No. 23-___

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER.

PETITION FOR WRIT OF MANDAMUS TO THE FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici

Petitioner is the National Association of Broadcasters ("NAB"). Respondent is the Federal Communications Commission (the "Commission"). There are no intervenors or amici at the time of the filing of this petition.

(B) Ruling Under Review

This is an original action challenging the Commission's unlawful withholding of action on its 2018 quadrennial broadcast ownership review, as mandated by Section 202(h) of the Telecommunications Act of 1996. NAB seeks a writ of mandamus compelling the Commission to complete the 2018 review within 90 days of this Court's decision. Because the Commission has not issued a decision on the 2018 review, no citation to the Federal Register or otherwise exists.

(C) Related Cases

This case was not previously before this Court or any other court. There are no other related cases currently pending in this Court or in any other court of which counsel is aware.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, NAB states as follows:

The National Association of Broadcasters is a nonprofit, incorporated association of radio and television stations. It has no parent company, and has not issued any shares or debt securities to the public; thus, no publicly held company owns ten percent or more of its stock. As a continuing association of numerous organizations operated for the purpose of promoting the interests of its membership, NAB is a trade association for purposes of D.C. Circuit Rule 26.1.

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INTRODUCTION

One might favor more regulation as a policy matter. One might favor less. But one thing should be common ground when it comes to the Commission's broadcast ownership rules: the agency must adhere to the mandatory statutory deadline Congress set in Section 202(h) of the Telecommunications Act of 1996 for periodically reviewing those rules to ensure they keep pace with competition. Adhering to that deadline not only respects the schedule set by Congress, but also ensures that decisions about the rules are made and explained, and thus can be understood and tested by regulated entities and interested parties alike.

This petition is about the Commission's undisputed failure to conduct its most recent review on time. Under Section 202(h), the Commission is required to complete a review of its broadcast ownership rules once every four years. The Commission last concluded a review in 2017, when it granted a reconsideration petition regarding a quadrennial review order issued in 2016. The Commission initiated its next review in 2018. It has been ***more than four years*** since the 2018 review began, ***nearly five and a half years*** since the 2017 reconsideration order, and ***over six and a half years*** since the 2016 order (which had belatedly addressed a combined 2010/2014 review). The record for the 2018 review has long been complete. Despite all of that, the agency still has not taken any final action. Instead, the Commission has left the 2018 review in a state of regulatory limbo while moving

onto the 2022 review without any indication about when—or even *whether*—the 2018 proceeding will conclude.

The Commission's noncompliance with respect to the 2018 review is part of a disturbing trend. From the time Congress first required periodic review of the broadcast ownership restrictions, the agency has made a habit of sitting on reviews, finishing them late, or skipping them altogether. That pattern has only grown worse over time. Since finishing the 2006 quadrennial review, the Commission has completed only one ownership review—just *one*—when it was obligated by statute to complete nearly *four*. The agency's inaction and delay is now a chronic problem. The problem is so bad that *both* media groups and certain public advocacy groups—who don't agree on much when it comes to the underlying rules—have been forced to seek judicial relief from the Commission's dilatory pattern. *See Prometheus Radio Project v. FCC*, 824 F.3d 33, 37 (3d Cir. 2016) ("*Prometheus III*") (concluding, in response to public advocacy groups, "that the FCC has unreasonably delayed action on its definition of an 'eligible entity'" used for promoting minority and female broadcast ownership, and, in response to media parties, that it was "[e]qually troubling . . . that nearly a decade has passed since the Commission last completed a review of its broadcast ownership rules").

This Court's intervention is necessary to put a stop to the agency's perpetual slow-roll. Although mandamus relief is extraordinary, so too is the Commission's

long-standing, flagrant refusal to perform its statutory obligation within the timeframe Congress expressly prescribed. There comes a point where a "court must let the agency know, in no uncertain terms, that enough is enough." *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (internal quotation marks omitted). That point is now.

STATEMENT OF JURISDICTION

This Court has jurisdiction over mandamus petitions alleging agency inaction or unreasonable delay "whenever a statute commits review of the relevant action to the courts of appeals." *In re Pub. Emps. for Env't Resp.*, 957 F.3d 267, 271 (D.C. Cir. 2020). Because Section 402(a) of the Communications Act of 1934 commits review of the Commission's orders to the courts of appeals, this Court has jurisdiction to compel the Commission to complete the 2018 review. 47 U.S.C. § 402(a); *see also Prometheus III*, 824 F.3d at 39; *Telecomm. Research and Action Ctr. v. FCC*, 750 F.2d 70, 75–77 (D.C. Cir. 1984) ("*TRAC*"). Venue is also proper in this Court because the Hobbs Act provides that a petitioner may seek review of agency action in the D.C. Circuit. 28 U.S.C. § 2343.

