NO. 18-1167

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

IN RE: PROMETHEUS RADIO PROJECT AND MEDIA MOBILIZING PROJECT

OPPOSITION OF THE FEDERAL COMMUNICATIONS COMMISSION TO PETITION FOR A WRIT OF MANDAMUS

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The Federal Communications Commission (FCC or Commission) submits this opposition to the petition for a writ of mandamus filed by Prometheus Radio Project and Media Mobilizing Project (Petitioners) to stay implementation of the Commission's revised media ownership rules. The Court should deny the petition. The extraordinary relief Petitioners request is not warranted.

Mandamus is a "drastic" remedy and hardly ever granted. *United States v. Wright*, 776 F.3d 134, 146 (3d Cir. 2015); *United States v. Farnsworth*, 456 F.3d 394, 401 (3d Cir. 2006). Petitioners claim that mandamus is appropriate here because the Commission allegedly violated the mandates from this Court's prior decisions.[1] But any fair examination of this Court's

[1] *See Prometheus Radio Project v. FCC*, 824 F.3d 33 (3d Cir. 2016) (*Prometheus III*); *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) (*Prometheus II*), *cert. denied*, 567 U.S. 951 (2012); *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) (*Prometheus I*), *cert. denied*, 545 U.S. 1123 (2005).

rulings and the Commission's orders[2] shows that Petitioners' claims are baseless.

First, it is simply untrue that the Commission failed to adopt a final definition of "eligible entity" following this Court's most recent remand. As Petitioners effectively concede (Pet. 16-17), the Commission made "a final determination . . . to adopt a new definition" in the *2016 Order*. *Prometheus III*, 824 F.3d at 49; *see 2016 Order* ¶ 279. Petitioners attempt to sow confusion by noting that, in the *Reconsideration Order*, the Commission sought comment on its plan to adopt a *different program* to promote new entrants in media markets and, among other things, whether it should import the same definition of "eligible entity" from 2016 into this new "incubator" program. But that notice of proposed rulemaking in no way reopened the *2016 Order* to further review.

Second, contrary to Petitioners' contention (Pet. 18-19), the Commission considered "the effect of its rules on minority and female ownership." *See Prometheus II*, 652 F.3d at 471. Indeed, the Commission carefully analyzed whether each of its rule changes would have a "material impact on minority and female ownership." *Reconsideration Order* ¶¶ 44-48

[2] *See* 31 FCC Rcd 9864 (2016) (*2016 Order*), *modified on reconsideration*, 2017 WL 5623028 (2017) (*Reconsideration Order*).

(newspaper-broadcast cross-ownership), *id.* ¶ 64 (radio-television cross-ownership), *id*. ¶ 83 (local television ownership), *id*. ¶ 107 n.315 (joint sales agreements); *2016 Order*, ¶¶ 124-128 (local radio ownership). Petitioners disagree on the merits with the Commission's determinations. Pet. 19. But their claim that the Commission ignored this Court's direction to "'consider'" the issue (Pet. 18 (quoting 652 F.3d at 471)) is baseless.

Third, Petitioners wrongly assert that this Court required the Commission to collect or analyze certain data before defining "eligible entity." To the contrary, this Court merely stated: "***If*** [the Commission] needs more data to do so, it must get it." *Prometheus III*, 824 F.3d at 49 (emphasis added). In the *2016 Order*, the Commission concluded, after carefully considering alternatives in light of constitutional concerns, that it did not need further data to readopt a revenue-based definition of "eligible entity" instead of an explicitly race- or gender-based approach. The *Reconsideration Order* did not disturb that conclusion, which fully comports with this Court's mandates.

Because the Commission complied with this Court's mandates in all respects, Petitioners cannot meet the high bar of showing a clear and indisputable right to mandamus relief. Nor would any alleged failure to satisfy aspects of this Court's mandates relating to eligible entities justify the

sweeping relief that Petitioners seek—namely, a stay of the *Reconsideration Order* ***in its entirety***. And there is no basis in this Court's mandates for Petitioners' extraordinary request to appoint a special master to act as overseer of the Commission's core data collection and rulemaking functions.

While Petitioners disagree with the Commission's policy decisions, they may raise those disagreements through the normal petition for review process, which provides an adequate alternative avenue for seeking to stay the agency's rules. *See* Fed. R. App. P. 18. By attempting to shoehorn their stay request into a mandamus petition, Petitioners seek to end run Rule 18's requirement that a party must ordinarily request a stay from the Commission first. *See id.* 18(a)(1). Petitioners' failure to seek a stay through the normal channels is perhaps unsurprising, as they could not satisfy the traditional stay criteria. Indeed, Petitioners do not even attempt to demonstrate likelihood of success on the merits in their mandamus petition. Further, they do not even allege injury to their own organizations, let alone irreparable injury, that could justify judicial intervention before their pending petitions for review have run their normal course. Instead, Petitioners rely on speculative harm to the public that they claim might result from media consolidation at some undefined future time. That is not enough to satisfy the limited, strict criteria for injunctive relief. *Wright*, 776 F.3d at 146.

