

United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

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LILA HARPER HELMS, MAJORITY STAFF DIRECTOR
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December 8, 2023

Patricia de Stacy Harrison
President & Chief Executive Officer
Corporation for Public Broadcasting
401 9th Street, NW
Washington, D.C. 20004-2129

Dear Ms. Harrison:

The Public Broadcasting Act states that the Corporation for Public Broadcasting (“CPB”) should support telecommunications services “which will constitute an expression of diversity.”¹ This is a mandate to fund different types of television and radio stations, broadening the range of public media content. Yet CPB has misconstrued such statutory language to restrict its community service grants (“CSGs”) to stations that strive to *be* “diverse”² by considering traits like race and ethnicity in hiring and workforce development. Meanwhile, CPB board members openly discuss circumventing civil rights laws to allow for unlawful discrimination.

In a particularly ironic example, CPB’s Office of the Inspector General (“OIG”) chided two Native American-owned radio stations earlier this year for not meeting CSG diversity requirements.³ The OIG complained that the stations’ published diversity statements were too short; failed to adequately disclose employee gender, ethnicity, or race; and lacked specific action items.⁴ The fact that the stations offered distinctive perspectives from the Zuni and Ojibwa peoples was seemingly insufficient. CPB subsequently revised its diversity rules, perhaps recognizing it would be awkward for radio stations operated by Native Americans to lose funding for lacking sufficient ethnic diversity. But even as it made the rules more open-ended, CPB insisted it was *not* diluting its commitment to “diversity.” In fact, CPB directors and staff explained that the change was partly driven by a separate consideration: the need to evade state

¹ 47 U.S.C. § 396(a)(5).

² For CPB, that typically means the five identities represented by the National Multicultural Alliance: Blacks, Latinos, Native Americans, Asian Americans, and Pacific Islanders. *See, e.g., Highlights of Public Media Serving Diverse Communities*, CORPORATION FOR PUBLIC BROADCASTING APPROPRIATION REQUEST AND JUSTIFICATION FY 2024/FY 2026, 81 (Mar. 13, 2023), [https://cpb.org/sites/default/files/FY24-26 CPB Budget Justification Public.pdf](https://cpb.org/sites/default/files/FY24-26%20CPB%20Budget%20Justification%20Public.pdf).

³ CPB OIG, *Evaluation of WOJB-FM Compliance with Selected Diversity Requirements Included in Radio Community Service Grants General Provisions and Eligibility Criteria* (Aug. 30, 2023), [https://cpboig.oversight.gov/sites/default/files/reports/2023%2D08/ECR2310%2D2311 WOJB%2DFM %28Issued 08 30 2023%29_WEB.pdf](https://cpboig.oversight.gov/sites/default/files/reports/2023%2D08/ECR2310%2D2311%20WOJB%2DFM%28Issued%2008%2030%202023%29_WEB.pdf); CPB OIG, *Evaluation of KSHI-FM, Zuni Communications Authority, Compliance with Selected Communications Act, Diversity, and Transparency Requirements* (Mar. 31, 2023), [https://cpboig.oversight.gov/sites/default/files/reports/2023%2D03/ECR2305%2D2306 KSHI%2DFM %28Issued 033123%29_WEB.pdf](https://cpboig.oversight.gov/sites/default/files/reports/2023%2D03/ECR2305%2D2306%20KSHI%2DFM%28Issued%20033123%29_WEB.pdf).

⁴ *E.g., Diversity Statement*, WOJB-FM, <https://web.archive.org/web/20230129102112/https://www.wojb.org/cpb-requirements.html> (Jan. 29, 2023) (since revised); *KSHI Radio Station Diversity Statement*, KSHI-FM, https://www.ashiwi.org/Documents/KSHI_TRANSPARENCY2023.pdf (last visited Dec. 8, 2023).

anti-DEI laws and fend off legal challenges in the aftermath of *Students for Fair Admissions v. Harvard*.⁵

