

Media Diversity Protects Democracy and the Public Interest

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I. Broadcast Ownership Diversity and Diffusion of Control of Broadcast Licenses Reflect Longstanding Policies of the Communications Act and First Amendment Values that Protect Democracy

Media marketplace diversity including diffusion of ownership and control of the media have long been recognized by the courts and Congress as pillars of democratic debate that serve the public interest. In *Associated Press v. United States*, the Supreme Court emphasized that the First Amendment “rest[s] on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”² In 1965, the FCC adopted a POLICY STATEMENT ON COMPARATIVE BROADCAST HEARINGS, outlining two primary objectives to determine who should receive a broadcast television and radio station license: 1) providing the best practicable service to the public, and; 2) maximum diffusion of control of the media of mass communications.³

In *TV9 v. FCC*, the D.C. Circuit upheld the FCC’s policy of promoting diversification of ownership in comparative hearings to award broadcast licenses.⁴ *TV9* emphasized the central role of media ownership in promoting first amendment values. It is “upon ownership that public

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² *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

³ POLICY STATEMENT ON COMPARATIVE BROADCAST HEARINGS, 1 F.C.C. 2d 393 (1965).

⁴ *TV9 v. FCC*, 495 F.2d 929, 938 (D.C. Cir. 1973).

policy places primary reliance with respect to diversification of content, and that has historically proven to be significantly influential with respect to editorial comment and the presentation of news,” the D.C. Circuit underscored in *TV9*.⁵

“The Supreme Court itself has on numerous occasions recognized the distinct connection between diversity of ownership of the mass media and the diversity of ideas and expression required by the First Amendment.”⁶ In *Metro Broadcasting v. FCC*, the Supreme Court noted the FCC “has recognized that the viewing and listening public suffers when minorities are underrepresented among owners of television and radio stations.”⁷ Diverse ownership serves all Americans. “Following people from different backgrounds can broaden your point of view.”⁸ Similarly, a “diverse student body” contributes to a “robust exchange of ideas” that benefits education.⁹

The benefits of diversity are not limited to members of minority groups or women who gain access to the broadcasting industry by virtue of the ownership policies; rather, the benefits redound to all members of the viewing and listening audience. As Congress found, “the American public will benefit by having access to a wider diversity of information sources.”¹⁰

Despite the longstanding recognition of the value of diverse media ownership and diffusion of control, the FCC’s media ownership decisions conducted pursuant to section 202(h) of the Telecommunications Act of 1996 have consistently failed to analyze the effect of the FCC’s media ownership policies on minority and female ownership. Over the course of the past 16 years, the Third Circuit in the *Prometheus Radio Broadcasting v. FCC* docket has faulted the FCC’s repeated failure to analyze effects of its media ownership policies on opportunities for minorities and women to control FCC radio and television licenses.

Prometheus IV emphasized that the FCC fails to analyze “an important aspect of the problem” by not analyzing in sufficient detail the impact of media ownership rules on

⁵ *Id.*

⁶ *Citizens Communications Center v. F.C.C.*, 447 F.2d 1201, n. 36 (D.C. Cir. 1971), opinion clarified 463 F.2d 822 (D.C. Cir. 1972) (citing *Associated Press v. United States*, 326 U.S. 1, 20; *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969)).

⁷ *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 554 (1990), *overruled on other grounds*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁸ Alex Acks, *THE BUBBLE OF CONFIRMATION BIAS*, 29 (Enslow Pub. 2019).

⁹ *Regents of University of California v. Bakke*, 438 U.S. 265, 311-313 (1978).

¹⁰ *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 566 (citing H.R. Conf. Rep. No. 97-765, p. 45 (1982), U.S. Code Cong. & Admin. News 1982, 2237, 2261, 2287).

opportunities for minorities and women to own FCC licenses, and by failing to explain its conclusions.¹¹ The Third Circuit vacated the FCC’s 2016 and 2018 media ownership decisions finding that the “only “consideration” the FCC gave to the question of how its rules would affect female ownership was the conclusion there would be no effect. That was not sufficient, and this alone is enough to justify remand.”¹² The FCC’s failure to meaningfully evaluate the relationship between its media ownership policies and minority and women license control along with the absence of a reasoned explanation for its decisions “violated the Commission’s obligations under the [Administrative Procedures Act] APA and our remand instructions,” the Third Circuit emphasized in 2019.¹³

In *Prometheus I* decided 16 years ago, the Third Circuit instructed the FCC to evaluate minority and female ownership issues *at the same time* as it examined media ownership rules on remand.¹⁴ The FCC has repeatedly failed to follow the court’s instructions over the course of the past 16 years to complete that analysis, manifesting arbitrary and capricious decision-making under the APA, and failing to comply with the Communications Act.¹⁵ The Third Circuit noted the FCC had “deferred consideration of the [Minority Media and Telecommunications Council] MMTC's other proposals for advancing minority and disadvantaged businesses and for promoting diversity in broadcasting” and had left some of those proposals left pending for years.

In 2011 in *Prometheus III* the Third Circuit chastised the FCC’s failure to follow the requirements of its first two remands and examine the impact of its media ownership rules on diversity. “Although courts owe deference to agencies, we also recognize that, “[a]t some point, we must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough,” the Third Circuit emphasized in *Prometheus III*.¹⁶ “For the Commission’s stalled efforts to promote diversity in the broadcast industry, that time has come,” the Third Circuit

¹¹ *Prometheus Radio Project v. Federal Communications Commission*, 939 F.3d 567, 587 (3d Cir. 2019) (“*Prometheus IV*”) (citing *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

¹² *Id.* at 585–586.

¹³ *Id.* at 586.

¹⁴ *Prometheus Radio Project v. FCC*, 373 F.3d 372, n. 59 (3d Cir. 2004) (“*Prometheus I*”).

¹⁵ See *Prometheus I*, 373 F.3d 372, 382–89; *Prometheus Radio Project v. FCC*, 652 F.3d 431, 438–44 (3d Cir. 2011) (“*Prometheus II*”); *Prometheus Radio Project v. FCC*, 824 F.3d 33, 37–39 (3d Cir. 2016) (“*Prometheus III*”); *Prometheus IV*, 939 F.3d 567, 573.

