No. 89-453

In the Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC. AND CONGRESSMAN EDOLPHUS TOWNS AMICI CURIAE IN SUPPORT OF RESPONDENT

LOIS E. WRIGHT *
Vice-President and Corporate Counsel
Inner City Broadcasting Corporation
801 Second Avenue
New York, New York 10017
(212) 661-3344

JAMES L. WINSTON
WALTER E. DIERCKS
DESMOND P. BROWN
Rubin, Winston & Diercks
1730 M Street, N.W.
Suite 412
Washington, D.C. 20036
(202) 861-0870

Counsel for the National Association of Black Owned Broadcasters, Inc.

CHERRI BRANSON
1726 Longworth House Office Building
U.S. House of Representatives
Washington, D.C. 20515
(202) 225-5936

Counsel for Congressman Edolphus Towns

MARCH 6, 1990

* *Counsel of Record*

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INTEREST OF AMICI CURIAE

This brief is submitted by the National Association of Black Owned Broadcasters, Inc. ("NABOB") and Congressman Edolphus Towns as amici curiae. Amici have secured the consent of each party to the filing of this brief. Amici support the position of respondent in this case and urge affirmance of the decision below.

NABOB is the trade association representing the interests of the 180 commercial radio and 18 commercial tel-

evision stations across the country owned by African Americans. NABOB has two principal objectives: to increase the number of African American owners of radio and television stations, and to improve the business climate in which African American owned radio and television stations operate.

Some of NABOB's members have acquired stations through the comparative hearing enhancement credit policy and other members may acquire stations pursuant to the comparative hearing enhancement credit policy in the future if that policy is found to be constitutional by the Court. Therefore, NABOB and its members have a very significant interest in the outcome of this proceeding and can provide to the Court the perspective of many potential and past beneficiaries of the Federal Communications Commission's policy at issue here.

The Honorable Edolphus Towns is a member of the United States House of Representatives. He has represented the people of the Eleventh Congressional District of the State of New York since 1983. As a member of the Congressional Black Caucus, Congressman Towns is deeply involved with the legislative issues which affect traditionally underrepresented groups. He is currently a member of two committees which have legislative and oversight jurisdiction over the Federal Communications Commission: the Committee on Government Operations and the Committee on Energy and Commerce. Broadcast ownership policies which affect minority groups nationally will affect the opportunities available to the predominately African American and Hispanic American constituency which he represents.

STATEMENT OF THE CASE

In the instant case, after a comparative hearing the Federal Communications Commission ("FCC") granted the application of Rainbow Broadcasting Company ("Rain-

bow") for a construction permit to build a new UHF television station to serve the Orlando, Florida metropolitan area and denied the competing application of Metro Broadcasting, Inc. ("Metro").

In comparing the Rainbow and Metro applications, the FCC ruled that Rainbow's integration proposal was both quantitatively and qualitatively superior to Metro's. In particular, Rainbow was awarded a substantial qualitative preference for minority participation by 90% of its owners in contrast with Metro's minority credit for only 19.8% of its owners. Rainbow also received a solid preference for its broadcast experience because the past broadcast experience of Joseph Rey, an 85% owner in Rainbow, was found to be much more significant and was attached to larger ownership than that of Metro's principals having broadcast experience (19.8% full-time participation, 19.8% part-time participation). Finally, Rainbow was slightly ahead on female ownership participation (5% compared to 0%). Metro was awarded a moderate preference for superior local residence and civic participation. The FCC concluded that, overall Rainbow was qualitatively superior to Metro, and, although the qualitative comparison between the two applicant's was close, Rainbow's substantial minority preference, in conjunction with its preferences for broadcast experience and female ownership, outweighed Metro's local residence and civic participation advantage. The FCC awarded Rainbow a slight overall integration preference over Metro. *Metro Broadcasting, Inc.*, 99 F.C.C.2d 688, 703-04 (Rev. Bd. 1984), *rev. denied*, FCC 85-558 (released Oct. 18, 1985).[1]

[1] Before the Commission, Metro contended *inter alia* that it should have received a "substantial" instead of a "moderate" preference for its local residence. The Commission said that even if Metro were awarded "substantial" credit for its local residence and no consideration were given for Rainbow's 5% female participation, that would not change the outcome of this proceeding. *Metro Broadcasting, Inc.*, FCC 85-558 (released October 18, 1985) (J.A. 1).

The case is now before this Court on a writ of certiorari. The issue presented is whether the FCC's congressionally mandated policy of considering minority racial status as one enhancement factor, among the many factors considered in its comparative hearing process, is constitutional.

