Nos. 19-1231, 19-1241

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,

v.

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

NATIONAL ASSOCIATION OF BROADCASTERS, *ET AL.*,
Petitioners,

v.

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

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitution

Statutes

Rules

Other Authorities

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Under Supreme Court Rule 37.3, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioners.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas are the separation of powers and constitutionally limited government. AFPF also believes that free and fair competition fosters technological innovation, which, in turn, benefits consumers and society as a whole. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF has a particular interest in this case because it believes that the Third Circuit panel has erroneously frustrated the FCC's efforts to honor and fulfill Congress's policy decisions, as set forth in the plain language of Section 202(h) of the Telecommunications Act of 1996, to promote competition and economic efficiency in the marketplace of ideas by removing wrongful regulatory

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person other than *amicus* made any monetary contributions intended to fund the preparation or submission of this brief.

barriers.[2] AFPF is concerned that the panel's seventeen-year freeze on the deregulatory process envisioned by Section 202(h) hamstrings competition in light of dramatic changes in technology and innovation over that time period.

More broadly, AFPF writes separately to urge this Court to issue a narrow decision interpreting Section 202(h). At its core, this case presents a familiar question: which branch of government is responsible for making public policy and how? The answer, of course, is Congress through duly enacted legislation, as Article I makes clear. But this case raises a familiar Goldilocks problem. Too often, federal agencies overstep their authority by substituting their policy preferences for those mandated by Congress in the law. Here, however, something even more egregious occurred: a 2-1 *judicial panel* erroneously imported atextual policy considerations into the text of the statute. Neither the FCC nor Article III courts should be in the business of substituting their policy preferences for those of Congress, as set forth in the text of statutes.

While AFPF believes the divided panel's mistaken venture into judicial policymaking here is in error, it also rejects the FCC's misguided request for extraconstitutional "deference" under the judicially

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[2] AFPF believes that administrative deference doctrines are inconsistent with the U.S. Constitution. Accordingly, AFPF respectfully parts ways with the FCC insofar as the agency relies on *Chevron* deference. AFPF writes separately to urge this Court to reject the panel's misguided effort to rewrite Section 202(h) on narrow statutory interpretation grounds. AFPF takes no position here as to the constitutional status of independent agencies.

created *Chevron* regime. The FCC itself has been at the heart of several controversial administrative agency deference decisions that have had problematic real-world impacts, and which appear to be, at the least, in tension with the U.S. Constitution and the separation of powers. This case need not, and should not, be the next *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), or *City of Arlington v. FCC*, 569 U.S. 290 (2013). And any broader ruling invites mischief.

AFPF's concerns are not speculative. Indeed, the FCC has recently indicated that it believes itself (and not Article III courts) to be the "authoritative interpreter" of Section 230, to the extent it is "ambiguous," to expand the scope of its jurisdiction. The FCC claims this power based on a toxic mixture of *Brand X* and *City of Arlington*. While the proper interpretation of Section 230 is beyond the scope of this case, AFPF wishes to alert this Court to potential collision course the FCC may be on with the U.S. Constitution and separation of powers.

SUMMARY OF ARGUMENT

The Third Circuit has repeatedly frustrated the FCC's attempts to follow Congress's clear commands, substituting its views for those of the legislature. Enough is enough. Under the separation of powers, federal courts, no less than federal agencies, are constrained by and must honor Congress's intent, as expressed in the text of federal statutes. That did not happen here. Instead, the 2-1 Third Circuit panel appears to have misconstrued the statute to judicially import atextual public policy considerations at odds with Congress's policy decisions, as set forth in

Section 202(h)'s text and the 1996 Telecommunications Act's structure, read as a whole.

At bottom, the core issue this case presents is not whether certain FCC ownership rules are sound public policy or whether Congress's deregulatory mandate was a good idea. Nor does this case necessarily implicate the *Chevron* regime, which itself is of dubious constitutional provenance. Instead, this case is about which branch of government is constitutionally tasked with making policy decisions and the process by which it should make those policy decisions. Under Article I of the U.S. Constitution, that is Congress. And under Article III, the federal judiciary is tasked with *interpreting* the text of Congress's legislative handiwork, however flawed or imperfect, in the context of concrete cases and controversies. But tinkering with the public policy decisions Congress has made, as the 2-1 panel has done, exceeds the judiciary's authority and crosses the line into a legislative function.

