Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries	)	MB Docket No. 19-177
	)	MM Docket No. 98-204
Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies	)	

To the Commission

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Summary and Introduction

Inasmuch as the FCC's record on EEO enforcement has not been refreshed in detail since 2004, the 37 EEO Supporters (*see* Annex) appreciate this long-awaited opportunity for the Commission to complete the unfinished work from its 1998 proceeding (MB Docket 98-204) on EEO enforcement.[1]

In response to the 2019 EEO Improvements NPRM,[2] we take this opportunity to 1) set out the purposes and importance of the regulations, and 2) provide five recommendations for improving EEO enforcement. Each of our five proposals is aimed at helping the Commission fulfill Congress' goal of putting an end to discrimination in the electronic mass media:

1. EEO data should be gathered as necessary for research on industry trends and EEO program effectiveness.

2. EEO data should be requested from licensees found to have failed to engage in the broad recruitment (e.g., via Internet postings) that is required by current FCC precedent; failure to engage in this basic practice means that a licensee recruited primarily by word-of-mouth ("WOM"), which has been deemed to constitute a racially discriminatory scheme when performed from a homogeneous staff.

3. Renewal applications and EEO audits should include a certification that job postings occurred before hiring decisions were made, as is common in other industries.

4. The FCC/EEOC Memorandum of Understanding ("*FCC/EEOC MOU*") should be updated to ensure that the FCC immediately audits employment units that receive EEOC probable cause determinations.

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[1] The views expressed in these Comments are the institutional views of the commenting organizations, and are not intended to reflect the individual views of each officer, director or member of these organizations.

[2] *See Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2), MB Dockets 18-23 and 17-105,* FCC 19-10 (February 1, 2019) at 5-6 ¶10 and at 7-8 ns. 46-48 (describing several EEO reform proposals from the EEO Supporters, including the use of Form 395 data to root out discrimination by licensees, publication of a summary of aggregate broadcast licensee employment data, and evaluation of the audit program; and pledging to undertake the proceeding that is now underway in MB Docket No. 19-177); *see also Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries, Notice of Proposed Rulemaking, MB Docket No. 19-177*, FCC 19-54 (June 21, 2019), 84 Fed. Reg. 35063 (July 21, 2019) ("*2019 EEO Improvements NPRM*") at 3-5 ¶¶5-9 (broadly seeking comment on potential improvements to EEO enforcement and compliance for broadcasting and MVPDs, including consideration of proposals offered by the EEO Supporters).

5. The Commission should open an Inquiry under 47 U.S.C. §403 ("Section 403") into the pattern of consistently very low representation of minorities in radio news.

I. <u>EEO Enforcement Is A Matter Of The Highest Priority.</u>

The principal broadcast EEO regulation—47 C.F.R. §2080, last readopted in 2002,[3] unequivocally bans discrimination in broadcast employment on the basis of race, color, religion, national origin, or sex.

The Commission can forever take pride that on July 3, 1968, it became the first federal agency to require its licensees to practice nondiscrimination in employment.[4] Another high point occurred exactly 50 years later—on July 3, 2018—when the Commission relocated the EEO Staff to the Enforcement Bureau.[5]

The EEO regulations have the five main purposes described below, each of which beneficially impacts each EEO Supporter organization's members and constituents.

A. <u>The Rules Prevent And Proscribe Discrimination.</u>

The regulations disallow the use of race and gender in hiring decisions, while ensuring that all qualified persons, including minorities and women, can learn of and compete on an equal footing for job openings. They contain carefully crafted, race- and gender-neutral procedures aimed at

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[3] *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second Report and Order and Third Notice of Proposed Rulemaking*, 17 FCC Rcd 24018 (2002) ("*2002 Second R&O*") ("Equal opportunity in employment shall be afforded … to all qualified persons, and no person shall be discriminated against in employment by such stations because of race, color, religion, national origin, or sex[.]") Parallel regulations govern MVPD and common carrier EEO.

[4] *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices, Memorandum Opinion and Order and Notice of Proposed Rulemaking,* 13 FCC2d 766 (July 3, 1968) ("*1968 EEO Rules*").

[5] *See* Press Release, FCC, *Chairman Pai Statement on Proposal to Improve the FCC's Enforcement of Equal Employment Opportunity Rules* (July 3, 2018), available at https://www.fcc.gov/document/chairman-pai-statement-proposal-improve-enforcement-eeo-rules (last visited August 10, 2019); *FCC Equal Employment Opportunity Audit and Enforcement Team Deployment, Order,* 33 FCC Rcd 7504 (July 24, 2018).

deterring both intentional and unintentional discrimination.[6]

The rules are designed to afford broadcasters and MVPDs wide latitude on how to recruit, as long as the methods chosen would enable minorities and women to learn about job openings. The rules neither call for nor embed any secret quota or set-aside, and the rules require that no additional consideration be given to any job applicant on the basis of race or gender.

B. The Rules Promote Competition.

In 2002, Commissioner Martin famously stated that the Commission's EEO program "should promote not just diversity, but also true competition."[7] The rules promote competition by enhancing the ability of the broadcast and MVPD industries to compete with new media for revenue and subscribership. The EEO rules achieve this goal in three ways: they help eliminate artificial restraints on the supply of labor; they improve the survivability and strength of competitive firms; and they improve the industry's reputation among consumers and the labor force. We discuss these in turn.

- **EEO rules help eliminate artificial restraints on the supply of labor.**

In any industry, the irrational exclusion of any input to production distorts the marketplace, reduces the quantity and quality of outputs, drives up prices, and leaves consumer demand unsatisfied. In the electronic media, the most critical input into production is labor. Talent and creativity are what makes broadcasting and multichannel video competitive with other media industries. The diversity of the employee pool is an especially critical input in these industries, which require an ever-growing stream of creative people on the line staff and in management. In a business such as media, whose product is the distribution of the fruits of talent, it is unsound economic policy to exclude or drive out anyone on a basis other than merit.[8] If an employer, through her own discrimination, or as a

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[6] *See, e.g., Streamlining Broadcast EEO Rules and Policies, Notice of Proposed Rulemaking,* 11 FCC Rcd 5154, 5156 ¶3 (1996) (holding that "an underlying rationale for the EEO rule [is] deterence [sic] of unlawful discrimination.")

[7] *2002 Second R&O*, *supra,* 17 FCC Rcd at 24078 (Separate Statement of Commissioner Kevin J. Martin).

[8] The economic cost to society when a discrimination victim does not earn the true value of her labor may be measured in foregone tax revenues, social service costs, and lost productivity. These costs are staggering. Dr. Andrew Brimmer, an economist and a former member of the Federal Reserve Board, quantified the economic cost of discrimination against African

consequences of the discrimination of others,[9] has fewer candidates from which to choose for a position, she is likely to select a less optimal person, and (given the reduced labor supply available to her) she will pay more to secure this person's services.

In 2001, Commissioner Martin captured this issue perfectly:

> by expanding their recruitment sources, broadcasters and cable entities, including multi-channel video programming distributors, are more likely to find the best-qualified candidate. And when broadcasters and cable entities have a more talented workforce, we all reap the benefits.[10]

- **EEO rules improve the survivability and strength of competitive firms.**

Greater minority broadcast and MVPD employment strengthens the competitiveness of these industries by improving the prospects for more minority owned firms, since hands-on experience is the key to eventual ownership.[11] More minority owners would mean an increase in the number of stations

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Americans. *See* A. Brimmer, "The Economic Cost of Discrimination against Black Americans," in M.C. Simms, ed., Economic Perspective on Affirmative Action (Joint Center for Political and Economic Studies, 1995) at 11-29. Dr. Brimmer calculated that the inefficient use of African Americans' productive capacity was costing the economy (in 1995) about $138 billion annually. That was about 2.15 percent of the gross national product. *Id.* at 12. *See also* Danielle Davis, *The Economic Costs of Discrimination,* MMTC (April 26, 2019), available at https://www.mmtconline.org/wp-content/uploads/2019/04/Andrew-Brimmer-and-the-Economic-Costs-of-Discrimination-042619.pdf (last visited August 24, 2019).

[9] Discrimination pollutes the entire pond. Those subject to discrimination do not develop to their full potential, or they become discouraged and leave the industry, or they never enter it in the first place. Consequently, the number of persons available for employment at any firm, and the qualifications of those persons, inevitably are depressed by the second-order consequences of discrimination practiced by other firms. That is especially true in an industry such as broadcasting, in which career employees frequently move from one firm to another and to and from competing industries like the internet and telecommunications.

[10] *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second Notice of Proposed Rulemaking,* 16 FCC Rcd 22843, 22875 (2001) ("*2001 Second NPRM*") (Separate Statement of Commissioner Kevin Martin).

[11] *See Review of the Commission's Broadcast Equal Employment Opportunity Rules and Policies, Report and Order,* 15 FCC Rcd 2329, 2346-49 ¶¶42-47 (2000) ("*2000 First R&O*"), *recon. denied,* 15 FCC Rcd 22548 (2000) (discussing the importance of employment as a means of fostering minority and female ownership, and noting that Section 309(j) of the Communications Act expressly requires the Commission to promote minority ownership in the manner in which it issues licenses.) We discuss the impact of EEO on minority ownership in more detail *infra* at 8-11.

that are operating successfully, staying on the air, and serving the public. More minority owners would create jobs that would not exist but for minority entrepreneurs who are empowered to use their unique skills and backgrounds to compete in the marketplace.

The Supreme Court, Congress, and the FCC all have long recognized that greater diversity in the ranks of owners and managers of our radio and television networks and stations can contribute to dissemination of more diverse viewpoints on the nation's airwaves, and thus exposes society to a richer and wider variety of programming.[12] In this way, the Commission has helped ensure that the public has available the broadest possible range of ideas and expression.

Seventy-three years ago, the Commission recognized that "the American system of broadcasting must serve significant minorities among our population, and the less dominant needs and tastes which most listeners have from time to time."[13] More minority owners would also serve heretofore underserved minority audiences, thereby enhancing the ability of advertisers to reach the entire public.

