

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Review of the Commission's)	MM Docket No. 98-204
Broadcast and Cable)	
Rules and Policies)	
and)	
Termination of the)	MM Docket No. 96-16
EEO Streamlining Process)	

**REPLY COMMENTS OF
NOW FOUNDATION
NOW LEGAL DEFENSE AND EDUCATION FUND
CENTER FOR MEDIA EDUCATION
FEMINIST MAJORITY FOUNDATION
PHILADELPHIA LESBIAN AND GAY TASK FORCE
WOMEN'S INSTITUTE FOR FREEDOM OF THE PRESS**

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Summary

NOW Foundation, et al. believe that the Commission is not required to revise its EEO rules as applied to women and should not do so; with that exclusion, the proposed rules, with changes suggested by NOW Foundation, et al. in earlier comments, should be adopted by the Commission.

NOW Foundation, et al. believe that the Commission possesses clear authority to develop and enforce EEO rules and policies. That authority arises from the statements of both Congress and the Courts that the Commission is uniquely situated and, in fact, obligated to ensure programming diversity and non-discrimination over the public airwaves. No other entity, governmental or private, shares the Commission's responsibility or expertise in this area.

Contrary to the assertions of some commenters, the proposed rules are constitutional. The proposed rules neither require race-based decision-making nor encourage it. In fact, the NPRM explicitly rejects the notion that the recordkeeping requirement should "pressure" broadcasters into hiring based on sex or race. For this reason, the rules are subject only to rational basis review.

However, even if the rules were subjected to a heightened standard, they would survive judicial scrutiny. The rules are designed to address the Commission's interest in programming diversity and non-discrimination, interests that are both important and compelling. In achieving their goals, the rules are narrowly tailored to be effective, reviewable, flexible, and minimally burdensome. Furthermore, the rules, as they apply to religious broadcasters, do not violate the Establishment Clause or the Free Exercise Clause of the First Amendment.

NOW Foundation, et al. believe that the Commission should reject proposals offered by broadcasters and cable operators that would undermine the effectiveness and reach of the proposed rules. In particular, the Commission should not increase the number of broadcast entities eligible for exemption from the EEO rules. None of the grounds for exemption offered by the commenters is sufficient to support waiving EEO rules. Likewise, the Commission should reject proposals that would lower the standard for compliance with the EEO rules. Specifically, the Commission should reject NAB's proposal because it is underinclusive and fails to promote the Commission's goals. Similarly, the FCC should not adopt the recruitment alternatives suggested by some broadcast and cable operators, including advertising via the Internet or allowing broadcast and cable operators to design their own policies, because these methods fail to meet the Commission's goals of non-discrimination and programming diversity.

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The NOW Foundation, NOW Legal Defense and Education Fund, Center for Media Education, Feminist Majority Foundation, Philadelphia Lesbian and Gay Task Force, and the Women's Institute for Freedom of the Press ("NOW Foundation, et al.") respectfully submit Reply Comments in response to the Notice of Proposed Rule Making ("Notice" or "NPRM") of the Federal Communications Commission ("FCC" or "Commission"), in the above-captioned proceeding, released November 20, 1998, concerning equal employment opportunity rules and policies.

NOW Foundation, et al. maintain that because the court in Lutheran Church - Missouri Synod v. FCC¹ explicitly made no determination with regard to the Commission's existing EEO

¹ Lutheran Church - Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1997).

rules as they apply to women, the Commission is under no obligation to alter its rules concerning EEO for women and should not do so.² Still, NOW Foundation, *et al.* agree with those commenters who believe that the Commission's proposed rules present a strong and effective EEO policy.

I. The Commission Has Clear Authority To Establish EEO Rules

The Commission must exercise its established authority to develop EEO rules and policies to promote the twin interests of non-discrimination and program diversity. NOW Foundation, *et al.* reject the assertions of some commenters that the FCC lacks the authority and expertise to establish EEO rules and policies.³ Contrary to the claims of those opposed to the Commission's proposed rules, the FCC, by statute and by virtue of its unique status as guardian of the public airwaves, possesses the power to ensure diversity of programming and non-discrimination in hiring and is the entity best equipped to fulfill that mandate. For these reasons, the Commission should continue its efforts to develop effective EEO policies, even within the constraints of the recent Lutheran Church decision.⁴

In their initial comments in this proceeding, NOW Foundation, *et al.* outlined the "substantial body of precedent" affirming the Commission's authority to implement EEO rules.⁵

² See NOW Foundation, *et al.*, Comments at 2; see also United Church of Christ ("UCC"), Comments at 7; Association of Women in Radio and Television ("AWRT"), Comments at 5.

³ See National Association of Broadcasters ("NAB"), Comments at 17; Evening Post Publishing Co. and Great Empire Broadcasting, Inc. ("EPP"), Comments at 4-11.

⁴ See Lutheran Church - Missouri Synod v. FCC, 141 F.3d 344, 354 (declaring portions of the Commission's previous EEO rules unconstitutional).

⁵ NOW Foundation, *et al.*, Comments at 3-7.

The courts⁶ and Congress⁷ have consistently found that the FCC has the jurisdiction to regulate in this area. This authority to promulgate EEO policies was recognized as well by a number of commenters, including the American Federation of Television and Radio Artists (“AFTRA”),⁸ the Association of America’s Public Television Stations (“APTS”)⁹ and Time-Warner Cable (“TWC”).¹⁰

Some commenters erroneously contend that the Commission has overstepped its statutory mandate in promulgating EEO policies.¹¹ NAB, in particular, asserts that the Commission’s claims of statutory authority and governmental interest are “tenuous.”¹² To support its position, NAB questions the connection between the Commission’s asserted interests in programming and

⁶ See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (recognizing the scarcity of the broadcast spectrum and the need to ensure “suitable access to social, political, esthetic, moral and other ideas and experiences”); NAACP v. FPC, 425 U.S. 662, 670 n. 7 (1976) (acknowledging the Commission’s responsibility under the Communications Act to establish an EEO program in order to promote diversity of programming); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 569 (1990) (identifying broadcast diversity as an important governmental interest, in a portion of Metro Broadcasting not overturned by Adarand).

⁷ H.R. Rep. No. 862, 102d Cong., 2d Sess. 97 (1992) (indicating that Section 334 of the Communications Act “codifies the Commission’s equal employment opportunity rules”); see also, H.R. Rep. No. 934, 98th Cong., 2d Sess. 84-85 (1984) (recognizing the Commission’s “well established” authority to regulate employment in the communications industry).

⁸ See AFTRA, Comments, at 3-7.

⁹ See APTS, Comments at 1-2.

¹⁰ See TWC, Comments at 1. Specifically, TWC argues that the Commission possesses ample authority to regulate EEO in the cable industry.

¹¹ See, e.g., American Center for Law and Justice (“ACLJ”), Comments at 7; NAB, Comments at 17; Pacific Legal Foundation (“PLF”), Comments at 6.

¹² NAB, Comments at 17.

ownership diversity and the proposed rules.¹³ Similarly, PLF rests its challenge to the Commission's authority on PLF's claim that the proposed rules could not survive strict scrutiny.¹⁴ Such claims are irrelevant to the question of the Commission's authority. The fact that governmental regulations are subject to judicial review has no bearing on the authority of government agencies to establish those regulations. Commenters who question the Commission's authority in this area ignore decades of legislative and judicial record.¹⁵

A. Establishing EEO Rules Is A Crucial Component Of The Commission's Public Interest Mandate

NOW Foundation, *et al.* share the Commission's belief that the Commission enjoys a unique public interest mandate,¹⁶ which, as the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters ("Advisory Committee") states, results from the "scarcity of broadcast frequencies [and the traditional understanding of broadcasters as] public trustees of the airwaves."¹⁷ The Supreme Court also recognizes the Commission's special responsibilities. The Court has found that "given spectrum scarcity, those who are granted a

¹³ *Id.* at 18.

¹⁴ *See* PLF, Comments at 6-7.

¹⁵ *See* NOW Foundation, *et al.*, Comments at 3-7.

¹⁶ *See* NPRM ¶39.

¹⁷ *See* Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, *Charting the Digital Broadcasting Future* (visited Dec. 22, 1998). <<http://www.ntia.doc.gov/pubintadvcom/piacreport.htm>>. According to the Advisory Committee, "[t]he public interest standard has most often been applied to six major arenas: diversity of programming, political discourse, localism, children's educational programming, access to persons with disabilities, and equal employment opportunity." *Id.* (emphases added).

license to broadcast must serve in a sense as fiduciaries for the public by presenting 'those views and voices which are representative of [their] community.'"¹⁸ Congress also has consistently acknowledged the Commission's obligation to promote programming diversity.¹⁹

The diversity of programming that results from diversity of employment furthers the public interest. As the Advisory Committee recently found, "[EEO] is a well-established national priority,"²⁰ and the

[a]uthority to ensure compliance with EEO requirements is within the FCC's expansive powers to ensure that licensees serve the public interest, convenience, and necessity, as specified in the Communications Act. The FCC is obliged to ensure that licensees act as responsible public trustees, which requires an attentiveness to the concerns of members of minority groups and women in a number of areas.²¹

For this reason, the Commission possesses not only the authority but also the responsibility to develop and maintain sound and effective EEO policies.

B. The Commission Should Not Leave EEO Enforcement To Other Agencies

NOW Foundation, *et al.* share the opinion of AFTRA that the Commission is in the best position to enforce EEO policies to protect the public interest and the diversity of the public

¹⁸ FCC v. League of Women Voters, 468 U.S. 364, 377 (1984) (quoting Red Lion, 396 U.S. at 389 (1969)).

