

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
2010 Quadrennial Regulatory Review, Review of the)	MB Docket No. 09-182
Commission's Broadcast Ownership Rules and Other)	
Rules Adopted Pursuant to Section 202 of the)	
Telecommunications Act of 1996)	
)	
Promoting Diversification of Ownership)	MB Docket No. 07-294
In the Broadcasting Services)	

REPLY COMMENTS OF PROFESSOR STACY HAWKINS

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I. Introduction

On December 22, 2011, the Federal Communications Commission (“FCC”) issued a Notice of Proposed Rulemaking (“NPRM”)¹ as part of the 2010 Quadrennial Review of its media ownership rules. The NPRM proposes to retain the local television and local radio ownership rules as well as the dual network rule, to modify the newspaper/broadcast cross-ownership rule, and to eliminate the radio/television cross-ownership rule.² Notwithstanding repeated direction from the Third Circuit to evaluate the impact of these rules on the ownership interests of women and minorities, as well as to specifically adopt measures designed to expand broadcast ownership opportunities for women and minorities,³ the NPRM largely fails to accomplish either of these goals. The primary justifications expressed in the NPRM for the FCC’s lack of consideration for these important diversity issues are: (1) concern over meeting the applicable legal standards in adopting either a race-neutral or race-conscious measure for increasing women and minority broadcast ownership opportunities,⁴ and (2) lack of data to support any inference that increased ownership opportunities for women and minorities contributes to the FCC goal of increasing the diversity of programming.⁵

Although numerous comments have been filed advocating for the maintenance or abandonment of the various FCC rules proposed in the NPRM, few of the comments filed address the critical legal questions presented by the NPRM.⁶ The Commission’s obligatory

¹ *In the Matter of 2010 Quadrennial Regulatory Review - Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Promoting Diversification of Ownership in the Broadcasting Services*, Notice of Proposed Rulemaking, MB Docket No. 09-182, FCC 11-186 (Dec. 22, 2011) (“NPRM”).

² NPRM ¶8.

³ *Id.* ¶9; see also *Prometheus Radio Project v. FCC*, 652 F.3d 431 (2011).

⁴ *Id.* ¶167.

⁵ *Id.* ¶¶158, 193.

⁶ The *Initial Comments of the Diversity and Competition Supporters in Response to the Notice of Proposed Rulemaking (“Initial Comments of DCS”)* (March 5, 2012) did urge the FCC to adopt a race-conscious eligible entity standard, but suggested that “a constitutionally sustainable race-conscious SDB definition would be bolstered

consideration of the adoption of some policy(ies), whether race-neutral or race-conscious, to further the general interest in broadcast diversity or the specific interest in expanding opportunities for minorities and women to participate in the broadcast industry raise critical legal questions. Professor Stacy Hawkins⁷ directs these Reply Comments to those questions.

These Reply Comments are directed to the following requests for comment in the NPRM:

1. How the Commission should respond to the Court's remand in Prometheus Radio Project v. FCC⁸ (Prometheus II) and other actions the Commission should consider to increase the level of broadcast station ownership by minorities and women.⁹
2. How the Commission most effectively can expand upon its diversity initiatives at the same time that the Commission addresses the Third Circuit's concerns in Prometheus II and other legal considerations, including the potential impediments to affording licensing preferences to minorities and women under current standards of constitutional law as set forth in Grutter v. Bollinger.¹⁰

In Prometheus II the Third Circuit vacated the FCC's 2008 Diversity Order insofar as it incorporated a revenue-based "eligible entity" definition into diversity measures designed to increase broadcast ownership opportunities for women and minorities.¹¹ According to the Third Circuit, the revenue-based "eligible entity" definition was "arbitrary and capricious" because the Commission "failed to show that measures based on the eligible entity definition 'will enhance significantly minority and female ownership, which was the stated goal of' the [2008 Diversity

by significantly updated disparity studies" and recommended adopting a race-neutral standard in the interim *Id.* at 17. For the reasons discussed herein, Professor Hawkins asserts that the FCC can immediately and constitutionally adopt a race-conscious eligible entity standard under the appropriate precedents established by Grutter v. Bollinger, 539 U.S. 306 (2003) and Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990). See discussion *infra* 4-13.

