

C. The Policy's Impact on Nonminorities Is Minimal.

We do not contend that a congressionally-enacted race-conscious program in which a benefit is awarded exclusively on the basis of race could never be found to place an unlawfully heavy burden on nonminorities. The distress sale program, however, does not place an undue burden on nonminorities, either in the individual circumstances of this case or, more generally, from the perspective of all nonminorities interested in entering the broadcast industry.

For example, respondent Shurberg and any other nonminority have three options for acquiring a broadcast station—they can apply for a new station, buy an existing station, or file a competing application against a renewal application of an existing station. See *Minority Task Force Report* at 9-10. The distress sale policy has no effect on applications for new stations or timely filed competing applications that challenge renewals. The policy is operative only where the qualifications of an existing licensee to continue broadcasting have been designated for hearing and no other applications for the station in issue were on file at the Commission at the time of the designation order. See *Clarification of Distress Sale Policy*, 44 Radio Reg.2d (P&F) 479 (1978). Moreover, the decision whether to seek to transfer a station pursuant to the distress sale policy is solely within the discretion of the licensee whose qualifications are at issue in the hearing. There is no requirement that the licensee make such election—it is free to choose to attempt to retain the license and proceed through the hearing, in which case no one—whether minority or non-minority—may compete for the license until issues concerning the incumbent licensee's qualifications have been resolved.

Nor does the distress sale policy involve a "quota" or "set-aside." No particular number or percentage of licenses has been reserved for minorities.⁴⁰ In fact, distress sales have represented

gress can continue to extend the program, eliminate the program, or leave it to the FCC's discretion.

⁴⁰ Insofar as the distress sale policy does reserve certain opportunities exclusively for minorities, it goes beyond the type of diversity-based, race-

only a tiny fraction of all applications for FCC approval of broadcast station transfers. As Chief Judge Wald observed below, under the distress sale policy, "[a]s in *Fullilove*, non-minority firms remain free to compete for the vast majority of licensee opportunities available" (Pet. App. 106a).⁴¹

From fiscal years 1979 through 1988, only 38 distress sales were approved by the FCC.⁴² Over the same period, the FCC approved approximately 10,000 sales of broadcast stations.⁴³

conscious policy that Justice Powell was prepared to accept in *Bakke*. See 438 U.S. at 315-20. The Court's subsequent decision in *Fullilove*, however, upheld a statute under which there was a distinct possibility that nonminorities would have no opportunity to compete for 10% of the funds authorized thereunder. See *Bakke*, 438 U.S. at 378-79 (Brennan, White, Marshall and Blackmun, JJ.) (disagreeing with Justice Powell's view that the Davis Medical School's special admissions plan was fatally defective because it reserved openings exclusively for minorities).

⁴¹ The policy does involve individualized consideration of each distress sale request. As this case itself illustrates, the FCC entertains, on a variety of grounds, objections to petitions for distress sale authorizations. Moreover, the FCC has made clear that all distress sales would "be scrutinized closely to avoid abuses." *1978 Policy Statement*, 68 F.C.C.2d at 983 (Pet. App. 139a); see also *1982 Policy Statement*, 92 F.C.C.2d at 855 ("[I]n order to avoid 'sham' arrangements, we will continue to review such [partnership] agreements to ensure that complete managerial control over the station's operations is reposed in the minority general partner(s)."). This Court has not held, as Judge Silberman's opinion below suggests, that a program must provide an "opportunity here to ensure that participating minority enterprises have actually been disadvantaged by past discrimination or its effects" (Pet. App. 30a). As Justice O'Connor observed in *Wygant*, "the Court has forged a degree of unanimity; it is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored'" 476 U.S. at 287.

⁴² See Pet. App. 61a, citing *Distress Sales Approved*, FCC Consumer Assistance & Small Business Div. (Oct. 18, 1988).