Evolution of CSG Diversity Requirements

CSG diversity requirements originated with an Obama-era review of television grants.⁶ A review panel said public media should “ensure that the composition of boards and staff, especially senior management, be at least as diverse as the communities they serve.”⁷ Before long, CPB had amended its eligibility criteria for both television and radio CSGs to add “diversity of staff and board” conditions for funding.⁸ Each grantee station had to publish a roughly 500-word statement reflecting on the elements of diversity it found important to its public media work; the extent to which its staff and governance reflected such diversity; the progress it had made to increase diversity in the last two to three years; and the station’s diversity plans for the coming year.⁹ Grantees also had to undertake a diversity initiative each year and were urged “to interview at least one qualified diversity candidate for each senior leadership position hire.”¹⁰

These requirements remained in place as of 2023,¹¹ when the CPB OIG began evaluating stations’ compliance with what were by then called the “diversity statement” rules.¹² After it became clear that *none* of the reviewed stations were compliant,¹³ the CPB Board of Directors decided to relax the eligibility criteria for television and radio CSGs. It would instead require a “community representation statement.”¹⁴ But there was an additional reason for the revision.

⁵ *Students for Fair Admissions v. Harvard*, 600 U.S. 181 (2023).

⁶ See Memorandum from Public Television CSG Review Panel to Pat Harrison, President & CEO, Corporation for Public Broadcasting, Final Report and Recommendations (Aug. 25, 2010) (on file with the Committee); Results of the 2010 Television Community Service Grant Policy Review As Approved by the CPB Board of Directors (Sept. 2010) (on file with the Committee); Cf. Board of Director’s Meeting, CPB (Oct. 16, 2023) (“It originated with a 2011 TV CSG policy review.”).

⁷ Final Report and Recommendations, *supra* note 6 at 19.

⁸ CPB, *Corporation for Public Broadcasting FY2014 Radio Community Service Grant General Provisions and Eligibility Criteria*, 16 (Mar. 25, 2014), <https://www.cpb.org/sites/default/files/stations/radio/FY-2014-Radio-CSG-General-Provisions-rev-2014-03-25.pdf> (“As of September 30, 2014”); CPB, *Corporation for Public Broadcasting FY2014 Television Community Service Grant General Provisions and Eligibility Criteria*, 10 (Mar. 25, 2014), <https://www.cpb.org/sites/default/files/stations/tv/2014/FY-2014-TV-CSG-General-Provisions-rev-2014-03-25.pdf> (“As of September 30, 2012”).

⁹ *Id.*

¹⁰ *Id.*

¹¹ CPB, *2023 Radio Community Service Grant General Provisions and Eligibility Criteria*, 13–14 (Oct. 2022), https://www.cpb.org/sites/default/files/stations/radio_community_service_grant_-csg-_general_provisions_and_eligibility_criteria_fy_2023.pdf; CPB, *2023 Television Community Service Grant General Provisions and Eligibility Criteria*, 8–9 (Oct. 2022), https://www.cpb.org/sites/default/files/stations/television_community_service_grant_-csg-_general_provisions_and_eligibility_criteria_fy_2023.pdf.

¹² CPB OIG, *Message from the Inspector General* (Oct. 2022), https://cpboig.oversight.gov/sites/default/files/reports/2022-10/ig_message_oct_2022_final.pdf.

¹³ See Board of Director’s Meeting, *supra* note 6.

¹⁴ See CPB, *2024 Radio Community Service Grants General Provisions and Eligibility Criteria*, 13 (Oct. 2023), [https://www.cpb.org/sites/default/files/FINAL.Radio Community Service Grant %28CSG%29 General Provisions and Eligibility Criteria%2C FY 2024.pdf](https://www.cpb.org/sites/default/files/FINAL.Radio%20Community%20Service%20Grant%20CSG%29%20General%20Provisions%20and%20Eligibility%20Criteria%2C%20FY%202024.pdf); CPB, *2024 Television Community Service Grants General Provisions and Eligibility Criteria*, 8-9 (Oct. 2023), [https://cpb.org/sites/default/files/Television Community Service Grant %28CSG%29 General Provisions and Eligibility Criteria%2C FY 2024.pdf](https://cpb.org/sites/default/files/Television%20Community%20Service%20Grant%28CSG%29%20General%20Provisions%20and%20Eligibility%20Criteria%2C%20FY%202024.pdf).