¹⁹ See NPRM ¶¶39-45 (citing 47 U.S.C. §§ 301, 303, 307, 309-10); see also, NOW Foundation, *et al.*, Comments at 5-7; AWRP, Comments, Implementation of Section 309(j) of the Communications Act, MM Docket No. 97-234, at 15 (filed Jan. 26, 1998).

²⁰ Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, Charting the Digital Broadcasting Future (visited Dec. 22, 1998) <<http://www.ntia.doc.gov/pubintadvcom/piacreport.htm>>.

²¹ Id. (citations omitted).

airwaves.²² The Commission has a specialized understanding of the broadcast industry and has demonstrated its ability to oversee its EEO policies.²³

The Commission should resist the urgings of some commenters that it leave EEO enforcement to other state or federal entities, including the Equal Employment Opportunity Commission (“EEOC”).²⁴ Those commenters who would have the Commission cede its EEO authority to the EEOC overlook the ways in which the Commission and the EEOC differ in both aim and scope.²⁵ Only the FCC possesses clear agency expertise in regulating the broadcast industry. Also, while the EEOC is empowered to address specific instances of employment discrimination, it does not share the Commission’s equally compelling interest in diversity of programming or its authority to reach all broadcasters, regardless of size.²⁶ The Commission and

²² See AFTRA, Comments at 3-7.

²³ The Commission issued 115 EEO forfeitures “in connection with license renewal applications filed [by radio and television broadcasters in renewal cycles running from 1988 to 1994].” Minority Media Telecommunications Council (“MMTC”), Comments at 53 (citing The FCC EEO Branch’s forfeiture database).

²⁴ See, e.g., American Center for Law and Justice (“ACLJ”), Comments at 7; Texas Association of Broadcaster (“TAB”), Comments at 3-5; PLF, Comments at 6-8; 46 Named State Broadcasters’ Associations, at 29-30; see also *infra* pp. 40-42 (discussing APTS contention that public stations are already regulated by other government entities and should be exempt from the proposed rules and NAB’s proposals that stations be regulated by OFCCP or state broadcasting associations).

²⁵ See EEOC and FCC, Memorandum of Understanding (Sept., 1978) (*revised* Feb. 1986) [hereinafter MOU] (reaffirming the EEOC’s designation of the FCC as its agent for receiving charges of employment discrimination). The MOU recognizes in particular the agencies’ shared interest in non-discrimination, as well as the unique public interest concerns of the FCC. *Id.* In addition, the MOU acknowledges that the FCC’s EEO authority extends to broadcasters not covered within the numerical minimum of Title VII. *Id.*

²⁶ Title VII of the Civil Rights Act of 1964, as amended, limits the power of the EEOC to enforce non-discrimination in employment to employers with 15 or more employees. 42 U.S.C

the EEOC should continue to work together to ensure that the broadcast industry follows non-discriminatory hiring and employment practices and that programming reflects a broad diversity of views.

II. The Proposed Rules Are Constitutional And The Existing Rules Are Constitutional As Applied To Women

The Commission has proposed rules capable of withstanding a constitutional challenge, even under Lutheran Church, NOW Foundation, et al. believe that, contrary to the assertions of a number of commenters,²⁷ the proposed rules do not trigger the heightened judicial scrutiny associated with Equal Protection jurisprudence, as they do not require gender or race-based decision-making. Moreover, NOW Foundation, et al. reject the claims of those commenters who appear to argue that the application of strict scrutiny would prove fatal by definition.²⁸ Even if heightened scrutiny were applicable to the kind of recruitment and record-keeping procedures outlined by the proposed rules, the rules would withstand not only intermediate but also strict scrutiny, as they are narrowly tailored to address compelling governmental interests in non-discrimination and programming diversity. Additionally, nothing in the proposed rules infringes upon the Establishment or Free Exercise Clauses of the First Amendment.

§§2000e, et seq.

²⁷ See, e.g., Virginia Association of Broadcasters and North Carolina Association of Broadcasters (“VAB”), Comments at 3; CEO, Comments at 1.

²⁸ See CEO, Comments at 1; Institute for Justice, Comments at 6-8; PLF, Comments at 5.

A. The Proposed Rules Do Not Warrant Heightened Scrutiny

The requirements imposed on broadcasters by the proposed rules are not the type of gender or race-based decision-making that triggers heightened judicial scrutiny, and for this reason they will be subject only to rational basis review. A few commenters argue that the proposed rules, with their recruitment and record-keeping requirements, amount to decision-making, either explicitly or through a resulting pressure on broadcasters to hire based on gender or race.²⁹ NOW Foundation, *et al.*, however, agree with the numerous federal courts³⁰ that have held that recruitment and record-keeping fall well-short of a decision-making standard. NOW Foundation, *et al.* further believe that broadcasters' claims of perceived "pressure" ignore the explicit language of the NPRM and fail to provide a valid ground for challenging the proposed rules.

1. The proposed rules do not require race-based decision-making

The Commission's proposed rules are easily distinguishable from the programs that the Supreme Court held subject to strict scrutiny in *Croson*³¹ and *Adarand*.³² In *Croson*, the City of Richmond required that contractors "subcontract at least 30% of the dollar amount of [any

²⁹ See ACLJ, Comments at 3; VAB, Comments at 4, 13; 46 Named State Broadcasters' Associations, Comments at 6, 12.

³⁰ See *infra* at 10 - 11 (citing *Duffy v. Wolle*, 123 F.3d 1026 (8th Cir. 1997); *Allen v. Alabama St. Bd. of Educ.*, 164 F.3d 1347 (11th Cir. (1999)); *Peightal v. Metro Dade County*, 26 F.3d 1545, 1557-58 (11th Cir. 1994); *Billish v. City of Chicago*, 962 F.2d 1269, 1270 (7th Cir. 1992), *vacated on other grounds*, 989 F.2d 89 (7th Cir.) (en banc), *cert. denied*, 114 S. Ct. 290 (1993); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992).

³¹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

³² *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

contract awarded by the city] to one or more Minority Business Enterprises.”³³ The program in Croson was based on an explicit quota and at issue was who would ultimately receive a government contract. Similarly, in Adarand the Court applied strict scrutiny to a federal highways program designed to reimburse federal contractors for the added costs associated with using subcontractors owned or controlled by members of disadvantaged groups. Members of minority groups were automatically considered disadvantaged. Like the Croson program, the Adarand program had a direct, measurable effect on decision-making, specifically who received a government subcontract.

By contrast, the FCC’s proposed rules do not have an impact on the decision-making process. Efforts aimed at widening the recruitment base for a position cannot legitimately be said to narrow the opportunities of any applicant or potential applicant other than by producing increased competition for employment. Not only do the proposed rules not reach the ultimate decision-making of hiring, they have no race-based effect on decisions earlier in the hiring process, such as whom to interview.

Some commenters would have the Commission believe that every step of the hiring process is decision-making as defined by the Court.³⁴ Institute for Justice, for example, argues incorrectly that “[t]he Commission’s proposed recruitment policy will ensure that certain qualified individuals are not informed of employment opportunities due to racial qualifications”

³³ Croson, 488 U.S. at 477 (1989).

³⁴ See, e.g., Institute for Justice, Comments at 4; CEO, Comments at 1;

and is, therefore, inconsistent with Adarand.³⁵ NOW Foundation, et al., contend that the EEO rules do not run afoul of Adarand. The problematic elements of the Adarand case are missing from the proposed rules: i.e., wide recruitment does not treat any individuals differently on the basis of sex or race. In fact, by broadening applicant pools, the rules make more likely the possibility that all individuals will enjoy equal opportunity regardless of sex or race. In addition, the proposed rules do not create even the slightest burden on white applicants. As the Eighth Circuit observed in Duffy v. Wolle:

An inclusive recruitment effort enables employers to generate the largest pool of qualified applicants and helps ensure that women and minorities are not discriminatorily excluded from employment... The only harm to white males is that they must compete against a larger pool of qualified applicants. This, of course, 'is not an appropriate objection' and does not state a cognizable harm.³⁶

Decision-making of the sort described in Adarand involves a narrowing of opportunity, an action that denies or limits an individual on the basis of his or her race.³⁷ Rather than subject any individual to "unequal treatment on the basis of his or her race," the proposed rules are designed to ensure equal treatment through equal access to employment opportunities.

VAB and the CEO inaccurately assert that the proposed rules must be "absolutely" gender and race-neutral in order to avoid strict scrutiny (and therefore a finding that they are

³⁵ See Institute for Justice, Comments at 4.

³⁶ Duffy v. Wolle, 123 F.3d 1026, 1039 (8th Cir. 1997) (quoting Shuford v. Alabama State Bd. Of Educ., 897 F. Supp. 1535, 1553 (M.D. Ala. 1995)).

³⁷ See Adarand, 515 U.S. at 229 (finding that "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." (emphasis added)).

unconstitutional).³⁸ This position represents a misreading of the Lutheran Church decision.³⁹ Post-Croson and post-Adarand, courts have generally refused to apply heightened scrutiny to gender and race-based outreach programs that, like the proposed rules, “do not accompany actual preferences.”⁴⁰ In Allen v. Alabama State Board of Education, for example, the Eleventh Circuit refused to apply strict scrutiny to a teacher certification program that employed a race-based screening process in the selection of test questions. The program was designed to ensure that certification exams did not unfairly advantage one race over another. The Court reasoned strict scrutiny did not apply because all examinees were held to the same standard.⁴¹ Similarly, in Sussman v. Tanoue, the U.S. District Court for the District of Columbia held that strict scrutiny did not apply to race-conscious “steps taken to ensure that no person is denied equal employment opportunity,” provided those steps do not “give any specific group or person a preference in

³⁸ See VAB, Comments at 3; CEO, Comments at 1.

