

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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CAPTION: ASTROLINE COMMUNICATIONS COMPANY
LIMITED PARTNERSHIP, Petitioner v. SHURBERG
BROADCASTING OF HARTFORD, INC., ET AL

CASE NO: 89-700

PLACE: Washington, D.C.

DATE: March 28, 1990

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----X

3 ASTROLINE COMMUNICATIONS :

4 COMPANY LIMITED PARTNERSHIP, :

5 Petitioner :

6 v. : No. 89-700

7 SHURBERG BROADCASTING OF :

8 HARTFORD, INC., ET AL. :

9 -----X

10 Washington, D.C.

11 Wednesday, March 28, 1990

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:04 a.m.

15 APPEARANCES:

16 J. ROGER WOLLENBERG, ESQ., Washington, D.C., on behalf of
17 the Petitioner.

18 HARRY F. COLE, ESQ., Washington, D.C., on behalf of
19 Respondent.

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1 industry is very, very significant agency for informing
2 the American people. And this has resulted in
3 compromises, if you like, in treatment over the years that
4 is different from other areas.

5 It is different from industries not so
6 effective. It is different from the newspaper industry,
7 which doesn't have a licensing problem. So way back in
8 NBC v. United States, this Court said that the FCC is not
9 a mere traffic cop. It's concerned with the nature of the
10 traffic, as well as its distribution.

11 This Court in Red Lion -- excuse me -- this
12 Court in Red Lion upheld a very significant action by the
13 Commission in requiring what was called the Fairness
14 Doctrine, which meant in substance that if one side of a
15 controversial issue was discussed, that it would be
16 necessary to provide discussion of other viewpoints.

17 In other words, a diversity of viewpoints was
18 imposed by the Commission and upheld by this Court in Red
19 Lion. Of course, that can be called content control. It
20 is not saying what position should be taken. It is not a
21 very precise or detailed form of content control, but it's
22 a form of content control.

23 It was mentioned earlier today, the Listeners
24 Guild case, and with deference, I think it was not
25 accurately described. The suggestion was that in the

1 Listeners Guild case that this Court said that it is
2 wonderful -- not wonderful, it is appropriate for the
3 Commission to leave entirely to the marketplace what goes
4 out over the air.

5 A closer examination of the Listeners Guild case
6 will reveal that the subject of it was entertainment
7 programming and that the Court, in upholding the
8 Commission's decision to leave entertainment to the
9 marketplace, was not dealing with the nonentertainment
10 aspects of it.

11 Now, it's perfectly true that the Commission
12 over the years and to some degree the Court over the years
13 have gone up and down on the question of the degree of
14 intrusiveness which is appropriate and permissible on the
15 part of the Commission in order to carry out what one of
16 the arguments this morning referred to as the trustee
17 notion of broadcasting.

18 It was suggested from the bench that what we are
19 all in for is to make the maximum money and therefore the
20 only test that will be applied by a broadcaster,
21 regardless of origins, is to make the most money.

22 I would hope that there are other factors which
23 enter into it, but be that as it may, I suggest that with
24 the licensing necessity, and with the Communications Act
25 and its structure having been upheld over the years, that

1 the determination of that question is a question for
2 Congress.

3 I think there has been unfortunately, today,
4 because Congress isn't here except through an extremely
5 impressive and comprehensive brief by the United States
6 Senate -- not a senator, but by the United States
7 Senate -- on the subject. Because the Congress isn't here
8 and the representative of the FCC is here, there is a
9 tendency of the Court to treat this as an FCC matter.

10 It really, as the brief for the Senate shows and
11 as Mr. Armstrong's argument made clear, it is not an FCC
12 matter. The FCC received large numbers of signals over
13 the years that it should pay more attention to the
14 composition of ownership of broadcast stations, and when
15 the FCC adopted the policies that have been discussed this
16 morning and then at a later time a differently composed
17 Commission looked as though it was going to change those
18 policies, Congress stepped in and very explicitly told it
19 not to. Now --

20 QUESTION: Mr. Wollenberg, do you think Congress
21 acted under its Fourteenth Amendment, Section 5 powers in
22 this case?

23 MR. WOLLENBERG: Justice O'Connor, I find it
24 impossible to comprehend or accept the notion that
25 Congress' powers are somehow greater under Section 5 when

1 dealing with Federal areas. This Court --

2 QUESTION: It perhaps acted under its commerce
3 clause powers?

4 MR. WOLLENBERG: Under its commerce clause,
5 under its spending powers --

6 QUESTION: And I suppose even Congress is bound
7 by the equal protection component of the Fifth Amendment.

8 MR. WOLLENBERG: Yes, and when we say equal
9 protection component, we have to say component, because
10 this Court, quite properly, read the equal protection
11 clause of the Fourteenth Amendment into the Fifth
12 Amendment, just as it has read the Amendments to the Bill
13 of Rights into the Civil War Amendments, and just
14 yesterday there was a jury trial -- I'm sorry, an election
15 spending requirement of a state that was subjected to
16 analysis under the First Amendment.

17 So I think it is one Constitution, now, and I
18 think any notion that somehow or other the Congress has
19 greater power in its own areas because of the Fourteenth
20 Amendment, or needs to rely on the Fourteenth Amendment, I
21 think is not well taken.

22 I think that the Congress is functioning here --
23 there has been a good deal of discussion this morning on
24 the question of remedial, and I think some of the
25 terminology gets confusing, or imprecise, as to what kind

1 of remedial we mean. No one is contending --

2 QUESTION: Well, I guess -- I guess the FCC, at
3 least, stands before us on the premise that it's
4 furthering a goal of program diversity.

5 MR. WOLLENBERG: No, I think not, Your Honor. I
6 think the FCC stands here defending the requirement that
7 Congress has imposed. And contrary to the suggestion that
8 Congress just late some night did something in an
9 Appropriations Act saying don't change your policies,
10 contrary to that suggestion, in Congressional Reports and
11 testimony and so forth before Congress, the focus has been
12 very definitely on diversity and on remedial in the sense
13 that, not that the FCC has discriminated, not that
14 broadcasters have discriminated, but that as a result of
15 society-wide discrimination, which we all know about and
16 which this Court has mentioned in a variety of contexts,
17 that at the beginning at least there was an
18 extraordinarily small percentage of broadcast ownership by
19 minorities.

20 QUESTION: Well, I thought I heard a spokesman
21 for the FCC at oral argument in the preceding case tell us
22 that the FCC did not rely on some remedial program for
23 prior discrimination, that we should take this case on the
24 basis that the goal of the FCC set-aside here and in the
25 multiple factor policy in the preceding case was to

1 achieve better program diversity through minority
2 ownership.

