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PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: METRO BROADCASTING, INC., Petitioner v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.

CASE NO: 89-453

PLACE: Washington, D.C.

DATE: March 28, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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METRO BROADCASTING, INC., :
Petitioner :
v. : No. 89-453
FEDERAL COMMUNICATIONS :
COMMISSION, ET AL. :

-----x
Washington, D.C.
Wednesday, March 28, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

GREGORY H. GUILLOT, ESQ., Washington, D.C.; on behalf of the Petitioner.

DANIEL M. ARMSTRONG, ESQ, Associate General Counsel, Federal Communications Commission, Washington, D.C.; on behalf of the Federal Respondent.

MARGARET POLIVY, ESQ., Washington, D.C.; on behalf of the Private Respondent.

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1 the case as part of an active investigation into the
2 factual statutory and constitutional underpinnings of the
3 Commission's preference policies. During the remand, the
4 Commission had held all cases in abeyance, including the
5 present one, pending its determination regarding whether
6 the policies were ordinarily tailored and otherwise
7 constitutional.

8 But in 1987 the Congress passed an
9 appropriations act defunding the Commission's inquiry and
10 specifically directing that this case be decided in
11 accordance with the minority and female preferences that
12 existed prior to the remand.

13 The issues presented in the case are twofold:
14 One, whether the Commission's policies of awarding the
15 preferences, which were created absent any findings of
16 past discrimination and for the sole purpose of promoting
17 program diversity, violate the equal protection component
18 of the due process clause of the Fifth Amendment.

19 And secondly, whether the congressional
20 entrenchment of the communications -- the Federal
21 Communications Commission's policies and its other
22 associated actions in the appropriations act violated the
23 equal protection clause of the Fifth Amendment or exceeded
24 its authority, whatever authority it has under the
25 Fourteenth Amendment.

1 This case is unlike other so-called affirmative
2 action cases which this Court has heard in the past.
3 Unlike the model program approved in Fullilove or the
4 academic admissions system hypothetically approved by the
5 Court in Bakke, in this case the preference programs of
6 the FCC have resulted in actual discrimination against
7 Metro Broadcasting which, importantly, is a corporation
8 comprised of both a minority member and nonminority
9 members.

10 Unlike the program under review in Fullilove,
11 the programs reviewed in Wygant or Croson, the FCC's
12 preference policies are not founded on the remedying of
13 past discrimination but upon the pursuit of program
14 diversity, an amorphous concept which, as we shall
15 examine, has intense First Amendment implications as well.

16 Unlike the other programs reviewed by this Court
17 in the past, three separate governmental entities, not
18 just one, have had a hand in establishing or perpetuating
19 the Commission's policies: the courts, the FCC and the
20 Congress.

21 But regardless of these distinctions between
22 this case and past cases, one thing is for certain; and
23 that is, that the Commission's policies impose race,
24 gender and ethnic-based classifications and that those
25 classifications, we feel, are presumptively invalid but,

1 at minimum, they require close examination.

2 Metro recognizes that there --

3 QUESTION: Excuse me, Mr. --

4 MR. GUILLOT: -- is diversity of perspective --

5 QUESTION: Excuse me, Mr. Guillot.

6 MR. GUILLOT: Yes, Justice Scalia.

7 QUESTION: Is -- is -- is it clear that the
8 gender-based issue is necessarily before us here?

9 MR. GUILLOT: It is absolutely clear, in our
10 opinion, that the gender-based issue is -- is before the
11 Court for several reasons.

12 First of all, the lower court did not consider
13 gender. It only considered the minority preferences
14 because of dicta contained in the Commission's denial of
15 Metro's application for review that said that the
16 minority -- it was not clear that the gender preference,
17 being only a 5 percent one, was dispositive in the case.

18 However, on remand, in an actual order of the
19 Commission, which we feel is what this Court should
20 review, the Commission held that the minority and female
21 preferences together were dispositive, and that was the
22 holding of the review board as well.

23 This Court is to review judgments, we feel, as
24 Justice Stevens pointed out in Fullilove at page 411, note
25 6, and Black v. Cutler Labs, and not just statements such

1 as the one accompanying the Commission's denial of Metro's
2 application for review.

3 But there is -- there is a more important
4 reason, Your Honor, and that is that in this case, as we
5 shall examine, the minority and female preferences are
6 pitted together in a comparative licensing proceeding.
7 They are not -- neither one of them -- are considered
8 separately, and you really can't examine one without
9 examining the other. And you can't really examine the
10 tailoring of the program without examining how the
11 two -- the two preferences fit together, both the gender
12 and the minority and ethnic preferences.

13 QUESTION: You wouldn't win if we just found the
14 racial preferences invalid? Is that what you're saying?

15 MR. GUILLOT: It's a close call, Your Honor. I
16 feel that we would, but what -- but the more important
17 thing is what the result would be for the Commission's
18 comparative process and the remainder of the people that
19 have to go through it for the next few years. If for some
20 reason, the minority preference classification is struck
21 by this Court as invalid but the gender classification
22 stands, then people are going to start searching for a
23 difference in the rationale between the two policies.

24 QUESTION: We -- we don't ordinarily want to
25 give sweeping decisions if they don't affect your

1 particular case.

2 Are you saying that it would be sufficient for
3 your case to decide solely the minority preference and not
4 the female preference?

5 MR. GUILLOT: Actually, it would not, Your
6 Honor, because Metro prevailed on the -- on the other
7 criterion recognized by the Commission below, particularly
8 local residence and civic participation.

9 Now the -- the minority enhancement policies
10 have the -- the minority enhancement credit has the same
11 weight as the weight given for local residence, so that
12 neutralized the local residence factor in this case.

13 In order to understand why Metro still lost, the
14 female preference has to defeat the civic participation
15 credit which Metro received in the case, and that is the
16 only thing to explain why all of Metro's comparative
17 qualifications were not sufficient for it to prevail over
18 Rainbow.

19 QUESTION: You -- you mean it's clear that the
20 Commission would have reached the same result had it not
21 given your opponent the racial preference? Is that clear?

22 MR. GUILLOT: That is not clear, Your Honor.

23 QUESTION: Well, if that's not clear then we
24 can't affirm the Commission's decision if we invalidate
25 the racial preference; isn't that right?

1 MR. GUILLOT: The Commission's decision, we
2 don't feel, can be -- can be affirmed on any grounds, but
3 the racial and gender preferences had a synergistic effect
4 in the present proceeding. That's our -- that's our
5 position, and the reason this is somewhat confusing now is
6 because we have an --

7 QUESTION: I don't think it's confusing at all.
8 It's -- it was a central part of their decision, and if
9 that's invalid their decision cannot stand. It will have
10 to be remanded.

11 Now they may on the remand apply the sexual
12 preference and come to the same result, but a remand would
13 still be necessary.

14 MR. GUILLOT: But we -- a remand is certainly a
15 possibility, and though we don't favor one we're not
16 discounting it.

17 But unfortunately, neither the review board's
18 decision nor the Commission's decision says what the exact
19 weight was that was accorded between the minority and
20 female preferences in this case. They both list them
21 together in the same sentence and say that together they
22 resulted in the outcome.