BACKGROUND

A. The Commission's Quadrennial Review Obligation

Section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), requires the FCC to review its broadcast ownership rules every four years, determine whether they remain useful in the public interest, and "repeal or modify any regulation it determines to be no longer in the public interest." 110 Stat. 111-12.[3]

B. This Court's Prior Decisions

This Court has addressed challenges to FCC quadrennial review orders on three prior occasions.

1. In *Prometheus I*, this Court examined revisions to the Commission's broadcast ownership rules adopted in the agency's order concluding the 2002 biennial review. The Court explained that the scope of its review was "narrow," and that it was not entitled "to substitute its judgment for that of the agency." 373 F.3d at 389. The standard of review was "even more deferential," the Court observed, given that "the issues involve elusive and

[3] The statute originally provided that the Commission should review its rules every two years. In 2004, Congress amended the statute to require review every four years. Consolidated Appropriations Act, Pub. L. No. 108-199, § 629, 118 Stat. 3, 100 (2004).

not easily defined areas such as programming diversity in broadcasting" and "line-drawing." *Id*. at 390.

Under these standards, the Court upheld the Commission's decision not to retain a ban on newspaper/broadcast cross-ownership, *id.* at 398-400, the agency's prohibition on combinations between any of the top four television stations in a local television market, *id*. at 416-18, and the agency's revised definition of local radio markets. *Id*. at 423-26. The Court nevertheless held that the FCC had failed to justify the specific limits it retained on cross-ownership of newspapers and broadcast stations, as well as the limits it had imposed on common ownership of television stations and radio stations in local markets. *Id*. at 398-400.

2. In *Prometheus II*, this Court reviewed the Commission's order concluding the 2006 quadrennial review. The Court rejected challenges to the Commission's limits on radio/television cross-ownership, 652 F.3d at 456-58, on common ownership of multiple television or multiple radio stations in a local market, *id*. at 458-63, and its prohibition on combinations among the top four television networks. *Id*. at 463-64. The Court again vacated and remanded, however, the FCC's decision to repeal the prohibition of newspaper/broadcast cross-ownership, this time "for failure to comply with the APA's notice and comment requirements." *Id.* at 453.

Prometheus II also reviewed a Commission order addressing proposals to promote ownership of broadcast stations by minorities and women. *Id*. at 465-72. In doing so, the Court found arbitrary the FCC's definition of entities eligible for certain regulatory preferences, concluding that the FCC had not rationally connected a revenue-based definition to its stated goal of increasing minority and female broadcast ownership. *Id.* 469-71. Recognizing that "there are significant challenges … in meeting this important policy goal," the Court remanded the eligible entity definition, as well as the preferences tied to that definition, "so that [the agency] may justify or modify its approach to advancing broadcast ownership by minorities and women during its 2010 Quadrennial Review." *Id*. at 472.

3. Shortly after *Prometheus II*, the FCC initiated the 2010 quadrennial review. *2010 Quadrennial Regulatory Review*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489 (2011). It sought comment on various proposed media ownership rule changes, including tentative decisions to repeal the newspaper/radio cross-ownership ban and the radio/television cross-ownership rule. *Id.* ¶¶ 25-146.

In April 2014, the FCC commenced the 2014 quadrennial review and merged the 2010 review into that quadrennial review. *2014 Quadrennial Review*, Further Notice of Proposed Rulemaking and Report and Order, 29

FCC Rcd 4371, 4372 ¶ 1 (2014) (*2014 FNPRM*). Among other things, the agency incorporated the record developed in the 2010 quadrennial review proceedings into the 2014 quadrennial proceedings and proposed various revisions to the agency's broadcast ownership rules. *See id.* ¶¶ 1-6, 145-149, 210-225. The agency also tentatively reinstated its revenue-based eligible entity definition on the ground that doing so would promote small business participation in broadcasting, while noting that the agency did not have sufficient information to conclude that such a standard would promote minority and female broadcast ownership. *See id.* ¶¶ 263-306. Lastly, the agency decided to attribute an ownership interest to the parties to certain television joint sales agreements (JSAs) for purposes of the local television ownership rule, even though the agency made no determination in the order as to the ongoing appropriateness of the existing local television ownership rule. *See id.* ¶¶ 349-365.

