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THE EMPTY PROMISES OF DIVERSITY MOU'S: HOW THE FCC CAN STRENGTHEN COMMITMENTS TO RACIAL EQUITY

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"The need to 'diversify' the media landscape, as dictated by the FCC and enacted by Comcast after the merger, ended up being a collection of empty promises."[1]

INTRODUCTION

African Americans have been systematically disenfranchised from nearly all sectors of American society since the country's founding.[2] As such, African Americans do not just perceive the problem of racial discrimination as a matter of personal prejudice but also a matter of survival.[3] Without access to fundamental resources like higher education, healthcare, and economic opportunity, the quality of Black life decreases astronomically.[4] The

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1 Jason A. Smith & Randy Abreu, *MOU or an IOU? Latina/os and the Racialization of Media Policy*, 42 ETHNIC & RACIAL STUD. 607, 619 (2019).

2 *See* Mabinty Quarshie et al., *12 Charts Show How Racial Disparities Persist Across Wealth, Health, Education and Beyond*, USA TODAY, (June 18, 2020, 11:06 AM), https://www.usatoday.com/in-depth/news/2020/06/18/12-charts-racial-disparities-persist-across-wealth-health-and-beyond/3201129001/ ("Black people have long suffered from persistent inequality in the United States due to centuries of racism, discrimination and the long-lasting effects of slavery. This has created conditions that make it difficult for Black Americans to get ahead. . . . Here are one dozen charts, showing how inequities impact not just Black Americans' quality of life, but length of life.").

3 *See* Ioana Popescu et al., *Racial Residential Segregation, Socioeconomic Disparities, and the White-Black Survival Gap*, 13 PLOS ONE, no. 2, Feb. 23, 2018, at 1. ("White-Black differences in survival remain wide notwithstanding public health efforts to improve life expectancy and initiatives to reduce health disparities. Eliminating racial residential segregation and bringing Black socioeconomic status (SES) to White SES levels would eliminate the White-Black survival gap.").

4 *See* Quarshie et al., *supra* note 2 ("Systemic racism leads to disparities in many 'success indicators,' . . . including wealth, health, criminal justice, employment, housing,

nation begins to equate being Black with being "less than," and continues to disinvest in Black populations, which signals to Black people that their lives do not matter.[5]

Nevertheless, determined Black entrepreneurs continue to fight to expand opportunities for Black people.[6] One such entrepreneur is media mogul Byron Allen, whose most recent fight took him all the way to the Supreme Court.[7] The controversy began on June 21, 2010, when Allen, in his capacity as the Chairman and Chief Executive Officer of Entertainment Studios, Inc. ("ESI"), filed a public comment opposing the pending application for a merger between Comcast and NBC Universal ("NBCU").[8] Citing Comcast's failure to carry independent, 100% African American-owned programming on equal tiers to other similar channels,[9] he claimed that the merger would give "Comcast-NBCU the ability and incentive to discriminate against new independent programming networks to restrain competition, to the detriment of . . . viewers."[10] As a remedy, he requested that the Federal Communications Commission ("FCC") either deny the application entirely or condition the merger on Comcast's commitment to set aside channels for independently owned African American programming.[11]

Denying any systemic racism in its programming, Comcast asserted that it carried eleven African American-owned or targeted networks,[12] and that it would implement a race quota in its

political representation and education.").

5 *See* Michael J. Dumas, *Against the Dark: Antiblackness in Education Policy and Discourse*, 55 THEORY INTO PRAC. 11, 12 (2016) (discussing the nature of antiblack racism and how Black people are "denied humanity and [are] thus ineligible for full citizenship and regard within the polity").

6 *See* Sheila Herrling, *Changing the Face of Entrepreneurship*, CASE FOUND. (Feb. 16, 2016), https://casefoundation.org/blog/changing-the-face-of-entrepreneurship/ (celebrating the history of Black entrepreneurs and other entrepreneurs of color).

7 *See* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 589 U.S. ___, 140 S. Ct. 1009 (2020).

8 *See* Ent. Studios, Inc., Comment on Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees (June 21, 2010), https://ecfsapi.fcc.gov/file/7020511805.pdf.

9 *See id.* at Pt. I.C p. 6. ESI also cited the inability of those networks to compete for program carriage. *See id.* at Pt. I.D p. 8.

10 *Id.* at Executive Summary p. 3.

11 *See id.* at Pt. IV p. 17. The conditions requested at the time were "(1) a 10% set aside (at least 25 channels) to be programmed by African American independently owned companies and (2) a 4 hour set aside during the 22 hours of prime time programming on NBC for African American independently owned programming." Ent. Studios, Inc., Reply to Comcast-NBCU Opposition at Executive Summary p. i (August 19, 2010) [hereinafter *ESI Reply to Comcast Opposition*], https://ecfsapi.fcc.gov/file/7020709261.pdf.

12 *See* Comcast Corp., Opposition to Petitions to Deny and Response to Comments on

programming.[13] Comcast also submitted to the FCC further proof of its commitment to diversity with regard to African Americans in the form of a Memorandum of Understanding ("MOU") between itself and the National Association for the Advancement of Colored People, the National Urban League, and the National Action Network, which contained additional race-quota-based commitments.[14]

In granting the merger license, the FCC failed to adopt Comcast's race quotas out of fear of running afoul of the Constitution and FCC precedent.[15] The FCC described the race quotas and other provisions within the diversity MOUs as merely private agreements meant only to appease the commenters who were concerned about "the treatment of minority and other groups by Comcast and NBCU."[16] Yet the FCC still relied on these agreements as enhancements to the conditions it would impose on Comcast's merger license, and commended Comcast for "meeting with a broad range of stakeholders" and "effectuating agreements" that would "further mitigate" the potential public interest harms.[17]

Without government oversight and enforcement, however, the private diversity commitments proved less effective in dealing with racial inequities than the FCC anticipated. In February 2015, less than five years after the merger, Byron Allen's organizations, Entertainment Studios Networks, Inc. ("ESN") and the National Association of African-American-Owned Media ("NAAOM"), filed a federal race discrimination suit against

Application of Comcast Corporation at 47-48 (July 21, 2010) [hereinafter *Comcast Opposition*], https://ecfsapi.fcc.gov/file/7020550539.pdf; *cf. ESI Reply to Comcast-NBCU Opposition*, *supra* note 11, at 10 (finding Comcast's claim that it carries 11 African American networks misleading).

13 *See Comcast Opposition*, *supra* note 12, at 44, 47 (expanding its prior commitment of six new independent networks to ten, four of which would be reserved for African Americans); *cf. ESI Reply to Comcast Opposition*, *supra* note 11, at 11 (contending that Comcast's commitment to carry four African American channels is insignificant in light of its capacity to soon carry 500 or more channels).

14 *See* Comcast Corp., Memorandum of Understanding between Comcast Corp., NBC Universal and the Afr. Am. Leadership Org. (Dec. 17, 2010), https://ecfsapi.fcc.gov/file/7020924347.pdf. The three organizations are collectively called the "National African American Leadership Organizations" within the agreement. *Id.*

15 *See Comcast Corp.*, 26 FCC Rcd. 4238, 4317-18 (2011) ("We also decline to impose the various conditions sought by commenters that would impose quotas on the amount of minority-produced or directed programming that the Applicants must offer on various platforms. . . . [T]he First Amendment, Section 326 of the [Communications] Act, and Commission precedent limit our ability to dictate the programming policies of our licensees.").

16 *Id.* at 4317.

17 *Id.*

Comcast for $20 billion in damages.[18] The plaintiffs claimed that the diversity commitments were simply "window dressing" designed to hide Comcast's discriminatory practices from the scrutiny of the FCC and the public.[19] The discriminatory practices alleged included Comcast's use of the diversity programs and application processes outlined under the MOU to (1) segregate the application process, (2) buy the support of various minority special interest groups, and (3) string ESN along with multiple recommendations for improving its application but never with any true intent of carrying its channels.[20]

Despite the factual allegations, courts were not convinced. ESN and NAOOM struggled to carry the high burden of proof for their race discrimination claims.[21] The lawsuit was dismissed at the pleading stage three times at the district court level before being reversed by the Ninth Circuit Court of Appeals[22] and then making its way to the Supreme Court.[23] The Court reversed and remanded the Ninth Circuit's decision concerning the applicable pleading standard, placing yet another legal hurdle for Black Americans to

18 *See* Complaint at 113a, 147a, Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009 (2020) (No. 18-1171). Available at: https://www.supremecourt.gov/DocketPDF/18/18-1171/91371/20190308153633288_Comcast%20-%20NAAAOM%20Petition%20Appendix%20TO%20PRINTER.pdf.

19 Second Amended Complaint at 54a-56a, 86a, 120a, Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009 (2020) (No. 18-1171). Available at: https://www.supremecourt.gov/DocketPDF/18/18-1171/91371/20190308153633288_Comcast%20-%20NAAAOM%20Petition%20Appendix%20TO%20PRINTER.pdf.

20 *See id.* at 35a-37a, 54a, 62a-64a. ESN had attempted numerous times between 2008 and 2015 to get Comcast to carry its 100% African American-owned programming, but each time Comcast gave ESN the runaround and never carried ESN's channels. *See id.* at 35a-37a.

21 *See* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1013 (2020) ("The district court twice allowed ESN a chance to remedy its complaint's deficiencies by identifying additional facts to support its case. But each time, the court concluded, ESN's efforts fell short of plausibly showing that, but for racial animus, Comcast would have contracted with ESN. After three rounds of pleadings, motions, and dismissals, the district court decided that further amendments would prove futile and entered a final judgment for Comcast.").

22 *See* Nat'l Ass'n of Afr. Am.-Owned Media v. Comcast Corp., 743 Fed. Appx. 106, 106-07 (9th Cir. 2018) ("The district court thrice dismissed Plaintiffs' complaints, concluding in its third and final dismissal order that 'not one fact added to the SAC is either antithetical to a decision not to contract with [Entertainment Studios] for legitimate business reasons or, in itself, indicates that the decision was racially discriminatory.'").

23 *See* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 139 S. Ct. 2693, 2693 (2019) (granting Comcast's petition for writ of certiorari).

overcome in the path to accessing racial justice.[24] The case eventually settled.[25]

Prior to the litigation, Byron Allen had sought other avenues of relief. He wrote a petition to the FCC to investigate Comcast's compliance with the conditions of the merger.[26] Comcast opposed the petition, calling Allen's claims baseless and requesting that the FCC leave the matter to be resolved in court.[27] In the end, the FCC failed to intervene and respond to Byron Allen's complaint, most likely because it lacked the authority to intervene.[28] The diversity MOU was a voluntary commitment and not one of the binding conditions of the merger.[29]

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[24] *See Comcast Corp.*, 140 S. Ct. at 1019 ("To prevail, a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right. . . . To allow … [the Ninth Circuit] the chance to determine the sufficiency of ESN's pleadings under the correct legal rule in the first instance, we vacate the judgment of the court of appeals and remand the case for further proceedings consistent with this opinion.").

[25] *See* Cynthia Littleton, *Byron Allen and Comcast Settle Racial Discrimination Lawsuit, Set Carriage Deal for 3 Channels*, VARIETY (June 11, 2020, 7:00 AM), https://variety.com/2020/tv/news/byron-allen-comcast-deal-lawsuit-racial-discrimination-1234631400/ ("Byron Allen and Comcast have settled the long-running racial discrimination lawsuit over Allen's cable channels that went all the way to the Supreme Court last November. Comcast has reached a deal with Allen's Entertainment Studios to pick up three of his cable channels — Comedy.TV, Recipe.TV and JusticeCentral.TV. The pact also amend [sic] the terms of Comcast's existing deal to carry Weather Channel, which Allen's company acquired in 2018. It also covers the retransmission consent rights to 14 local TV stations that Allen Media Group has acquired during the past few months.").

[26] *See* Nat'l Ass'n of Afr. Am.-Owned Media, Petition for Immediate Investigation and Imposition of Conditions, Monetary Forfeitures, Revocation and/or Non-renewal of Licenses (Mar. 24, 2016), https://ecfsapi.fcc.gov/file/60001561139.pdf; *see also* John Eggerton, *Byron Allen Asks FCC to Vet Comcast-NBCU Condition*, MULTICHANNEL, https://www.multichannel.com/news/byron-allen-asks-fcc-vet-comcast-nbcu-condition-403637 (last updated March 28, 2018).