RELIEF SOUGHT

NAB seeks an order granting this Petition and instructing the Commission to complete the 2018 review within 90 days of this Court's decision. NAB also asks this Court to retain jurisdiction over the matter solely to ensure the Commission's

compliance. *See In re Ctr. for Bio. Diversity*, 53 F.4th 665, 673 (D.C. Cir. 2022) (ordering EPA to take action by a specified date and "retain[ing] jurisdiction" to monitor the agency's progress); *In re Bluewater Network*, 234 F.3d 1305, 1316 (D.C. Cir. 2000) (ordering Coast Guard to undertake prompt action and "retain[ing] jurisdiction over the case until final agency action" was issued).

ISSUE PRESENTED

Whether this Court should issue a writ of mandamus compelling the Commission to comply with its express statutory obligation to complete the 2018 review.

STATUTORY PROVISION INVOLVED

Section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111–12 (1996), *as amended by* Pub. L. No. 108-199, § 629, 118 Stat. 3, 99–100 (2004), provides:

> SEC. 202. BROADCAST OWNERSHIP.
>
> * * *
>
> (h) FURTHER COMMISSION REVIEW.—The Commission shall review its rules adopted pursuant to this section and all of its ownership rules quadrennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

STATEMENT OF THE CASE

I. The Statutory Requirement to Conduct Quadrennial Reviews.

In the mid-1990s, Congress decided that substantial regulatory reform was needed to ensure that the broadcast industry could compete effectively in a changed marketplace. *See* H.R. Rep. No. 104-204, at 54–55 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 18–19 ("House Report"). To that end, Congress enacted the Telecommunications Act of 1996 ("1996 Act"). Pub. L. No 104-104, 110 Stat. 56 (1996). Section 202 of the 1996 Act accomplished Congress's goal "to preserve and to promote the competitiveness" of broadcast stations in two ways. House Report at 48. First, it relaxed or eliminated a series of decades-old rules restricting the number of television stations and radio stations a single entity could own and banning the common ownership of broadcast stations with certain non-broadcast media outlets. *See* 1996 Act, § 202(a)-(f), (i), 110 Stat. at 110–12. Second, it directed the Commission to "review" all its remaining broadcast ownership rules "biennially" to "determine" whether any of them continue to be "necessary in the public interest as the result of competition," and to "repeal or modify" those that are not. *Id.* § 202(h), 110 Stat. at 111–12. In 2004, Congress amended Section 202(h) to require that the Commission's periodic reviews take place every four years instead of every two because the agency had already failed to keep up with the statutory

deadline. *See* Consolidated Appropriations Act, 2004, Pub. L. No. 108-199 § 629, 118 Stat. 3, 99–100 (2004).

Section 202(h) established an "iterative process" requiring the Commission "to keep pace with industry developments and to regularly reassess how its rules function in the marketplace." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1156 (2021). Congress thus contemplated that the Commission would finish each review in a timely fashion so that it can assess how its rules, including any modified ones, function in the real world before initiating the next required review.

II. The Commission's Long History of Delaying and Failing to Complete Biennial and Quadrennial Reviews Leading Up to the 2018 Review.

Although Section 202(h) of the 1996 Act clearly instructs the Commission to conduct recurring reviews of its ownership rules on the timetable set by Congress, the agency has repeatedly failed to do so.

The Commission failed to finish its very first broadcast ownership review on time. The agency started that review in 1998. *See 1998 Biennial Regulatory Review*, Notice of Inquiry, 13 FCC Rcd 11276 (1998). But by November 1999, that inaugural review was still not done, drawing a direct congressional rebuke: Congress instructed the Commission to complete it within 180 days. Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, § 5003, 113 Stat. 1501, 1501A-593 (1999). The Commission finally released the review in mid-2000. *See 1998*

Biennial Regulatory Review, Biennial Review Report, 15 FCC Rcd 11058 (2000) ("Report").

