No. 24-60407

In the United States Court of Appeals for the Fifth Circuit

THEDOVE MEDIA, INCORPORATED,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of the Federal Communications Commission

PETITIONER'S REPLY BRIEF

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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INTRODUCTION

In its Opening Brief, theDove identified all the statutory bases on which the FCC relied to issue the Order and detailed why none of those statutes authorizes the FCC to require broadcasters to prepare and publish diversity scorecards. In response, the FCC mostly ignores those statutes and their limited application, instead asserting a broad power to define a "public interest" untethered from the FCC's statutory charge to ensure widely available communications services. This argument—especially after the demise of the *Chevron* doctrine—cannot be sustained. Even when the FCC does discuss individual statutes, it asks the Court to adopt sweeping, atextual readings; so that, for example, a statute expressly allowing the FCC to collect EEO information from *cable companies* somehow shows that Congress implicitly authorized the FCC to collect this information from anyone. To the extent the FCC correctly interprets these statutes—that is, to the extent the Communications Act provides no limiting principle to cabin the FCC's power to act in the public interest—the Communications Act violates the nondelegation doctrine.

Further, even if the FCC was authorized to issue the Order, it is still unconstitutional. The Order on its face requires broadcasters to dis-

tinguish employees on the bases of race and sex (as the FCC continually redefines). This mandate violates both the First Amendment's right against compelled speech and the Constitution's guarantee of equal protection. And by requiring publication of the race/sex scorecards, the FCC unconstitutionally seeks to impose indirectly—workplace diversity—what it is precluded from imposing directly.

The Court should grant theDove's Petition.

ARGUMENT

I. This Court may consider theDove's Petition

The FCC doesn't dispute that theDove has established Article III standing. *See* Op. Br. 20-21 (explaining that FCC's Order harms theDove and that a favorable judgment would redress the harm). Therefore, this Court may consider theDove's challenges under any of the following bases: the Hobbs Act; the *ultra vires* exception recognized most recently in *Texas v. NRC*, 78 F.4th 827 (5th Cir. 2023), or *Leedom v. Kyne*, 358 U.S. 184 (1958). *See* Op. Br. 21-23.

Under the Hobbs Act, there is no dispute that theDove is "aggrieved" by the FCC's Order. 28 U.S.C. § 2344. The FCC argues that theDove is not a "*party* aggrieved," *id.* (emphasis added), because theDove did not *directly* participate in the underlying proceedings. *See* FCC Br.

17-19. This Court's latest decision on the question is not so strict. *See NRC*, 78 F.4th ("[T]he plain text of the Hobbs Act requires only that a petitioner have participated—in some way—in the agency proceedings."). Here, theDove participated through its membership in the National Religious Broadcasters Association and Oregon Broadcaster Association. *See* Op. Br. 22.[1]

Regardless, the harsh result that would follow the FCC's argument is ultimately irrelevant due to this Court's *ultra vires* exception to the "party aggrieved" requirement.[2] Under this exception, a court may con-

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[1] theDove submits a Supplemental Declaration (*see* ¶¶5-6) to respond to the FCC's question (FCC Br. 19 n.4) whether theDove was an NRB or OBA member when they made submissions.

theDove reserves the right to challenge a strict interpretation of "party aggrieved" as it applies to rulemaking proceedings, as such a rule would clash with the general presumption of judicial review of agency action and prejudice smaller businesses lacking the wherewithal to flyspeck the Federal Register.

[2] The Court may also proceed under *Leedom v. Kyne*, which allows courts "to strike down an order . . . made in excess of its delegated powers," because "[i]f the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control." 358 U.S. at 188, 190. The FCC (Br. 19 n.5) argues that *Kyne* doesn't apply here because the Hobbs Act provides theDove with other means to protect its rights. But that claim can't be squared with its argument that the Hobbs Act precludes theDove's Petition.

sider a petition in two circumstances: (1) when "the agency action is 'attacked as exceeding [its] power'" or (2) where the petitioner "challenges the constitutionality of the statute conferring authority on the agency." *NRC*, 78 F.4th at 839 (cleaned up); *see also Am. Trucking Ass'ns v. ICC*, 673 F.2d 82, 85 n.4 (5th Cir. 1982) (same) (citing *inter alia* 3 K. Davis, Administrative Law Treatise § 22.08, at 240). theDove's Petition easily qualifies: It attacks the FCC's extra-statutory power and challenges the constitutionality of the authority-conferring statutes. *See* Op. Br. 23-61.