3 Now, I thought that was how we took the case.
4 You say that isn't so?

5 MR. WOLLENBERG: I do. The Senate report on the
6 '82 Act said, "A third important factor in diversifying
7 the media of mass communications is promoting ownership by
8 racial and ethnic minorities, groups which -- that
9 traditionally have been extremely underrepresented in the
10 ownership of telecommunication facilities and media
11 properties.

12 "The policy of encouraging diversity of
13 information sources is best served by not only awarding
14 preferences based on the number of properties already
15 owned, but also by assuring that minority and ethnic
16 groups that have been unable to acquire any significant
17 degree of media ownership are provided an increased
18 opportunity to do so.

19 "It is hoped that this approach to enhancing the
20 diversity through such structural means will, in turn,
21 broaden the nature and type of information and programming
22 disseminated to the public."

23 QUESTION: Wouldn't it still be fair to say,
24 then, that diversity of ownership is not an end in itself?

25 MR. WOLLENBERG: I think that's absolutely

1 correct. I think that that is true in jury cases, too,
2 if, Your Honor please.

3 In other words, when the Sixth Amendment
4 impartial trial is concerned, while the Court may differ
5 as to whether it applies to the panel or the venire, the
6 approach is that to have an impartial jury, some degree of
7 representation is -- is significant. And that's a
8 judgment which is not empirically demonstrable --
9 demonstrable. It is not something that can be proved.
10 It's thought to be a part of the concept.

11 And I think that the notion of having minorities
12 in employment -- it was mentioned earlier today that this
13 Court, without disagreement on this point by any member of
14 the Court in NAACP v. Federal Power Commission, said of
15 equal employment regulations by the Federal Power
16 Commission, this wasn't part of your mandate from
17 Congress. It could, of course, in the opinion of Justice
18 --

19 QUESTION: Mr. Wollenberg --

20 QUESTION: It sounded to me like you said that
21 it is an end in itself.

22 MR. WOLLENBERG: I beg your pardon.

23 QUESTION: It sounded to me --

24 MR. WOLLENBERG: No, I was -- working the long
25 way around, perhaps, Justice Kennedy, to say that the

1 reference to the FCC in its function in NAACP v. FPC was,
2 it is different with the Federal Communications
3 Commission, because employment can be important in its
4 impact on programming.

5 Now, surely no one would argue that -- whether
6 half of your janitors or even half of your salesmen
7 represent minorities, is necessarily more significant --
8 is ultimately affecting programming, than who controls the
9 station, who is the owner.

10 QUESTION: Mr. -- Mr. Wollenberg, a moment ago
11 you read some language from a Senate report in connection
12 with -- was it a 1982 act of Congress?

13 MR. WOLLENBERG: Yes.

14 QUESTION: And what did that act provide, so far
15 as minority preferences was concerned?

16 MR. WOLLENBERG: That had to do with granting
17 permission to process competing applications by lotteries.

18 QUESTION: And is that what was -- what was
19 involved in this particular case before us? Did the
20 Commission --

21 MR. WOLLENBERG: No. In this particular case,
22 what is before us is the distressed sale policy of the
23 Commission. But the point that I --

24 QUESTION: Was the distress sale policy
25 similarly authorized by Congress?

1 MR. WOLLENBERG: The distress sale policy was
2 not specifically mandated by Congress -- not authorized,
3 mandated by Congress until three successive budget acts,
4 the '87 act, the '88 act and the '89 act, where it was
5 made very clear that Congress, which I, with deference, I
6 think was fully informed -- maybe not everyone who voted
7 for it was fully informed, but the relevant people were
8 fully informed. Congress made the judgment that we do not
9 want those policies changed.

10 QUESTION: Congress cut off funding for the
11 Commission's effort to reconsider the policy.

12 MR. WOLLENBERG: Not just to reconsider it or to
13 change it. I mean, it is absolutely explicit. You can
14 decide that Congress didn't make the kind of evidentiary
15 findings which has been indicated from the bench Congress
16 doesn't have to make, or you can say that it was wrong
17 because it's not going to have anything to do with
18 programming. Or you can say that you can't prove that it
19 did have to do with programming.

20 And there obviously is force to all of that,
21 but, as the plurality opinion said in CBS v. DNC, which
22 was another case that strongly indicated the importance of
23 Congress and the Commission in carrying out the First
24 Amendment aspects -- interests of the act --

25 QUESTION: But -- but nothing before us in this

1 particular case depends on the lottery act?

2 MR. WOLLENBERG: No.

3 QUESTION: From which you read the history?

4 MR. WOLLENBERG: That's right. It's a part, as
5 the Senate brief makes so very clear, of the fact that
6 Congress, rightly or wrongly, was very much aware. And on
7 the remedial question --

8 QUESTION: But the only statute that Congress
9 passed that has to do with this case is an appropriations
10 act.

11 MR. WOLLENBERG: That has to do --

12 QUESTION: And the only law of Congress that
13 binds us here is the law that says the FCC won't use any
14 funds in each of these annual appropriations -- and the
15 current one has the same thing, I gather -- in order to
16 consider this policy.

17 That's the only formal expression of Congress'
18 view, in law, that we have.

19 MR. WOLLENBERG: It's the only formal expression
20 that -- that relates directly to this case, because it
21 said don't change the distress sale policy. But the
22 reports leading to that, and the -- the Kerner Commission
23 report, the FCC's 1978 policy statement --

24 QUESTION: When was the Kerner Commission
25 report?

1 MR. WOLLENBERG: It was about 20 years ago, I
2 think.

3 QUESTION: About 20 years ago. Since which time
4 the FCC has been on the other side of this issue, right?

5 MR. WOLLENBERG: Well, the FCC --

6 QUESTION: Which is why Congress passed the
7 appropriations?

8 MR. WOLLENBERG: Well, the FCC -- when you say
9 since that time, the FCC has unquestionably, with
10 different members, been on both sides of the -- of the
11 case. I think that this Court made very clear that
12 there's a big difference between subordinate agencies and
13 the Congress of the United States that supposedly
14 represents us all, even if it sits at home making its
15 decisions.

16 And the FCC, arguably, may be more like the
17 school board in Wygant, or the city counsel in Richmond,
18 or the Board of Regents of the University of California in
19 Bakke, but we're dealing here with Congress.

20 And to say that the only thing that binds us --
21 binds you -- is the appropriations act, it's the only
22 thing that directly relates to this -- this case -- but in
23 terms of whether it was a considered decision and whether
24 it should have the weight and deference that a considered
25 decision that is reflective of the culmination of policy

1 discussions over many years, it seems to me would be --

2 QUESTION: Mr. Wollenberg, could I -- let me
3 tell you the thing that -- that most troubles me about
4 this case. And maybe you can tell me how we can
5 distinguish it from other situations.