³⁹ Lutheran Church, 141 F.3d at 351 (D.C. Cir. 1997) (acknowledging that race-consciousness does not automatically activate strict scrutiny).

⁴⁰ Sussman v. Tanoue, 1999 U.S. Dist. LEXIS 2645 (Feb. 4 1999).

⁴¹ See Allen v. Alabama State Bd. of Educ., 164 F.3d, 1347 (11th Cir. 1999); see also, Peightal v. Metro Dade County, 26 F.3d 1545, 15557-58 (11th Cir. 1994) (observing that recruitment efforts specifically directed at women and minorities are gender and race-neutral); Billish v. City of Chicago, 962 F.2d 1269, 1270 (7th Cir. 1992), vacated on other grounds, 989 F.2d 89 (7th Cir.) (en banc), cert. denied, 114 S. Ct. 290 (1993) (concluding that “aggressive recruiting” is a race-neutral activity); Coral Constr. Co. v. King County, 941 F.2d 910, 923 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992) (finding that directed training and information sessions are race-neutral measures); Raso v. Lago, 135 F.3d 11 (1st Cir. 1998) (holding that a housing plan aimed at ending discrimination by opening opportunity to all people did not violate equal protection principles because housing units were available to all applicants regardless of race).

hiring.”⁴² By focusing on broadening recruitment, the proposed rules fit within this category of gender and race-based initiatives that do not trigger heightened scrutiny.

2. The proposed rules do not “pressure” broadcasters to make decisions based on race

The Commission makes explicit in the NPRM that gender and race based hiring is not encouraged or expected as part of the proposed rules.⁴³ While the Lutheran Church court cited pressure on broadcasters in finding the previous rules unconstitutional,⁴⁴ the Commission removed the two sources of the “pressure” referred to by the court: the required comparison of a broadcaster’s employee composition with the statistical labor force and the threat that information collected will “be used for screening or assessing compliance with EEO outreach requirements.”⁴⁵ Since NOW Foundation, et al. maintain that the FCC’s existing rules should have been retained with regard to gender, broadcasters should be required to file annual employment reports with regard to gender, with official notice taken by the FCC that women constitute fifty percent of the workforce.

Some commenters claim that, despite the assurances of the Commission to the contrary, the proposed rules have the effect of requiring gender and race-based hiring by virtue of the pressure they exert on broadcasters, fearful of sanctions from the Commission.⁴⁶ NAB goes so

⁴² Sussman at 31.

⁴³ NPRM ¶49.

⁴⁴ See Lutheran Church, 141 F.3d at 352.

⁴⁵ NPRM ¶49.

⁴⁶ See NAB, Comments at 28; VAB, Comments at 13; 46 Named State Broadcasters’ Associations, Comments at 12.

far as to say that it does not trust the Commission not to use the required record-keeping for other purposes.⁴⁷ Such concerns, in the face of explicit statements to the contrary by the regulating agency, cannot be enough to sustain a challenge. If they were, all laws could be subjected to heightened scrutiny by virtue of willful misunderstanding on the part of any individual.

B. The Existing Rules And The Proposed Rules Survive Intermediate Scrutiny

If the existing rules, as they apply to women, were examined under intermediate scrutiny, they would survive a constitutional challenge. Similarly, the proposed rules would withstand such heightened review. NOW Foundation, et al. restate their position that the standard of scrutiny for gender-based governmental policies is “intermediate scrutiny” and agree with UCC’s assertion that, given the court’s express refusal in Lutheran Church to address the rules’ application with regard to women, prior rulings applying intermediate scrutiny must govern.⁴⁸

Under intermediate scrutiny, the Commission need only demonstrate that the rules are “substantially related” to an “important” governmental interest.⁴⁹ Despite the claims of VAB,⁵⁰ no reason exists to doubt the constitutionality of the existing rules under intermediate scrutiny. The Supreme Court has found broadcast diversity “at the very least an important governmental

⁴⁷ See NAB, Comments at 28.

⁴⁸ UCC, Comments at 7; See also, AWRT, Comments at 5.

⁴⁹ U.S. v. Virginia, 518 U.S. 515, 532 (1996) (citations omitted).

⁵⁰ See VAB, Comments at 4. VAB does not provide any reasoning or analysis to support its claim that “it is unlikely that gender classifications could withstand constitutional scrutiny – any FCC gender classification would not be ‘substantially related’ to any legitimate interest of the Commission.”

interest.”⁵¹ Moreover, the rules are “substantially related” to this governmental interest because they do “not rely on overbroad generalizations about the . . . preferences of males and females.”⁵² Indeed, NOW Foundation, et al, along with AWRP, has clearly demonstrated the nexus between gender diversity in employment and diversity in programming.⁵³ Thus, the existing EEO rules, as they apply to women, would easily survive intermediate scrutiny. For the same reasons, if the proposed rules were applied to women, they would also survive intermediate scrutiny.

C. The Proposed Rules Satisfy Requirements of Strict Scrutiny

Even if the proposed EEO rules were subject to strict scrutiny, they would be found Constitutional. Governmental actions subject to strict scrutiny must be “narrowly tailored” to meet a “compelling governmental interest.”⁵⁴ The proposed rules can survive the requirements of strict scrutiny because they are designed to address the Commission’s well-established interests in broadcast diversity and non-discrimination through the most effective and least intrusive means necessary.⁵⁵

⁵¹ Metro Broadcasting v. FCC, 497 U.S. 547, 567 (1990). That portion of the Court’s holding finding that broadcast diversity was “at the very least” an important interest was unaffected by the Adarand decision.

⁵² U.S. v. Virginia, 518 U.S. at 533.

⁵³ See NOW Foundation, et al, Comments at 12-20; AWRP, Comments at 6; see also infra pp. 14-21 (establishing that the proposed rules would withstand strict scrutiny because they are narrowly tailored to meet the Commission’s compelling interest in broadcast diversity).

⁵⁴ Adarand, 515 U.S. at 227.

⁵⁵ Furthermore, NOW Foundation, et al, support MMTC’s contention that EEO rules are necessary to redress the effects of past discrimination by broadcast licensees. MMTC, Comments at 141 - 154.

1. The proposed rules meet the FCC's compelling interests in non-discrimination and program diversity

Congress recognized the Commission's compelling interests in non-discrimination and broadcast diversity when it carved out for the Commission the authority to promulgate EEO rules in the first place. The validity of the Commission's interest in these areas has been well-established and is discussed in detail supra pp 2-7.⁵⁶

Haley, Bader and Potts ("HBP") appears to suggest somewhat illogically that because the Commission's broadcast diversity interest was upheld in Metro Broadcasting, using intermediate scrutiny, it cannot withstand strict scrutiny.⁵⁷ In fact, the Court's finding that the governmental interest was "at the very least, an important"⁵⁸ one makes clear that the Court limited its analysis to intermediate scrutiny. Moreover, by finding the interest "at the very least" important, the Court signaled that broadcast diversity likely meets the compelling interest standard.

HBP also argues that the Commission has failed to define "diversity" and alternately, that diversity exists.⁵⁹ HBP mistakenly equates an increase in the total number of stations with diversity, suggesting that what it terms "the proliferation of media services" is enough to ensure diverse programming. This argument overlooks the extent to which diversity has decreased even

⁵⁶ Because it is well-settled that non-discrimination is a compelling governmental interest, NOW Foundation, et al. need not go into detail here. See Adarand, 515 U.S. at 237 (dispelling "the notion that strict scrutiny is strict in theory but fatal in fact" and finding that "government is not disqualified from acting in response to" the "lingering effects of racial discrimination." citations omitted).

⁵⁷ See ACLJ, Comments at 8; HBP, Comments at 5.

⁵⁸ Metro Broadcasting, 497 U.S. at 567 (1990).

⁵⁹ HBP, Comments at 7-9 & 13-14. HBP does not define the sort of diversity that it claims exists, other than to point to the expanding number of stations.

as the number of broadcast stations has increased.⁶⁰ In reality, with the increase in stations came a decrease in the total number of broadcasters, in particular minority broadcasters,⁶¹ and a simultaneous reduction in the variety of “voices” available to the public.⁶²

Finally, none of the commenters makes a case for why the proposed rules should fail the compelling interest test of strict scrutiny. In her plurality opinion in Croson, Justice O’Connor rejected the distinction between benign and invidious discrimination on the basis that the purpose of strict scrutiny was to “smoke-out” all illegitimate uses of race. It is significant that none of the commenters, even those most resistant to the proposed rules, identifies any illegitimacy in the goals of broadcast diversity and broader representation of women and minorities in broadcasting and cable. In fact, most of the commenters begin their comments by declaring their commitment to the spirit of EEO.⁶³ In the only explicit challenge to the legitimacy of the Commission’s goals, TAB and HBP argue that the promotion of diversity is somehow divisive and that

⁶⁰ See, e.g., UCC, et al., Reply Comments, Implementation of Section 309(j) of the Communications Act, MM Docket No. 97-234, at 4, 8-9 (citing Kofi Asiedu Ofori, et al., Blackout? Media Ownership Concentration and the Future of Black Radio. Impacts of the Telecommunications Act of 1996 (1998) and NTIA, Minority Commercial Broadcast Ownership in the United States (1998)).