The 1998 review was even more belated than these dates suggest. Because that proceeding began with a notice of inquiry rather than a rulemaking notice, the 1998 biennial Report could not effectuate any ownership rule changes. Further delays ensued as the Commission subsequently initiated several rulemakings to consider the Report's proposals, with one of these rulemaking notices not even being *released* until months *after* the next (*i.e.*, 2000) biennial review had been concluded. *See Cross-Ownership of Broadcast Stations and Newspapers*, Notice of Proposed Rulemaking, 16 FCC Rcd 17283 (2001); *2000 Biennial Regulatory Review*, Report, 16 FCC Rcd 1207 (2001).[1]

With another review of its ownership rules due, the Commission made two rulemakings still pending from the *1998* biennial part of the *2002* review. *See 2002 Biennial Regulatory Review*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13712, 13747–48 (2003). That 2002 biennial was not resolved until mid-2003. *Id*.

Congress responded by amending the law to require quadrennial, instead of biennial, reviews. *See supra* 5–6. Even with additional time, the 2006 quadrennial

[1] In this intervening 2000 ownership review, the Commission, in relevant part, issued a report merely summarizing its recent actions and proposals relating to its ownership rules. 16 FCC Rcd at 1217–18.

review was not completed until 2008. *See 2006 Quadrennial Regulatory Review,* Report and Order and Order on Reconsideration, 23 FCC Rcd 2010 (2008).

Then, despite initiating the 2010 review in 2009, *Media Bureau Announces Agenda and Participants for Initial Media Ownership Workshops and Seeks Comment on Structuring of the 2010 Media Ownership Review Proceeding*, Public Notice, 24 FCC Rcd 12584 (2009), the Commission not only failed to timely complete that review but also failed ever to properly finish it. Instead, the agency chose to disregard the long-completed 2010 record, start the 2014 review, and just roll the unfinished 2010 review into the 2014 proceeding. *See 2014 Quadrennial Regulatory Review*, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371 (2014). The Commission then delayed the 2014 review—which, of course, was *further* delay of the 2010 review. When NAB and other media parties challenged the agency's inaction as contrary to Section 202(h), the Third Circuit Court of Appeals found that the Commission had not complied with the "mandatory language" or the "very purpose" of the statute, stressing the "need for timeliness" in conducting Section 202(h) reviews. *Prometheus III*, 824 F.3d at 50.

The Commission finally released an order addressing the combined 2010/2014 review in late summer 2016, three months after the Third Circuit's decision. *See 2014 Quadrennial Regulatory Review*, Second Report and Order, 31 FCC Rcd 9864 (2016). The Commission subsequently reconsidered that order in

response to NAB's and other media parties' requests, taking measured and long-overdue deregulatory action. *See 2014 Quadrennial Regulatory Review*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802 (2017). Court challenges to the reconsideration decision followed, and the Supreme Court unanimously upheld the Commission's deregulatory order. *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021).

III. The Commission's Initiation of the 2018 Quadrennial Review.

In December 2018, the Commission released a rulemaking notice kicking off the 2018 review. *See* Add. 1 (*2018 Quadrennial Regulatory Review*, Notice of Proposed Rulemaking, 33 FCC Rcd 12111 (2018)). Many stakeholders filed comments in April 2019 and reply comments in May 2019, with some, including NAB, submitting extensive data and studies by economists and industry analysts as the Commission urged. The Commission took no further action on the 2018 review until after the Supreme Court's April 2021 decision in *Prometheus*. Following the Supreme Court's decision, the Commission sought to update its record, and interested parties filed another round of comments and reply comments on September 2 and October 1, 2021, respectively. *See* Add. 57 (*Media Bureau Seeks to Update the Record in the 2018 Quadrennial Regulatory Review*, MB Docket No. 18-349, DA 21-657 (June 4, 2021)). NAB again submitted extensive comments,

data, and studies, and asked the Commission to expeditiously conclude the 2018 review. Reply Comments of NAB, MB Docket No. 18-349, at 6 (Oct. 1, 2021).

The Commission has now been sitting on the record since 2019 and even on its updated record for more than 18 months. It has been nearly ***five and a half years*** since the 2017 reconsideration order that ended the combined 2010/2014 review—and more than ***six and a half years*** since the 2016 order that had initially concluded the 2010/2014 review. Despite those undisputable facts, the Commission to date has taken no further action on the 2018 review and has announced no plans to do so. The Commission has chosen to leave the 2018 review in limbo and instead begin its 2022 review.