SUMMARY OF ARGUMENT

The Federal Communications Commission's policy of awarding an enhancement credit in comparative hearings for minority applicants who will work in a management position at a new station has been mandated by the courts, mandated by Congress, and rests upon a strong factual record developed by the Congress and FCC. Because the minority enhancement credit policy is congressionally mandated, it should not be reviewed by this Court pursuant to the "strict scrutiny" standard, but should be reviewed according to the less stringent *Fullilove* standard. *See Fullilove v. Klutznick*, 448 U.S. 448 (1980). However, the minority enhancement credit policy is constitutional even under the strict scrutiny standard, because the policy serves a compelling interest and is narrowly tailored to serve that compelling interest.

The FCC's comparative hearing minority enhancement credit policy serves an important public interest benefit by providing an opportunity for minorities to become station owners. Minority station owners bring diversity to broadcast programming by bringing a minority perspective to programming decisions. Minorities were excluded from participation in the broadcast industry at its inception, due to both *de jure* and *de facto* discrimination, and it is unrealistic to suggest that a color-blind approach to FCC policies is sufficient to assure diverse ownership of the nation's broadcast facilities. The potential slight impact on nonminorities is not an adequate reason for eliminating the minority comparative hearing enhancement credit policy. While some nonminorities may stigmatize minorities because of the comparative hearing enhancement credit

policy, minorities have lived with and continue to live with much worse stigmas, many of which have been created or fostered by the nonminority controlled media.

ARGUMENT

I. THE FEDERAL COMMUNICATIONS COMMISSION'S POLICY OF AWARDING A MINORITY ENHANCEMENT CREDIT IN COMPARATIVE HEARINGS WAS MANDATED BY THE COURTS AND CONGRESS

The Federal Communications Commission has awarded licenses through the use of comparative hearings since its creation by Congress in the Communications Act of 1934. In order to develop fair and consistent criteria for determining which applicants should be awarded licenses in comparative hearings the FCC adopted its *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965) (hereinafter *Comparative Hearing Policy Statement*). The *Comparative Hearing Policy Statement* established two primary objectives which the FCC seeks to accomplish in the awarding of broadcast licenses. They are: (1) "a maximum diffusion of control of media of mass communications" and (2) "the best practicable service to the public." *Comparative Hearing Policy Statement*, 1 F.C.C.2d at 400. The *Comparative Hearing Policy Statement* identified two specific factors which the FCC would consider in determining which of two or more applicants is most likely to operate a station consistent with these objectives. These factors are:

1. Diversification of media ownership (This compares ownership of other media facilities by the applicants)

2. Integration of management and ownership (This compares involvement of the owners in the day-to-day running of the station)

Id. at 400-401.

Under "integration of management and ownership" the *Comparative Hearing Policy Statement* identified several criteria which it described as "qualitative enhancements" of the integration proposal. The qualitative enhancements identified in the *Comparative Hearing Policy Statement* are:

a. Local Residence

   1. in the community of license

   2. in the service area of the proposed station

b. Civic Participation

   1. in the proposed city of license

   2. in the service area of the proposed station

c. Past Broadcast Experience (successful employment in the broadcast industry)

d. Past Broadcast Record (exceptionally good record of ownership of other broadcast stations)

e. Efficient Use of the Frequency (a technical comparison)

Id. at 402.

However, it was the courts, not the FCC, which first recognized that the stated purposes of the Communications Act and the FCC's own *Comparative Hearing Policy Statement* required that the Commission attempt to promote racially diverse ownership of the nation's broadcast facilities. In 1973 the U.S. Court of Appeals for the District of Columbia Circuit instructed the FCC that the Communications Act required the FCC to give some "favorable consideration" to an applicant that proposes to include racial minorities among its owners who will participate in managing the station. *See TV 9, Inc. v. FCC*, 495 F.2d 929, 935-38 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974). The Court held that:

> [W]hen minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded. The fact that other applicants propose to present the views of such minority groups in their programming, although relevant, does not offset the fact that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and presentation of news.

Id. at 938 (footnotes omitted).

The Court of Appeals rejected the FCC's argument that a minority preference policy could not be adopted absent "advance assurance of superior community service attributable to such Black ownership and participation." The Court of Appeals held that a "[r]easonable expectation, not advance demonstration, is a basis for merit to be accorded relevant factors." *Id.*

Two years later, the Court of Appeals reaffirmed its *TV 9* decision. The Court of Appeals held that a "reasonable expectation" exists when Black owners participate in station management:

> The entire thrust of *TV 9* is that black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry, and that "reasonable expectation," without "advance demonstration," gives them relevance.