At a meeting to approve the change on October 16, 2023, CPB director Bruce Ramer asked whether the proposed community representation statement was “dilutive of the commitment to diversity throughout the system.”¹⁵ “The country is in a rather peculiar position,” Ramer said, because of “a rather concerning decision of the Supreme Court”¹⁶ on diversity, i.e., *Students for Fair Admissions*, which held that racial preferences in admissions violate the Equal Protection Clause of the Fourteenth Amendment.¹⁷

“Not dilutive,” replied Kathy Merritt, Senior Vice President for Radio, Journalism, and CSG Services. “I don’t think CPB would ever back away from a commitment to diversity.”¹⁸

Director Liz Sembler clarified that the amendment was actually “protective” because diversity had “become a dirty word” in some places, putting “stations that are out front and committed to diversity in a precarious position when it comes to state funding.”¹⁹ The diversity statement requirement, “without this change, would be punitive for us in *places like that*.”²⁰

“Like Florida?” Ramer asked, presumably alluding to the state’s efforts to regulate certain discriminatory diversity, equity, and inclusion practices.²¹ (Merritt had previously noted that certain state laws appeared to “conflict” with the diversity requirement.²²)

“It’s precarious,” replied Sembler. “So, this [change] *responds to that*...”²³

In other words, after legal and policy developments called CPB’s diversity rules—including its own affirmative action plan²⁴—into question,²⁵ the Board made the rules vaguer to avoid legal challenges. But CPB remains committed to ensuring that traits like race and gender factor into stations’ hiring decisions.

Consequences of CPB’s “Diversity” Regime

Assuming CPB’s characterization of the new “community representation” requirement is accurate, it faces the same problem as the old “diversity” requirement: it undermines the very

¹⁵ Board of Director’s Meeting, *supra* note 6.

¹⁶ *Id.*

¹⁷ *Students for Fair Admissions*, *supra* note 5 at 230.

¹⁸ Board of Director’s Meeting, *supra* note 6.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ See, e.g., CPB, *FY 2022 Affirmative Action Performance Report and FY 2023 Affirmative Action Plan* (Feb. 15, 2023), [https://www.cpb.org/sites/default/files/FY 2022 Affirmative Action Performance Report and FY 2023 Affirmative Action Plan Revised_0.pdf](https://www.cpb.org/sites/default/files/FY%2022%20Affirmative%20Action%20Performance%20Report%20and%20FY%2023%20Affirmative%20Action%20Plan%20Revised_0.pdf); cf. Board of Director’s Meeting, *supra* note 6.

²⁵ See *Students for Fair Admissions*, *supra* note 5 at 290 (Gorsuch, J., concurring) (“Title VI prohibits a recipient of federal funds from intentionally treating any individual worse even in part because of his race, color, or national origin and without regard to any other reason or motive the recipient might assert.”)

pluralism and individuality it's supposed to protect.²⁶ It also enables CPB to pass the buck. Rather than hold *itself* accountable for supporting a variety of stations, as the Public Broadcasting Act requires, CPB insists that *grantee stations* prioritize “diversity” in their makeup and programming. Instead of considering stations’ financial needs in relation to their audiences,²⁷ CPB requires each station to reflect “the populations it serves” via affirmative action in hiring. Under the guise of diversity, CPB in fact stifles²⁸ cultural and ideological diversity in public television and radio at a time when trust in mass media is at an all-time low.²⁹

CPB must strike a balance of encouraging objectivity in programs it funds without exercising editorial control or infringing on stations’ creative independence.³⁰ But the way the CSG diversity amendment was debated—the tacit, but indifferent, recognition that the rules might violate the Constitution’s promise of equality; the knowing allusions to “our values” while excoriating “places like that”—suggests that CPB already knows which side it’s on.³¹ And that makes it less capable of fulfilling its statutory mission. The truth is that CPB can support a diversity of stations and programs without auditing individual stations to ensure their employees’ races align with the five racial categories CPB recognizes. It can respect editorial independence without paying PBS to regurgitate Hamas propaganda blaming Israel for an explosion at a Gaza hospital or NPR to blithely air audio of a surgical abortion.³²

The Standing Rules of the Senate provide the Committee on Commerce, Science, and Transportation the authority and duty to “review and study, on a continuing basis” all matters relating to communications, including CPB.³³ So that I may better assess CPB’s compliance with federal law and the Constitution, please provide the documents requested below and written

²⁶ In practice, most stations comply by checking the “diversity box.” *But see Students for Fair Admissions, supra* note 5 at 223 (“[A]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.”) (citation omitted).