23 QUESTION: May I just ask you this? Supposing I
24 concluded that the racial preference was invalid and the
25 gender preference was valid. How should I vote?

1 MR. GUILLOT: I still think, Justice Stevens,
2 that you should vote for the invalidation of both --

3 QUESTION: I understand that, but that's not my
4 question.

5 (Laughter.)

6 QUESTION: Can you -- can you answer my
7 question?

8 MR. GUILLOT: I think that you should -- you
9 should vote to -- to award the construction permit to
10 Metro, and if -- and if it's not clear in the record as to
11 what the separate bases were for the two preferences, then
12 a remand is a possible --

13 QUESTION: The simple answer to my question is
14 if I think the racial preference is bad and the gender
15 preference is all right, I should still vote to reverse.
16 That's what you're telling me?

17 MR. GUILLOT: We feel that you should, Your
18 Honor, but again, we're limited by the judgment of the
19 review board and the FCC, and it's not clear that they
20 feel the same way.

21 QUESTION: But if that's the disposition, then I
22 would not have to reach the gender preference.

23 MR. GUILLOT: We feel that there are serious
24 consequences in not reaching the gender preference.

25 QUESTION: Well, I understand, but as you have

1 just told us we review judgments. We don't have to decide
2 all the future cases that come down the line.

3 MR. GUILLOT: That's right, Your Honor.

4 Well, a remand is a possibility, Your Honor, if
5 you were to uphold one of the preferences and not the
6 other, and we're open to that. But as -- as we go along,
7 we feel that the -- that the two must be considered
8 together. The Commission has said that the rationale
9 underlying the two preferences are the same, and the only
10 reason that people wanted them considered separately is
11 because no one wants to focus on the way that the two
12 policies operate together, and that is one of the burdens
13 that's imposed upon not only nonminorities but minorities
14 under the Commission's preference plan.

15 To the extent that female ownership is said to
16 contribute to program diversity and that it's valuable,
17 every time a female applicant comes against an applicant
18 that has a minority principal, that value is defeated, and
19 so there is also an impact on minorities and females that
20 have been -- that are the acknowledged beneficiaries of
21 the program.

22 MR. GUILLOT: In order to clarify these things a
23 little bit, I think it's important to look at the way that
24 these policies developed and how the weights of the two
25 policies really came about.

1 The Communications Act of 1934 gave the
2 Commission a broad public interest mandate in awarding
3 licenses for broadcast stations, and it said that in
4 making a grant of any application it was to determine that
5 the public interest would be served thereby. If more than
6 one applicant applied for a broadcast station, a
7 comparative hearing must be held to determine which of the
8 applicants would provide the best service to the public in
9 favor of the public interest.

10 The Communications Act didn't establish any
11 criteria for rendering this determination, and after many
12 years of trial and error, in 1965 the Commission passed
13 its Policy Statement on Comparative Broadcast Hearings,
14 which identified two general goals which were to govern
15 the entire licensing process.

16 The first was to effect a maximum diffusion, or
17 diversification of control of the media of mass
18 communications. This was a goal that had grounds in both
19 antitrust and First Amendment considerations. Given the
20 presumed scarcity of the broadcast spectrum, the antitrust
21 considerations would disfavor one person or just a few
22 people having control over all of the media outlets in the
23 United States.

24 The second acknowledged goal of the program is
25 to achieve the best practicable service to the public.

1 This criteria, unlike the diversification criterion, was
2 based on an examination of what the proposed broadcaster
3 would do for the local community, for the community of
4 license that was proposed.

5 In the old days, prior to the deregulatory era,
6 potential licensees had to go out into the communities and
7 ascertain the community needs by interviewing public
8 officials, interviewing minority groups and finding out
9 what gaps needed to be filled in programming. Those
10 requirements are no more.

11 The Commission prepared criteria from the 1965
12 Policy Statement originally were race neutral. That
13 changed, however, in 1973. TV 9 v. FCC was the D.C.
14 Circuit Court of Appeals' direction to the FCC that
15 minority ownership must be taken into account in
16 accordance with the public interest standard -- mandate of
17 the FCC. But the decision didn't really clarify where it
18 was to be taken into account in the Commission's
19 comparative process, and there has been a lot of question
20 about that.

21 The rationale for taking race into account
22 expressed in TV 9 was that there would be a maximum
23 diffusion of ownership of the media of mass communications
24 if we kind of broke up concentrations of certain
25 minority -- certain majority groups in the media. It was

1 a diversification-based criteria.

2 Pursuant thereto, the Court said that it's upon
3 ownership that the public policy places primary reliance
4 with respect to diversification of content. All of the
5 content language in TV 9, all of the goals of serving
6 program diversity, were really supposed benefits of
7 pursuing the primary goal of diffusion of the media of
8 mass communications.

9 The FCC in 1978 did not give a preference for
10 minority ownership under the diversification criterion,
11 however, notwithstanding this language in TV 9. In WPIX,
12 the Commission chose to award enhancements under the best
13 practicable service criterion, a criterion not grounded in
14 whether one group has control over the media, but a
15 criterion grounded in a determination of which applicant
16 could best serve the public interest. Which is the most
17 qualified? Which would be superior in its proposal?

18 QUESTION: Mr. Guillot, it is true, I suppose
19 that very few licenses are owned by people of minority
20 race.

21 MR. GUILLOT: That's true, Justice O'Connor.

22 QUESTION: And perhaps the situation is such
23 that it would justify some remedial action. Is that
24 possible? Do you think that the situation might be such
25 that it would be -- it would meet the Wygant test, for

1 example, for some kind of remedial action?

2 MR. GUILLOT: Your Honor, Metro is not against
3 affirmative action programs per se, and we feel that there
4 might well be a need for remedial action. However,
5 there's a couple of problems.

6 QUESTION: Then who could take that action? The
7 Congress or the FCC or both?

8 MR. GUILLOT: Only Congress, Justice O'Connor,
9 because we feel that under Section 5 of the Fourteenth
10 Amendment, only Congress, and uniquely Congress, has that
11 broad kind of power to remedy societal discrimination.
12 But again, it would have to be discrimination -- it's a
13 constraint against discrimination by the states, and it's
14 questionable, even if Congress could constrain --

15 QUESTION: Well, Congress took some kind of
16 action here. How should we view the action that Congress
17 took?

18 MR. GUILLOT: The action of Congress at best
19 should be viewed as an unconstitutional attempt to impose
20 a remedial action on the Commission to perpetuate these
21 policies without any findings of past discrimination.

22 QUESTION: Should we -- should we take it as a
23 given, then, that Congress was acting to achieve remedial
24 ends?

25 MR. GUILLOT: Well, that's not a given, Justice

1 O'Connor, because as you have said in the Croson decision,
2 underrepresentation in and of itself is not evidence of
3 past discrimination, and in the 1987 hearings before
4 Congress, in the 1989 hearings before Congress regarding
5 minority ownership, it was made clear both by
6 commissioners that testified before Congress and Congress
7 that there was -- that the underrepresentation was the
8 sole indicia of the supposed past discrimination.