[27] Comcast Corp., Opposition of Comcast Corporation to Petition of the National Association of African American Owned Media and Entertainment Studios, Inc. at 1-4, (April 4, 2016) [hereinafter *Comcast Opposition to FCC Petition*], https://ecfsapi.fcc.gov/file/60001568261.pdf ("Petitioners have brought their baseless allegations to the Commission because a federal district court judge has already once held that their allegations of supposed intentional race discrimination are insufficient to even "allege any plausible claim for relief." Huston Decl., Ex. A at 3. . . . The Commission should leave Petitioners to pursue . . . their claim in court. To the extent that Petitioners' ridiculous allegations are relevant at all to the actual NBCUniversal conditions, the Commission should dismiss the petition.").

[28] *See* Second Amended Complaint at 55a, Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009 (2020) (No. 18-1171) ("[T]he FCC has no authority to enforce the MOU conditions which Comcast has not lived up to . . . ."); *see also* Eriq Gardner, *Comcast Scrutinized After Racial Bias Hearing at Supreme Court*, HOLLYWOOD REP. (Nov. 22, 2019, 12:19 PM), https://www.hollywoodreporter.com/thr-esq/comcast-scrutinized-racial-bias-hearing-at-supreme-court-1257307 ("In 2016, Allen's company tried to petition the FCC to investigate whether Comcast had failed to live up to diversity commitments. The media regulatory agency appears to have shrugged it off.").

[29] *See* Smith & Abreu, *supra* note 1, at 617 ("[N]o tangible means of enforcing the

The FCC's lack of accountability on issues of racial equity continuously harms Black Americans. When the FCC grants licenses in reliance upon diversity MOU's without any way to ensure that they actually produce equitable opportunities for minorities, the FCC is offering illusory promises[30] as remedies to harms that it is obligated by law to prevent. Under Section 310(d) of the Communications Act of 1934, the FCC must review applications and only grant licenses so long as doing so is in the "public convenience, interest, and necessity."[31] The only way the decision to offer illusory promises holds any weight is if the FCC fails to see "the treatment of minority . . . groups"[32] as falling squarely within the interest of the public, which is simply unacceptable.

This Note addresses the racial inequities that exist because of the FCC's reliance on unenforceable "diversity MOUs" to carry out its public interest mandate. Because the FCC is limited by Supreme Court precedent when using race-based affirmative action policies, the FCC has largely left issues of racial inequity to be resolved by racial minorities themselves.[33] The FCC merely accepts voluntary diversity commitments when reviewing merger licenses, which are ineffective and can even be a barrier in fighting for true

voluntary commitments existed. This is because the voluntary commitments made in the MOU were just that, voluntary. Only conditions levied by the FCC as part of the merger approval could be enforced."); *see also* Comcast Corp., 26 FCC Rcd. 4238, 4330 (2011) ("We also note . . . the Hispanic, Asian American and African American MOUs . . . as well as their ongoing efforts to enhance workforce diversity. However, especially in light of constitutional considerations, our analysis of the employment issues does not depend on these commitments . . . [W]e . . . will not impose conditions incorporating the additional diversity obligations . . .").

30 *See* Second Amended Complaint at 55a, Comcast Corp., 140 S. Ct. 1009 (No. 18-1171) ("Faced with the possibility that its racist practices and policies might jeopardize the approval of its acquisition of NBC Universal, Comcast . . . convinc[ed] the FCC that, despite [its] history of discrimination, going forward, Comcast had committed to carriage of independently-owned-and-operated networks of which a majority or substantial interest was to be owned and controlled by African Americans. Any such commitment was illusory, as has since become obvious.").

31 47 U.S.C. § 310(d) (2020).

32 *Comcast Corp.*, 26 FCC Rcd. 4238, 4317 (2011) ("We note that many of the Applicants' other commitments under the Hispanic, Asian American and African American MOUs . . . are intended to address concerns raised by commenters regarding the treatment of minority and other groups by Comcast and NBCU. . . [T]hese specific additional commitments . . . should further mitigate the potential harms to diversity.").

33 *See* Jason Allen, *Disappearing Diversity? FCC Deregulation and the Effect on Minority Station Ownership*, 2 IND. J. L. & SOC. EQUAL. 230, 244 (2013) ("At this point, the FCC still appears to be clinging gamely to the belief that the broadcasting arena can police itself in accordance with the will of the free market. . . . One explanation for the FCC's reluctance to impose industry regulation . . ., particularly on racial or ethnic grounds, is the necessity that any such regulation pass muster under constitutional strict scrutiny.").

racial equity.[34] This Note proposes that instead, the FCC should recognize racial equity as falling within its public interest standard, particularly when it conducts license review. This narrowly tailored remedial policy would avoid constitutional concerns by simply redistributing the burden of proof during license review from falling solely on minorities to allege specific instances of discrimination to also falling upon applicants to demonstrate how they intend to promote racial equity as a licensee.

Section I of this Note discusses the burden of proof minorities must bear to bring a racial discrimination claim. It focuses on Byron Allen's claims of discrimination, Comcast's opposition, and why racial minorities generally do not have adequate legal tools to fight for their own equality. Section II explains why Supreme Court precedent limits the FCC's use of its rulemaking powers to address racial inequities. It also discusses past FCC affirmative action policies and why the FCC refused to adopt the diversity MOUs as binding conditions of the Comcast merger. Section III discusses how the FCC's current interpretation of the public interest standard has contributed to its complicity in upholding market entry barriers and racial inequities for minorities. It also explains why the practice of accepting and incentivizing the promulgation of diversity MOUs perpetuates these racial disparities. Section IV proposes that the FCC should expand its current interpretation of the public interest standard to encompass the promotion of racial equity and discusses the practical and legal concerns with doing so. Ultimately, by embracing a policy of promoting racial equity, the FCC would uphold its responsibilities under the Communications Act and equitably redistribute the burden of proof during license review.

[34] *See generally* Smith & Abreu, *supra* note 1.

I. THE BURDEN OF PROOF PROBLEM

Generally speaking, if Black Americans feel marginalized or discriminated against in society, they bear the legal burden of proving it by filing a claim with an administrative agency and/or in court.[35] In particular, Byron Allen faced a high burden of proof in court in order to bring his race discrimination suit under 42 U.S.C. §1981, because, under the statute, the burden rests on the plaintiff to prove that race was the barrier to making and/or enforcing the contract at issue.[36] During Allen's lawsuit, the parties disagreed over which causation standard under the statute should be used during the pleading stages, and Comcast appealed the case to the Supreme Court.[37] Comcast-NBCU argued before the Court that Byron Allen could not state a claim unless he proved that but for ENS being 100 percent African-American-owned, Comcast would have contracted to carry its channels.[38] Comcast argued that Allen failed to meet this standard because Comcast had other business-related reasons for declining to carry his networks, such as

35 *See* RACE FORWARD: CTR. FOR RACIAL JUST. INNOVATION, CONFRONTING RACIAL BIAS AT WORK: CHALLENGES AND SOLUTIONS FOR 21ST CENTURY EMPLOYMENT DISCRIMINATION 1 (2016) [hereinafter RACE FORWARD Report], https://www.raceforward.org/system/files/pdf/reports/RacialBiasAtWork.pdf ("[T]o those who champion racial justice in the United States, the overall record of largely reactive, oft-delayed, case-by-case enforcement continues to paint a disturbing picture. . . . For victims of intentional and unintentional forms of discrimination alike, it is a daunting reality that places too much burden on vulnerable workers to bring discrimination charges retroactively, through a slow and laborious process. Title VII places on vulnerable workers an unrealistic and unjust burden of initiating EEOC investigations and enforcement.")

36 *See* Comcast Corp. v. Nat'l Ass'n of Afr. Am.- Owned Media, 140 S. Ct. 1009, 1014 (2020) ("[Under Section 1981,] a plaintiff bears the burden of showing that race was a but-for cause of its injury."); *see also* Hassan A. Kanu, *Race Bias Harder to Prove Under High Court's Comcast Ruling (1)*, BLOOMBERG L. (March 24, 2020, 4:13 PM), https://news.bloomberglaw.com/daily-labor-report/race-bias-is-harder-to-prove-under-high-courts-comcast-ruling ("The higher burden of proof will apply in all future employment, contracting, and other cases alleging race discrimination under Section 1981 of the Civil Rights Act of 1866, the law passed to guarantee equal rights to former slaves and [B]lack Americans . . . . Raising the bar in terms of the factual allegations a plaintiff must make before they have an opportunity to gather evidence, and for proving those allegations, therefore disadvantages victims of race bias . . . .") (internal quotations omitted).

37 *See* Petition for Writ of Certiorari at ii, Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009 (2020) (No. 18-1171) (asking the Court to decide two issues, the first being "1. Does a claim of race discrimination under 42 U.S.C. § 1981 fail in the absence of but-for causation?"); *see also* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 139 S. Ct. 2693, 2693-94 (2019) ("Petition for writ of certiorari . . . granted limited to Question 1 presented by the petition.").

38 *See* Petition for Writ of Certiorari at 2, Comcast Corp., 140 S. Ct. 1009 (No. 18-1171).

bandwidth costs and the lack of consumer demand.[39] On the other hand, Byron Allen insisted that the burden of proof is lower at the pleading stage, and that he merely had to prove that race was a motivating factor in the decision not to carry ENS.[40] Byron Allen supported this motivating factor claim by alleging behavior by Comcast that was racially suspect and contributed to ENS's failure to be carried by Comcast, such as the racially targeted comment made by a Comcast executive, the false promises of carriage, and the dissimilar treatment in comparison to similarly situated non-African-American owned programming.[41] Ultimately, the Court unanimously decided that the heavier but-for causation standard was applicable to the discrimination statute—a devastating blow for Byron Allen and similarly-situated Black Americans.[42]

Even if Byron Allen had gotten the FCC to hear his claim instead, he most likely would have fared no better in front of the administrative agency than in court. The FCC places a similar burden of proof on racial minorities to allege particular instances of discrimination during license review or when filing Equal Employment Opportunity ("EEO") complaints.[43] During license

39 *See id.* at 8 ("Plaintiffs 'have not sufficiently pled facts that make a plausible claim for relief' in light of Comcast's 'legitimate business reasons for denying [ESN] carriage, namely, lack of demand for ESN programming, and the bandwidth costs associated with carrying ESN's channels.'") (internal quotations omitted).

40 *See* Brief for Respondents at 23, Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009 (2020) (No. 18-1171) ("As the Ninth Circuit held, at the pleading stage in a section 1981 case, the requirement is that the plaintiff plausibly alleges that race was a motivating factor in the refusal to contract. There is no dispute that Respondents' Second Amended Complaint alleged this.").

41 *See id.* at 51-53 ("Comcast executives . . . told Byron Allen . . . that Comcast would carry the Entertainment Studios Channels if they were carried on Comcast's principal competitors . . . but Comcast still refuses to contract with Entertainment Studios even though [Comcast's principal competitors] now carry the Entertainment Studios Channels . . . . Comcast told Entertainment Studios that it lacked the capacity to carry the Entertainment Studios Channels, but Comcast launched more than 80 channels since 2010, including lesser-known, white-owned channels . . . . [D]uring one meeting, a Comcast executive told Entertainment Studios, 'We're not trying to create any more Bob Johnsons,' [referring to] the African American former owner of BET.").

42 *See* Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1014 (2020) ("[Under Section 1981,] a plaintiff bears the burden of showing that race was a but-for cause of its injury."); *see also* Jeleesa Omala, *The Fight Against Increasing Racial Disparities: Comcast v. NAAOM*, J. C.R. & ECON. DEV. (May 13, 2020), https://www.jcred.org/shortreads/comcast-v-naaom-and-the-fight-against-increasing-racial-disparities. ("On March 23, 2020, . . . the Supreme Court unanimously held that racial minorities have to allege facts suggesting 'but for' causation in order to bring a claim under 42 U.S.C. § 1981 for race discrimination in contracting. This is a devastating blow to would-be civil rights litigants, particularly African Americans.").