In response, the FCC skips ahead to the merits. It argues that theDove cannot attack the Order as exceeding the FCC's power on the ground that the FCC has properly exercised its power. FCC Br. 20-21. But the question here is not whether theDove's challenge will ultimately succeed. The question is whether the FCC "action is attacked as exceeding its power." *NRC*, 78 F.4th at 839 (cleaned up). And that's just what theDove does here (Op. Br. 25-36), and that's what the FCC responds to (FCC Br. 23-37).

With respect to the second *ultra vires* basis for review—a "challenge[] [to] the constitutionality of the statute conferring authority on the agency," *NRC*, 78 F.4th at 839 (cleaned up)—the FCC says *nothing*.

The FCC also tries to sidestep the *ultra vire*s exception by noting that the Supreme Court is considering it. *See* FCC Br. 20 (citing *NRC v. Texas*, No. 23-1300). But that's no reason for this Court to withhold application of the exception, which "remains good law in this circuit." *NRC*, 78 F.4th at 839 n.3. And the Supreme Court is considering only one of the two bases for the exception.[3] It is not considering whether the *ultra vires* exception allows a petitioner to "challenge[] the constitutionality of the statute conferring authority on the agency." *NRC*, 78 F.4th at 839 (cleaned up).

theDove's Petition is properly before the Court.

II. The Order is beyond the FCC's delegated power

A. The FCC lacks congressional authority to impose Form 395-B

In response to theDove's arguments, the FCC **(1)** claims an effectively unlimited power to adopt any regulation *the agency itself* deems to be in the "public interest"—even if untethered to communications ser-

[3] *See NRC v. Texas*, No. 23-1300, Cert. Petition, 2024 WL 3001980, at *i (U.S. June 12, 2024) (Question Presented 1. "Whether the Hobbs Act, 28 U.S.C. 2341 *et seq.*, which authorizes a 'party aggrieved' by an agency's 'final order' to petition for review in a court of appeals, 28 U.S.C. 2344, allows nonparties to obtain review of claims asserting that an agency order exceeds the agency's statutory authority.").

vices, FCC Br. 23-25; **(2)** downplays the very statutes it cited as authorizing the Order, *id.* 25-27; **(3)** attempts to use its obligation to make reports to Congress as a grant of authority to micromanage broadcasters' businesses, *id.* 30-32; **(4)** claims that its adoption of new definitions and categories doesn't violate 47 U.S.C. § 334(c), which allows only technical changes to Form 395-B (only for TV stations), *id.* 32-37. None of its arguments can be sustained.

1. The FCC's reliance on its "'broad statutory authority to regulate broadcast media' in the public interest" proves too much. FCC Br. 23 (quoting *FCC v. Prometheus Radio Project*, 592 U.S. 414, 418 (2021)). There's no dispute that the FCC may act in the public interest for "the purpose of regulating interstate and foreign commerce in communication by wire and radio" to make available a "rapid, efficient, Nation-wide, and world-wide wire and radio communication service," "so far as possible, to all the people of the United States." 47 U.S.C. § 151 (1934). *See* Op. Br. 5. But the FCC seeks to expand this already broad grant of authority beyond *broadcasting or communications services*.

And it makes a crucial error right off the bat—relying (albeit stealthily) on *Chevron* deference. FCC Br. 23. The FCC claims "an

express delegation of authority" to "elucidate" statutory licensing provisions because of its (purportedly boundless) "public interest" authority. *Id.* (quoting *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 437 (5th Cir. 2021)). But the FCC omits quotation marks and the citation from the *Huawei* decision, which employed *Chevron* deference. *See Huawei*, 2 F.4th at 437 (quoting *Chevron USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984)). As this Court has since recognized, the "task was once different under the now-*ancien régime* that *Chevron* imposed." *Restaurant Law Ctr. v. Dep't of Labor*, 120 F.4th 163, 170 (5th Cir. 2024).

The FCC also omits crucial context from another Supreme Court decision. The Commission quotes *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 793 (1978), which says, the "general rule-making authority [47 U.S.C. § 303(r)] supplies a statutory basis for the Commission to issue regulations codifying its view of the public-interest licensing standard." FCC Br. 32. But it excised the rest of that sentence: "so long as that view is based on consideration of permissible factors and is otherwise reasonable." *Nat'l Citizens Comm. for Broad.*, 436 U.S. at 793. That language is the crux of the dispute here—whether the FCC's claim of virtually unlimited rulemaking authority for the "public interest" is permissible

under the Communications Act. As theDove exhaustively demonstrated, the FCC has no such authority. *See* Op. Br. 25-36.

