Nos. 01-639 and 01-662

In the Supreme Court of the United States

MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL, ET AL., PETITIONERS

v.

MD/DC/DE BROADCASTERS ASSOCIATION, ET AL.

OFFICE OF COMMUNICATION, INC., UNITED CHURCH OF CHRIST, PETITIONER

v.

MD/DC/DE BROADCASTERS ASSOCIATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

RALPH F. BOYD, JR.
Assistant Attorney General

MARK L. GROSS
LISA WILSON EDWARDS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JANE E. MAGO
General Counsel
Federal Communications Commission
Washington, D.C. 20554

QUESTION PRESENTED

Whether the court of appeals erred in declaring "Option B"—an alternate way of complying with the Federal Communications Commission's equal employment opportunity regulations—unconstitutional on its face, based on the theory that broadcasters selecting that option would feel pressure to adopt recruiting practices that could deprive potential job candidates of information concerning job opportunities based on their race.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 236 F.3d 13. The opinion of the court of appeals on denial of rehearing (Pet. App. 20a) is reported at 253 F.3d 732.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2001, and rehearing was denied on June 19, 2001. On September 12 and 13, 2001, the Chief Justice

extended the time within which to file the petitions for a writ of certiorari to and including October 17, 2001, and the petitions were filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the validity of certain equal employment opportunity (EEO) rules promulgated by the Federal Communications Commission (FCC or Commission) in February of 2000. Those rules are designed to prevent discriminatory hiring practices by broadcast licensees, and to eliminate recruitment practices that operate to exclude or disadvantage potential job applicants on the basis of race or gender.

1. The FCC first began administering EEO responsibilities with respect to its broadcast licensees in 1969, when it adopted rules that prohibited licensees from discriminating on the basis of race, and that required licensees to establish, maintain, and carry out continuing programs to assure equal employment opportunity in every aspect of their employment policies and practices. See *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 18 F.C.C.2d 240 (1969). Over the years, the FCC has adopted additional rules to prevent discrimination in recruitment, selection and hiring, placement and promotion, and has extended those rules to prevent discrimination on the basis of gender. See *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 23 F.C.C.2d 430 (1970); *Amendment of Part VI of FCC Forms 301, 303, 309, 311, 314, 315, 340 and 342*, 32 F.C.C.2d 708 (1971).

The FCC's authority to promulgate EEO regulations derives from various federal statutes that prohibit FCC

licensees from discriminating in their employment practices and require them to adopt "positive recruitment, [job] training" and other measures to ensure "equality of opportunity." 47 U.S.C. 554(b) and (c)(5); 47 U.S.C. 334(a)(1). In 1984, Congress enacted EEO requirements applicable to cable television systems. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 634, 98 Stat. 2779 (1984) (Pet. App. 269a). That statute was, according to its legislative history, designed to "codif[y] and strengthen[] the Commission's existing equal employment opportunity regulations." H.R. Rep. No. 934, 98th Cong., 2d Sess. 86 (1984). In 1992, Congress codified the FCC's EEO requirements for broadcast television licensees, and extended EEO requirements to all other multichannel video programming distributors. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 1498 (1992) (1992 Cable Act) (Pet. App. 276a). Congress found that, notwithstanding "regulations governing equal employment opportunity, women and minorities are not employed in significant numbers in positions of management authority in the cable and broadcast television industries," and that "rigorous enforcement of equal employment opportunity rules and regulations is required in order to effectively deter racial and gender discrimination." 1992 Cable Act, § 22(a)(1), 106 Stat. 1498 (Pet. App. 276a-277a). Congress also declared that the FCC "shall not revise" its equal employment opportunity rules applicable to television broadcast station licensees. 1992 Cable Act, § 22(f), 106 Stat. 1499 (codified as 47 U.S.C. 334(a)) (Pet. App. 279a-280a).

2. In 1997, the FCC determined that the hiring practices of one of its licensees, Lutheran Church-Missouri Synod, may have violated the Commission's EEO

regulations relating to community outreach. Lutheran Church sought review of the FCC's decision and challenged the constitutionality of the FCC's EEO outreach rules. In *Lutheran Church-Missouri Synod* v. *FCC*, 141 F.3d 344 (D.C. Cir. 1998), the court of appeals determined that the FCC's use of numeric processing guidelines and numeric measurements for analyzing racial and gender employment data "extend[ed] beyond outreach efforts" and "create[d] a strong incentive [for broadcasters] to meet * * * numerical goals." *Id.* at 353, 356. The court held that the "entire scheme" of the EEO outreach rules was "built on the notion that stations should aspire to a workforce that attains, or at least approaches, proportional representation" based on the racial composition of the surrounding community. *Id.* at 351-352. The court held that the EEO rules were unconstitutional because they were not narrowly tailored to advance a compelling governmental interest. *Id.* at 350-356.[1]

On February 2, 2000, the FCC released revised EEO rules in response to the court of appeals' *Lutheran Church* decision. See Report and Order, *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 15 FCC Rcd 2329 (2000) (Pet. App. 49a) (*EEO Report and Order*); 47 C.F.R. 73.2080 (Pet. App. 37a-48a). Those rules focused on recruitment efforts, rather than hiring

[1] The court denied a petition for rehearing. *Lutheran Church-Missouri Synod* v. *FCC*, 154 F.3d 487 (D.C. Cir. 1998). The panel stated that the FCC's use of "numerical norms based on proportional representation * * * is the aspect of the Commission's rule that makes it impossible for us to apply any standard of review other than strict scrutiny." *Id.* at 492. The full court declined to rehear the case en banc, with three judges dissenting. *Lutheran Church-Missouri Synod* v. *FCC*, 154 F.3d 494 (D.C. Cir. 1998).