Garrett v. FCC, 513 F.2d 1056, 1063 (D.C. Cir. 1975) (footnotes omitted).

In 1976, the Supreme Court, in *dicta*, commented on the FCC's equal opportunity rules and made a similar link between minority management and diversity of programming: "These [EEO] regulations can be justified as nec-

essary to enable the FCC to satisfy its obligation under the Communications Act . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976).

In 1984, the Court of Appeals addressed for the first time the constitutionality of the FCC's minority preference policy, and upheld it. *See West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985). The Court of Appeals stated that, in light of congressional action, "past societal discrimination" was a sufficient basis to uphold the policy as a remedial measure. In *West Michigan* the Court of Appeals added that, even if past societal discrimination was an insufficient justification, Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), provided an alternative basis for upholding the Commission:

> Just as the FCC rests its goal of attaining diverse programming on the First Amendment value "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," Justice Powell recognized that a state university could find support in the First Amendment for the goal of attaining a diverse student body in order to expose students to the "atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—[that] is widely believed to be promoted by a diverse student body." To this end the race of, for example, a black applicant could be a legitimate consideration in a school's admissions process if otherwise minorities would not be admitted in sufficient numbers "to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States." Clearly, under Justice Powell's approach

> the FCC's goal of bringing minority perspectives to the nation's listening audiences would reflect a substantial government interest within the FCC competence that could legitimize the use of race as a factor in evaluating permit applications.

West Michigan, 735 F.2d at 614 (citations omitted).

The Court of Appeals relied on Congress's 1982 enactment of a lottery statute which included minority preferences in the lotteries as an additional basis for upholding the constitutionality of the Commission's racial preference policy. Citing *Fullilove*, the Court held that "[a]ny doubt concerning the constitutionality of the FCC's consideration of minority status was ended by Congress' approval of the Commission's goals and means." *West Michigan*, 735 F.2d at 615. It stated that the lottery statute "must be viewed as congressional approval of the FCC's minority ownership promotion policies." *Id.* at 616. It relied on the legislative history, which, in its view, "made clear that Congress had explicitly found that the award of significant preferences to minority-controlled broadcast entities was an appropriate way of 'remedying the past economic disadvantage to minorities which has limited their entry into various sectors of the economy, including the media of mass communications, while promoting the primary communications policy objective of achieving a greater diversification of the media of mass communications.' " *Id.* (quoting H.R. Conf. Rep. No. 97-765 at 43). The Court of Appeals concluded that "an administrative agency can certainly follow Congress' lead in an effort to further implement Congress' concerns." *Id.* The Court of Appeals in *West Michigan* held that the FCC's preference policy "easily passes constitutional muster in light of the various *Bakke* and *Fullilove* approaches." *West Michigan*, 735 F.2d at 613.

II. THE STRICT SCRUTINY STANDARD OF REVIEW APPLIED IN THE *CROSON* CASE IS NOT APPROPRIATE FOR REVIEW OF THE FEDERAL COMMUNICATIONS COMMISSION'S CONGRESSIONALLY MANDATED COMPARATIVE HEARING ENHANCEMENT CREDIT POLICY

In *City of Richmond v. J.A. Croson Co.*, ___ U.S. ___, 109 S. Ct. 706 (1989), this Court articulated the principal issues it will consider when balancing interests between the Fourteenth Amendment's guarantee of equal treatment to all citizens and the use of racial preference policies to ameliorate the effects of past discrimination on the opportunities enjoyed by members of racial minority groups in our society. In writing the principal opinion for the majority in *Croson*, Justice O'Connor relied heavily upon the Court's decision in *Fullilove*. Justice O'Connor explained that "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." *Croson*, 109 S. Ct. at 719. She added, "The power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principals of equality and to adopt prophylactic rules to deal with those situations." *Id.* (emphasis in original). Thus, Justice O'Connor began from the proposition that "Congress may identify and redress the effects of society-wide discrimination." *Id.* Justice O'Connor stated that this substantially distinguished the facts of the *Croson* case from those of the *Fullilove* case:

> We do not, as Justice Marshall's dissent suggests, find in Section 5 of the Fourteenth Amendment some form of federal pre-emption in matters of race. We simply note what should be apparent to all—Section 1 of the Fourteenth Amendment stemmed from a distrust of state legislative enactments based on race; Section 5 is, as the dissent notes, 'a positive grant of legislative power' to Congress. Thus, our treatment of an exercise

> of Congressional power in *Fullilove* cannot be dispositive here [in *Croson*].

Croson, 109 S. Ct. at 720 (citations omitted).

