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.

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

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September, 1989

QUESTIONS PRESENTED FOR REVIEW

The Federal Communications Commission decides most of its comparative broadcast licensing cases on but five meaningful criteria, one of which is race or ethnicity and one of which is gender.

The questions presented for review are:

1. Whether the Federal Communications Commission's policies of awarding substantial preferences in comparative broadcast licensing proceedings to minority and female applicants, created in the absence of any findings of prior discrimination and applied for the sole purpose of fostering program diversity, violate the equal protection component of the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

2. Whether Congress' 1988 and 1989 appropriations legislation, which closed down the Federal Communications Commission's first comprehensive examination of the factual, statutory and constitutional bases for its minority- and gender-based preference classification policies; defunded any reexamination of, changes in, or appeal regarding the policies, and ordered the reinstatement and maintenance of the race-, ethnic- and gender-based classifications, absent historical evidence of prior discrimination and for the sole purpose of fostering program diversity, exceeded congressional authority under Section 5 of the Fourteenth Amendment and violated the equal protection principles embodied in the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

3. Whether the doctrine of *stare decisis* requires that a prior decision by a panel of a federal appellate court must be followed by subsequent, same-circuit, panels in later cases where reasoned analysis, especially in light of intervening Supreme Court pronouncements, compels the conclusion that the earlier panel was in error.

LIST OF PARTIES

The parties in *Winter Park Communications, Inc.* v. *Federal Communications Commission*, 873 F.2d 347 (D.C. Cir. 1989) (consolidated case nos. 85-1755 and 85-1756) were appellants Metro Broadcasting, Inc. (Metro) and Winter Park Communications, Inc. (Winter Park), appellee Federal Communications Commission, intervenors Rainbow Broadcasting Company (Rainbow), City of Winter Park and Winter Park Chamber of Commerce, and amicus curiae United States of America.

PARTIES' STRUCTURES

Metro and Winter Park are privately held corporations. Neither has any parent, subsidiary or affiliated corporations. Rainbow is a general partnership.

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Metro Broadcasting. Inc. (Metro) petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit (Court of Appeals or lower court) to review the decision and judgment in *Winter Park Communications, Inc.* v. *Federal Communications Commission*, 873 F.2d 347 (D.C. Cir. 1989) (2-1 decision) (*Winter Park*), denying review of a decision of the Review Board of the Federal Communications Commission (Commission or FCC), which awarded a construction permit for a new UHF television station at Orlando, Florida to Rainbow Broadcasting Company (Rainbow) and denied the competing application therefor of Metro.[1]

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 873 F.2d 347 (D.C. Cir. 1989) and is reproduced in Appendix

[1] The application of Winter Park Communications, Inc. (Winter Park) also was denied for reasons not here relevant. (App. B at 90a).

(App.) A at 1a. The Decision of the Review Board granting the application is published at 99 FCC 2d 688 (Rev. Bd. 1985) and is reproduced in Appendix B at 64a. The Commission's Order denying review of the Review Board's Decision is unpublished but is reproduced in Appendix B at 60a. The Commission's Memorandum Opinions and Orders while on remand are published at 2 FCC Rcd 1474 (1987) and 3 FCC Rcd 866 (1988) and are reproduced, respectively, in Appendix B at 52a and 48a.

JURISDICTION

The Opinion (App. A at 1a) and Judgment (App. C at 94a) of the Court of Appeals were entered on April 21, 1989, as was an order withholding issuance of the mandate pending any timely petition for rehearing and/or suggestion for rehearing *en banc.* (App. A at 47a). The order denying Metro's petition for rehearing was entered June 21, 1989 (App. C at 96a), as was the order denying Metro's suggestion for rehearing *en banc* (App. C at 98a).

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1)(1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the Constitution of the United States of America are the Fifth Amendment thereto and Sections 1 and 5 of the Fourteenth Amendment thereto. Their texts are set forth in Appendix D at 100a.

The germane sections of the *Communications Amendments Act of 1982,* Public Law 97-259, 96 Stat. 1087 (1982) *codified at* (47 U.S.C. §§ 309(i)(3)(A) - (4)(A)), are set forth in Appendix D at 102a.

The relevant provisions of the *Continuing Appropriations Act for Fiscal Year 1988 and for Other Purposes,* Public Law No. 100-202, 101 Stat. 1329-31 (1987) are reproduced in Appendix D at 100a.

The applicable provisions of the *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1989*, Public Law 100-459, 102 Stat. 2216-17 (1988) are set forth in Appendix D at 101a.

STATEMENT OF THE CASE

Metro, petitioner, filed an application for a construction permit for a new television station on Channel 65 at Orlando, Florida, in 1982. Rainbow, respondent, filed a competing application later that year, and the two mutually exclusive applicants[2] were pitted against one another in the crucible of a comparative hearing pursuant to Section 309(e) of the Communications Act of 1934, as amended.[3] Because Rainbow received enhancement credits for its attributable 90% Hispanic and 5% female (included within the Hispanic attribution) ownership composition, it ultimately prevailed under the Commission's minority and gender preference scheme. (App. A at 6a; App. B at 50a, 61a, 87a and 88a).

Racial and Gender Preferences in the Commission's Comparative Process[4]

In comparative licensing proceedings for new broadcast stations, the Commission is charged by statute with following the "public convenience, interest, or necessity." 47

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[2] The application of Winter Park was designated for hearing in the same proceeding, but as is reflected in note 1, supra, the issue Winter Park raised below is not germane to the proceedings before this Court. Also designated for hearing in the same proceeding was the application of Orlando Family Television, Ltd., which voluntarily was dismissed by the applicant while still before the Administrative Law Judge.

[3] 47 U.S.C. § 309(e) (1982).

[4] Certain sections of the Statement of the Case are taken from the Brief for the United States as Amicus Curiae in the court below, and the Brief for the Federal Communications Commission on Hearing *En Banc* in *Steele* v. *FCC*, No. 84-1176 (D.C. Cir.) (September 12, 1986).