The Census Bureau has stated that the population in 2014 included 37.2% people of color, made up of 13.2% African Americans, 5.4% Asian Americans, 17.4% Hispanics, and 1.2% Native Americans.[14] The broadcasting and multichannel video industries are poorly prepared to respond to

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[12] *See Metro Broadcasting Inc. v. FCC*, 497 U.S. 547, 569-579 (1990), *overruled in part on other grounds by Adarand Constrs., Inc. v. Pena*, 515 U.S. 200 (1995) ("*Adarand*"); *Communications Amendments Act of 1982*, Pub. L. No. 97-259, 96 Stat. 1087; H.R. Conf. Rep. 97-765, at 26 (1982) (declaring that "an important factor in diversifying the media of mass communications is promoting ownership by racial and ethnic minorities…it is hoped that this approach to enhancing diversity through such structural means will in turn broaden the nature and type of information and programming disseminated to the public"); *Promoting Diversification of Ownership in the Broadcasting Services, Report and Order and Fourth Further Notice of Proposed Rulemaking,* 24 FCC Rcd 5896, 5902 ¶12 (2009) ("*2009 Diversity Report*") ("The promotion of diversity of ownership of broadcast stations, including ownership by minorities and women, is a long-standing policy goal of the Commission…"); *cf. Prometheus Radio Project v. FCC*, 652 F.3d 431, 436 (3d Cir. 2011) (FCC structural media ownership rules did not violate the First Amendment because they are rationally related to substantial government interests in promoting competition and protecting viewpoint diversity.)

[13] FCC, *Public Service Responsibility of Broadcast Licensees* (1946) (the "Blue Book") at 15.

[14] Sandra L. Colby & Jennifer M. Ortman, *Projections of the Size and Composition of the U.S. Population: 2014 to 2060,* U.S. CENSUS BUREAU (March 2015), available at

these demographic trends. In many substantial communities, the management, sales and professional ranks of broadcasters and MVPDs are virtually homogeneous. The diversity disparity between the population and the industries threatens the industries' long-term ability to serve all of the public in a variety of languages,[15] and to recognize and serve the interests of a diversity of cultures. EEO enforcement can change that.

- **<u>EEO rules improve the industry's reputation among consumers and labor.</u>**

The industries' reputations, and their ability to attract and retain quality talent, depend on the maintenance of a discrimination-free environment. Any industry's reputation among consumers and among members of its own labor force can suffer dearly from even a few incidents of lawlessness.[16] Strong civil rights enforcement delivers a public benefit that industry "self-regulation" can never deliver: a healthy reputation for the industry as a place that welcomes and rewards people with productive careers irrespective of race or gender, and that delivers content that consumers can trust.

C. The Rules Promote Diversity In the Electronic Mass Media.

The EEO rules opened the doors of broadcasting to the two-thirds of our population who are not White men. In doing that, the rule injected into the industry an enormous dose of innovation, creativity, relevance, and competitive strength.[17]

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https://census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf (last visited August 23, 2019).

[15] The Commission has long appreciated the role of multilingual broadcasting in facilitating Americans' adjustment and survival. *See, e.g., Spanish International Communications Corporation*, 2 FCC Rcd 3336, 3339 ¶18 (1987) (subsequent history omitted) (taking licensee's Spanish language programming into consideration as a factor mitigating its violation of prohibition on foreign ownership); *Tele-Broadcasters of California, Inc.,* 58 RR2d 223, 228 (Rev. Bd. 1985) (Opinion by Member Blumenthal) (looking favorably on comparative proposal to offer Spanish language service because "minority audiences [are] usually the least-served by the mass-audience media"); *see generally* Susan Kuo, *Speaking in Tongues: Mandating Multilingual Disaster Warnings in the Public Interest,* 14 WASH. & LEE J. C.R. & SOC. JUST. 3 (2007).

[16] *See* pp. 11-13 *infra.*

[17] The Supreme Court has recognized, in *dictum*, that the Commission's broadcast EEO rules "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934...to ensure that its licensees' programming fairly reflects the tastes

Over the past fifty years, many broadcasters and multichannel video operators came to recognize that diversity invigorates and strengthens their industries. Many wonder why they ever doubted the value of the EEO rules.

Many commentators have made the case for media diversity, but few have done so more eloquently than Bernice Kearney, News Director of KSAT-TV (ABC affiliate), San Antonio:

> In such a diverse city, it is the responsibility of a newsroom to reflect the community we serve. If we don't reflect our community, we can't possibly cover it accurately and authentically. That means women and men. That means people of color. That means journalists from a variety of backgrounds, young and old, with a wide range of experiences, who've walked the walk and who understand and identify with the people with whom they interact. The person at home or at work who's watching our newscast or reading our articles should be able to see the person who is reporting the news and think, "That looks like me. They sound like me. They understand me."
>
> Without this rich variety of backgrounds and experiences, we run the risk of overlooking important issues that our audiences find important. We run the risk of being out of touch.
>
> Just as important as diversifying our newsroom team is the need to layer in that diversity in our news coverage. We must cultivate a myriad of voices who contribute to the conversation; from the expert offering context to a story to the woman on the street reacting to it, we owe it to the communities we serve to feature *their* voices and *their* perspectives.[18]

D. <u>The Rules Inspire Nondiscrimination In All American Industries.</u>

The electronic mass media is America's signature industry, serving as the mirror through which the rest of the world forms its opinions about us. When the Commission adopted its first EEO rules in 1968 and fleshed them out in 1969, it relied to a great extent on the "Pollak Letter," written by Assistant Attorney General Stephen Pollak 51 years ago and just as timely today:

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and viewpoints of minority groups." *NAACP v. FPC*, 425 U.S. 662, 670 n. 7 (1976). A full discussion of the role of the EEO rules in advancing diversity can be found at S. Jenell Trigg, *The Federal Communications Commission's Equal Opportunity Employment Program and the Effect of Adarand Constructors, Inc. v. Pena*, 4 COMMLAW CONSPECTUS 237, 257-58 (1996).

[18] Bernice Kearney, *Losing Touch: Why Newsroom Diversity Matters,* Radio-Television Digital News Association (RTNDA) (June 12, 2019) (emphasis in original); available at https://www.rtdna.org/article/losing_touch_why_newsroom_diversity_matters (last visited August 12, 2019).

> [An] argument against the proposed rule might be that the Commission should concern itself with broadcasting, and not with matters of racial or other discrimination. In view of the national policy against such discrimination, the critical importance of reducing it as soon as possible, and the responsibility of the Commission has to encourage and require the broadcasting industry to serve the public interest, I do not believe that this contention should be given substantial weight.
>
> Because of the enormous impact which television and radio have upon American life, the employment practices of the broadcasting industry have an importance greater than that suggested by the number of its employees. The provision of equal opportunity in employment in that industry could therefore contribute significantly toward reducing and ending discrimination in other industries.
>
> For these reasons I consider adoption of the proposed rule, or one embodying the same principles, a positive step which your Commission appears to have ample authority to take....
>
> Sincerely,
>
> Stephen J. Pollak
>
> Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, May 21, 1968.[19]

As Stephen Pollak's famous letter predicted, even the partial and insufficient inclusion of minorities and women in the mass media has proven vital to cross-cultural consciousness, to the diversity and strength of our national culture, and to the endurance of our democracy.

E. <u>The Rules Help Advance Minority Ownership.</u>

Broadcast employment is the primary route to broadcast ownership.

Congress has unequivocally commanded the FCC to promote racial diversity in the ownership of broadcast facilities,[20] and the Commission has expressed its concurrence with this

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[19] Letter to Hon. Rosel H. Hyde, Chairman, Federal Communications Commission, from Stephen J. Pollak, May 21, 1968 (the "Pollak Letter"), reprinted in *1968 EEO Rules, supra,* 13 FCC Rcd at 776-77; *see also id.* at 771 (discussing the Pollak Letter) and *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, Report and Order,* 18 FCC2d 240, 241 (1969) ("*1969 EEO R&O*") (relying on the Pollak Letter in adopting final rules.)

[20] *See* n. 12 *supra* (citing the Communications Amendments Act of 1982).

goal.[21] Indeed, the Commission has premised broadcast program deregulation on the continued vitality of its EEO and minority ownership policies.[22] Yet minority ownership has stagnated after the 1995 repeal of the tax certificate policy,[23] and the Commission has systematically

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[21] *See, e.g., Streamlining of Mass Media Applications, Rules and Processes, and Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, Report and Order,* 13 FCC Rcd 23056, 23098 ¶102 (1998) (observing that "[t]o the extent that a lack of employment opportunities in the broadcast industry deprives minorities of employment or management experience and thereby erects barriers to entry into the industry, our action today will help us to fulfill our mandate under Section 257 to identify and eliminate those barriers and foster a diversity of media voices"); *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, NOI,* 11 FCC Rcd 6280, 6306 ¶38 (1996) ("[r]ace or gender discrimination in employment may impede participation and advancement in the communications industry. Employment provides business knowledge, judgment, technical expertise, and entrepreneurial acumen, and other experience that is valuable in attaining ownership positions.")

[22] *See Deregulation of Radio*, *Notice of Inquiry and Proposed Rulemaking*, 73 FCC2d 457, 482 (1979) (justifying proposed deregulation of radio ascertainment and program service by relying, instead, on "our EEO and minority ownership rules and policies, which foster increased minority representation in the workforce and ownership of broadcast stations, thereby increasing the diversity of voices represented in broadcasting.")

[23] The Tax Certificate Policy quintupled minority ownership from its creation in 1978 until its repeal in 1995. It was created in *Statement of Policy on Minority Ownership of Broadcast Facilities, Public Notice,* 68 FCC2d 979, 983 (1978), and was repealed in *Deduction for Health Insurance Costs of Self-Employed Individuals*, Pub. L. No. 104-78, §2, 109 Stat. 93, 93-94 (1995).