²⁷ 47 U.S.C. § 396(k)(6)(B)(i) (requiring CPB to “provide for the financial needs and requirements of stations in relation to the communities and audiences such stations undertake to serve”).

²⁸ Requiring race-conscious employment policies in public television and radio could discourage the participation of those who believe such policies constitute discrimination based on race, for example.

²⁹ See Megan Brenan, *Media Confidence in U.S. Matches 2016 Record Low*, GALLUP (Oct. 19, 2023), <https://news.gallup.com/poll/512861/media-confidence-matches-2016-record-low.aspx>.

³⁰ Compare 47 U.S.C. § 396(g)(1)(A) (“[T]he Corporation is authorized to—facilitate the full development of public telecommunications...with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature.”) with 47 U.S.C. § 398(c) (“Nothing in this section shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the content or distribution of public telecommunications programs and services.”).

³¹ Accord Mike Jansen, *CPB Has ‘No Immediate Plans’ to Recruit New Ombudsman*, CURRENT (May 7, 2021), <https://current.org/2021/05/cpb-has-no-immediate-plans-to-recruit-new-ombudsman/>.

³² Najib Jobain et al., *At Least 500 Killed in Israeli Airstrike on Gaza City Hospital, Health Ministry Says*, PBS NEWSHOUR (Oct. 17, 2023), <https://web.archive.org/web/20231017182350/www.pbs.org/newshour/world/at-least-500-killed-in-israeli-airstrike-on-gaza-city-hospital-health-ministry-says>; Kate Wells, *Inside a Michigan Clinic, Patients Talk About Abortion—And a Looming Statewide Vote*, NPR MORNING EDITION (Nov. 4, 2022), <https://www.npr.org/2022/11/03/1133790770/what-its-like-inside-a-michigan-abortion-clinic-days-before-the-midterm-election>.

³³ S. Rules XXV(1)(f), XXVI(8).

responses to the questions below no later than December 22, 2023, and in accordance with the attached instructions.

1. Do the previous CSG “diversity statement” requirements or the newly adopted “community representation statement” requirements violate the Fourteenth Amendment of the U.S. Constitution or Title VI of the Civil Rights Act of 1964? Why or why not?
2. How does CPB ensure “strict adherence to objectivity and balance in all programs or series of programs of a controversial nature” in the public telecommunications it funds while avoiding editorial “control over the content or distribution of public telecommunications programs and services?”³⁴
3. The website of the federally funded Independent Television Service (“ITVS”) prominently includes an “Impact” page to show how its documentaries are “[i]nspiring audiences to take action” on controversial political issues like criminal justice reform.³⁵ Does ITVS adhere to “objectivity and balance?”³⁶
4. Is CPB statutorily obligated to fund ITVS?³⁷
5. Is CPB statutorily obligated to fund the National Multicultural Alliance?³⁸
6. Provide the “memo” prepared for the CPB Board of Directors regarding the proposed community representation statement.³⁹
7. List all state laws that CPB, including its directors and staff, believed might “conflict” with CSG diversity statement requirements or put stations in a “precarious position when it comes to state funding.”
8. Provide all versions of CPB’s personnel policies, Manager’s Guidebook, and diversity, equity, and inclusion trainings for staff or leadership from Fiscal Year 2019 to present.

Sincerely,



Ted Cruz
Ranking Member

³⁴ 47 U.S.C. §§ 396(g)(1)(A), 398(c), *supra* note 30.

³⁵ *See Impact*, ITVS (last visited Dec. 8, 2023), <https://itvs.org/impact/>.

³⁶ 47 U.S.C. § 396(g)(1)(A).

³⁷ *See* 47 U.S.C. § 396(k)(3)(B)(i).

³⁸ *Id.* *See also* 47 U.S.C. § 396(a)(6).

³⁹ *See* Board of Director’s Meeting, *supra* note 6.