⁶¹ See The Minority Telecommunications Development Program, National Telecommunications and Information Administration, U.S. Dept. of Commerce, Minority Commercial Broadcast Ownership in the United States (1998) (visited Nov. 4, 1998) <<http://www.ntia.doc.gov/opadhome/minown98/98/black.htm>>.

⁶² Indeed, one explanation for the recent increase in the number of low-power, pirate radio stations is that they fill a need created by the reduction in programming diversity.

⁶³ See, e.g., NAB, Comments at 1; EPP, Comments at i; Texas Association of Broadcasters, Comments at 2; TWC, Comments at 2; Ameritech New Media, Inc. (“Ameritech”), Comments at 1.

somehow divisive and that acknowledging difference may be harmful.⁶⁴ This argument entirely overlooks not only the clear case law but also the demonstrated, documented harm resulting from the lack of broadcast diversity.⁶⁵

2. The proposed rules are narrowly tailored

The proposed rules are narrowly tailored to meet the Commission's compelling interests in non-discrimination and programming diversity, and unnecessarily narrowly tailored with regard to gender. First, the rules are fashioned to address the Commission's interest as directly as possible; the use of EEO programs to promote non-discrimination is well-documented, and the nexus between diversity of employment and diversity of programming is well-established.⁶⁶ Second, they satisfy the factors laid out by Justice Powell in his concurrence in Fullilove v. Klutznick⁶⁷ for justifying a governmental action as narrowly tailored.

In their initial comments, NOW Foundation, et al. provided detailed evidence, both empirical and anecdotal to support the Commission's understanding of the nexus between diversity of employment and broadcast diversity.⁶⁸ That demonstrated nexus was further supported by comments filed on behalf of UCC, AWRT and the National Hispanic Foundation

⁶⁴ See TAB, Comments at 7; HBP, Comments at 5-10.

⁶⁵ See NOW Foundation, et al., Comments at 14-17 (citing numerous studies documenting the damage to perceptions of self and others, especially among children, caused by a lack of programming diversity and the resulting perpetuation of gender and racial stereotypes).

⁶⁶ As noted above, supra n. 56, because the interest in non-discrimination is almost universally accepted, our comments will focus on the Commission's interest in programming diversity.

⁶⁷ See Fullilove v. Klutznick, 448 U.S. 448 (1980).

⁶⁸ See NOW Foundation, et al., Comments 7-17.

for the Arts (“NHFA”).⁶⁹ In particular, AWRT provides detailed statistical analysis of the effects of women in decision-making positions on the programming produced by broadcasters.⁷⁰ NHFA provides the testimony of Nely Galán, President of Telemundo Network Group, who cites numerous examples of employment of women and Latinos influencing the amount and quality of programming for women and Latinos generally.⁷¹ All three organizations share NOW Foundation, et al.’s belief that employees at all levels have the power to influence programming.

A number of commenters, in particular, HBP and 46 Named State Broadcasters’ Associations, deny any nexus between employment diversity and diversity of programming.⁷² HBP declares that a survey of its clients revealed not one broadcaster who knew of a programming decision influenced by an employee’s race or sex.⁷³ Such a claim flies in the face of the actual evidence presented by NOW Foundation, et al. and others in response to the NPRM.⁷⁴

In order to determine whether or not governmental action is “narrowly tailored” to the extent required by strict scrutiny, courts typically look to a handful of factors, first outlined by

⁶⁹ See UCC, Comments at 14; AWRT, Comments at 6-7; NHFA at Appendix A.

⁷⁰ See AWRT, Comments at Appendix.

⁷¹ See NHFA, Comments at Appendix A.

⁷² See, e.g. HBP, Comments at 19; 46 Named State Broadcasters’ Associations at 14.

⁷³ HBP, Comments at 19.

⁷⁴ See NOW Foundation, et al., Comments at 14-20; MMTC, Comments, Volumes III and IV (detailing the experiences of witnesses as to the effectiveness of and need for EEO rules). The personal accounts of MMTC’s numerous witnesses clearly refute the claims of HBP’s clients.

Justice Powell in Fullilove v. Klutznick.⁷⁵ Courts inquire 1) whether other, neutral measures, might be as effective; 2) whether the proposed action is temporary and reviewable; 3) whether the program is flexible; and 4) whether and to what extent the program impacts those potentially burdened by it.⁷⁶

First, there is, by definition, no more neutral way to achieve the Commission's goals. Left to their own devices, broadcasters excluded women and minorities from employment and failed adequately to represent their viewpoints in programming.⁷⁷ With EEO rules in place, the percentage of women in broadcasting nearly doubled and the percentage of minorities more than doubled between 1971 and 1997.⁷⁸ By extension, under the EEO rules, the Commission has seen a corresponding, steady increase in programming that considers the viewpoints of women and minorities.⁷⁹

Second, the record-keeping requirement is specifically designed to allow the Commission to review the success of its EEO rules and policies. Without such a program in place, it would be impossible to measure the impact of the rules on the Commission's goals. Again, NOW Foundation, et al. express their concern that the proposed rules should include official notice of

⁷⁵ Fullilove v. Klutznick, 448 U.S. 448 (1980).

⁷⁶ Id. at 510-516 (Powell, J., concurring).

⁷⁷ See NOW Foundation, et al. Comments at 14-17.

⁷⁸ See Elizabeth A. Rathburn, Woman's Work Still Excludes Top Jobs, Broadcasting and Cable, Aug. 3, 1998, at 22-24. In 1971, after just two years of EEO rules, women were 23.3% of the full-time employees in broadcasting (radio and television); minorities represented 9.1%. By 1997, those numbers had increased to 40.8% and 19% respectively. Id.

⁷⁹ See NOW Foundation, et al., Comments at 17-20.

the vast presence of women in the workforce to ensure that the rules yield genuine employment benefits. Reviewable records also allow for the possibility that the Commission will determine some time in the future that the rules have served their intended purpose and ought to be “sunset.”⁸⁰

Third, the proposed plan is flexible in that it exempts the smallest broadcasters from coverage. NOW Foundation, et al. also believe that the Commission should make the rules still more flexible by providing broadcasters a menu of options from which to choose in developing their recruitment strategies.⁸¹ Such a plan would allow for flexibility, while ensuring that broadcasters comply with EEO rules and policies.

Fourth, the impact on those potentially burdened is nearly non-existent. White, male job applicants have no valid claim that they are burdened merely by being forced to compete with a wider pool of qualified applicants.⁸² Not a single applicant will lose an interview, much less a job, by virtue of sex or race, under the proposed rules. In fact, the chances of white males discovering a job opening will actually be increased by the introduction of broader recruitment strategies.

A number of commenters claim that the proposed rules place too heavy a burden on broadcasters by requiring them to keep records.⁸³ Most of the commenters who refer to a burden

⁸⁰ See Cole, Raywid, and Braverman (“CRB”), Comments at 9-11; NAB, Comments at 31 (proposing that the FCC establish criteria for “sunsetting” the EEO provisions).

⁸¹ See NOW Foundation, et al., Comments at 24-27.

⁸² See Duffy v. Wolle, 123 F.3d at 1039 (8th Cir. 1997).

⁸³ See, e.g. TAB, Comments at 4-5.

do so without providing any specific evidence. VAB, however, cites a study concluding that broadcaster's spend an average of 165 person-hours a year on EEO issues.⁸⁴ In other words, the only "burden" cited by VAB amounts to less than ten percent of one employee's annual activities. At stations with ten or more employees, complying with the EEO rules would consume less than one percent of total time worked.⁸⁵ Surely, this requirement does not amount to the sort of burdensomeness that broadcasters must demonstrate in order to challenge the rules on these grounds.⁸⁶

In addition, the 46 Named State Broadcasters' Associations complain that the requirement that broadcasters avoid selection techniques that have the effect of discriminating against women and minorities is particularly burdensome.⁸⁷ Their only support for this contention consists of pointing to the "pressure" to engage in race conscious hiring already addressed by the Commission.⁸⁸

D. The Proposed EEO Regulations Do Not Violate The Establishment Clause Or The Free Exercise Clause Of The First Amendment

Allegations that the proposed EEO rules violate the religious freedom clauses of the First Amendment are not valid. Some religious commenters question both the constitutionality of the

⁸⁴ VAB, Comments at 8.

⁸⁵ Approximately half of all broadcast stations would fall into this category. *See infra* pp. 34-35.

⁸⁶ *See UCC v. FCC*, 560 F.2d. 529, 532 (2nd Cir. 1977) (finding that the Commission required reasoned justification to alter its EEO policies).

⁸⁷ *See* 46 Named State Broadcasters' Associations, Comments at 12.

⁸⁸ *See* NPRM ¶49.

proposed definition of “religious broadcaster”⁸⁹ and EEO recruitment in general. These arguments are unpersuasive.

The Commission's proposed definition of “religious broadcaster” is sufficiently broad. Some religious broadcasters argue that the Commission’s definition is too narrow and question the constitutionality of its application. These commenters fear that an underinclusive definition will foreclose religious broadcaster status to many broadcasters.⁹⁰ However, the Commission states that even if a religious broadcaster lacks one or more of the characteristics enumerated in the definition, they would not be precluded from obtaining this special status.⁹¹ Moreover, the Commission notes that its list of characteristics is not exhaustive. Thus, the proposed definition is sweeping enough to encompass all religious broadcasters.