⁷ Professor Hawkins is currently a Visiting Assistant Professor at the Rutgers School of Law – Camden where she teaches, among other things, courses on Diversity and the Law and Constitutional Law. Prior to law teaching, Professor Hawkins spent more than a decade advising clients, including telecommunications clients and quasi-governmental entities, on the development of legally defensible diversity policies, programs and initiatives. She is a recognized expert on the intersection of law and diversity and is a frequent writer and sought after speaker on the issue of law and diversity. See e.g., Stacy L. Hawkins, *A Deliberative Defense of Diversity: Moving Beyond the Affirmative Action Debate to Embrace A 21st Century View of Equality*, 2 COLUM. J. RACE & L. 75 (forthcoming).

⁸ 652 F.3d 431 (2011).

⁹ NPRM ¶147.

¹⁰ *Id.* at ¶149, 539 U.S. 306 (2003).

¹¹ *Diversity Order*, 23 FCC Rcd at 5924 ¶2; see also NPRM ¶147.

Order].”¹² The Third Circuit remanded the 2008 Diversity Order for reconsideration in the context of the 2010 Quadrennial Review, which resulted in the current NPRM. Notwithstanding the Third Circuit’s explicit remand of the 2008 Diversity Order for reconsideration by the FCC, the NPRM purports to make no new rules to increase broadcast ownership opportunities for women and minorities. Instead, the NPRM solicits comment on whether it should decline to adopt “any new eligibility standard specifically aimed at increasing minority and female station ownership” in view of the legal challenges presented by the issue.¹³ Based on an assessment of the legal standards applicable to the issue, the FCC expresses a daunted view at the possibility of either: (1) constructing a suitable race-neutral standard of “eligible entity” to satisfy the Third Circuit’s demand that such a definition will in fact significantly enhance female and minority broadcast ownership, or (2) satisfying the constitutional threshold necessary to adopt a race-conscious measure for increasing female and minority broadcast ownership. The FCC need not be daunted. The FCC may be rightly concerned about devising a race-neutral eligible entity standard to satisfy the Third Circuit.¹⁴ Nevertheless, the FCC is capable of meeting the constitutional threshold necessary to adopt a race-conscious eligible entity standard on the record before it. These Reply Comments demonstrate that capability and urge the FCC to adopt a race-conscious eligible entity standard in the course of its 2010 Quadrennial Review.

II. Race-Conscious Measures to Increase Broadcast Ownership Opportunities for Women and Minorities Are Adequately Supported by the FCC’s Compelling Interest in “Broadcast Diversity”

The NPRM specifically requests comment on replacing the race-neutral, revenue-based eligible entity standard with a race-conscious standard based on the Small Business

¹² NPRM ¶152, quoting *Prometheus II*, 652 F.3d at 470.

¹³ NPRM ¶167.

¹⁴ In fact this concern, as addressed *infra* 10-12, bolsters the FCC’s ability to demonstrate that the race-conscious SDB eligible entity standard is constitutional.

Administration's ("SBA") definition of socially and economically disadvantaged businesses ("SDBs").¹⁵ Because the SBA definition of SDBs grants a rebuttable presumption that African Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Subcontinent Asian Americans are socially disadvantaged,¹⁶ the Supreme Court has declared this standard to be race-conscious.¹⁷ Notwithstanding the race-consciousness of an SDB-based eligible entity standard, the FCC can meet the constitutional threshold of proof necessary to adopt this standard if the FCC can articulate a "compelling interest" in support of the standard and demonstrate that use of the standard is "narrowly tailored" to meet the asserted compelling interest.¹⁸

As far back as *Metro Broadcasting, Inc. v. FCC*,¹⁹ the Supreme Court has acknowledged that "enhancing broadcast diversity is, at the very least, an important governmental objective."²⁰ Because the Court in *Metro Broadcasting, Inc.* applied an intermediate rather than strict scrutiny standard to the minority ownership policies at issue there,²¹ the Court did not have reason to conclude that the interest in enhancing broadcast diversity could meet the higher compelling interest standard applicable under the constitutional strict scrutiny test. Nor has the Court had

¹⁵ NPRM ¶163.

¹⁶ 13 C.F.R. §124.103(b).

¹⁷ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213 (1995) (noting "the race based rebuttable presumption used in some certification determinations under the Subcontracting Compensation Clause" is subject to some heightened level of scrutiny.)