Here, Congress, by statute, mandated an iterative, ongoing *de*regulatory process. Section 202(h) requires that the FCC "shall" review its ownership rules every few years to "determine whether any of such rules are *necessary* in the public interest as the result of competition," and to "repeal or modify any regulation it determines to be no longer in the public interest." 47 U.S.C. § 303 note. The plain language of Section 202(h) thus establishes a deregulatory presumption through which the FCC's actions should be viewed. And it contemplates that, at the least, the FCC will make changes to those rules every few years to account for changing technology and circumstances. That is the purpose of Section 202(h), which reflects

Congress's reality-driven decision in the 1996 Telecommunications Act to require the FCC to regularly update its rules with an eye toward deregulation, unless the *proponents* of the restrictions could meet *their* burden of showing restrictions were warranted, which they have not even attempted to do.

Yet two judges from the same panel have repeatedly frustrated Congress's clear intent and public policy decision that the FCC's rules must be regularly updated with a deregulatory tilt now for a period of *seventeen* years. Indeed, in *2004*, Chief Judge Scirica observed that the panel majority "substituted its own policy judgment for that of the Federal Communications Commission and upset the ongoing review of broadcast media regulation mandated by Congress in the Telecommunications Act of 1996." *Prometheus Radio Project v. FCC* (*Prometheus I*), 373 F.3d 372, 435 (3d Cir. 2004) (Scirica, C.J., concurring in part, dissenting in part). It is now 2020. And at least in this case, the more things change the more they stay the same.

Leaving for another day the broader question of appropriate limits on administrative agency authority,[3] federal courts should not be in the business of judicial lawmaking, let alone actively frustrating public policy choices made by Congress in the text of duly enacted federal statutes—and now for nearly two decades. That is not the judicial role. And

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[3] The Constitution vests "all legislative Powers herein granted . . . in a Congress of the United States." *See* U.S. Const. Art. I, § 1. Congress is thus tasked with making policy choices through legislation. *See Baldwin v. United States,* 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from denial of certiorari).

this state of affairs should not be allowed to continue, particularly in such a consequential area.

This Court should reverse the Third Circuit's judicially imposed roadblock to Congress's clear intent on straightforward, narrow statutory interpretation grounds focusing solely on the statutory text. No more, and no less.

ARGUMENT

I. SECTION 202(H)'S TEXT PLACES A THUMB ON THE SCALE IN FAVOR OF FREEDOM.

Congress, at times, statutorily places a thumb on the scale in favor of increasingly stringent standards, obligating agencies to revisit regulations periodically to determine whether to heighten requirements in light of legislatively specified factors. *See, e.g.*, *NRDC v. Abraham,* 355 F.3d 179, 195 (2d Cir. 2004).

Here, however, Congress did the exact opposite, putting its thumb strongly on the scale in favor of *deregulation* over time. Congress is free to make that policy choice, as it did here, making clear that Section 202(h) should generally operate as a downward ratchet against anticompetitive restraints over time. *But cf. Prometheus I*, 373 F.3d at 394 (declining to "accept that the 'repeal or modify in the public interest' instruction must therefore operate only as a one-way ratchet"). Indeed, the plain purpose of Section 202(h) is "to continue the process of deregulation" that "Congress set in motion" through the 1996 Act. *See Fox Television Stations, Inc. v. FCC (Fox I),* 280 F.3d 1027, 1033 (D.C. Cir. 2002), *modified on reh'g* 293 F.3d 537 (D.C. Cir. 2002).