The FCC (Br. 24-25) turns to the 1992 Cable Act, which by its express terms directs the FCC "not [to] revise . . . the regulations concerning equal employment opportunity as in effect on September 1, 1992 . . . as such regulations apply to television" broadcasters. 47 U.S.C. § 334(a). But the FCC treats Congress's express order *not to revise* as a fount of virtually unlimited authority, and it ignores the law's express limitation to television broadcasters. Thus, the FCC has no support for its illogical assertion that an *express limitation* on EEO regulations for *television* broadcasters is an *implicit grant* of authority to issue EEO regulations for *all* broadcasters.[4]

[4] *See* FCC Br. 25 (citing *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998) (relying on administrative guidance because it is entitled to *Chevron* deference); *CFTC v. Schor*, 478 U.S. 833, 846 (1986) (same)). Further, unlike here, in *Schor* and *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381-82 (1969) (another case cited by the FCC), Congress expressly authorized administrative action. *See Schor*, 478 U.S. at 846 (quoting statute providing, "The Commission may promulgate such rules," etc.); *Red Lion*, 395 U.S. at 380 (emphasizing that an exception to the "fairness doctrine" did not excuse broadcasters "from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance").

Finally, the FCC claims that Congress *in 1992* "directed" it to continue Form 395-B data collection. FCC Br. 24-25 (citing 2000 Order, 15 FCC Rcd 2329, 2342 ¶33); *id.* 27 (citing Order ¶53, JA042-043). If that were so, then the FCC has unlawfully ignored Congress's "direction" for most of the last 30-plus years.

* * *

The FCC's claim of an effectively limitless power to act for an expansive "public interest" unmoored from the Communications Act is wholly without merit.

2. The FCC's reliance on specific statutes fares no better. Here, the FCC complains (Br. 25) that theDove discussed a "lengthy list" of statutes from the Communications Act—47 U.S.C. §§ 151, 154(i) & (k), 155, 301, 303, 307-310, 334, 336, 339, 403. But theDove didn't pick these statutes out of the ether. They were identified *by the FCC* as authorizing the Order. *See* Op. Br. 25-26. But, with a few exceptions discussed below, the FCC doesn't even attempt to rebut theDove's argument (Op. Br. 28-31) that these statutes do not authorize the FCC to issue the Order.

Instead, the FCC changes the subject. It claims (Br. 26) that theDove fails to "meaningfully" grapple with Congress's "affirmative ratifi-

cation" of the FCC's "public interest data collection authority" in the 1992 Cable Act, 47 U.S.C. § 334(a). theDove explained above why the 1992 Cable Act does not "affirmatively" grant the FCC any power. But, regardless, because § 334(a), says nothing about the "public interest," it also says nothing about the FCC's "public interest" power. And decisions from the D.C. Circuit have undermined § 334's diversity rationale.[5]

Finally (FCC Br. 26-27), the FCC fails to explain why Congress's express authorization to collect EEO information from *cable companies*, 47 U.S.C. § 554(d), doesn't doom the FCC's claim of implicit authorization to collect that information from non-cable companies. *See* Op. Br. 32 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it

[5] The FCC's repeated claim to the contrary (FCC Br. 4-6, 26, 33-34, 43) does not withstand scrutiny. The FCC asserts that the D.C. Circuit decisions had nothing to do with Form 395-B data, but the decisions themselves say otherwise. *See MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 18-20 (D.C. Cir. 2001) (striking down FCC requirement that broadcasters design purported "outreach" plan that mandated reports of employees' race and sex); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 351-53, 390 (D.C. Cir. 1998) (invalidating FCC's "entire [EEO] scheme," which was (a) based on reaching "proportional representation" among employees and (b) included reliance on statistics, through Form 395-B, that created risks "not only in attracting the Commission's attention but also that of third parties"); *id.* at 349–50 (observing that detailed reporting requirements give rise to injury).

in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")). Instead, the FCC points, not to any statutory language, but to its own 2000 Order, according to which, § 554's legislative history supposedly "ratified" the FCC's authority to regulate the EEO practices of "mass media entities," broadcast as well as cable. 2000 Order, 15 FCC Rcd at 2341 ¶30; *see* FCC Br. 27 (citing 2000 Order).

Once again, the FCC erroneously asserts power to define "public interest" broadly, based on its own self-serving interpretations.