IV. The Commission's Initiation of the 2022 Quadrennial Review.

On December 22, 2022, the Commission's Media Bureau released a Public Notice opening the 2022 proceeding and seeking comment on the three rules that remain subject to periodic review. *See* Add. 64 (*Media Bureau Opens Docket and Seeks Comment for 2022 Quadrennial Review of Media Ownership Rules*, Public Notice, MB Docket No. 22-459, DA 22-1364 (Dec. 22, 2022)) ("Public Notice").[2] In explaining its decision to initiate the 2022 review before it had finished the 2018

[2] As with the 1998 review, *see supra* 7, the Commission cannot modify or repeal any ownership rules without first issuing a notice of proposed rulemaking. Accordingly, the Public Notice refers to "next steps in the 2022 proceeding, such as any subsequent Notice of Proposed Rulemaking," Add. 67, but the Commission has not said when and if it will take those "next steps."

review, the Public Notice observed that the Commission had "similarly initiated" the 2014 review before completing the 2010 review. Add. 64 n.2. But the Public Notice ignored the Third Circuit's ruling that the 2010 review was *unlawfully delayed* notwithstanding the fact that it had been rolled into the 2014 review. *Prometheus III*, 824 F.3d at 50–51.

On February 1, 2023, NAB asked the Commission to hold the 2022 review in abeyance until it expeditiously concluded the 2018 review (i.e., by the end of the first quarter of 2023). *See* Add. 69 (NAB, *Request to Toll the 2022 Quadrennial Regulatory Review and to Expeditiously Conclude the 2018 Quadrennial Regulatory Review*, MB Docket Nos. 22-459, 18-349 (Feb. 1, 2023)) ("Request"). NAB explained that the Commission's failure to timely complete the 2018 review violates Section 202(h), and that the initiation of the 2022 review prior to concluding the 2018 review upends the iterative process Congress established. Add. 70–76. NAB also pointed out that stakeholders cannot provide specific and relevant comments or studies for purposes of the 2022 review on rules still subject to potential modification or repeal in the pending 2018 review. Add. 74–77. Receiving no answer, NAB submitted comments in response to the Public Notice on March 3, 2023.[3] On March 29, 2023, NAB notified the Commission that if it did not act on NAB's Request by

[3] NAB's comments focused on issues it had previously commented on in the pending 2018 review, attaching several earlier filings it had submitted for the record in the 2018 proceeding. *See* Comments of NAB, MB Docket No. 22-459 (Mar. 3, 2023).

April 12, NAB would deem that Request denied and reserved its right to seek judicial relief. *See* Add. 79 (NAB, *Supplemental Submission Regarding Request*, MB Docket Nos. 22-459, 18-349 (Mar. 29, 2023)). The Commission did not act on the Request, leaving NAB with no choice but to file this petition for mandamus.

ARGUMENT

The Administrative Procedure Act ("APA") requires courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). This Court has repeatedly held that a writ of mandamus is the appropriate mechanism for carrying out that directive. *See, e.g.*, *In re Core Comm'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (noting that the court's "jurisdiction and authority" to provide mandamus relief in these circumstances is "undisputed"); *TRAC*, 750 F.2d at 77 (noting that the APA "indicate[s] a congressional view that agencies should act within reasonable time frames and that courts . . . may play an important role in compelling agency action that has been improperly withheld or unreasonably delayed"). Ordering mandamus relief not only protects the Court's future jurisdiction to review the agency action in question, but also ensures that agencies comply with the statutory obligations Congress established. *See TRAC*, 750 F.2d at 76; *see also In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) (explaining that an agency's "unreasonable delay" presents the type of "extraordinary circumstances" justifying mandamus relief). Accordingly, this Court

has held that a writ of mandamus should issue if (1) the agency's delay violates a clear legal duty, (2) the petitioner has no other adequate means to obtain relief, and (3) the agency's delay is "egregious." *In re Ctr. for Bio. Diversity*, 53 F. 4th at 670. Each of those prerequisites is satisfied here.

I. The Commission Has Violated a Crystal-Clear Legal Duty.

The Commission's failure to complete the 2018 review violates the "crystal-clear legal duty" Congress has imposed. *In re Ctr. for Bio. Diversity*, 53 F. 4th at 670. Section 202(h) uses "unmistakably mandatory language" in describing the Commission's obligation to complete a review of its broadcast ownership rules every four years. *Prometheus III*, 824 F.3d at 50. The provision states that the Commission "shall" review its ownership rules "quadrennially"; "shall" determine whether any of those rules remain necessary in the public interest as a result of competition; and "shall" repeal or modify those that are not. 1996 Act, § 202(h), as amended. By repeatedly using the word "shall," Congress created "'an obligation impervious to . . . discretion.'" *Prometheus III,* 824 F.3d at 50 (quoting *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998)).