⁴³ The Commission actually approved 21,200 assignments or transfers during this period. See *Broadcast/Mass Media Application Statistics, Annual Reports of the Federal Communications Commission FY 1979—FY 1988*. Agency staff familiar with this area estimate that corporate reorganizations and similar technical changes represent at least one-half of the applications granted. These types of transfers do not constitute "sales" of stations in the common sense of that term.

Thus, during its existence, the minority distress sale policy has accounted for less than four tenths of one per cent of all broadcast station sales; or, conversely, over 99.6 per cent of all broadcast station sales did *not* involve the distress sale policy. Similarly, during the same period, approximately 21,000 license renewal applications were filed, but only 94, or 0.5 per cent were designated for hearing and thus even eligible for disposition pursuant to the distress sale policy.⁴⁴ In sum, the distress sale policy operates to foreclose to nonminorities only a minuscule number of opportunities to acquire a broadcast station.

Even in those few cases where a distress sale becomes a possibility because an incumbent licensee finds itself in difficulty before the Commission, nonminorities are not necessarily foreclosed from having the opportunity to acquire the station at issue. If a nonminority (or a minority for that matter) files a competing application before the incumbent licensee's renewal application is designated for hearing, the distress sale option is not available. See page 42 above. Thus, a nonminority can prevent the distress sale policy from ever coming into play. In this case, for example, had respondent Shurberg filed its competing application in a timely manner, before the Commission designated Faith Center's renewal application for hearing, there could have been no distress sale. We note that timely filed competing applications against two of Faith Center's other stations did, in fact, prevent their sale under the distress sale policy. See *Faith Center, Inc.*, 89 F.C.C. 2d 1054 (1982) and 90 F.C.C. 2d 519 (1982).⁴⁵

A comparison of the foregoing statistics with similar information considered in *Fullilove* further demonstrates that the impact of the distress sale policy on nonminorities is not so great as

⁴⁴ See Broadcast/Mass Media Application Statistics, Annual Reports of the Federal Communications Commission FY 1979 - FY 1988.

⁴⁵ Even when the distress sale option is exercised, nonminorities can seek to become limited partners in a minority controlled entity and share in whatever financial benefits arise from operating a broadcast station on that frequency. See 1982 *Minority Policy Statement*, 92 F.C.C.2d at 853-855; Pet. App. 108a, Wald, C.J., dissenting. In this case, the minority general partner held a 21 per cent ownership interest in the limited partnership. See Pet. App. 10a.

to make the policy unconstitutional. Chief Justice Burger concluded in *Fullilove* that the burden on nonminority firms was "relatively light" because the percentage of funds available to minorities alone was a minuscule percentage (0.25 per cent) of the amount spent on construction in the United States. 448 U.S. at 484-485 n.72. See also *id.* at 515 (Powell, J.). The impact of the distress sale program is similarly small. Although Congress neither set aside stations for minority ownership nor limited the number of broadcast stations that could be transferred under the distress sale program, Congress could reasonably know from the Commission's experience that there were, on average, fewer than 5 distress sales per year since the inception of the program in an industry currently made up of some 12,000 radio and television licensees.⁴⁶ This means that, on average, only about 0.20 per cent of renewal applications filed each year have resulted in distress sales since the policy was begun in 1978.

When a race-conscious policy involves entry into employment, rather than layoffs of established employees, "the burden to be borne by innocent individuals is diffused to a considerable extent among society generally." *Wygant*, 476 U.S. at 282-283 (Powell, J.); *id.* at 294-295 (White, J.). In this regard, Chief Judge Wald correctly observed below that "the distress sale policy involves entry into a market [and] is far more analogous to 'hirings' than to 'firings.'" . . . Because of the unique and unpredictable nature of such situations, a distress sale can hardly be said to disrupt the settled expectations of potential licensees" (Pet. App. 107a).⁴⁷ In addition, as Chief Justice Burger stated

⁴⁶ There were 13,178 radio and television broadcast stations authorized at the close of fiscal year 1988, of which 11,769 were operating and 1409 were not on the air. Annual Report of the Federal Communications Commission - FY 1988 at 33.

