

**DISSENTING STATEMENT OF  
COMMISSIONER BRENDAN CARR**

Re: *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies*; Fourth Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking; MB Docket No. 98-204.

Today’s FCC Order takes two separate actions.

First, it reinstates the federal requirement that broadcasters file a document (known as Form 395-B) every year with the FCC that lists the race and gender of their employees. I would have had no objection here to an FCC decision limited to requiring broadcasters to file Form 395-B data with the agency—after all, Congress passed a statute that directs the FCC to collect this information.<sup>1</sup> The FCC could also have made this data available on an anonymized or otherwise aggregated basis that does not disclose information about specific broadcast stations. Indeed, the Civil Rights Act of 1964 expressly requires that the government keep this type of race and gender data confidential when it is collected by the Equal Opportunity Employment Commission.<sup>2</sup> But instead of confining today’s decision to lawful agency action, the FCC chooses a different course—one that violates the Constitution, as the D.C. Circuit has already determined in not one but two separate FCC cases.

In particular, in the second part of today’s Order, the FCC decides that it will take the Form 395-B demographic data and publish it on a station-by-station basis—meaning that the FCC will now post a race and gender scorecard for each and every TV and radio broadcast station in the country.<sup>3</sup> In doing so, the FCC caves to the demands of activist groups that have worked for years and across different industries to persuade the federal government to obtain—and most importantly publish—this type of data about individual businesses. This is no benign disclosure regime. The record makes clear that the FCC is choosing to publish these scorecard for one and only one reason: to ensure that individual businesses are targeted and pressured into making decisions based on race and gender. This is the exact same type of pressure that the FCC created in at least two prior cases. In both instances, the D.C. Circuit invalidated the FCC’s rules because they violated the equal protection guarantees of the Due Process Clause of the Fifth Amendment.<sup>4</sup> The only difference this time around is that the FCC has violated the First Amendment as well.

In the Further Notice portion of today’s decision, the FCC proposes to extend this same approach to additional industries.

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Let’s start with the FCC’s record of encouraging this type of discrimination. In *Lutheran Church*, the D.C. Circuit reviewed an earlier FCC effort to use Form 395-B (the same form that is at issue in

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<sup>1</sup> See 47 U.S.C. § 334. Notably, however, federal law prohibits the FCC from making any changes to Form 395-B unless those changes are “nonsubstantive technical or clerical revisions,” *id.* at 334(c). Nonetheless, the FCC adds an entirely new category of “gender non-binary” to Form 395-B today. In doing so, the FCC makes no argument that adding this box constitutes a lawful addition that is either a nonsubstantive technical or clerical revision.

<sup>2</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 264, § 709(e) (1964); *see also* 42 U.S.C. § 2000e-8(e).

<sup>3</sup> The only exception is for stations with four or fewer full-time employees.

<sup>4</sup> *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1988); *MD/DC/DE Broadcasters Ass’n v. FCC*, 236 F.3d 13 (D.C. Cir. 2001); *see also Adarand Constructors Inc. v. Pena*, 515 U.S. 200 (1995) (overruling *Metro Broadcasting, Inc., v. FCC*, 497 U.S. 547 (1990)).

today's decision) as part of a set of agency regulations aimed at influencing broadcasters' hiring practices. As with today's new rules, those FCC regulations did not expressly require broadcasters to hire employees in accordance with fixed quotas.<sup>5</sup> Instead, those earlier FCC rules required broadcasters to compare the composition of their workforce with the availability of minorities and women in its area. On review, the D.C. Circuit found that those rules would operate, in the real world, in a manner that would "oblige stations to grant some degree of preference to minorities in hiring."<sup>6</sup> In particular, the court found that the FCC's approach of mandating the comparison of employees with the general population across race and gender categories operated to "pressure license holders to engage in race-conscious hiring."<sup>7</sup> The D.C. Circuit concluded that the FCC violated the Constitution because its "regulations pressure stations to maintain a workforce that mirrors the racial breakdown of their [area]."<sup>8</sup>

