No. 89-453

In the Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC.,

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*

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

BRIEF OF THE UNITED STATES SENATE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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INTEREST OF THE UNITED STATES SENATE

The petitioner has presented to this Court a question about the constitutionality of acts of Congress which, since December, 1987, have required the Federal Communications Commission ("FCC") to adhere to a policy, previously adopted by the FCC, for promoting ownership by minorities and women of television and radio stations. The portion of the policy that is directly involved in this case requires the FCC to give credit for, among a number of factors, ownership by minorities in evaluating competing applications for new stations. While the FCC is defending its policy and the legislation that has required its implementation, the Acting Solicitor General, on behalf of the United States, has joined in petitioner's challenge to their constitutionality.

The interest of the Senate in this case is grounded in the conviction that the legislation the Congress has enacted to require the continuation of the FCC's policy is a measured and constitutional effort to overcome past inequities and to advance the legitimate public interest in diversity of programming. Accordingly, the Senate has authorized the filing of this brief pursuant to 2 U.S.C. §288e(a), which provides that the Senate may direct its Legal Counsel to appear as amicus curiae in its name "in any court of the United States . . . in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue." [1]

STATUTORY PROVISIONS INVOLVED

This case involves identical provisions of statutes providing appropriations for the Federal Communications Commission for fiscal years 1988, 1989, and 1990. The current provision was enacted as part of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 988, 1020-21 (1989), and states that

> [N]one 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 tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in the Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d 979 and 69 F.C.C. 2d 1591, as amended 52 R.R. 2d 1313 (1982) and Mid-Florida Television Corp., 6[9] F.C.C. 2d 607 [(]Rev. Bd. 1978), which were effective prior to September 12, 1986, other than to close MM Docket 86-484 with a reinstatement of prior policy and a

[1] *See* S. Res. 251, 101st Cong., 2d Sess. (1990); 136 Cong. Rec. S1775-76 (daily ed. Feb. 27, 1990) (directing appearance in this case). Permission for the Senate to appear is "of right" and may be denied only for untimeliness. 2 U.S.C. §288*l*(a).

> lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry. . . .

SUMMARY OF ARGUMENT

Congress's decision to keep the FCC's minority ownership policy in place is based on a record, compiled over two decades, of concern with the limited participation of minorities in the broadcast industry. Over the course of that time, Congress came to recognize that the unequal distribution of control over broadcast outlets was attributable in part to the effects of past discrimination and had disserved the public's interest in diverse radio and television programming. In order to ensure both that minorities could share in a vital and limited public resource, and that the public could benefit from their contributions to programming, Congress has required the FCC to continue a policy that works in modest ways to facilitate their entry into the field.

1. Congress first examined the problem of lack of minority participation in the broadcast industry in the late 1960s and early 1970s when it considered, but did not adopt, legislation that would have limited competing applications for existing licenses. Witnesses representing the interests of minority groups appeared at congressional hearings to state their concern that adoption of the legislation would further encumber the opportunity for minorities to obtain access to the media. The Congress was informed of the dearth of minority ownership of television and radio stations, and learned of the difficulties minorities faced in purchasing existing licenses or obtaining the limited number of new licenses that became available. This testimony was presented against the background of the Kerner Commission Report on the contribution of an essentially "all-white" media to racial disorders. As a result, Congress recognized that minorities faced a unique set of barriers that prevented their entry into the broadcasting field and that in the absence of

their participation, their perspectives and ideas were not being presented to the public.

2. From 1978 to 1983, concerned with the profound impact that the lack of minority contributions to programming had on both minority and nonminority audiences, the executive branch, the FCC, and the Congress acted to remedy that deficiency by enhancing the opportunities for minority ownership of broadcast licenses. The executive branch sought the implementation of a remedial program, including a grant of a preference to minorities in comparative hearings for licenses, in order to redress the historical problems which minorities faced in seeking broadcast ownership. The FCC adopted the policy which is the subject of this litigation. Then, in 1982, the Congress gave legislative support to the policy when, in authorizing a lottery for new licenses, the Congress provided for a preference for minorities in order to remedy the effects of past discrimination and to promote diversity in radio and television programming.

3. While proceeding to examine a range of minority issues in broadcasting, Congress has relied on the existence of the FCC ownership policy as a foundation of future policymaking. When the FCC determined that it would suspend the policy pending a reevaluation, Congress enacted legislation, first in 1987 and again in 1988 and 1989, to require the continued implementation of the policy.

4. The history of the minority ownership policy demonstrates that Congress had substantial evidence developed over a twenty-year period from which to conclude that the limited minority participation in broadcasting was attributable to the effects of past discrimination and that it disserved the goal of programming diversity. The policy is a measured and constitutional response to the persistent national problem of limited minority participation in broadcasting.

ARGUMENT

THE CONGRESS'S RATIFICATION OF THE FCC'S MINORITY OWNERSHIP POLICY IS GROUNDED ON TWO DECADES OF CONCERN WITH THE LIMITED PARTICIPATION OF MINORITIES IN BROADCASTING

Petitioner's characterization of Congress's ratification of the FCC's minority ownership policy as enactments "buried in appropriations measures, rather than constituting a 'considered decision of Congress and the President,'" Pet. Brief at 49 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 473 (1980)), fails to credit the fullness of Congress's consideration of the need to redress the lack of minority participation in broadcasting. The determination to require the FCC to continue to adhere to its policy was a considered decision based on a record developed over two decades. As Justice Powell's concurring opinion in *Fullilove* explains, restricting a reviewing court to the immediate legislative history of an act, such as the appropriations acts in question in this case, "would erect an artificial barrier to [a] full understanding of the legislative process." *Id.* at 502. The "special attribute [of Congress] as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation." *Id.* at 502-03.[2] The principal objective of this brief is to marshal more fully for the Court's consideration the experience of the Congress with the problem of limited minority participation in broadcasting.