Because Section 202(h) constitutes a "clear command," the agency may not simply ignore it. *In re Pub. Emps. For Env't Resp.*, 957 F.3d at 273; *see also Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 190 (D.C. Cir. 2016) (explaining that "shall" is "typically mandatory"). Although the Commission has openly acknowledged "its

'statutory obligation to review the broadcast ownership rules every four years,'" *Prometheus III*, 824 F.3d at 51 (internal citation omitted), the agency has repeatedly ignored it. The 2018 review commenced in December 2018. Yet, the agency has not taken *any* substantive action on the extensive record in that proceeding, which essentially has been gathering dust since May 2019. In fact, there has been no final action by the Commission regarding the broadcast ownership rules since its reconsideration of the belated 2010/2014 review order in 2017—*five and a half years ago*. The Commission has not said anything about when, if ever, it might close out the 2018 review.

Rather than issuing a decision based on the 2018 proceedings, the Commission has instead skipped ahead to the 2022 review. But it may not satisfy its statutory obligation to conduct a "quadrennial" review by combining the 2018 and 2022 proceedings or otherwise considering them contemporaneously. The iterative process in Section 202(h) contemplates "review cycles" that build on one another, not collapse into each other. *See Prometheus III*, 824 F.3d at 50–51. The law says "quadrennially," not "octennially" or "at the Commission's convenience." That is why the Third Circuit concluded that the Commission's decision to roll the 2010 review into the 2014 review did not save it from being unlawfully delayed. *Id.* By beginning the 2022 proceeding before completing the delayed 2018 review, the

Commission repeats its past errors. Each review must be done every four years and be timely in its own right. The 2018 review plainly is not.[4]

II. NAB Has No Other Adequate Means to Obtain Relief.

A petition for mandamus is NAB's only means for obtaining relief. NAB has already *thrice* implored the Commission to complete the 2018 review, but these efforts have been unsuccessful. First, in October 2021, NAB requested in its supplemental reply comments in the 2018 proceeding that the Commission expeditiously conclude the 2018 review, which at that time had already been underway for three years. Reply Comments of NAB, MB Docket No. 18-349, at 6. Second, NAB filed a Request with the Commission on February 1, 2023, asking the agency to toll the newly commenced 2022 review until it concluded the 2018 review expeditiously. Add. 69 (NAB, *Request to Toll the 2022 Quadrennial Regulatory Review and to Expeditiously Conclude the 2018 Quadrennial Regulatory Review*, MB Docket Nos. 22-459, 18-349). Third, after receiving no response, NAB notified

[4] Recognizing this problem, the Public Notice tries to distinguish the Commission's 2022 action from its 2014 action, stating that in 2014, the "Commission incorporated the existing 2010 record into the 2014 review[,] [but] [h]ere, the Media Bureau is creating a new docket" for the 2022 review. Add. 64 n.2. That point is inaccurate and irrelevant. The agency did create a new docket for the 2014 review (MB 14-50) that differed from the docket for the 2010 review (MB 09-182). In any event, whether or not the Commission incorporates an earlier review's record into a later review, the Commission's initiation of the 2022 review without timely completing the 2018 review violates Section 202(h)'s core command that the agency review the rules and determine whether they remain in the public interest every four years.

the Commission on March 29 that, unless the agency acted on NAB's Request by April 12, NAB would be forced to seek judicial relief. Add. 79 (NAB, *Supplemental Submission Regarding Request*, MB Docket Nos. 22-459, 18-349). The Commission did not respond by that time (or indeed as of the date of this filing) to any of NAB's requests, thereby constructively denying them.

The statutory framework does not provide a more formal mechanism for urging the Commission to comply with its statutory duty. NAB is out of options. The only relief it can seek is from this Court. *See In re Ctr. for Bio. Diversity*, 53 F. 4th at 671 (concluding that mandamus relief was the only way the petitioner could compel the agency "to perform its clear duties"); *In re Core Commc'ns*, 531 F.3d at 860 (explaining that petitioner's appeal to the agency was "not an adequate means to attain the relief it seeks").[5]

III. The Commission's Delay Is Egregious.

For 25 years, the Commission has played fast and loose with its obligation to review its broadcast ownership rules according to the clear timetable prescribed in Section 202(h). The Commission is well aware that its dilatory ways are unlawful; indeed, both Congress and the Third Circuit have admonished the agency for not

[5] If the Court concludes that the Commission's failure to respond to NAB's February 2023 Request constitutes reviewable final agency action, NAB asks that the Court treat this filing as a petition for review in addition, or in the alternative, to a petition for mandamus.

heeding the statutory deadline. The agency's continued inaction on the 2018 review—especially against the backdrop of its long history of chronic tardiness, *see supra* 6–9—is therefore egregious under any standard. In *TRAC*, the Court listed six factors to guide its analysis of the reasonableness of an agency's delay in fulfilling its statutory duty:

> (1) "the time agencies take to make decisions must be governed by a 'rule of reason'";
>
> (2) "where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason";
>
> (3) "delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake";
>
> (4) "the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority";
>
> (5) "the court should also take into account the nature and extent of the interests prejudiced by delay"; and
>
> (6) "the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."