The Third Circuit itself "acknowledge[d] that § 202(h) was enacted in the context of deregulatory amendments (the 1996 Act) to the Communications Act[.]" *Prometheus I*, 373 F.3d at 394. "The 1996 Act contemplated a 'pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector development of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.'" *Id.* at 384 (quoting S. Rep. No. 104-230, at 1–2 (1996)). As Chief Judge Scirica put it, it has a "deregulatory flavor." *Id.* at 443 (Scirica, C.J., dissenting in part, concurring in part). The D.C. Circuit also found "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules." *Fox I*, 280 F.3d at 1048.[4] Indeed, "the mandate of § 202(h) might better be likened to Farragut's order at the battle of Mobile Bay ('Damn the torpedoes! Full speed ahead.')" *Id.* at 1044. Unfortunately, the Third Circuit has re-written Congress's commands here.

Unfortunately, the panel below ignored the plain language of Section 202(h) to substitute its own public policy judgments for those made by Congress, which unambiguously reoriented the FCC in a deregulatory and thus procompetitive direction through the 1996 Telecommunications Act.[5] That was error.

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[4] This portion of the opinion was subsequently removed as unnecessary to the decision. *See Fox Television Stations, Inc. v. FCC (Fox II),* 293 F.3d 537, 540 (D.C. Cir. 2002).

[5] Under Section 202(h), "[t]he 'presumption'. . . is that a regulation will be vacated or modified if it does not continue to

A. The Divided Panel Ignored Section 202(h)'s Plain Language.

Under Section 202(h), every four years the FCC "*shall* review [certain of] its rules" and "*shall* determine whether any of such rules are necessary in the public interest as the result of competition." 47 U.S.C. § 303 note (emphasis added). And the FCC "*shall* repeal or modify any regulation it determines to be no longer in the public interest." *Id.* (emphasis added). These tasks are not optional; instead, Congress decided to continually task the FCC with this deregulatory work.

"The first sign that the statute imposed an obligation is its mandatory language: 'shall.'" *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020) (cleaned up). So too here. Section 202(h)'s "instruction comes in terms of the mandatory 'shall,' which normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). The Third Circuit panel majority has held "Section 202(h) . . . uses unmistakably mandatory language in describing the Commission's obligations." *Prometheus Radio Project v. FCC (Prometheus III)*, 824 F.3d 33, 50 (3d Cir. 2016).

As the language of Section 202(h) makes clear, the 1996 Act compelled a regularly occurring, iterative process to deregulate the telecommunications space

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be in the public interest. This is different from the traditional approach to rule retention, which would counsel for retention of a rule unless there were reasons to change it." *Prometheus I*, 373 F.3d at 443 (Scirica, C.J., dissenting in part, concurring in part).

and promote competition. This was consistent with the practical reality that technology is constantly changing as our society innovates. While Congress left some play in the joints to iron out the details, one thing is clear: Congress wanted changes to the rules to occur every few years—trending toward deregulation—absent a demonstrable reason not to do so. And unlike many statutory schemes, proponents *supporting* the regulatory status quo are the ones who must carry the burden of proving (with evidence) why the old rules should be retained.[6] *See also Prometheus I*, 373 F.3d at 443 (Scirica, C.J., dissenting in part, concurring in part).

"In ascertaining the plain meaning of the statute, the [C]ourt must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier*, 486 U.S. 281, 291 (1988). The 1996 Act's structure and design further confirms that Section 202(h) places Congress's heavy thumb on the scale in favor of regular deregulation. *See Fox I,* 280 F.3d at 1033 (discussing Congress's deregulatory purpose).

Otherwise, why would Congress have enacted Section 202(h) into law? "[W]hether it has merely a 'deregulatory tenor' or rises to the level of a 'deregulatory presumption,' section 202(h) must have

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[6] Section 202(h) "placed the burden of proof on the FCC to defend any media ownership rule it seeks to retain; and . . . set a standard of review that the FCC must meet to satisfy that burden of proof." Peter DiCola, Note, *Choosing Between the Necessity and Public Interest Standards in FCC Review of Media Ownership Rules*, 106 Mich. L. Rev. 101, 104 (2007).

been intended to mean something more than what existing administrative law principles already required." William R. Richardson, Jr., *The FCC's Television Duopoly Rule: Is the Third Time the Charm?*, 15 CommLaw Conspectus 1, 8 (2006). After all, "[w]hen Congress acts to amend a statute," Congress presumably "intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995). And "a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]"*Corley v. United States*, 556 U.S. 303, 314 (2009). Here, the plain language of Section 202(h) shows its intended—mandated—effect required the FCC to change its rules every few years, trending in a deregulatory direction.