Every two years, the Commission issues its "Section 323 Reports" on the status of minority ownership. The most recent such report, issued in 2017, provides data for the year 2015. *Third Report of Commercial Broadcast Stations, FCC Form 323 Ownership Data as of October 1, 2015*, FCC (May 2017), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-344821A1.pdf (last visited August 23, 2019). The FCC's Section 323 Reports are intended to provide a photograph-in-time of the broadcast industry's structural, racial and gender diversity. Among its findings were that minority broadcast ownership of commercial full power stations remains low and stagnant, being 7.9% of all such stations in 2013 and 8.0% (but fewer stations due to a decline in the nation's total station count) in 2015:

frustrated minority entrepreneurship.[24] In this environment, any weakening of EEO enforcement

Minority Broadcast Ownership, FCC Data, 2013 and 2015

Racial/Ethnic Group	2013 # TV & % of all TVs	2015 # TV & % of all TVs	2013 #AM & % of all AMs	2015 #AM & % of all AMs	2013 #FM & % of all FMs	2015 #FM & % of all FMs	2013 # all Stns & % of all Stns.	2015 #all Stns & % of all Stns.
Hispanics (any race)	42 3.0%	62 4.5%	194 5.3%	176 5.0%	180 3.2%	228 4.2%	416 3.9%	466 4.5%
Minorities (non-Hispanic)	42 3.0%	36 2.6%	225 6.1%	204 5.8%	169 3.0%	128 2.3%	426 4.0%	368 3.5%
All Minorities	84 6.1%	98 7.1%	419 11.4%	380 10.8%	349 6.1%	356 6.5%	852 7.9%	834 8.0%

[24] A recent law review article presented overwhelming evidence of six specific and systemic misdeeds of the agency over the past two generations that suppressed minority broadcast ownership. David Honig, *How the FCC Suppressed Minority Broadcast Ownership, and How the FCC Can Undo the Damage It Caused*, 12 S. J. POL'Y & JUST. 44 (2018) (documenting how the FCC, as a gatekeeper, (1) "outright refused to grant licenses to racial and religious minorities because of their race and religion"; (2) "conspired with state governments to award licenses to segregated institutions and prevent minority colleges and universities from securing broadcast licenses"; (3) "routinely granted and renewed licenses of intentional discriminators, thereby making possible their suppression of minority broadcast participation"; (4) "administered a broadcast licensing scheme that replicated the effects of past discrimination and rewarded beneficiaries of discrimination"; (5) "repeatedly failed to correct minorities' poor access to quality technical facilities"; and (6) "failed to prevent and proscribe employment discrimination." Here are a few of the most shameful illustrations: Even after *Brown v. Board of Education*, 357 U.S. 483 (1954), the Commission routinely granted and renewed licenses of broadcasters that discriminated, and in doing so openly embraced state segregation laws. *See, e.g., Southland Television Co.*, 10 RR 699, *recon. denied*, 20 FCC 159 (1955), in which the Commission awarded a VHF-TV license to a segregationist so rabid that he built one-story movie theaters to evade Louisiana's law requiring theater owners to admit African Americans to one floor of a two-story theater. The Commission justified its action by declaring that "[a]dmission of Negroes [only] to theatre balconies appears to be legal in Louisiana." *Id.* at 750. *See also Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) ("*UCC I"*) (requiring the Commission to hold a hearing on allegations that WLBT-TV, Jackson, MS, discriminated against African Americans in programming) and *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969) ("*UCC II*") (vacating WLBT-TV's license renewal after the Commission held a sham hearing). Segregation in broadcast education denied minorities an opportunity to obtain broadcast experience and a record of broadcast operation, yet the Commission still credited these factors when awarding broadcast licenses in comparative hearings. *Policy Statement on Comparative*

(especially now that we lack any meaningful minority ownership policies) would convert radio deregulation into a cynical "bait and switch" – a broken treaty with the American people. We must never overlook the important role played by the EEO rules in *facilitating* minority ownership by providing an entry pathway and opportunity for hands-on training for tomorrow's broadcast owners.

F. The Rules Are Overwhelmingly Cost/Benefit Justified.

Unquestionably, EEO regulation is cost-benefit justified. The costs of enforcement and compliance to the FCC and regulatees, respectively, are minimal, and the benefits are enormous. While we are hampered by the absence of Form 395 data that would have provided a precise measurement of the industry's degree of diversity, there can be little question that the rules, and strong enforcement, remain vital.[25] No one knows exactly how many instances of discrimination

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Broadcast Hearings, 1 FCC2d 393, 396-98 (1965). Finally, the Commission did not repeal a grossly excessive broadcast financial standard until 1981, when it recognized that the standard prevented minorities from securing broadcast licenses. *New Financial Qualifications Standards for Broadcast Assignment and Transfer Applicants*, 87 FCC2d 200, 201 (1981) (repealing *Ultravision Broadcasting Company*, 1 FCC2d 545, 547 (1965)).

[25] Although we lack Form 395 data, there is some data showing how far we still have to go in achieving a truly diverse broadcasting industry:

Fortune Magazine produces an annual survey of "The 100 Best Workplaces for Diversity" among Fortune 500 companies. Its 2018 report lists only one broadcast/MVPD company (Comcast/NBC/Universal/Telemundo, which actually ranked #2) among the Top 100 Best Workplaces for Diversity. *See* https://fortune.com/best-workplaces-for-diversity/2018/search/ (last visited August 16, 2019).

The 2019 edition of a longitudinal biennial industry employment survey by the National Association for Multi-Ethnicity in Communications (NAMIC) showed that "representation of people of color at executive/senior manager levels increased to 28.4% from 25.1%" from 2017-2019. A similar 2019 biennial survey by Women in Cable Telecommunications (WICT) found that "female representation at the executive/senior management level increased to 34.9% from 32.7" from 2017 to 2019. Despite these achievements, the two surveys found weaknesses in minorities' and women's rates of promotion. The two surveys' respondents represent 75.5% of the industry workforce. *See* WICT Home Page, https://www.wict.org/wp-content/uploads/2019/09/2019-AIM-PAR-Executive-Summary.pdf (last visited September 9, 2019); *see also* R. Thomas Umstead, *WICT, NAMIC Surveys: Women, People of Color Increase Representation at Senior, Executive, and Board Levels,* Multichannel News, available at https://www.multichannel.com/news/wict-namic-surveys-women-people-color-increase-

infect the media marketplace in a given year, but whatever the number, it's too many. Even if 99% of broadcasters did not discriminate and only one percent of broadcasters did, that one percent would amount to about 200 stations being unqualified to hold broadcast licenses. Would the IRS tolerate 200 tax cheats among 20,000 taxpayers? Would a town of 20,000 people tolerate 200 drunk drivers? 200 looters? 200 polluters?

Suppose 200 out of 20,000 shoe stores didn't allow minorities to shop there. Those turned away by the 200 shoe stores could each just take their money to any of the other 19,800 shoe stores. No one would go without shoes. Nonetheless, every decent American would be

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representation-senior-executive-board-levels (last visited September 19, 2019).

The RTNDA's annual broadcast management and news survey measures some of what Form 395 measures for broadcasters, albeit the survey is dependent on voluntary responses from industry, according to the survey's manager, Hofstra Emeritus Professor Robert Papper. Here are some historical and recent findings of the RTNDA's surveys:

Minority Broadcast Employment, RTNDA Data, 1994-2019

Job Category	% Minority					
	1994	2001	2002	2003	2011	2019
Total TV News Workforce	17.1	24.6	20.6	18.1	20.5	25.9
Total Radio News Workforce	14.7	10.7	8.0	6.5	7.1	14.5
TV News Directors	7.9	8.0	9.2	6.6	13.6	17.2
Radio News Directors	8.6	4.4	5.1	5.0	5.3	8.2
TV General Managers	n/a	8.7	5.2	3.6	7.5	10.0
Radio General Managers	n/a	5.7	3.8	2.5	6.0	7.2

See Robert Papper, *2019 Research: Local Newsroom Diversity*, RTNDA (June 13, 2019) and Hofstra University-RTNDA Newsroom Surveys (since 1990), available at https://rtdna.org/article/2019_research_local_newsroom_diversity (last visited August 16, 2019). As can be seen, the overall numbers are far below population parity, and often fluctuate considerably. The response rate is approximately 77%, with reported statistics adjusted to account for geography and market size diversity. [The response rate for Form 395 had been virtually 100%.] The data does not include stations that do not offer local news, nor does the data include sales positions [it should be noted that the career track to senior management more typically runs through sales than through news reporting]. The relatively lower numbers for radio vis-à-vis television appear attributable to the visibility of television anchors and reporters to audience members, who may react more favorably to programs where the visible personalities reflect the community's population. Interview with Dr. Papper by David Honig (September 10, 2019).

outraged. Should we not be far more outraged if 200 employers are denying minorities a *career*?

A few EEO violations deliver a huge multiplier effect, damaging the competitiveness of the industry by diminishing its credibility in the public eye. In the case of broadcasting, the persistence of unremedied discrimination is sure to discourage idealistic young communicators from pursuing broadcasting careers. It would be little comfort to them to learn that "only" 200 broadcasters discriminate.

As with every regulation, there is a cost associated with compliance. That cost here consists of the additional effort, beyond those costs that attend standard personnel administration, required to ensure that all job openings are timely posted online and are e-mailed to a list of community groups. Thanks to online recruitment, that cost is virtually zero.[26]

II. The Commission Should Take Five Steps To Improve EEO Enforcement.

A. EEO Data Should Be Requested From Licensees Found To Have Failed To Engage In Broad Recruitment Such As Internet Postings.

The Commission has long recognized that the predominant use of WOM[27] recruitment

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[26] *See Petition for Rulemaking Seeking to Allow the Sole Use of Internet Sources for FCC EEO Recruitment Requirement, Declaratory Ruling,* 32 FCC Rcd 3685 (2017), and additional discussion, at 34-35 *infra,* regarding the 82 Broadcasters Petition.

[27] "Word of mouth" means "friend to friend" and "relative to relative" which, almost by definition in a homogeneous workplace, tends to exclude minorities. *See, e.g., Garland v. USAir*, 767 F.Supp. 715, 726 (W.D. Pa. 1991) ("USAir's maintenance of an all white nepostistic/word of mouth hiring channel has a disparate impact on blacks"); *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 271 (10th Cir. 1975) (WOM recruiting results in a violation of Title VII "only when word-of-mouth is coupled with a work force from which minorities have been excluded or in which they are grossly underrepresented"); *Van v. Plant & Field Service Corp.*, 672 F.Supp. 1306, 1317 (C.D. Cal. 1987) ("[t]he use of referrals from current employees (as a source of new hires) which tends to perpetuate a low percentage of a disadvantaged group may violate Title VII if it is the employer's primary means for recruiting applicants. Relying on word-of-mouth or walk in applicants when the only applicants likely to walk in are members of the majority group amounts to unlawful discrimination"); *Montana Rail Link v. Byard*, 860 P.2d 121, 123 (S. Ct. Mont. 1993) (WOM recruiting by employer was an "affirmative act" that resulted in a disparate impact between male and female applicants); *Hutchinson v. Seagate Tech., LLC*, No. C 02-05763 JF, 2004 WL 1753391, at *10 (N.D. Cal. Aug. 3, 2004), *aff'd sub nom. Hutchinson v. Seagate Tech.*, 147 F. App'x 647 (9th Cir. 2005). (["R]eliance on word-of-mouth [hiring]—when likely applicants are members of the majority group—can amount to unlawful discrimination.")

from a homogeneous workplace can be evidence of intentional discrimination.[28] This practice – which we have dubbed "cronyism"—is the primary scheme by which discrimination occurs in broadcasting and multichannel video, and by which racial homogeneity is perpetuated deliberately across generations.[29]

Yet the Commission's audit program only examines one of these two elements of cronyism – whether recruitment is predominately WOM. It never looks at the other element: whether the workplace from which the recruitment is performed is homogeneous. *As a result,*