¹⁶ *Prometheus III*, 824 F.3d 33, 37 (citing *Public Citizen Health Research Group v. Chao*, 314 F.3d 143, 158 (3d Cir. 2002)).

emphasized.¹⁷ “We conclude that the FCC has unreasonably delayed action on its definition of an “eligible entity”—a term it has attempted to use as a lynchpin for initiatives to promote minority and female broadcast ownership—and we remand with an order for it to act promptly,”

Prometheus III emphasized.¹⁸

“Here we are again,” the Third Circuit lamented in 2019, vacating and remanding the FCC’s media ownership rules once again and faulting the FCC’s failure to conduct the analysis mandated by previous remands, the Communications Act and the APA.¹⁹ Despite the repeated and unusually stern warnings from the appellate court over the 16 year course of the *Prometheus* docket analyzing FCC media ownership decisions over the past 18 years, the FCC has yet to appropriately examine media diversity policies including those affecting minority and female ownership in any of those decisions.

The FCC’s repeated failures to comply with court orders over the past 16 years to analyze the impact of media ownership policies on minority and female license ownership underscore the importance of this Congressional hearing on “Lifting Voices: Legislation to Promote Media Marketplace Diversity.” In defiance of court orders, the FCC has failed to examine the interrelationship of its policies affecting minority and female ownership and its media ownership rules. The FCC’s omission fails to recognize media diversity, diffusion of control, and the marketplace of ideas, a marketplace which must include the viewpoints of diverse Americans including minority group members and women, though the Supreme Court has consistently recognized these values as central to American democracy. The FCC’s repeated failures over the past 16 years of the *Prometheus* docket to comply with the court’s four remand orders raise questions about whether institutional bias motivates the FCC’s conduct.

The FCC has never initiated an “Adarand” study during the 25 years since the Supreme Court confirmed that strict scrutiny is the appropriate standard of review for programs that take race into account. This testimony recommends that Congress mandate that the FCC promptly initiate and conduct an Adarand study to examine media ownership diversity including barriers to minority and female ownership in light of the importance of media ownership to our

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Prometheus IV*, 939 F.3d 567, at 572.

democracy and the important role of the media in protecting public safety, particularly during times of crisis.

The proposed Tax Certificate legislation before this Congress, requiring reporting on broadcast employment, study of market entry barriers for socially disadvantaged individuals in the communications marketplace in accordance with 47 USC 257(b), and Congressional recognition of the importance of media diversity to democracy are all important steps that can help ensure that broadcasting serves the public interest. Broadcasting remains a critical source of news and public affairs programming. Dissemination of “information from diverse and antagonistic sources”²⁰ that serves our first amendment values and protects democracy must include minorities and women as the owners who get to decide what programming to air, which commercials to accept, which editorials to broadcast, and who to hire.²¹

II. Broadcasting Remains an Important Source of News and Public Affairs Programming

Broadcasting remains an important source of news and public affairs information for most Americans.²² For U.S. Latinos, television is a critical source of news and public affairs information, even as Internet use among this group is increasing.²³ “In 2016, 85% of foreign born Latinos said that on a typical weekday they got their news from TV, the group’s most widely used news source. Meanwhile, two-thirds (67%) of foreign-born Latinos said they use the internet for news.”²⁴ African-Americans spend “more than 50 hours watching live and

²⁰ *Associated Press*, 326 U.S. 1, 20.

²¹ Ivy Group, WHOSE SPECTRUM IS IT ANYWAY, HISTORICAL STUDY OF MARKET ENTRY BARRIERS, DISCRIMINATION, AND CHANGES IN BROADCAST AND WIRELESS LICENSING, 1950 TO PRESENT, FCC, 15, Dec. 2000, file:///C:/Users/Owner/Documents/Communications%20Law%20Spring%202020/Readings/IVY%20Group,%20Whose%20Spectrum%20Is%20It%20Anyway,%20Historical_study,%20Dec.%202000.pdf (“fewer opportunities exist for the voice of the minority population to be heard since some minority on-air personalities and other employees are being precluded by their employers from taking public stands on issues relative to their minority group.”); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 105 (1973) (“Congress chose to leave broad journalistic discretion with the [FCC] licensee.”)

²² Pew Research Center, *Nearly as many Americans Prefer to Get their News Online as from the TV Set*, PEW RESEARCH CENTER, JOURNALISM AND MEDIA, March 19, 2019, https://www.journalism.org/2019/03/26/nearly-as-many-americans-prefer-to-get-their-local-news-online-as-prefer-the-tv-set/pj_2019-03-26_local-news_1-04/.

²³ Antonio Flores and Mark Hugo Lopez, *Among U.S. Latinos, the internet now rivals television as a source for news*, PEW RESEARCH CENTER, JAN. 11, 2018, <https://www.pewresearch.org/fact-tank/2018/01/11/among-u-slatinos-the-internet-now-rivals-television-as-a-source-for-news/>.

²⁴ *Id.*

timeshifted television a week in first quarter 2019, over 10 hours more than the total population.”²⁵

The continued reliance of many Americans on broadcast radio and television underscores the FCC’s faulty assumption that the Internet substitutes for broadcast media. In the FCC’s *2018 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*, the FCC stressed the growth of Internet access and use of Internet resources, without examining the digital divide that persists in rural America, for older Americans, people with disabilities, and for many minority communities.²⁶

The FCC acknowledged that broadcast television and radio remain important sources of news as “the amount of video Americans watch has actually been on the rise—approaching six hours a day in 2018—with a majority continuing to consist of live or time-shifted traditional television viewing.”²⁷ “Similarly, more than 90 percent of Americans still listen to the radio each week.”²⁸ The FCC acknowledged that “television remains a common place for Americans to get their news and some evidence suggests that broadcast television outlets produce a significant portion of the video news content published on websites and social media platforms.”²⁹

The role of broadcasting becomes even more crucial during emergencies when cell phone networks fail due to power loss or poor maintenance. In California, elevated wildfire risks and public safety power shutoffs have contributed to communications network outages, while broadcasting remained an information lifeline.

III. Broadcasting Protects Public Safety

When PG&E, California’s largest electric and natural gas provider servicing most of Northern and Central California, cut power to over 2.2 million customers in October 2019, their website crashed, leaving millions without information on which areas were to lose power and which areas still had power.³⁰ My family, like millions of others, relied on local television news

²⁵ R. Thomas Umstead, *African-Americans are Leaders in Media Consumption*, MULTICHANNEL NEWS, Sept. 15, 2019, <https://www.multichannel.com/blog/african-americans-are-leaders-in-media-consumption>.

²⁶ 33 FCC Rcd 12111, para 2 (2018) (“2018 Quadrennial NPRM”).