Despite all this, the divided panel below has ignored and frustrated Congress's legislative decisions for almost two decades by effectively freezing in place an outdated regulatory regime and the public policies underlying that regime. When Congress enacted Section 202(h), it envisioned the FCC should have implemented several revisions of its rules by now, trending towards a light touch approach. Despite the FCC's best efforts, that hasn't happened. Two judges have wielded enormous and unlawful power, effectively blocking advancement of public policy decisions *Congress*—not the *FCC*—clearly established.

B. This Court Should Not Rely on Any Deference Doctrines.

This case need not, and should not, be resolved through any constitutionally questionable deference

regimes. *See Baldwin v. United States*, 140 S. Ct. 690 (2020) (Thomas, J., dissenting from the denial of certiorari); *Talk Am., Inc. v. Mich. Bell Tel. Co.,* 564 U.S. 50, 67 (2011) (Scalia, J., concurring) ("I join the opinion of the Court. I would reach the same result even without benefit of the rule that we will defer to an agency's interpretation of its own regulations[.]"). As Justice Kavanaugh suggested, "the [*Chevron*] footnote 9 principle," which requires courts to independently use all traditional tools of statutory interpretation, "taken seriously, means that courts will have no reason or basis to put a thumb on the scale in favor of an agency[.]" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2448 (2019) (Kavanaugh, J., concurring).

Instead, this Court should reverse the panel decision below because the two-judge majority has, over the past nearly 20 years, failed in its duty to ensure that Congress's policy choices as set forth in the statute are implemented. That is the error here.

Any attempt to shift blame onto the FCC for its efforts to comply with Section 202(h) is a strawman for the real issue. The FCC has long tried to change its outdated rules. At the least, the FCC's actions in this regard have been in the ballpark of honoring Congress's policy choices. Yet the 2-1 panel's nearly twenty-year crusade of blocking the iterative deregulatory process, however well intentioned, has now ventured far into left field, well beyond the ballpark of Congress's choices.

At the very least, this *fourth* round *should* have alerted the panel to the possibility that its actions (and not the FCC's) were not in accord with what Congress wanted. But the panel below appears to

have mistakenly placed undue weight on atextual policy issues, while ignoring Congress's deregulatory mandate, as set forth in Section 202(h)'s text. This Court should not allow this to stand. Congress, not the judiciary, legislates.

C. Courts May Not Rewrite Statutes for Policy Reasons.

To be sure, Section 202(h) has been subject to extensive criticism by advocates. These advocates believe *Congress* should not have passed Section 202(h) because its plain deregulatory intent does not suit their public policy preferences. *See, e.g.,* Andrew Jay Schwartzman *et al.*, *Section 202(h) of the Telecommunications Act of 1996: Beware of Intended Consequences*, 58 Fed. Comm. L.J. 581, 586 (2006) ("Despite the attempt to deregulate through the back door, it would seem that the courts have resolved ambiguities relating to the interpretation of Section 202(h) in favor of making it a less intrusive provision."). That may or may not be true. But that's for them to take up with Congress, not the courts.

Whether government regulatory mandates relating to media ownership are a wise idea as a matter of policy is not a question our Constitution tasks the federal judiciary with answering. *See also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 352–54 (2014). "Questions like these are appropriately asked by those who write the laws, but not by those who apply

them."[7] *Id.* at 352–53. Conversely, the relevant judicial inquiry is what the statute actually says.

The "proper role of the judiciary . . . [is] to apply, not amend, the work of the People's representatives." *Henson v. Santander Consumer USA Inc.,* 137 S. Ct. 1718, 1726 (2017). "Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law." *Osborn v. President, Dirs. & Co. of Bank,* 22 U.S. (9 Wheat.) 738, 866 (1824) (Marshall, C.J.). A judge "is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness." Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (1921). Instead, it is a judge's "duty to call balls and strikes[.]" *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1724 (2020).