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[28] It is well settled that recruiting by WOM from a homogeneous staff is a means of perpetuating discrimination. *See 2000 First R&O, supra*, 15 FCC Rcd at 2331 ¶3 ("repeated hiring without broad outreach may unfairly exclude minority and women job candidates when minorities and women are poorly represented in an employer's staff.... Outreach in recruitment must be coupled with a ban on discrimination to effectively deter discrimination and ensure that a homogeneous workforce does not simply replicate itself through an insular recruitment and hiring process"); *see id. at* 2345 ¶40 (to the same effect). The courts agree. *See, e.g., Black Broadcasting Coalition of Richmond v. FCC*, 556 F.2d 59, 62-63 (D.C. Cir. 1977) (criticizing licensee whose "contact" with potential sources of minority candidates was limited to the passive acceptance of referrals – "waiting for them to come to it.") The Commission has long understood how word-of-mouth recruitment can be discriminatory. *See, e.g., Jacor Broadcasting Corporation, Memorandum Opinion and Order,* 12 FCC Rcd 7934, 7940 ¶14 (1997) (holding that over-reliance on WOM recruitment may "have the effect of discriminating against qualified minority groups or females"); *Walton Broadcasting, Inc. (KIKX, Tucson, AZ), Decision,* 78 FCC2d 857, 875, *recon. denied,* 83 FCC2d 440 (1980) (holding that station used "employment practices which discriminated against minority groups in recruitment and employment" including "'word of mouth' referral from a predominately white work force, which, while unintended, effectively discriminated against minority group employment"); *see also William H. Schuyler*, 44 RR2d 559 (1978), and *Triple R, Inc.,* 42 RR2d 907, 908 (1978). In 1994, the Commission rendered findings on WOM recruitment after a thorough inquiry undertaken at Congress' request. *Implementation of the Commission's Equal Employment Opportunity* Rules, Report, 9 FCC Rcd 6276, 6314-15 ¶79 (1994) ("*1994 EEO Report*") ("there continues to be evidence...that minorities are still not recruited for a significant number of positions....in many of these cases...positions were filled without any recruitment having taken place. Given the foregoing, we believe that a continuing need exists for EEO enforcement in the communications industry") (fn. omitted).

[29] Through "cronyism," broadcasters and MVPDs with homogenous staffs recruit primarily through WOM, perpetuating lack of diversity in the industry across generations due to social network effects. *See* Nancy Ditomaso, *How Social Networks Drive Black Unemployment*, THE NEW YORK TIMES (May 3, 2013), available at https://opinionator.blogs.nytimes.com/2013/05/05/how-social-networks-drive-black-unemployment/ (last visited August 11, 2019).

the audit program is incapable of ever apprehending a discriminator. Discrimination did not miraculously disappear overnight: instead, what happened was that the Commission has looked the other way for 17 years.

The Commission has stated that it "will not use the data in the [Form 395 Annual EEO] reports to screen renewal applications or to assess compliance with our EEO regulations."[30] While not using this data "to screen renewal applications", it is essential that this information be used to determine whether an entity that is violating the first prong of cronyism—failure to recruit broadly—is also violating the second prong - the predominant use of WOM recruitment from a homogeneous staff.

Before 2002, to determine whether a broadcast station's or MVPD's staff was homogeneous, the Commission collected and calculated staff composition by using Form 395. Although courts have called into question the constitutionality of some uses of the data collected from Form 395,[31] the mere collection and publication of this data is permissible.[32] An agency is

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[30] *See Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Third Report and Order and Fourth Notice of Proposed Rulemaking,* 19 FCC Rcd 9973, 9977 ¶9 (2004) ("*2004 Third R&O*"). *See also 2000 First R&O, supra,* 15 FCC Rcd at 2418 ¶225 ("[w]e...state in the clearest possible terms that we will *not* use the [Form 395] data to assess broadcasters' or cable entities' compliance with our EEO rules" (emphasis in original)). This must be taken to mean that these reports will not be used to determine whether outreach efforts were effective. The Commission has not (nor could it) disclaim reliance on the cases that hold that statistical evidence relating to employment is relevant to a case of intentional discrimination in employment – as in a case of "cronyism."

[31] *See Lutheran Church/Mo. Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), petition for rehearing denied, *Lutheran Church/Mo. Synod v. FCC*, 154 F.3d 487 (D.C. Cir. 1998), petition for rehearing en banc denied, *Lutheran Church/Mo. Synod v. FCC*, 154 F.3d 494 (D.C. Cir. 1998) ("*Lutheran Church*") and *MD/DC/DE Broad. Ass'n v. FCC*, 236 F.3d 13 (D.C. Cir. 2001), petition for rehearing and rehearing en banc denied, *MD/DC/DE Broad. Ass'n v. FCC*, 253 F.3d 732 (D.C. Cir. 2001), cert. denied sub nom. *MMTC v. FCC*, 534 U.S. 1113 (2002) ("*MD/DC/DE Broadcasters*") (invalidating the former recruitment and outreach portions of the EEO rules on equal protection grounds).

[32] *See Lutheran Church*, *supra*, 141 F.3d at 356; *see also MD/DC/DE Broadcasters, supra,* 236 F.3d at 18 (holding that strict scrutiny applies only if the government's actions lead to people being treated unequally on the basis of their race.)

allowed to collect data so long as the collection is for a legitimate purpose that does not bring about disparate treatment.[33] Certainly, the use of this data to combat discrimination in employee recruitment is lawful,[34] and the agency faces no legal impediment for such use.

Consistent with precedent that allows the FCC to use racial and gender data to ensure that its EEO enforcement program can prevent and prosecute discrimination, we propose that the Commission proceed as follows:

First, identify the stations that recruit primarily by WOM, as opposed to recruiting online or through local community job boards, employment agencies or community groups.[35]

Then, ask these primarily WOM recruiting stations to submit a Form 395. If the station's staff that conducted the primarily WOM recruitment is homogeneous, the station has met both prongs of "cronyism" and may be sanctioned, including through designation for hearing.[36] This

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[33] In Justice Kennedy's controlling opinion in the Louisville and Seattle school desegregation case, he encouraged the collection of data by race as a constitutionally permissible means to achieve a diverse student body. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701, 768 (2007) ("*Parents Involved*") (Kennedy, J., concurring) ("Schools may pursue the goal of bringing students of diverse backgrounds and races through other means, including… tracking enrollments, performance, and other statistics by race.")

[34] *See, e.g., Caulfied v. Bd. of Educ. City of New York,* 583 F.2d 605, 611 (2d Cir. 1978) (collection of racial and ethnic data of school employees was determined to relate to the government's statutory authority and duty to alleviate discrimination).

[35] *See generally 2002 Second R&O*, *supra.* Those *not* recruiting primarily by WOM could show, for example, that they recruit primarily online and through other readily available methods such as providing notices to community groups that request them.

[36] The determination of whether to designate for hearing under 47 U.S.C. §309(e) may turn on whether there is affirmative evidence of nondiscrimination, genuine confusion or mistake. If the Commission needs a more comprehensive record before voting on whether to designate a hearing, pre-designation discovery of this fact-specific question is authorized by *Bilingual Bicultural Coalition on the Mass Media v. FCC*, 595 F.2d 621, 630 (D.C. Cir. 1978) ("a substantial statistical disparity, especially when coupled with a languishing affirmative action plan, raises questions as to whether the station's poor EEO performance owes to inadvertence, or to intentional discrimination.") The Commission may render its decision on whether to issue an HDO on the pleadings, as it did in the case that became *Florida NAACP v. FCC,* 24 F.3d 271, 274 (D.C. Cir. 1994) (upholding FCC's refusal to hold a hearing where there was no minority recruiting and no minority employment; there were, however, mitigating factors; *compare Rust*

two-step method—first identifying those stations that recruit primarily by WOM, and then having those stations and MVPDs submit a Form 395—will allow the Commission to find and bring to justice those broadcasters and MVPDs that inherently discriminate, thereby fulfilling the most essential purpose of the EEO rules.

A decision on whether to use Form 395 in "cronyism" cases, as recommended here, need not await the additional time it might take the Commission to act on our proposal (in the next section) to collect Form 395 from all broadcasters and MVPDs for research on industry trends. The Enforcement Bureau does not require 8th floor authorization to require a regulatee to submit a Form 395 as part of a civil rights investigation.[37] Such a request is routine in civil rights adjudications. It is no more unusual than the expectation that a police officer, when arresting a burglar, may search the apprehended suspect to determine if she possesses burglar tools;[38] or, when stopping a motorist for possible drunk driving, may generally conduct a field sobriety test to determine if she is impaired by alcohol consumption.[39] In 2017 and 2018, there was only one completed EEO adjudication involving allegations of insufficiently broad recruitment,[40] so

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Communications Group, Memorandum Opinion and Order, 53 FCC2d 355 (1975) (hearing is designated on the pleadings alone; there was neither broad recruitment nor any minority employment, and the renewal application contained racially offensive rhetoric.) There is, however, no doubt about whether a proven intentional discriminator is entitled to hold a license. It is not. *See 1968 EEO Rules, supra,* 13 FCC2d at 771 ¶13 (citing, *inter alia,* 42 U.S.C. §309); *see also UCC II, supra,* 425 F.2d at 550; *cf. Catoctin Broadcasting Corp. of New York,* 4 FCC Rcd 2553, 2558 (1989) ("*Catoctin*").

[37] *See* 47 C.F.R. §0.111(a)(11), (13), and (17).

[38] *See Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) ("police officers may seize nonthreatening contraband detected during a protective patdown search of the sort permitted by [*Terry v. Ohio*, 392 U.S. 1, 27 (1968)]").

[39] *See Missouri v. McNeely*, 569 U.S. 141, 145 (2013).

[40] *Cumulus Licensing, LLC (WDAI (FM), Pawleys Island, SC), Notice of Apparent Liability,* 32 FCC Rcd 10285 (December 11, 2017).

obtaining Form 395's as part of "cronyism" investigations certainly could not be challenged on the basis of it being overzealous.

B. Data Should Be Gathered For Research On Industry Trends And EEO Program Effectiveness, And To Enable The Agency To Resume Its Publication Of Annual Summaries Of Industry Demographics.