In *Prometheus III*, this Court addressed challenges to the *2014 NPRM*, and ruled that the agency's delay in completing the 2010 and 2014 quadrennial reviews was unacceptable. 824 F.3d at 50-54. In doing so, the Court emphasized the costs of the delay to regulated parties. The Court pointed out, for example, that "the 1975 ban [on newspaper/broadcast cross-ownership] remains in effect to this day even though the FCC determined

more than a decade ago that it is no longer in the public interest," *id.* at 51—a situation that "has come at significant expense to parties" that might otherwise be able "to engage in profitable combinations." *Id*. at 51-52. The Court declined to vacate the ownership rules because of the delay, but it fully "anticipate[d]" that the Commission would adhere to its commitment to wrap up the quadrennial reviews by "the end of [2016]." *Id.* at 54.[4]

The Court also remanded the Commission's eligible entity definition to the agency and directed the Commission "to act promptly to bring the eligibil[ity] entity definition to a close." *Id*. at 49. The Court stated that the agency "must make a final determination as to whether to adopt a new definition," and emphasized that "[i]f it needs more data to do so, it must get it." *Id.* On the other hand, the Court made clear, "[w]e do not intend to prejudge the outcome of this analysis; we only order that it must be completed." *Id*. "Once the agency issues a final order either adopting an SDB [socially disadvantaged business] or ODP [overcoming disadvantage preference]-based definition (or something similar), ***or concluding that it***

[4] The Court did, however, vacate the Commission's decision to attribute JSAs, on the ground that the agency had inappropriately expanded the reach of the local television ownership rule without determining whether that rule remained in the public interest. 824 F.3d at 59.

cannot do so, any aggrieved parties will be able to seek judicial review." *Id.* at 49-50 (emphasis added).

C. The 2016 Order

The FCC responded to the *Prometheus III* remand in August 2016. 31 FCC Rcd at 9864. The *2016 Order* retained newspaper-broadcast and radio-television cross-ownership rules. *Id.* ¶¶ 129-197, ¶¶ 198-215. It also retained the local television and local radio ownership rules, and reinstated the vacated rule attributing television JSAs. *Id.* ¶¶ 17-128.

In addition, the FCC completed consideration of the eligible entity definition and readopted the revenue-based standard. *Id.* ¶¶ 272-316. The agency acknowledged the lack of evidence that this standard would promote minority and female ownership, but concluded that it was nonetheless the appropriate standard and would further ownership diversity by promoting broadcast ownership by small businesses and new entrants. *Id.* ¶¶ 276, 279-286. The FCC also reinstated all six regulatory preferences to which the eligible entity definition previously applied. *Id.* ¶ 285.

The FCC declined to adopt a socially disadvantaged business (SDB) or other race- or gender-based standard, concluding that the record evidence was not sufficient to withstand the heightened constitutional scrutiny applicable to such a standard. *Id.* ¶¶ 297-305, ¶¶ 309-312. It also declined to adopt an

"overcoming disadvantage preference" (ODP). *Id.* ¶ 306. The agency noted its willingness to revisit these issues in the future, however, "if changed circumstances suggest a different outcome." *Id.* ¶ 316.

Parties filed petitions for judicial review of the *2016 Order* in multiple courts of appeals. All the petitions were transferred to the Third Circuit and consolidated.

D. The Reconsideration Order

On November 20, 2017, the Commission released an order resolving petitions for reconsideration of the *2016 Order*. *2014 Quadrennial Regulatory Review*, Order on Reconsideration, 2017 WL 5623028 ¶ 2 & n.3 (2017).

Newspaper/broadcast cross-ownership rule. On reconsideration, the FCC repealed the newspaper/broadcast cross-ownership rule. The agency concluded that the rule is no longer necessary to protect viewpoint diversity because of changes in the media marketplace over the past 40 years, including the increase in the number of broadcast voices and "the growing prevalence of independent digital-only news outlets with no print or broadcast affiliation, many with a local or hyperlocal focus." *Id.* ¶ 19; *see id.* ¶¶ 16-22. The FCC also concluded that the rule is no longer justified given the newspaper industry's decline, *id.* ¶¶ 23-25, and that repeal may promote

localism by allowing newspapers and broadcasters to collaborate and combine resources. *Id.* ¶¶ 26-31. Finally, the agency determined that repeal will not materially impact minority and female ownership. *Id.* ¶¶ 44-46, 48. It explained there was no evidence the rule promotes or protects minority and female ownership, and that prior relaxations of other media ownership rules had not caused an overall decline in minority and female ownership levels. *Id.*[5]

Radio/television cross-ownership rule. The FCC also concluded that the radio/television cross-ownership rule is no longer justified and repealed it. *Id.* ¶¶ 54-63. The agency stressed that increases in cross-ownership after the rule's repeal could have positive effects on localism, including increased news and public affairs programming. *Id.* ¶ 63. It explained that broadcast radio's importance in contributing to viewpoint diversity has diminished, and that the *2016 Order* improperly discounted the contributions of nontraditional media outlets—including independent, online sources and cable and satellite programming—to viewpoint diversity. *Id.* ¶¶ 58-59. In addition, the Commission explained, the rule's elimination will have little effect in most markets, as significant cross-ownership was already allowed under it, and

[5] The Commission also noted the support of minority-owned media companies for repeal of the rule. *Reconsideration Order* ¶¶ 44, 46.

even after its repeal, common ownership will be limited by the local television and local radio rules. *Id.* ¶ 62. The agency also concluded that eliminating the rule would not directly affect minority or female ownership. *Id.* ¶¶ 64-65.