9 QUESTION: Well, suppose that we had a difficult
10 time establishing that state discrimination was
11 responsible for this disparity in minority ownership,
12 couldn't the Congress, pursuant to its commerce powers or
13 pursuant to the powers it has to regulate the airwaves,
14 which essentially comes from the commerce power, simply
15 say that as a matter of sound policy we want minority
16 ownership? Why do we need the Fourteenth Amendment when
17 we're acting in an area which is acknowledged to be an
18 exclusively Federal area?

19 MR. GUILLOT: Well, the Fourteenth Amendment is
20 only applicable insofar as Congress perceives this as a
21 remedial measure, Your Honor.

22 QUESTION: Well, but why is Congress limited to
23 the Fourteenth Amendment when it makes -- when it has a
24 remedial program?

25 MR. GUILLOT: No, Congress is limited to the

1 Fourteenth Amendment, we believe, when it seeks to redress
2 society-wide discrimination.

3 In Wygant, the Court seemed to indicate that
4 society-wide discrimination couldn't be taken into account
5 at all, but subsequent clarification has indicated that
6 Congress, pursuant to that unique power under Section 5 of
7 the Fourteenth Amendment, can redress society-wide
8 discrimination.

9 Again, there's no finding --

10 QUESTION: Mr. Guillot?

11 MR. GUILLOT: Yes, Mr. Chief Justice?

12 QUESTION: Are you saying that Congress' power
13 under Section 5 goes further than to redress
14 discrimination caused by states, who are the ones that are
15 subject to the Fourteenth Amendment?

16 MR. GUILLOT: It goes far enough to -- that's
17 not clear by the decisions of this Court, quite honestly,
18 Your Honor. The power goes far enough to redress society-
19 wide discrimination it's been stated, but on the other
20 hand, the rationale for that has always been grounded in
21 the Section 5 positive grant of power to Congress and the
22 Article 1 restriction on the states.

23 QUESTION: Congress itself is limited by the
24 equal protection component of the Fifth Amendment, isn't
25 it?

1 MR. GUILLOT: Under *Bolling v. Sharpe* and other
2 cases, yes, Your Honor. And that's one problem, is if we
3 do not isolate Congress' broader remedial power, Justice
4 Kennedy, under the Fourteenth Amendment, then it is left
5 to be constrained by the Fifth Amendment as to what type
6 of distinctions it can impose.

7 QUESTION: Has there been any argument by the
8 FCC or the competing applicants here who rest on their
9 minority credentials, has there been any argument that the
10 FCC has in any way furthered discrimination by its past
11 licensing activities?

12 MR. GUILLOT: Absolutely not, Your Honor, and
13 that is clear.

14 The Commission testified to that effect --
15 Ronald K. Porter on behalf of the Commission in September
16 '89, already after this Court had granted our petition for
17 certiorari -- that the FCC has never adopted remedial
18 rationale, that there's never been a finding of any past
19 discrimination on the part of the agency or in its
20 licensing practices or in any other way. And it's clear
21 if you look at the comparative process that it would be
22 difficult for any type of discrimination to enter into it,
23 because the only criteria that you have to have besides
24 certain -- or the only qualifications you have to have
25 besides certain financial and technical ones, is local

1 residence, which is presumed to serve the community that
2 the station is to be located in, civic participation
3 within the community, which is part of a local residence
4 background.

5 QUESTION: Has the FCC ever concluded that
6 their -- that a prima facie case, at least, exists to show
7 some discrimination in the allocation of licenses in the
8 past?

9 MR. GUILLOT: Your Honor, the FCC has done
10 exactly the opposite. On countless occasions they have
11 stated in no uncertain terms that there is no remedial
12 basis for the programs whatsoever.

13 We feel the focus in this case needs to be on
14 the Commission's program diversity goal, therefore,
15 because under FCC v. Chenery, this Court really we don't
16 feel should review a position that the Commission itself
17 did not take in adopting the program.

18 QUESTION: Well, has the FCC ever assessed
19 whether broadcasting does present presently diverse
20 viewpoints?

21 MR. GUILLOT: Actually, I was just looking at a
22 First Amendment case, Your Honor, that was before this
23 Court. The Federal Communications v. WNCN Listeners
24 Guild, and this case is replete with references by this
25 Court and by the Commission that diversity in the market -

1 - diversity of programming is assured by the marketplace
2 and the operations of the marketplace. It is not assured
3 any other way. It can only come from the marketplace.

4 It's questionable whether the Commission's
5 policies even promote program diversity, Your Honor, a
6 goal that it equates with the First Amendment value of the
7 widest possible dissemination of information from diverse
8 and antagonistic viewpoints.

9 Despite this very broad phrasing of the program
10 diversity goal, however, the Commission's entire efforts
11 to enhance program diversity consists of the enumeration
12 of six classifications. No other classifications are
13 recognized as having any potential contribution to program
14 diversity. The views of gays and lesbians
15 underrepresented obviously in the media, although there
16 similarly have been no studies on that fact, are
17 underrepresented in the media, but there is no way they
18 can receive credit for their potential contribution to
19 program diversity.

20 A Holocaust survivor from the Nazi days, there
21 is no way. That person would potentially, we feel, have
22 some contribution to make to program diversity. There is
23 no recognition for that.

24 The Commission's goal does not seem to be
25 program diversity --

1 QUESTION: Well, what are -- what are the six
2 classifications? Can they be shortly stated?

3 MR. GUILLOT: I hope so.

4 QUESTION: I do, too.

5 (Laughter.)

6 MR. GUILLOT: They are gender, black ownership
7 and participation, Pacific Islanders, Alaskans --
8 Aleutians are really what is specified there -- Asians and
9 Hispanics. That's it. Those are the only classifications
10 that are recognized as having an impact on program
11 diversity, and there is no way to assure that other groups
12 that have been hitherto unrecognized would have access or
13 potential contributions to diversity under --

14 QUESTION: What -- what other standards for
15 program diversity does the Commission have, I mean other -
16 - other than the minority aspect?

17 MR. GUILLOT: The Commission has -- Your Honor,
18 this is a key point in the case, we feel. The
19 diversification of control factor, that's the predominant
20 consideration, and we feel that program diversity is
21 really just a muddled restatement of this diversification
22 criterion.

23 The diversification criterion which is intended
24 to diffuse control in the media of mass communications by
25 limiting the number of stations someone can own is said to

1 be grounded in the supposition that perhaps this will
2 result in a greater degree of programming, a greater
3 variety of programming.

4 Now this Court has acknowledged --

5 QUESTION: You -- you don't really agree with
6 that anyway?

7 MR. GUILLOT: Pardon me?

8 QUESTION: You don't really agree with that
9 policy, either, because you just said a little time ago
10 that -- that, in fact, the programming will be determined
11 by what makes money. These are all profit stations we're
12 talking about here, right?

13 MR. GUILLOT: We don't agree with that notion at
14 all, Your Honor.

15 QUESTION: So the -- the evil of having one
16 person own it is probably not -- not an evil of not having
17 diverse viewpoints but an evil of -- of restricting
18 advertising rates or things of that sort?