⁸⁹ The Commission proposes to adopt the broad definition of “religious broadcaster” outlined in Streamlining Broadcast EEO Rule and Policies (“Order and Policy Statement”). See NPRM ¶71 (citing 13 FCC Rcd 6322 (1998)). The NPRM states:

We will define a ‘religious broadcaster’ as a licensee which is, or is closely affiliated with, a church, synagogue, or other religious entity, including a subsidiary of such an entity. Our determination as to whether a licensee is a ‘religious broadcaster’ will be made on a case-by-case analysis, based upon an evaluation of the religious entity’s characteristics. The relevant characteristics will include, among other things, whether the entity is operated for profit or non-profit, the existence of a distinct religious history, and whether the entity’s articles of incorporation mention any religious purpose.

⁹⁰ Christian Legal Society’s Center for Law and Religious Freedom, Concerned Women for America, and Focus on the Family (“CLSC”) Comments at 2-6, 17-29; Church State Council of Seventh-day Adventists (“CSCSA”) Comments at 1; National Religious Broadcasters (“NRB”) Comments at 1-9; Good News Radio (“GNR”) Comments at 4-8.

⁹¹ The Commission plans to designate “religious broadcaster” status on a case-by-case basis. The Commission will look for certain characteristics “*among other things*,” to determine “religious broadcaster” status. See NPRM ¶71.

Furthermore, proposals to redefine “religious broadcaster” are unworkable and should be rejected. For example, defining “religious broadcaster” through the existence of religious programming⁹² or mission statements based on sincerely held religious beliefs⁹³ would create administrative difficulties. Such proposals would require the Commission to evaluate the content of programs and the depth of religious convictions. Clearly, the Commission should employ more objective criteria to avoid First Amendment infirmities and to ensure uniform enforcement.⁹⁴

Additionally, adopting proposals to expand further the definition of “religious broadcaster” would undermine EEO enforcement. CLSC propose adopting a broader definition of “religious broadcaster” because non-religious entities have no incentives to attain “religious broadcaster” status.⁹⁵ However, if “religious broadcaster” is defined too broadly, secular broadcasters may claim the special status to evade EEO regulations.⁹⁶ The Commission must ensure that only true religious entities obtain preferential status.

In addition to opposing the proposed definition of “religious broadcaster,” some religious commenters also argue that the definition and the EEO rules in general violate the Establishment

⁹² See CLSC, Comments at 3; NRB, Comments at 6.

⁹³ See GNR, Comments at 6.

⁹⁴ See *infra* p. 26.

⁹⁵ See CLSC, Comments at 4. See also NRB, Comments at 6 (proposing that broadcasters be designated “religious broadcasters” if purpose in the articles of incorporation is religious).

⁹⁶ Secular stations may assert some religious belief and argue that the pool of religious adherents is so small that recruitment of women and minorities is impossible.

Clause. NOW Foundation, et al. maintain that the Commission's approach is consistent with the First Amendment. The NPRM states:

Religious broadcasters who establish religious affiliation as a bona fide occupational qualification for any job position would not be required to comply with specific recruitment requirements for that position, but would be expected to make reasonable good faith efforts to recruit minorities and women who are qualified on the basis of their religious affiliation.⁹⁷

NOW Foundation, et al. assume the Commission will require religious broadcasters to comply with the same requirements as secular broadcasters, except that religious broadcasters may discriminate based on religion.

While NOW Foundation, et al. believe that the FCC's approach is Constitutional, the American Center for Law & Justice ("ACLJ"), NRB, and CLSC argue that application of the "religious broadcaster" definition will result in the preference or endorsement of some religions over others⁹⁸ and may result in "excessive government entanglement" in religion.⁹⁹ Furthermore, ACLJ asserts that monitoring for EEO compliance also results in "excessive government entanglement."¹⁰⁰ Additionally, ACLJ and CLSC argue that both regulations violate the Free Exercise Clause by interfering with church governance.¹⁰¹

⁹⁷ See NPRM ¶71.

⁹⁸ See ACLJ, Comments at 12-18; NRB, Comments at 4 n. 7; CLSC, Comments at 17-22.

⁹⁹ See ACLJ, Comments at 12-18; CLSC, Comments at 25-29.

¹⁰⁰ See ACLJ, Comments at 12-18.

¹⁰¹ See ACLJ, Comments at 18-20; CLSC, Comments at 21.

ACLJ and CLSC comments are based on incomplete assessments of current law. NOW Foundation, et al. strongly urge the Commission to implement the EEO regulations proposed in the NPRM. Such regulations can sustain religious freedom challenges.

1. The Commission's EEO rules do not violate the Establishment Clause of the First Amendment

The proposed EEO rules meet the Establishment Clause requirements set forth in Lemon v. Kurtzman.¹⁰² In Lemon, the Supreme Court held that government actions comport with the Establishment Clause if the action (1) has a clearly secular purpose; (2) has a primary effect that neither advances nor inhibits religion; and (3) avoids excessive government entanglement with religion.¹⁰³ Both the EEO recruitment regulations and the "religious broadcaster" definition pass the test enunciated in Lemon.

First, EEO recruitment and the "religious broadcaster" definition have secular purposes. EEO recruitment was designed to promote diversity in broadcasting and to prevent discrimination, and granting "religious broadcaster" status assists religious broadcasters in meeting such secular goals in accordance with their religious beliefs. ACLJ, NRB, and CLSC do not refute the secular purpose of these government regulations.

Second, mandating compliance with the EEO regulations and designating some religious entities "religious broadcasters" do not have the "primary effect" of advancing or inhibiting religion. A law does not violate the Establishment Clause merely because it benefits or burdens

¹⁰² See Lemon v. Kurtzman, 403 U.S. 602 (1971).

¹⁰³ See id. at 612-613.

religious institutions in some way.¹⁰⁴ Courts have held that “central to the primary effect inquiry is whether a reasonable observer would interpret the government action to be religion-preferential.”¹⁰⁵ Moreover, the courts have found that “there is little danger of such a perception if a law applies to a broad range of entities, both religious and secular.”¹⁰⁶ A reasonable observer would not view EEO recruitment as inhibiting religion because both secular and religious broadcasters must comply with the regulations to meet public interest obligations; religious broadcasters are not specifically targeted for regulation.¹⁰⁷

In addition, designating some broadcasters as “religious broadcasters” will not have the “primary effect” of advancing or inhibiting religion. In Parker v. Commission of Internal Revenue, the court upheld an IRS decision to deny a tax exemption to a religious corporation, finding that “as long as the exemptions are denied by the Commissioner on a non-discriminatory basis using specific and reasonable guidelines and without inquiry into the merits of the particular religious doctrine,” withholding the exemption is constitutional.¹⁰⁸ Parker supports the Commission’s authority to differentiate among religious entities for the purpose of designating “religious broadcaster” status. Like the exemption in Parker, the definition of “religious

¹⁰⁴ See id. (citing Widmar v. Vincent, 454 U.S. 263, 273-274 (1981)).

¹⁰⁵ Turner Broadcasting v. FCC, 819 F. Supp. 32, 47 (D.C. Cir. 1993) (citing County of Allegheny v. ACLU, 492 U.S. 573, 592-593 (1989)), cert. granted, 512 U.S. 622 (1994) (vacating the District Court only on other grounds).

¹⁰⁶ Id. (citing Widmar v. Vincent, 454 U.S. 263, 274 (1981)).

¹⁰⁷ Furthermore, in Scott v. Rosenberg, the court upheld the Commission’s authority to regulate religious broadcasters in the same manner as other broadcasters. See 702 F.2d 1263, 1272 (9th Cir. 1983) cert. denied, 465 U.S. 1078 (1984).

¹⁰⁸ See 365 F.2d 797, 795 (8th Cir. 1966), cert. denied, 385 U.S. 1026 (1967).

broadcaster” is based on reasonable and well established criteria and does not involve inquiries into religious doctrines.¹⁰⁹ Thus, even if the Commission’s definition grants only some broadcasters “religious broadcaster” status, the second prong of Lemon is not violated.

Third, contrary to ACLJ and CLSC’s assertions,¹¹⁰ the EEO rules avoid “excessive government entanglement” in religion. The Court has long recognized that interaction between church and state is inevitable; courts have always tolerated some involvement between the two.¹¹¹ Regulatory interaction which involves no inquiries into religious doctrine creates no Establishment Clause infirmity.¹¹² While ensuring that religious broadcasters maintain their designated status may involve government inquiries into how a religion is organized,¹¹³ it will not entail inquiries into religious doctrine.

Similarly, measures to enforce EEO compliance through self-assessment, recordkeeping and audits¹¹⁴ would also not require excessive government entanglement. Case law indicates that the Supreme Court has held significant government monitoring of religious institutions

¹⁰⁹ See Order and Policy Statement ¶7.

¹¹⁰ See ACLJ Comments at 18-20; CLSC Comments at 21. Notably, ACLJ relies heavily on Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) to assert that religious institutions must be free from government interference. However, the government interference held unconstitutional in Amos prohibited a religious institution from making employment decisions based on religious affiliation. The present EEO recruitment regulations *allow* for religious affiliation to be used as a job qualification. Thus, Amos is inapplicable to the proposed EEO rules.

¹¹¹ See Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

¹¹² See id.

¹¹³ See NPRM ¶71.

¹¹⁴ See NPRM ¶¶72-74.

constitutional. For example, in Bowen v. Kendrick, the Court held that the government could monitor religious organizations that received federal grants by reviewing the programs run by the grantees, the educational materials the grantee proposed to use, and the program clinics. According to the Court, such monitoring did not rise to the level of excessive government entanglement.¹¹⁵ Also, in Jimmy Swaggart Ministries v. Board of Equalization of CA, that Court held that administrative and recordkeeping requirements which subjected a religious institution to on-site inspections, on-site audits, and examinations of the institution's books and records did not rise to the level of excessive government entanglement.¹¹⁶ Additionally, in Agostini v. Felton the Court found that unannounced, monthly visits by government employees to religious institutions did not violate the Establishment Clause.¹¹⁷ The proposed methods for monitoring EEO compliance are less intrusive than those declared constitutional in Bowen, Jimmy Swaggart, and Agostini. Thus, the third prong of Lemon is not violated.