⁴⁷ Recent events, in fact, indicate that the only expectation Shurberg could reasonably have had that may have been disrupted by the distress sale policy was the right to participate in a comparative hearing with at least four other parties who also desire to operate the station. That is the number of parties who filed competing applications when the license for this station was due for renewal in 1989. Shurberg did not lose any expectation that it could acquire the station without competition from numerous other parties.

in *Fullilove*, “[i]t is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such ‘a sharing of the burden’ by innocent parties is not impermissible.” 448 U.S. at 484, quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 777 (1976). See also *Wygant*, 476 U.S. at 280-281 (Powell, J.) (“As part of this Nation’s dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy.”).

CONCLUSION

The judgment of the court of appeals should be reversed.
Respectfully submitted.

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FEBRUARY 1990

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** The Acting Solicitor General has authorized the filing of this brief in order for the Court to have the benefit of the views of the Commission. The views of the United States will be expressed in a brief filed by the Acting Solicitor General.

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May 15, 1992

HAND DELIVER

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RE: National Minority TV, Inc., Licensee of KNMT(TV),
Portland, Oregon--Processing of Request for Declaratory
Ruling

Dear Mr. Miller:

Tendered herewith are an original and four copies of National Minority TV, Inc's ("NMTV") response to the Commission's March 30, 1992 letter regarding the referenced matter. This filing involves a seriatim response to each of the inquiries made by the Commission and provides extensive document production.

It should be noted that among the financial materials being produced are confidential financial information under section 0.457(d) of the Commission's rules, such as copies of bank statements for NMTV's money market and concentration checking account, as well as audited financial statements going back to 1980 for both NMTV and the Trinity Broadcasting Network ("TBN" or "Trinity"). NMTV has redacted the actual numbers from this material (Attachments 3G, 6D, 6E, and portions of Attachment 2) in the copies being provided to the other parties. The original copy filed with the Commission contains this information. NMTV respectfully requests that this information it be kept confidential and not made a part of the public record.

NMTV reiterates here its position, as set forth in its September 24, 1991 response to the Commission in the Wilmington proceeding (BALCT-910329AE), and November 18, 1991 Request for Declaratory Ruling, that the minority ownership exception to the multiple ownership rule (Rule 73.3555(d)) requires only legal ownership, without reference to an entity's day-to-day management policies or practices. Further support for NMTV's position, not cited in its earlier pleadings, is found in section 309(i)(3)(A) of the Communications Act of 1934, as amended. This is the provision of the Act which was amended on August 13, 1981 (Pub. L. No. 97-35, 95

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Stat. 357) authorizing the use of the lottery selection system in awarding LPTV/television translator licenses.

When that amendment was adopted, Congress directed the Commission to establish rules for a system of random selection by February 9, 1982. The Commission initially declined to adopt rules governing the lottery system because it found the statute to be ambiguous and unworkable. Congress thereafter provided detailed instructions as to what it intended to accomplish with its new provision in section 309(i)(3)(A), and thus issued, on August 19, 1982, its Conference Report No. 97-765, see Rad. Reg. (P&F) Current Service, paragraphs 10:1244 and 10:1258. After an extensive discussion of the media ownership and minority ownership preferences Congress instructed as follows:

With respect to both media ownership and minority ownership preferences, the Conferees expect that the Commission shall evaluate ownership in terms of the beneficial owners of the corporation, or the partners, in the case of a partnership. Similarly, trusts will be evaluated in terms of the identity of the beneficiary. (Rad. Reg. (P&F) Current Service, p. 10:638 (underlining added))

This clear direction from Congress ordered that the Commission only look to the "beneficial" owners of a corporation, or the actual beneficiaries of a trust. Congress was only concerned with the equity owners or beneficiaries, not with the identity of those actually operating or controlling the corporation or trust. This unambiguous Congressional directive fully supports the arguments made by NMTV at pages 16-28 of its Request For Declaratory Ruling.