Moreover, in recognition of Congress's unique power in this area, Justice O'Connor also recognized that the "strict scrutiny" standard is not appropriate for review of Congressional action with respect to race-conscious distinctions. Justice O'Connor's opinion recognized that the "strict scrutiny" standard of review is to be reserved solely for State and political subdivision legislative actions based on race. *See Id.* at 719. Thus, Justice O'Connor noted without criticism that the Court in *Fullilove* did not specify a "strict scrutiny" standard of review for Congressional action. As Justice O'Connor observed:

> The principal opinion in *Fullilove*, written by Chief Justice Burger, did not employ "strict scrutiny" or any other traditional standard of equal protection review. The Chief Justice noted at the outset that although racial classifications call for close examination, the Court was at the same time, "bound to approach [its] task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment."

Id. at 717-718.

Justice O'Connor then made the following observation concerning the principal opinion in *Fullilove*:

> The principal opinion asked two questions: first, were the objectives of the legislation within the power of Congress? Second, was the limited use of racial and ethnic criteria a permissible means

> for Congress to carry out its objectives within the constraints of the Due Process Clause?

Id. at 717 (citation omitted).

Thus, applying *Fullilove*, the Court's review of the Commission's implementation of the comparative hearing enhancement credit policy should focus similarly, i.e., (1) is the implementation of the policy by the Commission consistent with Congress's mandate that the Commission act to promote ownership of broadcast facilities by racial minorities, and (2) was the limited use of racial criteria a permissible means for Congress to carry out its objectives within the constraints of the Due Process Clause? Under the "strict scrutiny" standard the Court would inquire as to whether there was (1) a "compelling interest" for Congress to adopt a racial classification and (2) whether the means used to address that compelling interest were "narrowly tailored" to address that compelling interest. *See Id.* at 721. Although *Croson* did not hold that the "strict scrutiny" standard should be applied to Congressional action, as we shall demonstrate below, the minority enhancement credit policy meets the more stringent "strict scrutiny" standard of review.

III. THE CONGRESS HAS A COMPELLING INTEREST IN ENCOURAGING OWNERSHIP OF BROADCAST STATIONS BY RACIAL MINORITIES TO ENHANCE THE DIVERSITY OF BROADCAST VOICES

A. Congress has Repeatedly Determined that the Comparative Hearing Minority Enhancement Credit Policy Serves a Compelling Interest

In his decision for the majority below, Judge Edwards demonstrated convincingly that the decision below was consistent with this Court's decision in *Croson*. *See Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989). Judge Edwards pointed out that six Justices of this Court in *Croson* continued to regard *Fullilove*, which approved a congressionally mandated 10% minority set-

aside program, as good law. *Id.* at 354. He added that none of the opinions in *Croson* expressed any disagreement with the *Bakke* decision written by Justice Powell, where Justice Powell found racial diversity to be a constitutionally permissible goal, independent of any attempt to remedy past discrimination. *Id.*

Judge Edwards went on to point out that in *Croson* the Court noted two crucial differences between the set-aside program upheld in *Fullilove* and the set-aside plan struck down in *Croson*. First, the City of Richmond plan at issue in *Croson* involved an "unyielding racial quota." *See Id.* Second, the plan struck down in *Croson* was adopted by a city council and the plan upheld in *Fullilove* was enacted by the Congress. *See Id.*

Judge Edwards' analysis is clearly correct. The FCC is a creation of Congress, and it derives its authority from that body. In 1982 the Congress directed the FCC to provide a minority ownership preference when it awards broadcast licenses by lottery. In so doing, the Conference Committee stated in its report:

> The underlying policy objective of these preferences is to promote the diversification of media ownership and consequent diversification of programming content. This diversity principle is grounded in the First Amendment.

H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40 (1982).

The Conference Committee added:

> An important factor in diversifying the media of mass communications is promoting ownership by racial and ethnic minorities—groups that traditionally have been extremely underrepresented in the ownership of telecommunications facilities and media properties. The policy of encouraging diversity of information sources is best served by not only awarding preferences based on the num-

> ber of properties already owned, but also by assuring that minority and ethnic groups that have been unable to acquire any significant degree of media ownership are provided an increased opportunity to do so.

Id. at 43.

In 1987, Congress acted to prevent the FCC from repealing or altering these minority ownership policies. *See* Pub. L. No. 100-202, 101 Stat. 1329 (1987); *See also* H.R. Conf. Rep. No. 498, 100th Cong., 1st Sess. 504 (1987). The Senate Appropriations Committee, which reported out this provision, explained:

> The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences.

S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987).

Congress extended the prohibition through fiscal year 1989, *see* Departments of Commerce, Justice, & State, the Judiciary, and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216-2217, and has recently renewed that extension for the current fiscal year, 1990. *See* Departments of Commerce, Justice, & State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020-1021.