²⁷ *Id.* at para 3.

²⁸ *Id.*

²⁹ *Id.*

³⁰ KRON4 Staff, *PG&E Releases 3rd Link, Website Crashes*, KRON4, Oct 9, 2019, <https://www.kron4.com/news/pg-e-creates-new-website-after-other-site-crashes/>; Associated Press, *Persistent*

which broadcast information about the cities that would lose power. PG&E had faxed shutoff information to local television stations while that information was inaccessible on its website. Broadcasting became a lifeline for those needing to seek shelter in a place with power due to medical, family, or business needs.

During the Kincade Fire that burned more than 77,000 acres in October 2019, radio Stations such as 98.1 serving the San Francisco Bay Area broadcasted stories about road closures and power outages as nearly 200,000 people were evacuated from fire danger zones.³¹ As the Kincade fire raged, radio Station KBBF, a multi-lingual public affairs radio station based in Santa Rosa, California, a county with a large Latino population, “aired critical information to Spanish-speaking listeners who tuned in for updates on evacuations, shelters and power outages. Broadcasts were also made in indigenous languages such as Mixtec and Triqui.”³² Owned by Bilingual Broadcasting Foundation, Inc., KBBF is run by volunteers after its founding in the 1970s to serve the farmworker and immigrant community working in California’s wine country fields and communities.

KBBF broadcast interviews with a local County Supervisor, James Gore, who in English and “in his broken Spanish” encouraged immigrants to go to shelters as many feared that immigration agents would raid shelters and many immigrants slept in their cars or on the beach in the 2017 Wine Country fires and 2018 Tubbs Fire.³³ “Maria Rojas, 44, from the Mexican state of Michoacan, said her family had been planning to return to their home in Santa Rosa last week when she heard the station say that evacuation orders hadn’t yet been lifted.”³⁴

Radio and television stations are built for resiliency with power backup at many stations and antenna sites. People can hear the radio in their car even when the power is out as it was for millions during the PG&E-induced blackouts in October 2019. With the power out, many cell

Failures During Early PG&E Blackouts Forewarned Later Problems: Report, KTLA5, Dec. 20, 2019, <https://ktla.com/2019/12/20/persistent-failures-during-early-pge-blackouts-forewarned-later-problems-report/>.

³¹ Leila Miller, Los Angeles Times, *As the Kincade fire raged on, a Cesar Chavez-inspired public affairs radio station kept farmworkers informed*, LOS ANGELES TIMES, Nov. 3, 2019, <https://www.latimes.com/california/story/2019-1103/as-the-kincade-fire-raged-on-a-cesar-chavez-inspired-radio-station-kept-farmworkers-informed>.

³² *Id.*

³³ *Id.*

³⁴ California State Senate, Committee on Energy, Utilities, and Communications, Oversight Hearing, Jan. 8, 2020, Telecommunications Service Outages: Ensuring a Reliable Lifeline for Californians, Background, p. 1, https://seuc.senate.ca.gov/sites/seuc.senate.ca.gov/files/01-08-2020_background.pdf.

phones failed as charging resources were limited on the customer end and antennas and towers had limited backup power and were not equipped for power outages that stretched for three or more days in many California locations.

“Telecommunications outages limited Californian’s ability to call 911, receive emergency notifications, and conduct business,” during the October 2019 PG&E power outages, the California Senate reported.³⁵ The California Public Utilities Commission (CPUC) reported that during the 2017 fires in the North Bay area of Northern California, approximately 160,000 wireline and 85,000 wireless customers lost telephone service during the emergency.³⁶ The FCC reported that up to 27% of the cell sites in Sonoma County lost power during the evacuation of more than 200,000 people fleeing from the Kincadee fire in October 2019.³⁷

Loss of electric power contributed to communications outages in California, during Hurricane Katrina, and in Australia’s bush fires.³⁸ On the fourth day of widespread PG&E-induced power outages implemented by the utility as an emergency measures to reduce fire danger, more than 980,639 customers were without electric power. Telecommunications carriers reported to the FCC that 454,722 wireline and cable customers (including those who have Voice over Internet Protocol (VoIP) lost telephone service, while 874 cell sites were out, resulting in spotty or no cell phone service during the midst of evacuations and power outages.³⁹

Marin County, California suffered operational loss of 57% of the cell towers serving the county on October 27 as power shutoffs continued.⁴⁰ Marin County issues a Wireless Emergency Alert to inform the public about the power shutoffs, but “due to the loss of cell towers, the county was unable to update the message until electric service was restored to the towers.”⁴¹ The California State Senate also emphasized that in addition to power loss, poorly maintained

³⁵ California State Senate, Committee on Energy, Utilities, and Communications, Oversight Hearing, Jan. 8, 2020, Telecommunications Service Outages: Ensuring a Reliable Lifeline for Californians, Background, p. 1, https://seuc.senate.ca.gov/sites/seuc.senate.ca.gov/files/01-08-2020_background.pdf.

³⁶ *Id.* at 4.

³⁷ *Id.*

³⁸ *Id.* at 5.

³⁹ *Id.* at 6.

⁴⁰ *Id.* at 7.

⁴¹ *Id.*

infrastructure and lack of redundant networks have contributed to telecommunications outages in some California communities.⁴²

More than one-half of American homes (57.1%) had only wireless telephones during the second half of 2018, according to the Centers for Disease Control.⁴³ “More than three in four adults aged 25-34 (76.5%), and a similar percentage of adults renting their homes (75.5%), were living in wireless only households.⁴⁴ “Adults living in poverty (67.1%) and near poverty (64.8%) were more likely than higher income adults (56.0%) to be living in households with only wireless telephones.”⁴⁵ CDC reported that “Hispanic adults (68.1%) were more likely than non-Hispanic whites (53.5%)” to live in wireless-only households.”⁴⁶

The dependence on the majority of American households on wireless phones susceptible to power outages highlight the importance of radio and television as means of communication, particularly during power outages and other emergencies when cell phone and Internet access facilities fail. For those living in the digital divide, and for millions of Americans, radio and television broadcasting remain daily mainstays of news and public affairs information. The FCC’s longstanding policies to promote diffusion of control of the media must consider the role of ownership diversity in serving the range of American information needs.

IV. The FCC Was Founded to Protect Public Safety and Promote the Public Interest

Congress founded the FCC in 1934 to protect public safety, promote U.S. national security, and to safeguard the public interest in the use of spectrum-based and wireline services.