¹⁸ *Id.*

¹⁹ 497 U.S. 547 (1990).

²⁰ *Id.* at 567.

²¹ Specifically, the two programs at issue in *Metro Broadcasting, Inc.* were: (a) a program awarding an enhancement for minority ownership in comparative proceedings for new broadcast licenses, and (b) the minority "distress sale" program, which permitted a limited category of existing radio and television broadcast stations to be transferred only to minority controlled firms. *Id.* at 552. Notwithstanding the race-conscious nature of the programs, finding that the programs were specifically approved by Congress, the Court subjected them to an intermediate standard of constitutional review pursuant to the holding in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), requiring them only to be substantially related to an important governmental interest. *Id.* at 565. The holding of *Metro Broadcasting, Inc.* applying an intermediate standard of constitutional review to race-conscious actions, even those approved by Congress, was overturned in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). Nevertheless, the holding of *Adarand Constructors, Inc.* in no way suggests that race-conscious actions by the FCC could not be sustained under the strict scrutiny standard of review, and for the reasons cited herein, both the holding in *Grutter* and the Court's analysis in *Metro Broadcasting, Inc.* suggest that race-conscious actions by the FCC in pursuit of broadcast diversity could withstand constitutional strict scrutiny analysis.

occasion to consider that issue since *Metro Broadcasting, Inc.* However, in view of the Court's subsequent acknowledgement in *Grutter v. Bollinger* that student body diversity is a compelling interest capable of satisfying the constitutional strict scrutiny standard, there is reason to believe that broadcast diversity is similarly compelling. Numerous facts predict such a result.

First, the Court in *Metro Broadcasting, Inc.* expressly analogized the interest in broadcast diversity to the interest in student body diversity ultimately accepted by the Court in *Grutter* as compelling:

*Just as a diverse student body contributing to a robust exchange of ideas is a constitutionally permissible goal on which a race-conscious university admissions program may be predicated . . . , the diversity of views and information on the airwaves serves important First Amendment values.*²²

Although the Court in *Metro Broadcasting, Inc.* relied on Justice Powell's plurality opinion in *Regents of the University of California v. Bakke*²³ to support the constitutional permissibility of the interest in broadcast diversity, Justice Powell's opinion was ultimately adopted by a majority of the Justices in *Grutter* and became the basis for the holding in that case that student body diversity is constitutionally compelling.²⁴ One of the critical factors supporting the *Grutter* Court's holding that student body diversity is a compelling interest is the benefit of diversity to the entire classroom environment, and not merely to diverse students themselves.²⁵ Similarly, the *Metro Broadcasting Inc.* Court reasoned that the benefits of broadcast diversity "redound to all members of the viewing and listening audience" and are not merely limited to minority audiences.²⁶ The Court in *Metro Broadcasting, Inc.* relied on evidence presented from Congressional Hearings demonstrating the public benefits from having access to a wide diversity

²² *Id.* (internal quotations omitted), citing *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

²³ 438 U.S. 265 (1978)

²⁴ 539 U.S. 306, 325.

²⁵ *Id.* at 330.

²⁶ 497 U.S. at 568.

of information sources.²⁷ The FCC has articulated its present interest in broadcast diversity as inuring to the benefit of the public,²⁸ and as such this interest is likely to be viewed as constitutionally compelling.

Second, the *Grutter* Court supported the compelling nature of the interest in student body diversity by asserting that it, “promotes cross racial understanding, helps break down racial stereotypes, and enables [students] to better understand persons of different races.”²⁹ Likewise, the Court in *Metro Broadcasting, Inc.* justified the importance of broadcast diversity by stating:

*“minority ownership does appear to have specific impact on the presentation of minority images in local news, inasmuch as minority-owned stations tend to devote more news time to topics of minority interest and to avoid racial and ethnic stereotypes in portraying minorities.”*³⁰

If the promotion of “cross racial understanding” is a rationale capable of supporting the interest in student body diversity, so too it can support the interest in broadcast diversity. In *Metro Broadcasting, Inc.*, this rationale was supported by record evidence demonstrating a nexus between minority ownership and diverse programming.³¹ While it is arguable that this evidence should create a rebuttable presumption in favor of a continued nexus between minority ownership and diverse programming, there has been more recent evidence developed in support

²⁷ *Id.* at 568 (citing H.R. Conf. Rep. No. 97-65 and US Code Cong. & Admin. News 1982, 2289).