U.S.C. § 307(a). *See also* 47 U.S.C. § 309(a). Pursuant to this mandate, the Commission has adopted certain standard criteria which are considered in every comparative proceeding. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (the *1965 Policy Statement*). The Commission explained in its *1965 Policy Statement* that the two main goals governing its selection among qualified applicants were: (1) to achieve the best practicable service to the public; and (2) to effect maximum diffusion of control of the media of mass communications, generally referred to as diversification. Id. at 394.

As originally set forth in the *1965 Policy Statement*, the selection criteria for comparative analysis were race-neutral. *Chapman Radio and Television Co.*, 19 FCC 2d 157, 183 (1969), *reconsideration denied*, 20 FCC 2d 624 (Rev. Bd. 1969); *Mid-Florida Television Corp.*, 33 FCC 2d 1, 17-18 (Rev. Bd.), *review denied*, 37 FCC 2d 559 (1972), *rev'd. TV 9, Inc.* v. *FCC*, 495 F.2d 929 (D.C. Cir 1973), *cert. denied*, 419 U.S. 986 (1974) (*TV 9*). Only an applicant's "experience, background, and knowledge of the community" were deemed appropriate qualitative factors to consider under the "best practical service" criterion. 495 F.2d at 936.[5] However, in *TV 9*, the District of Columbia Circuit rejected the Commission's argument that the "the 'Communications Act, like the Constitution, is color blind,' " holding instead that "when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded" in the comparison. *Id.* at 938. Subsequently, in *Garrett* v. *FCC*, 513 F.2d 1056 (D.C. Cir. 1975), the same Circuit refused to accept the Commission's view that a racial preference should be

[5] In the *TV 9* proceeding the Review Board had held, and the Commission affirmed, that "[b]lack ownership cannot and should not be an independent comparative factor * * *; rather, such ownership must be shown on the record to result in some public interest benefit." 33 FCC 2d at 18.

awarded only where an applicant demonstrates a nexus between race and increased program diversity, declaring that race presumptively would promote such diversity when minority owners are integrated into the management of the proposed station.[6]

Based on these directives, the Commission concluded that minority ownership and participation should receive credit in the comparative process and decided that a preference would be awarded to minority applicants under the "best practicable service" criterion in Commission hearings. *WPIX, Inc.*, 68 FCC 2d 381 (1978). Subsequently, the Commission developed two other policies designed to promote minority ownership of broadcast facilities through preferences.[7] They are the *distress sale policy*, which allows a broadcaster whose license is in jeopardy due to a renewal or revocation proceeding to sell the station at up to 75% of market value to a minority-owned, or minority-controlled purchaser, and a policy of affording *tax certificates* to sellers of media properties where the purchaser is minority-owned or minority-controlled. The distress sale policy has fallen as unconstitutional.[8]

The FCC's Review Board first extended the minority preference to female applicants in *Mid-Florida Television Corp.*, 69 FCC 2d 607, 652 (Rev. Bd. 1978), *set aside on*

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[6] *Id.* at 1063.

[7] *Statement of Mark S. Fowler, Chairman, Federal Communications Commission, Before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce* (Oct. 2, 1986).

[8] Only three weeks before a panel of the Court of Appeals for the District of Columbia Circuit decided this case, a different panel of the same court, in *Shurberg Broadcasting of Hartford, Inc.* v. *FCC*, 876 F.2d 901 (D.C. Cir. 1989)(2-1 decision), struck down the Commission's distress sale policy. Rehearing *en banc* was denied in that case, as in *Winter Park*. It is expected that the Commission will petition for certiorari in *Shurberg*.

other grounds, 87 FCC 2d 203 (1981). The Commission later acquiesced in the Board's decision.[9] The gender preference was challenged in *Steele* v. *FCC*, 770 F.2d 1192 (D.C. Cir. 1985), where a panel held that "the Commission exceeded its authority under the Federal Communications Act by adopting a female preference in comparative broadcast proceedings." *Id.* at 1199. However, the circuit, sitting *en banc*, vacated the panel decision, granted rehearing and called for rebriefing.[10]

The Commission's Reexamination of its Preferences in *Steele*

In *Steele, en banc*, the Commission concluded that both its gender and minority preference policies were indefensible on the record as it stood. Before the *en banc Steele* court, the Commission submitted a motion for remand with its brief on the merits, and concurrently released a Public Notice, FCC 86-387 (Sept. 15, 1986) (App. E at 106a), announcing its actions. In its brief, the Commission admitted that it "had neither constitutional authority nor statutory basis for the female preference," and asked that the court remand the matter for further consideration. The Commission proclaimed in its motion for remand that "race, sex or national origin *per se* should not be a basis for licensing determinations," and expressed its disbelief in the proposition that "a sufficient foundation [existed] to satisfy statutory review requirements or the heightened scrutiny the Constitution requires of racial or gender based preferences." Through its Public Notice, the Commission announced that it would be "looking at this issue and instituting a proceeding to collect evidence if allowable in light of the court's *en banc* action in *Steele*," *Public Notice*

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[9] *E.g., Horne Industries, Inc.*, 94 FCC 2d 815 (Rev. Bd. 1983), *modified*, 98 FCC 2d 601, 602-03 (1984).

[10] As explained *infra* at n.18, Steele never reached an *en banc* Circuit decision.

(App. E at 107a.), and reiterated its opinion that "racial and gender preferences are constitutionally suspect and before they can be imposed the agency must have an 'exceedingly persuasive justification' " (citing *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 724 (1982)) (App. E at 107a).

