of scale, will in turn lead to benefits for the consumer or listener. Justice Thomas's opinion borrows from an FCC opinion arguing that the agency has clearly stated "it would be inappropriate to retain multiple ownership regulations for the sole purpose of promoting minority ownership" before concluding with advice that the agency was not under further obligation to consider ownership by women or minorities in future reviews.<sup>225</sup>

Taken as a whole, the decision in *FCC v. Prometheus Radio Project* doesn't address or resolve the minority ownership issue. Instead, Justice Kavanaugh argues that that the 2017 decision to remove cross ownership rules was not arbitrary or capricious, and moving forward, the agency can employ its own judgement in future reviews mandated by section 202(h).<sup>226</sup> The decision does not resolve the standing issue concerning how women and people of color continue to be underrepresented and in control of just a small fraction of broadcast outlets. Both Justice Kavanaugh and Justice Thomas failed to recognize that it is impossible to achieve viewpoint diversity and serve the public if the longstanding imbalance in ownership persists.

There is also the reality that by taking a narrow approach, and focusing only on the FCC's 2017 action, the decision leaves the FCC in a bit of a time crunch. Under section 202(h), the agency must complete an ownership review originally launched in 2018 during the calendar year of 2021 ahead of beginning a new review process scheduled and required for 2022. If the FCC continues to focus on the public interest goals through competition, localism, and viewpoint diversity, more data will be needed to demonstrate the link between ownership and diversity of content, and to provide the agency a structural model for moving forward.

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223. Multiple Ownership of Standard, FM, and TV Broad. Stations, *Second Report and Order*, 50 F.C.C. 2d 1046, 1074 (1975), *reconsidered* 53 FCC 2d 589 (1975), *aff'd sub nom.* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775 (1978).

224. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1123, 1162-63 (2021).

225. *Id.* at 1163.

226. *Id.* at 1159.

## VI. MINORITY OWNERSHIP AND THE DIVERSITY “NEXUS”: WHAT DOES THE EMPIRICAL RESEARCH SAY?

At least part of the FCC’s struggle to resolve minority ownership policy can be explained simply: like much of the FCC’s flawed approach to media ownership regulation since the late 1980’s, quality empirical evidence to support a minority ownership policy has been in short supply.<sup>227</sup> Researchers using the FCC’s ownership data have suggested that the FCC’s data on minority and female ownership “is extremely crude and subject to a large enough degree of measurement error to render it essentially useless for any serious analysis.”<sup>228</sup>

Although the NTIA was heavily involved in assessing minority ownership after the implementation of the Telecommunications Act, the data produced was focused entirely on racial designations and did not include assessments of ownership by women.<sup>229</sup> The first assessment of ownership that included gender was a study included by the FCC in its 2006 Media Ownership Rulemaking Inquiry. The research explored the quantity of minority and female ownership of traditional media outlets (broadcast radio and television, as well as newspapers).<sup>230</sup> Relying on the FCC’s own ownership data for the years between 2002 and 2005, minorities, as a group, never reach 4% combined ownership of broadcast television and radio stations.<sup>231</sup> The authors concluded that minorities and females were both “clearly underrepresented,” in comparison to their populations.<sup>232</sup>

By any measure, minority ownership has long represented a small percentage of the overall ownership of broadcast stations across the United States, and, problematically, the changes in ownership structures which followed implementation of the 1996 Telecommunications Act compounded

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227. Adam Candeub, *Media Ownership Regulation, the First Amendment, and Democracy’s Future*, 41 U.C. DAVIS L. REV. 1547, 1600 (2008).

228. ARIE BERESTEANU & PAUL B. ELLICKSON, *MINORITY AND FEMALE OWNERSHIP IN MEDIA ENTERPRISES 2* (2007).

229. *See* NAT’L TELECOMMS. & INFO. ADMIN, U.S. DEP’T OF COM., *CHANGES, CHALLENGES, AND CHARTING NEW COURSES: MINORITY COMMERCIAL BROADCAST OWNERSHIP IN THE UNITED STATES* 36-46, 50, 54, 56-57 (2000), <https://www.ntia.doc.gov/files/ntia/publications/mtdpreportv2.pdf> [<https://perma.cc/ES6L-ZWE6>].