Moreover, not only has the Congress legislated in this area, but it also repeatedly has held hearings to monitor the FCC's implementation of the minority ownership policies. *See, e.g., Hearings on H.R. 2763 Before a Subcomm. of the Senate Comm. on Appropriations*, 100th Cong., 1st Sess. Pt. 1, at 17-19, 75-77 (1987); *Minority-Owned Broadcast Stations: Hearings on H.R. 5373 Before the Subcomm.*

on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 99th Cong., 2d Sess. (1986); *Minority Participation in the Media: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983); *Parity for Minorities in the Media: Hearings on H.R. 1155 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983).

The Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation held hearings on September 15, 1989 to examine further the issue of minority ownership of broadcast stations. *See Hearings on Minority Ownership of Broadcast Stations Before the Subcomm. on Communications of the Senate Comm. on Communications, Science and Transportation*, 101st Cong., 1st Sess. (Comm. Print Sept. 15, 1989) (unpublished).

Thus, it is clear that the FCC's comparative hearing minority enhancement credit policy was established and has been applied under the direction of the Congress to foster what Congress has determined is a compelling federal interest.

B. The FCC Developed an Extensive Record Demonstrating the Compelling Interest in Promoting Diversity of Ownership Through Use of the Minority Enhancement Credit Policy

As noted above, the FCC historically has recognized that diversity of control of the media of mass communications constitutes a primary objective of its broadcast licensing scheme. *See Comparative Hearing Policy Statement, supra.*

Despite the national importance of diversity of ownership of mass media, until adoption of the FCC's 1978 *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978) (hereinafter *Minority*

Ownership Policy Statement), minorities, particularly African Americans, had little access to broadcast properties as owners. When Congress passed the Radio Act of 1927, African Americans, due to the vestiges of slavery and *de jure* and *de facto* segregation, had no opportunity to own radio stations. No American broadcast station was owned by an African American until Jesse B. Blayton purchased an existing station, WERD(AM), in 1949.[2] It was not until 1956 that a company owned by African Americans was granted a construction permit to build a new broadcast station.[3]

In 1968, the FCC first articulated the need to assure that broadcast licensees did not discriminate against racial minorities in their employment practices. *See Petition for Rulemaking to Request Licensees to Show Discrimination in their Employment Practices*, 13 F.C.C.2d 766 (1968). In 1968 the Commission stated:

> we simply do not see how the Commission could make the public interest findings as to a broadcast applicant who is deliberately pursuing or preparing to pursue a policy of discrimination—of violating the National Policy.

Id. at 767.

A year later, the Commission adopted rules which prohibited discrimination by broadcast licensees in employment on the basis of "race, color, religion or national origin" and also required that "equal employment opportunity in employment . . . be afforded by all licensees or permittees . . . to all qualified persons." *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240 (1969). In 1970, the Commission adopted rules requiring most broadcast licensees to file annual employment

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[2] M. Muhammed, *Minority Participation in Broadcasting*, Dollars & Sense, May/June 1979, at 18.

[3] *Id.*

reports and to file a written equal employment opportunity program when filing certain application forms. *See Nondiscrimination Employment Practices of Broadcast Licensees*, 23 F.C.C.2d 430 (1970). In 1975, the Commission reiterated and clarified its policy on employment discrimination. *See Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 54 F.C.C.2d 354 (1975). In 1976, the Commission adopted a Model Equal Employment Opportunity Program to be followed by all broadcast licensees. *See Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 F.C.C.2d 226 (1976).

The Commission explained in its *Minority Ownership Policy Statement* that it had taken other actions to assure that the needs, interests and problems of a licensee's community, including the minorities within that community, were both ascertained and treated in the programming of the licensee. Under the Commission's ascertainment guidelines, broadcast licensees were required to contact minorities, as well as nineteen other specified groups in the communities they served, to determine community interests so that the licensee could present programming responsive to those interests. *See Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C.2d 418 (1976).

After recounting this long list of very careful and considered measures to increase minority input into broadcast programming the Commission then pointed out the inadequacy of these measures:

> While the broadcasting industry has on the whole responded positively to its ascertainment obligations and has made significant strides in its employment practices, we are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to

> the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment.

Minority Ownership Policy Statement at 981.