Local television ownership rule. On reconsideration, the FCC modified the local television ownership rule by eliminating the eight-voices test. *Id.* ¶¶ 73-77.[6] The agency explained that the test is irrational because no evidence supports the rule's traditional justification—that the dominance of the top four stations in most markets "must be balanced by an equal number of independent, lower-performing stations." *Id.* ¶¶ 74-75. It also noted that the test limits potential localism benefits from allowing broadcasters to achieve economies of scale, particularly in small and mid-sized markets. *Id.* ¶ 77.

The FCC also modified the prohibition against common ownership of more than one of the top-four stations in a market by allowing applicants to seek approval of top-four combinations on a case-by-case basis, reasoning that some flexibility is warranted based on evidence that top-four stations do not dominate in all local markets. *Id.* ¶¶ 78-82.

[6] The eight-voices test disallowed an entity from owning two television stations in the same local market unless at least eight independently owned television stations would remain in the market following the combination. 47 C.F.R. § 73.3555(b)(1)(ii).

The FCC concluded that these rule modifications would not harm minority and female ownership. In support of that conclusion, the FCC noted that relaxation of the local television ownership rule in 1999 did not result in any decrease in minority and female ownership levels. *Id.* ¶¶ 83-84.

Local radio ownership rule. The FCC retained the local radio ownership limits, but granted in part a petition for reconsideration regarding the treatment of "embedded" local radio markets (*i.e.*, smaller markets within a larger parent market). *Id.* ¶¶ 91-95. Instead of applying the local radio ownership rule's numerical limits to embedded *and* parent markets using the Nielsen Audio Metro (Nielsen) market definition, *see 2016 Order* ¶ 101, the FCC decided to presumptively waive application of the Nielsen market definition for the New York and Washington, DC parent markets and instead apply the contour-based market definition to the parent markets if a proposed combination satisfies the rule's numerical limits for each embedded, Nielsen-defined market. *Reconsideration Order* ¶ 95.

Attribution of television JSAs. The FCC reconsidered and reversed its decision to reinstate the rule attributing television JSAs, finding that the record did not support the conclusion in the *2016 Order* that television JSAs confer on the broker sufficient influence or control to warrant attribution, *id.*

¶¶ 101-113, and that the costs of attribution, including the costs to diversity and localism, outweigh its benefits. *Id.* ¶¶ 107-111.

Incubator Program. Finally, the FCC adopted an incubator program with the goal of "help[ing to] create new sources of financial, technical, operational, and managerial support for eligible broadcasters." *Id.* ¶ 126. In connection with that action, the FCC sought comment on how to structure such a program, including "how to determine eligibility for participation in the incubator program." *Id.* ¶ 131.

ARGUMENT

The "drastic" remedy of mandamus is available only in "extraordinary" situations. *U.S. v. Farnsworth*, 456 F.3d 394, 401 (3d Cir. 2006) (internal quotes and citation omitted); *see Cheney v. United States District Court*, 542 U.S. 367, 380 (2004). In particular, writs of mandamus compelling agency action are "hardly ever granted." *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005). The petitioner must show that "[its] right to … the writ is 'clear and indisputable.'" *Kerr v. United States District Court*, 426 U.S. 394, 403 (1976)(citation omitted). In the administrative law context, "[t]he principal purpose … of the traditional limitations upon mandamus … is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts

lack both expertise and information to resolve." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66-67 (2004).

In this Circuit, in order to obtain mandamus, a petitioner must demonstrate "(1) a clear abuse of discretion or clear error of law; (2) a lack of an alternative avenue for adequate relief; and (3) a likelihood of irreparable injury." *Wright*, 776 F.3d at 146.[7] Petitioners have satisfied none of the requirements.

I. THE COMMISSION'S ORDERS DO NOT VIOLATE THE COURT'S PRIOR MANDATES

Petitioners argue that they satisfy the first criterion for mandamus relief because the FCC's orders completing the last two quadrennial reviews violate this Court's mandates in *Prometheus II* and *III* in three specific ways: (1) by not adopting a "final" definition of eligible entity (Pet. 16-18); (2) by refusing to consider the impact of media ownership rule changes on minority and female ownership (Pet. 18-19); and (3) by failing to collect additional ownership data (Pet. 19-22).

Petitioners are wrong. As we show below, the FCC fully complied with this Court's mandates.

[7] Even if the requirements are technically satisfied, the Court in its discretion may still deny mandamus. *In re Chambers Dev. Co.*, 148 F.3d 214, 223 (3d Cir. 1998).