In sum, the EEO rules at issue comport with the Establishment Clause of the First Amendment. ACLJ, NRB, and CLSC attempts to find the Commission's regulations unconstitutional are misguided.

¹¹⁵ See 487 U.S. 589, 615-617 (1988).

¹¹⁶ See 493 U.S. 378, 394-395 (1990) (upholding tax on a religious organization that sold religious books, tapes, records, and merchandise).

¹¹⁷ See 138 L.Ed. 2d 391, 421, 521 U.S. 203 (1997) (reversing Aguilar v. Felton, 473 U.S. 411 (1985) under Fed. R. Civ. Pro. 60(b)(5) based on changes in factual conditions and law).

2. The Commission's EEO rules do not violate the Free Exercise Clause of the First Amendment

ACLJ and CLSC incorrectly assert that the EEO rules violate the Free Exercise Clause. They argue that the Commission's rules defining "religious broadcaster" and mandating compliance with EEO recruitment interfere with church governance.¹¹⁸ ACLJ also argues that the federal EEO regulations are subject to the compelling interest test under the Religious Freedom of Restoration Act ("RFRA")¹¹⁹ and that the EEO regulations will fail such a test.¹²⁰

NOW Foundation, et al. maintain that the EEO rules do not violate the Free Exercise Clause. The standard of review applicable to the EEO rules is dictated by Employment Division, Dept. of Human Resources of Oregon v. Smith.¹²¹ RFRA is not applicable because Boerne v. Flores held the statute wholly unconstitutional.¹²² Additionally, should the compelling interest test under RFRA apply, the EEO proposals would pass such a test.

ACLJ argues that RFRA controls the constitutional fate of federal laws of general applicability.¹²³ ACLJ argues that Flores held RFRA unconstitutional only as to state laws of

¹¹⁸ See ACLJ, Comments at 12-18; CLSC, Comments at 22-25.

¹¹⁹ See 42 U.S.C. §§2000bb, et seq.

¹²⁰ ACLJ, Comments at 18-20. See also NRB, Comments at 4 n.8.

¹²¹ See 494 U.S. 872 (1990).

¹²² Since Flores, some jurisdictions have held that RFRA is unconstitutional as to both state and federal laws of general applicability. See U.S. v. Sandia, 6 F. Supp 2d 1278, 1280-1281 (N.M. 1997) (rejecting defendant's use of RFRA as a defense to alleged violations of several federal wildlife protection acts); Clay v. Rodriguez, 220 B.R. 31, 36-37 (W.D. La. 1998) (holding that RFRA has no bearing on the constitutionality of a federal bankruptcy law).

¹²³ See 42 U.S.C. §2000bb et seq.

general applicability and thus, the compelling interest test set forth in RFRA §2000bb continues to apply to federal law. However, ACLJ cannot make this blanket assertion. While one case, In re Bruce Young, supports ACLJ's position, Young erroneously concluded that the Supreme Court in Flores was silent on the constitutionality of RFRA as to federal laws of general applicability.¹²⁴

In fact, Flores spoke to the constitutionality of RFRA as applied to both state and federal laws of general applicability by declaring RFRA unconstitutional on two levels. The Court found: (1) in applying RFRA to state governments, Congress exceeded its powers in §5 of the Fourteenth Amendment, and (2) RFRA violates the separation of powers principles of the Constitution.¹²⁵ According to the Flores Court, Congress violated the separation of powers doctrine when enacting RFRA by invading the province of the Judicial Branch. The Court stated:

When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is...When the political branches of the Government act against the background of a judicial interpretation of the Constitution...it must be understood that....the Court will treat its precedents with the respect due them...and contrary expectations must be disappointed. RFRA was designed to control cases and controversies...but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.¹²⁶

¹²⁴ See 141 F.3d 854, 858 (8th Cir. 1998), cert. denied, 142 L.Ed 2d 119, 119 S.Ct 43 (1998) (stating "the Flores Court did not reach any decision as to the constitutionality of RFRA as applied to federal law").

¹²⁵ See 521 U.S. 507 (1997); U.S. v. Sandia, 6 F. Supp 2d 1278, 1280 (N.M. 1997).

¹²⁶ Boerne v. Flores, 138 L.Ed. 2d 624, 649, 521 U.S. 507 (1997).

Thus, Flores stands, in part, for the proposition that Congress impermissibly crossed into the judiciary's Article III jurisdiction when enacting RFRA.¹²⁷ As a result, the proposed federal EEO rules are not controlled by RFRA.

The proper standard of review for laws of general applicability is enunciated in Smith. The Supreme Court in Smith stated, "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."¹²⁸ Under Smith, if prohibiting the exercise of religion is not the *object* of a valid generally applicable law, but merely the incidental effect, the First Amendment is not offended.¹²⁹ The EEO rules as applied to religious broadcasters are laws of general applicability; both secular and religious broadcasters must comply with the EEO regulations. Like the housing laws upheld in Thomas v. Anchorage Equal Rights Commission, the EEO regulations in question do not selectively impose burdens on religiously motivated conduct in an attempt to target or suppress religious exercise.¹³⁰

¹²⁷ See U.S. v. Sandia, 6 F. Supp 2d 1278, 1280 (N.M. 1997).

¹²⁸ Employment Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 879 (1990) (citing United States v. Lee, 455 U.S. 252, 263, n. 3 (1982)), cert. denied, 453 U.S. 912 (1981). See also Scott v. Rosenberg, 702 F.2d 1263, 1272 (9th Cir. 1983) cert. denied, 465 U.S. 1078 (1984) (upholding the Commission's right to regulate religious broadcasters in the same manner as other broadcasters).

¹²⁹ See id. at 878. See generally Equal Employment Opportunity Commission v. Mississippi College, 626 F.2d 477, 488 (5th Cir. 1980) (citing Wisconsin v. Yoder, 406 U.S. 205 (1963) which applies a compelling interest test to laws that are not generally applicable).

¹³⁰ See Thomas v. Anchorage Equal Rights Commission, 165 F.3d 692, 701-702 (9th Cir. 1999) (citing Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 543 (1993) and relying on Smith to find Alaska housing laws that prohibited apartment owners from refusing to rent to unmarried couples were laws of general applicability).

The purpose of the EEO rules is to promote diversity in broadcasting and anti-discrimination. Clearly, the object of the “religious broadcaster” designation and EEO recruitment is not to prohibit religion, and any burden on religiously motivated conduct is incidental.

While NRB asserts that the proposed rule defining “religious broadcaster” is not generally applicable because it specifically addresses religious beliefs and practices, NRB misinterprets the definition of generally applicable laws. While the proposed rule aims to designate “religious broadcasters,” it is generally applied to *all* licensees to determine their religious or secular status; any licensee may seek “religious broadcaster” status. Furthermore, the Commission differentiates between religious and secular broadcasters to *accommodate* religious entities who want to use religious affiliation as a job qualification, not to burden religious broadcasters.

However, should RFRA, not Smith, dictate the standard of review for federal laws of general applicability, the EEO proposals would pass a compelling interest test. RFRA requires the government to demonstrate that a compelling interest justifies the regulation and that the agency has employed the least restrictive means to further that interest.¹³¹ The rule defining “religious broadcaster” furthers a compelling interest. It protects the First Amendment interests of religious broadcasters by allowing broadcasters who qualify for “religious broadcaster” status to use religious affiliation as a job qualification. Additionally, the Commission has employed the

¹³¹ See 42 U.S.C. §§2000bb(a)(3) and 2000bb(b)(1).

least restrictive means to further this interest. “Religious broadcaster” is broadly defined so that all legitimate religious entities can claim “religious broadcaster” status.¹³²

The EEO recruitment regulations also pass a compelling interest test. As discussed above, the EEO rules promote broadcast diversity and prevent discrimination¹³³ and achieve those ends through the least restrictive means.¹³⁴ The EEO regulations even accommodate religious broadcasters by permitting them to use religious affiliation as a job qualification to recruit women and minorities.

The EEO rules comport with the Free Exercise Clause set forth in Smith. Smith dictates the standard of review for laws of general applicability because Flores declared RFRA unconstitutional. Thus, arguments to abandon the EEO rules on the grounds of Free Exercise violations must be rejected.

III. The Commission Should Reject Proposals That Would Undermine The Effectiveness Of The Proposed Rules

Several commenters suggest modifying the rules proposed in the NPRM.¹³⁵ However, implementing their suggested changes would minimize the effectiveness of the proposed rules by: (1) exempting more stations and systems from EEO regulations or (2) lowering the standard

¹³² Further broadening the definition of “religious broadcaster” or allowing broadcasters to self-identify would impede the effectiveness of the EEO regulations. See supra pp. 21-23.

¹³³ See supra pp. 2-7, 15-17.

¹³⁴ See supra pp. 17-21.

¹³⁵ See generally VAB, Comments; Small Cable Business Association (“Small Cable”), Comments; APTS, Comments; NAB, Comments; and 46 Named State Broadcasters’ Associations, Comments.

for compliance altogether. The Commission should reject all proposals that would undermine the proposed rules' efficacy and scope.