19 MR. GUILLOT: We feel -- we feel that that's
20 absolutely correct, Your Honor, and it's even more correct
21 now than it ever was before because there are more
22 stations and more sources of information and viewpoints to
23 the public than there have ever been before, from cable
24 television to wireless transmissions to satellite dishes.
25 There is more diversity. There are more sources for

1 possible diversity than there has ever been before.

2 So we feel that, really, program diversity is a
3 misnomer. What the Commission is trying to do, which
4 Justice Powell had insinuated in Bakke and subsequent
5 cases it was not permissible, is simply to prefer one or
6 actually six groups over any other possible groups.

7 QUESTION: The FC -- the FCC and the licensed
8 companies suggest that this policy is not just any more a
9 Commission policy, that it's been adopted by Congress.

10 MR. GUILLOT: Well, that's right, Your Honor.

11 QUESTION: We don't know the basis on which
12 Congress adopted it, do we? Maybe Congress was using it
13 for some purpose other than diversity.

14 MR. GUILLOT: Well, we feel that they were, Your
15 Honor. Congress, as a matter of fact, specifically said
16 in the appropriations legislation -- if the legislative
17 history is read and the conference report is read,
18 Congress said that we are doing this in order to promote
19 diversification of ownership.

20 I am convinced, Your Honor, that Congress'
21 ratification of the FCC's policy is based on its belief
22 that the FCC in comparative licensing proceedings is
23 considering race under the diversification criterion. It
24 is clear in this brief filed by the United States Senate
25 in this proceeding, the amicus brief, that Congress does

1 not understand either the operation of the Commission's
2 processes and the various components in it or where this
3 recognition of minority and female ownership was placed.

4 Contrary to being of the notion that it's a
5 considered decision of Congress based on its broader
6 mission to investigate all facts, which the Senate and the
7 FCC cite as relevant, all evidence in this proceeding
8 shows that Congress didn't even know what was going on
9 with respect to the minority and female enhancement
10 policies.

11 QUESTION: We -- we enforce congressional
12 statutes whether they knew what was going on or not.

13 (Laughter.)

14 QUESTION: If they -- if they write a statute,
15 it has independent operative effect, doesn't it? They
16 don't even --

17 MR. GUILLOT: Sure, and we don't deny --

18 QUESTION: -- read about it. Each of them can
19 work at home and come in and vote on the basis of his own
20 research. They don't have to have a committee meeting, do
21 they?

22 MR. GUILLOT: And we don't deny that Congress
23 generally or even all the time makes their decisions on
24 that basis, but we need to look closer when we find that
25 they're making decisions that impose race, ethnic and

1 gender-based classifications upon society in violation of
2 the equal protection principles.

3 QUESTION: (Inaudible) categories Congress has
4 to make a record, is that it? It's sort of a due process,
5 a due legislative process?

6 MR. GUILLOT: There have to be findings. Even
7 Fullilove required narrow tailoring. Not the extensive --

8 QUESTION: Where do you get that? Out of the
9 Administrative Procedure Act?

10 MR. GUILLOT: No, Your Honor, out of Fullilove.
11 In Fullilove it was deemed important, and great, great
12 amount of talk was given to the -- to what Congress did in
13 deciding to pass the program that was under review there.

14 QUESTION: Congress cannot -- cannot enact a
15 valid piece of legislation in this field without making
16 findings? Is that what you're saying?

17 MR. GUILLOT: Well, Your Honor, we've been
18 talking about the remedial basis for the -- for the
19 legislation, and in order for there to be a remedial basis
20 how can there be no findings if there's something that
21 needs to be remedied?

22 QUESTION: We can, as we often do with
23 legislation, see whether there is a plausible basis for
24 the legislation but without demanding what the
25 Constitution does not require, that Congress give reasons

1 for its legislation. It doesn't have to give reasons for
2 its legislation.

3 MR. GUILLOT: Well, Your Honor, that is not the
4 standard that was enunciated by this court in Fullilove -
5 - this Court in Fullilove for reviewing race and ethnic-
6 based classifications under the Fourteenth Amendment. We
7 feel that --

8 QUESTION: You read it too broad.

9 MR. GUILLOT: I -- I -- I do think that it has
10 been read too broadly by the Commission and the amici in
11 this case. Their briefs stop at the point where they
12 under -- where they see that Congress has acted, and they
13 think the mere presence of congressional action is enough
14 to give up the inquiry.

15 But what we're saying, Your Honor, is that even
16 under Fullilove there's a two-prong test, whether the
17 objectives of the legislation are within Congress' power,
18 and Justice Kennedy referred to the commerce clause as
19 being one possible basis for the exercise of that power;
20 but second, whether the limited use of racial and ethnic
21 criteria are a permissible means for Congress to carry out
22 its objectives within the due process clause.

23 This program is not narrowly tailored, and,
24 significantly enough, underrepresentation is all Congress
25 refers to as evidence that there is a problem. And

1 underrepresentation is not enough but, more importantly in
2 the present case, you must realize that the Commission's
3 policies were in effect 18 years when Congress supposedly
4 ratified them.

5 If anything, the continuing existence of the
6 underrepresentation statistic demonstrates that the
7 Commission's comparative preference policies is a complete
8 and total failure in advancing either minority ownership
9 or diversity of programming, and when reviewing what
10 information Congress had before it at that time, that must
11 be taken into account, that the record is that the
12 policies were bad, ineffective and unconstitutional.

13 I'd like to reserve the rest of my time for
14 rebuttal, if I could.

15 QUESTION: Very well, Mr. Guillot.

16 Mr. Armstrong.

17 ORAL ARGUMENT OF DANIEL M. ARMSTRONG

18 ON BEHALF OF THE FEDERAL RESPONDENT

19 MR. ARMSTRONG: Mr. Chief Justice, and may it
20 please the Court:

21 The broadcasting industry has the power to shape
22 public opinion in this country that few, if any, others
23 can match.

24 This case involves a forward-looking decision by
25 Congress that we will all benefit if this powerful medium

1 communicates to us the views and perspectives of
2 minorities, and to that end some race-conscious steps are
3 needed to increase the number of minority-owned broadcast
4 stations.

5 Before I begin my argument, one brief reference
6 to the gender question since it did come up. Without the
7 minority enhancement, Rainbow's qualitative showing is not
8 as strong as Metro's, even if Rainbow keeps the gender
9 enhancement. So the Commission, as it indicated in the
10 specific language that was referred to by Petitioner's
11 counsel, has indicated that the gender enhancement doesn't
12 decide this case. That would have to be remanded --

13 QUESTION: You would concede that if the Court
14 should find against you on the racial portion, we would
15 have to set aside the Commission's action here?

16 MR. ARMSTRONG: Justice Scalia, there would have
17 to be a remand. You could not affirm the judgment below.

18 There was a great deal of discussion in the
19 earlier colloquy with Petitioner's counsel about the
20 factual predicate and Congress' powers under commerce or
21 the Fourteenth Amendment. Before we get to that, I would
22 like to emphasize to the Court that a lot of the cases
23 where that has been discussed -- and I'm thinking, for
24 example, of Fullilove -- have presented the Court with a
25 situation in which Congress was giving what has been

1 referred to in the affirmative action litigation as a
2 purely remedial program.

