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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission

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| In the Matter of |) | |
| |) | |
| Review of the Commission's |) | MM Docket No. 91-221 |
| Regulations Governing |) | |
| Television Broadcasting |) | |
| |) | |
| Television Satellite Stations |) | MM Docket No. 87-7 |
| Review of Policy and Rules |) | |

To: The Commission

REPLY COMMENTS OF SPECTRUM DETROIT

1. The comments filed by Spectrum Detroit, Inc. identified the company and the nature of its interest as a local small business owned by minorities including women. Spectrum Detroit proposes that the Commission retain the one-to-the-market rule, jettison the five factor waiver provision of the rule, and substitute a waiver provision available to stations that are owned and controlled by local residents of the communities served and by small businesses including businesses that are owned and controlled by minorities and/or women.

2. We support comments addressed to similar objectives, in whole or in part and whether in differing contexts, filed by such parties as Sunbelt Communications Company, at 6-7, Media Access Project at 3-5, American Women in Radio & Television, Inc. at 4-6, and Telemundo Group, Inc.

3. Our proposal does not contravene court rulings relative to FCC preferences concerning broadcast station ownership. We subscribe to the analysis of AWRT at 4-5 and also cite the Commission to the passage in the dissenting opinion of Justice Stevens in Aderand Constructors, Inc. v. Pena, 115 S.Ct. 2097

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(1995), at pages of 17-18 of the slip opinion, attached for handy reference, to which the majority opinion expressed no disagreement even though it expressed disagreement with many of the points made by Justice Stevens.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gene A. Bechtel", is written over a horizontal line. The signature is stylized and somewhat abstract.

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March 21, 1997

two cases. First, *Metro Broadcasting* involved a federal program, whereas *Croson* involved a city ordinance. *Metro Broadcasting* thus drew primary support from *Fullilove*, which predated *Croson* and which *Croson* distinguished on the grounds of the federal-state dichotomy that the majority today discredits. Although members of today's majority trumpeted the importance of that distinction in *Croson*, they now reject it in the name of "congruence." It is therefore quite wrong for the Court to suggest today that overruling *Metro Broadcasting* merely restores the *status quo ante*, for the law at the time of that decision was entirely open to the result the Court reached. *Today's* decision is an unjustified departure from settled law.

Second, *Metro Broadcasting's* holding rested on more than its application of "intermediate scrutiny." Indeed, I have always believed that, labels notwithstanding, the FCC program we upheld in that case would have satisfied any of our various standards in affirmative-action cases—including the one the majority fashions today. What truly distinguishes *Metro Broadcasting* from our other affirmative-action precedents is the distinctive goal of the federal program in that case. Instead of merely seeking to remedy past discrimination, the FCC program was intended to achieve future benefits in the form of broadcast diversity. Reliance on race as a legitimate means of achieving diversity was first endorsed by Justice Powell in *Regents of Univ. of California v. Bakke*, 438 U. S. 265, 311-319 (1978). Later, in *Wygant v. Jackson Board of Ed.*, 476 U. S. 267 (1986), I also argued that race is not always irrelevant to governmental decisionmaking, see *id.*, at 314-315 (STEVENS, J., dissenting); in response, JUSTICE O'CONNOR correctly noted that, although the School Board had relied on an interest in providing black teachers to serve as role models for black students, that interest "should not be confused with the very different goal of promoting

racial diversity among the faculty.” *Id.*, at 288, n. She then added that, because the school board had not relied on an interest in diversity, it was not “necessary to discuss the magnitude of that interest or its applicability in this case.” *Ibid.*

Thus, prior to *Metro Broadcasting*, the interest in diversity had been mentioned in a few opinions, but it is perfectly clear that the Court had not yet decided whether that interest had sufficient magnitude to justify a racial classification. *Metro Broadcasting*, of course, answered that question in the affirmative. The majority today overrules *Metro Broadcasting* only insofar as it is “inconsistent with [the] holding” that strict scrutiny applies to “benign” racial classifications promulgated by the Federal Government. *Ante*, at 26. The proposition that fostering diversity may provide a sufficient interest to justify such a program is *not* inconsistent with the Court’s holding today—indeed, the question is not remotely presented in this case—and I do not take the Court’s opinion to diminish that aspect of our decision in *Metro Broadcasting*.

The Court’s suggestion that it may be necessary in the future to overrule *Fullilove* in order to restore the fabric of the law, *ante*, at 34, is even more disingenuous than its treatment of *Metro Broadcasting*. For the Court endorses the “strict scrutiny” standard that Justice Powell applied in *Bakke*, see *ante*, at 22–23, and acknowledges that he applied that standard in *Fullilove* as well, *ante*, at 16–17. Moreover, Chief Justice Burger also expressly concluded that the program we considered in *Fullilove* was valid under any of the tests articulated in *Bakke*, which of course included Justice Powell’s. 448 U. S., at 492. The Court thus adopts a standard applied in *Fullilove* at the same time it questions that case’s continued vitality and accuses it of departing from prior law. I continue to believe that the *Fullilove* case was incorrectly decided, see *id.*, at 532–554 (STEVENS, J., dissent).