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

BRIEF OF THE NATIONAL BAR ASSOCIATION AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether it is constitutionally permissible for the Federal Communications Commission to utilize as criteria for selection among qualified applicants to become broadcast licensees, factors such as diversification of control of media of mass communications, standards of station operations, and enhancement credits to include broadcast experience, female ownership, minority ownership, local residence, past broadcast experience; and program service, efficient use of frequency and character considerations in its comparative hearing process to select from among competing applicants that one best calculated to operate in the public interest?

2. Whether the Government may require a minority broadcast applicant to make an advanced showing of program predilections of judgments as a tailoring device to qualify for the minority ownership enhancement policy without violating the First Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

INTEREST OF AMICUS CURIAE

The National Bar Association was founded in 1925, and is an organization comprised of Black lawyers across the United States. Since its founding, the National Bar Association has been involved in promoting civil rights activities in an effort to improve the educational, societal, and economic welfare of Black and other disadvantaged Americans. The National Bar Association has, for the last forty years, actively participated in the formation of the nation's telecommunications policy, particularly as it relates to promoting minority employment in and ownership of broadcast facilities.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case as presented by the Respondent, the Federal Communications Commission.

SUMMARY OF ARGUMENT

The FCC's minority enhancement credit policy is more narrowly tailored than the admissions program approved by the Court in *Bakke*. Petitioners have no basis to complain of unequal treatment under the Fifth Amendment.

The enhancement credit stems from the compelling governmental interest of furthering the widest dissemination of information from diverse and antagonistic sources through minority ownership. This clearly is a constitutionally permissible goal for a federal agency charged with furthering the widest dissemination of information and ideas from antagonistic sources. Diversity of ideas or programming, though not a specif-

ically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. Thus, in arguing that the FCC must be accorded the right to select those broadcast licensees who will contribute to the diversity of programming, Amicus invokes a countervailing constitutional interest: that of the First Amendment, and the goals of the Commerce Clause. In this light, the FCC must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its First Amendment mandate, and the Commerce Clause. In pursuit of a misguided goal of enjoining the FCC from ever considering the race of any applicant, Petitioner fails to recognize that a federal agency charged with distribution of a scarce public resource has a substantial interest that legitimately may be served by a properly devised program involving the competitive consideration of race and ethnic origin. Therefore, the principle enunciated in *Bakke* and *Johnson* allowing race to be used as a plus factor, among others, should logically be extended to the facts of the case *sub judice*.

ARGUMENT

I. DEVELOPMENT OF PUBLIC INTEREST MANDATE TO ENCOURAGE MINORITY PARTICIPATION IN BROADCAST OWNERSHIP

A. The Minority Enhancement Policy is an Outgrowth of the Policy Statement on Comparative Broadcast Hearings

As part of its public interest mandate, the Federal Communications Commission ("FCC") has historically recognized that diversity in the control of the broadcast spectrum constitutes a primary objective of the licensing scheme. *See, Policy Statement on Comparative*

Broadcast Hearings, 1 FCC 2d 393 (1965) ("*1965 Policy Statement*"); Communications Act of 1934, as amended, 47 U.S.C. § 309(a)(1982). In the *1965 Policy Statement*, the FCC adopted guidelines for choosing between competing applicants for available frequencies. These guidelines applied to a process—commonly referred to as the "comparative hearing process"—and are guided by two fundamental objectives. The first is to provide the best practicable service to the public, and the second is to promote diversity in the control of the mass media. *Id.* at 394. The *1965 Policy Statement* details six specific criteria to be considered in the disposition of comparative hearing proceedings:

> (i) *Diversification of control of the media of mass communications.* Diversification of ownership is a "primary objective in the licensing scheme." This criterion looks at the number of other mass communication outlets held by a candidate - both those in the community proposed to be served, and those outside of the relevant service area.
>
> (ii) *Full-time participation in station operations by owners.* This policy stems from the tenet that there is a "likelihood of greater sensitivity to an area's changing needs, and of programming designed to serve these needs, to the extent that the station's proprietors actively participate in the day-to-day operation of the station." The Administrative Law Judge determines whether, given the specific roles the candidates propose to occupy, the candi-

dates will affect policy that governs and guides the management of the broadcast facility. Credit under this criterion is enhanced where an applicant demonstrates that its principals 1) reside in the community of license, or within the service area of the proposed facility, 2) have past broadcast experience, and 3) are actively involved in community affairs. This criterion has been subsequently expanded so that enhancement credit can also be granted for minority ownership. *See Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978) (*Minority Ownership Policy Statement).*

(iii) *Proposed Program Service.* "Substantial differences" in proportions of time allocated to different types of programs "will be considered to the extent that they go beyond ordinary differences in judgment and show a superior devotion to public service."

(iv) *Past broadcast record.* A past broadcast record of average performance is disregarded since average performance is expected. The Administrative Law Judge will only look to past records to determine the following: unusual attention to the public's needs, or a significant failure to carry out representations made to the Commission.

(v) *Efficient use of frequency.* This factor is only considered when a competing applicant proposes an operation which, for one

or more engineering reasons, would be more efficient than that utilized by a competing candidate.