6 If we accept in this case the legitimacy of
7 making a prediction about a person's action on the basis
8 of his or her blood, what other fields of public policy
9 may we use that kind of a presumption in?

10 I know of no other area where we've allowed it
11 to be done. To say on -- not as a remedial matter, but on
12 the basis of predicting behavior, if a person is of a
13 certain blood, he will put on a certain programming. I
14 don't know of any other field where we've done that.

15 Now, how can -- if we adopt such a principle,
16 and say that is legitimate for Congress or the FCC or
17 anybody to do that, what other fields might -- might we do
18 that in? Or why might we not do it in other fields, as
19 well?

20 MR. WOLLENBERG: Justice Scalia, I can't think
21 of any. I think that the -- the strange, unique situation
22 that exists with the Communications Act in licensing, and
23 the necessity to be as unintrusive as possible, suggests
24 that the -- and it's been done over the years -- that the
25 Commission has a great interest in the kind of people --

1 their relationships to the community, and these other
2 factors that have been discussed, who will own the
3 stations.

4 And I think that race in this situation is
5 justified -- remedial in the very broad sense that the
6 groups that Congress has identified, and maybe it should
7 have included Portuguese, but the groups that Congress has
8 identified have really and truly not had an equal break in
9 our society, and therefore, they may be somewhat isolated
10 --

11 QUESTION: And --

12 MR. WOLLENBERG: -- they may be somewhat
13 isolated in their attitudes. And if they're permitted to
14 participate in ownership, it may affect what goes out on
15 the air, and it's going to be very difficult to prove this
16 minority station did something different.

17 But when one of the --

18 QUESTION: I'm not worried about proving it, I'm
19 worried about extending that principle to other fields.

20 MR. WOLLENBERG: And I --

21 QUESTION: And I'd like you to tell me how it
22 can be limited to this one field, once we accept that
23 Congress may predict human behavior on the basis of human
24 blood --

25 MR. WOLLENBERG: And I --

1 QUESTION: -- for this purpose, why may not it
2 do it for other purposes?

3 MR. WOLLENBERG: And I respond, Your Honor, on
4 the basis of the special licensing responsibility that
5 means that the people that are put in charge of the air,
6 like the decision in -- in Red Lion upholding the fairness
7 doctrine, which is the kind of interference that would --
8 we would all rather question with newspapers.

9 When the fairness doctrine -- when the other
10 Commission activities were upheld, it was on the notion
11 that they're going to make a try at assuring that
12 broadcasting is representative. When this Court in Bakke
13 refused to uphold the injunction against considering race
14 on the medical school class in Davis, it didn't like the
15 quotas and the fixed numbers, it -- it made a kind of a
16 race-conscious statement.

17 The truth is, that while the Constitution may be
18 colorblind, that race is with us. And we read every
19 morning in the newspapers about enormous new tensions
20 related to race. And it seems to me, to the Congress of
21 the United States, on a considered basis, to say that it
22 -- it -- it may help in our licensing field, and to avoid
23 program intrusion, to open up this field to ownership of
24 people who have been fairly conspicuously subjected to
25 society-wide discrimination, it seems to me that that's

1 what --

2 QUESTION: Tell me how it's going to help to
3 announce that, yes, indeed race does make a difference,
4 that you can indeed predict how people will act on the
5 basis of their blood, that's going to help the situation
6 of racism that you're concerned about.

7 MR. WOLLENBERG: I think only with -- only with
8 respect to -- to sensitivity. The people who own a
9 newspaper or own a station are obviously going to be
10 affected by their background and environment, and Congress
11 can't run around taking care of every group. But it --
12 it --

13 QUESTION: Blood, Mr. Wollenberg, blood, not
14 background and environment, isn't that right? It doesn't
15 matter where the person of that race was raised, in the
16 most privileged family in the most exclusive residential
17 community. Blood.

18 MR. WOLLENBERG: I think the congressional
19 judgment, while not applying to everybody, the
20 congressional judgment is that groups with particular kind
21 of blood were treated rather differently in this country
22 for a rather long time. Some of them were brought over as
23 slaves and the rest. I come from California and in
24 California Orientals were not terribly well treated over a
25 period of time. And therefore, people, even wealthy,

1 brought-up-in-Scarsdale Orientals may have a slightly
2 different perspective to what's of interest.

3 The plurality in CBS v. DNC says for better or
4 for worse, editing is what editors are for. I submit that
5 for better or worse this subject is one that is -- for
6 better or for worse -- is what Congress is for.

7 May I reserve the rest of my time for --

8 QUESTION: Everybody -- one point. You are
9 constantly talking about blood. What statistic or -- do
10 you have that there's a difference in people's blood?

11 MR. WOLLENBERG: I'm not talking blood, Your
12 Honor.

13 QUESTION: Sir?

14 MR. WOLLENBERG: I said I'm not talking blood.
15 I am not suggesting a difference in blood.

16 QUESTION: Well, is there any difference in
17 blood?

18 MR. WOLLENBERG: I'm not aware of any difference
19 in blood. What I was suggesting was that people -- using
20 Justice Scalia's term of blood, that people with
21 particular kind of blood are more particularly perhaps
22 particular kinds of skins have been treated rather
23 differently in the United States over a period of time and
24 where Congress is trying to ameliorate that situation, and
25 in that sense what Congress has done is largely ameliorate

1 it.

2 And because of the magnitude of these problems I
3 haven't really been able to get to the specifics of the
4 situation in Shurberg, and I'll try to do that in my reply
5 time.

6 QUESTION: Very well, Mr. Wollenberg.

7 Mr. Cole.

8 ORAL ARGUMENT OF HARRY F. COLE

9 ON BEHALF OF THE RESPONDENT

10 MR. COLE: Thank you, Mr. Chief Justice, and may
11 it please the Court:

12 In December of 1983 my client, Alan Shurberg,
13 who is the respondent here, applied for a TV station in
14 Hartford, Connecticut. He's a lifelong resident of
15 Hartford, and in 1984 the FCC refused even to consider his
16 application because Mr. Shurberg is white.

17 At the same time, though, the FCC granted
18 Petitioner Astroline's mutually exclusive application
19 because one Richard Ramirez, a Boston resident who had
20 been recruited to serve as Astroline's supposedly
21 controlling general partner was said to be Hispanic-
22 American. That was the sole difference between the two
23 applications and the sole distinguishing factor.

24 QUESTION: You said he was said to be. Was he
25 in fact?

1 MR. COLE: The record only reflects that he was
2 said to be Hispanic-American, Your Honor. There is no --
3 the FCC did not require any further discussion of that
4 and --

5 QUESTION: Does the FCC policy require more than
6 examining the surname to see if it's Hispanic?

7 MR. COLE: No, Justice O'Connor. In fact,
8 that's all that was reviewed in this case.

9 QUESTION: So someone could -- a woman could
10 marry an Hispanic and pick up an Hispanic surname and
11 qualify under the FCC policy?