In any meaningful regulatory system, universal and transparent recordkeeping is the only evenhanded way to ensure accountability and protect the public from bad actors. Responsible drivers accept emissions testing as a minor inconvenience needed to prevent pollution; responsible slaughterhouses accept USDA inspections as a minor inconvenience to prevent disease. And for thirty years, responsible broadcasters and MVPDs accepted recordkeeping as a minor inconvenience to prevent discrimination—just as they accept recordkeeping and on-site audits to ensure engineering rule compliance.[41]

The Commission generally performs its duties based on current data. Although it is authorized to collect annual employment reports from broadcasters and MVPDs,[42] it does not collect or publish aggregate data on the employment of minorities and women. This data – as well as data on the promotion and retention of minorities and women in media, telecom and high tech industries that share the same hiring pools – is essential if the Commission is to prescribe the ideal balance of pro-active activities covering recruitment, mentoring, training, retention, and promotion. Indeed, in the closely-related issue of minority broadcast ownership, the Commission began collecting and aggregating racial ownership data on Form 323 after finding that "[b]ecause comprehensive data on minority and female ownership of broadcast licensees are not available from other government and commercial sources, the quality and

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[41] Every broadcaster is subject to extensive engineering rules that require the maintenance of logs. The FCC can inspect these logs if it receives complaints that the broadcaster violated the interference rules, or for no reason at all. *See* 47 C.F.R. §73.1225 (Station inspections by FCC) and 47 C.F.R. §73.1226 (Availability to FCC of station logs and records).

[42] *See 2004 Third R&O, supra,* 19 FCC Rcd at 9976-77.

comprehensiveness of the Commission's database materially affects the Commission's and the public's ability to [assess ownership diversity and whether additional measures to promote are necessary]."[43]

Created in 1970, Form 395 was first used in 1971. It sets out an annual snapshot of the employment of Whites, minorities, men and women in nine job categories. It expresses no preference for the employment of members of one race or either gender; rather, it is simply a photograph of reporting units. Each year, until 2000, the Commission published summaries of state and national data by race, gender, job category, and fulltime/part-time status. Scholars used these reports to produce for longitudinal studies of employment trends, including an annual snapshot of diversity in the industry.

In the course of developing the 1971 EEO regulations, the Commission explained why enforcement data was needed. Its rationale has stood the test of time:

> [statistical data] is useful to show industry employment patterns, and to raise appropriate questions as to the causes of such patterns. Thus, if none of the broadcast stations in a city with a large Negro population had any Negro employees in other than menial jobs, a fair question would be raised as to the cause of this situation. The absence of data on the number of Negroes qualified for other positions does not affect the legitimacy of the query, unless we are to assume that there are no Negroes qualified for other than menial positions, an assumption we are not prepared to make.[44]

For thirty years, the Commission's EEO data compilation and disclosure procedures served the industry, the public and the Commission well. No broadcaster or MVPD ever credibly claimed that it endured a cognizable harm from the dissemination of Form 395 data.

Inasmuch as broadcasters are in the business of journalism, they should especially understand and embrace the need for the widest, most transparent public availability of data submitted to the government by those—like themselves—who receive federal benefits.

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[43] *See 2009 Diversity Report, supra*, 24 FCC Rcd at 5902-03 ¶12.

[44] *Petition for Rulemaing to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, Memorandum Opinion and Order,* 23 FCC2d 430, 431 ¶4 (1970).

Access to annual Form 395 data would enable the Commission, or independent scholars, to perform a time series analysis that would disclose employment trends for which systemic discrimination appears to be partly or largely responsible. Even without Form 395 data, recent research indicates that in recent years, minority participation in broadcasting has stalled or declined.[45] Form 395 data would provide the precision and universal response rates necessary for data-driven policymaking, much as the EEOC's comparable document, Form EEO-1, fulfills the same research functions.[46]

Indeed, the Commission is statutorily required to collect industry-wide broadcast television employment data.[47] The Commission acknowledged and reconfirmed those obligations in 2004.[48] Although the Office of Management and Budget (OMB) has granted its approval for the Commission's revised Form 395, collection of Form 395 data has been suspended due to unresolved questions of data confidentiality.[49]

Other authorities also express Congress' intention that Form 395 be put to its intended and lawful use. In 1996, Congress amended the first section of the Communications Act, 47 U.S.C. §151, in which Congress created the FCC "so as to make available, so far as possible, to

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[45] *See* ns. 23 (ownership) and 25 (employment), *supra*.

[46] *See Memorandum to Neomi Rao, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President, to Victoria Lipnic, Acting Chair, EEOC* (August 29, 2017) (while delaying technical edits to the EEO-1 form, holding that "EEOC may continue to use the previously approved EEO-1 form to collect data on race/ethnicity and gender during the review and stay.")

[47] 47 U.S.C. §334(a) (mandating retention of broadcast reporting rules); *see also* 47 U.S.C. §554(d)(3)(A) (imposing obligation on MVPDs).

[48] *See 2004 Third R&O, supra,* 19 FCC Rcd at 9976-78 ¶¶9-13.

[49] *See Notice of Public Information Collections Approved by the Office of Management and Budget* (OMB), 73 FR 62991 (Oct. 22, 2008). *See also 2004 Third R&O, supra,* 19 FCC Rcd at 9978 ¶9. There are some good reasons for data secrecy, but they do not apply here. Under the Privacy Act, 5 U.S.C. §552(a), names of individuals ought not to be made public in some contexts without consent. Under the Freedom of Information Act, 5 U.S.C. §552(b), the confidentiality of trade secrets can be preserved. However, Form 395 research data will be aggregate data, and it would not include trade secrets.

all the people of the United States, without discrimination *on the basis of race, color, religion, national origin, or sex*, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service."[50] The FCC's ability to implement this obviously non-self-executing provision depends—on its face—on the availability of supportive data by race and gender.

Congress itself relied on Form 395 data while considering the Cable Communications Policy Act of 1984,[51] and concluded that "while the employment record of the cable industry has improved in the years since the Commission first adopted equal employment opportunity regulations, women and minorities still are significantly underrepresented as employees and owners in the industry."[52] Congress also relied on Form 395 data in 1992 to bar the Commission from revising its EEO rules governing television stations.[53]

A host of scholarly research studies on broadcast and MVPD employment trends have relied on Form 395 data.[54] This line of research is essential in illuminating which EEO initiatives are effective and which are not. It is exactly the kind of research that the Supreme Court regards favorably in its jurisprudence on school desegregation.[55]

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[50] 47 U.S.C. §151 (italicized language added in the Telecommunications Act of 1996).

[51] Pub. L. No. 87-549 §2, 98 Stat. 2279, 2797 (1984), *codified as amended at* 47 U.S.C. §554(c) (1984).

[52] H.R. Rep. No. 98-934, at 85 (1984), *reprinted in* 984 U.S.C.C.A.N. 4655, 4723.

[53] Pub. L. No. 102-385, 1065 Stat. 1460 (1992), codified as amended at 47 U.S.C. §334(a)(1).

[54] Examples of studies using Form 395 data until it ceased to be available include Dwight Brooks, George Daniels and C. Ann Hollifield, *Television in Living Color: Racial Diversity in the Local Commercial Television Industry*, 14 HOWARD J. OF COMMS. 123 (2003); Fonda Leigh Whittaker, *Reflective Images: Personnel Diversity in the Public Broadcasting Industry,* Department of Telecommunications, University of Georgia (2000); Taylor Alan Sikes, *Race, Gender, and Sound: The Effects of Twenty Years of Affirmative Action Policies on Diversity in the U.S. Radio Industry,* Department of Journalism, University of Georgia (2000).

[55] *See, e.g., Parents Involved, supra,* 551 U.S. at 768 (Kennedy, J., concurring) ("Schools may pursue the goal of bringing students of diverse backgrounds and races through other means, including…tracking enrollments, performance, and other statistics by race.")

Form 395 would yield the longitudinal industry-wide data that has been vital to the ability of Congress,[56] the Commission,[57] scholars,[58] and the public to track industry employment trends as well as the effectiveness of the EEO rules and policies. As with the closely related subject of minority ownership policy,[59] data collection and publication is a constitutionally permissible step the Commission may take to improve its regulatory effectiveness, responsiveness and judgment.

C. Renewal Application Forms, And EEO Audits, Should Include A Certification That Job Postings Preceded Hiring Decisions.

Broad recruitment should be timed to coincide with WOM recruitment so that "inside" candidates do not get a set-aside, thereby frustrating the purpose of broad recruitment.[60]

In our experience, a common means of circumventing the broad recruitment obligations has been to time the dissemination of broad recruitment notices to occur after the job vacancy has already been filled through WOM recruitment. In this way, a discriminator can fool the Commission into thinking that it technically complied with the rules, even though persons reached by broad recruitment actually had no genuine opportunity to seek or obtain employment.

Delaying broad recruitment in this way gives an unfair head start, or a hidden ironclad preference or set-aside to WOM recruitees. Thus, it can be inherently discriminatory.

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[56] *See* n. 28 *supra (*citing *the 1994 EEO Report*, prepared by the Commission at Congress' request).

[57] *See, e.g., 1994 EEO Report*, *supra,* 9 FCC at 6314-15 ¶79 (using, *inter alia,* Form 395 data in concluding that "a continuing need exists for EEO enforcement in the communications industry.")

[58] *See, e.g.,* Fonda Leigh Whittaker, *Reflective Images: Personnel Diversity in the Public Broadcasting Industry*, Department of Telecommunications, University of Georgia (2000), and other research cited in n. 54 *supra.*

[59] *See Promoting Diversification of Ownership In the Broadcasting Services, Report and Order and Third Further Notice of Proposed Rulemaking, MB Docket No. 07-294*, 23 FCC Rcd 5922, 5942 ¶53 (2008) (acknowledging that the Commission's "current data-collection efforts could be improved.")

[60] *Cf. Paxton v. Union National Bank,* 688 F.2d 552, 568 (8th Cir. 1982) (job vacancy was not posted and plaintiff did not hear about it until the position was filled).

It is easy to proscribe this practice. The Commission may do so by adding a certification to Form 303 in which the respondent would check a box that states:

> When we undertake broad external recruitment to fill a position, such recruitment generally will commence one work week before the position is filled.[61]

In an audit, the Commission should require broadcasters and MVPDs to provide this basic time line for each vacancy:

1. when the position was opened to candidates not presently employed at the station or MVPD; and
2. when broad recruitment (online and otherwise) commenced and was completed; and
3. when the position was filled.

In this way, the Commission can be certain that those responding to broad recruitment have a genuine chance at winning a job. The Commission can also be sure that no broadcaster or MVPD could pretend to recruit broadly when, actually, it has already filled or will imminently fill the jobs through the old-boy network.