3. The FCC, addressing some of the statutory arguments ignored before, again fails to support its asserted power. Here, it claims to have "broad" power to collect and report information to Congress. FCC Br. 30-32 (citing Order ¶53 (JA042-043) (citing 47 U.S.C. §§ 154(i), (k), 303(r), 403)); 2000 Order, 15 FCC Rcd at 2358, 2395 ¶¶63, 165). But these statutes do not empower the FCC to demand any information whatsoever no matter how far afield from the agency's statutory remit to ensure widely available communication services. 47 U.S.C. § 151.

And § 403's authorization to collect information is expressly tied to an FCC "inquiry"—as confirmed by the cases cited in the FCC's Brief (at

30). *See FCC v. Schreiber*, 381 U.S. 279, 281 (1965) ("This case had its origin in a subpoena and various orders issued during the course of an investigatory proceeding conducted by the Federal Communications Commission pursuant to § 403 . . . ."); *Stahlman v. FCC*, 126 F.2d 124, 128 (D.C. Cir. 1942) (holding that § 403 permits the FCC to "seek through an investigation of its own making information properly applicable to the legislative standards set up in the [Communications] Act"). Here, the information sought through the Order is not part of any FCC inquiry or investigation—and the FCC points to none in its brief. FCC Br. 31-32. Rather, the Order is a final rule imposing upon broadcasters an ongoing obligation to identify the race(s) and sex(es) of its employees and then provide that information for public dissemination.

Section 403 also says nothing about workplace employment. It authorizes the collection of information related to "the provisions of this chapter," *i.e.*, related to *wire or radio communication* (47 U.S.C., Chapter 5). As the court in *Stahlman* observed, § 403 allows the FCC "to obtain the information *necessary* to discharge its *proper* functions." 126 F.2d at 127 (emphasis added).

Despite these limitations, the FCC claims that collecting employee demographics is necessary to "understand[] 'industry *employment* patterns'" and report those patterns to Congress. FCC Br. 31 (emphasis added). Here, again, the FCC relies on its own 1970 Order (23 F.C.C.2d at 431-32 ¶4). But there, the FCC claimed authority to collect demographic information in furtherance of its unconstitutional racial-proportionality mandate—a purpose far removed from merely monitoring employment trends, which in any event, is not necessary for the FCC to discharge its proper functions.

In sum, §403 itself supports theDove's argument that the FCC does not have the power to define the public's interest as anything the FCC believes to be good for the general public.

4. Lastly, the FCC fails to rebut theDove's argument that the new Form 395-B violates the 1992 Cable Act by making several *substantive* changes unrelated to changes in technology, terminology, or FCC organization. *See* 47 U.S.C. § 334(c) ("The Commission may revise the regulations described in subsection (a) to make nonsubstantive technical or clerical revisions in such regulations as necessary to reflect changes in technology, terminology, or Commission organization."). According to the

FCC, its "racial and job category revisions" did "'not subtract any information,'" but sought "'more detail on race identification and official/manager occupations, with minor changes in terminology.'" FCC Br. 35 (quoting *Commission Proposes Revisions to FCC Forms 395-A and 395-B*, Public Notice, 23 FCC Rcd 13142, 13143 (rel. Aug. 26, 2008)). Of course, a substantive change may come about through addition as well as subtraction; the FCC's decision not to subtract information—alone—does not resolve the question.

More importantly, the FCC is simply incorrect that its changes seek merely "more detail" with only "minor" changes in "terminology." As the-Dove described in detail (Op. Br. 7, 10, 11-12, 14-17), the FCC has made substantive categorical changes—literally redefining and recategorizing "races." Originally (1970), the FCC sought reports on minorities defined as "Negroes, American Indians, Orientals, and Spanish-surnamed Americans." *See* Op. Br. 7. In 1987, its definitions (a) changed "Negroes" to "Blacks not of Hispanic origin;" (b) changed "American Indians" to "American Indians or Alaskan Natives;" and (c) (presumably) changed "Spanish-surnamed Americans" to "Hispanics," and "Orientals" to "Asians or Pacific Islanders." *See* Op. Br. 10.

In 2000, the FCC redefined "race" again, identifying five racial categories ("White, not of Hispanic Origin"; "Black, not of Hispanic Origin"; "Hispanic"; "Asian or Pacific Islander"; and "American Indian or Alaskan Native"). Op. Br. 11-12. The FCC also (a) distinguished people with "origins" in North Africa, from people with "origins" "in any of the black racial groups of Africa"; (b) defined "Hispanic" to include a person of "Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race"; (c) described an "Asian or Pacific Islander"; and (d) defined "American Indian or Alaskan Native" to include a "person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition." *Id.* Further, according to the 2000 Form 395-B, "[m]inority group information necessary for this section may be obtained either by visual surveys of the work force, or from post employment records as to the identity of employees. An employee may be included in the minority group to which she or he appears to belong, or is regarded in the community as belonging." *Id.* 12.