After that appellate court loss, the FCC suspended the relevant regulations and sought comment on a set of replacement rules. Those substitute rules required broadcasters to report the race and sex of each job applicant. The FCC made clear that if the data collected did not demonstrate that a broadcaster's outreach efforts were reaching the entire community, then the FCC expected the broadcaster to modify those efforts and in some cases face an FCC investigation. On appeal, the FCC once again claimed that its regime did not impose any undue pressure on broadcasters to discriminate on the basis of race or gender and only sought to encourage broad outreach on a race- and gender-neutral basis. Focusing on how the rules would operate in the real world, the D.C. Circuit disagreed and struck them down in *MD/DC/DE Broadcasters Association*.<sup>9</sup> The court found that the regulations did more than encourage broad outreach—they made clear that "the agency with life and death power over the licensee is interested in results, not process, and it is determined to get them."<sup>10</sup> The FCC's approach "clearly does create pressure to focus recruiting efforts upon women and minorities" in violation of the Fifth Amendment, the court determined.<sup>11</sup> Ultimately, the court held that those FCC rules created "a race-based classification that is not narrowly tailored to support a compelling governmental interest and is therefore unconstitutional."<sup>12</sup>

The FCC's history of unconstitutional conduct is not a trivial matter. The Supreme Court has stated that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."<sup>13</sup> Likewise, the Supreme Court has written that racial classifications "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility."<sup>14</sup> For this reason, the Supreme Court has said, "governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed."<sup>15</sup>

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<sup>5</sup> *Lutheran Church*, 141 F.3d at 351.

<sup>6</sup> *Lutheran Church*, 141 F.3d at 351.

<sup>7</sup> *Lutheran Church*, 141 F.3d at 352.

<sup>8</sup> *Lutheran Church*, 141 F.3d at 352.

<sup>9</sup> *MD/DC/DE Broadcasters Ass'n*, 236 F.3d at 13.

<sup>10</sup> *MD/DC/DE Broadcasters Ass'n*, 236 F.3d at 19.

<sup>11</sup> *MD/DC/DE Broadcasters Ass'n*, 236 F.3d at 19.

<sup>12</sup> *MD/DC/DE Broadcasters Ass'n*, 236 F.3d at 15.

<sup>13</sup> *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

<sup>14</sup> *Shaw v. Reno*, 509 U.S. 630, 643 (1993).

<sup>15</sup> *Adarand*, 515 U.S. at 227 (cleaned up).

Today, for at least the third time now, the FCC once again seeks to pressure broadcasters into making hiring decisions on the basis of race and gender. It does so, as noted above, by requiring broadcasters to publicly disclose, on a station by station basis, a scorecard that lists the racial and gender breakdown of every employee.

As a threshold matter, the FCC argues that its decision merely adopts a disclosure regime and involves no pressure at all on broadcasters to engage in race- or gender-based discrimination. But this argument ignores both the Commission’s own history with Form 395-B and the rulemaking record here. Indeed, the FCC Order goes so far as to assert that, “[b]ased on the record before us, we find no basis to conclude that the demographic data on a station’s annual Form 395-B filing would lead to undue public pressure.”<sup>16</sup>

To the contrary, the record is overflowing with this type of evidence. For instance, one filer states: “We, the undersigned investors, with collective assets under management or advisement of approximately \$266 billion, write to urge the . . . [FCC] to require the disclosure of equal opportunity employment statistics among the companies it regulates” because doing so “allows market participants to assess whether companies stand by their public commitments to pursue diversity, equity and inclusion.”<sup>17</sup> You don’t have to read between the lines on that one. Or, as the D.C. Circuit stated in *Lutheran Church* when it struck down one of the FCC’s prior attempts at imposing unconstitutional pressure on broadcasters: “The risk lies not only in attracting the Commission’s attention, but also that of third parties.”<sup>18</sup> Like those investors, other organizations wrote that publicizing this data would be consistent with President Biden’s Executive Order on Advancing Racial Equity and “allow the public to hold these companies accountable.”<sup>19</sup> Other commenters made similar points. So the FCC’s ostrich-like claim that the record is devoid of any evidence that this public scorecard will be used to pressure broadcasters into making race- and gender-based hiring decisions does not withstand even casual scrutiny; indeed, it only raises additional questions under the law.<sup>20</sup>