43 *See* Curators of the Univ. of Mo., 16 FCC Rcd. 1174, 1178 (2001) (stating that

applications, the burden of proof is generally on applicants to prove that the grant of a license would promote the public interest.[44] However, the FCC seems to handle racial disparities and discrimination issues in a separate fashion. Despite the FCC's past recognition that race (and gender) discrimination shows that a licensee has failed to fulfill its public interest obligation,[45] the FCC does not currently place obligations on licensees with regard to equal treatment of racial minorities.[46] The only rules barring race discrimination that the FCC currently has are in employment,[47] where the burden is on those who have been discriminated against to file a timely complaint with the EEOC alleging sufficient and particular facts that show employment discrimination.[48]

In addition to the legal burden, many Black Americans and other minorities also face practical obstacles to bringing successful claims. Byron Allen, a fairly litigious multi-millionaire, is highly

discrimination complaints are normally resolved by the EEOC and/or in court and have little bearing on license renewal applications).

44 *See Comcast Corp.*, 26 FCC Rcd. 4238, 4341 (2011) ("The Applicants bear the burden of proving, by a preponderance of the evidence that the proposed transaction, on balance, serves the public interest.").

45 *See* In re Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, 15 FCC Rcd. 2329, 2332 (2000) ("We do not believe that a licensee who discriminates against minorities or women would be able or inclined to fulfill its responsibility as a public trustee to provide a program service that airs diverse viewpoints, enriches public debate, and is responsive to the needs and interests of all sectors of its community.").

46 *See* David Honig, *How the FCC Suppressed Minority Broadcast Ownership and How the FCC Can*
Undo the Damage It Caused, 12 S. REGION BLACK STUDENTS ASS'N L.J. 44, 47 (2018) ("The first sentence of the Communications Act expressly provides for the FCC's administration of the spectrum 'without discrimination on the basis of race, color, religion, national origin, or sex.' Yet, this powerful non-discrimination provision is not self-executing. And to the nation's shame, this provision has never been executed.").

47 The FCC mainly has rules with regard to specific employment policies such as recruitment practices rather than rules relating to workforce diversity generally. *See* 47 C.F.R. §§ 73.2080, 76.71 (2020). The FCC does not believe that broader workforce diversity issues relate to the types of transactions and proceedings under FCC authority. *Comcast Corp.*, 26 FCC Rcd. at 4329 ("Although the [workforce discrimination and diversity] concerns raised by commenters are important, these issues are not related to the transaction."). Such matters are relegated to other government agencies. *See id.* ("Moreover, these matters are enforced by agencies of government other than the Commission: . . . the Equal Employment Opportunity Commission, along with relevant state authorities, oversees the laws on workforce discrimination and diversity.").

48 The FCC permits "[a]nyone with knowledge of any violation of the FCC's EEO rules" to file a complaint with specific information and supporting evidence, which will then be processed by the Equal Employment Opportunity Commission ("EEOC"), in accordance with the Memorandum of Understanding between the FCC and the EEOC. FCC Media Bureau, Policy Division, EEO Branch, *EEO Frequently Asked Questions*, FED. COMM. COMMISSION https://www.fcc.gov/general/eeo-frequently-asked-questions (last visited Jan. 10, 2021).

fortunate to be able to file as many lawsuits as he did.[49] Most Black Americans and other racial minorities do not have the same luxuries, as many are lower-paid workers and not wealthy business owners or highly compensated CEOs.[50] Many minority workers do not file race discrimination suits because they are intimidated and hesitant to embroil themselves in a legal dispute with their employer.[51] Workers are afraid of the potential legal consequences with regard to their immigration status, as well as their prospects in the industry.[52] They have little to no knowledge of the applicable laws and are disincentivized by the incredibly slow pace of the administrative and judicial process.[53] They also face challenges in securing legal representation because the financial outcome of the case is likely to be low, and the case may not have a high likelihood of success at trial.[54] According to a study conducted

49 *See Comcast Opposition to FCC Petition*, *supra* note 27, at 1-2 (accusing Byron Allen of being a "serial litigant" who not only sued Comcast but also "Time Warner Cable, AT&T, DirecTV, and Charter Communications (as well as the NAACP, the National Urban League, the National Action Network, Al Sharpton, former FCC Commissioner Meredith Baker, and the Commission itself), claiming in each case that ESI was the victim of intentional racial discrimination against African Americans.").

50 *See* RACE FORWARD Report, *supra* note 35, at 1 ("Racial disparities in employment outcomes are well known, from hiring to access to benefits to overrepresentation in low-paying jobs to underrepresentation in high-paying jobs."); *see also* Leah P. Hunter, Overcoming the Diversity Ghetto: Determining the Effectiveness of Network Broadcast Diversity Initiative Programs 103 (2014) (Ph.D. dissertation, Florida State University)(on file with Florida State University Libraries), http://purl.flvc.org/fsu/fd/FSU_migr_etd-8811 ("As evidenced by [Dr. William V.] Banks' application [to the FCC] for a broadcasting license in 1975 being the first by a person of color, African Americans and other minority groups had, and continue to have, limited presence in broadcasting ownership. The lack of minority presence in ownership continues to this day.").

51 *See* RACE FORWARD Report, *supra* note 35, at 17 ("[T]he current system for protected workers under Title VII relies on an individual's willingness to come forward and file a formal charge of discrimination with the EEOC against their employer . . . However, major barriers discourage workers from doing so.").

52 *See id.* at 17-18 ("Our survey suggests that some of these barriers for workers include insecurity about undocumented status, fear of legal consequences . . ., and fear that filing a claim will harm workers' prospects in the industry (45.6 percent) . . . . The concern about a worker's prospects in the industry registered as a significant barrier across almost all of the industries we surveyed, including journalism and education.").

53 *See id.* at 18 ("[A] third of the survey respondents conveyed that the lack of workers' knowledge regarding laws that prohibit discrimination and the slow pace of the legal and administrative processes to play out are 'major barriers' for workers who would otherwise file a formal discrimination claim against their employers.").

54 *See id.* at 18-19 ("Understandably, for the vast majority of attorneys in private practice, the likelihood of winning a case, as well as the total monetary compensation for their client, must be considered . . . . [A] variety of statutes and Supreme Court cases often make employment cases difficult to win, particularly if no evidence of intentionally discriminatory treatment is available. The federal courts make the prospect of taking employment discrimination claims unappealing for lawyers, particularly in cases involving lower-income workers and those working at smaller businesses unless multiple employees have all suffered similar treatment . . . .").

by the Center for Public Integrity regarding complaint data from federal, state, and local administrative agencies in 2017, "[r]ace claims are among the most commonly filed and have the lowest rate of success, with just fifteen percent receiving some form of relief."[55]

Another barrier to filing claims is private arbitration agreements that many workers have signed with their employers.[56] Arbitration is not always preferable to bringing a lawsuit, especially with regard to producing systemic change, because arbitrations do not create legal precedent, nor do arbitrators have the ability to provide injunctive relief.[57] Alternatively, if the discrimination claim is covered by an arbitration agreement, the employee may still file a charge with an administrative agency like the Equal Employment Opportunity Commission ("EEOC"), who can pursue the claim in court on the employee's behalf.[58] However, considering the number of cases that the EEOC has to handle at once, it is highly unlikely that the EEOC will take a case unless there is clear evidence of discrimination.[59]

Without the ability to file race discrimination claims, racial equity is at a standstill in many sectors of society, particularly in the media industry, where FCC media ownership rules are weakening while disparities in representation and ownership for minorities rapidly increase.[60] Racial minorities do not have the adequate

55 Maryam Jameel & Joe Yerardi, *Despite Legal Protections, Most Workers Who Face Discrimination Are on Their Own*, CTR. FOR PUB. INTEGRITY (Feb. 28, 2019), https://publicintegrity.org/inequality-poverty-opportunity/workers-rights/workplace-inequities/injustice-at-work/workplace-discrimination-cases/.

56 *See* RACE FORWARD Report, *supra* note 35, at 19 ("Another method that employers deliberately use to limit worker rights has been the proliferation of forced arbitration clauses in employee contracts or handbook policies. Such HR-policy 'fine print' requires workers to sign away their rights to sue their employers for discrimination in courts of law. Workers are forced to resolve disputes in a system that is supposedly independent, but is typically designed and paid for by employers.").

57 *See id.* at 19-20 ("Arbitration decisions are typically confidential, and unlike the courts, arbitrators don't have 'the authority to order injunctive relief to remedy ongoing violations of the law.'").

58 *See id.* at 20 ("Although workers are never required to sign away their right to file a Title VII claim against an employer, a forced arbitration clause effectively means the workers must rely on the under-resourced EEOC to take up their claims in court on its own.").

59 *See id.* ("Faced with tens of thousands of new claims each year, and the reality that well-heeled employers fight tooth-and-nail even in many cases of egregious discrimination, the chances are extremely slim that the EEOC will take up any individual claim — particularly where no smoking gun of explicit discrimination exists.").

60 *See* Allen, *supra* note 33, at 231 ("Combined with ongoing reduction in the limitations upon station ownership and the corresponding rise in media consolidation, many onlookers believe that there is an inevitable trend toward the demise of viewpoint diversity."). *See*

legal tools to vindicate their rights, especially since many of the barriers they face are a result of ongoing socially disadvantageous structures of oppression and exclusion, of which even the FCC and media conglomerates like Comcast are a part.[61] The FCC does not have to sit idly by while Black Americans continue to suffer. It can and should do something.

II. THE AFFIRMATIVE ACTION PROBLEM

The FCC has recognized the problem of racial inequity in media in the past and has tried to rectify the issue through its rulemaking powers but to no avail.[62] While the FCC is better-positioned to deal with market entry barriers for Black people in the media industry because of its regulatory authority,[63] the Fifth Amendment constrains the FCC's use of race in its affirmative action policies.[64] Under Fifth Amendment precedent, courts consider both the adequacy of the FCC's rationale or policy goal as a compelling

also Robert Millar, *Racism is in the Air: The FCC's Mandate to Protect Minorities from Getting Shortchanged by Advertisers*, 8 COMMLAW CONSPECTUS: J. COMMC'NS L. & POL'Y 311, 321 (2000) ("Many minority-owned and -formatted broadcasters attribute their difficulties competing with popular format stations to government efforts to deregulate, claiming that the deregulation intended to help the market actually hinders minority broadcasters.").

61 *See* Second Amended Complaint, *supra* note 19, at 45a ("Racial discrimination in contracting for cable carriage is an insidious ongoing practice with far-reaching adverse consequences. The practice is so extensive that even a top advisor to the Chairman of the Federal Communications Commission ('FCC') candidly told an Entertainment Studios representative that 'inherent racism' infects the cable television and broadband industry. As a result of that discrimination, 100% African American–owned media companies and African American individuals, and their diverse viewpoints, are precluded from access to the broadest possible audience; conversely, such discrimination deprives the U.S. audience of access to that rich diversity.").

62 *See* Honig, *supra* note 46, at 46-50 (describing minority exclusion from the broadcasting industry, how the FCC and Congress "have long been of one voice that minority ownership must be addressed as a central element of structural broadcast ownership regulation," and past failed regulatory frameworks).

63 *See* 47 U.S.C. § 151 (2020) (providing that the FCC was created, *inter alia*, "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, nationwide and worldwide wire and radio communication service").

64 *See* Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 875 (2010) ("In 1998, the D.C. Circuit, in *Lutheran Church v. Federal Communications Commission* (*Lutheran I*), finally struck down part of the FCC's equal employment rules—not as an insufficient implementation of the Fifth Amendment's equal protection guarantees, but as a violation of them. The evolving court constitutionalism in which equal protection had come to constrain, rather than to require, equal employment rulemaking had finally caught up with the FCC.").

government interest as well as whether the FCC's affirmative action policy is narrowly tailored to achieving that goal.[65] The FCC has struggled on both fronts.[66] When the FCC's affirmative action policies rely on systems of racial preferences or racial quotas, they often get struck down as unconstitutional because they are not narrowly tailored enough to pass the muster of strict scrutiny.[67] Additionally, the FCC has struggled to articulate a sufficiently clear and defined policy goal or government interest that can withstand judicial scrutiny.[68]

Two main rationales for race-based affirmative action policies have been upheld by the Supreme Court: diversity and remedying past discrimination. As to the first, the FCC had its diversity rationale accepted in *Metro Broadcasting v. FCC,* where the FCC had instituted two affirmative action policies, comparative hearings and distress sales, both of which prioritized awarding licenses to minorities.[69] Its rationale for promoting a system of minority

65 *See* MD/DC/DE Broad. Ass'n v. FCC, 236 F.3d 13, 21 (D.C. Cir. 2001) ("For a government action to withstand strict scrutiny it must 'serve a compelling governmental interest, and must be narrowly tailored to further that interest.'") (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995)).