230. BERESTEANU & ELLICKSON, *supra* note 228, at 2.

231. The FCC relies on self-reported data for ownership assessments, collected on a biannual basis using forms 323 and 323E. *See generally* Promoting Diversification of Ownership in the Broad. Servs., *Report and Order, Second Report and Order, and Order on Reconsideration*, 31 FCC Rcd 398, paras. 47-50 (2016).

232. BERESTEANU & ELLICKSON, *supra* note 228, at 2.



an existing market regulation failure.<sup>233</sup> Ownership data collected by communication policy scholars in 2003 painted a much bleaker picture of minority ownership after the first major round of ownership mergers.<sup>234</sup> Minority ownership of radio stations was reported to make up 335 of the 13,499 (2.48%) radio stations on the air.<sup>235</sup> Of the 1,748 commercial and educational television stations on the air, only 15 claimed to be owned by racial minorities (0.8%).<sup>236</sup> The FCC compiled similar data from ownership reports filed in 2004 and 2005. Of the 12,844 stations which filed FCC form 323 or 323-E,<sup>237</sup> only 460 broadcast stations (3.6%) met the Commission's defined criteria for minority ownership.<sup>238</sup>

A decade later, in 2013, the FCC's assessments of minority ownership also provided a grim evaluation of media ownership policy.<sup>239</sup> The data from the 2013 Form 323 filings indicated racial minorities collectively or individually held a majority of the voting interests in forty-one (3%) of full power commercial television stations, 225 (6%) of commercial AM radio stations, and 169 (3%) commercial FM radio stations.<sup>240</sup> The FCC's 2013 data assessing ownership by gender was equally problematic. Women collectively or individually held a majority of the voting interests in just eighty-seven (6.3%) of full power commercial television stations, 310 (8.3%) of commercial AM radio stations, and 383 (6.7%) commercial FM radio stations.<sup>241</sup>

The FCC's 2015 ownership report continued to demonstrate low levels of minority ownership.<sup>242</sup> Racial minorities collectively or individually held a majority of the voting interests in 402 broadcast stations, consisting of thirty-

233. Increasingly, scholars are arguing that in place of a full regulation scheme, selective use of regulations should be used to fix outcome gaps. *See* VICTOR PICKARD, *AMERICA'S BATTLE FOR MEDIA DEMOCRACY: THE TRIUMPH OF CORPORATE LIBERTARIANISM & THE FUTURE OF MEDIA REFORM* 221-23 (2015).

234. *See* BERESTEANU & ELICKSON, *supra* note 228, at 6-7.

235. *Id.*

236. *Id.*

237. FCC Form 323 Ownership Report for Commercial Broadcast Stations is an ownership report filed by stations every two years. FCC Form 323-E is filed by educational and noncommercial stations. Form 323-E does not collect information on Minority ownership. *See* 2017 323 REPORT, *supra* note 3.

238. FCC OWNERSHIP MINORITY REPORT FOR 2004-2005 179 (2006), [https://www.fcc.gov/ownership/owner\\_minor\\_2004-2005.pdf](https://www.fcc.gov/ownership/owner_minor_2004-2005.pdf) [<https://perma.cc/ER9Z-QU2K>].

239. 2014 Quadrennial Reg. Rev. – Rev. of the Comm'n's Broad. Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommns. Act of 1996, *Report on Ownership of Commercial Broadcast Stations*, 29 FCC Rcd 7835 (2014).

240. *Id.* at 7838.

241. *Id.* at 7837-38.

242. 2017 323 REPORT, *supra* note 3, at 3-5.

six full power commercial television stations (2.6%); 204 commercial AM radio stations (5.8%) and 128 commercial FM radio stations (2.3%).<sup>243</sup>

The FCC's 2017 data on minority ownership, released by the agency in 2020 but ahead of the Supreme Court's grant to hear the FCC and NAB challenges to *Prometheus IV*, continued to illustrate the ongoing problem.<sup>244</sup> Both women and minorities continued to be drastically underrepresented in terms of media control. Women held a majority of the voting interests in 73 of 1,368 full-power commercial television stations (5.3%); 19 of 330 Class A television stations (5.8%); 76 of 1,025 low-power television stations (7.4%); 316 of 3,407 commercial AM radio stations (9.3%); and 390 of 5,399 commercial FM radio stations (7.2%).<sup>245</sup> Racial minorities collectively or individually held a majority of the voting interests in only 26 of 1,368 full power commercial television stations (1.9%); 8 of 330 Class A television stations (2.4%); 21 of 1,025 low-power television stations (2.0%); 202 of 3,407 commercial AM radio stations (5.9%); and 159 of 5,399 commercial FM radio stations (2.9%), for a total of 416 of 11,529 (3.6%) of all commercial broadcast stations.