750 F.2d at 80 (citations omitted). "No one factor is determinative, and each case must be analyzed according to its own unique circumstances." *In re Pub. Emps. for Env't Resp.*, 957 F.3d at 273 (internal quotation marks omitted).

Rule of Reason. As discussed above, Section 202(h) provides a clear timetable for the Commission to review its broadcast ownership rules. This

timetable "suppl[ies] the content" for determining whether the agency's delay in completing the 2018 review is reasonable. *TRAC*, 750 F.2d at 80.

Both the Supreme Court and the Third Circuit have explained that in enacting Section 202(h), Congress intended to create an "iterative process" through which the Commission would "keep pace" with the industry and "regularly reassess" how its rules function in the market. *Prometheus*, 141 S. Ct. at 1156; *see also Prometheus III*, 824 F.3d at 50 (stating that Section 202(h) was designed as an "ongoing mechanism" to ensure that Commission rules "keep pace with the competitive changes in the marketplace") (internal quotation markets omitted). To accomplish that objective, the statute requires the agency to both start *and complete* a review of its broadcast ownership rules "quadrennially"—*i.e.*, every four years. This constitutes a "plain deadline." *In re Center for Bio. Diversity*, 53 F.4th at 671. Congress has shown it knows how to change the deadline if it so desires; it previously provided that the reviews should be completed "biennially." If Congress wanted to allow the Commission to complete a review every eight years, or whenever it was able to do so, it would have used "octennially" or "at the Commission's discretion."

Extending the review proceedings beyond that four-year period—as the Commission has done here—upends the statutory scheme. The Commission is *not* keeping pace with the industry or regularly reassessing its rules as Congress

intended. The Commission last evaluated the broadcast ownership rules when it belatedly completed the 2010/2014 review, and the competitive landscape has changed dramatically since then. But the industry and all those affected by it are held captive in a state of regulatory stasis while the Commission does nothing. Failing to comply with the statute's requirement to perform discrete and recurrent reviews has thus "eviscerat[ed] the very purpose" of Section 202(h). *In re Center for Auto Safety*, 793 F.2d 1346, 1353 (D.C. Cir. 1986); *see also In re People's Mojahedin Org. of Iran*, 680 F.3d 832, 837 (D.C. Cir. 2012) (per curiam) (holding that a "failure to act" that "plainly frustrates the congressional intent . . . cuts strongly in favor of granting [a] mandamus petition"). As this Court found when explaining Section 202(h)'s directive, "[t]he Commission's wait-and-see approach cannot be squared with its statutory mandate *promptly*—that is, by revisiting the matter biennially [now, quadrennially]—to 'repeal or modify' any rule that is not 'necessary in the public interest.'" *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1042 (D.C. Cir. 2002) (emphasis added), *modified on reh'g on other grounds*, 293 F.3d 537 (D.C. Cir. 2002); *accord Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 164 (D.C. Cir. 2002). That the Commission has *repeatedly* ignored the timeline in Section 202(h) only reinforces the unreasonableness of its conduct. *See In re Center for Auto Safety*, 793 F.2d at 1354 & n.55 (finding agency delays

unreasonable in a case involving "statutorily-mandated" recurring rulemakings "beset with repeated delay").

Nor can the Commission contend that the litigation relating to the 2010/2014 review justifies its delay in completing the 2018 review. While that litigation may account for *some* of the delay, it cannot account for all of it. It has been more than two years since the Supreme Court rendered its opinion, and the supplemental comments the Commission sought following that opinion have been sitting with the agency since October 1, 2021—*over 18 months*. A year and a half (on top of the time the Commission has had with the record compiled in spring 2019) is more than enough time for the Commission to complete its work.[6]

The Commission, moreover, knows it must abide by congressional deadlines as a general matter, *see, e.g.*, *Amendment to the Commission's Rules Concerning Effective Competition*, Report and Order, 30 FCC Rcd 6574, 6575 ¶ 1, n.6 (2015) (acknowledging that Congress's direction that the Commission "shall" complete a designated rulemaking means the Commission "must" complete the rulemaking by the date specified in the statute), and has *admitted* that it bears a particular "'statutory obligation'" to conduct broadcast ownership reviews on a four-year schedule,

[6] The Commission can move quickly when it wants to. In 2021, the Commission sought comment and promulgated new rules in just 60 days to meet a congressional deadline. *See Establishing Emergency Connectivity Fund to Close the Homework Gap*, Report and Order, 36 FCC Rcd 8696 (2021) (adopting rules on May 10, 2021, following legislation passed on March 11, 2021).