66 *See, e.g.*, Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998) (striking down the FCC's EEO regulations as unconstitutional because its rationale, promoting "diversity of programming," was not a compelling governmental justification and because the EEO policies were not narrowly tailored nor were they substantially related to the FCC's goal); *see also, e.g.*, *MD/DC/DE Broad. Ass'n,* 236 F.3d 13 (striking down the FCC's EEO regulations as unconstitutional because the FCC's policy of placing pressure upon broadcasters to recruit minority candidates was not narrowly tailored to support a compelling governmental interest).

67 *See* Grutter v. Bollinger, 539 U.S. 306, 334 (2003) ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot 'insulate each category of applicants with certain desired qualifications from competition with all other applicants.'") (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978)); *see also, e.g.*, *Lutheran Church*, 141 F.3d at 354, 354-56 ("[W]e do not think it matters whether a government hiring program imposes hard quotas, soft quotas, or goals . . . [T]hey can and surely will result in individuals being granted a preference because of their race . . . . [T]he term 'diversity' has . . . been coined both as a permanent justification for policies seeking racial proportionality in all walks of life ('affirmative action' has only a temporary remedial connotation) and as a synonym for proportional representation itself. It has, in our view, been used by the Commission in both ways. We therefore conclude that its EEO regulations are unconstitutional . . . .").

68 *See, e.g.*, *MD/DC/DE Broad. Ass'n*, 236 F.3d at 20-22 (describing "[t]he matter of a compelling governmental interest" as "somewhat vexed" due to the FCC's various deficient justifications for its EEO regulations); *see also* Michelle C. Forelle, *The FCC and the Problem of Diversity*, 9 INT'L J. COMM. 3432, 3433 (2015) ("I find that the FCC has acted as its own worst enemy in failing to provide either an adequate, applicable definition of diversity for researchers and policymakers or a rubric that determines what type of evidence would pass the strict scrutiny standard.").

69 *See* Metro Broad. v. FCC, 497 U.S. 547, 552 (1990) ("The issue in these cases, consolidated for decision today, is whether certain minority preference policies of the Federal Communications Commission violate the equal protection component of the Fifth

preferences with license review and distribution was based upon the recognition that minorities needed to be adequately represented in the media industry to preserve a diversity of views.[70] The Supreme Court accepted this rationale as passing intermediate scrutiny because the "diversity of views and information on the airwaves serves important First Amendment values."[71] However, that holding was substantially overturned in *Adarand v. Pena*, when the Supreme Court determined that strict scrutiny was the appropriate standard rather than intermediate scrutiny.[72] The Supreme Court has not yet reached the question of whether the FCC could put forward a diversity rationale that would suffice as a compelling government interest. Still, the D.C. Circuit has not found the *Metro Broadcasting* diversity rationale to be compelling.[73]

The Supreme Court has found another race-based diversity interest to be compelling, but it was within the context of education, not broadcasting.[74] In *Grutter v. Bollinger*, the Supreme Court upheld the University of Michigan's affirmative action admission

Amendment. The policies in question are (1) a program awarding an enhancement for minority ownership in comparative proceedings for new licenses, and (2) the minority 'distress sale' program, which permits a limited category of existing radio and television broadcast stations to be transferred only to minority-controlled firms. We hold that these policies do not violate equal protection principles.").

70 *See id.* at 552-54 ("The policies before us today can best be understood by reference to the history of federal efforts to promote minority participation in the broadcasting industry. . . . The Commission has recognized that . . . [u]nless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial portion of our citizenry will remain underserved and the larger, non-minority audience will be deprived of the views of minorities.") (internal quotations omitted).

71 *Id.* at 567-68. ("[W]e conclude that the interest in enhancing broadcast diversity is, at the very least, an important governmental objective and is therefore a sufficient basis for the Commission's minority ownership policies . . . [T]he diversity of views and information on the airwaves serves important First Amendment values.").

72 *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226-27 (1995). In that case, the Court struck down the government incentives designed to increase minority contracting opportunities as unconstitutional because the incentives relied upon racial preferences. *See id.* at 235.

73 *See* Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 354-55 ("Even if *Metro Broadcasting* remained good law in that respect, it held only that the diversity interest was 'important.' . . . . Even the majority in *Metro Broadcasting* who thought the government's interest 'important' must have concluded implicitly that it was not 'compelling'; otherwise, it is unlikely that the majority would have adopted a wholly new equal protection standard to decide the case as it did. After carefully analyzing *Metro Broadcasting*'s opinions and considering the impact of *Adarand*, it is impossible to conclude that the government's interest, no matter how articulated, is a compelling one.").

74 *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) ("In summary, the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.").

policy of giving minorities a higher chance of acceptance based on their race, finding that "student body diversity is a compelling state interest that can justify the use of race in university admissions."[75] The Court also found that the admissions policy was narrowly tailored because (1) the law school had considered race-neutral alternatives and found that policies that explicitly relied on race were the only way to resolve the issue, (2) the law school had considered individualized merits of each applicant and not just considered the applicant's race, and (3) the policy was limited in duration as opposed to open-ended with no clear goals.[76] As remarkable as the *Grutter* case is, it does not provide sure footing for the FCC's affirmative action policies to withstand strict scrutiny,[77] especially considering the narrow tailoring requirement. As discussed below in Part III, the FCC's diversity policies tend to be quite vague and open-ended.

As for the second rationale behind affirmative action, the Supreme Court has upheld the government's use of racial classifications when a government actor seeks to remedy past discrimination. In *Adarand*, the Supreme Court stated that government is "not disqualified from acting" to remedy "the practice and the lingering effects of racial discrimination against minority groups in this country."[78] However, government actors cannot pre-emptively start "remedying" discrimination.[79] To survive strict scrutiny, the

75 *See id.* at 325.

76 *See id.* at 340-43 ("We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission . . . . We agree that, in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants . . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

77 *See* Leonard M. Baynes, *Making the Case for a Compelling Governmental Interest and Re-establishing FCC Affirmative Action Programs for Broadcast Licensing*, 57 RUTGERS L. REV. 235, 252 (2004) ("It is uncertain whether the Supreme Court ultimately will decide that the diversity rationale affirmed in *Metro Broadcasting* should be reaffirmed as a compelling governmental interest for the FCC's current licensing regime.").

78 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.").

79 Richmond v. J. A. Croson Co., 488 U.S. 469, 497 (1989) ("He indicated that for the governmental interest in remedying past discrimination to be triggered 'judicial, legislative, or administrative findings of constitutional or statutory violations' must be made. Only then does the government have a compelling interest in favoring one race over another.") (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307-09 (1978)).

governmental actor must show "a strong basis in evidence for its conclusion that remedial action is necessary."[80] The government may not simply rely upon the desire to include more minorities or rely upon the general "history of discrimination in society at large."[81] Rather, the government must show that it is remedying either its own discrimination, or it is remedying private discrimination in which the government has become a "passive participant."[82] Furthermore, a governmental actor must "possess evidence that [its] own . . . practices are exacerbating a pattern of prior discrimination," and "must identify that discrimination, public or private, with some specificity," in order to justify race-conscious relief.[83]

The FCC has attempted to use this remedial rationale in the past when it put forth several affirmative action policies to promote Equal Employment Opportunity and minority media ownership; however, most of these policies have been struck down in the courts or otherwise discontinued.[84] The FCC began promulgating EEO policies during the wave of the Civil Rights Movement in the 1960s.[85] The FCC created EEO regulations that prohibited discriminatory hiring practices and instructed broadcasters to

80 *Croson*, 488 U.S. at 500 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (plurality opinion)).

81 *Id.* at 496-97.

82 *Id.* at 492.

83 *Id.* at 504.

84 *See* Honig, *supra* note 46, at 49-50 ("[M]odest 1970s-era policies to advance minority ownership have been revoked, repealed, eviscerated, or overruled, only to have the FCC fail or refuse to develop replacement policies. . . .

[T]he FCC adopted broadcast, cable, and common carrier EEO rules in the 1970s-then almost always proceeded not to enforce them. What slight EEO enforcement the FCC undertook in the 1990s died in 2001, leading to a purge of almost all minorities from English language radio journalism.").

85 *See* Commissioners Statements Concerning Commission Action of October 27, 1972, on Pennsylvania and Delaware Broadcasting Stations Renewals, 38 F.C.C.2d 158, 158 (1972) ("Some four years after the enactment of the Civil Rights Act of 1964, the Federal Communications Commission promulgated equal employment opportunity regulations of broadcasters. Nondiscrimination Employment Practices of Broadcast Licensees, 13 FCC 2d 766 (1968); Nondiscrimination Employment Practices of Broadcast Licensees, 18 FCC 2d 240 (1969); Nondiscrimination Employment Practices of Broadcast Licensees, 23 FCC 2d 430 (1970)."). *See also* Hunter, *supra* note 50, at 92 ("Equal Employment Opportunity regulations (EEO) within the broadcasting industry were created as a result of the Civil Rights Movement. The Movement brought to the forefront the mistreatment of minorities, in particular African Americans, in the United States. In 1964, President Lyndon Johnson issued an Executive Order requiring an Equal Employment Opportunity clause in all federal contracts. The FCC determined that employment discrimination against minority groups went against the broadcasters' mandate to serve communities in the public interest.") (internal citations omitted).

proactively recruit from minority and women's organizations.[86] These regulations were somewhat successful in diversifying the workforce.[87] However, the D.C. Circuit court struck down the broadcaster community outreach requirements as unconstitutional in 2001, leaving only the nondiscrimination-based provisions in place.[88]

The FCC also promulgated policies to boost minority ownership, creating a minority ownership policy in 1978 which put in place a system of minority preferences.[89] One aspect of that system was a tax certificate program that deferred or eliminated the capital gains tax on the sale of media properties to qualifying minority buyers,[90] but the power to enact that policy was repealed by

86 *See* MD/DC/DE Broadcasters Ass'n v. FCC, 236 F.3d 13 (D.C. Cir. 2001) ("The regulations then in effect required all broadcast licensees—both radio and television stations—not only to refrain from invidious discrimination but also to 'establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity and nondiscrimination in every aspect of station employment policy and practice.' 47 C.F.R. § 73.2080(b). The regulations required stations to seek out sources likely to refer female and minority applicants for employment, to track the source of each referral, and to record the race and sex of each applicant and of each person hired."). *See also* Hunter, *supra* note 50, at 94-95 ("By June 4, 1969, the Commission presented an EEO policy that proposed a set of checks and balances to guarantee that employment practices by broadcasters were not discriminatory against people of color. According to the Commission, there were two main objectives for EEO policy: discouraging discriminatory hiring practices and the marketing of programs that address the interests of people of color, women, and the larger community. . . . Additionally, the FCC instructed broadcasters to recruit via minority and women's organizations and to gauge employment profiles based on the availability of people of color and women in the recruiting area.") (internal citations omitted).

87 *See* Honig, *supra* note 46, at 84-85 ("Between 1971 and 1977, minority broadcast employment doubled. . . . [T]he 1970s boost in minority broadcast employment came just in time for the potential dramatic growth in minority ownership that would have been fueled by minority ownership policies in the last three decades if only the FCC had not weakened or abandoned them. It was not to last. EEO enforcement came almost to a halt during the Reagan administration . . . .").

88 *See* MD/DC/DE Broadcasters Ass'n v. FCC, 236 F.3d 13, 21-22 (D.C. Cir. 2001) ("Option B places pressure upon each broadcaster to recruit minorities without a predicate finding that the particular broadcaster discriminated in the past or reasonably could be expected to do so in the future. . . . [S]uch a sweeping requirement is the antithesis of rule narrowly tailored to meet a real problem. . . . Because Option B of the new EEO rule is not narrowly tailored, it does not withstand strict scrutiny, and we hold that it violates the equal protection component of the Due Process Clause of the Fifth Amendment.").

89 *See* Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 979 (1978).

90 *See* Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d at 983 ("[W]e will make use of our authority to grant tax certificates to the text of the note to the assignors or transferors where we find it appropriate to advance our policy of increasing minority ownership."); Allen, *supra* note 33, at 238 ("[The tax certificate policy] allowed media property owners to sell off media properties to qualifying minority buyers while either deferring or altogether avoiding the subsequent capital gains tax on the transactions. This made such sales very attractive and effectively subsidized minority media owners with benefits unavailable to larger conglomerates.").