A. The FCC Adopted a Final Definition of Eligible Entity

Petitioners contend that the Commission violated this Court's mandate by failing to adopt a final definition of entities eligible for favorable regulatory treatment. But the Commission adopted a final definition, based on an entity's revenues, in the *2016 Order*, ¶¶ 279-284, and the agency did not revisit that decision on reconsideration. The definition accordingly remains operative for the regulatory preferences tied to it, all of which the FCC has reinstated. *See id.* ¶ 285. Likewise, the FCC has not reopened its decision, also adopted in the *2016 Order*, not to rely on a race- or gender-conscious definition for the same purposes. *Id.* ¶¶ 297-316.

Petitioners acknowledge that the FCC adopted a final definition of eligible entity in the *2016 Order*. *See* Pet. 17 (*2016 Order* "provided a final decision allowing [Petitioners] to seek judicial review, which they promptly did in No. 17-1107"). But they then falsely contend that the FCC reopened the issue—and violated the Court's mandate—by adopting a new incubator program on reconsideration and seeking comment on how to structure the new program, including how to identify entities eligible for that program. Petitioners argue that these actions by the Commission "render[ed] the [*2016 Order*]'s definition of eligible entity nonfinal and [non]reviewable." Pet. 17.

Petitioners' contentions are simply incorrect. The FCC made clear that it had reconsidered the adoption of a new incubator program and would seek comment on "how to determine eligibility for participation in the incubator program," *Reconsideration Order* ¶ 131; it did not purport to revisit the eligible entity definition applicable to the various regulatory preferences identified in the *2016 Order*. To the contrary, the Commission specifically acknowledged the 2016 definition by listing it as one of several options that the Commission could consider using for the proposed new incubator program. *Id.*

In short, the definition of eligible entity finalized in 2016 has, as the Court directed, been brought "to a close," *Prometheus III*, 824 F.3d at 49, and the agency has determined that entities that fall within that definition are eligible for the specific benefits that have been at issue in this set of cases. Petitioners are free to challenge the Commission's revenue-based eligible entity definition on review, but they cannot credibly contend that the agency's definition is not final. The Commission's adoption of a new incubator program does not undermine or otherwise affect the existing eligible entity definition nor the regulatory preferences tied to it.

B. The FCC Considered the Impact of Rule Changes on Minority and Female Ownership

Petitioners next contend that the FCC violated the Court's mandate to "consider the effect of its rules on minority and female ownership" before modifying or repealing the rules. Pet. 18 (quoting *Prometheus II*, 652 F.3d at 471). But the FCC plainly did consider the effect of its rule changes on ownership of broadcast properties by minorities and women, devoting separate discussions to the subject for each rule it modified or repealed.

Thus, the Commission concluded that repeal of the newspaper-broadcast cross-ownership rule "will not have a material impact on minority and female ownership," *Reconsideration Order* ¶ 44, and that, indeed, "eliminating the rule potentially could increase minority ownership of newspapers and broadcast stations." *Id*. ¶ 46; *see also id*. ¶ 44 (noting support of minority-owned media organizations for repeal). Likewise, the Commission concluded that eliminating the radio/television cross-ownership rule and modifying the local television ownership rule is "[not] likely to harm minority and female ownership." *Id*. ¶¶ 64-65 (radio/ television cross-ownership), ¶¶ 83-84 (local television ownership); *see also 2016 Order* ¶ 125 (retaining existing local radio ownership limits "promotes opportunities for diverse ownership in local radio").

Petitioners also contend (Pet. 19) that the Commission provided "no analysis" of the effect on minority and female ownership of the agency's decision not to attribute television JSAs. But the *Reconsideration Order* specifically found that record evidence "refute[d]" the assertion that "attribution of television JSAs" in the period between 2014 and 2016 "had produced opportunities for minority and female ownership." *Reconsideration Order* ¶ 107 n.315. The Commission also adverted to evidence that allowing JSAs without attribution in fact helps "promote minority and female ownership" *Id.* (citing *2014 FNPRM*, 29 FCC Rcd at 4593 (dissenting statement of then-Commissioner Pai)).[8]

Indeed, Petitioners implicitly acknowledge that the agency did in fact address the effect of its rule changes on ownership of broadcast properties by minorities and women, arguing that the FCC's analysis was not "serious" and "relies on [] flawed reasoning." Pet. 18-19. Rather than provide a ground for mandamus relief, this argument demonstrates that Petitioners are seeking to

[8] Elsewhere in their petition, Petitioners assert the FCC "failed to even consider how the loss of the FSSR [failed station solicitation rule] would affect diversity of ownership in the *Reconsideration Order*." Pet. 28. But the FCC did not modify that rule. Petitioners complain that the rule "will have no effect in the absence of local ownership limits," *id.*, but the local television ownership rule remains in place, as does the top-four prohibition (subject to case-by-case review). *See* pp. 13-14 *supra*.

raise a substantive challenge to the Commission's decisions by way of mandamus. That is a wholly improper attempt to bypass the normal processes of judicial review, and invites the kind of "judicial entanglement in abstract policy disagreements" that traditional limitations on mandamus are intended to avoid. *Norton*, 542 U.S. at 66-67. Petitioners are of course free to press their challenges to the Commission's reasoning through their pending petitions for review. *See* Nos. 17-1107; 18-1092. But they have no basis for their claim that the Commission failed to address the issue in its orders, much less violated this Court's mandate.