"[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). "If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent." *Lamie v. United States Tr.*, 540 U.S. 526, 542 (2004). It is not for Article III courts to look beyond the statute's text to attempt to divine what Congress

[7] "These are battles that should be fought among the political branches and the industry. Those parties should not seek to amend the statute by appeal to the Judicial Branch." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002).

subjectively intended or must have really meant but did not say in the statute's text.[8]

Instead, courts "are bound to operate within the framework of the words chosen by Congress[.]" *Richards v. United States*, 369 U.S. 1, 10 (1962) (Warren, C.J.). It is not the role of a court to "pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason." *Anderson v. Wilson*, 289 U.S. 20, 27 (1933) (Cardozo, J.); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 588 (2012). And "considerations of policy divorced from the statute's text and purpose c[an] not override its meaning." *United States v. Tohono O'odham Nation*, 563 U.S. 307, 317 (2011).

Here, however, the Third Circuit panel effectively "enlarge[d]" Section 202(h) to add language that it perhaps believed "was omitted, presumably by inadvertence[.]" *Nichols v. United States*, 136 S. Ct. 1113, 1118 (2016) (citation omitted). That was error. "To supply omissions transcends the judicial function." *Id.* (citation omitted); *see also Lamie*, 540 U.S. at 542 ("It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result." (cleaned up)).

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[8] There should be no serious argument that the absurdity doctrine would apply here. *See* Scalia & Garner, *supra*, at 234–39 (discussing limited circumstances absurdity doctrine applies).

II. THE 2-1 PANEL MISAPPLIED THE APA ARBITRARY AND CAPRICIOUS STANDARD.

The 2-1 panel compounded its statutory interpretation errors by effectively rewriting Section 202(h) to also add procedural requirements onto the APA, which it may not do. As a threshold matter, robust application of the arbitrary and capricious standard to agency actions restricting liberty is a good thing. If an administrative agency acts to restrict liberty, impose compliance costs, or deprive businesses and individuals of property or their livelihoods, the agency bears a heavy burden of showing its work, among other requirements. These types of agency decisions should not be based on junk science, unreasonably incomplete data, or policy-driven "expert" conjecture.

But the arbitrary and capricious standard was never intended to prevent federal agencies from removing outdated regulatory restrictions. Nor was it intended to provide a mechanism for judges to frustrate Congress's deregulatory intentions, as expressed in statutes. It would be perverse for a court to foist upon a federal agency some judicially-created duty to conduct research projects *as a condition precedent to lifting restrictions on liberty*—and all at taxpayer expense. *Cf.* Note, *Judicial Review of Administrative Inaction*, 83 Colum. L. Rev. 627, 670 & n.273 (1983) ("Professor, now Judge, Scalia has argued that courts should always give deregulation or the failure to regulate greater deference than is given to agency decisions to regulate."). If one holds the APA does not require federal agencies to perform empirical research as a condition of *restricting* liberties and imposing onerous compliance duties, then surely the

APA cannot be construed to require taxpayer-funded empirical research as a condition of restoring freedom and competition.

Indeed, as Judge Rao of the D.C. Circuit recently explained: "The APA . . . imposes no general obligation on agencies to produce empirical evidence. . . . [A]n agency need not—indeed cannot—base its every action upon empirical data; depending upon the nature of the problem." *Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 516 (D.C. Cir. 2020) (Rao, J.); *see also* Pet. App. 50a & n.2 (Scirica, C.J., concurring in part, dissenting in part) ("To the extent my colleagues require the FCC to conduct empirical analysis on remand, they risk impermissibly adding requirements beyond the APA."). Nor does Section 202(h) impose any such requirements, which would frustrate Congress's clear intent. "[N]either Section 202(h) nor the APA requires the FCC to quantify the future effects of its new rules as a prerequisite to regulatory action." Pet. App. 48a (Scirica, C.J., dissenting in part, concurring in part). Instead, "Congress prescribed an iterative process; the FCC must take a fresh look at its rules every four years." Pet. App. 48a (Scirica, C.J., dissenting in part, concurring in part).