Since the late 1960s, Congress—informed by the courts, national advisory commissions, the FCC, witnesses at congressional hearings, and, notwithstanding its current position, by the executive branch—has considered the uneven distribution of ownership of television and radio

[2] *See also id.* at 478 (opinion of Burger, C.J.) ("Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings.").

stations. During the twenty years in which minority broadcasting issues have been the subject of its scrutiny, the Congress has come to recognize that increased minority participation in the ownership of broadcasting outlets is essential not only to remedy the effects of past discrimination that impeded access of minorities to the industry, but also to benefit the entire population by increasing the diversity of voices heard over the nation's airwaves. Attention to the entire record before the Congress will show not only the basis on which it has legislated, but also the consensus that developed among all three branches of government, at the time of the formation of the current policy in 1978, that positive government action was essential to encourage minority access to a vital and limited public resource.

A. A DECADE OF CLOSE SCRUTINY OF MINORITY PARTICIPATION IN BROADCASTING PRECEDED THE FCC'S ADOPTION OF A MINORITY OWNERSHIP POLICY IN 1978

In the late 1960s, a number of forces combined to bring under congressional scrutiny the causes and effects of the lack of minority participation in the broadcast industry. In 1966, the District of Columbia Circuit, to which the Congress has assigned a special role in reviewing FCC decisions, reversed the dismissal by the FCC of a petition contending that a Jackson, Mississippi television station "did not give a fair and balanced presentation of controversial issues, especially those concerning Negroes," and held that the FCC must permit responsible members of the listening public to contest the renewal of broadcast licenses. *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 998, 1005 (D.C. Cir. 1966). Articulating the central rationale for such "consumer actions," Circuit Judge Burger observed that a broadcaster "is granted the free and exclusive use of a limited and valuable part of the public domain," which is "burdened by enforceable public obligations." *Id.* at 1003.

The court of appeals decision was soon followed by the Kerner Commission Report, which concluded that an es-

sentially "all-white" media had contributed to racial disorder in the 1960s by failing to portray minority perspectives and images. President Johnson had appointed the Commission in 1967 to investigate the cause of racial disorder and to recommend measures to prevent future disorder. The resulting report concluded that the media had contributed to racial unrest in at least two respects. First, it had failed to communicate to its white audience an understanding of black culture, thought, and history. Second, by portraying blacks as whites saw them, rather than the way they saw themselves, it had failed to communicate to its black audience. *Report of the National Advisory Commission on Civil Disorders* 210 (1968). In the Commission's words, "[b]y failing to portray the Negro as a matter of routine and in the context of the total society, the news media have, we believe, contributed to the black-white schism in this country." *Id.* at 211.

Recognizing that the government could not correct this failure by controlling program content, *id.* at 203, the Kerner Report observed that an alternative approach was to increase the number of minorities employed in the industry. *Id.* at 211-212. The Department of Justice added its understanding that equal employment opportunity in the broadcast industry could " 'contribute significantly toward reducing and ending discrimination in other industries' " because of the " 'enormous impact which television and radio have upon American life.' " [3] In response, the FCC announced in 1968 its commitment to increasing employment of minorities in the broadcast industry. *See id.* at 774-75.

Following the court's lead in *Church of Christ*, the FCC implemented an additional means to encourage responsive programming. In *WHDH, Inc.*, 16 F.C.C.2d 1 (1969), the Commission held that a licensee who applied for renewal would receive credit for past performance only to

[3] *Nondiscrimination Employment Practices of Broadcast Licensees*, 13 F.C.C.2d 766, 771 (1968) (quoting letter of Assistant Attorney General Stephen J. Pollak).

the extent that its performance indicated that it offered the best practicable service. This decision signaled a major departure from the FCC's prior approach of awarding substantial credit for past performance automatically, which had largely guaranteed that incumbent licensees would always prevail in license renewal hearings. Together with *Church of Christ*, the FCC's new approach to comparative renewal hearings commenced a new era of public scrutiny of the broadcast industry's practices.

Against this background of increased public participation in the licensing process and attention to the performances of broadcast licensees, Congress for the first time confronted the barriers to minorities that inhered in the structure of the broadcast industry. In 1969, partly in response to *WHDH*, Senator Pastore had introduced a bill that would have eliminated the comparative renewal hearing by prohibiting the FCC from considering a competing application for a facility, unless and until the FCC found that the incumbent had failed to serve the public interest. *See Amend Communications Act of 1934: Hearings on S. 2004 Before the Communications Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 1st Sess., pt. 1, at 7–8 (1969). The bill's proponents maintained that the threat to a licensee of having to defend a costly renewal action every three years would discourage investment and innovation in the industry. *See id.* at 11 (statement of Sen. Moss).