In making this determination, the Commission explained that it was basing its conclusion on specific findings it had made in its *Report on Minority Ownership in Broadcasting* (May 17, 1978) (hereinafter *Minority Ownership Task Force Report*). The *Minority Ownership Task Force Report* developed much of its information from testimony given by witnesses at a two-day minority ownership conference held April 25-26, 1977 at the Commission. In its *Minority Ownership Task Force Report* the Commission recognized the acute underrepresentation of minorities among broadcast station owners (at that time it was less than one percent, while today it is still less than two percent). The conference was held to provide the participants with an opportunity to identify obstacles confronting minorities seeking to obtain broadcast licenses and to define possible means of overcoming the obstacles to ownership. *Minority Ownership Task Force Report* at 1.

Analyzing the findings of its *Minority Ownership Task Force Report*, the Commission stated in its *Minority Ownership Policy Statement* that:

> It is apparent that there is a dearth of minority ownership in the broadcast industry. Full minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming. In addition, an increase in ownership by minorities will inevitably

> enhance the diversity of control of a limited resource, the spectrum. And, of course, we have long been committed to the concept of diversity of control because 'diversification . . . is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities.'
>
> What is more, affecting programming by means of increased minority ownership—as is also the case both with respect to our equal employment opportunity and ascertainment policies—avoids direct government intrusion into programming decisions.

Minority Ownership Policy Statement at 982 (quoting *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965)).

The Commission then concluded:

> We believe that diversification in the areas of programming and ownership—legitimate public interest objectives of this Commission—can be more fully developed through our encouragement of minority ownership of broadcast properties. In this regard, the Commission is aware of and relies upon court pronouncements on this subject.

Minority Ownership Policy Statement at 982 (citations omitted).

The above detailed description of the steps taken by the FCC to encourage minority involvement in programming decisions demonstrates clearly that the FCC developed a full record upon which it based its determination that there was a compelling interest in promoting diversity of ownership by minorities through use of the comparative hearing minority enhancement credit policy.

IV. THE COMPARATIVE HEARING MINORITY ENHANCEMENT CREDIT POLICY IS NARROWLY TAILORED TO ACHIEVE DIVERSITY OF CONTROL OF BROADCAST STATIONS THROUGH ENCOURAGEMENT OF MINORITY OWNERSHIP

The preceding description of the record developed by the FCC and repeatedly approved by Congress demonstrates not only the compelling interest being addressed by this policy, but also demonstrates that the comparative hearing minority enhancement credit policy is narrowly tailored to serve that compelling interest. The FCC's race-neutral efforts, beginning in 1968, to encourage employment of minorities by broadcast licensees, and to require ascertainment of minority programming interests by all licensees, demonstrates that the comparative hearing minority enhancement credit policy was adopted only after these other race-neutral extensive efforts failed to produce any significant results in diversifying the control of broadcast programming decisions.

Moreover, the policy is narrowly tailored in the following additional aspects: (1) it does not establish a quota or even a set-aside. If nonminorities having superior comparative qualifications apply for all FCC licenses, it is possible that minorities would win no comparative hearings. (2) Nonminorities are not barred from competing for any frequency. Every frequency the FCC makes available for applications can be applied for by anyone. (3) The minority enhancement credit is but one secondary factor among many factors (several of which are of greater importance) considered by the FCC.

Thus, the comparative hearing minority enhancement credit policy is directly analogous to the permissible minority preference policy used by Harvard College and approved by Justice Powell in *Bakke*, 438 U.S. 265. Justice Powell placed great emphasis on the fact that the admission plan described there did not establish quotas or set-asides, did not prevent any nonminority from applying for

any seat in the class and was only one factor among many considered in the admissions process. *Id.*

Moreover, the policy is consistent with this Court's *Fullilove* and *Wygant* decisions. The policy is consistent with the *Fullilove* set-aside plan in that it has only a small impact on nonminorities. *See Fullilove*, 448 U.S. at 484-85 n.72 (Burger, C.J.). In *Fullilove*, Chief Justice Burger noted that it was "not a constitutional defect in [the minority business enterprise set-aside provision] that it may disappoint the expectations of nonminority firms." *Id.* at 484. He added that this was especially true given that the 10% minimum minority participation requirement translated into only 0.25% of the annual expenditure for construction work in the United States. *Id.* at 484-85 n.72. Here, no set aside even exists.

Similarly, the degree of impact on specific applicants, such as Metro, does not cause the policy to fail under constitutional scrutiny. In *Wygant*, the Court struck down a preferential layoff plan, but distinguished between preferential layoff plans and hiring plans. *See Wygant v. Jackson Board of Education*, 476 U.S. 267, 282-83 (1986) (Powell, J.). In his *Wygant* opinion, Justice Powell observed that, "Denial of a future employment opportunity is not as intrusive as loss of an existing job." *Id.*

Finally, it is clear that Metro failed to receive maximum credit for many of the FCC's other comparative criteria. Therefore, had Metro been a more desirable applicant in some of the other more important criteria where it was deficient, the minority ownership of Rainbow would not have been decisionally significant and Metro would have been awarded the construction permit. The deficiency lies not with the FCC's policy but with the quality of Metro's application.