Nonetheless, the panel, in essence, imported an atextual heightened standard of review into the FCC rule review process under the guise of arbitrary and capricious review, shifting the burden onto the FCC to justify easing restrictions. The result of this impossibly high de facto standard is predictable and outcome determinative: the status quo cannot change. That is the exact opposite of what Congress intended. Under Section 202(h), "[t]he FCC must 'repeal or

modify' rules that cease to serve the public interest even when it lacks optimal data." Pet. App. 52a (Scirica, C.J., dissenting in part, concurring in part) (citing Telecommunications Act of 1996, § 202(h)). With its own, judge-made procedural rules, the Third Circuit has now frustrated that imperative for nearly two decades.

III. THE 2-1 PANEL'S FRUSTRATION OF CONGRESS'S TEXTUAL COMMANDS HAS HARMED COMPETITION AND HAMSTRUNG INNOVATION.

The panel has also stymied competition and innovation. "The Telecommunications Act of 1996 mandates that the Federal Communications Commission (FCC) regularly review its broadcast media ownership rules to ensure they remain in step with the demands of a rapidly evolving marketplace." Pet. App. 39a (Scirica, C.J., dissenting in part and concurring in part). "Embodied in Section 202(h) is the imperative that the broadcast ownership rules stay in sync with the media marketplace." Pet. App. 42a (Scirica, C.J., dissenting in part and concurring in part). That has not happened here.

As discussed above, the plain language of Section 202(h) is iterative and deregulatory. By preventing the FCC from carrying out its Section 202(h) duties for almost two decades by freezing the status quo in place, the 2-1 panel mistakenly embarked on a judicial policymaking venture that squarely conflicts with Section 202(h)'s text. This has harmed competition and innovation, as technology continues to rapidly change.

Experience has shown that, at the very least, absent legitimate and demonstrated antitrust concerns not at issue here, media ownership restrictions should not exist. Here, for example, the current media ownership rules that the panel has wrongly locked into place have had the perverse effect of hamstringing traditional media's efforts to adapt in the face of online competition, which did not exist when those rules were first promulgated. That concern is not theoretical, as the International Center for Law and Economics ("ICLE") and others have explained. *See* Br. of ICLE as *Amicus Curiae* in Support of Petitioners, *National Association of Broadcasters et al. v. Prometheus Radio Project et al.*, No. 19-1241, at 3, 5–6, 17–21 (U.S., filed May 22, 2020); Br. of ABC Television Affiliates Association *et al.* in Support of Petitioners, *National Association of Broadcasters et al. v. Prometheus Radio Project et al.*, No. 19-1241 (U.S., filed May 22, 2020).

In today's environment it has become fashionable in many quarters to pin the blame for traditional media's plight on social media's purportedly loose regulatory environment. Not so, and this suggestion should be rejected out of hand. Instead, Congress wanted the FCC to deregulate the traditional media industry, but the divided panel has frustrated this process. The answer to increased online competition with traditional media is not increased regulation of social media. Rather, the solution is maximal deregulation of media ownership, getting government out of the way.

IV. THIS COURT SHOULD REVERSE THE DECISION BELOW ON NARROW STRAIGHTFORWARD STATUTORY INTERPRETATION GROUNDS.

As shown above, the 2-1 panel decision ignored Section 202(h)'s plain language, as well as the structure, context, and purpose of the 1996 Telecommunications Act, when read as a whole. The panel substituted its policy preferences for those mandated by Congress. That should end the matter.

The FCC—and Section 202(h)—is something of a special case, and the issues presented here are unique. Accordingly, this Court should issue a narrow statutory interpretation decision, so as to allow the FCC to comply with its mandatory *de*regulatory duties in furtherance of promoting competition, without undue interference from the divided panel.

