

# Minority Media and Telecommunications Council

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TO: MB Docket No. 09-182 (2010 Quadrennial Review), MB Docket No. 07-294 (Diversity Proceeding), IB Docket No. 11-133 (Foreign Ownership)

FROM: David Honig, President, MMTTC

## **MEMORANDUM OF LAW: FCC MINORITY OWNERSHIP RESEARCH**

This memorandum considers whether the FCC could collect data about the impact of crossownership on minority broadcasters without triggering strict scrutiny. In short, it is well-established that such inquiries do not trigger strict scrutiny, as long as the government's policies are race-neutral.

Strict scrutiny does not apply whenever the government merely considers the impact of its policies on race. Instead, strict scrutiny applies only to government actions that classify people by race and treat them differently. In 2007, the Supreme Court struck down a school district's plan to assign students to school districts based on racial classifications. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007). But the Supreme Court explicitly refused to opine on whether strict scrutiny applies to "other means" of achieving racial diversity, such as considering "where to construct new schools, how to allocate resources among schools, and which academic offerings to provide to attract students to certain schools." *Id.* at 745. Moreover, as Justice Kennedy stated in his concurrence, "it is permissible to consider the racial makeup of schools," and school boards may draw "attendance zones with general recognition of the demographics of neighborhoods" and may engage in "tracking enrollments, performance, and other statistics by race." *Id.* at 2792 (Kennedy, J., concurring). While acknowledging that these mechanisms are "race conscious," Justice Kennedy correctly reasoned that they "do not lead to different treatment based on a classification that tells each student he or she is to be defined by race[.]" *Id.*; see also Doe v. Lower Merion Sch. Dist., 665 F.3d 524 (3d Cir. 2011) (holding that strict scrutiny does not apply to a school redistricting plan that "neither uses racial classification as a factor in student assignment nor distributes any burdens or benefits on the basis of racial classification.").

Indeed, it is well established that the government need not be blind to race. As the Fifth Circuit stated in a landmark 1966 ruling against school segregation, "[i]f the Constitution were absolutely colorblind, consideration of race in the census and in adoption proceedings would be unconstitutional." United States v. Jefferson County Bd. of Education, 372 F.2d 836, 861 (5th Cir. 1966). For example, in United States v. Brignoni-Ponce, 422 U.S. 873, 886 (1975), the Supreme Court held that race can be one of many factors that law enforcement agents use when determining whether to inquire about an individual's immigration status. Similarly, in Buffkins v. Omaha, 922 F.2d 465, 468 (8th Cir. 1990), the Eighth Circuit held that strict scrutiny does not

apply when an officer identifies a criminal suspect based on a racial classification; see also Comfort v. Lynn Sch. Comm., 263 F. Supp. 2d 209, 244 (D. Mass. 2003) (“while in Adarand the Court subjected a racial classification to strict scrutiny, the mere consideration of race, where no preference is given to members of one race over another, is distinguishable.”).

For these reasons, state and federal governments routinely gather information about individuals’ race and ethnicity. Indeed, the FCC already collects information about the race and ethnicity of broadcast owners in its biannual Form 323. Just as the Form 323 would not be subject to strict scrutiny, neither would a research study about the impact of crossownership. As long as the Commission does not begin to treat broadcast owners differently based on their race, its actions will not be subject to strict scrutiny.

Accordingly, it would not trigger strict scrutiny for the Commission to perform research that would examine whether crossownership would have an impact on minority broadcast ownership.

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