With the recognition that minority-focused or formatted content does not come from minority ownership alone, other assessments of minority access have examined broadcast station content directly. Todd Chambers explored the ownership and programming patterns of Spanish language radio stations in the fifty metropolitan areas with the highest populations of Hispanics.<sup>246</sup> Using industry definitions for Hispanic formats to identify stations in each individual market, Chambers concluded that just over 20% (314 of 1,545) of the stations in these markets carried a Spanish language format.<sup>247</sup>

The data also indicated that larger radio companies dominated the control of stations within these markets, with then Clear Channel Communications and Infinity controlling almost a third of all the stations in the markets at the time.<sup>248</sup> According to Chambers, HBC (fifty of sixty-one stations) and Entravision (forty-one of fifty-five stations) were the radio ownership groups which provided the most service to Hispanic audiences.<sup>249</sup> The results indicated that large radio groups had not diversified their holdings to include stations carrying primarily minority-targeted content, as the FCC had theorized

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243. *Id.*

244. FOURTH REPORT ON OWNERSHIP, *supra* note 3, at 4-7.

245. *See id.* at 4-5.

246. Todd Chambers, *The State of Spanish-Language Radio*, 13 J. RADIO STUD. 34, 34 (2006).

247. *Id.* at 42.

248. *Id.* at 41-42.

249. *Id.*

would occur as a result of internal competition between co-owned stations.<sup>250</sup> Instead, mid-size companies, also owned and operated by minorities, were the media organizations providing a large quantity of the minority content to audiences.<sup>251</sup>

Another study designed to assess the structures providing minority content used industry data to examine 1,532 of the commercial radio stations operating in the top fifty media markets.<sup>252</sup> Sixty-eight different owners were operating 225 stations with minority formats across forty-two of the top fifty radio markets.<sup>253</sup> The majority of owners operating a minority formatted station in the Top 50 markets were smaller media operations with six or fewer stations, and more than half of these operated only a single station.<sup>254</sup>

Collectively, content focused research supported the FCC's contention in 2007 that an increase in content diversity is more likely to come from smaller broadcast operations that have local ties to a community.<sup>255</sup> While data strongly suggested that the Commission's focus on smaller broadcasters as way to increase content diversity in the Eligible Entity program represented a sound premise, these findings were tied to the top fifty markets.<sup>256</sup> However, when combined with social science research that indicates that minorities are the group most likely to program formats targeted at specific minority groups,<sup>257</sup> a model ownership structure for the production of diverse content appears to be a small owner with a woman or minority as the lead interest in the operation.

The methods used to achieve more diversity have, at times, been arguably counterproductive.<sup>258</sup> The "Incubator" program launched by the FCC in August of 2018, offered already existing media outlets an opportunity to expand beyond the local ownership limits defined by the Telecommunications Act of 1996 in return for fostering start-up operations.<sup>259</sup> In practical terms, this means that FCC's most recent plan for minority ownership policy was

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250. *Id.* at 39.

251. *Id.*

252. Terry, *supra* note 37, at 32.

253. *Id.* at 24-27.

254. *Id.* at 25-28.

255. *Id.*

256. *Id.*

257. See Laurie Mason, Christine M. Bachen & Stephanie L. Craft, *Support for FCC Minority Ownership Policy: How Broadcast Station Owner Race or Ethnicity Affects News and Public Affairs Programming Diversity*, 6 COMM. L. & POLY 37, 71 (2001).

258. See David Pritchard et al., *One Owner, One Voice? Testing a Central Premise of Newspaper/Broadcast Cross-Ownership Policy*, 13 COMM. L. & POLY 1 (2008).