Prometheus III, 824 F.3d at 51 (internal citation omitted). It should not be allowed to pick and choose which statutory deadlines it meets, respecting some but disregarding others. As this Court observed in upholding the Commission's application of its deadlines against a dilatory licensee, "'rules is rules.'" *Nat'l Sci. and Tech. Network, Inc. v. FCC*, 397 F.3d 1013, 1015 (D.C. Cir. 2005).

It is not only long past time for the Commission to act on the belated 2018 review, but continued delay also will make a properly conducted and even remotely timely 2022 review virtually impossible. The Commission has finished only a single review—the improperly combined 2010/2014 review—since February 2008. One completed "quadrennial" review in over 15 years undoubtedly qualifies as egregious.

The Commission's failure to meet the clear statutory deadline is the "most important" consideration in determining whether mandamus is appropriate to remedy agency inaction or delay. *In re Ctr. for Bio. Diversity*, 53 F. 4th at 671 (internal quotation markets and citation omitted). And in some courts, that failure alone provides the basis for awarding relief. *See South Carolina v. United States*, 907 F.3d 742, 760 (4th Cir. 2018) (holding that judicial relief is non-discretionary when an agency fails "to meet a hard statutory deadline"); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999) ("[W]hen an entity governed by the APA fails to comply with a statutorily imposed absolute deadline, it has unlawfully

withheld agency action and courts, upon proper application, must compel the agency to act."). Accordingly, this factor weighs heavily in favor of mandamus.

Human Health & Welfare. "Though this is not a case where inaction risks life and limb," *In re Pub. Emps. For Env't Resp.*, 957 F.3d at 274, Congress requires the Commission to conduct quadrennial reviews so that it can "promptly" repeal or modify regulations no longer in the "public interest." *Fox Television Stations*, 280 F.3d at 1042. Indeed, NAB in its 2018 review submissions recommended that the Commission adopt measured deregulatory reforms that would serve the public. *See* Comments of NAB, MB Docket No. 18-349, at 29–35, 70–79 (Apr. 29, 2019) (urging elimination or loosening of numerical caps on radio station ownership, especially in economically struggling small markets, and supporting removal of across-the-board *per se* bans on local TV station ownership that ignore competitive differences between local markets). The Commission's failure to even consider NAB's proposals results in more than mere "economic" harm to regulated entities. That failure harms competition in markets across the country, impairing the continuing viability of our nation's free, over-the-air broadcast services, which provide vital local news, information, and emergency alerts for millions of Americans, including in smaller communities that increasingly lack other local journalism outlets.

Effect on Agency Priorities. Requiring the Commission to complete the 2018 review will neither "reorder" the agency's priorities nor facilitate the type of "line-jumping" this Court has cautioned against. *In re Ctr. for Bio. Diversity*, 53 F. 4th at 672. Here, *Congress has already set the Commission's priorities* by not only mandating reviews of its broadcast ownership rules but also requiring those reviews every four years; thus, Congress has placed these quadrennial reviews ahead of discretionary matters before the agency that lack a specific statutory directive or timetable. Mandatory duties should come first: "congressionally imposed mandates and prohibitions trump discretionary decisions." *Am. Hosp. Ass'n*, 812 F.3d at 193.

Moreover, the 2018 review, which the Commission should have *already* completed, must be at the front of the ownership review line. NAB merely asks that the Commission not allow the 2022 review to cut in front of it, or to make either or both superfluous. In addition, by initiating the 2022 review—and refusing NAB's request to hold off until the 2018 review is promptly completed—the Commission already has made clear that examining the ownership rules *is* one of its own priorities and that it has the resources to do so. In all events, completing the 2018 review, rather than proceeding with the 2022 review, will not prevent the Commission from dedicating resources to other important agency initiatives. The record for the 2018 review is already complete and more than ripe for review, which means that ruling on it would require *less* work than facilitating the 2022 proceedings.