Congress in 1995 due to concerns that the system was being abused by minorities who acted as middle-men or who were not actively involved in the operations of the media property.[91] The other major program within that system was distress sales where minority station owners were able to purchase stations that either lost their accreditations or went bankrupt for seventy-five percent of the fair market value or less.[92] This program was pre-emptively discontinued in 1995 after the *Adarand* decision, which raised the constitutional equal protection standard from intermediate scrutiny to strict scrutiny.[93] For similar reasons, the FCC could not adopt the quota-based requirements in the diversity MOUs from the 2011 Comcast-NBCU merger as binding and enforceable conditions of the merger license.[94] As mentioned above, doing so would contravene FCC precedent and constitutional principles.[95]

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91 Allen, *supra* note 33, at 238 ("The policy was in effect until 1995 when Congress repealed it. The program was repealed due to concerns that it was being abused by deals either structured so that the sale was to a 'minority owner' who was not actively involved in the management of the station or by using a minority as a middle man to ensure a tax break for the seller; sales executed under either of these conditions obviously failed to accomplish the program's underlying objective of placing minority owners in positions to influence content. Because Congress repealed this measure, the FCC does not possess the authority to reinstate this program without congressional assistance.").

92 *See* Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d at 983 ("Moreover, in order to further encourage broadcasters to seek out minority purchasers, we will permit licensees whose licenses have been designated for revocation hearing, or whose renewal applications have been designated for hearing on basic qualification issues, but before the hearing is initiated, to transfer or assign their licenses at a 'distress sale' price to the text of the note to applicants with a significant minority ownership interest, assuming the proposed assignee or transferee meets our other qualifications."); Allen, *supra* note 33, at 239 ("Minorities also received preference in distress sales, which occurred when a station either lost its accreditations or went bankrupt. Under this program, minority station owners were often able to obtain ownership of a struggling station's license for no more than 75% of the station's actual fair market value. This created considerable incentive for minorities to take on more media ownership responsibilities, while having a sizable portion of the required capital outlay essentially subsidized by the FCC.")

93 *See* Allen, *supra* note 33, at 239 ("Unfortunately, the FCC last attempted to implement [the distress sale policy] in 1995 due to concerns about whether the program would survive heightened constitutional scrutiny.")

94 *See Comcast Corp.*, 26 FCC Rcd. 4238, 4317-18 (2011) ("We also decline to impose the various conditions sought by commenters that would impose quotas on the amount of minority-produced or directed programming that the Applicants must offer on various platforms. . . . [T]he First Amendment, Section 326 of the [Communications] Act, and Commission precedent limit our ability to dictate the programming policies of our licensees."); *see also* Grutter v. Bollinger, 539 U.S. 306, 334 (2003) ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot 'insulate each category of applicants with certain desired qualifications from competition with all other applicants.'") (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978)).

95 *See supra* note 94; *supra* notes 15-17 and accompanying text.

III. DIVERSITY MOUS AND FCC COMPLICITY IN THE PERPETUATION OF RACIAL INEQUITIES

Because the FCC is limited by Fifth Amendment precedent when using race-based affirmative action policies, the agency has largely left issues of racial inequity to be resolved by racial minorities themselves.[96] This, in conjunction with the FCC's current interpretation of its public interest standard under the Communications Act, has contributed to its complicity in upholding market entry barriers and racial inequities for minorities.[97]

Under the Communications Act of 1934, the FCC is bound by Congress to only distribute licenses insofar as applicants can demonstrate that they will promote the public interest.[98] Under this standard, the FCC determines whether granting the license violates the law or FCC rules, or whether it would "substantially frustrat[e] or impair[] the objectives or implementation of the Act or related statutes."[99] The Commission then weighs the "public interest harms of the proposed transaction against any potential public interest benefits."[100] The burden is on the applicants to prove, by a preponderance of the evidence, that the public interest benefits outweigh the public interest harms.[101] If the FCC

96 Allen, *supra* note 33, at 244 ("At this point, the FCC still appears to be clinging gamely to the belief that the broadcasting arena can police itself in accordance with the will of the free market. . . . One explanation for the FCC's reluctance to impose industry regulation centered around advancing minority ownership, particularly on racial or ethnic grounds, is the necessity that any such regulation pass muster under constitutional strict scrutiny.")

97 *See* Smith & Abreu, *supra* note 1, at 611 ("The FCC currently states that its public interest obligations lie in competition, localism and diversity. However, criticism has been launched at the FCC for allowing increased consolidation to occur within the media landscape. . . . As media outlets become consolidated they are seen to promote less diversity among minorities and women, as well as less of a focus on local issues that serve various populations.")

98 *See* 47 U.S.C. § 310(d) (2020); *see also Comcast Corp.*, 26 FCC Rcd. at 4247 ("Pursuant to Section 310(d) of the Act, we must determine whether the proposed assignment and transfer of control of certain licenses and authorizations held and controlled by Comcast and NBCU will serve 'the public interest, convenience, and necessity.'")

99 *See Comcast Corp.*, 26 FCC Rcd. at 4247. ("[W]e must assess whether the proposed transaction complies with the specific provisions of the Act, other applicable statutes, and the Commission's Rules. If the transaction would not violate a statute or rule, the Commission considers whether a grant could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes.")

100 *See id.* ("The Commission then employs a balancing test, weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.")

101 *See id.* ("The Applicants bear the burden of proving, by a preponderance of the

determines that it cannot grant the Application because of the public interest harms, it can either deny the Application, hold a hearing, or impose conditions to remedy the public interest harms.[102]

The FCC has defined this public interest standard to encompass "localism, diversity, and competition" in the context of broadcast media ownership.[103] The FCC does not currently define racial equity as part of its public interest goals or obligations, but instead embeds racial issues as part of its competition and diversity interests—both of which are inadequate strategies to deal with systemic racial inequities. Such loosely held commitments to racial equity lead the FCC to merely accept voluntary diversity commitments when reviewing licenses, which are ineffective and can even perpetuate racial disparities.[104]

A. Competition

The FCC has tried to use its competition interest to address racial inequities in the past by relying upon specific provisions under the Communications Act. For example, under Section 257(a) of the Communications Act, the FCC has a statutory obligation to identify and remove all market entry barriers to competition within the telecommunications industry.[105] The FCC has found that race- and gender-based discrimination can be market entry barriers.[106] Accordingly, Section 257(b) outlines the interests the FCC should consider when eliminating market entry barriers, which include "favoring diversity of media voices, vigorous

evidence, that the proposed transaction, on balance, serves the public interest.")

102 *See id.* at 4249 ("Section 303(r) of the Communications Act authorizes the FCC to prescribe restrictions or conditions, not inconsistent with the law, which may be necessary to carry out the provisions of the Act.")

103 *See* Prometheus Radio Project v. FCC, 373 F.3d 372, 446 (3d Cir. 2004) ("the Commission identified three longstanding policy goals that would continue to guide its ownership rules: diversity, competition, and localism."); Smith & Abreu, *supra* note 1, at 611 ("The FCC currently states that its public interest obligations lie in competition, localism and diversity.")

104 *See generally* Smith & Abreu, *supra* note 1.

105 *See* 47 U.S.C. § 257(a) (2020).

106 *See* In re Sec. 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, 11 FCC Rcd. 6280, 6301-02, 6305-08 (1996) (discussing race- and gender-based market entry barriers, such as difficulty accessing capital, and allowing parties to submit evidence suggesting discrimination based on race or gender).

economic competition, technological advancement, and promotion of the public interest, convenience, and necessity."[107] Additionally, Section 309(j)(4)(D) of the Communications Act requires the FCC 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. . . ."[108] However, the focus on market entry barriers and small business in the past has been largely rendered moot by recent large scale media consolidation.[109]

As the FCC reviews these large-scale mergers, racial inequity issues tend to fall by the wayside in the face of more prominent goals.[110] For example, during the 2011 Comcast-NBCU merger, when the FCC evaluated ESI's public comment alleging that Comcast discriminated against independent, 100% African-American-owned businesses,[111] the FCC focused only on how Comcast discriminated against independently owned businesses because they lacked affiliation with the Comcast brand. The FCC concluded that "the adoption of a non-discrimination [in affiliation] requirement, a condition to make ten channels available to independent programmers over a period of time, and a narrowly tailored neighborhooding requirement" would resolve the discrimination problem.[112] Yet the FCC did not acknowledge race discrimination as a market entry barrier for ESI, nor did it remedy its race-based complaint. Indeed, the FCC felt that the racial discrimination claims were outsourceable to other agencies like the EEOC or could be dealt with privately amongst the involved parties via the diversity

107 47 U.S.C. § 257(b) (2020).

108 47 U.S.C. § 309(j)(4)(D) (2020).

109 *See* Baynes, *supra* note 77, at 5-8 ("The FCC's race-based affirmative action programs have been swept into the vortex of these two parallel, and sometimes conflicting, currents: deregulation leading to increased media consolidation and the Supreme Court's changing and evolving standards for establishing race-based government programs. . . . Consolidation is likely to make it more difficult for small entrepreneurs of color to obtain an FCC license and enter the broadcast market. Due to the media mergers, the station prices have skyrocketed. The often-less capitalized minority firms have a more difficult time competing against group owners and as a consequence are more likely to sell their stations to the group owners.").

110 *See* Smith & Abreu, *supra* note 1, at 611 ("[C]riticism has been launched at the FCC for allowing increased consolidation to occur within the media landscape. . . As media outlets become consolidated they are seen to promote less diversity among minorities and women, as well as less of a focus on local issues that serve various populations.").

111 *See supra* notes 8-11 and accompanying text.

112 *Comcast Corp.*, 26 FCC Rcd. 4238, 4282 (2011).

MOUs.[113] Ignoring its own complicity in upholding race-based market entry barriers, the FCC claimed that it wanted the parties to be free to negotiate and form transactions with each other in the market without the FCC lording over them.[114]

By failing to adequately account for market entry barriers that affect racial minorities (and women), the FCC exacerbates racial inequities. Minority-owned businesses will continue to have difficulty obtaining the capital to build, update, and maintain broadcast facilities and equipment, as well as the capital to hire employees and legal representation, all of which severely impact their ability to obtain a broadcasting license from the FCC.[115] Minorities will continue to own fewer stations and face increasing difficulties in competing with media conglomerates due to the passage of the 1996 Telecommunications Act, which removed the national ownership cap and other regulations that hampered media consolidation.[116] Because of these factors, which are largely ignored by the FCC, promoting a race-neutral idea of free-market competition is an unrealistic pathway to addressing racial inequities.

B. Diversity

Another avenue that the FCC has used to promote racial equity has been through its diversity interest. The FCC has stated that "diversity of information sources and services to the public" is a vital part of its public interest obligation.[117] This vague and largely undefined language has subsumed and watered down racial equity.[118] Under this framework, minority groups often feel

113 *See supra* notes 15-17 and accompanying text. Ultimately, these suggested alternative avenues were not appropriate to ESI's claim. The EEOC was inapplicable to ESI's claim because ESI was not an employee, and there was no enforceable agreement between the parties to privately resolve the matter.

114 *See Comcast Corp.*, 26 FCC Rcd. at 4288-89 ("We intend to evaluate the parties' behavior in the context of the specific facts pertaining to each negotiation. By our actions today, we take measures to prohibit program carriage discrimination while allowing parties the flexibility to engage in good faith, arm's-length transactions.")

115 *See* Baynes, *supra* note 77, at 275 ("A 'cashstrapped' company is less able to attract and maintain top personnel, operate up-to-date facilities, upgrade and maintain state-of-the-art equipment, retain competent attorneys to represent them before the FCC, promote the business to customers, or acquire additional licenses.").

116 *See* Allen, *supra* note 33, at 232.

117 *Comcast Corp.*, 26 FCC Rcd. at 4248 (citing 47 U.S.C. § 521(4) (2020)).