(vi) *Character.* Character deficiencies may warrant demerits to a competing application. Significant deficiencies can warrant disqualification.

See id. at 394-99. In asserting that full-time involvement in station operations by licensees and "maximum diffusion of communications" were the two primary objectives needed for a positive decision to grant a license or construction permit, the FCC acknowledged the importance of the Supreme Court's premise that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Id.* at 394 n.4 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

In the *1965 Policy Statement*, the Commission acknowledges the significant value of the broadcast spectrum, stating that "radio and television broadcast stations play an important role in providing news and opinion. . .[.] [T]hat government should not create such a concentration is equally apparent, and well-established." *1965 Policy Statement*, supra, at 394, n.4.[1] Although the importance of diversity of programming has been recognized by the FCC in its *1965 Policy Statement*, it was shortly after the passage of the Communications Act of 1934 that Blacks themselves began

[1] See also, *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Scripps-Howard Radio, Inc. v. FCC*, 189 F.2d 677, *cert. denied* 342 U.S. 830 (1951).

to realize the importance of broadcast ownership.[2] Available scholarly sources indicate that no American broadcast station was owned by a Black until around 1948.[3]

B. The FCC Has Historically Recognized The Importance of Minority Ownership As A Vehicle to Further Programming Diversity

It was in 1946 that the FCC acknowledged the significance of broadcasting to minorities in stating that "the American system of broadcasting must serve significant minorities among our population." *Public Responsibility of Broadcast Licensees (The Blue Book)*, 15 (March 7, 1946). Nearly thirty years later, after the FCC had granted thousands of licenses, minorities continued to remain substantially underrepresented in the broadcast industry. The concept of minority ownership, however, did surface in various spectrum allocation proceedings as minorities sought to influence public policy by participating in FCC proceedings in order to enhance their opportunity to become broadcast licensees.

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[2] See, Smith, "The Black Bar Association and Civil Rights," 15 *Creighton L. Rev.*, 651, 667 n.61 (1982); Smith, "For a Strong Howard University Press," Vol. 121, Part 21, Cong. Rec. 27,790, 94th Cong., 1st Sess. (Sept. 5, 1975).

[3] As one scholar noted, "It is difficult to determine exactly when black radio moved into [the ownership] stage of development. It is known that blacks were owners of radio stations in the 1950's. Station WSOK in Nashville was reported to have had several black shareholders (exact date unknown). In 1950, newspaper accounts said that a 'powerful Negro station' (50,000 watts) in New Orleans was going to be serving the South. It was recently reported that a black-owned station went on the air in Kansas City in 1950, and that another station may actually have become black-owned as early as 1948." R. D. Bachman, *Dynamics of Black Radio* 16 (1977) (citations omitted).

In a 1973 spectrum allocation proceeding, the FCC had conceded that "the promotion of minority group ownership of broadcast facilities [was] a socially desirable end." *Amendment of Part 73 of the Commission's Rules*, 39 FCC 2d 645, 677-78 (1973).

The dearth of minority ownership of broadcast stations troubled many, including the FCC Chairman Richard E. Wiley and Commissioner Benjamin L. Hooks, whose concerns were the genesis of the historic Minority Ownership Conference sponsored by the FCC on April 24-25, 1977. *See* Smith, "Toward Minority Visibility in Telecommunications Ownership," 12 *Nat'l B. L. J.* vii-xi (1983); *FCC Report on Minority Ownership in Broadcasting*, May 17, 1978 (*"1978 Minority Taskforce Report"*). The text from the Report demonstrates the FCC's intent in encouraging minority ownership:

> Minorities should be fairly represented in the broadcast industry of a society which mandates an unrestricted flow of diverse ideas and equal opportunity for all. Diversity of ideas and viewpoints is vital to a free society. Indeed, the promotion of greater diversification in the media has been recognized as socially desirable by the FCC as well as the courts.

1978 Minority Taskforce Report at ii. Moreover, the *Taskforce Report* specifically acknowledges the general public value of diverse views in stating that:

> [u]nless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial portion of our citizenry will remain underserved and *the larger non-*

> *minority audience will be deprived of the views of minorities.*

Id. at i (emphasis added). *See also* Lee, *The Supreme Court And The Right To Receive Expression*, 1987 Sup. Ct. Rev. 303, 306.

The FCC also reported on financial barriers to entry, and noted that "[a]nswers to all the problems confronting potential minority broadcasters will be found by hard and imaginative development of solutions by the potential minority broadcasters and the *private and governmental institutions confronting the issues.*" *Id.* at 2 (emphasis added).

Exhaustive measures to ensure the legitimacy of the FCC's minority ownership policies did not end in 1978. In 1982, the FCC issued a second minority ownership report based on a conference at the Commission on September 28, 1981. *See Advisory Committee on Alternative Financing Opportunities in Telecommunications*, (May 27, 1982) ("*1982 Conference Report*"). The *1982 Conference Report* makes several recommendations for eradicating the economic barriers typically confronting potential minority broadcasters. Moreover, the *1982 Conference Report* echoes the themes of the *1978 Minority Taskforce Report* by advising the FCC that "in structuring entry and establishing licensing procedures of developing technologies, [the FCC] must continually consider whether its proposed policies will encourage or preclude minority entrants." *1982 Conference Report, supra.* (Introduction). The FCC's commitment to promoting minority ownership of broadcast facilities was affirmed by FCC Chairman Mark Fowler in 1981, when he declared that "we at the FCC. . . will not. . . turn back the gains made by minorities in this country. . . will not frustrate the gains made by minorities in te-

lecommunications. . . ." FCC Release, No. 003550, at 3 (Sept. 24, 1981).