As recounted in *Metro Broadcasting, Inc.*, 3 FCC Rcd 866 (1988) (App. B at 48a), the court remanded *Steele* to the Commission "in order to permit the agency to reexamine the bases for its minority and female preference policies." The record in this case was remanded for the same purpose, *id.*, as was the record in *Shurberg*, 876 F.2d at 927 (MacKinnon, J., concurring in judgment). In due course, the Commission, by *Notice of Inquiry*, opened MM Docket No. 86-484, encaptioned *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 FCC Rcd 1315 (1986), *modified*, 2 FCC Rcd 2377 (1987) (*Racial, Ethnic or Gender Classifications*, or *Inquiry*).[11] Evidence was collected from numerous interested parties, but the *Inquiry* was doomed on December 22, 1987, when the President signed *House Joint Resolution 395* into law. *Racial, Ethnic or Gender Classifications*, 3 FCC Rcd 766 (1988); *Continuing Appropriations for Fiscal Year 1988 and for Other Purposes*, Pub. L. No. 100-102, 101 Stat. 1329 (1987) (*1988 Appropriations Act*) (App. D at 100a).

The *1988 Appropriations Act*, which contained the funding legislation for the Commission for fiscal year 1988, directed the FCC, *inter alia*, "to close MM Docket No. 86-484 with a reinstatement of prior policy . . ." with re-

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[11] Pending completion of the *Inquiry*, the Commission ordered that action be deferred in all cases in which the award of racial, ethnic or gender preferences would be dispositive of the outcome. 1 FCC Rcd at 1319. The instant case was among those held in abeyance. *Metro Broadcasting, Inc.*, 2 FCC Rcd 1474 (1987) (App. B at 52a).

spect to "minority and women ownership of broadcasting licenses . . . ." *1988 Appropriations Act* (App. D at 100a). Similar language was incorporated into the appropriations legislation for fiscal year 1989. *Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1989*, Pub. L. No. 100-459, 102 Stat. 2216 (December, 1988) (*1989 Appropriations Act*). (App. D at 101a). Following the enactment of the *1988 Appropriations Act*, the Commission ceased the *Inquiry*, decided those cases held in abeyance pursuant to its order therein, and began to reapply its minority and female preferences in comparative proceedings. *E.g., Faith Center, Inc.*, 3 FCC Rcd 868 (1988); *Metro Broadcasting, Inc.* 3 FCC Rcd 866 (1988) (App. B at 48a).

The Mechanics of Integration and the Application of the Commission's Preferences in the Instant Proceeding

Diversification of ownership of the mass media, the second of the Commission's standard comparative criteria, is of such overwhelming importance, *e.g., FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 697 (1978), that it is seldom, if ever, a factor in comparative rankings. Under the diversification criterion, ownership interests in other mass communications media push an applicant below its starting point in the comparative evaluation. *WPIX, Inc.*, 68 FCC 2d at 385. As the Commission's Review Board said, "an applicant having no other attributable mass media interests will all but certainly prevail over a party with such interests." *Newton Television, Limited*, 3 FCC Rcd 553 (Rev. Bd. 1988), *modified* 4 FCC Rcd 2561 (1989) (citing eight prior cases). Accordingly, the Commission's licensing decisions almost invariably turn on the second factor, "best practicable service," under which the predominant consideration is the quantitative degree to which new station owners are proposed to be integrated into management (most applicants seek 100% credit or close to it), incorporating consideration of certain qualitative en-

hancements that elevate the applicant for comparative purposes. *WPIX, Inc.*, 68 FCC 2d 381.

Not surprisingly, this case was decided on the "best practicable service" criterion. The Review Board awarded Metro a "79.2% full-time plus 19.8% part-time quantitative integration credit" and Rainbow a "90% full-time credit." 99 FCC 2d at 703 (App. B at 86a). Quantitative credit is calculated by determining the voting ownership interest of each integrated principal and totaling them as to each category, *i.e.*, full-time, substantial, and part-time. Rainbow's quantitative advantage was not sufficient to be decisional. In circumstances where that is the case, the Commission turns, as it did here, to "qualitative attributes."[12]

Qualitative attributes, or enhancement factors, are the heart of this case. They are scant in number[13] thus each, where present, takes on enormous importance. The enhancement factors are: (1) minority status; (2) female status; (3) local residence; (4) civic activity within the service area, and (5) past broadcast experience. The two most important factors are local residence and minority status. Indeed, they are co-equal.[14] Female status is entitled to somewhat less weight than minority status,[15] but the exact weight accorded female status is uncertain. Civic participation is considered as part of a proposed owner's local residence background, and thus is close on the heels of the foregoing in terms of importance.[16] Past broadcast ex-

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[12] *New Continental Broadcasting Co.*, 88 FCC 2d 830, 850 (Rev. Bd.), *reconsideration denied*, 89 FCC 2d 631 (1982).

[13] *Racial, Ethnic or Gender Classifications*, 1 FCC Rcd at 1315.

[14] *E.g., Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945-946 (1985); *Linda Crook*, 3 FCC Rcd 354 (1988).

[15] *Mid-Florida Television Corp.*, 69 FCC 2d 607, 652 (Rev. Bd. 1978), *set aside on other grounds*, 87 FCC 2d 203 (1981).

[16] *1965 Policy Statement*, 1 FCC 2d at 396.

perience is a distant last and seldom serves any function other than that of a tie breaker.[17]

The Commission's application of minority and female preferences in the instant case was dispositive. Metro prevailed on the local residence and civic participation qualitative attributes. However, the Review Board concluded that "although the qualitative comparison between Rainbow and Metro is close, Rainbow's substantial minority preference, in conjunction with its slight female ownership advantage (5% vs. Metro's 0%) and solid broadcast experience preference, somewhat outweighs Metro's local residence and civic participation advantage." 99 FCC 2d at 704 (App. B at 88a). On remand, discussed *supra* at 6-7, the Commission acknowledged that, "absent credit for its minority and female integration, Rainbow would lose its qualitative advantage over Metro." *Metro Broadcasting, Inc.*, 2 FCC Rcd at 1475 (App. B at 56a).