The bill was strenuously opposed on the grounds that the opportunity to challenge existing stations was crucial, both as a means of ensuring a responsive media and as a way that previously excluded groups could enter an essentially closed industry. Earle Moore, General Counsel to the National Citizens Committee for Broadcasting and attorney for the petitioner in *Church of Christ*, testified that because the most valuable broadcast licenses had all been assigned long ago, excluded groups, particularly blacks, had to gain entry into the broadcasting industry through competitive applications against substandard sta-

tions.[4] Another witness pointed out that, out of 7,000 existing radio and television stations, only 7 radio stations and no television stations were owned by blacks. *Id.*, pt. 2, at 602 (testimony of Absalom Jordan, Black Efforts for Soul in Television). John McLaughlin, who was then an associate editor of *America*, testified that the bill would "exclude minority groups from station ownership in important markets. . . . If this bill is passed, existing station licenses will be, for all intents and purposes, frozen." [5]

Before Congress acted on the Pastore bill, the FCC issued a policy statement in January, 1970, announcing that an incumbent would receive a controlling preference in a renewal hearing if it demonstrated substantial past performance without serious deficiencies.[6] The FCC statement failed to still the debate, however. The Civil Rights Commission reported to the President and to the Congress that, "it appears that [the FCC policy] necessarily will discourage license competition and tend to exclude minority participation in the ownership of broadcasting stations," [7] and the District of Columbia Circuit held that the FCC policy violated the Communications Act of 1934. *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (1972) (per curiam).

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[4] *Id.* at 128. Moore acknowledged that the petition to deny process sanctioned in *Church of Christ* had enabled excluded groups to have some impact on programming, but pointed out that the expense of those proceedings rendered them an impractical alternative. *See id.* at 136–37.

[5] *Id.* at 642. Clearly troubled by the potential impact of his bill on minorities, Senator Pastore observed that, "I feel that the course of events . . . have been such that maybe the black community has not been allowed—I don't know through what mechanism or through whose fault—a fair share of the broadcasting industry." *Id.* at 421. He maintained, however, that providing them with access to comparative hearings would not remedy the problem. *Id.* at 422.

[6] *Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants*, 22 F.C.C.2d 424 (1970).

[7] United States Commission on Civil Rights, *Federal Civil Rights Enforcement Effort* 858–59 (1970) (footnotes omitted).

The court was troubled that the FCC's proposed summary procedure would have the effect of frustrating the first amendment goal of achieving diversity of expression at a time when, "[a]s new interest groups and hitherto silent minorities emerge in our society, they should be given some stake in and chance to broadcast on our radio and television frequencies." The "uncontested testimony" that "no more than a dozen of 7,500 broadcast licenses issued are owned by racial minorities" prompted the court to observe that the FCC's rule would "perpetuate this dismaying situation." [8]

The debate over how to resolve the conflict between the interest of broadcasters in stability and the desire of minorities for access to the broadcast field returned to the Congress when House and Senate committees held extensive hearings in 1973 and 1974 on proposals to extend the broadcast license period from three years to five years and to modify the comparative hearing process.[9] In greater numbers than during the 1969 hearings, organizations representing the interests of minorities came forward to testify that policies that reduced the opportunities for citizens to challenge existing licensees either by challenging license renewals, as permitted in *Church of Christ*, or by competing applications, which were given new life by

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[8] 447 F.2d at 1213 n.36. While recognizing an interest in industry stability, the court found that the policy instead induced "*rigor mortis*." *Id.* at 1214 & n.38 (noting findings of the Commission on Civil Rights that comparative hearings had been " 'an effective mechanism for bringing about greater racial and ethnic sensitivity in programming, nondiscriminatory employment practices, and other affirmative changes which otherwise might not take place' " (quoting U.S. Commission on Civil Rights, *Federal Civil Rights Enforcement Effort* 283 (1971)).

[9] *See Broadcast License Renewal: Hearings on H.R. 5546 Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce*, 93rd Cong., 1st Sess., pts. 1 & 2 (1973) ["*1973 House Hearings*"]; *Broadcast License Renewal Act: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 93rd Cong., 2d Sess., pts. 1 & 2 (1974)["*1974 Senate Hearings*"].

WHDH, threatened to perpetuate a status quo that excluded minorities. Witnesses reported that renewal proceedings had been used to challenge the practices that the Kerner Report had criticized: employment discrimination, the lack of responsiveness to minority views, and the failure to portray minorities either at all, or other than in stereotypical ways.[10]

Witnesses also stressed that the renewal process provided a practical way for minorities to obtain a foothold in the industry. Minorities had been unable to obtain licenses at a time when they were essentially free. In 1973, those same licenses were worth upwards of $50 million in major markets. Only those who had the necessary capital and broadcast experience could afford to purchase existing licenses or obtain the few new ones that became available. *See 1973 House Hearings*, pt. 2, at 774 (statement of Dr. William Fore, National Council of Churches of Christ). The impact on minorities of this historical development of the industry was described as "a tax on blackness." *1974 Senate Hearings*, pt. 1, at 297 (testimony of James McCuller, National Black Media Coalition).