²⁸ See *Promoting Diversification of Ownership in the Broadcasting Services*, MB Docket No. 07-294, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922, ¶2 (2008) (“*Diversity Order*”) (quoting language from the Court’s opinion in *Metro Broadcasting, Inc.*, the FCC supported its diversity policies by arguing “the widest dissemination of information from diverse and antagonistic source is essential to the welfare of the public.”). Although the FCC cites no new evidence of this public benefit, the evidence proffered by Congress in support of the public benefit in *Metro Broadcasting, Inc.* is arguably subject to judicial notice, especially if no contrary evidence can be or has been presented to the Court.

²⁹ 536 U.S. at 324-25 (internal quotations and citations omitted).

³⁰ 497 U.S. at 581-82 (internal quotations and citations omitted).

³¹ *Id.* at 580-82, n. 31-34 (The evidence presented in support of this conclusion also included a nexus between minority ownership and treatment of news events, as well as between minority ownership and minority employment in top station management).

of this nexus which could be proffered by the FCC in support of the present interest in broadcast diversity.³²

The *Grutter* Court offered a third justification for the compelling nature of the interest in student body diversity that finds analogy to broadcast diversity. In one of the more oft-quoted passages from Justice O'Connor's opinion in *Grutter* she reasoned that the interest in student body diversity is compelling because, "the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity . . . [e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective. . . ."³³ This inclusive access to public higher education can be readily analogized to the "the public's right to receive a diversity of views and information over the airwaves."³⁴ The Court in *Metro Broadcasting, Inc.* recognized that given the scarcity of broadcast frequencies, it was "essential to the welfare of the public" that government regulate access based on ensuring "the wildest [sic] possible dissemination of information from diverse and antagonistic sources."³⁵ If it represents a paramount objective of government that public institutions be accessible to people of all races and ethnicities, so too it is a paramount objective, and by consequence a compelling interest, of government that the public airwaves be accessible to people of both genders and all races and ethnicities. Just as broad accessibility to our public universities was described by the Court in *Grutter* as essential to our democratic functioning, the

³² See e.g., *Initial Comments of DCS* at 6 (citing studies by Catherine J.K. Sandoval ("Sandoval Study") and Joel Waldfogel, as well as the FCC's own Media Ownership Study 7); *Comments of the University of Southern California Annenberg School for Communication & Journalism on Behalf of the Communication Policy Research Network ("Comments of CPRN")* at 7 (March 2, 2012) (citing attached Abstract by Dam Hee Kim purporting to establish a nexus among minority ownership, a diverse workforce, and content provided to the community of owner).

³³ 539 U.S. at 323.

³⁴ *Metro Broadcasting, Inc.*, 497 U.S. at 567.

³⁵ *Id.*

FCC has articulated its goal of “broadening participation in the broadcast industry” as essential to the “robust marketplace of ideas that is essential to our democracy.”³⁶

Finally, just as the Court in *Grutter* reasoned that universities occupy a special niche in our constitutional tradition given the unique First Amendment values (including freedom of speech and thought) inherent in public education,³⁷ the Court also recognized that First Amendment principles informed its review of the FCC’s minority ownership policies in *Metro Broadcasting, Inc.*:

*“Safeguarding the public’s right to receive a diversity of views and information over the airwaves is [] an integral component of the FCC’s mission. . . the ‘public interest’ standard necessarily invites reference to First Amendment principles . . . Congress may seek . . . to assure that the public receives through this medium a balanced presentation of information on issues of public importance . . .”*³⁸

The Court’s holding in *Grutter*, recognizing the interest in student body diversity as compelling in the context of public universities, invites direct analogy to the interest in broadcast diversity pursued by the FCC. Both protect features of the “marketplace of ideas,” and both are subject to unique First Amendment deference. Thus, not only can the justifications for diversity in the public university and public broadcast contexts be analogized, but the contexts themselves have also been declared analogous by the Court.

Any one of these justifications standing alone could arguably support a compelling interest in broadcast diversity under the Court’s precedents in *Metro Broadcasting, Inc.* and *Grutter*. The combined effect of these justifications renders the compelling nature of the FCC’s articulated interest in broadcast diversity virtually unassailable. But it is not enough for the

³⁶ *Diversity Order* ¶2.