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[61] This language would still permit a broadcaster or MVPD to post a job internally, for legitimate, nondiscriminatory reasons, before recruiting externally; it could not, however, refrain from broad recruitment entirely. *See, e.g., Holsey v. Armouor & Co.,* 743 F.2d 199, 214 (4th Cir. 1984) ("Armour's practice of not posting sales or supervisory vacancies, and its practice of using a white managerial staff who relied on unwritten subjective criteria for making promotion decisions, support a finding of a pattern of classwide discrimination.") Before soliciting outside applicants, it is often desirable to give incumbents a chance to seek promotions or transfers. If a broadcaster or MVPD follows this procedure, its internal postings might state that the position will be restricted to in-house applicants only up to a certain date; thereafter, external applicants may be solicited and will be considered although in-house applicants may still be preferred. In this way, a broadcaster could not frustrate broad recruitment by (1) using an internal posting as a signal to employees to commence WOM recruitment to their friends; then (2) commencing broad recruitment only when the job is about to be filled (or has already been filled) by a WOM recruitee.

D. The FCC/EEOC Memorandum Of Understanding Should Be Updated To Ensure That The FCC Immediately Audits Employment Units That Received EEOC Probable Cause Determinations.

In 1968, realizing that the glacial Title VII process, unaided, could never bring about the racial integration of broadcasting, the FCC adopted its first EEO regulations. In the FCC's 1968, 1969, 1971, 1972, 1975, 1984, 1987, 1994, 1996, 1999, 2002 and 2004 EEO rulemaking proceedings and inquiries, EEO opponents contended that the existence of the EEOC makes FCC regulation unnecessary or redundant. For a host of reasons, never has this contention been well taken. As shown below, the relationships between the two agencies are in perfect harmony, and can be improved with only one small but important tweak – which is that *an EEOC probable cause determination should be reported to the FCC and should trigger an FCC audit.*

While the EEOC and Section 706 agencies can triage some individual EEO complaints, no one but the FCC has the expertise, the congressional mandate, or the moral authority to act effectively to proscribe, and to prevent systemic race and gender discrimination in broadcasting and multichannel video. The EEOC always, but never the FCC, provides relief to individual victims of discrimination. The FCC always, but never the EEOC, provides relief to the nation's broadcast and MVPD consumers by ensuring that these industries are operated free of the taint of race and gender discrimination.[62] These respective roles of the FCC and the EEOC as partners in broadcast EEO enforcement are well established.[63]

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[62] *See, among other authorities*, *2000 First R&O, supra*, 15 FCC Rcd at 2360-61 ¶69 ("[w]hile the EEOC and the FCC share as a common goal, the elimination of discriminatory employment policies and practices at broadcast stations and cable systems, the primary functions of the two agencies are different. Whereas the EEOC reviews discrimination complaints for the purpose of providing relief to victims of discrimination, either individually or as a group, and deterring future discrimination, the FCC's principal concern in reviewing discrimination allegations is the fitness of broadcasters and cable entities to fulfill their obligations under the Communications Act"); *1969 EEO R&O, supra,* 18 FCC2d at 241 ("[a]ction by the Commission will complement, not conflict with, action by bodies specially created to enforce" the national policy against discrimination.)

[63] In 1978, the EEOC and the FCC signed the FCC/EEOC Memorandum of Understanding, which sets out how the agencies coordinate their EEO efforts. *Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission, Report and Order,* 70 FCC2d 2320 (1978) ("*FCC/EEOC MOU*"). The *FCC/EEOC*

To evaluate our recommended tweak to the *FCC/EEOC MOU*, it is vital first to appreciate the respective interlocking roles of the two agencies in combating employment discrimination.

Title VII's purpose is to help complainants, while the primary beneficiaries of the FCC EEO Rule are the listeners and viewers. Title VII is aimed at making whole the very rare individual who knows she may have been a victim of discrimination *and* who is willing and able to risk her career to fight it. In broadcasting and multichannel video, no EEOC intervention is possible unless a very highly motivated, financially endowed individual, who knows and can prove that she personally was a victim of discrimination, is willing to fight for years and risk her career in a close-knit industry.[64] The most common discriminatory practice in broadcasting and MVPDs—WOM recruitment conducted in an exclusionary manner—is by definition not knowable by its victims, because the practice works by ensuring that those who are discriminated against will never learn of the job itself, much less that they will not be considered for the job. But even if an individual knew she had been discriminated against, the FCC could not make her whole. Instead, FCC EEO regulation is aimed at ensuring that systemic discrimination does not endanger the integrity, competitiveness and diversity of the industry most critical to the maintenance of democracy. The EEOC lacks the resources or the statutory mandate to undertake or supervise the prevention of discrimination in a specialized industry. On the other hand, the FCC's forward-looking jurisprudence is ideal for this preventive and proscriptive purpose, which

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MOU made the FCC "an agent of the EEOC for the sole purpose of receiving charges of employment discrimination" and a "conduit for formal discrimination charges falling within the EEOC's jurisdiction." *FCC/EEOC MOU* at 2321 (quotations omitted) and 2326. While the FCC may defer to the EEOC in pursuing individual cases, it retains the authority to investigate a matter on its own, even before the EEOC concludes its review. *See FCC/EEOC MOU* at 2327 (providing that the FCC may inquire into EEO complaints "even before the EEOC's conciliatory process ends"); *see also id.* at 2328 ¶21, 2328 n. 12, and 2331, Appendix B, §III(b). The FCC may also investigate and process a complaint where the EEOC lacks jurisdiction. *See Catoctin*, 4 RCC Rcd at 2558 ¶44 (holding that race discrimination by a radio station with five employees was sufficient to justify denial of the station's license renewal applicant.)

[64] *See, e.g.,* Paula Span, *Discrimination is Hard to Prove, Even Harder to Fix*, THE NEW YORK TIMES (July 22, 2019), available at https://www.nytimes.com/2019/07/22/health/age-discrimination-legal.html?action=click&module=Discovery&pgtype=Homepage (last visited August 9, 2019).

the agency exercises for the benefit of the nation's media consumers.

It is unrealistic to expect that the FCC's ability to review final EEOC or judicial determinations is sufficient to deter discrimination. There has only been one instance in 50 years when a final order in an employment discrimination case came back to the FCC for licensing review, and by then—seventeen years after the case began—the broadcast station license had changed hands four times.[65]

Moreover, the EEOC's resources are limited and its backlog is substantial. Its employee-numerosity threshold is high,[66] and its statute of limitations is far shorter than an FCC license term.[67]

Further, its processes virtually ensure that even the most determined complainants will be worn down or broken. Even when a complainant wins a judgment and secures a financial reward, she has no incentive to then take the additional step of refusing the broadcaster's offer of an additional payment in exchange for allowing the decision in her case to be vacated in order to rob the FCC of the ability to review it.[68] Compulsory arbitration provisions in many employee

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[65] The case involved WSM Radio, Nashville, TN. It was brought in 1973 and not finally resolved until 1990, when all appeals were concluded. Three African Americans were found to have been discriminated against by the radio station beginning in 1970.

[66] The EEOC's jurisdictional threshold is fifteen employees. 42 U.S.C. §2000e(b). A high proportion of radio stations, and some television stations and cable systems don't have that many employees. Stations with fewer than fifteen employees are typically the initial points of entry for women and minorities, and therefore should be among the least likely candidates for EEO immunization.

[67] The statute of limitations for Title VII is 300 days for jurisdictions with a Section 706 agency, and 180 days otherwise. 42 U.S.C. §2000e-5(e)(l).

[68] Under the *FCC/EEOC MOU*, 70 FCC2d at 2331 §IV, upon concluding an administrative hearing or court case involving an FCC regulatee, the EEOC will report back to the FCC—*if* there is anything to report. In our experience, a prudent broadcaster or MVPD having lost a case at the EEOC or in court, and having been required to pay a complainant a judgment, will approach the complainant and offer to forego further appeals, pay immediately an amount equal to the judgment, *and* pay a bonus on top of the judgment if the complainant will join in a motion to vacate the judgment. No one but the most bitter (and independently wealthy) complainant will turn down such an offer. That is how the FCC is always deprived of any knowledge that these rare cases even existed. The EEOC does not, however, report to the FCC its earlier-stage decision on whether or not to find probable cause.

contracts ensure that the EEOC will never even know about most allegations of discrimination in the first instance.[69]

Finally, Congress chose to endow the FCC with EEO authority,[70] being aware, obviously, that the EEOC also has EEO authority.[71] The agencies themselves have harmonized their respective missions through the *FCC/EEOC MOU*, which ensures that the work of the two agencies does not overlap. Virtually every employment discrimination complaint received by the FCC is already sent over to the EEOC, leaving the FCC to consider only allegations of systemic practices that do not involve requests for individual make-whole relief.[72]

As noted above, only one tweak to the FCC/EEOC relationship is desirable: *an EEOC probable cause determination should be reported to the FCC and should trigger an FCC audit.* EEOC probable cause determinations are not final merits determinations concluding litigation at the EEOC. Rather, when the EEOC finds probable cause that a violation of a discrimination statute such as Title VII has occurred, courts read that finding as an expert assessment that the

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[69] *See Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 111-13 (2001) (with the exception of workers engaged in transportation, employment contracts, are covered by the Federal Arbitration Act (FAA); *but see also E.E.O.C. v. Luce, Forward, Hamilton & Scripps,* 345 F.3d 742 (9th Cir. 2003) (the Civil Rights Act of 1991 does not preclude enforcement of agreements requiring arbitration of Title VII claims as a condition of employment.)

[70] *See* 47 U.S.C. §§334 and 634.

[71] *See* 47 U.S.C. §151 (amended in the Telecommunications Act of 1996 by adding the phrase in italics), regulating "communication by wire and radio so as to make available, so far as possible, to all the people of the United States, *without discrimination on the basis of race, color, religion, national origin, or sex*.") The EEOC, established by Title VII of the Civil Rights Act of 1964, is responsible for preventing unlawful employment practices including employment discrimination. Pub. L. No. 88-352, §705, 78 Stat. 241, 258-29 (1964); codified at 42 U.S.C. §§2000e-2 - 2000e-3.

[72] *See FCC/EEOC MOU*, *supra,* 70 FCC2d at 2327, and Section IV of the appended MOU itself, which provide that the FCC must refer a charge it receives to the EEOC, whereupon either or both agencies can process it. Since 1969, there have only been two instances when the FCC processed a charge rather than waiting for the EEOC to act, and there have been no instances when the FCC acted in response to an EEOC finding of discrimination.

respondent more than likely has violated the law.[73] The FCC should not overlook such a finding, as it stands as a powerful indication that one of its regulatees may not be qualified to hold an FCC authorization. Instead, the FCC should use its audits authority to learn whether the entity has violated the EEO Rule and, if so, whether such a violation should be handled through an HDO or otherwise.

E. The Commission Should Open A Section 403 Inquiry Into The Pattern Of Consistently Very Low Representation Of Minorities In Radio News.