V. THERE ARE IMPORTANT PUBLIC INTEREST BENEFITS WHICH WILL RESULT FROM A DETERMINATION THAT THE DISTRESS SALE POLICY IS CONSTITUTIONAL

In order to place this case in proper perspective, it is necessary for the Court to answer two questions: What overall public interest benefit does our nation obtain by a determination that the comparative hearing enhancement credit policy is constitutional? What overall public interest harm might our nation incur from a determination that the comparative hearing enhancement credit sale policy is constitutional?

On the benefit side, we must begin with a clarification. In his dissent below, Judge Williams goes on at great length to argue that the majority's decision was premised on the notion that the societal benefit which is to be achieved by the FCC's minority enhancement credit policy is "minority programming." *Winter Park*, 873 F.2d at 351-56. This characterization is misleading, patronizing and stereotypes minority broadcasters. Although many minority station owners have used the airwaves to help eliminate the dearth of minority oriented programming,[4] to suggest that their contributions have been limited to minority programming is to do an injustice to the efforts of these broadcasters. Minority owners contribute to the overall commerce of their respective communities in three crucial areas: increased employment opportunities for minorities in management as well as staff positions; increased business opportunities for ancillary minority businesses as well

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[4] The Congressional Research Service has determined that minority station owners, particularly African American owners, tend to do minority oriented programming and that there is a nexus between minority ownership and minority oriented programming. Congressional Research Service, Library of Congress, *Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?*, June 29, 1988 at CSR-13, CSR-27.

as minority vendors and suppliers; and increased training opportunities for minority students.

Minority station owners also bring to the airwaves diversity of control over programming decisions. It is narrow-minded to presume that all programming which appeals to minorities is "minority programming." Similarly, programming which might be described as "minority programming" often appeals to non-minorities. (The long-running number one television program, "The Cosby Show," graphically illustrates this phenomenon.)

The minority owner brings to the airwaves a minority perspective on programming, which has been lacking in an industry dominated by white males. This input is most influential in the news area. While a responsible broadcaster does not consciously slant news stories to appeal to any particular racial audience, all broadcasters must decide daily what is "news." Whether to carry a story about a local councilman's speech on drug abuse instead of a report on political developments in Eastern Europe, whether to do a thirty second story or a two minute story on an abortion march, whether to report an incomplete story on possible political corruption or to hold it until additional research can be done? These are the types of decisions made several times each day by broadcasters. They are subjective decisions and the personal background of the person making these decisions necessarily will influence the decisions he or she makes. The results of these news decisions will often go a long way toward shaping public awareness and ultimately public opinion about the issues and people in the news.

In a nation built upon the premise of "free speech" and the sanctity of allowing—indeed encouraging—differing views to be heard, it is a failure of national broadcast policy that diverse opinions rarely can be found on the nation's airwaves. Through its minority ownership policies, which are designed to provide and to preserve diversity,

the FCC represents the only government outpost still true to the tenets of the First Amendment and of Congress's intent when it formulated the Communications Act of 1934. While the societal benefits of a free press are not being challenged directly in this proceeding, the FCC's recognition that a free press must include outlets of expression for all members of a pluralistic society is being challenged. The FCC has recognized that certain segments of our society historically have been denied access to the exercise of their free speech rights and that such denial harms all of society because the entire society has been denied its rights to experience and consider differing opinions.

The FCC, through its comparative hearing minority enhancement credit policy, attempted to facilitate the emergence of minority voices in the exercise of their First Amendment freedoms through participation of minorities in the ownership of stations and in the control of programming decisions. In order to accomplish this, the FCC embraced a very basic principle of business and democracy: ownership is control.

Those concerned about the possibility of public interest harm resulting from upholding the comparative hearing minority enhancement credit policy often raise two issues: (1) Does this policy create reverse discrimination against nonminorities? (2) Does this policy stigmatize minorities? In *Croson*, Justice O'Connor, was clearly concerned about both of these issues. Considering first the issue of reverse discrimination, any policy which allocates a finite resource between competing interests will always leave one of those interests without that resource. Every time Congress decides to make the age old choice between "guns or butter," it deprives some interest group of a resource. However, allocation of resources is not discrimination, it is the making of a choice. As is clear from the discussions elsewhere in this brief, Congress has a compelling interest in making the choice to allocate limited broadcast resources so as to encourage minority ownership. More importantly, the

choice at issue in this proceeding is one which Congress would not have been required to make were there not a history of racial discrimination in American society.