Not only has the FCC itself compiled research and data pertaining to the significance of minority ownership of broadcast facilities, and methods for attaining this policy objective, Congress has pursued information on the minority ownership policies and has granted its approval of the agency's actions, also. In 1982, Congress expressed approval of the FCC policy of awarding minority enhancement credit in the lottery scheme, stating that:

> [i]t is the firm intent of the conferees that traditional Commission objectives designed to promote the diversification of control of the media of mass communications be incorporated in the administration of a lottery system.

See H.R. Rep. No. 765, 97th Cong., 2d Sess. 40 (1982). In 1987, Congress reaffirmed its strong support for the minority enhancement policy, by prohibiting repeal or reconsideration of the policy by the FCC. In the statute, Congress specifically provides that:

> none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and . . . to expand minority. . . ownership of broadcasting licenses, including those established in *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 and 69 FCC 2d 1591, as amended 52 RR 2d 1313 (1982) and *Mid-*

> *Florida Television Corp.*, 60 FCC 2d 607 (Rev. Bd. 1978), which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending conclusion of the inquiry. . . .

See Pub. L. No. 100-202, 101 Stat. 1329-31 (1987). *See also* H.R. Rep. 498, 100th Cong., 1st Sess. 504 (1987); Pub. L. No. 100-459, 102 Stat. 2216 (1988); Pub. L. No. 101-162, 103 Stat. 1020 (1989).

There is ample legislative history and majoritarian affirmation to support the FCC's determination that minority ownership is a means to achieve diversity in programming and viewpoints as a legitimate means or end of the Commerce Clause. *See* U.S. Const. art. I, § 8; *see also Gibbons v. Ogden*, 9 Wheat. 1 (1824). In 1983, Congresswoman Cardiss Collins stated:

> if we do not take action to correct the deliberate and systematic invisibility of minorities in the media, we will not play a meaningful role in the way American society receives information about itself and the world.

Minority Participation in the Media: Hearing Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. (1983) at 132. The late Congressman Mickey Leland specifically reflected on Congress' interest in preserving the FCC's minority ownership policies in stating:

> It is imperative that, to the extent we provide for license certainty for broadcast licenses, we

> do not exclude the possibility of greater minority participation as owners in the industry. For that reason, I firmly believe that any new licenses created by the FCC through drop ins radio or television or, by revocations or denials of existing licensees should, to the maximum extent possible, be made available to qualified minority applicants. . . . Whatever means we use, the essential point is that minority ownership is at an abysmally low level and must increase if the industry is to live up to its promise of service to the entire community.

Id. at 133. *See also Parity for Minorities in the Media-Hearing 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); *Minority-Owned Broadcast Stations - Hearing on H.R. 5373 Before Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. (1986).

More recently, the Senate Subcommittee on Communications conducted a hearing to further examine the FCC's minority ownership policies. *See Minority Ownership of Broadcast Stations: Hearing Before the Subcomm. on Communications of the Senate Common Commerce*, 101st Cong., 1st Sess. (1989). The Senate hearing demonstrates Congress' continuing interest in preserving the FCC's minority enhancement policy. As noted by Subcommittee Chairman, Senator Daniel K. Inouye, Congress' current interest with respect to the policy is to "demonstrate that minority. . .ownership of broadcast stations does, in fact, promote diversity in the views presented on the airwaves[,] [and] [Congress]

need[s] to consider what, if any, changes need to be made in the policies or their implementation to improve their effectiveness." *Id.* at 4.[4]

C. The Minority Qualitative Enhancement Factor Is Consistent With The Mandate to Encourage Broadcast Diversity In The Public Interest

As this Court articulated in *Associated Press v. United States*, 323 U.S. 1 at 20, the importance of diversity of approach and viewpoint in broadcasting is well-entrenched as an important public interest goal. *See also FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978)("*FCC v. NCCB*"); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 923 (1971). The District of Columbia Circuit has consistently given credence to specific FCC policies that would effectuate the public interest of program diversity without regulating content of broadcast programming. Thus, as discussed, *infra*, policies which diversify ownership of broadcast facilities have become an instrumental device in encouraging diversity of programming content while minimizing governmental intrusion in broadcast content, thereby preserving First Amendment freedoms.[5]

In *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), *clarified* 463 F.2d 822 (D.C. Cir. 1972), the court acknowledged that diversity of own-

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[4] *See also Minority Ownership of Broadcast Stations: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 101st Cong., 1st Sess. 136-37 (1989) (Testimony of Marilyn Fife, PhD., Temple University).