This Court should reject invitations by any party to craft any broad new rules of judicial deference for agency decisions. Such a ruling could have severe and adverse long-term implications radiating beyond this case. A perfect example of this is *Brand X*, which was decided in a similar context but resulted in a new judicially created deference doctrine that agencies have used to override the decisions of Article III courts. As Justice Thomas recently explained, "[r]egrettably, *Brand X* has taken this Court to the precipice of administrative absolutism. . . . *Brand X* may well follow from *Chevron*, but in so doing, it poignantly lays bare the flaws of our entire executive-deference jurisprudence." *Baldwin*, 140 S. Ct. at 695 (Thomas, J., dissenting from the denial of certiorari). Nor should this Court accept any invitations to graft onto the APA's arbitrary and capricious standard

atextual preconditions on *relaxing* regulatory compliance burdens.

This Court should not be swayed by the FCC's sweeping extraconstitutional *Chevron* deference demands here, which are unnecessary for this Court's interpretation of Section 202(h) and resolution of this pure question of statutory interpretation. This is particularly important because the FCC has recently indicated that it may plan to attempt to retroactively alter judicial interpretations—as well as the plain text—of Section 230 through regulations using *Brand X* and then demand *Chevron* deference for these potential regulatory changes in an effort expand its jurisdiction under the banner of *City of Arlington*.

The FCC is quite candid on this point:

> The fact that courts have been interpreting Section 230 for years does not prevent the Commission from construing its ambiguous terms. As the Supreme Court held in *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967 (2005), the FCC may act as the "authoritative interpreter" of ambiguous provisions in statutes like the Communications Act that it administers, and nothing "preclude[s] agencies from revising unwise judicial constructions of ambiguous statutes." Section 230 allows the FCC to determine whether courts have appropriately interpreted its proper scope. . . . Under *Brand X*, the FCC may review these judicial interpretations to determine whether

> they reflect the best reading of the statute. Indeed, an agency's role as "authoritative interpreter" may be particularly useful where, as here, courts have reached divergent interpretations of key provisions of an important statute, thus creating substantial uncertainty and disharmony in the law.

The FCC's Authority to Interpret Section 230 of the Communications Act (Oct. 21, 2020), https://www.fcc.gov/news-events/blog/2020/10/21/fccs-authority-interpret-section-230-communications-act.

Contrary to the FCC's suggestion, *this Court* is tasked as the "authoritative interpreter" of statutes, *not the FCC*. *See* U.S. Const., Art. III. And this Court resolves circuit splits. *See* Rule 10(a). Remarkably, the FCC claimed this power to resolve circuit splits less than two weeks after Justice Thomas suggested that *this Court* should decide *how* that exact provision should be properly interpreted in an appropriate case, after full briefing on the merits. *See Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 208 L.Ed.2d 197, 202 (Oct. 13, 2020) (Thomas, J., statement respecting the denial of certiorari) ("Without the benefit of briefing on the merits, we need not decide today the correct interpretation of §230. But in an appropriate case, it behooves us to do so."). Regrettably, the FCC appears to have mistakenly misconstrued Justice Thomas's suggestion that *this Court* should grant *certiorari* in a proper case to independently interpret Section 230 as an open

invitation for the FCC to step into the Supreme Court's shoes and resolve an alleged circuit split.[9]

The FCC's statements on its purported *Brand X* power to resolve circuit splits bring into stark relief Justice Thomas's recent observation that "*Brand X* appears to be inconsistent with the Constitution, the Administrative Procedure Act (APA), and traditional tools of statutory interpretation" and thus should be revisited.[10] *Baldwin*, 140 S. Ct. at 691 (Thomas, J., dissenting from the denial of certiorari). Consider, for example, a world in which this Court does grant review in a Section 230 case involving private parties and, after de novo review, independently interprets the statute's scope. Under Article III of the Constitution, that should end the matter, unless and until *Congress* chooses to amend the statute. Does *Brand X* somehow authorize the FCC to reinterpret Section 230 to overrule this Court?[11] The answer

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[9] Regarding Section 230, however, there are no real circuit splits. The courts have been clear in their interpretation of this statute. *See* Comment of AFPF 9–12, 17–34, *In the matter of the Nat'l Telecomm. & Info. Admin.'s Pet. to Clarify Provisions of Section 230 of the Commc'n's Act of 1934, as Amended*, FCC RM No. 11862 (Sept. 1, 2020), *available at* https://bit.ly/388Ubv1.