Communications Act Sec. 47 USC 151 created the FCC:

For the purpose of regulating interstate and foreign commerce in 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, a rapid, efficient,

⁴² *Id.* at 13-14.

⁴³ Stephen J. Blumberg, Ph.D., and Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July–December 2018*, National Health Interview Survey Early Release Program, NATIONAL CENTER FOR HEALTH STATISTICS, June 2019, file:///C:/Users/Owner/Documents/Communications%20Law%20Spring%202020/Readings/CDC%20Wireless%20Substitution%20July-Dec%202018.pdf.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications...⁴⁷

The D.C. Circuit in *Nuvio Corp. v. F.C.C.*, emphasized that the FCC's founding statute and other legislation including the Wireless Communication and Public Safety Act of 1999, 47 U.S.C. § 615, require the FCC to consider public safety in its rulemakings.⁴⁸

The FCC's failure to consider the impact of its media ownership rulemaking including the lack of media ownership diversity on public safety is arbitrary and capricious decision-making under the APA and violates the FCC's duties under the Communications Act, 47 USC 151.⁴⁹ The D.C. Circuit in 2019 remanded the FCC's repeal of net neutrality for failure to analyze the effect of the agency's action on public safety.⁵⁰ Likewise, the FCC must consider the public safety interests promoted by diverse broadcast ownership including ownership by minorities and women.

V. Status of Minority Radio and Television Ownership

My 2011 study of minority-owned commercial broadcasters, *Minority Commercial Radio Ownership in 2009: FCC Licensing and Consolidation Policies, Entry Windows, and the Nexus Between Ownership, Diversity and Service in the Public Interest*, found that in 2009 324 minority owners control 815 commercial radio stations.⁵¹ There were 11,249 commercial AM and FM stations in June 2009, and minorities controlled 7.2%, or 815, of those stations.⁵²

The FCC's May 2017 media ownership study as reported by FCC form 323s submitted as of October 21, 2015 stated that Hispanic/Latino persons, American Indian/Alaska Natives, African-Americans, Asians, and Native Hawaiian/Pacific Islanders collectively controlled 736

⁴⁷ 47 U.S.C.A. § 151 (West).

⁴⁸ 473 F.3d 302, 307 (D.C. Cir. 2006).

⁴⁹ *Mozilla v. FCC*, 940 F3d 1, 63 (D.C. Cir. 2019).

⁵⁰ *Id.* at 61 (citing comments of Catherine Sandoval, Santa Clara County, and the CPUC about the need to examine the effect of net neutrality repeal on public safety).

⁵¹ CATHERINE J.K. SANDOVAL, *Minority Commercial Radio Ownership in 2009: FCC Licensing and Consolidation Policies, Entry Windows, and the Nexus Between Ownership, Diversity and Service in the Public Interest*, in COMMUNICATIONS RESEARCH IN ACTION: SCHOLAR-ACTIVIST COLLABORATIONS FOR A DEMOCRATIC PUBLIC SPHERE, 90 (Minna Aslama & Philip M. Napoli, eds., Fordham University Press, forthcoming 2011). My study defined minority owners as Latino/Hispanic, African-American, Native American/Alaska Native, Asian, Native Hawaiian/Pacific Islander.

⁵² *Id.*

AM and FM radio station licenses as of October 2015.⁵³ This represents a decrease of 76 stations controlled by minority groups including Latinos since 2009 as documented in my study of minority-owned commercial radio broadcasters.

The FCC reported that as of October 2015, Hispanic/Latino persons controlled “176 commercial AM radio stations (5.0 percent) of 3,509 stations; and 228 commercial FM radio stations (4.2 percent) of 5,492 stations.”⁵⁴ The FCC reported that racial minorities (which it defined as American Indian/Alaska Natives, African-Americans, Asians, and Native Hawaiian/Pacific Islanders, but excluding Hispanics/Latinos from its definition of “racial minorities”) controlled “204 commercial AM radio stations (5.8 percent) of 3,509 stations; and 128 commercial FM radio stations (2.3 percent) of 5,492 stations.”⁵⁵

The FCC reported that as of October 2015, Hispanic/Latino persons controlled “671 broadcast stations, consisting of 62 full power commercial television stations (4.5 percent) of 1,385 stations; 53 Class A television stations (13.4 percent) of 396 stations; 152 low power television stations (13.4 percent) of 1,137 stations.”⁵⁶ During that time, racial minorities (defined by the FCC as American Indian/Alaska Natives, African-Americans, Asians, and Native Hawaiian/Pacific Islanders, but excluding Hispanics/Latinos) controlled 36 full power commercial television stations (2.6 percent) of 1,385 stations; 7 Class A television stations (1.8 percent) of 396 stations; 27 low power television stations (2.4 percent) of 1,137 stations.⁵⁷ Combined, Latinos and American Indian/Alaska Natives, African-Americans, Asians, and Native Hawaiian/Pacific Islanders, controlled 98 full power commercial television stations, 60 Class A television stations, and 197 low power television stations.⁵⁸

The FCC has reported that women own 7.4 percent of all full power TV stations, control 8.1 percent of all commercial FM radio stations, and control 8.9 percent of commercial AM stations, despite the fact that women constitute the majority of the American population and the majority

⁵³ See *Id.*

⁵⁴ FCC, Media Bureau, Industry Analysis Division, THIRD REPORT ON OWNERSHIP OF COMMERCIAL BROADCAST STATIONS, FCC Form 323 Ownership Data as of October 1, 2015, p. 5, May 2017, file:///C:/Users/Owner/Documents/Media%20Ownership%20Diversity/FCC%20Info/Report%20on%20Ownership%20of%20COMMERCIAL%20Broadcast%20Stations,%203rd,%20Oct%202015,%20pub%20May%202017,%20FCC%20Media%20Bureau.pdf.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See *Id.*

of college students.⁵⁹ Women with college degrees will soon make up the majority of the college-education workforce.⁶⁰ Yet the FCC has failed to conduct a systematic analysis of barriers to media ownership facing women.

VI. The Relationship between Minority Ownership and Entry and FCC Media Ownership Rules

My 2011 study of more than 11,000 FCC media ownership records highlighted the relationship between media ownership limits and minority ownership entry. “Fifty-three percent, or 172, of the 324 minority commercial radio owners in mid-2009 were awarded their *first* license among the radio station licenses they still control, *prior to the Telecommunications Act of 1996*” which lifted the cap on the number of radio stations one entity could control nationally.⁶¹ Most minority commercial radio broadcasters entered the market during the period of relatively unconsolidated markets and FCC policies that took minority ownership into account to determine license assignment in the public interest.