Prejudice from Delay. Allowing the Commission's inaction on the 2018 review to continue would severely prejudice NAB, its members, and other stakeholders in at least three ways. First, an incomplete but pending 2018 review—the outcome of which might change the ownership rules—seriously hampers stakeholders' efforts to submit meaningful comments or studies in the 2022 review because the relevant rules are a moving target. Second, the longer the Commission delays completing the 2018 review, the more likely the Commission will be effectively "forced" into skipping it altogether and/or unlawfully combining it into the 2022 review (as with the 2010 and 2014 reviews). That would impose substantial harm on parties that expended time and resources submitting comments, data, and studies for the 2018 record and, in turn, undermine public participation in the review process. Third, as described above, NAB urged the Commission to make specific deregulatory decisions in the 2018 review to help the broadcast industry keep up with its burgeoning online video and audio competitors, which are unencumbered by any comparable ownership restrictions. Every day that broadcasters must fight this lop-sided competitive battle harms them and the local communities they serve. Even the Public Notice commencing the 2022 review recognized that the "media marketplace can change dramatically" between periodic reviews, Add. 64, highlighting the importance of their timely completion.

Agency Impropriety. This Court "need not find any impropriety" underlying the Commission's delay to grant NAB relief. *TRAC*, 750 F.2d at 80. Late is late, no matter the reason. Nevertheless, impropriety may be present here, given that the Commission stands to gain an unfair advantage by withholding the 2018 review. If the Commission wanted to retain certain rules or even try to adopt new ones but had no basis to do so on the 2018 record, then the Commission would have every incentive to delay releasing a final (and judicially reviewable) order and bypass the 2018 review to attempt to generate a more favorable record for its preferred (but currently unsupported) outcomes through the 2022 proceeding.

Similarly, if stakeholders made proposals during the 2018 review that the Commission had no basis to reject on the 2018 record, the Commission would be required under the APA to adopt them. And, if the Commission decided to undo that action during the 2022 review, it would have to provide a reasoned explanation to justify its decision. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). But if the Commission avoids ruling on the 2018 proposals and then leverages the 2022 record to reject them in the first instance, it could avoid this hurdle altogether. Thus, opening the 2022 review before completing the 2018 review could aid in sidestepping not just Section 202(h)'s timetable, but also its deregulatory purpose. *See Fox Television Stations*, 280 F.3d at 1033 (stating that Congress "instructed" the Commission in Section 202(h) to review its ownership

rules periodically "in order to continue the process of deregulation"). Whether the Commission's inaction is motivated by these strategic advantages or not, a decision denying mandamus relief will give the agency an opportunity to bypass the limitations Congress has placed on its rulemaking authority and to achieve by sheer inaction what it might not be able to do directly.

Accordingly, the Commission should be compelled to complete the 2018 review so its decision will be based on the record it has compiled in that proceeding, and so that any future rule changes comply with the APA's requirements. It is critical to Section 202(h) and administrative law principles more generally that the Commission be required to complete an existing review before embarking on a new one. *See Prometheus III*, 824 F.3d at 51–52 (stating that the Commission's failure to conclude the 2010 review while commencing the 2014 review kept its ownership rules "in limbo" and "hamper[ed] judicial review because there is no final agency action to challenge").

* * *

This case presents the "compelling equitable grounds" that justify mandamus relief. *Am. Hosp. Ass'n*, 812 F.3d at 189 (internal quotation marks omitted). The Commission cannot hold the broadcast industry and interested parties in "administrative limbo" any longer. *In re People's Mojahedin Org. of Iran*, 680 F.3d at 837. It must make a decision on the proposals that have been presented in the

2018 review to meet its admitted statutory duties and to avoid rendering the 2022 review a meaningless exercise. In light of the Commission's past sluggish practices, the Court should not accept any promises the agency might make regarding its intent to complete the 2018 review.

CONCLUSION

For these reasons, this Court should grant this Petition and instruct the Commission to complete the 2018 review within 90 days of this Court's decision. This Court also should retain jurisdiction solely for the purpose of monitoring the Commission's compliance.

April 24, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this mandamus petition complies with the applicable typeface, type style, and type-volume limitations. This petition was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1), this petition contains 6,370 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this petition.

April 24, 2023

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CERTIFICATE OF SERVICE

I hereby certify that, on April 24, 2023, I electronically filed the foregoing mandamus petition with the Clerk for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that I have caused the foregoing petition to be served by FedEx overnight service and by electronic mail on the Commission as follows:

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