However, the above answer does not address a side issue to the reverse discrimination issue. That issue is: Does this policy create a public perception of reverse discrimination? In other words, does this policy inflame racial tensions by making nonminorities feel that minorities are being treated better than nonminorities? The answer to this question is very subjective. In all candor, the answer may be that some nonminorities do feel this way. However, the possibility of those feelings cannot deny the fact of or erase the impact of a history of slavery and subsequent society-wide discrimination endured by African Americans. The court cannot ignore the evil of a history of racism which has created the need for the policy we must defend herein.

In the face of such a well-documented and historical pattern of racial discrimination such as exists in the United States, it is a cruel twist of the intent of the Fifth, Thirteenth and Fourteenth Amendments even to suggest that a policy as benign as the comparative hearing minority enhancement credit policy could result in reverse discrimination. Slavery did exist. "Jim Crow" laws did exist. "Separate but equal" did exist, until this Court finally overturned that injustice. We cannot sweep away, under some vague notion of "possible" reverse discrimination, the vestiges of those documented patterns of racism, perhaps in the faint hope that memories of this sad past will simply fade away. The comparative hearing minority enhancement credit policy is an effort to face the realities of our racial history head-on, and attempt some limited relief. The Court cannot allow potential hostility to its decision to cloud the obvious public interest benefits to be achieved from upholding the constitutionality of the comparative hearing minority enhancement credit policy.

Finally, we note that the Court may be concerned about the societal impact of stigmatizing minorities. As the trade association of African American owners of broadcast facilities, NABOB is uniquely qualified to address the issue of stigmatizing minorities in the context of the comparative hearing minority enhancement credit policy, because some NABOB members have acquired broadcast stations through use of the comparative hearing minority enhancement credit policy.

In addressing the issue of stigmas, this Court should begin by recognizing that stigmas are not new to African Americans, or to most racial minorities in America. Every day African Americans see and hear in the broadcast media images and commentaries which negatively stigmatize all African Americans. We bear a stigma which in Boston allowed Charles Stuart, an apparent murderer, to use racism to cloak his crime. The majority controlled media were used by Stuart to create a climate of hysteria and racial tension which lasted for weeks.[5] Perhaps, if there had been even one African American controlled television station in that city, objectivity, and maybe the truth, might have found the light of day much sooner.

The Stuart case is an extreme example of the daily situation in which African Americans bear the stigma of the Willie Horton's of the world, the rapists, the crack dealers, the crack users, the robbers, and the murderers. The many positive accomplishments of African American businessmen and businesswomen, politicians, doctors, educators and other professionals are rarely "news worthy" in the eyes of those who control the major communications facilities in this country.

It may be that there are those who would stigmatize those minorities benefiting from the FCC's comparative

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[5] Edley, *Why Everyone Believed Charles Stuart*, Legal Times, January 22, 1990 at 24.

hearing minority enhancement credit policy. However, as owners of broadcast stations, we know that the broadcast industry evolved in the early 20th century at a time when African Americans lived under *de jure* segregation in the south and *de facto* segregation in the north. Therefore, we African Americans had no equal opportunity to become the leaders of that industry, which was mature before its doors were ever open to us. By the time the doors were opened, not only racial discrimination but its tandem economic stratification prevented our advancement. Therefore, any potential stigma which may attach to acquiring a station through the comparative hearing minority enhancement credit policy pales to nothingness when compared to the stigma of having to watch our community portrayed, spoken for, spoken to and analyzed by voices which are not our own. The Court need not look to protect us from the stigma of receiving preferential treatment. Rather, we request that the Court protect our children from growing up in a society where the broadcast industry does not reflect meaningful ownership and programming control by African Americans.

CONCLUSION

For the reasons set forth above, the National Association of Black Owned Broadcasters, Inc. and Congressman Edolphus Towns request that the Court affirm the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

LOIS E. WRIGHT*
Vice President and
Corporate Counsel
Inner City Broadcasting
Corporation
801 Second Avenue
New York, New York 10017
(212) 661-3344

JAMES L. WINSTON
WALTER E. DIERCKS
DESMOND P. BROWN
RUBIN, WINSTON & DIERCKS
1730 M Street, N.W.
Suite 412
Washington, D.C. 20036
(202) 861-0870

Counsel for the National Association of Black Owned Broadcasters, Inc.

CHERRI BRANSON
1726 Longworth House
Office Building
U.S. House of Representatives
Washington, D.C. 20515
(202) 225-5936

Counsel for Congressman Edolphus Towns

**Counsel of Record*