While the Congress was declining to adopt the proposals that were so strongly challenged in the Senate and House hearings in 1973 and 1974, the District of Columbia Circuit was determining that a policy of neutrality would not suffice to increase minority participation in the ownership of broadcast licenses. In *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974), the court reversed the Commission's refusal to award merit for an applicant's minority ownership in a comparative hearing. Rejecting the FCC's argument that the Communications Act was colorblind, *id.* at 936, the court

[10] Groups representing Spanish-surnamed Americans and groups representing the interests of women testified that these practices had similarly affected them. *See, e.g., 1974 Senate Hearings*, pt. 2, at 785 (statement of Manuel Fierro, Raza Association of Spanish Surnamed Americans); *1973 House Hearings*, pt. 1, at 518–38 (statement of Whitney Adams, National Organization for Women).

stated that the Act's public interest standard gave the FCC wide discretion to consider factors that would contribute to that goal. *See id.* ("Inconsistency with the Constitution is not to be found in a view of our developing national life which accords merit to Black participation among principals of applicants for television rights.").[11]

B. FROM 1978 TO 1983 THE FCC, EXECUTIVE BRANCH, AND CONGRESS ADOPT POLICIES DESIGNED GRADUALLY TO INCREASE MINORITY OWNERSHIP

Building on the decade, described above, of growing attention to the limited minority participation in broadcasting, and informed by continuing concern about the portrayal of minorities in the media,[12] the executive branch, the FCC, and the Congress undertook from 1978 to 1983 to formulate policies that would operate in modest ways to increase minority ownership at the margins of the well-established broadcast industry.

In 1978, the executive branch actively encouraged both the FCC and the Congress to adopt measures to increase minority ownership. Turning first to the FCC, the Office of Telecommunications Policy (which at the time was part of the Executive Office of the President), and the Department of Commerce filed a petition with the Commission in January, 1978, proposing several minority ownership policies. Observing that "[m]inority ownership markedly serves the public interest, for it ensures the sus-

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[11] The court was careful to point out that it was not recommending a quota system, but rather was deciding only that merit should be awarded when minority ownership was likely to increase diversity of content. *See id.* at 938 (explaining that ownership was relevant because 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"); *see also Garrett v. FCC,* 513 F.2d 1056 (D.C. Cir. 1975).

[12] The Civil Rights Commission submitted two reports to the President and the Congress on the inadequate portrayal of women and minorities in television: United States Commission on Civil Rights, *Window Dressing on the Set* (1977); United States Commission on Civil Rights, *Window Dressing on the Set: A Update* (1979).

tained and increased sensitivity to minority audiences," and noting that less than one percent of the nation's stations were owned or controlled by minorities, the executive branch suggested, among other things, that the FCC grant a "preference" to minorities in comparative hearings for licenses.[13]

Reflecting later on a degree of progress toward greater minority ownership, President Carter explained that the purpose of his 1978 proposal was twofold: to overcome past discrimination and to increase the range of voices heard over the airwaves. With respect to the first purpose, the President stated that the lack of minority ownership was attributable to "such obstacles as not having adequate financing, the lack of technical training because of discrimination and exclusion in the past, and a shortage of available stations to buy or to manage, because so many were assigned long ago when racial discrimination was both a *de facto* and a *de jure* part of the American societal life." *Telecommunications Minority Assistance Program*, 1980–81 Pub. Papers 1703, 1704 (Pres. Carter). The lack of minority participation in broadcasting, the President stated, was "one of the roots of the slow progress in the elimination of discrimination and the enhancement of justice in our Nation in the past." *Id.*

Even prior to the Executive's January 1978 proposals, the FCC had begun to formulate a minority ownership policy by holding a conference on minority ownership in April, 1977. Building on a task force report,[14] as well as

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[13] *See Telecommunications Minority Assistance Program*, 1978 Pub. Papers 252, 253 (Pres. Carter). The executive branch also suggested that the FCC adopt a Congressional Black Caucus proposal to permit sales at distress sale prices of stations designated for license renewal or revocation hearings to groups with at least 50 percent minority ownership. *Id.*

[14] The task force reported the views of conference participants that minority ownership policies were justified, both to increase diversity of viewpoint, FCC Minority Ownership Taskforce, *Report on Minority Ownership in Broadcasting* 4–6 (1978), and to remedy the effects of past discrimination that had resulted in an unequal distribution of broadcast licenses, *id.* at 6–8.

on the decisions of the District of Columbia Circuit regarding comparative license proceedings, the FCC adopted in May, 1978, a *Statement of Policy on Minority Ownership of Broadcasting Facilities,* 68 F.C.C.2d 979 (1978). The FCC found that in spite of progress in ascertaining the needs and interests of the communities served by licensees and in employment practices, "the views of racial minorities continue to be inadequately represented in the broadcast media." *Id.* at 980 (footnotes omitted). Seeking to increase diversification in programming while "avoid[ing] direct government intrusion into programming decisions," *id.* at 981, the FCC expressed its "commitment to increasing significantly minority ownership of broadcast facilities," *id.* at 982.