C. The Court Did Not Mandate More Data Collection

Finally, Petitioners contend that the FCC violated the Court's mandate to collect "necessary data." *See* Pet. 19-22. But this Court did not impose a free-standing obligation on the agency to collect data to Petitioners' satisfaction. Instead, the Court stated that "[i]f" the Commission "needs more data" to comply with its direction "[to] make a final determination as to whether to adopt a new [eligible entity] definition," "it must get it." *Prometheus III*, 824 F.3d at 49. The Court's mandate was plainly conditional: the FCC "must get" more data "[i]f it needs more" to make a final determination. *Id.* But by the same token, the agency was under no instruction

to collect more data if it had enough information to "bring the eligible entity definition to a close." *Id*.

The Commission did precisely what this Court ordered. It determined that the eligible entity definition should be based on revenues. *2016 Order* ¶¶ 279-316. And in so doing, the Commission specifically determined that no further data collection on this issue was necessary or appropriate. *Id.* ¶¶ 313-16. As the Commission explained, "neither the record in this proceeding nor the Commission's own efforts have produced additional study designs that we expect would develop the evidence necessary to support race- and/or gender-conscious measures." *Id.* ¶ 316.

Petitioners offer a series of criticisms of the FCC's data collection efforts dating to 2010, arguing that these "demonstrate the need for a special master [to] set and supervise a timetable and parameters for the collection and analysis of data to meet the [C]ourt's mandate." Pet. 21-22. That request is wholly unwarranted. Nothing in the Court's mandate requires the agency to collect data for its own sake. And special masters, in any event, "recommend factual findings" and dispose of matters "ancillary" to this Court's proceedings, *see* Fed. R. App. P. 48; *see also* 3d Cir. R. 48.1; they are not empowered to oversee an agency's information collection efforts.

The FCC has made, and continues to make, extensive efforts to improve its ownership data. *See 2016 Order* ¶¶ 256-270. And Petitioners are free to challenge those efforts. But they cannot claim that the agency violated this Court's mandate by not collecting more data in the context of the 2010 and 2014 quadrennial reviews without misreading this Court's opinions and the agency's *2016 Order*.

II. PETITIONERS HAVE NOT MET THE OTHER CONDITIONS FOR MANDAMUS RELIEF

Mandamus is unwarranted because the FCC has not violated this Court's mandates, and the petition should be denied on that basis alone. In all events, mandamus would be inappropriate unless Petitioners also satisfied the other conditions—"a lack of an [alternative means] for adequate relief [and] a likelihood of irreparable injury." *Wright*, 776 F.3d at 146. They cannot do so.

A. Petitioners Have Not Shown They Lack an Adequate Alternative Remedy

It is settled that mandamus may not "be used as a substitute for the regular appeals process." *Cheney*, 542 U.S. at 380-81. Petitioners can challenge—and indeed *have* challenged—both the *2016 Order* and the *Reconsideration Order* via petitions for review under 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a). And to the extent Petitioners believe they are entitled to interim relief during the pendency of those proceedings, they could have

sought a stay pending review pursuant to Federal Rule of Appellate Procedure 18. "[A]n Emergency Petition [for stay relief through mandamus] will not lie where a stay pending appeal (which might be termed the 'normal' means of obtaining extraordinary relief) will suffice to prevent the alleged harm." *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 762 (D.C. Cir. 1985). Petitioners have not demonstrated, nor could they, that they could not file a motion for stay pending appeal. Nor do they provide any excuse for their failure to seek a stay from the Commission first before filing a motion with this Court, as required by Rule 18(a)(1). Petitioners thus have not shown a lack of "an alternat[ive] avenue for adequate relief." *Wright*, 776 F.3d at 146.

Petitioners contend that, despite having filed petitions for review challenging both orders, they should not have to go through the regular review process "to obtain execution of the judgment of this Court." Pet. 22 (quoting *Citibank, N.A. v. Fullum*, 580 F.2d 82, 90 (3d. Cir. 1978)). But *Citibank* does not stand for such a broad proposition; indeed, the *Citibank* Court noted that the underlying district court order was not immediately appealable, and that even had it been Citibank could not have obtained adequate relief via such an appeal. 580 F.2d at 90. Here, by contrast, Prometheus plainly could have, and indeed did, seek direct review in this Court. In any event, Petitioners' disagreements with the agency's orders

present precisely the type of issue that courts routinely consider via petitions for review—the validity of agency action under the Administrative Procedure Act in light of prior court cases. Petitioners' attempt to recharacterize their claims as involving violations of this Court's mandate is baseless.