[5] As this Court noted in *FCC v. NCCB*, "[d]iversity and its effects are... elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds." 436 U.S. at 796-97.

ership can assist the FCC in effectuating its public interest goals, and stated that the Commission "simply cannot make a valued public interest determination without considering the extent to which the ownership of the media will be concentrated or diversified by a grant of one or another of the applications before it." 447 F.2d at 1213 n.36. The court added, as diversity of ownership is significant, so too it is important that "hitherto *silent minorities*. . . be given some stake in and chance to broadcast on [ ] radio and television frequencies." *Id.* (emphasis added).

The issue of minority underrepresentation in the broadcast industry has been directly addressed by the FCC and the court. See generally Wilson, "Minority and Gender Enhancements: A Necessary and Valid Means to Achieve Diversity In The Broadcast Marketplace," 40 *Fed. Comm. L. J.* 89 (1988). Mechanisms have been designed by the courts and implemented by the FCC to spawn greater participation in broadcasting by minority groups in furtherance of the public interest goal of enhancing the public's exposure to programming that is comprised of diverse group viewpoints. *See, e.g., Garrett v. FCC*, 513 F.2d 1056, 1061, 1063 (D.C. Cir. 1976). In *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974), the significance of minority ownership was dealt with directly with respect to its necessity in furtherance of the public interest and the First Amendment considerations that mandate it. As acknowledged in *TV 9, Inc.*, "[t]he thrust of the public interest opens to the Commission wide discretion to consider factors which do not find expression in constitutional law[,] . . . [h]owever exclusive the public interest may be it has reality[;] [i]t is a broad concept to be given realistic

content." *Id.* at 936. The District of Columbia Circuit looked to the Supreme Court's acknowledgement of the FCC's power to enforce the public interest mandate which served as the court's foundation for the minority enhancement policy.

> 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 the presentation of news.

Id. at 938. [footnote omitted]. *West Michigan*, 735 F.2d 601 (D.C. Cir. 1984) *cert. denied*, 470 U.S. 1027 (1985) further establishes minority ownership as a legitimate policy objective and a vital part of the FCC's public interest mandate that must be recognized regardless of the minority make-up of a station's local population. *Id.* at 611. The policy enunciated in *TV 9, Inc.* was clarified even more in *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975), wherein the court rejected the assertion that a grant of qualitative enhancement credit due to minority status compels advance demonstration of the intent to broadcast minority programming. The court held that "[t]he entire thrust of *TV 9, Inc.* 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." *Id.* at 1063, *citing TV 9, Inc.*, 495 F.2d at 938. [footnotes omitted.]

In sum, the minority qualitative enhancement factor is consistent with the public interest standard enunciated by the Court, the FCC and Congress to encourage broadcast diversity.

II. AN FCC DECISION THAT IS REASONABLE AND BASED UPON CONSIDERATION OF PERMISSIBLE FACTORS SHOULD BE ACCORDED DEFERENCE

Since Congress gave the FCC broad discretion in granting broadcast licenses, courts have a limited standard of review of such FCC decisions. Section 402 of the Communications Act provides that courts shall hear appeals as prescribed by Section 706 of Title 5. 47 U.S.C. § 402(g) (1989). Therefore, in this case, as in all appeals of agency decisions, the courts have limited judicial review as the Administrative Procedure Act states, a "reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be in excess of statutory jurisdiction, authority, or limitations or short of statutory right." 5 U.S.C. § 706(2)(C) (1982).

This standard of review restricts the Court's review of FCC decisions, unless the enhancement factors of the comparative license policy is in excess of the authority of the Communications Act of 1934, as amended. Amicus submits that it is not. *See Western Union Telegraph Co. v. FCC*, 541 F.2d 346, 354 (3d Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977). The court is not permitted to conduct a *de novo* comparative analysis of broadcast applications, or to second-guess the FCC's evaluation of the proposed service. *Victor Broadcasting, Inc. v. FCC*, 722 F.2d 756, 763 (D.C. Cir. 1983).

The courts emphasized that their review of comparative hearing proceedings is limited to ensuring that

the agency has engaged in reasoned decision-making that is based upon the FCC's announced policies. In 1983, the District of Columbia Circuit explained its need to "proceed cautiously" when reviewing a comparative hearing decision, stating:

> It is necessary only that we satisfy ourselves that the agency acted within the bounds of its statutory and constitutional authority, that it has followed its own procedural rules and regulations, that its findings of fact are reasonably articulated and based on substantial evidence in the record as a whole, that its conclusions, do not deviate greatly from past pronouncement without sufficient explanation, and that in general it has engaged in reasoned decision-making. . . . *It is not our judicial job to direct the Commission on how to run the comparative hearing process.* . . .

Victor Broadcasting, Inc., 722 F.2d at 760 (citing *Miner v. FCC*, 663 F.2d 152, 155 (D.C. Cir. 1980)) (emphasis added).

When the FCC's action is reasonable and based on the consideration of permissible factors, courts have declined to substitute their views for the FCC's views and have given deference to the FCC's expert judgment regarding how the public's interest is best served. *See, e.g., National Broadcasting Co. v. United States*, 319 U.S. 190, 210-18 (1943); *Victor Broadcasting, Inc.*, 722 F.2d at 760. Some, who command much respect, have expressly stated that they give more deference to FCC comparative decisions because those decisions are based upon " 'judgmental and predictive' conclusions." *Black Citizens for a Fair Media v. FCC*, 719

F.2d 407, 417 (D.C. Cir. 1983)(Bork, J.). *See also Pinellas Broadcasting Company v. FCC*, 230 F.2d 204, 206 (D.C. Cir.), *cert. denied*, 350 U.S. 1007 (1956).