A. The Commission Should Not Expand The Number Of Entities Exempt From EEO Rules

The Commission should not adopt any proposal that would broaden the category of exempt entities¹³⁶ because doing so would severely inhibit the Commission's attainment of its goals of promoting diverse programming and preventing discrimination. As NOW Foundation, et al. stated in their initial comments, the FCC should not streamline the EEO requirements in this way because it would allow a large number of broadcast and cable providers to operate without any obligation to recruit in an open and equal manner.¹³⁷ Enlarging the scope of exemptions would prevent the FCC from discovering possible discriminatory treatment in recruitment and hiring. AWRP agrees, stating in their comments that "the void created by failing to collect data from such a large proportion of stations is serious."¹³⁸

The same objections made to earlier attempts to exempt additional stations from EEO compliance still apply today. In 1977, the Court in UCC v. FCC¹³⁹ rejected the FCC's plans to increase the number of stations exempt from EEO rules from those stations with five or fewer employees to stations with ten or fewer employees. The Court noted that such a policy change

¹³⁶ See Small Cable, Comments at 8; VAB, Comments at 14 (asking for total exemptions for stations employing fewer than twenty-five people). See also APFS, Comments at 7-8 (seeking a similar exemption for public broadcasters).

¹³⁷ See NOW Foundation, et al., Comments at 28.

¹³⁸ AWRP, Comments at 10.

¹³⁹ 560 F.2d 529 (2d. Cir. 1977).

would have more than doubled the number of exempted stations from 21.3% to 54%.¹⁴⁰

Expanding the exemption today would yield similar unfavorable results. Data from the Commission's 1994 Broadcast Annual Employment revealed that there were 2,445 full-service broadcast stations which employ between five and ten persons.¹⁴¹ If that number were combined with the number of broadcasters with fewer than five employees, who are already exempt from the rules, half of all broadcasters would not have to comply with any form of equal employment regulation.

Broadening the EEO exemption not only reduces the reach of the EEO rules but also adversely impacts employment diversity at larger stations. NOW Foundation, *et al.* agree with AWRP and MMTC who assert that imposing recruitment obligations on smaller stations and cable systems is crucial because these stations are the training grounds for larger stations.¹⁴² Both the Courts and the Commission have recognized this fact. In *UCC v. FCC*, the court cited a study indicating that stations with fewer than ten employees control 15.1% of the jobs in the industry and afford 32% of the job opportunities, including 41.7% of the entry level positions.¹⁴³ A year earlier, the Commission acknowledged that, "it is vitally important to have the full

¹⁴⁰ *Id.* at 535.

¹⁴¹ See *Streamlining Broadcast EEO Rules and Policies*, MM Docket No. 96-16 at footnote 35. See also AFTRA, Comments at 4.

¹⁴² See AWRP, Comments at 10 (stating that "smaller stations and smaller markets may not offer high salaries or prime market access, but they can offer experience and training essential to breaking into the business."). See MMTC, Comments at 187 (citing a study which found that "the positions available at smaller stations tend to be the very positions which are essential to the entry of previously excluded groups such as minorities and women.").

¹⁴³ *UCC v. FCC*, 560 F.2d at 535.

participation of the small stations as well as the large because it is natural that the smaller stations serve as a training ground for aspirants in this industry.”¹⁴⁴

Over the years, the Commission has continually reaffirmed its belief in the importance of small stations for mass media employment. In 1987, the Commission decided against expanding the exemption to stations with more than five employees because it “recognize[d] that small broadcast stations often offer opportunities for entry by women and minorities to employment and careers in the broadcast field.”¹⁴⁵ More recently, in 1996, the Commission reached a similar conclusion, stating that it could not “underestimate the importance of ‘small’ stations for minority and female applicants initial entry into the communications industry.”¹⁴⁶

Other commenters share the Commission’s views. As MMTC states, “when minorities and women are denied a meaningful opportunity to enter this small-to-large station pipeline, the larger stations will inevitably be forced to hire from relatively less diverse pools of experienced persons.”¹⁴⁷ Because small stations and systems are the doors to employment in mass media, they must be required to adhere to the EEO rules.

¹⁴⁴ See Separate Statement of Commissioner Benjamin L. Hooks, Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees, 60 FCC Rcd 226, 257 (1976).

¹⁴⁵ See Equal Employment Opportunity in the Broadcast Radio and Television Services, 2 FCC Rcd 3967, 3970 (1987).

¹⁴⁶ See also Separate Statement of Commissioner Andrew C. Barrett, Streamlining Broadcast EEO Rules and Policies, Order and NPRM, 11 FCC Rcd. 5154, 5171 (1996).

¹⁴⁷ See MMTC, Comments at 191. See also AFTRA, Comments, in, Streamlining Broadcast EEO Rule and Policies, MM Docket No. 96-16, at 5 (attached to comments filed in this proceeding) (stating, “any relaxation of the current EEO requirements at small stations will harm minorities and women when they try to get a start in the broadcasting business and will make an already difficult climb nearly impossible.”).

B. Commenters Have Not Provided Sufficient Justification For Expanding the Exemptions From EEO Rules

As NOW Foundation, et al. stated in their initial comments, UCC v. FCC prohibits the Commission from increasing the number of exempted entities without reasoned justification.¹⁴⁸ Some commenters suggest that small entities or entities already subject to other governmental regulations should be exempt from the Commission's EEO rules. None of these commenters comes close to providing the Commission with the justification it would need to adopt their proposals.

While some commenters claim that smaller operations warrant exemption because of their limited administrative resources,¹⁴⁹ they offer no evidence or specific examples of these stations' perceived burden. For example, VAB concludes that the relaxation of local broadcast station ownership limits qualifies broadcasters employing twenty-five or fewer as "small stations,"¹⁵⁰ and that as a result, these stations should not have to comply with EEO rules. However, simply stating that broadcast stations or cable systems of a certain size are more susceptible to burdens is insufficient to warrant an exemption from the rules. Thus, the Commission should reject Small Cable and VAB's proposals.

¹⁴⁸ See NOW Foundation, et al. (citing UCC v. FCC, 560 F.2d at 532).

¹⁴⁹ See Small Cable, Comments at 3; VAB, Comments at 14 (seeking regulatory EEO exemption for stations with twenty-five or fewer employees).

¹⁵⁰ See VAB, Comments at 15.

Similarly, the Commission should also reject proposals from commenters who request exemptions for stations already subject to EEO regulation from other entities.¹⁵¹ APTS, for example, states that two-thirds of public television stations are affiliated with either local or state governmental entities or universities and urges the Commission to waive EEO requirements for such stations because they already must comply with local, state or university regulations.¹⁵² The Commission should not adopt this proposal, both because it lacks the statutory authority to take such an action and because granting such exemptions would have a negative impact on broadcast diversity. The rules of the FCC and other regulating entities may differ substantially in terms of their goals, procedures and enforcement; and the other policies may not be an adequate substitute.¹⁵³ A uniform national policy is preferred because such a standard would ensure that all job applicants will be made aware of employment opportunities regardless of where they are job hunting or whether they are seeking a job with a commercial or non-commercial station.

Commenters requesting that the Commission expand the types of exemptions available offer conflicting reasons for their requests. Some argue the need for exemption because turnover is rare,¹⁵⁴ while others base the need for exemption on a high turnover rate.¹⁵⁵ Whether small

¹⁵¹ See *infra* pp. 40-42 (discussing enforcement by OFCCP); *supra* pp.6-7 (discussing enforcement by EEOC).

¹⁵² See APTS, Comments at 7.

¹⁵³ See *supra* pp 36-38.

¹⁵⁴ APTS, Comments at 5.

¹⁵⁵ See VAB, Comments at 15 (stating that because turnover is frequent, the EEO rules would impede small stations' ability to fill vacancies quickly).

stations have a low or high turnover rate, there remains a need for a strong EEO recruitment policy.

As stated earlier, NOW Foundation, et al. contend that employees in all levels of employment affect diversity of programming. Under the low turnover theory, employees will hold their positions for a long time. Thus, it is vitally important that when a position becomes available, every effort is made to recruit widely to afford a diverse pool of applicants the opportunity to influence programming. Moreover, stations with a low turnover rate should have little problem complying with rules concerning recruitment efforts. Recruitment efforts are necessary only when a position is opened, so completing the EEO paperwork should be a relatively simple process.

Complying with EEO rules may be even more important for a station with a high turnover rate. NOW Foundation, et al. agree with MMTC's comments which state that the high turnover rate at many small stations illustrates that these stations are often a point of entry from which newcomers to the industry advance to larger stations as they develop their careers.¹⁵⁶ Thus, stations with high turnover rates must be required to adhere to EEO rules.

Regardless of whether an entity experiences high or low job turnover, a station should adopt recruitment practices that are appropriate to its own specific situation. To ease compliance, stations could choose among various options for EEO recruitment. For example, VAB recommends that the FCC adopt "an approach that would afford broadcasters greater flexibility

¹⁵⁶ See MMTC, Comments at 187. See also AFTRA, Comments at 3.

to fashion their EEO programs.”¹⁵⁷ They argue that broadcasters could use a wide variety of recruitment efforts which would include “using various recruitment sources, establishing internship programs with high schools, colleges and universities, participating in minority and women focused job fairs, and participating in programs.”¹⁵⁸ NOW Foundation, *et al.* agree that such flexibility would allow broadcasters to fashion their EEO efforts in ways best suited to their particular stations.

C. The Commission Should Reject Proposals That Would Lower The Standard For Compliance With EEO Rules

The Commission should not adopt any proposal for modifying the EEO rules that would lower the standard for compliance and in effect undermine the rules. For example, the Commission should reject proposals such as the one offered by NAB, which are not inclusive and may not respond to the Commission’s diversity and anti-discrimination goals. In addition, Commission should reject proposals employing ineffective recruitment methods. Similarly, proposals which allow cable and broadcast entities the power to craft their own rules also should be rejected because such policies may compromise the goals of the Commission.