The FCC policy contained two elements. One was to provide encouragement through financial incentives for the assignment or transfer of existing licenses to minorities. *Id.* at 983 & n.19 (adopting "tax certificate" and "distress sale" policies). The other was to implement judicial decisions on the consideration of minority ownership as one factor in comparative proceedings for new licenses. Within a month, the FCC clarified its policy on granting merit for minority ownership in comparative hearings. In *WPIX, Inc.,* 68 F.C.C.2d 381 (1978), the FCC stated that all applicants in a hearing start on an equal plane and move up or down, with positive attributes such as integration of ownership and management lifting the applicant above the starting position. Minority ownership was to be considered an additional credit under the integration attribute, as were other positive factors such as community involvement and broadcast experience.[15] When the FCC

[15] *Id.* at 411. In July, 1978, the FCC extended its comparative evaluation policy to female ownership. *In re Mid-Florida Television Corp.,* 69 F.C.C.2d 607, 652 (Rev. Bd. 1978) (noting that this credit was less significant than that for minorities), *set aside on other grounds,* 87 F.C.C.2d 203 (1981). *Mid-Florida* also involved a minority applicant. The minority applicant prevailed neither in *WPIX*, 68 F.C.C.2d at 412, nor in *Mid-Florida,* 69 F.C.C.2d at 655–56.

acted on the Executive's minority ownership petition in November, 1978, it pointed out that the Executive and the FCC were in substantial agreement "that past Commission actions taken to encourage minority ownership . . . are consistent" with this Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).[16]

During 1978, both the FCC and the Executive presented their views on minority ownership policies to Congress as Congress considered a major proposal to deregulate the broadcasting industry. The proposed Communications Act of 1978 would have, among other things, replaced comparative hearings with a lottery; it also would have created a fund for loans to minorities who sought to buy stations. The bill was the subject of extensive hearings in the House.[17] As described by Representative Markey, the bill was intended to increase "the opportunities for blacks and women and other minorities in this country to get into the communications systems in this country so that their point of view and their interests can be represented" without interfering with the rights of existing licensees. *1978 House Hearings*, vol. 5, pt. 1, at 59. The sponsor of the bill, Representative Van Deerlin, stated, "It was the hope, and with some reason the expectation of the framers of the bill, that the most effective way to reach the inadequacies of the broadcast industry in employment and programming would be by doing something at the top, that is, increasing minority ownership and management and control in broadcast stations."[18]

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[16] *In re Petition for Issuance of Policy Statement or Notice of Inquiry by National Telecommunications and Information Administration*, 69 F.C.C.2d 1591 n.1 (1978).

[17] *The Communications Act of 1978: Hearings on H.R. 13015 Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. (1978) [*"1978 House Hearings"*].

[18] *Id.*, vol. 3, at 698 (noting that inadequacies of present licensing system had left minorities with only 1 television station out of 755 and 41 out of 7,500 commercial radio stations).

The executive branch objected to the lottery proposal because it would harm minorities by eliminating the credit granted under the existing comparative hearing scheme as developed by the FCC. *See id.* at 50 (statement of Henry Geller, Assistant Secretary for Communications and Information of the Department of Commerce). Acknowledging that a lottery could be structured to ameliorate that concern by giving a weight based on minority ownership, *id.* at 85, the Executive explained that it preferred granting credit for minority ownership during comparative hearings as a more finely tuned way to achieve the Communications Act's public interest goal.[19] FCC Chairman Charles Ferris testified that a finding that "[m]inorities had gained a foothold in the medium through employment and ownership" should be a precondition to deregulation, *id.* at 108, and acknowledged that a "weighted lottery" was one way to pursue this objective. *Id.* at 118.[20]

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[19] *Id.* (contending that a lottery would not take into account the individual needs of particular communities).

[20] Although no lottery legislation was enacted that year, Congress continued to explore the idea the following year. In the House, the proposed Communications Act of 1979 would have provided that any minority applicant for a license that had not previously been assigned would be counted twice in the pool. The provision was intended to increase minority representation in the ownership of broadcast stations, thereby achieving more diverse programming that would both serve minority communities and enhance the programming available to non-minority community audiences. Staff of the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce, *H.R. 3333, "The Communications Act of 1979" Section-by-Section Analysis,* 96th Cong., 1st Sess. 39–41 (Comm. Print 1979).

The 96th Congress considered two additional bills that related to the FCC's licensing process. S. 622 would have authorized a lottery selection process for new or revoked radio and television licenses, without a credit for minority ownership. *Amendments to the Communications Act of 1934: Hearings on S. 611 and S. 622 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation,* 96th Cong., 1st Sess., pt. 1, at 156, 177 (1979). S. 611 would have maintained comparative hearings but prevented the FCC

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When Congress finally authorized a lottery system for initial licenses or construction permits as part of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, 736-37 (1981), it determined that a system of preferences should be established. The Act provided that where more than one application for an initial license or construction permit involving any use of the electromagnetic system was received, the FCC could grant the license to a qualified applicant through the use of a lottery. But the Act also required the FCC to adopt rules that would ensure that "significant preferences" would be granted in the lottery process to groups underrepresented in the ownership of telecommunications facilities. As explained in the accompanying conference report, Congress intended to encourage

> ownership by minorities, such as blacks and hispanics, as well as by women, and ownership by other underrepresented groups, such as labor unions and community organizations.... These are groups which are inadequately represented in terms of nationwide telecommunications ownership, and it is the intention of the conferees in establishing a random selection process that the objective of increasing the number of media outlets owned by such persons or groups be met.

H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 897 (1981), *reprinted in* 1981 U.S. Code Cong. & Admin. News 396, 1259.[21]

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from considering in renewal hearings the multiple ownership or integration of ownership and management, the factor under which the FCC would give credit for minority ownership. *Id.* at 41, 141-42. During Senate hearings, the executive branch reiterated its opposition to a nonweighted lottery. *Id.*, pt. 3, at 2124 (statement of Assistant Secretary Geller).