In the case before the court, the FCC Review Board determined that Rainbow had quantitative and qualitative advantages over its competitors, Winter Park and Metro. Neither applicant received an enhancement credit for comparative coverage; but, Rainbow prevailed in the integration of ownership and management category. Metro received 79.2% integration credit for the full-time participation of four stockholders and 19.8% for the part-time participation of one stockholder as general manager. By comparison, Rainbow received 90% full-time integration credit for participation as a general manager. Therefore, Metro and Rainbow were awarded substantial enhancements over Winter Park.

At that point, the Review Board properly concluded that since Winter Park lacked full-time integration and sufficient qualitative enhancements, further consideration of its application was unnecessary. In addition, Rainbow's 10.8% quantitative advantage over Metro was decisional as a matter of evidentiary weight. However, the Board did conduct a factual qualitative comparison of Metro and Rainbow and decided that Rainbow's service would be qualitatively superior to Metro's proposed service. Rainbow received a substantial minority enhancement for its proposed 90% minority (Hispanic) participation and it is here emphasized that *Metro received 19.8% credit for its female participation.*

Rainbow also received an enhancement credit for broadcast experience, since one of its principals had 85% past broadcast experience as compared to Metro principals' 19.8% past experience. Moreover, Rainbow

proposed 5% female ownership while Metro claimed none. Finally, Metro received only a moderate enhancement credit for the local and service area residence and civic participation of its three principals. The Review Board determined that based upon Rainbow's quantitative and qualitative edge, Rainbow would best serve the public interest. Amicus contends that the FCC's decision to award the license to Rainbow is supported by substantial evidence and that limits the scope of judicial review. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951); *Black Citizens for a Fair Media v. FCC*, 719 F.2d at 417.

III. THE FACT THAT PETITIONER LOST TO RAINBOW IN THE COMPARATIVE HEARING IS NOT INVIDIOUS DISCRIMINATION BECAUSE THE FCC APPLIES MULTIPLE FACTORS IN THE AWARD OF BROADCAST LICENSES

As discussed in Section I of this Brief, the comparative hearing process involves a consideration and review of several factors including: diversification of control of the media, integration of ownership and management, proposed program service, past broadcast record, efficient use of the frequency and character. Petitioner argues, however, that the minority enhancement credit is an unconstitutional factor, notwithstanding the fact that overwhelming evidence demonstrates that an applicant's minority status is not and has never been the sole basis for granting a license. Amicus submits that the Petitioner's claim is without merit because the minority enhancement credit is consistent with the courts' statements in *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974), *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), *Johnson v. Transportation Agency,*

Santa Clara County, 480 U.S. 616 (1987), and *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

It is useful to bear in mind what this case is not. The Court is not asked to order parties to suffer the consequences of an agreement that they had no role in adopting. *See Firefighters v. Scotts*, 467 U.S. 561, 575 (1984); *Martin v. Wilks*, 109 S.Ct. 2180 (1989). This is not one in which a party to a collective-bargaining agreement has attempted unilaterally to achieve racial balance by refusing to comply with a contractual, seniority-based layoff provision. *Cf. Teamsters v. United States*, 431 U.S. 324, 350, 352 (1977). The Court is not presented with the occasion to resolve whether a white worker may be required to relinquish his job to accommodate the hiring of a black worker. *See United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979). Also, there has been no court order to achieve racial balance which might require the Court to reflect upon the existence of judicial power to impose obligations on parties not proved to have committed a wrong. *See Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). Further, the Court is not called upon to determine whether a state or local government's race-conscious program to remedy societal discrimination is narrowly tailored so that it allows for case-by-case consideration of applicants to ensure that each minority has in fact suffered from the effects of past discrimination, and to see if the program is patterned so that it minimizes the burden on nonminorities, so that innocent people are not asked to shoulder an undue share of the cost of remedying past discrimination. *City of Richmond v. J.A. Croson*, 109 S.Ct. 706 (1989). Resolution of this case is best guided by the Court's pronouncements in the *Bakke* and *Johnson* decisions.

In *Bakke*, a California medical school special admissions program which set aside sixteen of one hundred positions in the class for minority applicants was declared unconstitutional. Justice Powell summarized the Court's objection to giving students a preference based solely upon race stating, "[t]he diversity that furthers a compelling state interest encompasses a broad array of qualifications and characteristics of which racial or ethnic origin is but a single, although important, element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity." 438 U.S. at 315. The comparative hearing process and the facts before the Court satisfy the *Bakke* test.

Justice Powell compared the University of California's program to the admissions program of Harvard College which included high school records, test scores, geographical origin and race among its admissions criteria. Justice Powell explained that the Harvard program was dissimilar to the University of California's program because:

> race and ethnic background may be deemed a 'plus' in a [Harvard] applicant's file, yet it does not insulate the individual from comparison with all other candidates. . . . The applicant who loses out on the one last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for the seat simply because he was not the right color or the wrong surname. It would mean only that his combined qualifications, which may have included similar non-objective factors, did not outweigh those of the other applicant.