12 MR. COLE: In an uncontested situation I believe
13 that would be correct.

14 QUESTION: Or vice versa, or vice versa.

15 MR. COLE: That a Caucasian --

16 QUESTION: That a Hispanic woman could marry Mr.
17 Smith and not qualify.

18 MR. COLE: No. What would then happen or what
19 is my experience in that situation is that the Hispanic
20 woman makes clear on the face of her application that she
21 is, in fact, Hispanic herself and that her name merely
22 reflects her marital status. And in those situations the
23 FCC, at least in my experience, would tend to accord that
24 person minority status.

25 QUESTION: But isn't the name --

1 QUESTION: Well, then why the emphasis on
2 surnamed all the time? It's always bothered me because I
3 think it makes no sense.

4 MR. COLE: Well, I would agree with Your Honor.
5 And in fact, the FCC initially used surname in the 1978
6 articulation of the policy and ultimately abandoned that I
7 believe in 1982 just to use the term Hispanic.

8 QUESTION: So it's determined on the basis of
9 dissent, is that right?

10 MR. COLE: It would appear to be the case
11 although again, in this situation all that was stated in
12 the application was Mr. Ramirez is an Hispanic-American.

13 QUESTION: What -- what if your -- one of your
14 great grandparents was Hispanic. Is that enough?

15 MR. COLE: I could not tell you that, Justice
16 Scalia. I knew -- we stated in our brief --

17 QUESTION: There must be some rules about that,
18 mustn't there? What degree of -- of -- of the race you
19 have to be in order to qualify?

20 MR. COLE: Not to my knowledge. In fact, we
21 said in our brief the Storer broadcasting case where the
22 FCC reviewed a family's lineage back to 1492 to determine
23 that a -- a family named Lieberman was, in fact, Hispanic.

24 QUESTION: Well, Mr. Cole, would you have had an
25 opportunity at some stage in the FCC proceedings to

1 challenge the status of Mr. Ramirez as being a Hispanic
2 had you chosen to do so?

3 MR. COLE: Conceivably -- actually, no, I don't
4 believe that would be the case, Chief Justice Rehnquist.

5 We filed a petition to deny, obviously, raising
6 a number of questions including the constitutionality of
7 the distress sale. And we had no other information -- we
8 had no information on which to challenge his -- his racial
9 or ethnic status. We were certainly not willing to
10 concede his racial or ethnic status without examination.
11 We had no discovery rights, we had no cross-examination
12 rights. We had only what we could dig up out and about.

13 QUESTION: But had you been able to dig up
14 something, you might have had an opportunity to challenge.

15 MR. COLE: Had we been able to dig something, we
16 might -- presumably we could have disclosed that to the
17 FCC, and we might have made some headway. We might not
18 have. I would be speculative if I guessed.

19 The basis for the disparate treatment between
20 Shurberg on the one hand and Astroline on the other was
21 the FCC's minority distress sale policy.

22 QUESTION: May I -- may I just ask you, on the
23 joint exhibit -- Joint Appendix 68 there's a chart which
24 shows capital contributions and percentage interests.

25 MR. COLE: Yes, sir.

1 QUESTION: And I see Mr. Ramirez made a
2 contribution of \$210 and had a 21 percent percentage
3 interest and a Mr. and Mrs. Rose had an \$830,000
4 contribution for a 6 percent interest. What -- what -- is
5 this just voting, voting power?

6 MR. COLE: The way as I understand the
7 partnership setup -- and again, this is not my client so
8 it's -- all I can tell you is what I understand through
9 the pleadings.

10 As I understand, the way the partnership was
11 initially conceived, it was a limited partnership, and the
12 -- Mr. Ramirez was said to own 21 percent overall equity,
13 but 70 percent voting equity, whereas the rest of the
14 people were --

15 QUESTION: So the percentage interest appears to
16 be ownership equity --

17 MR. COLE: That's correct.

18 QUESTION: -- so far as your understanding?

19 MR. COLE: That's correct.

20 QUESTION: Thank you.

21 QUESTION: But he got this for \$210?

22 MR. COLE: That's correct.

23 And also I should point out, Justice Kennedy,
24 that this is a 1987 or 1986-87 document. The more recent
25 document on file with the FCC shows the total capital

1 contributions by the so-called limited partner is in the
2 range of \$24 million, and Mr. Ramirez's remains at \$210.
3 Now, that's -- that's among the documents which we lodge
4 with the Court as supplemental materials with our brief.

5 In acting as it did in 1984, the FCC stated that
6 on balance the minority distress sale policy and the
7 agency's general interest in increasing minority ownership
8 in broadcast stations outweighed the statutorily mandated
9 interest inherent in considering competing applications
10 such as Mr. Shurberg's.

11 In so doing the FCC affirmed what the minority
12 distress sale basically says on its face, and that is that
13 white people need not apply when the minority distress
14 sale policy is involved.

15 The FCC's action and the policy underlying it
16 are the guts of our case at this point, and our argument
17 is a simple one. The Constitution prohibits racial
18 discrimination by the government. The distress sale
19 policy is a governmental policy which discriminated
20 against Mr. Shurberg on the basis of his race, pretty much
21 under discussion.

22 QUESTION: Well, of course, the Court has
23 recognized the need and the possibility of some remedial
24 action for past discrimination or for, in some cases,
25 prima facie evidence of such discrimination.

1 Now, is that a possibility that that is what
2 underlay the policy in this case?

3 MR. COLE: Well, Justice O'Connor, I have to say
4 I've sat through four separate arguments, four separate
5 presentations this morning to the court, and I think the
6 one lesson that I've learned is that there is no basis for
7 saying exactly what the FCC was doing.

8 The FCC itself, as I believe you've noted in the
9 last presentation, had specifically disclaimed here this
10 morning that its minority ownership policies are remedial
11 in nature, and we would tend to agree with that, although
12 some of the briefs in this case have indicated that they
13 believe there is some remedial component.

14 In any event, even if it were remedial and even
15 if it could be said that there is some effort to correct
16 remediation, it is not at all narrowly tailored to that
17 purpose. In other words, there's no showing -- again,
18 going back to what was shown in the application -- all
19 that was said is Mr. Ramirez is an Hispanic-American. It
20 doesn't say Mr. Ramirez is an Hispanic-American who has
21 suffered discrimination, who has been the victim of any
22 kind of disadvantage at all. And the FCC policy
23 specifically doesn't get into that.