The Commission obeyed this clear statement of Congressional intent when it modified FCC Form 346 to specifically provide that the minority preference was available to nonstock corporations when "a majority of the members are minorities, the entity is entitled to a minority preference." See, FCC Form 346, section V, Minority Preference, Instruction 3.c.

Moreover, the specific narrowing by the Commission of the definition of "minority-controlled" to be "minority-ownership" in rule 73.3555(d) is entirely consistent with Congressional intent. Indeed, this was the precise standard the Commission specified in its own reports and orders developed in General Docket No. 83-1009 relating to the relaxation of the multiple-ownership rules--specifically, Report and Order in Multiple Ownership - Seven Stations Rule, 100 F.C.C.2d 17, 56 Rad. Reg. 2d (P&F) 859 (1984),

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and Reconsideration of Multiple-Ownership - Seven Station Rule, 100 F.C.C.2d 74, 57 Rad. Reg. 2d (P&F) 966 (1985).

NMTV is the only entity whose applications have ever been processed under the minority exception to Rule 73.3555(d). NMTV has been forced to operate under the guidance which the Commission's Reports and Orders, and the Commission Staff have given it. NMTV has disclosed everything that the Commission has requested or required of it. While NMTV does not believe there has been a de facto exercise of control in its relationship with the Trinity Broadcasting Network, the admittedly close (and disclosed) relationship between the two organizations can only be evaluated based upon their good faith, rationally held belief that their relationship was in accordance with the Commission's rules and permitted under the exception stated in rule 73.3555(d).

Finally, since both the multiple-ownership rule and the underlying orders for the rule specifically define "minority-control" to be ownership, and in the context of a nonprofit corporation, ownership equals "directorship" (See, e.g., Roanoke Christian Broadcasting, Inc., 52 Rad. Reg. 2d (P&F) 1725 (Rev. Bd. 1983), rev. den., FCC 83-441 (1983)), NMTV believes the attached materials fully support the conclusion that its directors indeed function as directors and thus comply with the requirements of Rule 73.3555(d). Nothing more is required under the standard set by the Commission itself.

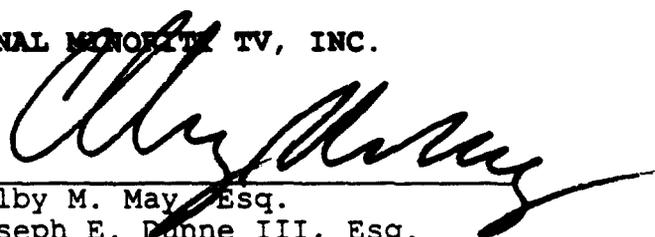
Accordingly, the information provided herein is submitted without prejudice to NMTV (or Trinity) from maintaining in any fora that much of the information it is herein providing is irrelevant to the determination which NMTV hopes the Commission will expeditiously reach with respect to its Request for Declaratory Ruling. NMTV herewith provides a full response to the questions posed in the Commission's March 30, 1992 letter because NMTV has always fully provided the Commission with any information requested of it.

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Should the Commission require any further or other information please contact the undersigned.

Respectfully submitted,

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I, Howard A. Topel of the law firm of Mullin, Rhyne, Emmons and Topel, P.C., hereby certify that on this 20th day of August, 1996, copies of the foregoing "Motion To Vacate the Record on Improvidently Designated Issues" were sent by first class mail, postage prepaid, to the following:

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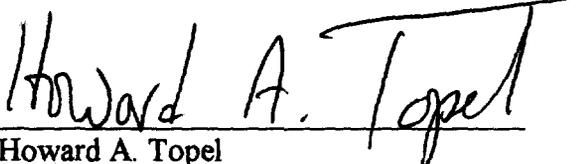
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