Prior to its appeal to the District of Columbia Circuit under 47 U.S.C. § 402(a) (1982), and before the *Winter Park* and *Steele* remands, Metro petitioned the full Commission for review. The Commission's denial of Metro's entreaty (App. B at 62a) transformed the decision of the Review Board into that of the Commission, pursuant to Section 155 of the Communications Act of 1934. 47 U.S.C. § 155(c)(3). With *Racial, Ethnic or Gender Classifications* closed down by the congressional appropriations legislation, *Winter Park*, on Metro's motion, was recalled by the Court of Appeals, rebriefed, argued and decided.[18]

Between oral argument and decision, this Court decided *City of Richmond* v. *J. A. Croson Co.*, 109 S.Ct. 706 (1989) (*Croson*), which should have influenced the lower court's ruling. Recognizing this, Metro timely lodged a Supple-

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[17] *Id.*

[18] *Steele* was not decided post-remand, nor will it ever be, as the case has been settled. *James U. Steele*, 4 FCC Rcd 4700 (1989).

mental Brief with the court. However, Metro's motion for leave to file its Supplemental Brief was denied and the brief rejected. (App. E at 104a).

REASONS FOR GRANTING THE WRIT

1. The Lower Court's Ruling That The Federal Communications Commission's Race-, Ethnic- And Gender-Based Preference Classifications Are Constitutional Involves Important Issues Of Constitutional Law That Ought To Be Resolved By This Court.

This case presents the Court with several issues of first impression regarding the constitutionality of government sponsored race-, ethnic- and gender-based classifications in the context of the minority and female preferences routinely applied by the FCC in its comparative hearing process. This Court has addressed the constitutionality of governmental race-based preference classifications thrice before,[19] and those cases portend the ultimate arrival of the issues raised herein. *Fullilove* examined racial classifications imposed by *Congress*, discussing the standard of equal protection review applicable to congressional race-based remedial measures enforced against the States and the degree to which Congress may exercise its unique remedial powers under Section 5 of the Fourteenth Amendment. *Fullilove*, 448 U.S. at 472-92 (Burger, C.J., writing for the plurality). *Wygant*, and the more recent *Croson*, shed light on the disposition of cases in which race-based remedies are imposed by a *state* or *local* government without evidence of identified past discrimination, and enunciate criteria for properly tailoring race-based remedies where evidence of such identified discrimination is present. *Webster* v. *Reproductive Health Services*, 109

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[19] *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980); *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986); and *City of Richmond* v. *J.A. Croson Co.*, 109 S.Ct. 706 (1989) (*Croson*).

S.Ct 3040, 3064 (1989) (Scalia, J., concurring in part). However, the Commission's preference classifications, which (1) arose as a federal agency's response to judicial directives; (2) are administered and applied by the agency, rather than Congress or state or local government; (3) were created in the absence of any evidence of past discrimination or nexus between remedy and objective, and (4) have been entrenched by subsequent congressional legislation despite the agency's attempts to reexamine or repeal them, fit snugly in the gaps left by this Court's prior decisions and evade clear resolution under current equal protection review standards. This Court's evaluation of the Commission's preference scheme could resolve many unsettled issues in the complex area of equal protection review and reach, for the first time, elements therein relating to federal agencies.

The Decision Below

The lower court's determination that the FCC's racial, ethnic and gender[20] preferences withstand constitutional scrutiny was based almost entirely upon the same court's previous ruling in *West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601, 604-07 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985). Judge Edwards, writing for the majority, stated in *Winter Park*'s opening paragraph that, "this case is clearly controlled by *West Michigan* . . .," 873 F.2d at 349 (App. A at 2a), and concluded that "our prior decision in West Michigan controls the disposition of the case with respect to the FCC's use of a qualitative enhancement for minority ownership." 873 F.2d at 356 (App. A at 17a). The lower court's majority opinion merely tracks the reasoning first advanced in *West Michigan*, noting that governance of the cases on which *West Michigan* relied—*Fullilove* and *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978)—remains intact, despite more recent

[20] The lower court defaulted on gender. See note 22, *infra*.

Supreme Court decisions. 873 F.2d at 353-55 (App. A at 10a-15a).

The *West Michigan* Rationale

When the Court of Appeals decided *West Michigan*, two of this Court's precedents were deemed critical to the constitutionality of the Commission's award of minority-based preferences: *Fullilove* and *Bakke*. *West Michigan*, 735 F.2d at 613; *Winter Park*, 873 F.2d at 354 (App. A at 12a). Yet the *West Michigan* court declined to undertake "a detailed or lengthy inquiry into the exact contours of the approaches taken in . . . those cases." 735 F.2d at 613. Instead, Judge J. Skelly Wright, announcing the opinion of the court, casually declared that "a *number* of factors show that the FCC's plan easily passes constitutional muster in light of the various *Bakke* and *Fullilove* approaches." *Id.* (emphasis added).

In fact, *West Michigan* specified only two factors in support of its conviction that the FCC's minority preference policy was constitutionally firm: (a) that consideration of minority status was but "one factor in a competitive multi-factor selection system that is designed to obtain a diverse mix of broadcasters," 735 F.2d at 613, and (b) that Congress, in passing legislation directing the Commission to incorporate preferences for minority applicants into any random selection licensing scheme adopted to replace the comparative hearing process,[21] recognized the "extreme underrepresentation of minorities and their perspectives in the broadcast mass media." 735 F.2d at 613-14.

The court determined that the first factor validated the minority preference classifications under Justice Powell's

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[21] *Communications Amendments Act of 1982*, Public Law 97-259, 96 Stat. 1087 (1982) (*codified* at 47 U.S.C. §§ 309(i)(3)(A)-(4)(A)), reproduced in Appendix D at 102a.

approach in *Bakke*, drawing an analogy between Justice Powell's approval, in principle, of the use of race as a factor in the educational admissions process for the purpose of obtaining diverse student bodies, and the FCC's use of a minority preference to further its goal of attaining diverse broadcast programming, on the First Amendment value "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *West Michigan*, 735 F.2d at 614 (quoting *1965 Policy Statement*, 1 FCC 2d at 394 n. 4). The second factor, presence of congressional action, was found dispositive under Fullilove, as the court stated "[a]ny doubt concerning the constitutionality of the FCC's consideration of minority status was ended by Congress' approval of the Commission's goals and means." *Id.* at 615. Judge Wright concluded that

> Under *Fullilove*, Congress can clearly adopt such race-conscious policies to assure that current allocations do not perpetuate race-based disparities derived from past discrimination. And an administrative agency can certainly follow Congress' lead in an effort to further implement Congress' concerns.