24 In other words, it is not -- even if it were
25 remedial in nature -- and we do not agree that it is -- it

1 is not at all narrowly tailored to correct remediation or,
2 I'm sorry, to correct conceivable discrimination which has
3 occurred.

4 Before I get into the substance of my argument I
5 think it may be appropriate to -- to discuss very briefly
6 the standard of review because there has been a lot of
7 discussion this morning, but not much directed to
8 precisely what issues are before the Court.

9 As I understand the standard of review with
10 respect to race-based governmental classifications, it is
11 incumbent upon the proponent of that classification,
12 whether it's an agency, local government or even the
13 federal government to come forward and explain what in
14 compelling governmental interest the classification is
15 directed to, and then to -- to demonstrate that, in fact,
16 the classification is narrowly tailored with a good degree
17 of precision to achieve that compelling governmental
18 interest. That -- that, at least, is my understanding of
19 the strict scrutiny standard.

20 Now, in this case, as I just mentioned to
21 Justice O'Connor, there appears to be some confusion as to
22 exactly what compelling governmental interest is
23 supposedly being advanced. And I think we can take as a
24 given at least based on the Commission's presentation this
25 morning that it is not remedial -- a remedial purpose to

1 -- to correct past discrimination although I'm certainly
2 happy to discuss that if anyone has questions.

3 Rather, what appears to be the Commission's
4 position now is that it is -- the distress sale policy in
5 particularly in the minority ownership policies as a whole
6 are directed to the advancement of program diversity, and
7 that is the compelling governmental interest. And the
8 citation is to the First Amendment and the diversity of
9 voices and a multiplicity of voices and so forth.

10 I want to say right off the top that Shurberg is
11 not averse. We do not dispute the value or the
12 desirability, especially in a democratic society of
13 diversity of voices. A multiplicity of voices is clearly
14 the way that our society has chosen to govern itself, and
15 we support that.

16 Our problem is that race-based classifications
17 are completely and utterly inappropriate and unnecessary
18 for the advancement of that interest. There is absolutely
19 no rational connection at all between the asserted goal
20 and the policy. So from that point of view we would
21 challenge the notion of -- of -- of program diversity as
22 -- as a valid compelling governmental interest.

23 QUESTION: May I ask a question there?

24 MR. COLE: Certainly.

25 QUESTION: Supposing two alternatives: one,

1 that all of the broadcast media in the country were owned
2 by white males, 100 percent, and the second hypothesis,
3 that 80 percent were owned by white males and 20 percent
4 were owned by minority groups of various characteristics.

5 Do you think it is safe to say that there will
6 be no difference in the diversity of programming between
7 the two hypotheses?

8 MR. COLE: We're talking commercial stations,
9 sir?

10 QUESTION: Just whatever -- the whole spectrum
11 that the FCC licenses.

12 MR. COLE: Well, if I may at least initially
13 restrict my -- my -- my response to commercial stations,
14 in the commercial broadcast area, broadcast programming is
15 market driven. Even Mr. Wollenberg in his amicus brief
16 for Capital Cities in the Metro case concedes that point.
17 They're market-driven considerations.

18 QUESTION: He said they weren't exclusively, but
19 he said primarily, yes.

20 MR. COLE: I would have to get his brief out,
21 but -- I -- there is --

22 QUESTION: Well, in any event, are they entirely
23 market driven?

24 MR. COLE: I believe so or certainly --

25 QUESTION: So your answer then is you can safely

1 predict there would be no difference between the programs
2 in the two hypotheses.

3 MR. COLE: I will accept that, yes, sir.

4 QUESTION: Yeah. Is that critical to your
5 argument that we accept that as a factual premise?

6 MR. COLE: No. In fact, it may be that the --
7 there would be vast differences in programming, but the
8 vast differences might arise not because -- have nothing
9 to do with the race of the owners. For instance, the
10 FCC's review board has specifically found that in at least
11 two instances that were -- that were subjects of
12 litigation, nonminority white owners had provided what was
13 referred to as extraordinary program service to a Hispanic
14 and to a black audience. In fact, even here in the
15 Washington, D.C. market, there are -- I'm aware of two
16 stations one of which is owned by whites but programs
17 primarily for a black audience and --

18 QUESTION: Of course, there's no doubt.
19 Obviously you're correct there. But your feeling is that
20 the program ownership is totally irrelevant to the -- to
21 the programming?

22 MR. COLE: Yes. It should be presumed to be so
23 for -- for regulatory purposes.

24 QUESTION: Would it be true also, I suppose, if
25 100 percent of the stations were owned by Democrats and

1 then in the other alternative would be 100 or 80 percent
2 Democrats and 20 Republicans. We'd also assume there'd be
3 absolutely no difference in the programming?

4 (Laughter.)

5 MR. COLE: I suppose that would depend on the
6 Republicans and the Democrats.

7 QUESTION: Well, of course that depends on the
8 whites and the blacks or not.

9 MR. COLE: That may be, but again, there is no
10 constitutional problem with -- the Constitution is not --

11 QUESTION: But supposing the Commission went out
12 and that survey and found out they were all owned by
13 Democrats and they decided to set aside a few for
14 Republicans?

15 MR. COLE: That would raise -- that would raise
16 First Amendment problems, but not equal protection
17 problems.

18 QUESTION: They're just interested in diversity?

19 MR. COLE: Well, the -- I'm sorry?

20 QUESTION: They're just interested in diversity,
21 I say, and you'd say that's totally irrational to assume
22 that would produce any diversity because everybody's
23 market driven. Politics, race, all these things don't
24 make any difference at all in program planning.

25 MR. COLE: In the Republican-Democrat situation

1 I would suggest that a different standard of review might
2 conceivably apply because again there are no equal
3 protection problems or considerations raised on the face
4 of that hypothetical. Now --

5 QUESTION: I suppose Democrats and Republicans
6 are entitled to be treated equally.

7 MR. COLE: But the Constitution does not mandate
8 that.

9 QUESTION: And does the personnel of the
10 Commission have to be politically -- isn't there some
11 requirement that different parties be represented?

12 MR. COLE: I believe there is a requirement of
13 at least some -- some split.

14 QUESTION: There's some reason to think that
15 Republicans and Democrats thinking differently, isn't
16 there?

17 MR. COLE: Yes, there is.

18 (Laughter.)

19 MR. COLE: One problem or a threshold problem
20 with the notion of program diversity, even assuming that
21 there were some -- some basis for it, is a valid,
22 compelling governmental interest for strict scrutiny
23 purposes is that this court has never approved race-based
24 classifications just because they might achieve some good
25 or desirable goal.