As RTNDA's data has shown, minority representation in radio news is very low, most recently standing at 14.5% overall – a statistic that includes minority-focused and multilingual stations, and is actually below where it stood in 1994.[74]

The statutory provision best suited to enable the Commission to inquire into this endemic, recurring failure of the marketplace is 47 U.S.C. §403, which provides that the Commission may:

> institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act….[75]

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[73] EEOC, *What You Should Know: The EEOC, Conciliation, and Litigation*, available at https://www.eeoc.gov/eeoc/newsroom/wysk/conciliation_litigation.cfm (last visited August 27, 2019) ("If the EEOC determines there is reasonable cause to believe discrimination has occurred, both parties will be issued a "Letter of Determination" telling them that there is reason to believe that discrimination occurred. The Letter of Determination invites the parties to join the agency in seeking to settle the charge through an informal and confidential process known as conciliation. . . . If conciliation fails, the EEOC must decide whether to sue the employer in court.")

[74] *See* n. 25 *supra* (citing the RTNDA's longitudinal research).

[75] 47 U.S.C. §403.

Such an inquiry may be opened by the Commission and then delegated to a senior staff person to preside and gather evidence. The Enforcement Bureau also has independent authority to open and conduct a Section 403 investigation.[76]

The employment patterns are irrational after five decades of generally equal access by race to broadcast education. Further, witnesses who can testify as to why these patterns persist need the protection that a subpoena can provide.

The inquiry should carefully avoid any detour into the content that is being broadcast. Instead, it should focus only on the extent to which the systemic exclusion of minorities from radio news jobs has been caused by discrimination on the basis of race.

MMTC's request for such a Section 403 inquiry has been pending since 2010.[77]

IV. Each Of Our Proposals Is Constitutionally Noncontroversial.

We anticipate that no one will contend that our proposals on the time sequences of job postings and hiring decisions, on the *FCC/EEOC MOU*, or seeking an inquiry into whether the systemic exclusion of minorities from radio news is caused by racial discrimination, would have any constitutional ramifications. Our proposals on the use of Form 395 data are not constitutionally controversial either, as detailed below.

Anti-Discrimination Enforcement. Outreach-based FCC EEO enforcement has been effective and fair. The Commission's EEO regulations have always required broadcasters and

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[76] 47 C.F.R. §0.111(a)(17) (authorizing the Enforcement Bureau to "[i]dentify and analze complaint information, conduct investigations, conduct external audits and collect information, including pursuant to sections … 403… of the Communications Act, in connection with complaints, on its own initiative or upon requst of another Bureau or Office.")

[77] *See* Letter to Chairman Julius Genachowski from David Honig (June 29, 2010) (calling for the Commission, "[u]sing the procedures authorized by 47 U.S.C. §403, including subpoena power, [to] designate an ALJ to conduct an inquiry into how minorities came to be purged from radio journalism and why minority representation in television journalism is in decline. Upon receiving the results of the inquiry, the Commission should act promptly to ensure that systemic discrimination never again takes root in the broadcasting or any other FCC-regulated industry.")

MVPDs to hire only the best-qualified persons. No one can possibly be harmed when a broadcaster or MVPD recruits broadly enough to allow well-qualified minorities and women to learn of job openings.

Anti-discrimination enforcement using Form 395 data for civil rights law enforcement deprives no one of anything to which she would otherwise be entitled.

In *MD/DC/DE Broadcasters*, the Court struck the rules based on a hypothetical under which a broadcaster with a "finite" recruitment budget shrinks its ad in the daily paper in order to find the money to put an ad in a "minority" paper.[78] This hypothetical came from the Court itself, so there was nothing in the record about how much an ad in a "minority" paper actually costs. Today, the *MD/DC/DE Broadcasters* hypothetical no longer applies. Job openings can be posted, for free, on numerous sites online; and these sites are easily accessible by everybody. No longer is there any risk that minority recruitment will be a zero-sum game allegedly played at the expense of non-minorities.

The regulations do not affect anyone's ability to present her qualifications, have them considered, and secure employment. Simply providing wide notice of job openings does not upset anyone's settled expectations because no one has the right to be insulated from competition from other qualified persons.[79] Every court that has examined this question agrees.[80]

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[78] *Id.,* 236 F.3d at 20-21 n. **.

[79] A White male who would have been hired if competing only against other White males recruited by WOM, but who was not hired because an equally or better qualified minority or woman learned of the job as a result of targeted recruitment, has not been deprived of any right owed to him under the equal protection component of the Fifth Amendment. *Shuford v. Alabama State Bd. of Education*, 897 F.Supp. 1535, 1553 (M.D. Ala. 1995); *see also Barbera v. Metro-Dade Cty. Fire Dep't,* 117 F. Supp. 2d 1331, 1337 (S.D. Fla. 2000) ("*Barbera*") (quoting *Shuford*) ("Recruitment and other techniques of inclusion do not affect the selection process for hiring or promotion. Rather, inclusive techniques seek to ensure that as many qualified candidates as possible make it to the selection process.")

[80] The rules only require inclusive outreach. One objective of these outreach efforts is to ensure that minorities are made aware of employment opportunities, but this is because the record before the Commission shows that minorities have been most likely to be excluded from opportunities by WOM recruiting. There is nothing invidious about ensuring that broad

Unlike in *Lutheran Church*, our proposed "screen" is for predominant WOM recruitment, not staff composition. Only those broadcasters that unlawfully engaged in predominant WOM recruitment would be asked whether they also have a homogeneous staff and, thus, may be engaging in an inherently discriminatory recruitment practice. Thus, if there would be "pressure", it is "pressure" to obey settled law by recruiting broadly, *e.g.*, online and by e-mailing notices to community groups, as the Commission has quite properly expected of broadcasters for decades.

Collecting EEO Data. No broadcaster or MVPD has ever demonstrated that because it had to file Form 395, the government expected it to hire preferentially. Nor could such a claim have been made, because on its face Form 395 is not race-preferential. Form 395 no more

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recruiting programs reach those segments of the community that have been historically discriminated against and excluded. *See Raso v. Lago,* 135 F.3d 11, 16 (1st Cir. 1998) (holding that a HUD outreach plan aimed at reaching minority as well as majority applicants, and including mailing to minority organizations, did not create a suspect racial classification because "[e]very antidiscrimination statute aimed at racial discrimination and every enforcement measure taken under such a statute, reflects a concern with race. Such race-conscious purposes do not make enactments or actions unlawful or automatically 'suspect' under the Equal Protection Clause.") *See also Allen v. Alabama State Board of Education,* 164 F.3d 1347, 1352 (11th Cir. 1999) (holding that strict scrutiny does not apply to efforts to recruit minority teachers when no one is disadvantaged because of her race, and declaring that "[w]here the government does not exclude persons from benefits based on race, but chooses to undertake outreach efforts to persons of one race, broadening the pool of applicants, but disadvantaging no one, strict scrutiny is generally inapplicable"); *Duffy v. Wolle*, 123 F.3d 1026, 1038 (8th Cir. 1997) (finding that inclusive recruiting "enables employers to generate the largest pool of qualified applicants and helps ensure that women and minorities are not discriminatorily excluded from employment" and concluding (at 1038-39) that "[a]n employer's affirmative efforts to recruit minority and female applicants does not constitute discrimination.... The only harm to white males is that they must compete against a larger pool of qualified applicants.") Along similar lines, *see Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1557-58 (11th Cir. 1994) (holding that presentations at job fairs and career days designed specifically to apprise minorities of career opportunities are race-neutral), as well as *Ensley Branch, NAACP v. Seibels,* 31 F.3d 1548, 1571 (11th Cir. 1994), *Billish v. City of Chicago*, 962 F.2d 1269, 1290 (7th Cir. 1992), vacated on other grounds, 989 F.2d 890 (7th Cir.) (*en banc*), cert. denied, 510 U.S. 908 (1993), and *Coral Construction Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992); *see also Barbera, supra*, 117 F.Supp.2d at 1337.

"pressures" anyone to break the law than the Census, or Title VII, "pressure" anyone to do so. Like an EEO-1 form used in connection with Title VII, Form 395-B is set out in columns that specify Whites, minority groups, men and women. Such a form nowhere suggests or implies preference. The mere collection and reporting of these statistics can have no impact on whether a broadcaster receives a federal benefit or a sanction.

Recognizing the necessity of using statistics to estimate the prevalence of discrimination, the Supreme Court has repeatedly endorsed this kind of industry-wide analysis, which arises in cases as diverse as voting rights[81] and jury composition.[82] Government collection of data—even data about ethnicity or gender—poses no constitutional concern. It is *differential* treatment on the basis of a prohibited class, not classification *per se*, that implicates equal protection.[83] Accordingly, courts have historically approved the collection of data regarding the racial and gender composition of a federal agency workforce,[84] the

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[81] *See, e.g., Gomillion v. Lightfoot,* 364 U.S. 339 (1960) (holding that a change in city boundaries from a square to a 28-sided figure, which excluded 99% of the Black voters and no White voter, constituted racial discrimination violative of the 15th Amendment.)

[82] *See Flowers v. Mississippi*, 139 S. Ct. 2228, 2248 (2019) (holding that the trial court committed a clear error in concluding that the State's peremptory strike of a Black prospective juror was not motivated in substantial part by discriminatory intent where the State used its peremptory challenges to strike 41 of the 42 Black prospective jurors that it could have struck; one factor that a trial judge can consider in evaluating whether racial discrimination occurred is: "statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case"); *see also Batson v. Kentucky*, 476 U.S. 79 (1986) (taking account the race of jury venire members to hold that race-based peremptory challenges in a criminal petit jury might in some circumstances violate the equal protection clause).

[83] *Morales v. Daley*, 116 F. Supp. 2d 801, 813 (S.D. Tex. 2000) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("The Equal Protection clause does not forbid classifications. It simply keeps decision makers from treating differently persons who are in all relevant respects alike.")

[84] *See, e.g., Sussman v. Tanoue*, 39 F. Supp. 2d 13 (D.D.C. 1999*); see also Honadle v. Univ. of Vermont & State Agric. Coll.*, 56 F. Supp. 2d 419, 422 (D. Vt. 1999) (noting that detailed occupational data from the 1990 national census' Equal Employment Opportunity Special Files was used to determine the availability of qualified faculty.)

collection by the federal government of the racial composition of state employees,[85] and the collection of local census data regarding the racial and ethnic composition of public school employees.[86] Indeed, if the Equal Protection Clause does not permit the FCC to proscribe racial discrimination by being aware of racial statistics, then it would also prevent the enforcement of laws against school segregation including pupil placement, teacher recruitment, teacher placement and extracurricular activities;[87] or housing segregation including racial steering;[88] indeed, every civil rights law or rule that proscribes the use of a racially exclusionary cabal to exclude others in order to replicate racial exclusion over time. The Commission should ensure that its civil rights jurisprudence remains in harmony with the jurisprudence in all other areas of civil rights law.