“From 1953 to 1985, FCC rules permitted common control of no more than seven FM radio stations, seven AM radio stations and seven television stations nationally and *one* station within a local market.”⁶² “In 1985 the FCC raised the national ownership cap to 12 AMs, 12 FMs and 12 TV stations. In 1992 the FCC permitted broadcasters to control two or more stations in medium sized markets with 15 or more radio stations, as long as their combined audience share was below 25%.”⁶³

Nearly 35% or 285 of the 815 minority commercial radio *stations* still held in mid-2009 were obtained before the 1996 Act.⁶⁴ Fewer new minority owners who still hold their licenses in

⁵⁹ Jennifer Burnett, *Women Outnumber Men in All But Nine States*, THE COUNCIL OF STATE GOVERNMENTS, March 25, 2015, <https://knowledgecenter.csg.org/kc/content/women-outnumber-men-all-nine-states>; Jon Marcus, *Why Men Are the New College Minority*, THE ATLANTIC, August 8, 2017, <https://www.theatlantic.com/education/archive/2017/08/why-men-are-the-new-college-minority/536103/>.

⁶⁰ Dani Matias, *New Report Says Women Will Soon Be Majority Of College-Educated U.S. Workers*, NPR, June 29, 2019, <https://www.npr.org/2019/06/20/734408574/new-report-says-college-educated-women-will-soon-make-upmajority-of-u-s-labor-f>.

⁶¹ Sandoval, *supra* note 51 at 96.

⁶² *Id.* at 99 (citing Ivy Group, *supra* note 21).

⁶³ *Id.* at 96.

⁶⁴ *Id.*

mid-2009 *entered* the commercial radio field after 1996, compared to those who entered between 1978 and 1995.⁶⁵

My review of more than 11,000 FCC records from the Consolidated Database System (CDBS) and FCC Application database found that 61% (198 minority commercial radio owners) controlled only one station in mid-2009.⁶⁶ The predominance of single-station owners among minority radio owners made it difficult to withstand the market's sea change in the wake of the 1996 Act, which opened the floodgates of consolidation.

The FCC's 2017 report and analysis of its form 323s did not analyze the year that a Latino/Hispanic or other minority station owner acquired its first commercial radio or television license, or any subsequent license. Analysis of first license acquisition is critical to understanding the effect of the FCC's media ownership rules and other policies on the ability of minorities, women, and others to enter into the broadcast marketplace. The FCC failure to analyze market entry does not comply with the FCC's duty to examine media ownership rules as required by Telecommunications Act section 202(h) and 257 which requires the FCC to examine barriers to entry for small, minority and women-owned businesses. Neither does it fulfill the FCC's 47 USC 309(j)(4)(d) mandate to ensure that small, women, and minority owned businesses and rural telephone companies are given the opportunity to participate in the provision of spectrum-based services.

The FCC's 2017 Order on Reconsideration and Notice of Proposed Rulemaking (NPRM) contended that there was no evidence that the media ownership rules adopted since 1996 and increased media consolidation affected minority and female ownership.⁶⁷ The Third Circuit in *Prometheus IV* found those assumptions arbitrary and capricious commenting that the FCC's analysis was "so insubstantial that it would receive a failing grade in any introductory statistics class."⁶⁸ The Third Circuit emphasized that the FCC "has not offered any theoretical models or analysis of what the likely effect of consolidation on ownership diversity would be. Instead it has

⁶⁵ *Id.*

⁶⁶ *Id.* at 90.

⁶⁷ Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd. 9802 (2017); Quadrennial NPRM, *supra* note 26 at paras. 37, 72.

⁶⁸ *Prometheus IV*, 939 F.3d 567, 586.

confined its reasoning to an insubstantial statistical analysis of unreliable data—and, again, has not offered even that much as to the effect of its rules on female ownership.”⁶⁹

The Third Circuit faulted the FCC’s failure to examine the effects of deregulation and consolidation on minority ownership. The FCC also failed in its limited attempts at longitudinal analysis as it compared incomplete and inconsistent datasets. The FCC compared “only the absolute number of minority-owned stations at different times, and make[s] no effort to control for possible confounding variables,” and “did not actually make any estimate of the effect of deregulation in the 1990s,” the Third Circuit found in *Prometheus IV*.⁷⁰ The FCC did not examine minority *entry* into and exit from the broadcast licensee marketplace, and the effect of consolidation policies or other programs such as the tax certificate on entry and subsequent opportunities for growth even in a more consolidated marketplace.

VII. Examination of Entry is Critical to Understanding the Impact of the Tax Certificate’s Repeal

By omitting analysis of market entry for minority owned stations, the FCC fails to analyze the effect of the tax certificate program the FCC adopted in 1978 pursuant to Congressional authorization in 26 U.S.C. § 1071(a).⁷¹ The Tax Certificate Program allowed the seller to defer capital gains on the sale of a radio or television station or cable franchise to a minority or female purchaser upon FCC approval of the application for a license transfer which requires analysis of whether the transfer is in the public interest per 47 USC 310(d).

The Tax Certificate program created incentives for sellers to go beyond “Old boys networks” and reach out to a more diverse pool of buyers.⁷² “During the tax certificate program’s tenure, minority broadcast ownership increased from 40 radio and TV stations in 1978, to 288

⁶⁹ *Id.* at 587.

⁷⁰ *Id.* at 586.

⁷¹ Federal Communications Commission, Statement of Policy on Minority Ownership of Broadcast Facilities, Public Notice (May 25, 1978) (FCC 78-322).

⁷² Ivy Group, *supra* note 21 at 46 (citing interview with broadcaster Don Cornwell, “Look, it’s a club...I work pretty hard to get at least on the periphery of the club so I know most of the broadcasters. ... And when you’re in the club, then you hear about things, okay? You hear about what’s for sale, what it isn’t, et cetera.”); *Id.* (“The brokers and large lenders interviewed indicated that they had worked with very few or no women and minorities. The women and minorities, however, all observe examples of exclusion from this “old-boy’s” network.”)

radio and 43 TV stations in 1995.”⁷³ My 2011 study of the FCC CDBS and application database found that nearly 35% or 285 of the 815 minority commercial radio *stations* still held in mid-2009 were obtained before the 1996 Act.⁷⁴ I did not have access to the records of buyers Tax Certificate transactions so was not able to correlate acquisition of the first FCC license and the award of a tax certificate.