Finally, through the recent change, the FCC identifies six racial categories: Hispanic or Latino; White (Not Hispanic or Latino); Black or

African American (Not Hispanic or Latino); Native Hawaiian or Other Pacific Islander (Not Hispanic or Latino); Asian (Not Hispanic or Latino); and American Indian or Alaska Native (Not Hispanic or Latino). Op. Br. 16. The FCC added a category: Two or More Races (Not Hispanic or Latino). *Id.* These *categorical* changes are, by definition, categorical—not minor changes in terminology. The FCC has no response; instead, it merely asserts that these changes "are authorized." FCC Br. 35.

Similarly, the Commission tries to justify the addition of a new gender category (non-binary) through a non sequitur: that the new category is merely an option, not a new requirement. *Id.* 36-37. But it concedes, as it must, that "non-binary" is a new gender "category." *Id.* 37. Like the substantive changes and additions to its racial definitions and categories, the non-binary category is not a minor change in terminology.

In short, the FCC's substantive changes violate 47 U.S.C. § 334, which authorizes only non-substantive technical changes.

B. If the FCC's statutory interpretations are correct, the statutes violate the nondelegation doctrine

The FCC's cursory attempt to evade the nondelegation doctrine fails. FCC Br. 27-30.[6] It cites, of course, the Supreme Court's decision in *NBC v. FCC*, 319 U.S. 190, 216 (1943), which held that the FCC's rule-making power (47 U.S.C. § 303(r)) is not "so indefinite as to confer an unlimited power," but is tied to "the interest of the listening public in 'the larger and more effective use of radio.'" But the facts of *NBC* demonstrate that the Court's holding is not as broad as the FCC claims. There, the Court considered whether, under the FCC's public-interest authority, the agency could adopt regulations concerning "chain" broadcasting, *i.e.*, the simultaneous broadcasting of an identical program by two or more connected stations. *Id.* at 193-94. The Court did so only in connection with actions related to communications. *See id.* at 216 ("The 'public interest' to be served under the Communications Act is thus the interest of the listening public in 'the larger and more effective use of radio.'") (citation

[6] The FCC claims that the nondelegation argument is barred under 47 U.S.C. § 405(a) because no party raised the issue during the agency's proceeding. FCC Br. 27. But, as explained above, this Court allows challengers to raise constitutional defects even if the challengers didn't participate in the underlying proceeding.

omitted).[7] The Supreme Court did not grant the FCC a limitless authority to take any action that might conceivably further some public interest unconnected to communications.

The FCC's argument only underscores the nondelegation violation. It argues that its authority "encompasses 'a legitimate public interest in collecting Form 395-B data' to facilitate analysis and reporting on broadcast industry *workforce trends*," and comparisons thereof. FCC Br. 29-30 (emphasis added) (quoting Order ¶41, JA036). The FCC's *ipse dixit* fails to show any limiting principle whatsoever. It simply declares workforce data to be a legitimate public interest. But that merely begs the nondelegation question—whether any statute in the Communications Act "sufficiently instructs" the FCC to guide its discretion. *Consumers' Research v. FCC*, 109 F.4th 743, 759-60 (5th Cir. 2024) (en banc), *cert. granted* Nov. 22, 2024 (No. 24-354). If, as the FCC contends, virtually anything is in the public interest, then this Court should hold that the Commu-

[7] Even the Court's more expansive readings of the Communications Act focused on radio. *See id.* at 217 ("The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the [] Commission with comprehensive powers to promote and realize the vast potentialities of radio.").

nications Act does not sufficiently cabin the FCC's discretion and, as such, violates the nondelegation doctrine.

Indeed, the FCC later gives the game away. Attempting to defend against theDove's equal protection challenge, the FCC emphasizes that both "workforce diversity" and "ownership diversity" are "longstanding *FCC policy* goal[s]." FCC Br. 45 n.12 (emphasis added; citation omitted). But as this Court explained, "the most important question in the intelligible principle inquiry is whether Congress, and not the Executive Branch, made the policy judgments." *Consumers' Research*, 109 F.4th at 764 (quoting *Gundy v. United States*, 588 U.S. 128, 166 (2019) (Gorsuch, J., dissenting)) (cleaned up). Because the FCC—not Congress—has established the policy at issue in this case, the Communications Act violates the nondelegation doctrine.[8]

[8] The FCC didn't respond to theDove's alternative argument, namely, that the Court may hold that the FCC has no statutory authority to impose Form 395-B on *radio* broadcasters and that the nondelegation doctrine precludes the FCC from imposing the mandate on *television* broadcasters. *See* Op. Br. 39.