Id. at 616.

West Michigan's dual rationale for affirming the constitutionality of the Commission's preference classifications was adopted by the majority in *Winter Park*, 873 F.2d at 356 (App. A at 17a and 18a), notwithstanding that any remedial purpose was vehemently disclaimed by the Commission. 873 F.2d at 356 n.1 (App. A at 18a) (Williams, J. dissenting). Yet, the *West Michigan* decision, if ever sound, would appear to have been undermined by subsequent pronouncements in *Wygant*, 476 U.S. 267, and *Croson*, 109 S.Ct. 706. Moreover, neither *West Michigan* nor *Winter Park* reviewed the constitutionality of the Commission's gender-based preference policy, which must be

addressed in this case.[22] A ruling from this Court is needed to break the lock fastened by *stare decisis* in the D.C. Circuit, and to determine whether the Commission's preference policies have a valid constitutional basis.

Program Diversity as a Compelling Governmental Interest

The *West Michigan* and *Winter Park* courts' references to the Commission's diversity rationale in support of the constitutionality of its minority-based preferences raise hitherto dormant issues regarding the application and expansion of reasoning first advanced by Justice Powell in *Bakke*, 438 U.S. 265, and again by Justice O'Conner in *Wygant*, 476 U.S. 267. Additionally, neither the *West Michigan* nor the *Winter Park* opinion discusses whether the Commission's preference policies are narrowly tailored to achieve its objectives. Accordingly, review by this Court is needed to determine: (a) whether the "diversity" rationale, first advanced in *Bakke*, has valid application with respect to the Commission's race-, ethnic- and gender-based classifications; (b) whether program diversity, as employed by the FCC, is a compelling governmental interest under

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[22] The *Winter Park* majority noted, in footnote 5 to its opinion, 873 F.2d at 353, n.5 (App. A at 10a), that "the Commission determined below that the outcome of the proceeding would not change even if no consideration were given to Rainbow's five percent female participation. *See* 3 FCC Rcd at 867 n.1. Accordingly, we consider only the legality of the FCC's use of a qualitative enhancement for minority ownership."That language came on remand, not upon the Commission's denial of review, which said the same thing. Pursuant to 47 C.F.R. Section 115(g) the Commission could have granted in part and denied in part Metro's Application for Review. It chose to deny, thereby invoking Section 155(c)(3) of the Communications Act, notwithstanding note 5 to the *Winter Park* majority opinion. The Commission's text accompanying denial of review, (App. B at 60a), including its remark that Rainbow's female preference was not decisional, is but dicta. Moreover, whether *failure* to consider gender would not have altered the result is irrelevant. What is relevant is what happened and the legal consequences thereof.

the prevailing strict scrutiny standard of review, independent of any attempt to remedy past discrimination, and (c) if so, whether the Commission's preference classifications are narrowly tailored to achieve that interest.

Metro, along with The United States, as *amicus*, urged the court below to hold that governmental classifications by race and gender are subject to strict scrutiny and that the Commission's policy is not narrowly tailored.[23] The *Winter Park* majority, as Judge Wright in *West Michigan*, did neither—avoiding the subjects altogether. The majority of this Court apparently now believes that racial classifications, whether purportedly "remedial," or "benign," must be subjected to strict scrutiny review when faced with an equal protection attack.[24] To survive such analysis, (1) a racial or gender classification must be justified by a "compelling governmental interest," and (2) the means chosen by the governmental unit to effectuate its purpose must be "narrowly tailored." *Wygant*, 476 U.S. at 274, 285; *Croson*, 109 S.Ct at 721-22 (quoting *Weinberger* v. *Wiesenfield*, 420 U.S. 636, 648 (1975).

Metro questions whether the promotion of program diversity is a compelling governmental interest. This Court clearly has held that the federal government has a compelling interest in remedying past racial discrimination and/or its lingering effects. *Wygant*, 476 U.S at 286. "In *Ful-*

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[23] Brief for the United States as Amicus Curiae at 11-13 and 28-32; Metro Brief at 24 and at Oral Argument.

[24] *See Wygant*, 476 U.S. at 273-74 (Powell, J., joined by Burger, C.J., Rehnquist, J. and O'Connor, J.); *id.* at 285 (O'Conner, J., concurring in part and concurring in the judgment); *Croson*, 109 S.Ct at 721 (Part III-A, O'Connor, J., joined by Rehnquist, C.J., White, J., and Kennedy, J.); *id.* at 735 (Scalia, J. concurring); *Fullilove*, 448 U.S. at 537 (Stevens, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification"); *see also Croson*, at 752 (Marshall, J., dissenting, joined by Brennan, J., and Blackmun, J.) (noting this as a novel aspect of the decision).

lilove, six members of this Court deemed this interest sufficient to support a race-conscious set-aside program governing federal contract procurement." *Croson*, 109 S. Ct. at (Marshall, J., dissenting). Additionally, although its application remains untested, this Court has held that a state interest in the promotion of racial diversity was sufficiently compelling to support the use of racial considerations in furthering that interest, at least in the context of higher education. *Bakke*, 438 U.S. at 311-15; *Wygant*, 476 U.S. at 286. And, Justice O'Connor suggested in *Wygant*, that additional interests might be considered by this Court:

> [N]othing the Court has said today necessarily forecloses 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 here to be sufficiently "important" or "compelling" to sustain the use of affirmative action policies.

Id.