3 It's critical to understand that in this case
4 -- and so the Court -- in this case the Court need not
5 decide whether the factual record here would support a
6 purely remedial program in an economic sense because in
7 this case, of course, the immediate beneficiary of these
8 policies are minorities if they are granted licenses and
9 have the opportunity to operate the station. But it is
10 critical to understand that Congress' purpose here is not
11 -- that's not the purpose. The purpose, the ultimate
12 purpose here, is to benefit the public's interest in a
13 diversity of expression over the airways.

14 QUESTION: The assumption of the Commission, I
15 take it, is that if there are more minority owners, there
16 will be more diversity in the airwaves?

17 MR. ARMSTRONG: Mr. Chief Justice, the Court has
18 previously had occasion to recognize --

19 QUESTION: Well, I -- I was asking you if -- if
20 that was the Commission's assumption.

21 MR. ARMSTRONG: Yes, sir. And that is the
22 position Congress has taken, and that's the position the
23 Commission supports.

24 QUESTION: Now, is -- is -- what is the
25 reasoning behind that so far as the Commission is

1 concerned?

2 MR. ARMSTRONG: Yes, sir.

3 By way of background, the Court has had occasion
4 in the past in the cross-ownership case ten years ago and
5 earlier in the Storer case to be familiar with the
6 Commission's position that there is a nexus between the
7 source, the owner, and the diversity of programming.

8 Now, this case requires a further step that has
9 not been taken by the Court before, and this step requires
10 that the Court consider whether there is a nexus between
11 race and expression, and the Commission's position is that
12 that is a defensible, predictive judgment.

13 First, it is a judgment that has been made by
14 university admissions officials who are in the business of
15 achieving diversity. It is a judgment that Justice Powell
16 in the Bakke opinion seemed to accept, and Justice Powell
17 has always been an advocate of strict scrutiny in these
18 cases and yet he accepted that nexus in the Bakke case
19 without demanding empirical proof.

20 QUESTION: Let me understand what you mean. You
21 -- you -- you mean the nexus between race and expression,
22 the thing -- that white people think and express
23 themselves one way and Aleutians another way and Asians
24 another way and -- I thought this was what we were trying
25 to get away from.

1 MR. ARMSTRONG: Congress' opponents in this
2 litigation have understood the position to be that all
3 members of a group think in one way. We reject that
4 characterization, Justice Scalia. The very Harvard plan
5 upon which we rely so heavily in this place. As it was
6 described in Justice Powell's opinion, it explains that
7 the reason why Harvard doesn't want to limit itself to 10
8 or 20 black students is that they couldn't begin to bring
9 to their classmates the variety of points of view,
10 backgrounds and experiences of blacks in the United
11 States.

12 So, it's not --

13 QUESTION: The Harvard plan was adopted long
14 black admissions were an issue, and many thought that the
15 reasons for its adoption was to -- was to eliminate the
16 excessive number of Jewish students who were getting
17 admitted on a purely merit basis.

18 MR. ARMSTRONG: But I referred to it --

19 QUESTION: So, I -- I'm not very impressed
20 with --

21 MR. ARMSTRONG: I refer to it, Justice Scalia,
22 only for the purpose of telling you that the policy does
23 not rest on a judgment that all members of a group think
24 in the same way.

25 QUESTION: Well, in your view, then, could the

1 FCC require that every broadcast station in the United
2 States devote one hour a week to minority -- the
3 expression of minority views?

4 MR. ARMSTRONG: Justice Kennedy, the --

5 QUESTION: Assuming we can define that.

6 MR. ARMSTRONG: -- the Commission and Congress
7 in their consideration of alternatives are limited both by
8 renewal expectancy considerations and by First Amendment
9 considerations, and this Court in the case about 10 years
10 ago -- it was involving cable, but the Court spoke to
11 broadcasting as well and said that there are concerns in
12 Section 3(h) of the Communications Act. These concerns
13 reflect First Amendment concerns, and these concerns do
14 not permit the Commission to dictate to a broadcast
15 licensee that it shall turn over its facilities for the
16 expression of a particular program. Now, obviously --

17 QUESTION: So, it can do -- so it can do so
18 indirectly what it can't do directly?

19 MR. ARMSTRONG: Well, we do attempt through
20 structural regulations to achieve the public interest in
21 programming content without direct content regulation.

22 The question of when --

23 QUESTION: But -- but you're trying to achieve
24 content regulation nonetheless?

25 MR. ARMSTRONG: Well, there's no question that

1 this judgment believes that if there are more minority
2 owners -- it's a nominally structural regulation -- but if
3 there are more minority owners, when all is said and done
4 at some point in the future, the public will have received
5 a diversity of expression that it will not have received
6 if we do not have the minorities. So, in that sense we
7 are influencing the --

8 QUESTION: Well, can -- can -- can non-minority
9 owners offer programs of a diverse nature?

10 MR. ARMSTRONG: Well, Justice O'Connor,
11 certainly.

12 QUESTION: And can the FCC take action to
13 evaluate the extent to which that is now being done?

14 MR. ARMSTRONG: Your question has two thoughts.
15 The Court certainly -- nonminority licensees
16 have obligations to offer issue-responsive programming for
17 their entire audience, and that would include presentation
18 fairly of minority perspectives.

19 But the Court itself in a dictum, in a footnote
20 in the NAACP case in 1976, said, after rejecting the
21 authority of the Federal Power Commission to have -- to
22 pursue employment discrimination, referred to the FCC's
23 attempts to get more minority employees.

24 And the Court said that can be justified because
25 it is related to the Commission's duty to ensure that a

1 licensee's programming fairly reflects the views and
2 perspectives of minority groups. If --

3 QUESTION: Has the FCC assessed the extent to
4 which the broadcasting today presents diverse viewpoints?

5 MR. ARMSTRONG: Justice O'Connor, two thoughts.
6 One --

7 QUESTION: I mean, has it or hasn't it?

8 MR. ARMSTRONG: No, we have not, because it
9 would be improper for us to do so. What we are talking
10 about in an effort to justify this policy is not achieving
11 some quantity of entertainment programming that will
12 appeal to this or that audience.

13 What we're talking about is the presentation of
14 the more subtle point of views and perspectives in news,
15 in editorial comment, in public affairs and it,
16 admittedly, would be very difficult empirically to
17 demonstrate the validity of the predictive judgment, just
18 as it would very difficult empirically for a university to
19 demonstrate the validity of a --

20 QUESTION: So -- so you're trying to --

21 QUESTION: You're saying you cannot -- that it
22 can't be done?

23 MR. ARMSTRONG: And the First Amendment would
24 present very difficult --

25 QUESTION: And if it can't be done, then how do

1 you ever evaluate whether the remedy you have prescribed
2 has been met. I mean --

3 MR. ARMSTRONG: The focus --

4 QUESTION: -- it puts us in quite a dilemma.

5 MR. ARMSTRONG: The focus is on ownership,
6 Justice O'Connor. That's the focus.

7 QUESTION: Well, to -- to say at the time that
8 the TV 9 decision came down in 1973 or whenever it was
9 that you can't -- you're not certain about how to validate
10 predictive judgment, but after 18 years I would think it
11 would not longer be a predictive judgment. You -- you've
12 had experience that you could evaluate.