[10] The FCC has stated: "[T]he only question is whether the FCC or a federal court will do the interpreting." The FCC's Authority to Interpret Section 230 of the Communications Act (Oct. 21, 2020), https://www.fcc.gov/news-events/blog/2020/10/21/fccs-authority-interpret-section-230-communications-act.

[11] This has happened before. In *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478 (2012), the IRS claimed to possess the power, under *Brand X*, to overrule this Court. But this Court has "never said an agency can change what we've said the law means." Oral Arg. Tr. at 55:8–9, *United States v. Home Concrete*

surely must be "no." The FCC's recent statements thus showcase why *Brand X* and *Chevron* should be squarely overruled. *See also Baldwin,* 140 S. Ct. at 695 (Thomas, J., dissenting from the denial of certiorari); *Kisor*, 139 S. Ct. at 2446 n.114 (Gorsuch, J., concurring in the judgment); *City of Arlington*, 569 U.S. at 315 (Roberts, C.J., dissenting).

Whatever the proper interpretation of Section 230 immunity may be, and whether those court decisions interpreting Section 230 were properly decided, is beyond the scope of this case. But this Court should be aware of the longer term implications of any broad ruling here, particularly to the extent the FCC pursues regulatory changes to Section 230 that purport to overrule Article III courts or override Congress, all in violation of the separation of powers.

The federal Constitution tasks Congress with enacting legislation, subject to bicameralism and presentment; Article I vests "[a]ll legislative Powers herein granted" in Congress, U.S. Const. art. I, §1, not the courts and not the Executive branch. *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (confirming "that assignment of power to Congress is a bar on its further delegation."); *Loving v. United States*, 517 U.S. 748, 758 (1996) ("[T]he lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity."). Article II tasks the Executive Branch with faithfully executing the law. U.S. Const. Art. II, § 3. Article III "vests the

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& Supply, LLC, No. 11-139 (U.S. Jan. 17, 2012). The Court rejected the IRS's overreach. *Home Concrete*, 566 U.S. at 485–87.

judicial power exclusively in Article III courts, not administrative agencies." *Michigan v. Envtl. Prot. Agency*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring). Under Article III, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

It is not for the FCC to be the "authoritative interpreter" of statutes. Instead, Article III of the U.S. Constitution tasks Article III courts with interpreting the law in the context of concrete cases and controversies. And it is ultimately this Court's role to be the "authoritative interpreter."

As Goldilocks teaches, the porridge should not be too cold or too hot but just right. So too here. Our Constitution's system of checks and balances reflects this, keeping each of the three constitutionally created branches of government in their proper role. While in this particular case it was the 2-1 panel that erred by mistakenly venturing into judicial policymaking, in the next case it may be the FCC that strays from the statutory text and the U.S. Constitution. *Cf. Talk Am., Inc.*, 564 U.S. at 69 (Scalia, J., concurring) (*Auer* deference unnecessary to decision).

The cure for the 2-1 panel's mistaken venture into judicial policymaking should not be worse than the disease. A decision rejecting the panel's error should not facilitate any future attempts by the FCC to violate the separation of powers by, among other things, purporting to overrule Article III court decisions and arrogate to itself *this Court's* role in resolving circuit splits. Instead, in each case, this Court should use its independent judgment to call

balls and strikes, simply interpreting the text of the law using traditional tools of statutory interpretation. *Cf. id.* at 67 (Scalia, J., concurring) (finding no need to resort to deference). Then, Congress, and Congress alone, may choose to amend the statutes, subject to constitutional constraints. But this task of amending the work of the People's representatives is not for federal agencies. *La. Pub. Serv. Com v. FCC*, 476 U.S. 355, 374–75 (1986). And not for Article III courts. *Henson*, 137 S. Ct. at 1726.

CONCLUSION

For these reasons, this Court should reverse the judgment below.

Respectfully submitted,

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