259. See Terry, *supra* note 4, at 406.

based on an empirically unsupportable conceptual premise that more diversity will be created through additional ownership consolidation.<sup>260</sup>

## VII. RETHINKING THE ROLE OF STRICT SCRUTINY

In considering the role of strict scrutiny, one must start with a simple premise: strict scrutiny of government action exists to protect liberties which merit special protections.<sup>261</sup> By placing government actions under review focused on the necessity of the action, potential harm is avoided. Strict scrutiny also serves as a check on the government's power by ensuring that the action taken is not over or under inclusive as it relates to the need.<sup>262</sup>

To be necessary under strict scrutiny, government action must address an actual problem that has not been dealt with and for which alternative, less restrictive, actions to resolve that problem do not exist.<sup>263</sup> Proper application of the strict scrutiny standard requires that the government's solution to the problem represents an important but also logical objective and that the action taken will achieve the objective.<sup>264</sup>

Although many of the agency's legal and policy setbacks can be tied directly to the FCC's overriding regulatory obsession with competition implemented through loosening structural regulation limits and providing mechanisms that incentivize repurposing content for use on more than one station, one cannot not simply ignore the roadblock installed by *Adarand* and the mandate for a strict scrutiny review. The preference programs upheld in *Metro* and then undermined by *Adarand*, were justified not only on the benefits of the program, but on the potential benefits additional viewpoint diversity offers at a societal level. Put another way, if a minority ownership policy must meet strict scrutiny's traditional compelling government interest standard, the assessment of the benefit should not be on the individuals that could obtain a station license, but rather on the citizens in the media market who will have access to additional diversity in their local programming options.<sup>265</sup>

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260. *Id.* at 406, 429, 432.

261. Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 294-95 (2015).

262. *Id.* at 291-294.

263. *Id.* at 299-301.

264. *Id.* at 306.

265. This suggestion represents the larger point of this article, that the benefits of increasing diversity of content by increasing the diversity of ownership, especially by increasing the number of racial and ethnic minorities and women who own stations, creates a societal benefit for all, not just the new owners. If the FCC desires to act to promote diversity, it must take the focus off the benefits to the owners and refocus on the larger benefits to the public.

In terms of the narrow tailoring requirement, any program that provides preferential treatment must eradicate a form of prior discrimination.<sup>266</sup> There can be few arguments that the policies upheld in *Metro* were designed to (partially) correct a prior discrimination, specifically, the discriminatory pattern of awarding of 90% of all broadcast licenses to white, male candidates.

In contemporary terms, there can be no question that the FCC's failure to address the four remands related to minority ownership from the *Prometheus* cases functionally extended the existing discrimination which resulted in underrepresentation. When historically marginalized groups are denied access to broadcast ownership, their viewpoints are not included in public discourse. In a democratic society, this is harmful.

### VIII. A MODEST AND SIMPLE PROPOSAL:

There is no need to bend the legal standards of review to fit this problem, and arguably the deference the FCC was provided by the Supreme Court's opinion in *FCC v. Prometheus Radio Project* makes this proposal even easier to implement. There is a substantial quantity of empirical support for the premise that increasing representation by minorities and women will produce an increase in diversity in programming options as well as viewpoints.<sup>267</sup> Likewise, there is also support for the premise that smaller, locally based broadcast ownership structures are most likely to succeed with minority focused programming options.<sup>268</sup> The solutions are clear, the FCC just needs to choose to pursue them.

Developing a minority ownership policy to its logical conclusion is a straightforward exercise. The FCC must develop and implement a minority ownership policy that puts broadcast stations in the hands of (in-market) locally-based owners who are women and/or people of color. By focusing on just two aspects of the media ownership equation, localism and diversity, competition is likely to increase as new entrants are created. There is substantial empirical evidence available that would justify this approach, and unless the FCC intends to lose in court again, this path provides an answer ahead of the next round of media ownership rule review.<sup>269</sup>

Concerns about the costs to the individual in programs which provide preferences are not without merit, and the authors do not intend to make light of them. However, in the context of media ownership policy, any continuing

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266. Spece, Jr. & Yokum, *supra* note 261, at 318-332.

267. See Terry, *supra* note 37; Terry, *supra* note 4.

268. Terry & Carlson, *supra* note 4, at 407-410.

269. See *Prometheus I*, *supra* note 2, at 435.

policy stalemate benefits no one. Citizens go without important viewpoints and information sources while the media industry is trapped by the agency's failure to develop a functional minority ownership program.

The narrow decision in *FCC v. Prometheus* has not changed the underlying metrics or obstacles on media ownership policy. The agency has a pair of reviews to complete, and regardless of the outcomes of those reviews, the FCC's decisions in those proceedings is certain to be challenged in court. If heading that way anyway, the agency should choose a different approach.