13 MR. ARMSTRONG: Well, the one thing we can
14 evaluate -- I don't think, Mr. Chief Justice, that we
15 should be standing before you today and looking at the
16 content and saying look at the content here and look at
17 what it was in 1970 and see, there's more diversity. I
18 would be -- approach this podium with great trepidation if
19 that were my assignment, given the First Amendment and
20 given the fact that I represent a government licensing
21 agency.

22 But what we can assess, we can assess the
23 ownership. We can see how many broadcast stations in this
24 nationwide industry are owned by minorities.

25 QUESTION: And you're doing that to accomplish a

1 goal which you think is so constitutionally sensitive, you
2 think it's even inappropriate for you to measure it
3 directly?

4 MR. ARMSTRONG: I believe that we are saying,
5 Justice Kennedy, that it is necessary in this area. That
6 whatever we do to accomplish goals -- I don't want to
7 forswear any content regulation. This Court has had
8 cases from the Commission in the past in which we've been
9 doing that. Our opponents in the industry from time to
10 time have been here, but it is a tightrope and it is a
11 concern that we have limits on how far we can go, and so
12 we do try and Congress tries to fill that void by
13 structural-type regulations that are intended to achieve
14 the same purpose.

15 QUESTION: Mr. Armstrong, how do you -- how do
16 you pick out these -- these particular minorities? I
17 mean, if I had -- somebody had said, you know, get -- get
18 a group of minorities that -- that would produce diverse
19 programming, you know, I would have thought maybe Southern
20 Baptists and Ethical Humanists and perhaps homosexual
21 groups, groups that -- that -- that have some difference
22 in -- in -- in their ideas, in -- in -- in what ideas they
23 consider important. How did you come up with these groups
24 which are what, blacks and Hispanics, but not Portuguese?
25 They -- they have been excluded from your definition of a

1 Hispanic, right?

2 MR. ARMSTRONG: The Congress came up with the
3 groups.

4 QUESTION: Yes.

5 MR. ARMSTRONG: And the Commission has accepted
6 what Congress did in the lottery sense.

7 QUESTION: Oh, I see.

8 MR. ARMSTRONG: And the groups are not unique to
9 this particular case. These are essentially the same
10 groups that the Congress had in the program that was
11 before the Court in Fullilove, and they -- Congress has
12 explained in the conference report on the lottery statute.

13 QUESTION: How were the groups determined? By
14 blood? I mean, a Hispanic would -- what degree of blood
15 does one have to be to qualify?

16 MR. ARMSTRONG: Congress has identified the
17 groups that it believed have been the victims of
18 discrimination, society-wide discrimination. Congress
19 obviously --

20 QUESTION: Well, wait. What does that have to
21 do with diversity of viewpoint? I thought you said it was
22 not remedial?

23 MR. ARMSTRONG: Well, this is where the case
24 -- we said it didn't involve a purely remedial case, but
25 it involves in part the remedial aspect because

1 Congress --

2 QUESTION: You identified the groups on the
3 basis of a remedial theory in order to achieve a diversity
4 objective. Is that what's been done?

5 MR. ARMSTRONG: In identifying the groups that
6 the Congress believed the public most needed to hear from
7 the Congress said, given our wealth of experiencing in
8 broadcasting, given our wealth of involvement with civil
9 rights litigation, we believe the groups, the public most
10 needs to hear from are those groups that have been the
11 victims of discrimination. And the Congress said we have
12 extensive experience in identifying whose those groups are
13 from our civil rights activity for the past 30 years, and
14 they listed the six groups. That's how they came up with
15 it.

16 QUESTION: I see. So, it really --

17 QUESTION: I just want to make it clear. You do
18 not -- you do not seek to justify this program based on
19 racial discrimination and as -- as to trying to remedy
20 past discrimination?

21 MR. ARMSTRONG: The -- obviously we had to
22 refer, Justice White, to the past because that is how
23 Congress decided who should be in the picture.

24 QUESTION: Do you -- do you --

25 MR. ARMSTRONG: But, no, sir, we are relying in

1 this case --

2 QUESTION: On -- on diversification?

3 MR. ARMSTRONG: -- the forward-looking purpose
4 to achieve a diversity of expression for the benefit of
5 the public.

6 QUESTION: And we shouldn't even address, I
7 suppose -- at least we shouldn't accept any submission
8 that this program is -- is justifiable based on a remedial
9 basis?

10 MR. ARMSTRONG: The Court would not have to in
11 this case hold that --

12 QUESTION: We can't -- we can't -- if you didn't
13 rely on it, we shouldn't accept any submission based on
14 the remedy.

15 MR. ARMSTRONG: Well, I -- I think it's clear
16 from the -- the Court has to decide whether what Congress
17 did is lawful, but it's clear what Congress has in mind.
18 And Congress did in the lottery report -- conference
19 report for the lottery statute -- say in addition to the
20 diversity objective, they thought this case was like the -
21 -

22 QUESTION: Yeah, but that isn't what the FCC has
23 done.

24 MR. ARMSTRONG: But this is Congress now,
25 Justice White, that's acted. This is Congress the Court

1 has to review. So I think that given the fact that
2 Congress has acted, the Court would not have to hold in
3 this case that diversity alone could support a race-
4 conscious effort.

5 QUESTION: Well, I know, but all Congress said
6 that here's -- that you don't want to change -- that it
7 didn't want you to change your -- your preference policy.
8 Stay with it.

9 And, as I understand you to explain what your
10 policy was and is, it's purely diversification --

11 MR. ARMSTRONG: When they said that, Justice
12 White, they did refer to the 1982 lottery statute. And in
13 that lottery statute, which was intended to address the
14 situation that would govern if we didn't have a prepared
15 hearing, they expressed the remedial purpose.

16 QUESTION: I know, but Congress didn't change
17 -- Congress didn't change the basis that -- on which
18 you're acting.

19 MR. ARMSTRONG: The amicus brief of the Senate
20 -- no, sir, they didn't change the basis on which we had
21 acted, but we have been acting since '82 --

22 QUESTION: Well, you've been acting on a
23 diversification basis --

24 MR. ARMSTRONG: Yes.

25 QUESTION: -- not a race remedy basis.

1 MR. ARMSTRONG: But I believe as in Fullilove
2 the earlier statute is relevant, and the earlier statute
3 indicates that Congress also had the remedial purpose in
4 mind.

5 QUESTION: Thank you, Mr. Armstrong.
6 Ms. Polivy.

7 ORAL ARGUMENT OF MARGARET POLIVY
8 ON BEHALF OF THE PRIVATE RESPONDENT

9 MS. POLIVY: Mr. Chief Justice, and may it
10 please the Court:

11 Four times in the last 12 years this Court has
12 had occasion to consider the constitutionality of
13 government programs involving race conscious- or ethnic
14 conscious-based decisions as selection criteria.

15 Under the holdings of each of those cases, we
16 submit that the FCC's comparative minority preference
17 policy should be sustained. Bakke and the issues
18 addressed in there -- in that case by Justice Powell most
19 closely resemble the issues presented here today. Both
20 cases involve as a compelling governmental interest the
21 diversity of voices contributing to robust debate among
22 the audience. In the case of Bakke, we're talking about a
23 student body. In the case of the FCC, we're talking about
24 everyone in the Nation.