Both *West Michigan* and *Winter Park* treated the FCC's diversity goal as analogous or identical to the objective embraced by Justice Powell in *Bakke*. *West Michigan*, 735 F.2d at 615; *Winter Park*, 873 F.2d at 354 (App. A at 13a). Metro, however, posits that the "diversity" interest advanced by the Commission in its comparative hearing context is much different from the "diversity" interest hypothetically approved in *Bakke*, and should be reviewed by this Court before receiving routine application in lower courts as an interest justifying race-, ethnic- and gender-based classifications.

The Commission has characterized its race-, ethnic- and gender-based preference policies as an attempt to "enhance *program diversity* by increasing ownership of stations by significant groups that are substantially underrepresented in station ownership." *FCC Brief in*

Winter Park at 47 n. 47 (quoted in *Winter Park*, 873 F.2d at 357 (Williams, J., dissenting)) (App. A at 19a) (emphasis added). However, programming diversity appears to be amorphous, undefined even by its proponent. Only the origins of the concept provide a clue as to its meaning. Apparently, the rationale is an extension of the idea, first presented by the D.C. Circuit in *TV 9, Inc.* v. *FCC*, 495 F.2d at 938, and *Garrett* v. *FCC*, 513 F.2d at 1063, that diversity of station ownership will bring about diversity of programming. *See Winter Park*, 873 F.2d at 363 (Williams, J., dissenting) (App. A at 32a, 33a). In plain English, "program diversity" means different kinds and types of programming.

"Program diversity" and the "academic diversity" outlined by Justice Powell in *Bakke* would not appear to serve as interchangeable justifications for government imposed racial, ethnic and/or gender classifications. The different contexts from which the two goals arise would seem to render meaningful comparison impossible. For example, Justice Powell found that academic diversity was tied to the notion of academic freedom. *Bakke*, 438 U.S. at 313. A university's First Amendment freedom to select and create its own diverse student body was deemed important for exposing students to the "atmosphere of 'speculation, experiment and creation' " deemed "essential to the quality of higher education." *Id.* at 323. This unique academic goal would not seem to have a counterpart in the Commission's race-, ethnic- and gender-based preference policies. Judge Silberman, writing for a different panel of the D.C. Circuit in *Shurberg*, found the analogy between the two goals "wanting":

> It is simply unacceptable, in my view, to say that the government has a role in educating the general public through television broadcasts that is parallel to its interest in promoting diversity in the educational setting. That is a somewhat Orwellian notion. Through public education, the gov-

> ernment has assumed a special function in preparing our youth for participation in society. . . . But there is no indication that Justice Powell contemplated that his reasoning would extend beyond the distinctive context of education where the state legitimately engages in a form of indoctrination.

876 F.2d at 920 n. 27.

Another distinction between Justice Powell's academic diversity rationale and the Commission's program diversity goal is that the pursuit of academic diversity in the manner advocated by Justice Powell tends to break down racial stereotypes, whereas the Commission's indirect pursuit of program diversity through the promotion of minority and female ownership perpetuates them. As Judge Williams stated in his *Winter Park* dissent, "[e]thnic diversity in the classroom enables those present to see individual members of ethnic groups as they are. Far from depending on some link between race and conduct, it is a potent device *against* ethnic stereotyping." 873 F.2d at 357 (App. A at 21a). Conversely, the Commission's ownership promotion policies are based on the "reasonable expectation"[25] that minority owners will program in some sort of minority manner. Under the Commission's theory, race, ethnicity and gender not only determine what type of programming station owners want to provide, but also what viewers and listeners want to hear. *See Id.* at 358 (App. A at 21a). This appears to be exactly the type of racial stereotyping that the *Croson* majority identified as a preeminent danger in the use of racial classifications. *See Croson*, 109 S.Ct at 721; *id.* at 730-34 (Stevens, J., concurring); *id.* at 735, 739 (Scalia, J., concurring).

Numerous contrasts render acceptance of the Commission's preference classifications under the *Bakke* diversity

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[25] *TV 9, Inc.*, 495 F.2d at 938 ("Reasonable expectation, not advance demonstration, is a basis for merit to be accorded relevant factors").

rationale problematic, if not impossible. Accordingly, this Court's ruling is necessary to determine the extent to which Justice Powell's rationale may be expanded to encompass the use of "diversity" as a compelling governmental interest outside the academic admissions context.

Notwithstanding the applicability or nonapplicability of the *Bakke* diversity rationale to the instant case, however, programming diversity, by itself, would not appear to be a compelling government interest because the government neither can ensure nor enhance it: the marketplace does that. And, the marketplace apparently is working. The Commission itself concluded in *Deregulation of Radio*,[26] that "all types of minority needs, be they racial, ethnic or taste, can be and indeed are being well met through increasing the number of stations." *Id.* at 1068. As the Commission explained:

> [L]icensees have come to the conclusion that, even where the group appealed to has traditionally . . . had a low income or is low in number, marketplace forces make the provision of radio service to these segments of the community a rational economic decision.

Id.

Similar conclusions were reached in *Commercial TV Stations*, 98 FCC 2d 1076 (1984), *reconsideration denied*, 104 FCC 2d 357 (1986), *aff'd, Action for Children's Television* v. *FCC*, 821 F.2d 741 (D.C. Cir. 1987). Accordingly, even were program diversity a valid governmental interest, it could not be "compelling" because according to the governmental entity advancing the interest, it already has been, and is being, achieved.

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[26] 84 FCC 2d 968, *reconsideration denied*, 87 FCC 2d 797 (1981), *aff'd in part and rev'd in part, Office of Communication of the United Church of Christ* v. *FCC*, 707 F. 2d 1413 (D.C. Cir. 1983).

Narrow Tailoring and the FCC's Minority and Gender Ownership Promotion Policies

Assuming, *arguendo*, that the Commission's goal of program diversity constitutes a compelling government interest, strict scrutiny review requires that the means chosen to effectuate this goal be "narrowly tailored" to its accomplishment. *Wygant*, 476 U.S. at 274; *Fullilove*, 448 U.S. at 480. This "narrow tailoring" aspect of strict scrutiny review was not applied to the Commission's preference classifications by either the *West Michigan* court, or the majority in *Winter Park*, and never will be, due to the continuing grip of *West Michigan*, absent the intervention of this Court.