118 *See* Forelle, *supra* note 68, at 3433 ("I find that the FCC has acted as its own worst

that it is their only choice to hide their particular racial concerns and their experiences of discriminatory exclusion behind the vague but broader language of diversity because it can appeal to everyone. In trying to appeal to everyone, minorities become tokenized representations of a very small, and often stereotyped, portion of their communities.[119] A prime example of tokenization is Comcast's argument to the FCC that it was diverse because it had eleven African American channels, even though it had the capacity to carry up to 500 channels.[120] If media conglomerates have a few minority representatives among them, those few minority representatives become a new racial barrier, preventing other minorities from accessing the same opportunities.[121] Nothing displays these issues more prominently than the practice of diversity MOUs.

enemy in failing to provide either an adequate, applicable definition of diversity for researchers and policymakers or a rubric that determines what type of evidence would pass the strict scrutiny standard.").

119 *See* Smith & Abreu, *supra* note 1, at 616 (discussing how race-based interest groups have to appeal to broad interests in order to gain acceptance, which often leaves them powerless and without any form of accountability).

120 *See Comcast Opposition*, *supra* note 12, at 47-48. *Cf. ESI Reply to Comcast Opposition*, *supra* note 11, at 10 (finding Comcast's claim that it carries 11 African American networks misleading); *see also id.* at 10-11 (contending that Comcast's commitment to carry four African American channels is insignificant in light of its capacity to soon carry 500 channels).

121 *See* Hunter, *supra* note 50, at 175 ("Languishing in the diversity ghetto does not only hurt the writer in the position. Dan notes that, 'When you're a staff writer and you're this ethnic minority that qualifies, you're not competing against white people. You're just competing against other brown people.' With one slot reserved for diversity, whether it is a woman or person of color, if the former diversity person is not promoted, this reduces the total number of people of color employed by the networks. Meanwhile, the broadcast networks are still seen as fulfilling their due diligence in trying to bring on diverse candidates because their diversity spots are filled.").

C. Diversity MOUs

There is not much known about the general practice of creating and implementing diversity MOUs within the broadcasting industry, save for a few prominent cases.[122] Information concerning the creation and implementation of these agreements tends to only be known by insiders.[123] As such, this Note will focus mainly on the diversity agreements from the 2011 Comcast-NBCU merger to explore some of the conceptual issues with diversity MOUs generally. The types of promises typically made diversity agreements are reflected in the diversity MOUs propagated during the Comcast merger, which had five main focus areas: (1) corporate governance—the creation of executive and advisory positions for minorities, (2) employment/workforce recruitment and retention, (3) procurement—obtaining services from more minority-owned vendors or firms, (4) programming, and (5) philanthropy and community investments.[124] Although these diversity agreements have resulted in some change, they have not produced the long-term structural improvements that many minorities so desperately need.[125] For the most part, these diversity agreements are nothing more than a weak, loosely defined set of charitable ideals instead of a strong recognition of social responsibility.[126] As they are

122 *See* Geoffrey Starks, Commissioner Geoffrey Starks Statement On T-Mobile Diversity Agreement, (Oct. 17, 2019) https://docs.fcc.gov/public/attachments/DOC-360270A1.pdf (statement from Commissioner Starks opposing the T-Mobile and Sprint merger, but recognizing the value of the diversity MOU); *see also* Hunter, *supra* note 50, at 128-29 (discussing the origins of network agreements that promoted diversity initiatives as arising out of the 1999 NAACP media boycott); *see generally* Smith & Abreu, *supra* note 1 (discussing the outcome of the numerous diversity MOUs in the 2011 Comcast-NBCU merger).

123 *See* Hunter, *supra* note 50, at 205 ("A final improvement to the diversity initiative program would be to establish a more transparent culture within the diversity initiative groups and within the networks. In the process of studying the diversity initiatives, this researcher faced many obstacles in trying to get even basic information about the programs. Whether it was access to the Memorandum of Understanding or information on the programs and its past participants, there was often a road block of silence. Considering the relationships that this researcher has had with people in television and film, it is even more frustrating how secretive the networks chose to be about this process.").

124 *See* Smith & Abreu, *supra* note 1, at 614-15 (discussing the diversity MOUs from the 2011 Comcast Merger).

125 *See* Hunter, *supra* note 50, at 190-97 (discussing the various pitfalls and barriers minority employees still face within the process of the diversity initiatives that were established by the diversity MOUs, including lack of mentorship, diversity stigma, and lack of advancement).

126 *See* Smith & Abreu, *supra* note 1, at 611-12 (discussing the failure of diversity MOUs to provide increased representation for minorities).

purely voluntary commitments and ultimately unattached to the formal obligations of a licensee under FCC regulatory authority, these diversity MOUs often do more harm than good.[127]

One of the primary conceptual issues with diversity MOUs is that they often create internal systems of segregation and stigma within the organization instead of fundamentally restructuring the organization to be more inclusive.[128] One such complaint arising out of the aftermath of the 2011 Comcast-NBCU merger claimed that Comcast seemed to be putting Black businesses through a "Jim Crow-like system" where, instead of having their applications boosted or even having multiple pathways of competing for channel carriage with Comcast, they had to try to snag one of the two remaining diversity slots reserved for African American programming.[129] The complainant, ESN, was directly told that it would have to wait to be part of the "next round of [MOU diversity] considerations" instead of being told how it could improve its application to be considered for any open programming slot.[130] The diversity slots were the *only* way ESN could be considered for carriage, rather than an *additional* way.[131] ESN would also be competing with other businesses that were not even 100% owned and controlled by African Americans, thus, giving ESN an even smaller chance of being carried.[132] ESN ultimately complained that the system created by the diversity MOUs was racially discriminatory because Comcast created segregated pathways for minorities that were inherently unequal to the pathways non-minorities could access.[133]

Another issue with diversity MOUs is that the primary motivation for companies like Comcast to be diverse is for economic gain,

127 *See id.* at 617 ("Despite the [Hispanic Leadership Organization,] HLO's public attempts to hold Comcast accountable to the MOU, no tangible means of enforcing the voluntary commitments existed. This is because the voluntary commitments made in the MOU were just that, voluntary. Only conditions levied by the FCC as part of the merger approval could be enforced.").

128 *See id.* at 619 ("This racialized [labeling] of channels and diversity efforts undermines the public interest obligations of the FCC, and fails Latina/o communities seeking media inclusion."); *see also* Hunter, *supra* note 50, at 166-76 (discussing the stigma of being diverse in the broadcasting industry); Second Amended Complaint, *supra* note 19, at 62a-64a (describing the diversity MOU-based path as a Jim Crow-like system of segregation).

129 *See* Second Amended Complaint, *supra* note 19, at 62a-64a.

130 *Id.* at 62a (alteration in original) (quoting a Comcast executive).

131 *See id.* at 63a.

132 *See id.*

133 *See id.*

not equity and the betterment of the lives of racial minorities. In the scenario of the Comcast merger, this led to the trivializing of minority audiences then, eventually, the abandonment of that group in favor of efforts to attract a broader multi-cultural audience,[134] as well as the use of minorities for economic gain in front of the FCC. Minority groups tried to hold Comcast accountable, but were unable to do so because the agreements were completely voluntary.[135] The agreements came across to the FCC only as charitable acts of goodwill.[136] This was particularly harmful for the Hispanic community because after the merger, there was not a significant increase in diversity behind the camera for Latina/os during the 2014-15 television season; stereotyped portrayals increased in film and television productions; news segments from 2012 to 2014 presented Latina/os as a threat to the U.S.; Latina/o leaders within the company were segregated and paid less; and streaming content through services such as Hulu and Netflix segregated Latina/o talent from traditional media.[137]

Diversity MOUs ultimately end up functioning more like a barrier, rather than a booster, to market entry. The FCC is complicit in the perpetuation of these racial inequities, in violation of its duty under statutory law to make the telecommunications industry accessible to all.[138] The failure of these agreements to bring about meaningful change and the lack of accountability and scrutiny from the FCC bespeaks the need for stronger FCC policy.

134 *See* Smith & Abreu, *supra* note 1 at 618 ("Although at first glance such a shift might seem worthy of praise, past experiences of networks moving from narrowcasting their programming for marginalized groups into the more general (white, middle-class) audience has demonstrated an abandonment of the initial groups the networks were intended to serve.").

135 *See id.* at 617 ("Despite the HLO's public attempts to hold Comcast accountable to the MOU, no tangible means of enforcing the voluntary commitments existed. This is because the voluntary commitments made in the MOU were just that, voluntary. Only conditions levied by the FCC as part of the merger approval could be enforced.").

136 *See id.* ("The MOU served as a key document for FCC commissioners to justify approval. Comcast's voluntary agreements with the HLO signified that Comcast was acting in accord with the public interest through a commitment to diversity efforts. Establishing minority-led channels and programming was enough for Comcast to pass the FCC's public interest threshold regarding 'diversity.'").

137 *Id.* at 619.

138 *See* 47 U.S.C. § 151 (2020), providing that the FCC was created, *inter alia*, "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, nationwide and world-wide wire and radio communication service."

IV. RACIAL EQUITY

The FCC's current interpretation of its public interest mandate is profoundly deficient where racial minorities are concerned because the FCC has failed to recognize racial equity as a core aspect of its public interest standard alongside diversity, localism, and competition. The FCC must ensure minority groups are treated fairly by large media conglomerates and have equal opportunities to engage in the broadcasting and media industries. Although the FCC currently has an EEO antidiscrimination policy that forbids employment practices that discriminate based on protected classes such as race and gender,[139] it does not have such an antidiscrimination policy concerning making and enjoying the benefits of contracts at large.[140] Therefore, the FCC should develop an explicit policy statement that incorporates racial equity within its understanding of its public interest obligations under the Communications Act. The idea is already embedded within many aspects of the Communications Act, as illustrated by the past actions of the FCC and the language of the Act.[141] The concept just needs to be clearly and explicitly defined.

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139 *See* FCC, *EEO Rules and Policies for Radio, Broadcast TV and Non-Broadcast TV*, FCC.gov (December 30, 2019) https://www.fcc.gov/consumers/guides/eeo-rules-and-policies-radio-and-broadcast-and-non-broadcast-tv. ("The FCC has Equal Employment Opportunity (EEO) rules and policies for radio and TV broadcasters and multichannel video programming distributors (MVPDs) . . . [which] prohibit discrimination in hiring on the basis of race, color, religion, national origin or gender by broadcasters and MVPDs.") This process generally does not have any effect on the broadcaster's license because the EEOC takes over the antidiscrimination claim. *See* Curators of the Univ. of Mo., 16 FCC Rcd. 1174, 1178 (2001) (stating that discrimination complaints are normally resolved by the EEOC and/or in court and have little bearing on license renewal applications).

140 *See* Hunter, *supra* note 50, at 195-96 (lamenting "the lack of long-term success of FCC anti-discrimination policy" in light of *Adarand*). The comparison I am making between employment discrimination and contract discrimination is similar to the differences between Title VII and Section 1981. Title VII prohibits race discrimination in employment while Section 1981 more broadly prohibits race discrimination in the making, enforcing, and the enjoyment of the benefits of contracts. *See, e.g.,* 42 U.S.C. § 2000e-2(a)-(b) (2020); 42 U.S.C. § 1981(a)-(b) (2020). Section 1981 is the statute which allowed business owner Byron Allen to file his race discrimination claims against Comcast-NBCU. *See generally* Second Amended Complaint, *supra* note 19 at 34a.

141 *See supra* notes 105-108, discussing the portions of the Communications Act that implicate racial justice issues; *see also* 47 U.S.C. §§ 151, 257, 309; *see also* 47 U.S.C. § 151 (2020), providing that the FCC was created, *inter alia*, "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, nation-wide and world-wide wire and radio communication service."

A. Proposal

Racial equity within the context of the scope of the FCC could be defined as the elimination of race or ethnicity as a barrier to participation and advancement within telecommunications-based industries, like broadcast and media, for example.[142] This would not mean the FCC is responsible for promoting racial quotas.[143] Rather, the FCC would be responsible for promoting the fair and equitable treatment of minorities by removing "market entry barriers" specifically for minorities.[144] Perhaps one of those market entry barriers is the illusory nature of diversity MOUs. Having a policy commitment to promoting racial equity will ensure that the FCC is not complicit in private discrimination and that minorities have the same opportunities to enter into the same good faith negotiations and transactions as the rest of the public.