25 The root of the FCC's regulatory power in this

1 area lies in the First Amendment guarantee that multiple
2 voices produce the most informed electorate. What is
3 involved here is the FCC's attempt and Congress'
4 ratification of that attempt --

5 QUESTION: Ms. Polivy, are you suggesting that
6 the First Amendment requires the FCC's diversification
7 program?

8 MS. POLIVY: Your Honor, the -- this Court and
9 many others and Congress have had occasion over the years,
10 starting with the Associated Press case and going unbroken
11 for almost 50 years, of acknowledging the fact that the
12 First Amendment is certainly part of the Commission's
13 requirement to diversify the ownership of broadcasting,
14 and it's through the ownership of broadcasting that
15 editorial control takes place.

16 QUESTION: Well, are you saying that this Court
17 has held that the FCC must -- the First Amendment requires
18 the FCC to follow a diversification --

19 MS. POLIVY: I think the question would come up
20 in the -- in the reverse, that the FCC's foundation,
21 reliance upon the First Amendment as part of its reason
22 for diversity, is an appropriate First Amendment finding.
23 I would refer you to the Court's opinion in Red Lion.

24 QUESTION: Well, but what is an appropriate
25 First Amendment finding?

1 MS. POLIVY: Well, that diversification is part
2 of the First Amendment, that the multiplicity of tongues
3 and the encouragement of diversity in the control of media
4 is something that the Commission properly sees as its
5 function under the Communications Act and under the First
6 Amendment.

7 QUESTION: But now that's quite different, to
8 say that the Commission sees that as its function under
9 the Communications Act and that this Court has upheld its
10 seeing it that way. That's different than saying that if
11 the Communications Act did not provide for it, the
12 Commission would nonetheless have to do it because of the
13 First Amendment.

14 MS. POLIVY: I don't think the Court has ever
15 said that. I think the --

16 QUESTION: No, I don't, either.

17 MS. POLIVY: I think the Court has said that
18 this is consistent with the Commission's obligation both
19 to further the First Amendment and the Communications Act,
20 and I think that's all that I'm claiming there.

21 But that the Court's holding in Bakke that
22 diversity of viewpoint is a compelling state interest in
23 the academic field would certainly be as valid or more
24 valid in the area of broadcasting where you're talking
25 about the entire Nation.

1 The -- some of the confusion, I think, perhaps
2 as to the purpose is caused by the fact that the
3 Commission's justification of the race-conscious criteria
4 that it is using stems from the fact that in seeking
5 diversity of viewpoint they first identified the missing
6 voices. To that extent, one would have to say that it is
7 -- if there was no past deprivation or exclusion there
8 would be no need to look specifically to include those
9 people. So it's somewhat difficult to separate the
10 remedial from the question of diversity of viewpoint and -
11 - and ownership that the Commission is talking about.

12 QUESTION: Under the Commission's rationale, I
13 take it, if there's a community with a substantial
14 Hispanic population, an Asian owner of the applicant gets
15 the race preference under the FCC statute, or must there
16 be some parallel between the composition of the local
17 community and the particular minority being given the
18 preference?

19 MS. POLIVY: Justice Kennedy, the -- the
20 underlying rationale of the -- the policy is that the
21 people who are to benefit from the inclusion of multiple
22 voices are not the minority groups involved but the
23 population as a whole.

24 QUESTION: Well, my question was how -- my
25 question is how does it work?

1 MS. POLIVY: The way it works is very simply
2 there is no consideration given to whether this is an
3 Asian population or a Hispanic population. The underlying
4 theory is that --

5 QUESTION: So there's no -- so there's no
6 correlation required between the race of the owners and
7 the racial composition of the community that it serves?

8 MS. POLIVY: No, sir. The -- the underlying
9 theory is that everyone benefits from hearing a
10 multiplicity of voices. We are not talking here about
11 specialized programming. We are talking about differences
12 of perspective, differences of choices made in editorial
13 control, differences made in choice of news, in choice of
14 programs, in choice -- the whole theory is that the
15 reflections that each of us bring to ownership are a
16 product of our background, are a product of our
17 uniqueness.

18 When there are identifiable groups, such as
19 there are here that have been excluded from broadcasting,
20 what we're talking about here --

21 QUESTION: I thought we're all trying to make
22 money when we -- when we buy a for-profit radio or
23 television station.

24 MS. POLIVY: Well, we're not --

25 QUESTION: And I thought that the smarter we all

1 are we will all try to make money in exactly the same way,
2 and if we're an Asian broadcasting in a Hispanic
3 community, we will broadcast Hispanic programming, just as
4 we would if we were a white broadcasting in a Hispanic
5 community.

6 MS. POLIVY: The air waves are a public domain,
7 and broadcasters are public trustees. While stations may
8 in fact make money, and certainly we have heard a great
9 deal about that, that is not a standard by which the
10 licenses are allocated. It is not a standard by which
11 licenses are awarded.

12 Those seeking licenses must demonstrate their
13 intention to serve the public interest, not the public
14 coffer. And what we have here is a question of who
15 determines what goes out over the air waves, who
16 determines whether a program on apartheid is to be shown
17 or not, who determines whether an editorial is to be run
18 about a local election. That's what we're talking about.

19 QUESTION: What evidence -- what evidence can
20 you refer to that demonstrates that individuals of any of
21 these particular race, or of any race for that matter,
22 will produce programming of a particular racial type?

23 MS. POLIVY: There have been some studies, and
24 in the brief filed by the NAACP there -- there is a
25 footnote that extensively refers to them, but that is not

1 the point.

2 The point here is that the -- the concept that
3 underlies the First Amendment, the concept that underlies
4 our democracy is that a multiplicity of voices give rise
5 to a multiplicity of views, and it is true that --

6 QUESTION: I thought the concept was also,
7 however, that people's voices -- that is, their
8 ideas -- are not to be judged on the basis of their skin.

9 Isn't that a concept that underlies the
10 Constitution, too?

11 MS. POLIVY: Certainly, it is, and we are not
12 saying that the content of their voices underlies the --

13 QUESTION: But that's exactly what you're
14 saying.

15 MS. POLIVY: I think --

16 QUESTION: You're saying that if you have black
17 owners you will have black programming, whatever that
18 means.

19 MS. POLIVY: I am not saying that. In fact,
20 what I am saying is quite the reverse. What I'm saying is
21 that insofar as we each are a product of our backgrounds,
22 our unique experiences bring our unique choices. Now that
23 is not the color of our skins, but it is a fact that we
24 all come from different places. And it is the fact that
25 we come from different places that leads to the panoply of

1 views and voices.

2 There is no such thing as an American voice. We
3 are each the product of our backgrounds.

4 QUESTION: A black who gets a minority
5 preference here could have been born and raised in
6 Scarsdale; isn't that right?

7 MS. POLIVY: Certainly.

8 QUESTION: You're saying our background, where
9 we come from. It has to do with nothing here except
10 blood; isn't that right?