B. Petitioners Have Not Established Irreparable Injury

Petitioners have also failed to show that they will be irreparably injured if mandamus is not granted.

At the outset, Petitioners allege no harm to their organizations, as opposed to the public interest generally. Neither Petitioner describes the impact that the Commission's orders will have on its organization; indeed, they say next to nothing in their petition about their organizations' interests in the Commission's ownership rules, or in FCC efforts to promote ownership of broadcast stations by minorities and women. To be sure, Prometheus Radio Project has participated in past challenges to earlier Commission quadrennial review orders, but that past participation does not relieve Petitioners of the obligation to demonstrate that they will suffer irreparable injury from the Commission's present actions.

In any event, Petitioners' claims that "the public" will be irreparably harmed by the Commission's revised ownership rules (Pet. 23-30) are unavailing. The irreparable harm requirement is not met where, as here, the

alleged harm is contingent on future regulatory decisions that may be challenged on their own. In *Center for Food Safety v. Vilsack*, 636 F.3d 1166, 1173-74 (9th Cir. 2011), for example, the Ninth Circuit held that seed business owners failed to demonstrate irreparable harm from the permitted planting of genetically modified sugar beet seedlings where the alleged harm of contamination hinged on later stages of planting and production that would require further agency decisions that could themselves be subject to judicial review.

Petitioners' request for mandamus presents the same flaw. The media consolidation Petitioners fear depends on FCC approval of future applications that the agency has yet to consider, and that Petitioners will have an opportunity to challenge separately if and when they are approved. The Communications Act requires any party seeking to acquire a broadcast license to file an application with the Commission and obtain the agency's consent before the transaction can be consummated, 47 U.S.C. § 310(d), and it grants interested parties the right to file petitions to deny such applications. *See id.* §§ 309(a), 309(d), 310(d). If the FCC approves any transaction, interested parties, including Petitioners, may seek judicial review of the FCC's approval. *See* 47 U.S.C. § 402(a); *see, e.g.*, *ADX Commc'ns v. FCC*, 794 F.3d 74 (D.C. Cir. 2015) (reviewing FCC order approving acquisition of

radio station licenses). Similarly, the fact that broadcasters may seek authorization to acquire stations with which they have television JSAs does not mean the station licenses will be transferred without further approvals. *See* Pet. 24-25.

Petitioners complain that modification of the local television ownership rules, and repeal of the newspaper-broadcast cross-ownership ban, will "moot" existing temporary waivers of those rules. *Id.* at 23-24.[9] But no broadcast licenses will change hands as a result of the changes in those rules; existing combinations simply will be allowed to continue. Petitioners do not explain how maintaining existing combinations causes them harm, and this Court can in any event redress any harm on review if warranted. Likewise, the Commission's decision that television JSAs will no longer be attributable, *see id.* at 25, merely reinstates the status quo before the *2014 NPRM* (after the attribution rule was vacated in *Prometheus III* and before it was readopted in the *2016 Order*).

[9] If read broadly, Petitioners' request to "enjoin the FCC from approving any broadcast license applications that would be inconsistent with the ownership limits in effect as of this date" (Pet. 31) would actually foreclose the Commission's existing power to grant these and similar rule waivers in the future in individual cases "for good cause shown." *See* 47 C.F.R. § 1.3. That would make the media ownership rules even more restrictive than they were before the challenged orders.

Petitioners contend that the rule changes will also "facilitate" Sinclair Broadcast Group's pending application to acquire Tribune Media Co. Pet. 25. But Sinclair has not amended its application to seek approvals based on the rule changes adopted in the *Reconsideration Order*. If Sinclair does so, any such amendments will be subject to additional notice and public comment, and the Commission will have the opportunity to pass on the amended application. And if the Commission were to approve that transaction and Petitioners are aggrieved by it, they would have the opportunity to challenge the FCC's action in court.[10]

The possibility that corrective relief will be available in the ordinary course of litigation "weighs heavily against a claim of irreparable harm." *In re Revel AC, Inc.*, 802 F.3d 558, 571 (3d Cir. 2015) (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (internal quotes omitted)). If Petitioners prevail on the merits in their pending challenges to the *2016 Order* and the *Reconsideration Order*, the Court could order the FCC to rescind its rule changes and re-examine any transactions that may have been approved during

[10] Petitioners argue that, absent a stay, "the few stations controlled by women and minorities are likely to be purchased by large group owners." Pet. 27. But this Court has never suggested that the Commission must structure its rules so that minority or women broadcast station owners are prohibited from voluntarily selling their properties.

the interim. Indeed, as Petitioners acknowledge (Pet. 29 n.80), the FCC can condition its approval of any transaction that depends on the revised rules on the outcome of this Court's disposition of Petitioners' petitions for review, and to require divestiture if necessary. *See, e.g.*, *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 814 (1978).