The Ivy Group prepared a study for the FCC in 2000, *Whose Spectrum is it Anyway, Historical Study of Market Entry Barriers, Discrimination, and Changes in Broadcast and Wireless Licensing, 1950 to Present*.⁷⁵ The Ivy Group interviewed several minority broadcasters, brokers, and people and institutions involved in broadcast finance and asked about the impact of the tax certificate’s presence and repeal. The Ivy Group interviewed Z-Spanish Media founder Amador Busto (my former boss when I was Vice-President and General Counsel of Z-Spanish Media which later merged with Entravision), who said that “(t)he only thing that was effective [in promoting minority entry] was the tax certificate [because it] allowed minorities, as in our case, access to get some property that we would not otherwise get, because the seller was motivated by the fact that they could defer the tax for a period of time.”⁷⁶

Based on their interviews and analysis of documents, the Ivy Group concluded that “the tax certificate program was the single most effective program in lowering market entry barriers and providing opportunities for minorities to acquire broadcast licenses in the secondary market.”⁷⁷ “Virtually every minority broadcaster with whom we spoke commented on the program’s effectiveness and recommended its reinstatement as a means to increase opportunities for minority ownership,” the Ivy Group reported.⁷⁸ “While it did not guarantee that transactions would be consummated, the tax certificate program did motivate sellers to seek out and offer an increased number of broadcast properties for sale to minorities,” the Ivy Group reported.⁷⁹

⁷³ Erwin G. Krasnow and Lisa M. Fowlkes, *The FCC’s Minority Tax Certificate Program: A Proposal for Life After Death*, 51 FED. COMM. L.J. 665, 670 (1999).

⁷⁴ Sandoval, *supra* note 51, at 96.

⁷⁵ Ivy Group, *supra* note 21.

⁷⁶ *Id.* at 107.

⁷⁷ *Id.* at 106.

⁷⁸ *Id.*

⁷⁹ *Id.*

Bernadine Nash, like several other minority broadcasters the Ivy Group interviewed, commented on the difference between the tax certificate's availability and absence on her ability to get access to broadcast deals. Nash who owned a license for a minority daytime-only AM radio station owner in Boston, commented "The biggest blow for us, really, has been the dissolution of the minority tax certificate. Because ...when the minority tax certificate was in existence, I actually had people approach me when they wanted to sell their radio stations because there were significant tax breaks to be derived from it."⁸⁰ Nash commented that when the tax certificate was eliminated by Congress, "not only did I not get phone calls, I couldn't get phone calls returned when I was inquiring about properties."⁸¹

It is important to recognize that the Tax Certificate program was one method to defer capital gains, among other options to defer capital gains. Until 2017 capital gains could be deferred through a 1031 exchange of one property for another.⁸² Minority broadcast Diane Sutter commented to the Ivy Group that without the Tax Certificate "it's like Monopoly. Everybody sits at the board and they shuffle their hotels around. You know, I'll trade you a Boardwalk and a Park Place for St. James Place, and (a "get out of jail free" card)."⁸³ Sutter commented, "because there's no reason to sell it to a woman or a minority, because there are no Tax Certificates available today, there's no incentive to sell it to any of us, so why not just keep it in the family?"⁸⁴

The Tax Reform and Jobs Act of 2017 eliminated the ability to use a 1031 exchange to defer capital gains on the sale of a business or business asset, except for real estate. Other methods remain available after the 2017 Tax Reform Act to defer capital gains on a business sale including a radio or television station license or assets including installment sales.⁸⁵

Congress repealed the Tax Certificate program in 1995. The following year, the Telecommunications Act of 1996 eliminated the national caps on radio ownership, allowed more local consolidation of radio ownership, and raised the national caps on television station

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Andy Gustafon, *Like-Kind Exchange Of Radio And Tv Station*, A T L A S 1031 E X C H A N G E , Aug. 15, 2013, <https://atlas1031.com/blog/like-kind-exchange-of-radio-and-tvstations/>.

⁸³ Ivy Group, *supra* note 21, at 56.

⁸⁴ *Id.*

⁸⁵ See e.g., *How to Avoid Capital Gains Tax When Selling a Highly Appreciated Asset*, Deferred Capital Gain, <https://www.deferredcapitalgain.com/how-to-avoid-capital-gains-tax>.

ownership. The FCC has yet to systematically analyze the cumulative impact of these actions on minority and female ownership and media diversity. I commend Congressman Butterfield and the co-sponsors of H.R. 3957, Congress members Clarke, Cardenas, Rush, Hastings, and Veasy, and the members of the Communications and Technology Subcommittee of the House Energy & Commerce Committee, for their consideration of a bill to adopt a new Tax Certificate program with appropriate holding periods to incentivize diverse media ownership that supports American democracy and the public interest.

VIII. Minority Ownership Contributes to Program and Viewpoint Diversity that Promotes American Democracy and Protects Public Safety

Minority radio broadcasters overwhelmingly contribute to the diversity of American radio programming by airing minority-oriented formats. My 2011 study found that 74.7% of the minority broadcasters offering programming in mid-2009 air minority-oriented programming.⁸⁶ The most popular formats among the minority-owned broadcasters my study researched were Spanish, Religious formats including Gospel and Spanish Christian, and Urban formats.⁸⁷

Several studies using different methodologies and examining different time periods have reached the same conclusion that minority ownership contributes to program and format diversity.⁸⁸ “This pattern of a nexus between minority radio ownership and content has been repeated for more than 30 years. Absent government compulsion to offer any particular type of broadcast format, seventy-four percent of minority commercial radio owners actively

⁸⁶ Sandoval, *supra* note 50, at 101.

⁸⁷ *Id.* at 101-102.