[21] In the same statute in which it increased the opportunities for minorities to obtain new broadcast licenses, Congress increased the license period from three to five years. *See* Pub. L. No. 97-35, 95 Stat. at 736, *amending* 47 U.S.C. § 307(d). This effort to improve industry stability had long been opposed on the ground that it would limit the op-

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Although the lottery system Congress authorized in 1981 was consistent with lottery proposals that had been discussed with the Executive and the FCC since at least 1978, *see supra* at 15–16, the FCC did not implement the statute because, for a number of administrative reasons, the FCC believed that the lottery established by the statute would not produce the economies the Congress had sought to provide. The Commission also questioned the constitutionality under *Bakke* of granting a preference to minorities or women, expressing the belief that while the Commission may have found that these groups had suffered from discrimination, Congress did not appear to have done so in the lottery legislation.[22]

In response to the FCC's decision not to implement a lottery, Congress enacted a second lottery statute. Section 115 of the Communications Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087, 1094, amending 47 U.S.C. § 309(i), provided that in random selection lotteries, a preference shall be granted to any applicant whose receipt of a license would increase the diversification of ownership of mass media and that, "[t]o further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group." [23]

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portunities for minorities to enter the broadcast industry. *See supra* at 8–10.

[22] *In re Amendment of Part 1 of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 89 F.C.C.2d 257, 281 n.* (1982). Dissenting, Commissioner Fogarty doubted the validity of the suggestion that the preference policy might present constitutional concerns. *Id.* at 292 (pointing out that Congress had not required that a preference be controlling to the exclusion of any nonminority's chance to win).

[23] "Minority group" was defined to include "Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders." *Id.* at 1095, 47 U.S.C. § 309(i)(3)(C)(ii).

The accompanying conference report responded to the FCC's articulated concerns about the preference requirement. The conferees explained that Congress had two reasons for granting preferences to underrepresented groups. First, the Congress sought "to promote the diversification of media ownership and consequent diversification of programming content." *See* H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 2261, 2284 (observing that the nexus between ownership and programming "has been repeatedly recognized by both the Commission and the courts").[24] Second, with respect to racial and ethnic minorities, the preference was intended to remedy "the effects of past inequities stemming from racial and ethnic discrimination [which] have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well." [25]

More generally, the conferees made clear that the Congress did not view the lottery system in isolation from the values served by the Commission's comparative licensing process. As expressed by the conferees,

> if the traditional comparative process would provide a superior means of diversifying media ownership in particular instances, a service should not be subject to a lottery when to do so would undermine or thwart this policy goal. . . . Diversification of media ownership and information are central goals

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[24] In response to concerns of the Commission, the Congress made the preference requirement applicable to media of mass communications and not to common carriers, which do not control the content of the information they carry. *See id.* at 41, 1982 U.S. Code Cong. & Admin. News 2285.

[25] *Id.* at 43, 44, 1982 U.S. Code Cong. & Admin. News 2288 (citing *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979 (1978); FCC Minority Ownership Taskforce, *Report on Minority Ownership in Broadcasting* (1978); *Fullilove v. Klutznick*, 448 U.S. 448 (1980)). The conference report on the lottery bill parallels a report of the House Committee on Energy and Commerce. *See* H.R. Rep. No. 751, 97th Cong., 2d Sess. (1982).

> of the traditional comparative licensing process, and continued promotion of these goals should not be sacrificed merely because a lottery may be more expedient.

Id. at 37-38, 1982 U.S. Code Cong. & Admin. News 2281-82. For this reason, the conferees declared their "firm intent . . . that traditional Commission objectives designed to promote the diversification of control" be incorporated into the administration of a lottery system. *Id.* at 40, 1982 U.S. Code Cong. & Admin. News 2284.

With these new directions from Congress, the FCC adopted rules to govern the use of a lottery.[26] The FCC agreed that the program was constitutional, given that the conferees "found that past discrimination has resulted in severe underrepresentation of minorities in media ownership"; that the preference for race was only one of several factors considered; and that the Congress intended to receive information annually about the program in order that it may "further tailor the program based on that information, and may eliminate the preferences when appropriate." [27]

C. THE CONGRESS ACTS TO ASSURE CONTINUATION OF THE MINORITY OWNERSHIP POLICY

Shortly after the convening of the 98th Congress in 1983, the Senate passed a comprehensive broadcast de-

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[26] These rules were preceded by the FCC's 1982 Policy Statement announcing that, based on the Report of its Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications, it would expand the distress sale and tax certificate policies and expedite the processing of distress sales. *See In re Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting,* 92 F.C.C.2d 849, 52 Rad.Reg.2d (P&F) 1301 (1982) (responding to Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications, *Strategies for Advancing Minority Ownership Opportunities in Telecommunications* (1982)).

[27] *See In re Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings,* 93 F.C.C.2d 952, 974 (1983).

regulation bill which, among other matters, would have eliminated comparative procedures for license renewals.[28] While the Senate bill was silent on minority ownership issues, proposals to codify and expand provisions for minority ownership of broadcast facilities were the subject of extensive hearings in the House in 1983 and 1984.[29] No legislation was enacted.[30]

Within two years of the 1984 hearings, the minority ownership question returned to the Congress when a House committee held a hearing in October, 1986, on issues raised by the FCC's September 12, 1986 brief in *Steele v. FCC,* No. 84-1176 (D.C. Cir.), in which the Commission requested a remand to consider the constitutionality of its preference policy.[31] After the court granted

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[28] S. 55, 98th Cong., 1st Sess. (1983), 129 Cong. Rec. 2420-24 (1983).