III. The Form 395-B requirement is unconstitutional

The FCC asserts that its 395-B requirement should be subject to no more than rational basis scrutiny, regardless of the Equal Protection and First Amendment concerns raised in the Petition. But the agency's response glosses over or mischaracterizes key elements of theDove's argument.

The Commission makes two main mistakes, which permeate its entire response. First, the FCC asserts throughout that there is no reason to believe that it would ever use the data collected in the 395-B process to pressure broadcasters to change their hiring practices. *See, e.g.*, FCC Br. 45-46. Second, the FCC repeatedly asserts that the FCC's Order is constitutional because other government agencies lawfully collect similar information. *See, e.g.*, *id.* at 37-38, 45-46, 57. Both assertions are critical to the agency's constitutional arguments, and both are false.

First, as the D.C. Circuit emphasized in striking down the FCC's previous attempts to force broadcasters to adopt workplace diversity, the 395-B Form requirement cannot be separated from the FCC's "life and death" power over broadcasters and its "long history" of employing *sub silentio* pressures and "raised eyebrow" regulation. *See MD/DC/DE*, 236

F.3d at 19. The FCC's response simply ignores this history. Instead, the agency tries to claim on the one hand that "workforce diversity" is "critical," while asserting on the other hand that its widespread racial classification and publication regime is for purely educational or informational purposes. This isn't plausible.

Second, that other branches of government collect similar data, through explicit statutory authorization and under careful protections, *undercuts* the FCC's case. As explained above, the FCC has no statutory authority whatsoever to collect and publish racial-classification data from its licensees. But even accepting the FCC's arguments here, the FCC's purpose is at best related to an undefined power to act in the "public interest." The agency cannot show that Congress has specifically authorized the FCC's program; that alone sharply distinguishes the challenged Order from any program the agency cites.

A. The requirement to file and publish Form 395-B violates equal protection

As theDove explained, the FCC's rule classifies on the basis of race—it is not race neutral and therefore must be subject to strict scrutiny. Op. Br. 42-49. The Commission's attempted rebuttals fail for two reasons. First, in the context of a publication requirement and an agency

with a long history of using informal pressure on licensees, a forced racial-classification scheme cannot be dismissed as insignificant and the "mere collection of demographic information." FCC Br. 39-41. Second, the Commission ignores or downplays the record, which makes clear, as Commissioner Carr recognized in dissent, that the "FCC is choosing to publish these scorecard[s] for one and only one reason: to ensure that individual businesses are targeted and pressured into making decisions based on race and gender." Order, p. 52, JA066 (Carr, Comm'r, dissenting). With this record as the background, the FCC's protestations that it is "committed" not to pressure broadcasters with Form 395-B data are empty.

The FCC can't ignore its own history of regulating in this area and the unique context of its authority over broadcasters. In this context, when the agency imposes a literal racial-classification scheme on the industry, without any explicit congressional authorization, strict scrutiny is required.

1. The 395-B Requirement has significant equal protection consequences

The FCC's main argument is that strict scrutiny does not apply because the 395-B requirement is merely "neutral" data collection with no

bearing on race-based outcomes. The FCC asserts that the rule requires nothing more than "collecting" information about race and gender, and that it merely "takes account" of race without mandating "different treatment." FCC Br. 39-43. But this argument is wrong as both a factual and a legal matter.

First, as a factual matter, it isn't true that the 395-B requirement can be treated as a simple collection of racial information. For one thing, it does more than require mere collection of information—it requires the creation of that information, which means it requires that employers must themselves classify by race (and sex). This requirement applies to employers with as few as five employees, who are not covered by any other federal racial-reporting obligation. And, when employees choose not to self-identify, employers must literally generate this information by guessing at their employees' race(s), based on the arbitrary racial categories created by the FCC. Lastly, that information is published online for the world to see. The reality of the 395-B mandate could not be any more different than the FCC's characterization.[9]

[9] A valid collection of information might involve, for example, collecting already existing data, like EEO-1 Reports, where available.