³⁷ 536 U.S. 306, 329. (observing that Justice Powell in *Bakke* grounded his analysis in the academic freedom that “long has been viewed as a special concern in the First Amendment,” Justice O’Connor reasoned that the majority’s acceptance of “student body diversity” as constitutionally compelling was “in keeping with [the Court’s] tradition of giving a degree of deference to a university’s academic decisions . . . [based on] the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment.”)

³⁸ 497 U.S. at 567.

interest in broadcast diversity to be compelling, to withstand constitutional scrutiny the FCC must also demonstrate that its use of the SDB eligible entity standard is narrowly tailored to meet that interest.

III. The SDB Eligible Entity Standard Can Be Narrowly Tailored to Meet the Interest in Broadcast Diversity

In querying whether the SDB eligible entity standard can meet the constitutional strict scrutiny threshold, the FCC cites *Grutter*³⁹ for the applicable standard.⁴⁰ *Grutter*, however makes clear that the narrow-tailoring inquiry must be “calibrated to fit the distinct issues raised by the use of race” in a given context.⁴¹ In the context of student body diversity, the *Grutter* Court defined the elements of narrow tailoring as follows: (1) race-neutral alternatives;⁴² (2) individualized consideration/undue burden on non-minorities;⁴³ and (3) durational limits.⁴⁴ Notwithstanding its purported application of an intermediate standard of review, these are the same elements used to evaluate the minority ownership policies in *Metro Broadcasting, Inc.*⁴⁵ Because *Metro Broadcasting, Inc.* deals with a context more analogous to the FCC’s proposed use of the SDB eligible entity standard, and it applies the narrowly tailoring analysis in effect, if not in name, *Metro Broadcasting, Inc.* provides the appropriate precedent for evaluating the constitutionality of the FCC’s present actions in pursuit of broadcast diversity.

First, the Court in *Metro Broadcasting, Inc.* looked at the available race-neutral alternatives to the FCC minority ownership policies.⁴⁶ Finding that the FCC adopted the minority ownership policies only after “long study and painstaking consideration” of race-neutral

³⁹ 539 U.S. 306, 326 (“We have held that all racial classifications imposed by government ‘must be analyzed by a reviewing court under strict scrutiny.’”)

⁴⁰ NPRM ¶¶149 and 164, n. 394.

⁴¹ 539 U.S. at 334.

⁴² *Id.* at 339.

⁴³ *Id.* at 334,341.

⁴⁴ *Id.* at 342.

⁴⁵ *Id.*, 584-596.

⁴⁶ *Metro Broadcasting, Inc.*, 497 U.S. 547, 584.

alternatives, the Court determined that this element of narrow tailoring had been met.⁴⁷ Citing studies from 1946 and 1960, the Court reasoned that the FCC pursued race-conscious means only after determining that race-neutral efforts failed to produce sufficiently diverse programming.⁴⁸ Although the FCC has expressed concern that its 2000 data in support of the current proposal for the SDB eligible entity standard is “stale,”⁴⁹ it is certainly no more stale than the 1946 or 1960 data was in relation to the FCC’s 1978 minority ownership policies under review in *Metro Broadcasting, Inc.* This evidence should also be subject to a rebuttable presumption of validity.⁵⁰ Notwithstanding such a presumption, the FCC is not without recent evidence to demonstrate the continued need for race-conscious measures to ensure diverse programming, especially among television broadcasters.⁵¹ Moreover, the Court in *Grutter* found that this burden can be satisfied by demonstrating “good faith consideration of workable race-

⁴⁷ *Id.*

⁴⁸ *Id.* at 585.

⁴⁹ *FCC Advisory Committee on Diversity for Communications in the Digital Age Report and Recommendation of the Subcommittee on Eligible Entities* at 2 (October 28, 2008) (questioning whether studies conducted in 2000 would be stale in relation to the 2008 proposals). This Report also suggests that *Adarand Constructors, Inc.* would require the FCC to conduct racial disparity and participation studies of the affected industry before employing the SDB eligible entity standard. *Id.* at 7. For the reasons discussed above, the FCC can justify its use of the SDB eligible entity standard as furthering an interest in broadcast diversity. Therefore, the FCC need not concern itself with meeting the burden of proof for furthering an interest in remedying past discrimination within the broadcast industry, to which the *Adarand Constructors, Inc.* standard would be directed.