In so doing, when the FCC conducts merger reviews or reviews applications for licenses, it would explicitly consider issues of racial equity as part of its standard of review. The burden of proof would fall on applicants to prove how they would promote racial equity, rather than on minorities themselves to prove that they faced a specific instance of discrimination. Thus, if the FCC found substantial racial inequities that would be exacerbated by granting the license, it would have to either deny the license, conduct a hearing, or adopt a lawfully permitted remedy that would resolve the racial inequities arising from the transaction.[145] This process allows the FCC to hold private parties responsible for their treatment of racial minorities while avoiding constitutional affirmative action barriers because the FCC would be acting remedially, and

142 *See* ANGELA GLOVER BLACKWELL ET. AL, THE COMPETITIVE ADVANTAGE OF RACIAL EQUITY 2 (October 2017) ("Racial equity is defined as just and fair inclusion into a society in which all people, immaterial of their race or ethnicity, can participate, prosper, and reach their full potential.").

143 *See id.* at 3. ("Advancing racial equity does not mean that everyone will be treated the same, nor that everyone will achieve the same level of success.").

144 This is in reference to Section 257(a) of the Communications Act, in which the FCC has a statutory obligation to identify and remove all market entry barriers generally. *See* 47 U.S.C. § 257 (2020).

145 If the FCC determines that it cannot grant an application because of the public interest harms, it can either deny the application, hold a hearing, or impose conditions to remedy the public interest harms. *See* Comcast Corp., 26 FCC Rcd. 4238, 4247–48, 4249 (2011)("Section 303(r) of the Communications Act authorizes the FCC to prescribe restrictions or conditions, not inconsistent with the law, which may be necessary to carry out the provisions of the Act.").

its remedy will be narrowly tailored to the specific applicant.[146] Additionally, if the FCC announces this general policy of promoting racial equity as falling within its statutory public interest obligation, broadcast networks would be incentivized to be serious in their commitments to minority interest groups, and minorities who are beneficiaries of these agreements could have their claims heard by the FCC instead of being forced to go through the EEOC or to bring their own lawsuit as Byron Allen did.

In order to practically effectuate such a policy, the FCC needs to (1) consider whether the policy falls within the constraints of the Communications Act,[147] (2) support its policy with factual findings,[148] (3) balance the competing interests,[149] and (4) choose the best regulatory tool to address the issue from a range of options.[150] To legally support its policy, the FCC can point to Supreme Court precedent and specific statutory language from the

146 *See* the constitutional standard as applied in Richmond v. J. A. Croson Co., 488 U.S. 469, 497 (1989) ("[F]or the governmental interest in remedying past discrimination to be triggered 'judicial, legislative, or administrative findings of constitutional or statutory violations' must be made. Only then does the government have a compelling interest in favoring one race over another.") (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307-09 (1978)). *See also supra* notes 78-83 and accompanying text, discussing the remedial rationale for affirmative action.

147 *See* National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (discussing the regulatory authority of the FCC under the Communications Act); *see also* CHARLES D. FERRIS & FRANK W. LLOYD, TELECOMMUNICATIONS REGULATION: CABLE, BROADCASTING, SATELLITE, AND THE INTERNET, 1.04(5)(b)(iii) (current through 2020) (explaining how the FCC generally promulgates a new policy).

148 *See* FERRIS & LLOYD, *supra* note 147, at 1.04(5)(b)(iii) ("[T]he FCC must make a factual finding, either from applications and petitions in licensing proceedings or through rulemaking, to determine whether a regulatory action is warranted under the circumstances.").

149 *See* FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981) ("The Commission's implementation of the public-interest standard, when based on a rational weighing of competing policies, is not to be set aside by the Court of Appeals, for 'the weighing of policies under the "public interest" standard is a task that Congress has delegated to the Commission in the first instance.'") (internal citations omitted). In *WNCN Listeners Guild*, the FCC had to weigh the competing values of programming diversity and format innovation. *Id.*; *see also* FERRIS & LLOYD, *supra* note 147, at 1.04(5)(b)(iii) ("[T]he FCC must weigh the competing interests and to fashion a policy which, in the agency's estimation, will most effectively promote the public interest. This balancing process necessarily involves trade-offs between interests that are recognized as valid public interest concerns. Faced with this choice, the FCC must normally seek a balance that secures the greatest good for the greatest number of consumers.").

150 Although the FCC usually relies on rulemaking to create industry-wide changes, the FCC has a great deal of procedural flexibility in adjudications. It may grant a license for a temporary period instead of a full term, approve a license conditionally, or modify the terms of a license. *See* 47 U.S.C. §§ 303, 309, 316 (2020).

Communications Act, as discussed previously in Parts II[151] and III[152] of this Note, that show that the FCC has a compelling government interest in promoting racial equity within telecommunication-based industries.[153] To support this compelling government interest with factual findings, the FCC could make specific determinations during licensing proceedings, conduct investigations with regard to certain practices like the diversity MOUs or, perhaps, even conduct hearings or public inquiry.[154] Then, the FCC would balance its compelling interest in promoting racial equity with competing private interests when it incorporates racial equity considerations into its standard of review, much like it has already incorporated localism, competition, and diversity into the public interest standard.[155]

Finally, the FCC would choose the best regulatory tool to address any racial inequities from a range of options. Most of the regulatory tools the FCC would normally use, such as rulemaking, would have trouble withstanding the *Adarand* standard of strict scrutiny.[156] However, the racial equity rationale would likely suffice under this standard because such an adjudicatory framework merely ensures that the FCC is not a passive participant in systems of private discrimination by putting the burden on private parties to demonstrate their fitness to be entrusted with a finite

151 *See supra* Part II (discussing the Supreme Court precedent). *See also* Richmond v. J. A. Croson Co., 488 U.S. 469, 497 (1989).

152 *See supra* Part III (discussing the specific statutory language). *See also* 47 U.S.C. §§ 151, 257, 309.

153 *See supra* notes 105-108, discussing the portions of the Communications Act that implicate racial justice issues. *See also* 47 U.S.C. § 151 (2020), providing that the FCC was created, *inter alia*, "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, nation-wide and world-wide wire and radio communication service."

154 *See* FERRIS & LLOYD, *supra* note 147, at 1.04(5)(b)(iii) ("[T]he FCC must make a factual finding, either from applications and petitions in licensing proceedings or through rulemaking, to determine whether a regulatory action is warranted under the circumstances.").

155 *See* Prometheus Radio Project v. FCC, 373 F.3d 372, 446 (3d Cir. 2004) ("[T]he Commission identified three longstanding policy goals that would continue to guide its ownership rules: diversity, competition, and localism."); *see also* Smith & Abreu, *supra* note 1, at 611 ("The FCC currently states that its public interest obligations lie in competition, localism and diversity.").

156 *See supra* Part II, discussing the *Adarand* standard and the FCC's past affirmative action policies.

government resource.[157] If there is any state action at all,[158] the FCC would be taking remedial action, which is already permitted under Equal Protection precedent and under the Communications Act.[159]

B. Challenges

The solution proposed is not without its potential problems. Some argue that the FCC should not use the license application process to elicit concessions or coerce private parties into agreements that have nothing to do with explicit violations of FCC rules.[160] They think running around the rulemaking process would violate Congressional intent and the Constitution.[161] They

157 *See* Richmond v. J. A. Croson Co., 488 U.S. 469, 492 (1989) ("[I]f the [government] could show that it had essentially become a 'passive participant' in a system of racial exclusion . . . we think it clear that the [government] could take affirmative steps to dismantle such a system.").

158 For an in-depth historical discussion of the FCC's interpretation of the state action doctrine, *see generally*, Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. R. 799 (2010) (describing the creative ways the FCC has interpreted Fifth Amendment equal protection precedent over the years to promote equitable opportunities for women and racial minorities).

159 *See J.A. Croson Co.*, 488 U.S. at 497 ("[F]or the governmental interest in remedying past discrimination to be triggered 'judicial, legislative, or administrative findings of constitutional or statutory violations' must be made. Only then does the government have a compelling interest in favoring one race over another.") (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 308-09). Under its statutory authority, the FCC can remedy public interest harms by either denying license applications, holding a hearing, or imposing conditions. *See, e.g.,* Comcast Corp., 26 FCC Rcd. 4238, 4249 (2011) ("Section 303(r) of the Communications Act authorizes the FCC to prescribe restrictions or conditions, not inconsistent with the law, which may be necessary to carry out the provisions of the Act.").

160 *See* Christopher S. Yoo, *Merger Review by the Federal Communications Commission: Comcast-NBC Universal*, 45 REV. IND. ORG. 295, 318 (2014) ("[T]he FCC was able to use its role to extract concessions from the merging parties that had nothing to do with the merger and which were more properly addressed through general rulemaking."); Gwen Lisa Shaffer & Scott Jordan, *Classic conditioning: the FCC's use of merger conditions to advance policy goals*, 35 MEDIA, CULTURE & SOCIETY 392, 392 (2013) ("In fact, the FCC may negotiate with companies under review to extract conditions that have minimal connection to actual concerns surrounding the transaction, and that circumvent established policymaking processes."); Brent Skorup & Christopher Koopman, *The FCC's Transaction Reviews and First Amendment Risks*, 39 HARV. J.L. & PUB. POL'Y 675, 693 (2016) ("Under existing law, the FCC can . . . require more racial minority . . . programming on broadcast TV and radio through rulemaking. It is also permissible for the FCC to promulgate modest regulations about industry composition if intended to in-increase viewpoint diversity in broadcast and cable TV. Yet, today, the FCC is wary of formal mandates because they bring unwanted congressional attention, irritate media companies, and provoke public complaints of censorship. In ways consistent with the empire building model, the agency uses opaque, coercive pressures that end in ostensibly voluntary commitments, thereby avoiding headline risk while allowing the agency to take credit for any public benefits.").

161 *See* Skorup & Koopman, *supra* note 160, at 678 ("'Informal enforcement . . . cloaks

are also concerned about FCC decision-making evading judicial review and becoming too arbitrary and politicized.[162] However, many of the theoretical concerns misunderstand the role of the FCC. The FCC is not obligated to provide broadcast licenses to anyone.[163] The FCC is merely permitted to provide licenses under the Communications Act if it is within the public interest.[164] The affirmative burden of proof has always been on each applicant to demonstrate that its application promotes those public interests.[165] If anything, this policy would reign in the FCC's past muddled standards with regard to racial equity and its reliance upon illusory promises and instead incentivize the FCC to offer a clearer articulation of FCC decision-making that can be judicially scrutinized.

i. First Amendment Concerns

Under the First Amendment, the FCC is not permitted to tell private broadcast stations what programming they must offer, nor may the FCC impose on private parties its own ideas of what is best for the public to hear.[166] In this vein, some may argue that

what is in reality state action in the guise of private choice,' and such 'regulation by transaction' has far-reaching legal and constitutional effects. . . . These circumstances eviscerate norms of good governance and the rule of law and may also be unconstitutional because of the amount of discretion that the FCC has over speakers.").

162 *See* Shaffer & Jordan, *supra* note 160, at 392 ("Critics also assert that by engaging in closed-door negotiations and 'arm-twisting,' the FCC is able to evade judicial scrutiny—partially because companies in regulated industries fear repercussions if they challenge agency demands.") (internal citations omitted); *see also* Skorup & Koopman, *supra* note 160, at 700 ("[T]he current standard . . . is a grab bag of economic, social, political, and personal goals of individuals within the agency and in advocacy groups . . . [instead of] one that focuses on the actual competitive effects of a proposed merger.").

163 *See* Yoo, *supra* note 160, at 311-12 ("[B]roadcast license transfers require the affirmative authorization of the FCC. Moreover, . . . FCC merger review places the burden on the merging parties to show that the merger would create affirmative benefits. . . . The FCC . . . can unilaterally prevent a merger from proceeding simply by doing nothing.")

164 *See* 47 U.S.C. § 310(d) (2020).

165 *See* Comcast Corp., 26 FCC Rcd. 4238, 4247-48 (2011)("The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.").

166 *See id.* at 4307 ("The FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations; for although the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.") (citing Turner Broad. Sys. Inc. v. U.S., 512 U.S. 622, 650 (1994)) (internal quotations omitted.).

strong-arming the FCC's notion of racial equity on private companies infringes private companies' freedom of speech.[167] However, courts have consistently rejected First Amendment challenges to FCC regulations, emphasizing that the FCC actually has a First Amendment interest in promoting diversity.[168] In addition, Congress explicitly gave the FCC the authority under the Communications Act to make the telecommunications industry accessible to the public regardless of race.[169] Yet, the FCC is not currently ensuring that this form of access and equity actually takes place.[170]

Because of the consolidation of power made possible by the deregulation of the broadcasting industry under the Telecommunications Act of 1996, minority groups are largely unable to enter

167 *See* Skorup & Koopman, *supra* note 160, at 694-96 ("The problem of coercion arises . . . with the FCC's coercive power in transaction reviews. Hortatory language about diverse viewpoints and local news transform into something more pernicious for a free media, and media companies are increasingly cooperating to satisfy their regulator's whims, including decisions related to content. . . . Most readers likely sense that these circumstances represent a First Amendment violation and predictably chill the free exercise of speech. They would be correct.")