But even if the record were more opaque, the FCC would still not be in the clear. As the D.C. Circuit stated in *MD/DC/DE Broadcasters Association*, a “regulatory agency may be able to put pressure upon a regulated firm in a number of ways, some more subtle than others. The Commission in particular has a long history of employing: [‘]a variety of *sub silentio* pressures and ‘raised eyebrow’ regulation . . . all serv[ing] as means for communicating official pressures to the licensee.”<sup>21</sup> So too here. It is obvious to everyone what is going on—or it should be. By requiring the public disclosure of these race and gender scorecards, the FCC is ensuring that broadcast stations will be targeted by activist groups, media campaigns, and conceivably the government itself—unless those broadcasters hire the right (if

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<sup>16</sup> Order at para. 17; *see also id.* (“the record contains no evidence of use of such data in this manner”).

<sup>17</sup> Letter from Investors to FCC Chairwoman Jessica Rosenworcel, MB Docket Nos. 19-177, 98-204 (Nov. 16, 2022).

<sup>18</sup> *Lutheran Church*, 141 F.3d at 353.

<sup>19</sup> Letter from The Leadership Conference on Civil and Human Rights to FCC Chairwoman Jessica Rosenworcel, MB Docket Nos. 19-177, 98-204 (Sept. 29, 2022).

<sup>20</sup> 5 U.S.C. § 706; *see also Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42-44 (1983) (noting that agencies have an APA obligation to make reasoned decisions that account for record-based evidence).

<sup>21</sup> *MC/DC/DE Broadcasters Ass’n*, 236 F.3d at 19 (quoting *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978)).

unspecified) mix and type of employees.<sup>22</sup> In other words, the FCC is standing up the same type of race- and gender-based pressure campaign that the D.C. Circuit invalidated twice before. It is just doing so in a more roundabout way. But the bank shot still counts.<sup>23</sup> Particularly given the FCC’s long history here, broadcasters know the message the FCC is delivering and the results it wants to see. In cases like these, “we are ‘not required to exhibit a naiveté from which ordinary citizens are free.’”<sup>24</sup>

This conclusion is only reinforced when one examines the reasons the FCC proffers for requiring the public disclosure of these scorecards—rather than making the data available on an anonymized or non-station-identifiable basis. It is quite obvious that the FCC’s stated rationales are nothing more than pretext. And none of them establish a government interest sufficient to survive Fifth Amendment review. Let’s go through all three of them.

First, the FCC argues that it is requiring these scorecards to be publicly disclosed because doing so “will increase the likelihood that erroneous data will be discovered and corrected.”<sup>25</sup> But there is no record support at all for the agency’s claim that publicizing this data will render it more reliable. This is not surprising. After all, how exactly does the FCC anticipate that a member of the public will verify the reported race, ethnicity, and gender of an individual employee—including those that the FCC now says can report as gender non-binary? It doesn’t. And, in any event, I don’t think the FCC should be encouraging the public to engage in that type of conduct.

Second, the FCC argues that publicly disclosing the data is consistent with Congress’s goal of maximizing the utility of data an agency collects.<sup>26</sup> But this argument proves too much. It says nothing at all about the propriety of disclosing this particular set of data on a station-specific basis in light of the FCC’s history of pressuring broadcasters and the agency’s own rulemaking record here, which counsels against public disclosure. Indeed, the FCC’s normal practice is not to make all of the data it collects publicly available in the interest of maximizing utility; it makes decisions based on the facts and circumstances relevant to each data set.

Third, the FCC argues that by publicly disclosing all of the data about every covered broadcaster, rather than disclosing it on an anonymous or non-station-identifiable basis, the FCC avoids the problem of accidentally disclosing data about a specific station.<sup>27</sup> What? That is like deciding to sink a ship to

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<sup>22</sup> The FCC makes no claim in this Order—nor could it—that government officials from State AGs to Congress to the FCC itself in a future rulemaking proceeding will not use this data to take action against broadcasters for failing to meet some as-yet undefined hiring targets. This threat of potential future government action will naturally operate to pressure broadcasters today—pressure that is not materially different than the forms the D.C. Circuit addressed in *Lutheran Church and MC/DC/DE Broadcasters Association*.

<sup>23</sup> See, e.g., *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866)) (“‘[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows,’ and the prohibition against racial discrimination is ‘levelled at the thing, not the name.’”); see also *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (cleaned up) (“It is axiomatic that [the government] may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.”).