⁵⁰ *Id.* at 2, n. 6 (citing *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 499 F. Supp.2d 775, 839 (W.D. Tex. 2007) for the proposition that “a governmental entity resisting strict scrutiny challenge . . . should be able to rely on the most recently available data so long as that data is reasonably up to date.”)

⁵¹ Interestingly, one of the record facts cited by the Court in *Metro Broadcasting, Inc.* was a 1968 report by the Kerner Commission, which concluded that “the world that television and newspapers offer their black audience is almost totally white.” *Id.* at 586. In 2002, the NAACP initiated a review of network programming due to the fact that among the 1999-2000 fall television lineup of 26 new shows, not one featured “a single actor of color in a starring or leading role.” *Out of Focus – Out of Sync Take 4 (“Out of Focus”)* at p. ii, (December 2008). That 2008 Report by the NAACP observed a “disturbing downward trend” in featured roles for actors of color beginning in the 2004 season, which the NAACP concluded seemed likely to continue into at least the 2007-2008 season. *Out of Focus* at 5. This ongoing evidence of the continuing “almost totally white” programming available from the majority owned major television networks provides record support for the ongoing need for the FCC’s race-conscious measures to achieve broadcast diversity. Although Media Ownership Study 7 demonstrates that many minority-formatted radio stations are majority-owned, it also found that the presence of minority-owned stations in a market increases the amount of minority-targeted programming in that market. *See Initial Comments of DCS*, 6-7, n. 28.

neutral alternatives.”⁵² The Third Circuit’s rejection of the race-neutral eligible entity definition as adequate for the purpose of increasing the ownership opportunities for women and minority broadcasters⁵³ demonstrates the FCC’s good faith consideration and the unworkable nature of a race-neutral alternative.

The second narrow-tailoring factor considered by the Court in *Metro Broadcasting, Inc.* was the burden the FCC minority ownership policies placed on the interests of non-minority broadcasters.⁵⁴ The Court found it relevant that in the context of broadcast licenses, “the limited number of frequencies on the electromagnetic spectrum means that no one has a First Amendment right to a license,”⁵⁵ and further that the public interest in broadcast diversity was an appropriate consideration in the awarding of licenses.⁵⁶ Finding the impact on the interests of non-minority broadcasters to be “slight” where they remained eligible to compete for the vast majority of license opportunities, the Court found no undue burden on non-minority broadcasters by the FCC’s use of the minority ownership policies.⁵⁷ Similarly, here the continuing public interest in broadcast diversity would make it an appropriate consideration in the awarding of licenses, and use of the SDB eligible entity standard in the limited category of license proceedings proposed by the FCC would place at most a “slight” burden on the interests of non-minority broadcasters. In addition to the distress sales that were also at issue in *Metro Broadcasting, Inc.*, the proceedings in which the FCC proposes to utilize the SDB eligible entity standard include: (1) Revision of Rules Regarding Construction Permit Deadlines; (2) Modification of Attribution Rules; (3) Duopoly Priority for Companies that Finance or Incubate

⁵² *Grutter*, 539 U.S. at 339.

⁵³ NPRM ¶152, quoting *Prometheus II*, 652 F.3d at 470.

⁵⁴ *Id.* at 596.

⁵⁵ *Id.* at 597.

⁵⁶ *Id.*

⁵⁷ *Id.* at 600.

an Eligible Entity; (4) Extension of Divestiture Deadline in Certain Mergers; and (5) Transfer of Grandfathered Radio Station Combinations to Non-Eligible Entities.⁵⁸ It is arguable that because the SDB eligible entity standard neither ensures minority broadcast owners the SDB designation, nor precludes non-minority broadcast owners from competing for the SDB designation,⁵⁹ it places no burden, even a slight one, on the interests of non-minority broadcasters.⁶⁰ Nevertheless, so long as non-minority broadcast owners remain free to compete for the vast majority of broadcast licenses, the use of the SDB eligible entity standard in these limited license proceedings places no undue burden on their interests.