1 Such an approach would enable Congress to enact
2 a wide variety of racial classifications. As Justice
3 Scalia suggested in questioning Petitioner's counsel, it
4 is conceivable under the same rationale, program diversity
5 rationale if it's accepted here, that ten years from now
6 the Commission could state that -- issue a policy
7 statement saying that there are too few white upper-middle
8 class classical music stations in the major urban areas
9 and that, therefore, we're going to set aside a certain
10 number of those for -- in order to promote diversity in
11 that respect because we see a lack there.

12 And again, if the policies are affirmed today,
13 then presumably that policy would be affirmed as well. By
14 the same token, it is conceivable that this could extend
15 outward to other important institutions beyond the
16 broadcasting range. For example, federal judgeships.

17 If it is desirable to have a multiplicity of
18 -- of people or representative voices in some -- in some
19 respect along those lines, then very conceivably it --
20 that -- that rationale could be extended to include --

21 QUESTION: Well, are there some signs in the
22 cable industry?

23 MR. COLE: There are minority ownership
24 policies, I believe --

25 QUESTION: No, I mean -- I mean not -- not on

1 the minority basis, but are there set-asides for local
2 stations or local channels or --

3 MR. COLE: You mean carriage provisions for so
4 that a local cable system will have to carry? No. Those
5 have been -- those are the former "must-carry" provisions,
6 and those have eliminated, Justice White.

7 QUESTION: But there used to be?

8 MR. COLE: There used to be, yes. Yes.

9 QUESTION: Were those unconstitutional do you
10 think?

11 MR. COLE: I have not researched or briefed that
12 point. My -- my gut reaction is that that is not, again,
13 a race-sensitive issue that raises on its face equal
14 protection problems.

15 QUESTION: Well, you were talking about music
16 stations.

17 MR. COLE: Well, I had thrown in -- used the
18 term white, upper-middle class music stations. In that -

19 - QUESTION: Mr. Cole, would you have an objection
20 to this if the Commission had set it up a different way,
21 that there is a preference for, let's say, people who are
22 leaders in Hispanic cultural affairs, whether they're
23 Hispanic or not or a preference for people who've taken
24 particular interest and done particular study in black
25 history?

1 MR. COLE: That would certainly be far less
2 objectionable. It might arise in --

3 QUESTION: Would it be objectionable at all --

4 MR. COLE: It might be.

5 QUESTION: And it would be more likely to have a
6 direct effect on what the programming would be, wouldn't
7 it, than just -- just the race of the person?

8 MR. COLE: Yes. That's correct. It might raise
9 some content regulation problems. But certainly from an
10 equal protection point of view, I would have no problem
11 with it.

12 QUESTION: But there's no reason to think that
13 this policy is that at all?

14 MR. COLE: No. This policy inquires only as to
15 racial or ethnic status, and that's the end of the
16 discussion.

17 And that brings me to the second objectionable
18 aspect of -- of -- of program diversity as a compelling
19 governmental interest. It is based on a racist
20 assumption. It assumes that each racial or ethnic group
21 has its own minority viewpoint and that that minority
22 viewpoint will ultimately be reflected in "minority
23 programming" of a sort which cannot at any time be
24 provided by nonminorities such as Mr. Shurberg.

25 That is nothing less than a racist attitude

1 which ignores individual traits and abilities and instead
2 substitutes invidious stereotypes rather than
3 consideration of the individual.

4 QUESTION: You're not saying that certain types,
5 whether it be, you know, Hispanics, white, upper-middle
6 class, blacks, don't like certain kinds of programs, but
7 you're saying they could be provided by people who aren't
8 necessarily of that -- of that group?

9 MR. COLE: I'm saying two things, Chief Justice
10 Rehnquist. First, I'm saying that that's correct, that
11 those kind of programs can be provided and may very likely
12 be provided by any number of different people from
13 different groups, but I'm also saying that it's
14 inappropriate to assume, certainly as a legislative
15 constitutional matter, that all black people like soul
16 music, that that is -- that's not a rational conclusion.
17 Black people like all kinds of music, as do white people,
18 as do Hispanic people. There --

19 QUESTION: May I ask, is it -- is it irrational
20 to assume that a greater percentage of black people like
21 that kind of music than the same corresponding percentage
22 of white people?

23 MR. COLE: Yes, I would say that is --

24 QUESTION: That's irrational?

25 MR. COLE: That is a presumption which would

1 offend the equal protection clause.

2 QUESTION: Even if it were -- supposing it
3 weren't a presumption. Suppose you went out and took a
4 survey of an area which was, say, very much majority black
5 and the response of those people was we all -- or, say, 85
6 percent of them say we want soul music, we want rap,
7 something like that.

8 Now, if that isn't being provided at all in that
9 community, could the Commission take that into
10 consideration?

11 MR. COLE: Sure. The need for programming as
12 perceived by the actual audience itself is -- is -- is
13 certainly a consideration which might be taken into
14 account.

15 But again, the need for programming, for any
16 particular programming, may not be racially driven. Even
17 though you interview 75 percent of the people in
18 Washington, D.C. and in that survey obtain a -- a skewed
19 heavily toward blacks, even if they all happen to say,
20 yes, we like X kind of music, that doesn't necessarily
21 mean that all blacks -- that that is racially driven.
22 That may be class driven, geographically driven,
23 economically driven.

24 There are any number of other factors which
25 enter into it other than race, and that's all we're

1 saying, that race is irrelevant, and race should be
2 irrelevant.

3 The range of viewpoints that -- that are
4 available in any particular race or ethnic group is, in
5 our view, at least, similar if not identical to the
6 equivalent range in other groups. For example, you have
7 David Duke. You have Louis Farrakhan. You have Abbey
8 Hoffman. You've got Eldridge Cleaver. You have Admiral
9 William Crowley. You have General Colin Powell. You've
10 got George Wallace. You have Gus Savage.

11 There are ranges, and certainly just because --

12 QUESTION: I think your argument is really -- I
13 just think it's not true if -- if you're saying that there
14 are not some generalizations that could be made validly if
15 you wanted and were permitted to make the generalizations.
16 I suppose you could say that a higher percentage of one
17 group would like a certain percent -- kind of programming
18 than another.

19 I had thought your point is that that is simply
20 the kind of a generalization that our government is not
21 allowed to make. We can't send people to school on that
22 basis. We can't program on that basis. We cannot make
23 racial generalizations. If that isn't your point, I
24 think -- and you're going to argue it on the basis of
25 probabilities, you know, I'd say it's maybe not a high

1 probability, but if you pick somebody with a Hispanic
2 surname, you know, 60/40 they would like mariachi bands.
3 I don't know.

4 MR. COLE: Justice Scalia --

5 QUESTION: If I had to bet on it, that's how I'd
6 put my money.

7 MR. COLE: I'm not arguing that the government
8 can take these into account at all. I believe you
9 understood my point precisely, that -- that I'm not
10 arguing that these factors can be taken into account.