III. PETITIONERS IGNORE THE REQUIREMENTS FOR GRANT OF A STAY

As set forth above, the mandamus petition does not satisfy any of the conditions for mandamus. But even if it did, stay relief—Petitioners' primary request—is only available via mandamus pursuant to "the well established requirements that [the Court] routinely appl[ies] to motions for stay pending appeal." *Reynolds*, 777 F.2d at 762. The petition fails to address those criteria, let alone demonstrate that they have been satisfied. Petitioners have not even discussed the FCC's reasonable justifications for the rule changes it adopted, even though likelihood of success on the merits is a "critical" requirement for grant of a stay motion. *Nken v. Holder*, 556 U.S. 418, 434 (2009); *see Revel AC*, 802 F.3d at 568-70. And the balance of harms and the public interest, which Petitioners also skip over, weigh against a stay.[11]

[11] Petitioners also have not requested a stay from the agency, the ordinary and express precondition for an application for a judicial stay of agency action pending review. *See* Fed. R. App. P. 18(a)(1).

A. Petitioners Have Not Shown a Likelihood of Success on the Merits

A "strong showing" of likelihood of success on the merits is required for a stay. *Revel AC*, 802 F.3d at 568. In the *2016 Order* and the *Reconsideration Order*, the Commission revised its broadcast ownership rules to "reflect" the "reality" of today's dynamic media marketplace, and to improve the ability of broadcast stations and newspapers "to invest in local news and public interest programming and improve their overall service to [local] communities." *Reconsideration Order* ¶ 1. Other than maintaining—incorrectly—that the Commission ignored the minority and female ownership impact of its rule changes, *see supra,* § I.B, Petitioners do not contest the FCC's justifications for the rule changes it adopted in the *Reconsideration Order*. Nor do they explain how the limited aspects of the mandates that they claim the Commission violated relating to "eligible entities" make it more likely that they will prevail on their completely unrelated challenges to the broadcast ownership rules adopted in the *Reconsideration Order*.

This failure to demonstrate that the Commission's orders are unlawful, or even to engage with the Commission's decisions on the merits, is an independent—and fatal—bar to a stay of the Commission's orders.

B. The Balance of Harms and the Public Interest Weigh Against a Stay

The balance of harms and the public interest also weigh against the grant of a stay. *See Revel AC*, 802 F.3d at 571. Although Petitioners ignore this consideration, a stay would harm the interests of parties seeking to engage in transactions that the revised media ownership rules would permit. As this Court recognized in the context of the newspaper-broadcast cross-ownership ban, delay in revision of the rules "has come at significant expense to parties that would be able, under some of the less restrictive options being considered by the Commission, to engage in profitable combinations." *Prometheus III*, 824 F.3d at 51-52.

Contrary to Petitioners' contention (Pet. 23-30), grant of a stay also would disserve the public interest. This Court recognized in *Prometheus I* that newspaper-broadcast combinations can promote localism, 373 F.3d at 398-99, and that television station combinations can improve local programming. *Id*. at 415. In the *Reconsideration Order*, the Commission likewise concluded, among other things, that repeal of the newspaper-broadcast cross-ownership rule likely would "increas[e] the quantity and quality of local news and information" that newspapers and broadcasters "provide in … local markets," *Reconsideration Order* ¶ 26; that the modifications of the local television ownership rule "will help local television

broadcasters achieve economies of scale and improve their ability to serve their local markets in the face of an evolving [media] marketplace," *id.* ¶ 72; and that joint sales agreements between television stations "create[] efficiencies" that permit local broadcasters to "better serve their communities" and that weigh against attributing such arrangements for ownership purposes, *id.* ¶ 108.

"[A] forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency." *NCCB*, 436 U.S. at 814 (quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)). Yet Petitioners' claims utterly fail to take account of the agency's comprehensive and considered findings that its rule modifications will benefit, not undermine, the public interest.

* * *

Petitioners seek to invoke this Court's mandamus jurisdiction, but they fail to demonstrate that they have a clear and indisputable right to that extraordinary remedy. Petitioners are of course free to challenge the Commission's media ownership orders by way of the ordinary process of judicial review—and indeed they have filed such challenges, which are pending before this Court. But Petitioners cannot attempt an end-run around that process by raising the entirely unsubstantiated assertion that the Commission has failed to comply with this Court's prior mandates.

CONCLUSION

The petition for a writ of mandamus should be denied.

Respectfully submitted,

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February 2, 2018

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I, William J. Scher, hereby certify that on February 2, 2018, I filed the foregoing Opposition of the Federal Communications Commission to Petition for a Writ of Mandamus with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the electronic CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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