⁸⁸ *Id.* at 101 (citing Congressional Research Service, *Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?* (1988) (On file with the Library of Congress, Washington D.C.); Dubin and Spitzer, Testing Minority Preferences in Broadcasting, 68 *S. Cal. L. Rev.* 841, 869 (1995); Siegelman and Waldfogel, Race and Radio: Preference Externalities, Minority Ownership, and the Provision of Programming to Minorities In M.R. Baye & J.P. Nelson (Eds.), *Advertising and Differentiated Products* (pp. 73-108) (Cambridge, MA: Elsevier. 2001), <http://www.fcc.gov/ownership/roundtable>; Bachen, Hammond, Mason Craft, Bachen, C., Hammond, A., Mason, L., and Craft, S., *Diversity of Programming in the Broadcast Spectrum: Is There A Link Between Owner Race Or Ethnicity and News and Public Affairs Programming?* (Report submitted to the Office of Communications Business Opportunities, Federal Communications Commission). Washington D.C., (1999), www.fcc.gov/opportunity/meb_study/content_ownership_study.pdf.2000; S.D. Turner, *Off the Dial: Female and Minority Radio Ownership in the United States, How FCC Policy and Media Consolidation Diminished Diversity on the Public Airwaves, Review of Current Status and Comparative Statistical Analysis*, Free Press, (2007), Washington D.C., http://www.freepress.net/files/off_the_dial.pdf).

broadcasting choose to do so in 2009,” my 2011 study observed.⁸⁹ The FCC’s 2017 Media Ownership report did not analyze program format.

IX. “Here we are Again,” the FCC’s 25-year Failure to Conduct an Adarand Study and Nearly Two Decades of Failure to Properly Analyze Media Ownership Diversity

Beginning in 2004, the Third Circuit in *Prometheus Radio Broadcasting v. FCC* remanded the FCC’s 2002 media ownership review for failure to analyze the effect of the media ownership rules the FCC adopted on minorities and women.⁹⁰ In *Prometheus IV* (2019) the Third Circuit found the FCC’s 2016 Media Ownership review and its 2018 “Incubator Order,” Report and Order—In the Matter of Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services, 33 F.C.C.R. 7911 (2018) arbitrary and capricious and in violation of the Communications Act. The Third Circuit vacated the Reconsideration Order and the Incubator Order in their entirety, as well as the “eligible entity” definition from the 2016 Report & Order.

Prometheus IV ordered the FCC to “ascertain on record evidence the likely effect of any rule changes it proposes and whatever “eligible entity” definition it adopts on ownership by women and minorities, whether through new empirical research or an in depth theoretical analysis.”⁹¹ The APA and the *Prometheus IV* remand requires the FCC to analyze and explain its reasoning. “If it finds that a proposed rule change would likely have an adverse effect on ownership diversity but nonetheless believes that rule in the public interest all things considered, it must say so and explain its reasoning.”⁹² “If it finds that its proposed definition for eligible entities will not meaningfully advance ownership diversity, it must explain why it could not adopt an alternate definition that would do so.”⁹³

The Third Circuit observed that the FCC’s 2018 order “proceeded on the basis that consolidation will not harm ownership diversity,” but failed to articulate the reasoning to support this determination.⁹⁴ This violated the Commission’s APA obligations and the Third Circuit’s

⁸⁹ Sandoval, *supra* note 51, at 101-102.

⁹⁰ *Prometheus I*, 373 F.3d 372, 420-421.

⁹¹ *Prometheus IV*, 939 F.3d 567, 587.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

remand instructions. The Court “may not supply a reasoned basis for the agency’s action that the agency itself has not given.”⁹⁵

The FCC’s 2016 Media Ownership Order concluded that while the FCC finds “that a reviewing court could find the Commission’s interest in promoting a diversity of viewpoints over broadcast media compelling, we do not believe that the record evidence sufficiently demonstrates that adoption of race-conscious measures would be narrowly tailored to further that interest.”⁹⁶ The order faulted commenters on the FCC’s Further Notice of Proposed Rulemaking (FNPRM) for failing to “propose specific, executable studies that plausibly might generate evidence that would support the adoption of race- or gender-conscious measures.”⁹⁷ The FCC did not explain why it believed it could shift the burden to commenters to design an appropriate study.⁹⁸

To comply with the responsibility to promote diffusion of control of the broadcast media and the congressional directive in 47 USC 209(j)(4)(d) to “ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures,” the FCC bears the burden to analyze these issues and conduct the required research. This includes developing the methodology (with an opportunity for public comment) to analyze whether race conscious or gender-based measures are merited and would meet the strict scrutiny standards of *Adarand v. Peña*, 515 U.S. 200, 227 (1995).

Assumptions do not substitute for analysis under the APA. An agency must articulate a rational connection between its decision(s) and supporting facts.⁹⁹ Neither does the FCC comply

⁹⁵ *Id.* (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

⁹⁶ In the Matter of the 2014 Media Ownership Review, 31 FCC Rcd 9864, 9986 (2016) [hereinafter FCC 2016 Media Ownership Order].

⁹⁷ *Id.* at 9987.

⁹⁸ *Cf.* *Office of Communication of United Church of Christ v. F.C.C.*, 425 F.2d 543, 546 (D.C. Cir. 1969) (the FCC inappropriately shifted the burden of proof to the public intervenors).

⁹⁹ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Prometheus IV*, 939 F.3d 567; *DOC v. New York*, ___ U.S. ___, 139 S. Ct. 2551 (2019) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–169 (1962) (“In order to permit meaningful judicial review, an agency must “ ‘disclose the basis’ ” of its action.”)

with the Communications Act's command to promote diffusion of control of the media and spectrum-based resources, 47 USC 309(j), nor any of the *Prometheus* remands over the past 16 years, by shifting to commenters the burden of study design and analysis.

When I served as the Director, and previous as the Deputy Director of the FCC's Office of Communications Business Opportunities from 1994-1999, I and several other FCC staff members suggested that the FCC commission a study that complied with the standards of Adarand to determine whether policies that supported minority media ownership had a sufficient factual and legal found. The FCC Office I directed, in coordination with the FCC's Office of General Counsel, designed the scope of work for the six studies the FCC released between 1999-2000 which examined several barriers facing minority media ownership, consistent with the Communications Act's mandate in Sec. 257 to examine market entry barriers.¹⁰⁰

These studies documented issues including the importance of the Tax Certificate program to market entry and the detrimental effects of its repeal, and capital access barriers facing minorities and women who sought to enter the broadcast marketplace as station owners. One study examined the practice of "No Urban/No Spanish Dictates" and "Minority Discounts" that reduced both revenue earned by stations that broadcast in Urban or Spanish formats and created deterrents to serve communities who wanted to obtain information and programming through such formats.¹⁰¹ These studies provided an important information that led the FCC in 2008 to ban discrimination in broadcast transactions.¹⁰²