1. The FCC should reject the National Association of Broadcasters’ proposal because it is underinclusive and will not satisfy the goals of the Commission

The FCC should not adopt NAB’s proposed EEO rules. Under NAB’s proposal:

stations with five or more full-time employees must certify every two years that they have either: (1) complied with the Office of Federal Contract Compliance Program (“OFCCP”) EEO regulations as a covered federal contractor; or (2) complied with their state broadcaster association’s “Broadcast Careers” program; or (3) complied

¹⁵⁷ See VAB, Comments at 10.

¹⁵⁸ *Id.*

with the NAB's General and/or Specific Outreach Initiatives of the stations's choosing.¹⁵⁹

NAB's proposal is flawed in several respects. In general, NAB's rule is faulty because it applies only to broadcasters. If the FCC were to adopt NAB's rule, it would have to design a separate rule for cable operators and other multi-channel video distributors.¹⁶⁰ Such an approach would be inefficient and cause administrative delays. Also, enforcing different EEO policies would create a burden on the FCC's administrative resources.

Additionally, NAB does not address how many entities fall into each of its three categories and what should be done about broadcasters who are not regulated by the OFCCP and are not members of NAB or any of the state broadcast associations. A broadcaster who falls outside of NAB's proposed rules would have no incentive to make any recruitment efforts. In addition, nothing in NAB's proposal ensures that the state broadcast associations' programs or the NAB initiative would promote broadcast diversity or comply with federal equal protection guarantees.¹⁶¹ Also, because NAB's proposed rule does not encourage uniformity, stations across the country may adhere to different, possibly conflicting equal employment rules. The public will ultimately suffer because inconsistencies in EEO rules could lead to inequities as well. For example, job applicants in a state whose broadcast association requires extensive

¹⁵⁹ See NAB, Comments at 7.

¹⁶⁰ The Commission stated that because its cable EEO rules contain some of the same provisions that the court invalidated in Lutheran Church, it would adopt new rules for cable as well. See NPRM at ¶51.

¹⁶¹ NAB's proposal does not require that broadcasters use sources that specifically target women and minorities, so there is no guarantee that its proposed methods will be effective.

recruitment may have the advantage of being aware of more job openings than job applicants in a state whose broadcast association does not require broad recruitment.

Furthermore, requiring only that broadcasters adhere to OFCCP EEO rules would not meet the goals of the FCC. Unlike the FCC's EEO rules, the OFCCP's rules are not designed to promote diversity of viewpoints. OFCCP's rules focus solely on anti-discrimination,¹⁶² presumably for the purpose of insulating the federal government from discrimination suits. Also, the FCC's enforcement authority comes from its mandate to ensure that broadcasters serve the public interest.¹⁶³ In contrast, OFCCP contractors are not subject to a similar obligation.

2. The Commission should not adopt ineffective recruitment methods proposed by commenters.

Some commenters have proposed recruitment methods which are less effective than the proposed rules, and adopting these proposals would severely handicap the Commission's ability to achieve its diversity and anti-discrimination goals. Specifically, the Commission should reject proposals to rely on word-of-mouth, Internet advertising, and self-designed programs, because these recruitment methods would be less meaningful than those proposed by the Commission.

The Commission should reject Ameritech's contention that word of mouth recruiting should be retained.¹⁶⁴ As AFTRA states in its comments, word of mouth recruiting tends to stifle

¹⁶² Executive Order 11246 requires that every federal contract contain a clause mandating that contractors and subcontractors take "affirmative action" to guard against discrimination. OFCCP requires that each contractor covered by their regulation submit form EEO-1 and a written Affirmative Action Plan within 120 days of the award of the contract.

¹⁶³ 47 U.S.C. § 309.

¹⁶⁴ See Ameritech, Comments at 6.

diversity by drawing applicants almost exclusively from the same backgrounds as current employees. In a homogenous work environment, relying on word-of-mouth recruitment could be problematic because there would be little possibility of finding diverse applicants. While Ameritech may have a diverse pool of employees, not all broadcast and cable entities do, and Ameritech cannot expect the Commission to base national policy on Ameritech's special situation.

NOW Foundation, et al. believe that making employment information available on the Internet and the World Wide Web may be beneficial. NOW Foundation, et al. do not agree, however, that advertising on the Web alone should constitute an entity's entire compliance with the EEO rules. NAB's proposal to encourage members of various state broadcast associations to post job vacancies on the associations' Web pages and to allow the public to post their resumes on the Web page may increase the availability of job information. Additionally, the FCC should heed NAB's suggestion and "take an active role in promoting outreach" by establishing a Web page which links to state association Web pages and NAB's Web page.¹⁶⁵ However, allowing Web recruitment alone to fulfill EEO requirements is discriminatory against those without the resources and ability to access the Internet.¹⁶⁶ The Benton Foundation published a report in 1998

¹⁶⁵ See NAB, Comments at 13.

¹⁶⁶ A 1999 Consumer Federation of America and Consumers Union study found that there was a digital divide and not all households had access to the Net. See THE DIGITAL DIVIDE CONFRONTS THE TELECOMMUNICATIONS ACT OF 1996: Economic Reality Versus Public Policy, The First Triennial Review, (February 1999) In July 1998, NTIA released a study which analyzed telephone and computer penetration and on-line access rates across the United States. See NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, Falling Through the Net II: New Data on the Digital Divide (1998) <<http://www.ntia.org.doc.gov/ntiahome/net2/falling.html>> [hereinafter Digital Divide].

which provides statistical and anecdotal evidence of an ever-increasing technology gap between low income communities and the rest of the nation.¹⁶⁷ Likewise, Digital Divide found that just over half of all upper income households have Internet access and that virtually no one in very low income households have access.¹⁶⁸

While recruitment methods such as advertising by word-of-mouth or on the Web may yield job candidates, they will not guarantee a diverse pool of applicants. Thus, the Commission should reject proposals asking that these methods alone be allowed to satisfy the Commission's EEO goals.

Finally, some commenters ask the Commission to grant stations and cable systems the discretion to develop their own recruitment policies.¹⁶⁹ CRB states that individual cable entities know their local area and referral sources best and thus, should craft their own recruitment

Analyzing data compiled by the Census Bureau, NTIA found a "persisting digital divide" in terms of computer usage. See id. at Sec. III, Highlights.

¹⁶⁷ Communications Policy and Practice, Benton Foundation, LOSING GROUND BIT BY BIT: LOW INCOME COMMUNITIES AND THE INFORMATION AGE (1998) <<http://www.benton.org/Library/Low-Income>>.

¹⁶⁸ See Digital Divide, supra note 166, at 25. The Digital Divide report also found that income greatly affects on-line access: 49.2% of Americans earning over \$75,000 and 32.4% of those earning between \$50,000 and \$74,999 had on-line access compared to just 7% of those earning between \$15,000 and \$19,999 and 4.9% of Americans earning between \$10,000 and \$14,999. See Digital Divide at chart 20. Another report found that "web users" were most likely to be among the wealthiest individuals (those with incomes of \$60,000 and higher). See Donna L. Hoffman, Thomas P. Novak and Alladi Venkatesh, Diversity on the Internet: The Relationship to Access and Usage, in, INVESTING IN DIVERSITY: ADVANCING OPPORTUNITIES FOR MINORITIES AND THE MEDIA (1998).

¹⁶⁹ See Small Cable, Comments at 8; HBP, Comments at 27-30.

efforts.¹⁷⁰ Small Cable argues that a discretionary system would address small operators' limited resources.¹⁷¹ However, NOW Foundation, et al. maintain that the FCC should require broadcasters and cable operators to select among various specific options rather than afford broadcasters and cable entities the discretion to design their own policies. NOW Foundation, et al. stated in their initial comments that employers may not be able to craft effective policies and that self-designed EEO programs may lead to apparently race neutral hiring practices which yield discriminatory results.¹⁷² Furthermore, NOW Foundation, et al. indicated that, historically, voluntary rules have proven to be ineffective.¹⁷³ Without FCC- crafted requirements, women and minorities may be shut out of employment opportunities. Rather than allow entities to develop their own rules, the Commission should require broadcasters and cable operators to adhere to the Commission's proposed specific rules.

CONCLUSION

As enunciated in their initial comments, NOW Foundation, et al. believe that the Commission has clear authority to establish EEO recruitment rules and that doing so is a necessary and significant component of the Commission's public interest mandate. The Commission should not accept suggestions to leave EEO enforcement to other agencies because the Commission is the only entity with a public interest mandate and the institutional expertise

¹⁷⁰ See CRB, Comment at 6.

¹⁷¹ See Small Cable, Comments at 8.

¹⁷² See NOW Foundation, et al., Comments at 21.

¹⁷³ Id.

and understanding of the broadcast and cable industries as well as the additional interest in diversity.

Furthermore, contrary to claims made by some commenters, the Commission's proposed rules are Constitutional and would pass judicial review. The proposed rules survive rational review and do not warrant heightened scrutiny. However, even if they did trigger an intermediate or strict scrutiny analysis, the rules would be found constitutional. Moreover, the rules are not violative of the Establishment or the Free Exercise clauses of the First Amendment.

Finally, NOW Foundation, et al. urge the Commission to reject all proposals, including the one put forth by NAB, that would undermine the effectiveness and reach of the proposed rules.

Respectfully submitted,



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