Id. at 318.

Recently, the Court decided that a similar agency plan that required women to compete with all other qualified applicants, but gave a preference to women, was constitutionally permissible. *Johnson*, 480 U.S. at 637-40. The plan included consideration of the applicant's sex as well as low turnover rates, the type of labor, and the number of positions within a job category in promotion and hiring decisions. *Id.* at 622. In *Johnson*, seven people applied for a position. Petitioner Johnson, a male, filed a discrimination complaint when a woman was selected. Rejecting petitioner's claim, the Court concluded that the agency's plan neither unnecessarily trammeled the rights of male employees nor created an absolute bar to their advancement. The Court stated that "[n]o persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants." *Id.* at 638. The FCC's comparative hearing factors, including the minority ownership enhancement policy on review before the Court, follow the same nondiscriminatory model upheld in *Johnson*.

The minority enhancement credit is one diversity plus factor among several comparative factors by which the FCC selects licensees. *See, e.g., Gainesville Media, Inc.*, 70 FCC 2d 807, 184 n.15 (1978); *Flint Family Radio, Inc.*, 69 FCC 2d 38, 46 (1977). Unlike the University of California's program, "[t]he FCC comparative process. . .explicitly provides for examination of a wide variety of traits to assess an applicant's potential for increasing diversity and quality programming." *West Michigan Broadcasting Company v. FCC*, 735 F.2d 601, 615 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985). Therefore, the FCC's policy of taking race into account

in the award of broadcast licenses, among other factors, "easily passes constitutional muster." *Id.* at 613.

The FCC's policy is similar to the Harvard program which the Supreme Court approved. In both instances, minority status is only one of several factors which decision-makers review to choose applicants. Neither the Harvard program nor the *TV 9, Inc.* minority factor adopts a quota system. In *TV 9, Inc.* when Judge Fahy asserted the need for a minority enhancement, he emphasized that "no quota system is being recommended or required." 495 F.2d at 941. Likewise, the originators of the Harvard program noted that no "target-quotas" were intended. 438 U.S. at 324. Thus, neither of these programs unnecessarily trammels upon the rights of whites or creates a bar to their advancement since the FCC could select any qualified applicant. *United Steelworkers of America*, 443 U.S. at 208. *Cf. NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-93 (1974). And Petitioner, who took advantage of an enhancement factor (female enhancement credit) himself, cannot here legitimately claim invidious discrimination because he lost a close competitive contest to a minority applicant.

IV. THE MINORITY ENHANCEMENT POLICY IS NARROWLY TAILORED AS STRUCTURED, AND ANY FURTHER TAILORING ENCROACHES ON THE FIRST AMENDMENT

A critical question posed by the case, *sub judice*, is whether the Constitution prohibits a federal administrative agency from exercising its broad delegation of power by taking race into account to promote First Amendment concerns.

The FCC's minority ownership policy and, in particular, the award of enhancement credit for minorities

in the comparative hearing process, primarily serves the compelling governmental interest of advancing First Amendment concerns. The comparative hearing process and its attendant minority enhancement policy is narrowly tailored to achieve the compelling governmental interest. It therefore promotes First Amendment concerns through diversity of ownership, with an expectation of diversity of programming, without advance demonstration, *and avoids direct intrusion into First Amendment rights.* The minority enhancement policy does not create a *numerus clausus* because race is one of several factors to be considered rather than a decisive factor in and of itself.[6]

Amicus acknowledges that the promotion of First Amendment concerns in the academic community is the only other state interest heretofore identified in a Supreme Court opinion and upheld as sufficiently compelling to support a race-conscious policy. *Wygant v. Jackson Board of Education*, 476 U.S. at 286 (O'Connor, J., concurring) (citing *Bakke*, 438 U.S. at 311-15). However, the Court in *Wygant* acknowledged that its previous decisions did not "necessarily foreclose [ ] the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on [ ] to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies." *Id.* at 286 (O'Connor, J., concurring).[7]

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[6] The minority enhancement becomes relevant after the FCC concludes that there are no significant differences in the quantitative aspects of two competing applicant's integration proposals. *See WHW Enterprises, Inc.*, 89 FCC 2d 799, 817 (Rev. Bd. 1982).

[7] It can not be overemphasized that the Commission has never,

Amicus argues that the case *sub judice* provides the factual basis for the logical extension of the principles enunciated in *Bakke*. The promotion of First Amendment concerns in the broadcast arena is a sufficiently compelling governmental interest to justify regulations which invite greater participation by minorities, who are substantially underrepresented in the ownership and management of broadcast facilities.[8] As in the educational setting, diversity of ideas or viewpoints is the pivotal issue in the case *sub judice*.