¹⁰⁰ Santa Clara University & University of Missouri, CONTENT/OWNERSHIP STUDY, DIVERSITY OF PROGRAMMING IN THE BROADCAST SPECTRUM: IS THERE A LINK BETWEEN OWNER RACE OR ETHNICITY AND NEWS AND PUBLIC AFFAIRS PROGRAMMING? FCC, Dec. 2000; William D. Bradford, *CAPITAL MARKETS STUDY DISCRIMINATION IN CAPITAL MARKETS, BROADCAST/WIRELESS SPECTRUM SERVICE PROVIDERS AND AUCTION OUTCOMES*, FCC, Dec. 2000; KPMG LLP, *BROADCAST LICENSING STUDY, ESTIMATION OF UTILIZATION RATES/PROBABILITIES OF OBTAINING BROADCAST LICENSES FROM THE FCC*, FCC, Dec. 2000; Ernst & Young LLP, *AUCTION UTILIZATION STUDY, FCC ECONOMETRIC ANALYSIS OF POTENTIAL DISCRIMINATION UTILIZATION RATIOS FOR MINORITY-AND WOMEN-OWNED COMPANIES IN FCC WIRELESS SPECTRUM AUCTIONS*, FCC, Dec. 2000, each available at: <https://www.fcc.gov/fcc-creating-opportunity-policy-forum-market-entry-barriersdecember-12-2000>; Ivy Group, *WHOSE SPECTRUM IS IT ANYWAY, HISTORICAL STUDY OF MARKET ENTRY BARRIERS, DISCRIMINATION, AND CHANGES IN BROADCAST AND WIRELESS LICENSING, 1950 TO PRESENT*, Dec. 2000, FCC, *supra* note 21; Kofi Ofori and the Civil Rights Forum on Communications Policy, *WHEN BEING NUMBER ONE IS NOT ENOUGH*, FCC, Jan. 1999, https://transition.fcc.gov/Bureaus/Mass_Media/Informal/ad-study/.

¹⁰¹ Ofori, *supra* note 100.

¹⁰² *See, Prometheus II* 652 F.3d 451, 468, n. 41 (upholding the FCC's ban on discrimination in broadcast station sales transactions and in advertising sales contracts adopted in its 2008 media ownership review order).

The six market entry barrier studies conducted between 1999-2000 were intended to provide a foundation for an Adarand study of minority and female utilization in the broadcast ownership field. Yet, over the past 25 years, the FCC has failed to commission an Adarand study, despite four remands from the Third Circuit ordering it to analyze the effects of its media ownership policies on minority and female ownership.

The lack of an Adarand study has undermined the FCC's ability to comply with the four remands in the *Prometheus* proceeding. This is a problem of the FCC's own making. The FCC has repeatedly failed over the course of the past 16 years to comply with the *Prometheus* remands and to systematically examine minority or female ownership issues as part of the review of media ownership rules.

X. Transparency about Broadcast Hiring Serves the Public Interest

Congress requires the FCC to collect industry-wide broadcast television employment data under the Communications Act, 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). Though this is a statutory mandate, the FCC apparently stopped collecting this data in the early 2000s. Collecting demographic employment data “is both reasonable and fully consistent” with goal of “achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past.”¹⁰³ Neither *Lutheran Church Missouri Synod v. FCC* (“*Lutheran Church*”) nor *MD/DC/DE Broadcasters Association v. FCC* (“*State Broadcasters*”) found that collection and publication of broadcast employment data is unconstitutional.¹⁰⁴

The FCC's failure to collect broadcast employment data is inconsistent with its statutory duties and undermines the ability to examine the relationship between media ownership and employment. Dae Hee Kim found positive correlation between minority media ownership, minority employment, and content targeted to minorities (the “Triangle”), but emphasized that the FCC's inconsistent and incomplete information obstructed longitudinal analysis.¹⁰⁵ Lack of industry experience for women and minorities due to few employment opportunities offered by

¹⁰³ *Caulfield v. Bd. Of Ed. Of City of New York*, 583 F.2d 605 (2nd Cir. 1978); *U.S. v. New Hampshire*, 539 F.2d 277 (1st Cir. 1976); *Berkley v. United States*, 48 Fed. Cl. 361, 378–79 (2000).

¹⁰⁴ *Lutheran Church Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998); *MD/DC/DE Broadcasters Association v. FCC*, 236 F.3d 13(D.C. Cir. 2001).

¹⁰⁵ Dae Hee Kim, *Diversity Policies in the Media Marketplace: A Review of Studies of Minority Ownership, Employment, and Content*, 10 INTERNATIONAL JOURNAL OF COMMUNICATION 2201–2220 (2016).

majority broadcasters and the failure of the FCC to enforce EEO rules,” was a factor the Ivy Group highlighted in its report to the FCC in 2000 as a barrier to minority and female broadcast ownership.¹⁰⁶

Broadcasters are increasingly asking their employees to be “Swiss army knives,” multi-tool employees who report stories and often film themselves. Several media outlets interviewed me in 2019 about PG&E’s bankruptcy filing and public safety threats associated with electricity line maintenance and operation. For many of these interviews, the cameraperson was also a journalist who called the “on air” personality on the phone and then later helped write the story. Broadcast employment at all levels remains crucial to developing and communicating content. Broadcast owners determine what is aired and who is hired. Accordingly, U.S. jurisprudence has consistently recognized the importance of broadcast ownership, and the responsibility of broadcast owners to serve the public interest.¹⁰⁷

XI. Conclusion

I commend Congress for holding this landmark hearing on media diversity—an issue central to our democratic debate and values. In the hierarchy of first amendment interests in broadcasting, it is “the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”¹⁰⁸ This hearing gives Congress the opportunity to recognize the paramount importance of media diversity to viewers and listeners, to American democracy, to public safety, and to the analysis of the FCC’s media ownership rules.

I support Congress’ consideration of the legislation before this committee to promote media diversity through adoption of a tax certificate policy, EEO data collection and reporting, require the FCC to study market entry barriers for socially disadvantaged individuals in the communications marketplace in accordance with 47 USC 257(b), and affirm the values of media diversity to democracy and public safety. I also recommend that Congress direct the FCC to conduct a study that complies with the requirements of Adarand to examine minority, female, and disadvantaged individual FCC license ownership opportunities and their relationship to FCC media ownership policies. Thank you for the opportunity to address this hearing.

¹⁰⁶ Ivy Group, *supra* note 21, at 3, 11, 14, 15.

¹⁰⁷ *TV9 v. FCC*, 495 F.2d 929.

¹⁰⁸ *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) (citing *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940); *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 361—362 (1955)).