IV. The Commission Should Reject The 82 Broadcasters' Proposal To Exempt Nearly All Broadcasters From EEO Compliance.

In their July 18, 2019 "Joint Comments and Petition for FNFRM" ("82 Broadcasters Petition"), 82 broadcast companies sought the following relief:

1. Require the online posting of all fulltime job openings by all licensees of any size, including those with fewer than the current jurisdictional threshold of five fulltime employees;

2. Have EEO reports filed by "entities" covering entire markets, to avoid the practice by large broadcasters of creating several small entities, each of which falls below the five fulltime station jurisdictional limit, to evade scrutiny; and

3. Evidently intended as a "trade" for Proposals #1 and #2, the Commission would

[85] *See United States v. New Hampshire*, 539 F.2d 277 (1st Cir. 1976), cert. denied, 429 U.S. 1023 (1976).

[86] *See Caufield v. Bd. of Educ.*, 583 F.2d 605 (2d Cir. 1968).

[87] *See generally Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).

[88] *See Smith v. City of Cleveland Heights,* 760 F.2d 720 (6th Cir. 1985); *see Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1529 (7th Cir. 1990) (stating that the "mental element required in steering case under housing discrimination laws is same as that required in employment discrimination cases challenged either under Title VII or under statute governing equal rights under the law on theory of disparate treatment.")

raise the jurisdictional limit from five fulltime employees to 50.

The EEO Supporters take no position on the 82 Broadcasters' Proposal #1 – to require online job posting for stations with fewer than five fulltime employees.[89] The five-employee jurisdictional floor in 47 C.F.R. §2080(d) was established in 1969 because most stations smaller than five employees are family-operated and seldom look outside of the family when jobs are open. These tiny stations are seldom points of entry for non-family members beginning their careers. Instead, stations with 5-15 employees are the key targets. Even very small stations are barred from discrimination, however, and appropriately so. Any slight benefit from Proposal #1 would do little to counteract the detriment from Proposal #3, discussed *infra.*

We also take no position on the 82 Broadcasters' Proposal #2 – to have EEO reports filed by market-wide entities that may have abused the repeal of the Main Studio Rule by assigning their employees in a manner that could justify not filing EEO reports at all.[90] We are not aware of any instances of group broadcasters that went to the trouble of creating sham entities to mask their actual joint operations so as to evade EEO accountability. Few large group owners would risk their FCC licenses just to avoid filing a Form 396.

We strongly oppose the 82 Broadcasters' Proposal #3,[91] which would put an end to most broadcast EEO enforcement, and would do that based on a false premise. The 82 Broadcasters declare that 50 employees is "the number regarded by the human resources profession as demarcating smaller from large for the purposes of hiring a human resources manager[.]" *See* 82 Broadcasters Petition at 10-11. What the 82 Broadcasters overlook is the fact that the amount of "paperwork" the FCC requires *that does not have to be done anyway as part of any business' routine personnel functions* requires far less time than a fulltime employee's 40 hours per week. In fact, it is exactly the same work that routine recruitment entails: maintaining an e-mail list, hitting a key to send out job notices, and posting the notices online – while *also* ensuring that the

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[89] 82 Broadcasters Petition at 3-5.

[90] *Id.* at 5-7.

[91] *Id.* at 7-10.

posts and job notices are widely accessible and that records of the postings are maintained in the (very rare) event of an FCC audit. This additional "burden" requires more like 40 seconds per week than 40 hours per week.

Compliance with the rules is not arduous at all—a conclusion the D.C. Circuit upheld in 2001 in rejecting a "burdensomeness" argument under the arbitrary and capricious standard.[92] And objections that the rule is too complex or difficult must be viewed in the light of 50 years of experience. During that time, not a single broadcaster credibly claimed that it suffered any material financial hardship because of the need to comply with the EEO rule. Nor did any broadcaster ever claim that the rule was too dense for it to comprehend.

Not only is this proposal unjustified on its own terms, it would swallow the rule. Few radio stations and only about half of all television stations employ more than 50 people fulltime. In several states, every radio and nearly every television station would be EEO-exempt. Nearly all non-commercial radio and television stations nationwide would be exempt.

The practical effect of exempting most of the industry from EEO compliance would be devastating. Many broadcast careers begin in small stations. Cutting off EEO protection at these points of entry would have a ripple effect on the rest of the industry. Large broadcasters that do not discriminate would have less diverse, and thus less talented pools of trained applicants from which to draw.[93]

The Commission has been here before, in 1976,[94] and in 1986.[95] In the current century,

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[92] *See MD/DC/DE Broadcasters, supra,* 236 F.3d at 18.

[93] *See 2001 Second NPRM, supra,* 16 FCC Rcd at 22857 ¶48 (small stations "have an important role in providing entry level opportunities into the broadcast industry.")

[94] *See Nondiscrimination in the Employment Policies & Practices of Broadcast Licensees*, 60 FCC2d 226, 257 (1976) ("*Nondiscrimination – 1976*") (Dissenting Statement of Commissioner Benjamin L. Hooks) ("it is almost inequitable to place a filing requirement only on larger stations and treat the filing requirement as if it were a penalty rather than a concomitant of a positive, affirmative national effort to alleviate the patent inequality of opportunity and experience . . . all licensees are public trustees and all have an equal mandate to serve the same public interest"); *see also Office of Communication of the United Church of Christ v. FCC*, 560 F.2d 531, 532 (2d. Cir. 1977) (overruling *Nondiscrimination – 1976*, holding that "[w]e grant the petition to review the order and set it aside as arbitrary and capricious insofar as it changes the

the Commission recognizes that exempting broadcasters with more than five employees would eviscerate the rule, because small broadcasters are key points of entry for those historically excluded from the industry.[96]

Finally, the idea that a broadcaster of any size greater than "mom and pop" should be exempt from EEO compliance is deeply flawed and troubling. Broadcast ownership is a privilege that necessarily includes EEO compliance; ownership coupled with nondiscrimination is not a "burden."[97] Discrimination is a burden. The risk that discrimination will not be prevented is a burden on all of us. Preventing discrimination is an interest of the "highest priority."[98]

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policy of the Commission by extending the exemption for stations with fewer than five full-time employees to those with ten or less full-time employees.")

[95] *See Equal Employment Opportunity in the Broadcast Radio and Television Services, Report and Order*, 2 FCC Rcd 3967, 3970 ¶22 (1987), in which the Commission retained the five-employee size cap because it "recognize[d] that small broadcast stations often offer opportunities for entry by women and minorities to employment and careers in the broadcast field."

[96] *See 2001 Second NPRM, supra*, 16 FCC Rcd at 22857 ¶48 (small stations "have an important role in providing entry level opportunities into the broadcast industry.")

[97] The word "burden" somehow creeps into FCC jurisprudence only when EEO is the topic of the day – just as "busing" only became "forced" or rights became "states rights" when racial integration was on the line. In an industry built on the power of words, the choice of language is substance, not symbolism. The time has come to stop labeling efforts to prevent discrimination a "burden" from which certain regulatees need "relief." This dog whistle dates from the mid-1960's when (like its cousins "forced busing", "states rights" and other terms such as "law and order") it was invoked as polite code for massive industry resistance to the 1964 Civil Rights Act. *See* Teun van Dijk, *Communicating Racism: Ethnic Prejudice in Thought and Talk* 372-82 (1987) (documenting how code words like "flood", and the word "invade" that is in such common usage today, were used in Europe as code words to convey anti-immigrant prejudice); *id.* at 378 (explaining that a key function of this coded language is to allow prejudiced individuals to "confirm or 'ratify' these models and schemata by expressing [them] as characteristic examples of a consensus and as result of – literally – 'commonsense' reasoning. At the same time, they will appeal to hearers by asking for similar confirmation of the shared nature of their own opinions and experiences.")

[98] *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976); *see* pp. 2-13 *supra*.

Conclusion

Providing equal employment opportunity is one of only a handful of public services required of broadcasters and MVPDs in exchange for regulatory protection from competitors. Certainly the Commission should regard the electronic media's EEO compliance as a matter of the highest priority. At a minimum, this means that today's broadcasters, and MVPDs, should help develop the next generation of their respective industries by providing an employment marketplace free from discrimination. As Chairman Powell put it,

> The public benefits of individuals in our society having equal employment opportunities, based on merit rather than discriminatory factors, are so numerous they are impossible to list. I believe few would disagree with this proposition. Thus, it is only right and proper for this agency to expect its licensees to afford equal opportunities for everyone. Indeed, I believe it is our obligation to attempt to widen the circle of those Americans that benefit from the fruits spawned by those licenses. If the public interest means anything at all it cannot possibly tolerate the use of a government license to discriminate against the citizens from whom the license ultimately is derived.[99]

[99] *2001 Second NPRM*, *supra,* 16 FCC Rcd at 22872 (Separate Statement of Chairman Michael K. Powell).

Respectfully submitted,

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September 20, 2019

ANNEX

EEO Supporters

1. American Indians in Film and Television
2. Asian American Journalists Association
3. Black College Communication Association
4. Black Entertainment and Sports Lawyers Association
5. Blacks in Government
6. Dialogue on Diversity
7. International Black Broadcasters Association
8. International Business Kids Foundation
9. Japanese American Citizens League
10. League of United Latin American Citizens
11. LGBT Technology Partnership and Institute
12. MANA, A National Latina Organization
13. Multicultural Media Correspondents Association
14. Multicultural Media, Telecom and Internet Council
15. National Action Network
16. National Asian American Coalition
17. National Association for the Advancement of Colored People
18. National Association of Black Journalists
19. National Association of Multicultural Digital Entrepreneurs
20. National Black Caucus of State Legislators
21. National Coalition on Black Civic Participation
22. National Congress of Black Women
23. National Council of Negro Women
24. National Diversity Coalition
25. National Hispanic Caucus of State Legislators
26. National Hispanic Foundation for the Arts
27. National Newspaper Publishers Association
28. National Organization of Black County Officials
29. National Puerto Rican Chamber of Commerce
30. National Urban League
31. National Utilities Diversity Council
32. Native American Journalists Association
33. OCA – Asian Pacific American Advocates
34. TechLatino: The National Association of Latinos in Information Sciences and Technology
35. Transformative Justice Coalition
36. U.S. Black Chambers, Inc.
37. Vision Maker Media