168 *See Comcast Corp.*, 26 FCC Rcd. at 4316 ("Diversity is one of the guiding principles of the Commission's broadcast ownership policies. It advances the values of the First Amendment, which, as the Supreme Court has stated, '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."); Second Amended Complaint, *supra* note 19, at 45a-46a ("Both Congress and the Supreme Court . . . have repeatedly emphasized that a diversity of voices and viewpoints in the media advances First Amendment values and, thus, is quintessentially in the public interest and to be encouraged. [T]he Third Circuit Court of Appeal recently held that the FCC 'has a statutory obligation to promote minority and female broadcast ownership.'") (internal citation omitted); Metro Broad. v. FCC, 497 U.S. 547, 568 (1990) (*overruled in part on other grounds by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995))("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."); Prometheus Radio Project v. FCC, 373 F.3d 372, 399-402 (3d Cir. 2004) (finding that the FCC's interest in promoting diversity and means of using ownership rules was sufficient to withstand a First Amendment challenge); FCC v. WNCN Listeners Guild, 450 U.S. 582, 604 (1981) (finding that the FCC's policy statement does not violate the First Amendment). *See generally*, Associated Press v. United States, 326 U.S. 1 (1945); Turner Broad. Sys. v. FCC, 520 U.S. 180 (1997); Nat'l Citizens Comm. for Broad. v. FCC, 436 U.S. 775 (1978).

169 *See* 47 U.S.C. § 151 (2020), providing that the FCC was created, *inter alia*, "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, nation-wide and world-wide wire and radio communication service . . . ."

170 *See* Honig, *supra* note 46, at 47 ("The first sentence of the Communications Act expressly provides for the FCC's administration of the spectrum 'without discrimination on the basis of race, color, religion, national origin, or sex.' Yet, this powerful non-discrimination provision is not self-executing. And to the nation's shame, this provision has never been executed.").

and compete in the marketplace.[171] They are instead completely reliant upon the goodwill of media conglomerates as well as the enforcement power of the FCC to ensure that goodwill actually manifests. Unfortunately, the FCC is currently abdicating this responsibility. When those concerned about the "treatment of minority and other groups" voiced their concerns about Comcast-NBCU's lack of goodwill concerning diversity and racial equity issues, the FCC justified Comcast-NBCU's behavior by blindly trusting "good faith" negotiations and transactions that are largely in control of media conglomerates like Comcast-NBCU in the first place.[172] Notwithstanding the freedoms private companies have under the First Amendment to choose what types of business transactions they undertake, the FCC cannot allow merging parties who substantially control the market to systemically deny minorities the opportunity to enter the market. Instead, the FCC should hold those merging companies strictly accountable for their behavior towards minority groups every time the FCC reviews a merger.

171 *See* Millar, *supra* note 60, at 321 ("Many minority-owned and -formatted broadcasters attribute their difficulties competing with popular format stations to government efforts to deregulate, claiming that the deregulation intended to help the market actually hinders minority broadcasters. These broadcasters argue that efforts to allow the market to determine certain outcomes have made the practice of advertising discrimination more visible by taking away certain market-imposed incentives given to minority licensees that previously evened out the playing field. Two specific actions are the consolidation changes imposed by the 1996 Act and the elimination of the minority tax credit. Both programs once counterbalanced the effects of advertising discrimination. In their absence, minority broadcast stations find it more difficult to compete.").

172 *See Comcast Corp*., 26 FCC Rcd. at 4289, 4317 ("By our actions today, we take measures to prohibit program carriage discrimination while allowing parties the flexibility to engage in good faith, arm's-length transactions. . . . We note that many of the Applicants' other commitments under the Hispanic, Asian American and African American MOUs . . . are intended to address concerns raised by commenters regarding the treatment of minority and other groups by Comcast and NBCU. . . . We . . . decline to impose the various conditions sought by commenters that would impose quotas on the amount of minority-produced or directed programming that the Applicants must offer on various platforms.").

ii. Not Subject to Scrutiny via Public Comment or Judicial Review

To some, the FCC's use of the public interest standard, particularly in the license review process, seems arbitrary and evasive, and thus, the FCC should be held only to objectives that were explicitly stated within the communications statute instead of implementing its own political policy agenda.[173] They argue that because voluntary commitments do not constitute official agency action, they are not subject to public participation and judicial review, which is dangerous for democracy.[174]

This criticism might be apt with regard to other political policy goals of the FCC, but not to the goal of promoting racial equity. Racial equity is not political. Racial equity is about providing access to a certain portion of the population to whom it has been systemically denied, not providing some sort of special benefit or validating a particular political preference to which public comment and judicial scrutiny would be most relevant. If anything, this proposal clarifies the vague stance that the FCC has taken with protecting minority interests under a diversity- or competition-based rationale and would hold up better under judicial scrutiny.

173 *See* Bryan N. Tramont, *Too Much Power, Too Little Restraint: How the FCC Expands Its Reach Through Unenforceable and Unwieldy "Voluntary" Agreements*, 53 FED. COMMC'N L. J. 49, 50 (2000) ("When the Federal Communications Commission ('FCC' or 'Commission') breaks free of the limitations imposed by the law, the Commission's leadership sets its own course. . . . [T]he Commission seems to capitalize on these situations to achieve goals that would not be attainable through traditional policymaking. The result is a far-reaching, unenforceable, opaque and ultimately arbitrary policy and process that undermines both the Commission's standing and the public interest. . . . [A]n agency should never act beyond its jurisdiction—even when it may 'get away with it'—because it detracts from its statutorily defined mission . . . .").

174 *See* Yoo*, supra* note 160, at 313 ("Because merger commitments are supposedly voluntary, they are not the action of the agency and need not be open to public comment or backed by a reasoned justification. . . . To the extent that commitments are regarded as voluntary, they are not agency action and thus escape judicial review altogether."); *see also* Michael Farr, *Brace Yourself, Voluntary Commitments Are Coming: An Analysis of the FCC's Transaction Review*, 70 FED. COMMC'N L. J. 237, 240 (2018) (discussing FCC overreach and the danger of voluntary commitments with regard to judicial review).

iii. Rulemaking Process Instead of Review Process

Some object to the FCC's recent habit of implementing its policy goals through license review pressures instead of creating formal rules that have concrete legal boundaries and procedures.[175] They fear that the FCC may be strong-arming parties without concrete and transparent legal backing.[176] Others also fear that the FCC may use pressure during license review to elicit "voluntary agreements" or other concessions from desperate applicants that have been struck down in the rulemaking process.[177] While these are all valid concerns, they are a result of the flexible public interest standard provided by Congress and not necessarily any wrongdoing by the FCC, particularly with regard to racial equity. If anything, the FCC has been the most hesitant and cautious when dealing with race-based issues because the *Adarand* standard is looming over its head.[178]

Rulemaking is generally too broad on its own to address the vast racial disparities and challenges that minorities face when entering the broadcasting market. Plus, as explained above, under the Fifth Amendment to the Constitution, the FCC's race-based rules have to be narrowly tailored to resolve a particular short-term problem in order to survive strict scrutiny.[179] The FCC's general

175 *See* Skorup & Koopman, *supra* note 160, at 677 ("Not much has changed in the fifteen years since Bryan Tramont, then-Legal Advisor to Commissioner Harold Furchtgott-Roth, wrote that 'procedural loopholes and circumstance create opportunities for the Commission to operate free of the discipline imposed by the statute and administrative procedure' during license transfer approvals and consent decrees.").

176 *See id.* ("If anything, the problem may be becoming more severe and getting far worse. Scholars criticize lawmakers for the jawboning—a term for informal regulation and threats using dubious legal authority—of Internet and media companies outside of transparent regulation.").

177 *See* Tramont, *supra* note 173, at 55 n.17 ("The Commission uses the indirect 'voluntary' conditions path to achieve policy goals it cannot obtain directly. Such back-door tactics have troubled courts.") (citing Natural Res. Def. Council, Inc. v. EPA, 683 F.2d 752, 763 n.23 (D.C. Cir. 1982)).

178 Hunter, *supra* note 50, at 195 ("*Adarand Constructors, Inc. v. Pena*, however, muted most of the EEO policy established by the FCC because the Courts required policy that satisfied strict scrutiny. This increased scrutiny has hampered the FCC's EEO policy to this day. The lack of long-term success of FCC anti-discrimination policy has foreshadowed any issues that broadcasting networks likely had in establishing a program targeting a diverse population.").

179 *See* MD/DC/DE Broadcasters Ass'n v. FCC, 236 F.3d 13, 20 (D.C. Cir. 2001) ("For a government action to withstand strict scrutiny it must 'serve a compelling governmental interest, and must be narrowly tailored to further that interest.'") (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995)).

rulemaking powers do not typically fall within that scope.[180] In fact, the FCC's past affirmative action policies were generally all struck down for that very reason.[181] Thus, it is easier for the FCC to outsource problems that it cannot solve directly by shifting the burden onto private parties to engage in private agreements, relationships, and dialogue with minorities.

This burden-shifting and outsourcing process would work best if the FCC closely monitored the efficacy of those agreements based on its explicit commitment to racial equity. If private parties can make agreements with minorities that can change with the wind or are never adhered to at all, then the problem of racial inequity is left completely unresolved. Therefore, because the FCC cannot use rulemaking to impose a direct singular solution to fix the vast spectrum of racial inequity problems, the FCC must acknowledge its responsibility to apply pressure where necessary to hold private parties accountable for their treatment of racial minorities. Even if it cannot adopt voluntary agreements like diversity MOUs as binding conditions of merger licenses, the FCC can still shift the burden onto licensees to prove that these agreements are equitable and can still put into place procedures that allow public dissenters like Byron Allen to have their claims heard and taken seriously by the FCC.

180 *See, e.g., id.* at 15-16 (striking down the FCC's EEO regulations as unconstitutional because the FCC's policy of placing pressure upon broadcasters to recruit minority candidates was not narrowly tailored to support a compelling governmental interest); *Lutheran Church-Missouri Synod*, 141 F.3d at 355-56 (striking down the FCC's EEO regulations as unconstitutional because its rationale, promoting "diversity of programming," was not a compelling governmental justification and because the EEO policies were not narrowly tailored nor were they substantially related to the FCC's goal.).

181 *See* Honig, *supra* note 46, at 49-50 ("[M]odest 1970s-era policies to advance minority ownership have been revoked, repealed, eviscerated, or overruled, only to have the FCC fail or refuse to develop replacement policies. . . .

[T]he FCC adopted broadcast, cable, and common carrier EEO rules in the 1970s—then almost always proceeded not to enforce them. What slight EEO enforcement the FCC undertook in the 1990s died in 2001, leading to a purge of almost all minorities from English language radio journalism.").

CONCLUSION

Racial inequities in media ownership, contracting, and hiring and employment practices within the broadcast industry are directly tied to the FCC's policy of promoting the public interest. Because the FCC must meet the high burden of strict scrutiny to promote racial equity through rulemaking procedures, it merely accepts voluntary commitments when reviewing mergers, which are largely ineffective and are a barrier in fighting for true racial equality. The FCC would better-promote the interest of minorities by creating a more clear standard of review that explicitly promotes racial equity as a public interest objective. Doing so would allow the FCC to explore a variety of private mechanisms to address racial inequities and give a stronger articulation of the government's interest that just may well withstand judicial scrutiny. Even if the FCC took no remedial measures under this policy, if it incorporated racial equity into its standard of review during license review, it would pressure broadcast networks to affirmatively prove how they are committed to promoting racial equity instead of resorting to window dressing, it would allow adversely impacted individuals to file complaints, and it would vindicate the harms that are perpetuated under the current MOU process. By the FCC holding media conglomerates accountable, Black Americans will finally have a fighting chance of having thriving businesses and transactions within the media and broadcasting industries.