11 QUESTION: You're saying that the government
12 cannot take those factors into account?

13 MR. COLE: That's correct.

14 QUESTION: Well, supposing that there's -- that
15 there's -- take a community in the southwest and take
16 Justice Scalia's hypothesis where there's an actual survey
17 that -- and it happens to be largely Hispanic, that there
18 are 100,000 people there, 80,000 of them prefer mariachi
19 bands and there's no station providing mariachi bands.

20 Can't the FCC make some requirement that the
21 station provide mariachi bands?

22 MR. COLE: I suppose it could, but what it can't
23 do is compel that the license which is issued by the FCC
24 go to a Hispanic or Mexican or what -- or any particular
25 ethnic group because of the assumption that that ethnic

1 group will provide mariachi music.

2 QUESTION: But it could put in some condition
3 that an applicant, at least be favored -- if it,
4 regardless of who the applicant was, if it would be put in
5 some mariachi band music?

6 MR. COLE: From an equal protection point of
7 view I have no objection to that. From a content
8 regulation point of view, that may raise other questions,
9 depending on the structure of the policy. And the
10 Commission has, as the Court is aware in the WNCN case,
11 has moved itself completely away from government
12 regulation of entertainment formats.

13 QUESTION: Because the market takes care of it,
14 but before it came to that -- that -- that conclusion, it
15 had indeed licensed stations on basis of format.

16 MR. COLE: That's correct.

17 QUESTION: What kind of -- you know, different
18 kind of music; indeed, different degrees of rap -- of rock
19 music. I forget how many there were. But it used to do
20 that, right?

21 MR. COLE: That's correct.

22 QUESTION: But not on the basis of race, just on
23 the basis of the kind of programming that was promised.

24 MR. COLE: That's correct.

25 The bottom line as far as the compelling

1 interest is concerned, in our view, is it can be reduced
2 to two questions. Why is Alan Shurberg any less capable
3 of increasing program diversity just because he is white,
4 and why is Astroline any more capable of doing so just
5 because it is -- its supposedly controlling principal has
6 a Spanish-sounding last name?

7 And I think that -- that presents that point as
8 clearly as I can.

9 I would like to proceed to the second aspect of
10 the strict scrutiny standard, which is the narrow
11 tailoring, that even if it is accepted for the sake of
12 argument, that the program diversity is a valid,
13 compelling governmental interest sufficient to support
14 race-based classifications, it still has to be -- the
15 program still has to be narrowly tailored to meet that.

16 The distress sale policy is not narrowly
17 tailored in any sense, meaningful or otherwise. The only
18 requirement that needs to be -- that is imposed on a
19 minority distress sale applicant is that it is assert that
20 it is minority controlled. There is nothing about any
21 program commitments. The applicant does not have to show
22 in his application what he expects to do or what he may do
23 or what he'd like to do, and, in fact, as we've indicated
24 in the -- in our brief, the -- what Astroline ultimately
25 came up with in the way of programing in our view shows

1 not a tremendous sensitivity to minorities.

2 Secondly, there is no limit on the number of
3 other stations that might be owned by the distress sale
4 applicant. In other words, if I'm a distress sale
5 applicant and I own 35 other stations, AM, FM and TV
6 stations, I'm still qualified for an absolutely
7 dispositive preference under the distress sale policy as
8 against somebody who's white but doesn't own any stations.
9 This makes no sense as far as program diversity is
10 concerned.

11 Second, there's -- or third, there's no need for
12 a showing of the need for the programming. In other
13 words, for example, assume a community with three radio
14 stations, all of which are playing rock and roll music of
15 a similar genre, and a distress sale applicant comes in
16 and says I want to come in. He's not required to show
17 that he's going to anything other than rock and roll music
18 of that genre. There's no -- there's nothing at the -- at
19 the door when he walks into the Commission to indicate to
20 the Commission that program diversity will be increased in
21 the least.

22 QUESTION: Is there any requirement that the
23 station -- the property be held for a particular amount of
24 time?

25 MR. COLE: No, Your Honor.

1 QUESTION: If it becomes profitable, if it can
2 be sold?

3 MR. COLE: I'm sorry. I correct myself. There
4 is a one-year holding period.

5 QUESTION: But after one year the new owners are
6 free to sell it?

7 MR. COLE: That's correct, for whatever dollar
8 value to whomever. Let the marketplace govern.

9 And as we've indicated in the brief that people
10 who have taken advantage of the distress sale have made
11 out quite well. One entity bought a station for \$3.5
12 million and sold it five, six years later for \$35 million,
13 so it's in the nature of, not so much programming --

14 QUESTION: I would hope that they improved the
15 station immensely.

16 MR. COLE: I would hope so, Your Honor, for that
17 amount of money.

18 There's no indication required that the
19 distressed sale applicant demonstrate an ability or
20 familiarity with the local -- an ability to serve the
21 local community or familiarity with the local community.

22 This is a -- a similar component is imposed in
23 the comparative preferences area so that a white person
24 who is a local resident of the area is deemed by the FCC
25 to have the equivalent enhancement value as a minority who

1 is not from the area. There is no -- that doesn't enter
2 into the matrix in the distress sale policy.

3 If I might, there are alternative measures. If
4 the FCC really wants to get to minority -- or, diverse
5 programming, there is one very simple expedient which it
6 could use. It could say only -- it could reduce to one
7 the maximum number of stations that any individual or
8 entity could own. Just reduce it to one and say, that is
9 all there is. One per person, come and get them.

10 If the theory of program diversity is that the
11 maximum number of owners leads to the maximum amount of
12 diversity, that would be the way to do it. It could be
13 done on a race-neutral basis, and it could be done
14 tomorrow. The FCC has not done that.

15 To the contrary, over the last five years it has
16 increased the number of stations that can be owned by any
17 particular entity, almost doubling them from seven to 12,
18 and in some situations as many as 14 can be owned. That
19 being the case, it would appear that the FCC is not as
20 concerned about diversity as it would have the general
21 public believe.

22 I would like to address very briefly the 3.5
23 percent figure, because I think it's an important one if
24 the question of remediation arises at any point. Ms.
25 Polivy during the Metro argument referenced the fact that

1 only 3.5 percent of the broadcast stations in the country
2 are owned by minorities, and this is asserted in some of
3 the briefs as a basis for concluding there is an
4 underrepresentation.

5 I don't want the Court to go away thinking that
6 that is in fact a valid assessment of the situation. In
7 fact, the congressional research study report indicates, I
8 believe -- and it's cited by the FCC in its own brief --
9 that minority participation in the broadcast industry may
10 be somewhere between 13 and 15 percent.