Finally, narrow tailoring requires consideration of the durational limits on race-conscious measures. Both *Metro Broadcasting, Inc.*⁶¹ and *Grutter*⁶² demonstrate that where the government entity commits to periodic assessment and reevaluation of race-conscious measures for necessity and efficacy, it satisfies this element. The FCC has already undertaken to implement the data collection necessary to conduct periodic assessment and evaluation of the efficacy of its diversity initiatives, including those utilizing the SDB eligible entity standard, in expanding broadcast ownership opportunities for women and minorities, as well as in increasing programming diversity.⁶³ Moreover, various commenters have provided recommendations for

⁵⁸ NPRM ¶¶168.

⁵⁹ The SDB standard gives a rebuttable presumption of social disadvantage to certain racial and ethnic groups, 13 C.F.R. §124.103, but it also permits challenges to that presumption. *Id.* Further, it allows non-minority entities to prove social disadvantage. *Id.* Both minority and non-minority entities designated as socially disadvantaged must then prove economic disadvantage before receiving the SDB designation. 13 C.F.R. §124.104.

⁶⁰ An analogous argument was made in *Grutter*. There the Court found that the race-conscious admissions policy at issue did not place an undue burden on the interests of non-minority applicants because they could equally compete with minority applicants for the ability to contribute to the asserted goal of student body diversity. *Id.* at 341 (acknowledging that the race-conscious admissions policy in *Grutter* “considers ‘all pertinent elements of diversity,’ [and] it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants.”). Here, because the SDB eligible entity definition permits non-minority broadcast owners to demonstrate their eligibility as an SDB, it can be analogized to the individualized consideration of student body diversity sustained by the Court in *Grutter*.

⁶¹ 497 U.S. 547, 594.

⁶² 539 U.S. 306, 342.

⁶³ NPRM ¶¶ 171 and 185-193.

how the FCC can modify its future analyses to provide the basis for more robust longitudinal assessment of the impact of its diversity policies on these dual policy goals.⁶⁴ In addition to its existing data collection and analysis efforts, adoption of some of these recommendations will demonstrate the FCC’s commitment to assessment and reevaluation of its use of the race-conscious SDB eligible entity standard sufficient to satisfy the durational prong of the narrow tailoring analysis. So long as the FCC demonstrates its intent to utilize the race-conscious SDB eligible entity standard no longer than necessary to achieve the compelling interest in broadcast diversity, there is no constitutional bar to its ability to do so.

IV. Conclusion

While it is true that the constitutional strict scrutiny standard is a high burden to meet, the Court has repeatedly affirmed that the standard is not “strict in theory, but fatal in fact.”⁶⁵ As Justice O’Connor commented in *Grutter* when sustaining the race-conscious admissions policy employed by the University of Michigan Law School:

*“Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.”*⁶⁶

The FCC is seeking to employ the SDB eligible entity standard to achieve a compelling interest in broadcast diversity. It can do so in a way that is narrowly tailored to that end and can,

⁶⁴ See *Comments of CPRN*, 8-12 (providing recommendations for methodological approaches to the FCC’s data analysis that will improve the Commission’s ability to measure progress towards its policy goals); *Comments of Free Press* (March 5, 2012) (recommending that the FCC engage in a number of data collection efforts to establish the longitudinal impact of its policies on female and minority broadcast ownership opportunities.); *Comments of The Leadership Conference on Civil and Human Rights* (March 5, 2012) (urging the FCC to remedy certain flaws in its data collection efforts to better support its policy goals); *Comments of Alliance for Women in Media, Inc.* (March 5, 2012) (suggesting that the FCC make the FCC Form 323 more easily searchable so that interested parties can conduct analyses that might aid in demonstrating the efficacy of the FCC’s efforts to improve ownership opportunities for women and minorities); *Comments of Communication of United Church of Christ, Inc., Media Alliance, National Organization for Women Foundation, Communication Workers of America, Common Cause, Benton Foundation, and Media Council Hawai’i* (March 5, 2012) (recommending that the FCC evaluate the efficacy of its race-neutral diversity initiatives).

⁶⁵ *Grutter*, 539 U.S. 306, 326 (citing *Adarand Constructors, Inc.*, 515 U.S. 202, 237).

⁶⁶ *Id.* at 327.

consequently, withstand constitutional scrutiny. Accordingly, the FCC should not defer consideration of the SDB eligible entity standard until the 2014 Quadrennial Review, but should implement the standard immediately in the context of its 2010 Quadrennial Review.

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