Second, as a legal matter, the FCC significantly downplays the extent to which forced racial classifications have met suspicion in courts. In *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007), the Supreme Court made clear that strict scrutiny is required whenever the government uses race "in a decisionmaking process—whether judicial, legislative, or executive." The existence of "neutral" motives does not negate the constitutional harm of forcing licensees to classify individuals by race and publish those classifications. Indeed, in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995), the Court emphasized that "all racial classifications, imposed by [government], must be analyzed by a reviewing court under strict scrutiny"—even if the government's intentions appear benign. The Supreme Court has never carved out a particular racial classification scheme as immune from strict scrutiny because it has allegedly minor impacts; indeed, the opposite is true. The Supreme Court has long recognized that "the right to be free from racial discrimination is not a matter of degree," *Parents Involved*, 551 U.S. at 748, and that the constitutional violation arises from the classification itself. Part of the reason for that suspicion is the stigma that arises from all forced racial classifications. *See City of Richmond v. J.A.*

Croson Co., 488 U.S. 469, 493 (1989) (noting "[c]lassifications based on race carry a danger of stigmatic harm" and can "lead to a politics of racial hostility"). And the danger here is significant, since the rule requires employees to consider their own classifications, compels employers to make classifications, and ultimately mandates that these classifications be published for the entire world to see.

2. The FCC is using Form 395-B to indirectly accomplish what *Lutheran Church* and *MD/DC/DE* forbade

The FCC next tries to evade strict scrutiny by arguing that it has no intention to use or enforce the data to compel race-based hiring. FCC Br. 43-47. But this runs headlong into the record, and the FCC's own repeated statements on the "critical" importance of workforce diversity and the agency's underlying desire to see it progress. *See, e.g.*, Order ¶¶2, 14, 52, JA016-017, JA022-023, JA041-042. *See also id.* ¶2, JA017 (claiming that collecting this information "is consistent with a broader shift towards greater openness regarding diversity, equity, and inclusion across both corporate America and government"); *id.* at pp. 58-59, JA072-073 (Starks, Comm'r, concurring) (describing "urgent need" to collect racial and ethnic classification data because of "how critical it is to have diversity in our media organizations").

The Order's paper-thin justifications for requiring publication of the racial scorecard only confirm the FCC's true objective. For example, the FCC's own statements regarding the importance of "public transparency"—without explaining how the public is supposed to verify the race or gender of any given employee—strongly indicate an intent to encourage public scrutiny, rather than improve data accuracy. *See also* Op. Br. 53-54 (discussing agency's plainly pretextual justifications). The agency repeatedly admits (and practically encourages) third parties to use 395-B data to pressure employers into improving workforce diversity. This is a blatant attempt to accomplish indirectly what the agency cannot do directly. *Cf. NRA v. Vullo*, 602 U.S. 175, 190 (2024). The FCC doesn't deny the principle but claims it doesn't apply when *third parties* are encouraged to accomplish the government's forbidden objective. FCC Br. 47. This contention is obviously untrue in the equal protection context. The government has never been allowed to encourage private actors to discriminate, especially with, as here, express racial classifications. *See, e.g.*, *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948) (holding that even "private" enforcement of a race-based covenant constitutes state action under the Fourteenth Amendment).

The forced publication of race and gender data—collected through compelled classification and posted for public scrutiny and agitation—represents exactly the kind of *sub silentio* pressure the D.C. Circuit has already forbidden. *MD/DC/DE*, 236 F.3d at 19-20; *Lutheran Church*, 141 F.3d at 354. Because the FCC fails to show a compelling interest or narrow tailoring sufficient to survive strict scrutiny, the 395-B requirement cannot survive the Fifth Amendment's Equal Protection guarantee.

B. The requirement to file and publish Form 395-B violates the First Amendment prohibition on compelled speech

The FCC argues that compelled speech concerns arise only when the government forces a speaker to convey an overtly ideological or political message. *See* FCC Br. 53. But that misstates the law. The Supreme Court has repeatedly held that compelled speech protections apply equally to factual statements. *See Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 797-98 (1988) (holding "compelled statements of fact . . . are subject to First Amendment scrutiny"); *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47, 62 (2006) ("[C]ompelled statements of fact . . . like compelled statements of opinion, are subject to First Amendment scrutiny."). The Court reaffirmed this principle in

NIFLA v. Becerra, 585 U.S. 755, 767-68 (2018), where it struck down a law forcing clinics to provide notices that were undoubtedly factual.