<sup>24</sup> *Dep’t of Commerce v. New York*, 139 S.Ct. 2551, 2575–76 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2nd Cir. 1977) (Friendly, J.)).

<sup>25</sup> Order at para. 15.

<sup>26</sup> Order at para. 15 (citing The OPEN Government Data Act).

<sup>27</sup> Order at para. 15. The FCC also proffers an interest in potentially using the data to run unspecified analyses or for drafting yet-to-be-conceived reports. But that interest is not relevant to the question of posting the data publicly on a

avoid the risk that it might spring a leak. It makes no sense, particularly in light of the fact that the FCC regularly obtains and refrains from inadvertently disclosing a large and wide range of secret, sensitive, and/or confidential data sets.

In other words, the only rationales the FCC offers for deciding to publicly disclose individual broadcasters' race and gender scorecards are pretextual. They only serve to confirm the FCC is acting for the same reasons it did in *Lutheran Church* and in *MD/DC/DE Broadcasters Association*—to pressure broadcasters into making race- and gender-based hiring decisions.

But the Fifth Amendment is not the only portion of the Constitution that the FCC violates today. For similar reasons, today's Order also runs afoul of the First Amendment. By requiring stations to publicly disclose their workforce composition, the Order compels speech on matters of race and gender. Compelled disclosures are typically subject to heightened First Amendment scrutiny. And the exception for disclosures of "purely factual and uncontroversial information"<sup>28</sup> plainly does not apply here because that exception is "limited to cases in which disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."<sup>29</sup> The FCC has made no claim that the public disclosure of these scorecards bears any resemblance to consumer protection labels upheld under *Zauderer*.

The Order also flunks heightened First Amendment review, whether intermediate or strict scrutiny. As noted above, the three governmental interests the FCC asserts for publicizing this content ring hollow. They are either generic rationales applicable to any disclosure or unsupported in the record. No other justification can save the Order, for it disclaims a governmental interest in using the data for any other purpose, whether license renewal,<sup>30</sup> EEO compliance,<sup>31</sup> audits,<sup>32</sup> FCC enforcement,<sup>33</sup> or third-party filings.<sup>34</sup> Even if a valid governmental interest existed, disclosure would not be narrowly tailored. The Order provides no reason why publicizing race and gender data on a station-specific basis is necessary for the Commission to conduct analysis or stay abreast of industry trends, at least compared to a less restrictive alternative, like requiring broadcasters to submit the forms to the FCC on a confidential or non-station identifiable basis. In short, the disclosures do not accomplish cognizable governmental interests in a narrowly tailored manner.

We are thus left with one of two possibilities. At worst, the Order pretextually seeks to force broadcasters into making race- and gender-based hiring decisions, a constitutionally offensive rationale that cannot justify any rules. Or at best, Order pursues disclosure for disclosure's sake, which violates the First Amendment.<sup>35</sup>

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station-by-station basis because the FCC could pursue those interests while keeping the data confidential, anonymized, or aggregated.

<sup>28</sup> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

<sup>29</sup> *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1213 (D.C. Cir. 2012) (cleaned up).

<sup>30</sup> See Order at para. 7.

<sup>31</sup> See Order at para. 45.

<sup>32</sup> See Order at para. 18.

<sup>33</sup> See Order at para. 20.

<sup>34</sup> See Order at para. 17.

<sup>35</sup> See, e.g., *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018) (invalidating abortion-related disclosures in medical facilities); *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015) (invalidating conflict mineral disclosures); *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996)

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It did not have to be this way. As I conveyed to my Commission colleagues before casting my vote, I would have supported today's decision if it eliminated the public disclosure component and instead required broadcasters to complete and file Form 395-B with the FCC on a non-public or non-station-identifiable basis consistent with the way the Equal Employment Opportunity Commission treats this type of data. Narrowly tailoring what is made public would have avoided the FCC playing a part in pressuring broadcasters into making hiring decisions on the basis of race and gender in violation of the Fifth Amendment. And it would have sidestepped a compelled disclosure that runs afoul of the First Amendment. My suggestions were ultimately rejected, and we are now left with an item that runs headlong into the Constitution. I dissent.

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(invalidating hormone labeling requirement for milk) (“[W]e hold that consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement.”).