Application of the narrow tailoring prong of heightened or strict scrutiny review to the Commission's preferences fails to yield the conclusion that the Commission's minority and female ownership promotion policies are even reasonably, much less narrowly, tailored to fulfill its program diversity goal.[27] First, the Commission itself has declared that program diversity already exists or is assured by the marketplace. Thus, an indirect attempt to promote such diversity by awarding ownership preferences would appear unnecessary for, or unrelated to, the accomplishment of, program diversity. Second, the Commission's own concession that there is no record to demonstrate that the use of "a race- or gender-based preference scheme to increase minority and female ownership is essential to achieving

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[27] Accordingly, it is doubtful whether the Commission's preference policies could withstand review under the standard advocated by Justice Marshall in *Wygant*, that use of race as a classification is permissible if it (1) serves important government objectives, and (2) is substantially related to achievement of those objectives. 476 U.S. at 302 (Marshall, J., joined by Brennan, J., and Blackmun, J., dissenting). The Commission's ownership promotion policies do not appear to be substantially related to the achievement of program diversity.

that objective," *FCC Steele Brief*, at 19,[25] renders inconceivable the notion that the Commission's policies are narrowly tailored; indeed, they would appear to have no rational basis. Third, as Judge Williams points out in his *Winter Park* dissent, "[n]o party here has offered a definition of minority programming that is empirically verifiable . . . ." 873 F.2d at 358 (App. A at 22a). Ergo, the lack of a clear definition of program diversity hampers any conclusion that racial, ethnic or gender ownership composition promotes it. Fourth, the Commission has admitted it has no evidence "on which to base an assumption that a nexus exists between an owner's race or gender and program diversity." *FCC Steele Brief*, at 19. This admission would appear to destroy any claim of narrow tailoring; the Commission is uncertain even of the logic underlying its preference awards. Fifth, even if the Commission's policies promote program diversity despite its own apparent evidence to the contrary, the Commission does not appear to have considered race-neutral alternatives that can avoid the stereotyping resulting from its "reasonable expectation" that certain owners inherently broadcast specific types of programs. Finally, to the extent that the Commission's policies are designed to correct the "underrepresentation" of certain viewpoints by awarding preferences to specific groups until true program diversity is achieved, they would seem either to be unlimited in duration, or to constitute a quota. *See Winter Park*, 873 F.2d at 360 (Williams, J., dissenting) (App. A at 26a).

In sum, review by this Court is needed because evidence of narrow tailoring with respect to the Commission's minority and gender preferences is sadly lacking, and the lower courts have refused to conduct this portion of strict scrutiny analysis.

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[25] Notably, the brief was adopted by the commissioners themselves (App. E at 106a) rather than consisting of the usual *post hoc* rationalizations of government counsel.

The Presence of Congressional Action and the *Fullilove* Standard

Apparently, the reason that neither the *West Michigan* nor *Winter Park* panels undertook a complete, strict scrutiny equal protection review of the Commission's minority and female preference policies was their determination, based upon this Court's holding in *Fullilove*, that "any doubt concerning the constitutionality of the FCC's consideration of minority status was ended by Congress' approval of the Commission's goal and means." *West Michigan*, 735 F.2d at 615; *Winter Park*, 873 F.2d at 355 (App. A at 15a). For the *West Michigan* court, this "approval" was expressed by Congress' passage of § 115 of the *Communications Amendments Act of 1982*,[29] designed to facilitate the development of a random lottery system as an alternative to the Commission's comparative process. The legislation required that preferences for minority applicants be incorporated into any random selection licensing scheme adopted by the Commission. *Id.* The *Winter Park* majority found additional legislative acquiescence in the *1988* and *1989 Appropriations Acts*.[30] Both courts implied that the mere presence of the enactments provided ample grounds for treating the Commission's preferences as if they had been imposed by Congress directly, and upholding them as a valid exercise of the remedial powers accorded Congress under § 5 of the Fourteenth Amendment, pursuant to this Court's rationale in *Fullilove*. *West Michigan*, 735 F.2d at 613-16; *Winter Park*, 873 F.2d at 354 (App. A at 14a-15a).

This Court's recent decision in *Croson* raises serious questions as to whether the *Fullilove* rationale is applicable

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[29] Public Law 97-259, 96 Stat. 1087, Sept. 13, 1982 (*codified* at 47 U.S.C. §§ 309(i)(3)(A) - (4)(A)) (App. D at 102a).

[30] The court observed that "Congress has interceded at least twice to endorse the FCC's policy of enhancements for minority ownership. . . ." *Winter Park*, 873 F.2d at 355 (App. A at 14a).

to the FCC's preference classifications. *Croson*, for the first time, makes clear that *Fullilove*'s review standard may be employed only in connection with race-based remedial measures undertaken by *Congress*, pursuant to its unique constitutional responsibility to enforce the Equal Protection Clause against the states. *Croson*, 106 S.Ct at 718, 719, 726. Application of that standard in the instant case is problematic. First, the Commission has eschewed the notion that its preference policies have any remedial basis,[31] and both the congressional lottery legislation and appropriations acts appear to be based upon the promotion of program diversity rather than the imposition of a remedial rationale upon the agency.[32] Second, the presence of congressional action sufficient to invoke the more deferential *Fullilove* standard of review is dubious. The Commission's preferences, which developed as an agency response to *judicial* directives, had been in effect for *ten years* before Congress enacted the *1988* and *1989 Appropriations Acts*, and the 1982 legislation relied upon in *West Michigan* did not even pertain to the Commission's comparative hearings.[33] Finally, the specific justification presented in *Fullilove* for application of a more deferential review standard—Congress' authority, under § 5 of the Fourteenth Amendment to curtail or correct *state* discrimination based on race, *Croson* 109 S.Ct at 719-20,—is wholly absent here, where the policies at issue were formulated and applied by a *federal agency* and no evidence of past discrimination by the agency has been proffered.