[29] *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) (exploring the impact of broadcast deregulation on efforts to improve minority ownership); *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 Telecommunications Development Act of 1983); *Broadcast Regulation and Station Ownership: Hearing on H.R. 6122 and H.R. 6134 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce,* 98th Cong., 2nd Sess. (1984) (considering minority preference for new licenses for broadcast properties and new technologies).

[30] *See* Congressional Quarterly, *Almanac: 98th Congress, 2d Session. . . . 1984,* vol. XL, at 286 (1985).

[31] *Minority-Owned Broadcast Stations: Hearing 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. 1, 10 (1986) (addressing, in addition to the FCC's request to restudy its preference policies, a bill to eliminate discrimination by advertisers). The Chairman of the House Subcommittee on Telecommunications, Representative Wirth, expressed the view that, "[t]he most important message of this hearing today, is that the Commission must not dismantle these longstanding diversity policies, which Congress has repeatedly endorsed, until such time as Congress or the courts

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the remand request, the FCC commenced an examination of the constitutionality of its comparative preference, distress sale, and tax certificate rules. In its December 17, 1986 order on that inquiry, the FCC directed its administrative law judges and officials to hold in abeyance actions on licenses and distress sales in which a preference would be dispositive.[32]

In response to the FCC's announcement that it would no longer employ its minority ownership policy until it had concluded an inquiry into its constitutionality, a number of bills proposing codification of the policy were introduced in Congress.[33] In search of an appropriate legislative response to the Commission's actions, members questioned the FCC during hearings over a span of six months in 1987 on the FCC appropriation for fiscal year 1988,[34] on legislation to reauthorize the Commission for

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direct otherwise." *Id.* at 13. One reason that the FCC's action seemed inexplicable to members was that the District of Columbia Circuit had determined that the comparative hearing preference was constitutional, *see West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), and this Court had declined to review that decision. 470 U.S. 1027 (1985).

[32] *In re Reexamination of the Commission's Comparative Licensing Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 F.C.C. Rcd 1315, 1319 (1986), *as amended*, 2 F.C.C. Rcd 2377 (1987).

[33] *See* 133 Cong. Rec. 860 (1987) (H.R. 293); 133 Cong. Rec. 3300 (1987) (H.R. 1090); 133 Cong. Rec. 9744 (1987) (S. 1095); 133 Cong. Rec. 13742 (1987) (S. 1277).

[34] *Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations for Fiscal Year 1988: Hearings on H.R. 2763 Before a Subcomm. of the Senate Comm. on Appropriations*, 100th Cong., 1st Sess. 17 (1987) (statement of Sen. Lautenberg) (questioning why the FCC was dissatisfied when the Congress and the courts had approved the policy).

fiscal years 1988 and 1989,[35] and on legislation to codify the Commission's minority ownership policy.[36]

Instead of permanently codifying the policy, Congress employed its appropriations power to keep the FCC's minority ownership policy in place for fiscal year 1988. The report of the Senate Committee on Appropriations restated the long-standing conviction of the Congress "that promoting diversity of ownership of broadcast properties satisfies important public policy goals," and that "[d]iversity 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). The committee emphasized that Congress had explicitly approved the use of preferences to promote minority and female ownership when it authorized the use of lotteries in 1982, and referred to the conference report on that legislation, a report which described the Congress's interest both in eradicating the effects of discrimination and in promoting diversity in programming. *Id.* at 77.

The Senate passed the committee bill in October. Speaking in favor of the bill, Senator Lautenberg expressed the concern that the FCC's actions threatened to halt progress that had been achieved during the preceding decade. 133 Cong. Rec. S14395 (daily ed. Oct. 15, 1987) ("As recently as 10 years ago, there were fewer than 60 minority-owned broadcast licenses. Now, there are 250. The FCC has not only cast doubt on future progress in this area, it has clouded the status of current license applicants."). Final enactment of the legislation occurred in December, 1987, Pub. L. No. 100-202, 101 Stat. 1329,

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[35] *FCC Authorization: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 100th Cong., 1st Sess. 55 (1987); *FCC and NTIA Authorizations: Hearings on H.R. 2472 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 130-31, 211-12 (1987).

[36] *Broadcasting Improvements Act of 1987: Hearings on S. 1277 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 100th Cong., 1st Sess. 51 (1987).

1329–31 (1987), after the Congress and the President resolved budgetary and other issues that had delayed the enactment of all appropriations for fiscal year 1988.[37]

In 1989 and 1990, Congress carried forward for additional fiscal years the decision to keep the FCC's policy in place. In debate on the fiscal year 1989 legislation, Senator Hollings, chairman of both the authorizing committee and appropriations subcommittee for the FCC, presented to the Senate a summary of a June 1988 report prepared by the Congressional Research Service, entitled "Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?". The report analyzed data the FCC had collected during its preference policy inquiry. The study, Senator Hollings reported to the Senate, "clearly demonstrates that minority ownership of broadcast stations does increase the diversity of viewpoints presented over the airwaves." 134 Cong. Rec. S10021 (daily ed. July 27, 1988).[38]

D. CONGRESS'S DETERMINATION TO REQUIRE CONTINUATION OF THE MINORITY OWNERSHIP POLICY IS BASED ON A CONSIDERED CONGRESSIONAL JUDGMENT THAT THE POLICY IS ESSENTIAL TO ERADICATE THE EFFECTS OF PRIOR DISCRIMINATION AND TO ACHIEVE DIVERSITY OF PROGRAMMING

The history of the minority ownership policy shows that Congress strove to ensure that minority participation in broadcasting would be increased in a way that was respectful of other values. As this Court has recognized, Congress's decision to allocate the limited number of broadcast frequencies to licensees, who in return must

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[37] Congressional Quarterly, *Almanac, 100th Congress, 1st Session . . . 1987*, vol. XLIII, at 480–88 (1988).