11 MS. POLIVY: No, it --

12 QUESTION: Isn't blood what counts?

13 MS. POLIVY: It has --

14 QUESTION: What counts for purposes of whether
15 the preference is given? Is it anything other than blood?

16 MS. POLIVY: Well, if you -- if you mean
17 belonging to a group by blood --

18 QUESTION: That's what I mean.

19 MS. POLIVY: -- I would say yes.

20 However, what it does mean is it's the
21 recognition in the First Amendment -- in the Commission's
22 view that this is a different perspective. Whether you
23 were born in Scarsdale or you were born in Harlem, the
24 fact of who you are is what contributes to your
25 perspective.

1 QUESTION: And who you are is your race, under
2 your view -- in the Commission's view?

3 MS. POLIVY: Well, it may be your ethnicity. It
4 may be your background, but what we have done here is
5 identify those groups that have been excluded from the
6 mass media.

7 When the Commission started this program in
8 1978, fully only 1 percent of the broadcast outlets in
9 this country were owned by minority individuals. Today
10 after 18 years -- 12 years, the latest figures that we
11 have in the Congressional Research study is that 3.5
12 percent of all broadcast outlets are owned by minority
13 individuals.

14 I'd like to just address one or two things that
15 have been alluded to. The first is that the minority
16 enhancement that the Commission gives is one of a number
17 of multiple factors. It is by no means a decision factor.
18 In fact, in this case Rainbow did not win simply because
19 it got a minority preference. It proposed a larger amount
20 of qualitative to quantitative integration, more of its
21 ownership was to be integrated into the management, and it
22 was given credit for its past broadcast experience.

23 The Commission considers multiple factors in
24 addition to simply whether or not people are going to be
25 integrated. The Commission considers whether or not the

1 proposals are technically advantageous. The Commission
2 considers whether there are any other stations owned. The
3 Commission considers whether or not programming is offered
4 as a specialized basis.

5 This as a plus factor is perhaps less
6 influential than the plus factor in Bakke that was
7 referred to in the Harvard plan.

8 Here, what we are talking about is fully
9 qualified applicants. How do you choose between two fully
10 qualified applicants? In the past the Commission has made
11 certain standards. They have said when you have two fully
12 qualified applicants we will look at such things as local
13 residence, we will look at such things as what civic
14 activities you've been involved in. They have now said we
15 will look at race also because this is an area that is
16 across the board underrepresented in the broadcast
17 industry.

18 There is no danger that this is going to go on
19 forever. The figures are so low that there is really no
20 reason to consider how it ends, but at this point what we
21 are talking about is Congress is authorizing this program
22 on a year-to-year basis, so we are not talking about any
23 possibility of going on into the future.

24 In deciding whether or not to have this
25 program --

1 QUESTION: Of course, I take it diversity of
2 views is a constant goal. If you reached racial
3 proportionality, whatever that means, in ownership and the
4 regulations ceased and there was an imbalance, I would
5 suppose the same diversity of view problem would arise.
6 So it seems to me that what you are -- since you are not
7 relying on something that is remedial, you are espousing a
8 rationale that must necessarily be permanent.

9 MS. POLIVY: Diversity of views is certainly a
10 rationale that is permanent. Whether there is a minority
11 preference or not is a matter that is different.

12 The whole Communications Act, the whole
13 Commission's allocation of new licenses, is premised on
14 diversity. There is no question about it. That would go
15 on as long as the Commission has licenses to grant.
16 Congress has approved that. Congress has insisted that
17 the Commission continue to look at the diversity of
18 ownership.

19 What they have said here is that on the basis of
20 their experience, on the basis of 30 years' worth of
21 Congressional hearings, Commission hearings -- and I
22 commend the Senate brief to your attention for the
23 background of that -- that we believe that this is an area
24 that the Commission must consider and continue to consider
25 until we are satisfied at such time that the past

1 deprivation has been -- the balance has been changed.

2 In Fullilove this Court made clear that Congress
3 need not have a record in the same sense that a court or
4 an administrative agency indeed must compile a record. In
5 the area of minority preferences, Congress has been
6 holding hearings. Congress has had experience in this
7 area for almost 30 years. Contrary to Petitioner's
8 suggestion, it would be difficult, indeed, to conclude
9 that Congress didn't know what was going on. Congress has
10 been intimately involved in this process.

11 The basis for congressional action here has
12 extended both in terms of the legislative approach and in
13 terms of hearing approach. Under the standard of
14 Fullilove one must, I think in this case accord --

15 QUESTION: Thank you, Ms. Polivy.

16 MS. POLIVY: Thank you.

17 QUESTION: Mr. Guillot, do you have any
18 rebuttal? You have two minutes remaining.

19 REBUTTAL ARGUMENT OF GREGORY H. GUILLOT

20 ON BEHALF OF PETITIONER

21 MR. GUILLOT: Oh, my gosh. Yes, Your Honor.

22 A couple of important points in that two
23 minutes, Mr. Chief Justice and other members of the Court:

24 The Commission here is caught in a grave and
25 painful vice between content regulation and stereotyping

1 with the program diversity rationale. If the Commission
2 is wrong and minority ownership or female ownership does
3 not result in a different kind of programming, then the
4 Commission is engaged in impermissible stereotyping based
5 on predictions of what a particular person will do in a
6 particular occasion on account of their blood.

7 On the other hand, assuming the Commission is
8 right and that we can make accurate predictive judgments
9 about a person's behavior based upon their race, then that
10 means that the Commission, by selecting these groups,
11 knowing that their behavior is going to be a certain way,
12 is seeking a content objective. They want the type of
13 content that they believe it can be identified by these
14 racial and sexual characteristics. So either it's
15 stereotyping or it's content regulation, but it's not
16 permissible.

17 The second point, Your Honor, is that again both
18 the Commission and Rainbow now are speaking in terms of a
19 diversification rationale for the program. That is not
20 the rationale. The rationale is program diversity. The
21 Commission has a diversification criterion. If it was
22 truly the rationale they could incorporate a race neutral
23 preference under the diversification rationale and say if
24 a hitherto prejudiced-against or discriminated-against
25 group wants to enter the media and they can show some past

1 discrimination or show that they have been denied access,
2 we will give them a preference. We won't specify what the
3 groups are.

4 Why did the Commission have to specify those
5 groups, and why are those groups exclusive of a list of
6 program diversity?

7 Third, these policies have no end. They will
8 continue to operate until this proportional
9 underrepresentation is gone. In the last 18 years,
10 minority ownership has only increased 1 percent. I am no
11 mathematician, but it would appear that we have 600 years
12 left of the Commission's minority and female preferences
13 based on proportional equal representation.

14 QUESTION: May I ask, how do we know the next
15 group of commissioners is going to follow the same policy?

16 MR. GUILLOT: Your Honor, given the
17 appropriations acts, we will never know even what the
18 Commission's true viewpoint is because the Commission has
19 been statutorily restricted to express only one view
20 regarding the policies, and that is a pro-constitutional
21 one.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
23 Guillot.

24 The case is submitted.

25 (Whereupon, at 11:02 a.m., the case in the

1 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

METRO BROADCASTING INC., PETITIONER v.

FEDERAL COMMUNICATIONS COMMISSION 89-453

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BY Alan Friedman

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