The Courts, Congress and the FCC have endorsed the principle that the "widest possible dissemination of information from diverse and antagonistic sources is essential to the public interest." *See Associated Press v. United States*, 326 U.S. at 20 (1945); H.R. Conf. Rep. No. 97-765, 97th Cong., 2d Sess. 40 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News. 2261; S. Rep. No. 100-182, 100 Cong., 1st Sess. 76 (1987); *1965 Policy Statement*, 1 FCC 2d at 394; *Minority Ownership Policy Statement*, 68 FCC 2d 979 (1978); *cf. FCC v. NCCB*, 436 U.S. at 795; *Greater Boston Television Corp. v. FCC*, 444 F.2d at 860 (FCC should seek out "as licensees those who would speak out with fresh voices, [and] would most naturally...

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in form or substance, classified its minority ownership policy as tantamount to an affirmative action program. Brief for FCC, *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), at 28-30. However, the principle of inclusion in *Bakke* is relevant and applicable to the case at the bar.

[8] According to the most recent census figures, minorities constitute about 23.5 percent of the population. However, only 2.1 percent of radio and television stations are minority owned and controlled, according to a National Association of Broadcasters study done in 1987. See "Minority Owned and Controlled Broadcast Stations," National Ass'n of Broadcasters (1987).

expand diversity of approach and viewpoint"); *Citizens Communications Center*, 447 F.2d at 1213 n.36.

As First Amendment concerns relate to the FCC's minority ownership policy, and in particular the comparative hearing process, both the courts and the FCC have determined that diversity in broadcast programming is a compelling governmental policy. *Accord* brief for FCC, on appeal from a decision and Order of FCC, *West Michigan Broadcasting Co.*, supra, at 19 n.16 (citations omitted) (FCC General Counsel Bruce Fein). Further the minority ownership policy increases ownership diversity which, in turn, leads to increased program of diversity. *See* Brief for FCC before this court (Docket 89-700), *Astroline Communications Co. v. Shurburg Broadcasting of Hartford, Inc.*, at 24, citing *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 355 (D.C. Cir. 1989), *cert. granted sub nom. Metro Broadcasting, Inc. v. FCC*, 110 S.Ct. 715 (1990)("Like the set-aside plan in *Fullilove*, the FCC's minority preference policy has Congress' expressed approval. Congress has interceded at least twice to endorse the FCC's policy of enhancements for minority ownership in the award of broadcast licenses"). In *West Michigan Broadcasting Co.*, the court concluded that promotion of diversity was a sufficiently important governmental interest to warrant a race-conscious policy. 735 F.2d at 614-15. In *TV 9, Inc.*, the court noted that the policy acknowledged the FCC's First Amendment mandate of promoting diversity of ownership of broadcast stations along with the "diversity of ideas and expression required by the First Amendment." *TV 9, Inc.*, 495 F.2d at 937.

Congress has also recognized the compelling governmental interest of furthering the First Amendment

concerns of the FCC's minority ownership policy. In enacting the 1982 lottery statute, Congress sanctioned the means chosen as a proper vehicle to achieve diversity, *see* H.R. Rep. No. 765 at 44, and in three subsequent appropriations acts, it mandated that the FCC continue its minority ownership policy premised on the compelling governmental interest of furthering the First Amendment. *See* Pub. L. No. 100-202, 101 Stat. 1329-31 (1987)(Pet. App. 162a):

> The Congress has expressed its support of 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. 100-182 at 76, citing 47 U.S.C. § 309(i)(3)(A) and H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 37-44 (1982); Pub. L. No. 100-459, 102 Stat. 2216 (1988) (Pet. App. 163a); Pub. L. No. 101-162, 103 Stat. 1020 (1989).

The Court has implicitly recognized that the FCC through other regulation can seek to achieve its First Amendment mandate. Consider the case of *NAACP v. Federal Power Commission*, 425 U.S. 662, 670 n.7 (1976). There, the Court opined that the FCC's equal employment opportunity rules were justified "as necessary 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." *Id.* Similarly, the FCC has attempted to meet its public interest mandate through policies that invite greater participation by minorities

who are substantially underrepresented in the ownership and management of broadcast facilities. *See, e.g., Minority Ownership Policy Statement*, 68 FCC 2d at 980-81; *Waters Broadcast Corp.*, 91 FCC 2d 1260, 1264 (1982); *Mid-Florida Television Corp.*, 69 FCC 2d 203 (1981); *Horne Industries, Inc.*, 94 FCC 2d 815, 822-24 (Rev. Bd. 1983), *rev. denied*, 56 Radio Reg. 2d (P&F) 665 (1984).

The FCC *Minority Ownership Policy Statement, supra*, outlined the diversity-related basis for its minority policies:

> Adequate representation of minority viewpoint 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. . . . [T]he Commission believes that ownership of broadcast facilities by minorities is another significant way of fostering the inclusion of minority views in the area of programming. . . . In addition, an increase in minorities will inevitably enhance the diversity of control of a limited resource, the spectrum.

Minority Ownership Policy Statement, supra, 68 FCC 2d at 980-81 (citing *1978 Minority Taskforce Report*). Therefore, giving enhancement credit for minorities in the comparative hearing process can be justified as a compelling governmental interest implicating First Amendment concerns.