[38] Even as the litigation over the FCC's minority ownership policy has proceeded, Congress has continued to examine, as it has over the past twenty years, the problem of how to increase minority ownership of broadcast stations. *See Minority Ownership of Broadcast Stations: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 100th Cong., 1st Sess. (1989).

act as public trustees, has resulted in a "delicately balanced system of regulation intended to serve the interests of all concerned." *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 102 (1973). Within that context, assuring minorities an opportunity to fully and meaningfully participate in the system has presented a particularly difficult problem. From the first time that Congress was confronted with statistics that described an industry which was nearly devoid of minority participation at any level,[39] it also was confronted with several well-understood facts that shaped its response.

To begin with, the government had distributed this valuable public resource at a time when undisguised discrimination in education, employment opportunities, and access to capital excluded minorities from all but token participation. Numerous factors, "difficult to isolate or quantify," *Fullilove,* 448 U.S. at 461, have continued to preclude minorities from effective participation. It is not only that "minority groups have fewer financial resources than nonminorities," U.S. Brief at 21, although that is true and has its roots in the nation's history. But as the executive branch itself has recognized, minorities have also encountered "barriers to technical training and employment opportunities" in broadcasting. *Telecommunications Minority Assistance Program,* 1978 Pub. Papers 253 (Pres. Carter). Burdened by denial of experience in the industry with "disabilities caused by an inadequate 'track record,'" lack of awareness of opportunities, and lack of knowledge of the licensing process, *see Fullilove,* 448 U.S. at 467 (listing similar factors), minorities "through no fault of their own," *id.* at 461, were impeded from competing successfully for licenses when they were first awarded and as they became available in the market. Thus, as in *Fullilove,* the "Congress could take necessary

[39] *Cf., e.g., Fullilove,* 448 U.S. at 478 (opinion of Burger, C.J.) ("Congress had before it, among other data, evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises").

and proper action to remedy the situation," and "[i]t is not necessary that [the FCC or any particular broadcasters] be shown responsible for any violation of antidiscrimination laws." *Id.* at 475.

Further, while the resulting unequal distribution of opportunity in the broadcast industry was unlikely to change at an acceptable rate without government intervention, the Congress recognized that its ability to remedy the problem was limited. Redistribution of existing licenses was out of the question, and first amendment considerations precluded Congress from dictating the content of the programs of licensees. Given these constraints, and that other efforts such as challenges to existing licenses had failed to significantly increase minority ownership, two opportunities for change have presented a measure of promise. One is to provide incentives to existing licensees to transfer their stations to minorities. The other is to increase the chance that qualified minority applicants would obtain new stations as they became available.

Congress's determination that the policy incorporating these measures strikes an appropriate balance between the interests of broadcast licensees on the one hand, and the national interests in providing equal opportunity to all citizens and access to diverse sources of expression on the other hand, is worthy of this Court's deference. Far from being "delphic action," U.S. Brief at 19, the legislation enacted by Congress represents a judgment building on years of consideration of how to provide at the margin of an established industry some opportunities for entry by minorities who had been excluded.

In light of the history of Congress's consideration of the problems of minority ownership in broadcasting, "it is inconceivable that Members of both Houses were not fully aware of the objectives of the [appropriations measures] and of the reasons prompting [their] enactment." *Fullilove*, 448 U.S. at 467. The formalistic view that this Court cannot regard the policy as an attempt by the Congress to

remedy discrimination because that intention was not made "unmistakably clear in the language of the statute," U.S. Brief at 15, ignores the twenty-year history evidencing that intent and would require the Court "to be blind to the realities familiar to the legislators." *Katzenbach v. Morgan*, 384 U.S. 643, 653 (1966).[40] Moreover, Congress did make an explicit finding of discrimination when enacting the 1982 preferential lottery legislation for licenses. That finding is relevant here because Congress perceived a strong relationship between the values served by the preference provisions of the lottery legislation and the comparative preference policy established by the FCC. *See supra* at *19-20*.

There is also a firm basis for the Congress's additional objective of increasing diversity by increasing minority ownership. That objective does not rest on the notion that all minority owners "will program their new broadcast stations in some sort of minority . . . manner." Pet. Brief at 38. Rather, it is based on the common sense understanding that an individual with a particular background may bring to a broadcast station experience, perspectives, and ideas that will enrich the rest of the public. *Cf. Bakke*, 438 U.S. at 314 (opinion of Powell, J.) (observing that selecting students on the basis of diverse features, including race, may enrich a university's student body). The consideration of minority ownership as one of several factors weighed in choosing among qualified applicants for new broadcast licenses is a measured and constitutional means to achieve this objective.

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[40] *See also Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.) ("Although the Act recites no preambulatory 'findings' on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

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