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[31] *Winter Park*, 873 F.2d at 353 n.6 (majority opinion) (App. A at 11a); *id.* at 356, 362, 363 (Williams, J., concurring in part and dissenting in part) (App. A at 18a, 31a, 33a).

[32] *See* discussion in *Winter Park*, 873 F.2d at 363-65 (Williams, J. concurring in part and dissenting in part) (App. A at 34a-38a).

[33] Metro notes that only the lottery legislation had been enacted when it first applied for the proposed Orlando station in 1982, and questions whether congressional enactments following that date may be lawfully construed herein.

If, notwithstanding the above, *Fullilove* is deemed applicable here, issues remain which have yet to be addressed by the Court, the most important of which are (a) whether the objective of promoting program diversity provides sufficient constitutional basis for congressional race-, ethnic- and/or gender-based legislative measures, absent evidence of identified discrimination; (b) what level of congressional participation is required before a court must invoke the *Fullilove* review standard; (c) whether, and to what extent Congress' § 5, Fourteenth Amendment power may be expanded and used to constrain agency action, as well as action by the states, and (d) whether the entrenchment of the FCC's minority and female preference policies constitutes a narrowly tailored, constitutional means for achieving Congress' diversity objectives. Clarification is needed to allay the confusion which remains following the *Croson* decision and to apply, for the first time, some of the reasoning initially suggested therein.

2. The Lower Court's Determination That The Federal Communications Commission's Race-, Ethnic- And Gender-Based Preference Classifications Are Constitutional Is Inconsistent With The Rationale And Result Reached By A Different Panel Of The Same Circuit Three Weeks Earlier And Involves An Important Issue Of Judicial Policy With Respect To Intracircuit *Stare Decisis* Which Ought To Be Resolved By This Court.

Croson acknowledged confusion in the lower courts regarding the appropriate standard for equal protection review. Opening in *Croson*, Justice O'Connor noted that some federal courts had applied the *Fullilove* standard in assessing the constitutionality of state and local minority set-aside programs, whereas others employed *Wygant*'s strict scrutiny approach. *Croson*, 106 S. Ct. at 712. Unfortunately, whereas *Croson* clarified both the *Fullilove* and strict scrutiny standards by enumerating certain circumstances in which the use of each is appropriate, confusion

still reigns, particularly with respect to applications not discussed by this Court due to the *Fullilove, Wygant* and *Croson* factual scenarios.

This confusion has been felt in the D.C. Circuit, as two separate panels, in *Winter Park*, and *Shurberg*, have grappled with the application of this Court's precedents to the FCC's preference policies, each reaching opposite conclusions. Judge Silberman's comments on behalf of the *Shurberg* majority are illustrative:

> [I]in [the] aftermath [of *Bakke, Fullilove, Wygant*, and *Croson*] I would be less than candid not to concede that discerning and applying constitutional principles in this area is difficult; in none of the first three cases does a majority of the Court join any one opinion. Under these circumstances, a lower federal court must do its level best to extract the holding that commanded a majority in each case to arrive at the governing principles and limitations.

876 F. 2d at 910.

Similar frustrations were expressed by Judge Williams in *Winter Park*, 873 F.2d at 366 (App. A at 41a), and Judge MacKinnon in *Shurberg*. 876 F.2d at 928.

Between *Shurberg* and *Winter Park*, five opinions sprung forth—three finding constitutional fault and two finding constitutional validity. Four displayed valiant efforts to come to grips with the novel constitutional issues presented in the two cases, notwithstanding the holding in *West Michigan*. One, however, the majority opinion in *Winter Park*, dodged the constitutional issue, claiming fealty to *West Michigan* notwithstanding the intervening *Wygant*, 476 U.S. 267, and *Croson*, 109 S. Ct. 706.

Former Commission Chairman Patrick exclaimed his bafflement at the inconsistency between *Shurberg* and *Winter*

Park, particularly in light of *Wygant* and *Croson. Commission Files Petition for Rehearing* en banc *in* Shurberg *v.* FCC, 4 FCC Rcd 4511-12 (1989) (Dissenting Statement of Chairman Dennis R. Patrick) (App. E at 111a). He was of the opinion that *Shurberg* and *Winter Park* should have been considered together so that "the court could give us definitive guidance." *Id.* at 4512 (App. E at 112a).

It is evident from the strong criticism of *West Michigan* by Judges Silberman, MacKinnon and Williams in the two conflicting decisions that a reasoned analysis of *West Michigan* would have led to the conclusion that it was decided erroneously, especially in light of subsequent decisions of this Court undermining it. *West Michigan* should not have been followed blindly in the name of intracircuit *stare decisis*. This Court should so proclaim, thereby freeing subsequent panels in all circuits to meet their obligation to decide cases as they view the law, leaving reconciliation or interment to the particular circuit *en banc*.

CONCLUSION

The Commission has been delegated responsibility for determining the public interest in the field of electronic communications. It developed criteria based upon this mandate and implemented them in a race-neutral manner. The D.C. Circuit concocted the racial preference. The FCC dutifully submitted until this Court's decisions required that it exercise its own judgment. Congress stepped in, notwithstanding its earlier delegation, and, through the Appropriations Acts, emasculated the Comnmission's efforts. Judge Silberman, in *Shurberg*, noted "not only has Congress prevented the FCC from attempting to muster factual support for a position that it conceded was impermissible on the present record, but it has placed the FCC in a situation where it was obligated to disregard an

order of this Court." 876 F.2d at 925 n.39. Chairman Patrick has felt the full brunt of this whipsaw and has cried out for relief from the void created. *Dissenting Statement*, 4 FCC Rcd at 4511 (App. E at 110-111a).

For the foregoing reasons, the requested writ of certiorari should issue.

Respectfully submitted,

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September, 1989

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