Turning to the issue of narrow tailoring, the constitutional test seems to be different when the gov-

ernment's justification for a race-conscious program is the promotion of diversity rather than the remedy of past discrimination.[9] In the First Amendment context, Justice Powell in *Bakke* suggested that a program is narrowly tailored if each applicant receives individualized consideration. *See Bakke*, 438 U.S. at 318 & n.52; *Cf. Croson*, 109 S.Ct. 728-29. The Court in *Bakke* required no more than individualized considerations with respect to narrow tailoring, even rejecting the argument that an admission program which considers race only as one factor is simply a "subtle and more sophisticated"—but no less effective—means of according racial preference." *Id.*

Even assuming *arguendo*, that the narrow tailoring in *Bakke* is deficient in light of recent Supreme Court decisions, the Court could reasonably find that the FCC's comparative hearing policy is *more* narrowly tailored than required by the *Bakke* decision. The FCC's minority enhancement credit accounts for only one fac-

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[9] When remedying past discrimination is the justification for the government's race-conscious programs, the Court has emphasized that an important consideration in a "narrowly tailored" analysis is whether there has been prior consideration of the use of alternatives. *See Croson*, 109 S.Ct. at 728; *United States v. Paradise*, 480 U.S. 149, 171 (1987); *Fullilove*, 448 U.S. at 463-67 (Burger, C.J.); *id.* at 511 (Powell, J.). Amicus points out that the justification of remedying past discrimination is not the specific goal of the minority ownership policy. The FCC, however, has for years followed policies of encouraging diversity of employment practices of broadcast licensees. *See, e.g., Nondiscrimination Employment Practices of Broadcast Licensees*, 18 FCC 2d 240 (1969) (Regulations sought to ensure that broadcast licensees did not discriminate against minorities in employment practices); *see also Nondiscrimination Employment Practices of Broadcast Licensees*, 23 FCC 2d 430 (1970); *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 FCC 2d 226 (1976).

tor in the overall comparative evaluation, and the impact on nonminorities is minor compared to the harsh layoff provisions in *Wygant*. Therefore, the analysis employed in *Wygant* does not apply to the FCC's minority enhancement policy.

In short, the FCC's policy of awarding a qualitative enhancement credit for minority status in the comparative hearing process strikes a reasonable balance between First Amendment concerns of diversity while minimizing government intrusion into broadcast program content and the Fifth Amendment's equal protection component.[10] The minority enhancement credit operates only to enhance qualitatively the quantitative credit given for participation in station management by the station's owners.[11] Amicus submits the compar-

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[10] "[I]n our present society, race is not always irrelevant to sound governmental decision-making." *Wygant*, 476 U.S. at 314 & n.7 (Stevens, J., dissenting) ("As Justice Marshall explains, although the Court's path in *University of California Regents v. Bakke*, 438 U.S. 265 (1978), and *Fullilove v. Klutznick*, 448 U.S. 448 (1980), is tortuous, the path at least reveals that race consciousness does not automatically violate the Equal Protection Clause. In those opinions, only two Justices of the Court suggested that race-conscious governmental efforts were inherently unconstitutional. *See id.* at 522 (Stewart J., dissenting, joined by Rehnquist, J.). *Id.* at 548 (Stevens, J., dissenting) ("Unlike Mr. Justice Stewart and Mr. Justice Rehnquist, . . . I am not convinced that the Clause contains an absolute prohibition against any statutory classification based on race").

[11] *See WHW Enterprises, Inc.*, 89 FCC 2d at 817 (minority preference becomes significant only after FCC concludes that no significant differences in quantitative aspects of competing applicants' integration proposals exist). Further narrow tailoring can be found in the FCC's decision not to award credit unless the owner will "devote substantial amounts of time on a daily basis" to the station management. *1965 Policy Statement*, 1 FCC 2d at

ative hearing process is narrowly tailored in that it avoids a race-based allocation of benefits according to a fixed, unyielding percentage or quota. See *Fullilove*, 448 U.S. at 473 (No "inflexible percentages solely based on race or ethnicity"); *Bakke*, 438 U.S. at 316 ("assignment of a fixed number of places to a minority group"); *Croson*, 109 S.Ct. at 728 (constitutionally infirm plan relied on "a rigid numerical quota" which "cannot be said to be narrowly tailored to any goal").

In summary, the FCC's minority enhancement policy is as narrowly tailored as the admission's program approved by the Court in *Bakke*. As in *Bakke*, the applicant did not lose out on the last available seat [grant of broadcast license] simply on the basis of race. Hence, Metro's claim of violation of the Fifth Amendment is without basis and should fail

CONCLUSION

For the foregoing reasons, the decision by the District of Columbia Circuit should be affirmed.

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395. The above-mentioned structural-type policies avoid FCC's supervision and oversight of the content of broadcast programming and such an approach has been endorsed by the Court in analogous contexts. *See, e.g., National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 226 (1943) ("Congress did not authorize the FCC to choose among applicants based upon their political, economic or social views. . . ."); *see also FCC v. NCCB*, 436 U.S. at 796-97 (Defining and measuring diversity is difficult without making qualitative judgments objectionable on both First Amendment and policy grounds). Further, the impact on innocent parties is minor because the minority enhancement credit accounts for only one factor in an overall comparative analysis.

Respectfully submitted,

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