The FCC's counterargument relies heavily on dicta from *Riley*, where the Court stated that it might be narrowly tailored for the government to publish the disclosures they require from charitable organizations. *Riley*, 487 U.S. at 800. *See also Nat'l Fed'n of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202, 214 (5th Cir. 2011) ("[T]here is nothing stopping Texas from requiring for-profit resellers to file financial disclosure forms, which Texas could publish without burdening the charities with unwanted speech."). But this is an unpersuasive comparison. In those cases, the crucial point was that the government would be speaking on its own behalf, disseminating forms it already collected. By contrast, Form 395-B compels *licensees themselves* to classify employees' race (sometimes by guessing), based on the government's definitions, and then publish those classifications on the FCC's website. This is not the government neutrally posting forms it received; it is the government forcing broadcasters to create and post contested racial data as if it were their own message.

That the disclosure form goes on the FCC's website rather than the broadcasters' is of no import—it will still be understood by the public as the broadcasters' speech. The FCC admits as much by claiming that publication will allow third parties to help ensure the accuracy of *the broadcasters'* data. Thus, the FCC's regime is much more like the program struck down in *Riley* than the hypothetical one entertained by the Court. *See* 487 U.S. at 795 (holding requirement that fundraisers disclose particular factual information to donors before an appeal for funds is content-based regulation of speech).

It also matters that here, unlike in *Riley*, the information in question is not obviously "fact-based" but involves a controversial and subjective classifications of racial and gender identities. Many employees may not wish to be racially categorized, or do not fit neatly into the FCC's preset, arbitrary categories—yet broadcasters must still generate and publicize the FCC's classifications.[10] *Cf. Wooley v. Maynard*, 430 U.S. 705, 713-14 (1977) (recognizing the "individual freedom of mind" to reject

[10] The FCC points out that the employer must use "observer identification" (*i.e.*, guess) only if an employee refuses to self-identify. But this is sure to happen, especially with the agency's crude categories on a subject as controversial, divisive, and subjective as race.

even "factual" government messages). Each broadcaster is thus obliged to articulate the Commission's race categories as though it endorses or accepts their legitimacy. This intrusion is particularly severe because employees' personal identities can be far more sensitive than a fund-raiser's basic financial data.

For the same reason, the Commission is wrong to analogize this requirement to the "essential operations of government." *See Book People, Inc. v. Wong*, 91 F.4th 318, 339 (5th Cir. 2024). The information required here is nothing like sex offender registries or tax information. Rather, employers are required to adopt artificial racial categories, classify their employees, and post that information online. Nor is there anything essential about this program, which is—at best—tethered to amorphous (supposedly) informational concerns, rather than concrete, congressional directives.

Finally, the FCC seems to concede that *Zauderer* does not apply on its plain terms. FCC Br. 57 ("Regardless of whether the commercial speech doctrine and *Zauderer* apply in this case . . . ."). The Court should not expand those doctrines beyond their ordinary scope. But even if the *Zauderer* principle did somehow apply, the Commission's rule is plainly

"controversial" in both substance (racial labeling) and scope (public posting). The forced classification scheme compels broadcasters to adopt the government's racial categories—categories that the FCC continues to change, and categories that may be inaccurate or meaningless to affected individuals. Far from being a "purely factual and uncontroversial" disclosure, it compels speech on a hotly contested topic, violating the fundamental principle that "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley*, 487 U.S. at 790-91.

In short, the government cannot avoid constitutional scrutiny merely by asserting that its requirement is "factual" rather than "ideological." Even a neutral-sounding disclosure can unconstitutionally conscript private speakers into delivering the government's chosen message. That is the case here.

C. The Rule does not pass even rational basis scrutiny, much less strict scrutiny

Even if this Court were to apply rational basis review—an approach the Supreme Court has consistently rejected for governmental racial classifications, *Adarand*, 515 U.S. at 227—the 395-B requirement would still fail. The FCC offers no coherent explanation for why it must post licen-

sees' demographic data online, rather than keep it confidential or aggregate it to protect privacy. Nor does it show how the public can meaningfully "verify" racial self-identifications. Because the Commission's asserted justifications—improving data quality, monitoring trends, etc.—are so tenuously connected to compelled, public workforce scorecards, the requirement is not a "reasonable fit" to any legitimate public-interest goal. This lack of any logical nexus to actual regulatory functions means the rule cannot survive even the lowest level of constitutional scrutiny.

CONCLUSION

This Court should grant theDove's Petition and enjoin and set aside the Order.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2025, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This document complies with Federal Rule of Appellate Procedure 27(d)(2)(a) because this brief contains 6,480 words, excluding items enumerated in Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2. I relied on my word processor, Microsoft Word, to obtain the count.

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