11 The 2 to 3.5 percent figure which is so
12 frequently cited by the various supporters of the policy
13 relates only to those situations in which the minority
14 person or people exercise what the FCC defines as control
15 of the license, control being defined as 50 percent or
16 more ownership.

17 So that if a minority individual happened to own
18 49.9 percent of a chain of stations that amounted to 25,
19 35 stations, that ownership would not be reflected at all.

20 QUESTION: Thank you, Mr. Cole.

21 MR. COLE: Thank you.

22 QUESTION: Mr. Wollenberg, you have seven
23 minutes remaining.

24 REBUTTAL ARGUMENT OF J. ROGER WOLLENBERG

25 ON BEHALF OF THE PETITIONER

45

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1 MR. WOLLENBERG: If the Court please:

2 I think it's important to realize that in the
3 circumstances of this case, contrary to the suggestions of
4 counsel, that Mr. Shurberg was not burdened because he was
5 white. He was not treated differently from a hypothetical
6 black who at the same time that Mr. Shurberg came in had
7 come in in the same fashion.

8 They both would have been turned down, because
9 under the Commission's procedures, the time when the
10 window opens for coming in against a renewal had passed.
11 So that when, after the 1977 renewal of Faith Center,
12 which was the old licensee, after the time for that had
13 passed, it was too late for someone else to come in, and
14 if Mr. Shurberg had come in then, which he didn't, and
15 someone else had come in then who was black, they both
16 would have been turned down.

17 The Court below, while it found the Commission's
18 distress sale unconstitutional -- policy unconstitutional
19 -- I prefer to call it the congressional policy now, and
20 in that regard I hope the Court will take the time to read
21 the conference report on the '82 Act which is even more
22 explicit than the Senate report that I was reading from.
23 Congress knew what it was doing, it knew it was
24 remediation for society-wide discrimination and because it
25 thought it would help with programming.

1 Counsel referred to some things not in the
2 record about individuals. I guess it's permissible for me
3 to mention that in the last few days there was a story in
4 the Washington newspapers about a conservative radio
5 station where the personality made an invidious remark
6 referring to an anchor person on one of the networks as
7 "Connie Chink."

8 It's barely possible that if an Oriental had
9 owned that station, that that at least would either not
10 have been done, or might not have been repeated, and it's
11 even possible if a Hispanic owned the station. It's also
12 possible if a white owned the station. But sensitivity is
13 something that I think, just as with juries, I think that
14 Congress is entitled to some interest in sensitivity.

15 QUESTION: Did you finish what you wanted to say
16 about the fact that this client of your friend here
17 wouldn't have been considered in any event?

18 MR. WOLLENBERG: No, I hadn't finished, and I
19 thank Your Honor.

20 Mr. Shurberg and later his company did not come
21 in at renewal time against Faith Center --

22 QUESTION: Why didn't that serve to disqualify
23 him completely, without even getting to any of the --

24 MR. WOLLENBERG: Well, there was a long,
25 complicated procedure. Under the distress sale policy, if

1 a licensee's renewal is designated for hearing on
2 qualifications issues, then competing applicants can't
3 come in until the matter is settled. The court below has
4 upheld that.

5 QUESTION: But he didn't lose -- his client --
6 your opposition didn't lose on that basis, I guess.

7 MR. WOLLENBERG: Well, he did in a way, because
8 there were three distress sales. The first two fell
9 through --

10 QUESTION: Well, on that basis we shouldn't have
11 taken the case. Is that it?

12 MR. WOLLENBERG: And when he got to the third
13 distressed sale, which was a distress sale to Astroline,
14 the normal renewal time would come up, but the Commission
15 does not engage in taking competing applications and the
16 Court below held this, when the case is in a hearing
17 status, so that under the distress sale policy, when the
18 Commission approved the distress sale to Astroline, Mr.
19 Shurberg couldn't come in and demand a hearing and no one
20 else could, white or black.

21 QUESTION: Are you saying that the minority set
22 aside program made no difference in the outcome of this
23 case?

24 MR. WOLLENBERG: I think it made no difference
25 in the outcome of what Mr. Shurberg was trying to do. He

1 never offered to buy the station.

2 QUESTION: Well, but I said, did it make any
3 difference in the outcome of this case, of the award of
4 this franchise?

5 MR. WOLLENBERG: Well, had the -- had there been
6 no distress sale policy, then what would have happened was
7 --

8 QUESTION: Couldn't you answer my question a yes
9 or a no?

10 MR. WOLLENBERG: Would you repeat it? I'm
11 sorry.

12 QUESTION: Yes. Are you saying that the
13 Commission's minority set-aside policy and distress case
14 sales made no difference in the outcome of this case?

15 MR. WOLLENBERG: It made no necessary difference
16 in the outcome as far as Shurberg was concerned, because
17 if there had been no distress sale the Faith Center
18 renewal hearing on qualifications would have gone through.

19 If Faith Center won, it would be renewed. If
20 Faith Center lost, then at that point Shurberg and
21 everybody else in the world could come and apply. So that
22 would have made a difference, but it wouldn't necessarily
23 mean that Shurberg would have gotten the station. He
24 never offered to buy it.

25 QUESTION: You're the plaintiff -- I mean,

1 you're the petitioner in this case and you didn't raise
2 any of this in your petition.

3 MR. WOLLENBERG: Oh, no. We didn't have to,
4 because the court below -- I'm glad you make that point,
5 because this Court has admonished recently that you like
6 to stick to what the petition is granted on.

7 The court below found that what the Commission
8 had done was entirely appropriate under the Communications
9 Act and its procedures and there was no violation of the
10 act. It held only that the distress sale policy was
11 unconstitutional, and that's all that we're here on.

12 So we're not asking this Court to reverse the
13 Court below on the question of whether Mr. Shurberg would
14 have been allowed under the Communications Act to do
15 something different. What we're here asking is that this
16 Court determine the distress sale policy is (1) nonrigid,
17 nonquota, on very small -- about four times a year, when a
18 station is in trouble, the Commission may or may not
19 permit a distress sale. On one of the other Faith Center
20 things it didn't.

21 It passes on each case, on its own facts, and if
22 the distress sale applicant is qualified, if the
23 licensee's putative sins aren't deemed to be too heinous
24 and the distress sale applicant is fully qualified, the
25 Commission may approve it. It may not, it may go ahead

1 and order a comparative hearing when, as and if the
2 station comes up for regular renewal.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
4 Wollenberg. The case is submitted.

5 (Whereupon, at 12:04 p.m., the case in the
6 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:

89-700 ASTROLINE COMMUNICATIONS Co. LTD. PETITIONOR
VI SHURBERG BROADCASTING OF HARTFORD INC. OF A.K.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Alan Friedman

(REPORTER)

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