decisions, and eliminated the use of numerical norms that the court of appeals disfavored. See *EEO Report and Order*, 15 FCC Rcd at 2412, ¶ 211 n.336 (Pet. App. 207a n.336). Instead, "[u]nder the new rule," licensees would "not be required to compare the racial composition of their employment profile with the racial composition of the labor force in their communities, and the Commission would not make that comparison in processing renewal applications." *Id.* at 2412, ¶ 211 (Pet. App. 207a). Because of that change, the FCC concluded that "the new rules would not indirectly pressure employers to make race-based hiring decisions contrary to the *Lutheran Church* decision." *Ibid.*

The revised rules provided new methods for licensees to document recruitment efforts, and established two ways for broadcasters to achieve compliance. 47 C.F.R. 73.2080(c)(1), (c)(2) and (d) (Pet. App. 38a-40a, 43a-44a). See also *EEO Report and Order*, 15 FCC Rcd at 2363-2365, ¶¶ 77-78 (Pet. App. 113a-116a). In all circumstances, licensees were required to disseminate widely information concerning each full-time job vacancy. *EEO Report and Order*, 15 FCC Rcd 2364, ¶ 78 (Pet. App. 113a). In addition, licensees were required to engage in outreach activities, consistent with one of two alternate approaches, known as Option A (47 C.F.R. 73.2080(c)), and Option B (47 C.F.R. 73.2080(d)). See *EEO Report and Order*, 15 FCC Rcd 2364-2365, ¶ 78 (Pet. App. 114a-116a). Under Option A, licensees could fully comply without considering or documenting race or gender in any recruitment activity. Instead, Option A required licensees to recruit for every job vacancy by providing notification of the vacancy to any recruitment organization that requests such notice, 47 C.F.R. 73.2080(c)(1)(ii) (Pet. App. 39a), and to participate in two to four additional recruitment activities every two

years (depending on the number of full-time employees at the station), 47 C.F.R. 73.2080(c)(2) (Pet. App. 39a-40a). The additional recruitment activities could be selected from a non-exclusive menu of options that included participation in job fairs and job banks, establishment of scholarship and in-house training programs, and participation in community events related to employment opportunities in the industry. *Ibid.* See also *EEO Report and Order*, 15 FCC Rcd at 2372-2374, ¶¶ 99-103 (Pet. App. 129a-133a).[2] In addition, licensees could choose, instead of the specifically listed options, to conduct "other activities * * * reasonably calculated to further the goal of disseminating information as to employment opportunities in broadcasting to candidates who might otherwise be unaware of such opportunities." 47 C.F.R. 73.2080(c)(2)(xiii) (Pet. App. 40a). See also *Report and Order*, 15 FCC Rcd at 2374, ¶ 102 (Pet. App. 132a). Licensees selecting Option A were required to maintain records documenting compliance, but did not need to report racial data in so doing. 47 C.F.R. 73.2080(c)(5) (Pet. App. 41a-42a).

At the request of several licensees, the Commission also gave broadcasters an alternative—Option B—under which they could forgo the additional recruitment measures set out in Option A and design their own outreach programs instead. See 47 C.F.R. 73.2080(d) (Pet. App. 43a). See also *EEO Report and*

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[2] Only two of the thirteen listed recruitment measures involved special attention for women and minorities. Those two measures provided that a licensee may "co-sponsor[] at least one job fair with" or list "each upper-level category opening in a job bank or newsletter of" entities whose "membership includes a substantial participation of women and minorities." 47 C.F.R. 73.2080(c)(2)(iii) and (xii).

Order, 15 FCC Rcd at 2365, 2374, ¶¶ 78, 104 (Pet. App. 115a-116a, 133a-134a). Licensees electing Option B were required to demonstrate that their outreach programs result in wide dissemination of information on job vacancies and to maintain "data reflecting the recruitment source, gender, and racial and/or ethnic status of applicants for each full-time job vacancy filled by the station employment unit." See 47 C.F.R. 73.2080(d)(1) (Pet. App. 43a). In addition, licensees choosing Option B were required to report "data reflecting, for each recruitment source utilized for any full-time vacancy during the preceding year, the total number of applicants generated by that source, the number of applicants who were female, and the number of applicants who were minority, identified by the applicable racial and/or ethnic group with which each applicant is associated." 47 C.F.R. 73.2080(d)(2) (Pet. App. 43a-44a).

With respect to the data collection component of Option B, the FCC stated that "there is no requirement that the composition of applicant pools be proportionate to the composition of the local work force." *EEO Report and Order*, 15 FCC Rcd at 2378, ¶ 120 (Pet. App. 142a). "The only purpose of the data collection is to give the broadcaster, the public, and the Commission more information by which to monitor the effectiveness of a station's outreach efforts so that the broadcaster can take appropriate action to modify its outreach efforts should the information indicate that they are not reaching the entire community." *Id.* at 2378-2379, ¶ 120 (Pet. App. 143a). The FCC also stated that Option B was designed merely to give broadcasters an opportunity to design their own program and that it was not necessary to the FCC's EEO program; if Option B were invalidated, the FCC noted, it should be severed from

the remainder of the regulation. See Memorandum Opinion and Order, *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 15 FCC Rcd 22,548, 22,555, ¶ 22 & n.19 (2000).

3. Following the FCC's issuance of its revised EEO rules, various parties, including the Office of Communication, Inc., United Church of Christ (UCC) (petitioner in No. 01-662), sought review in the Court of Appeals for the District of Columbia Circuit. The Minority Media and Telecommunications Council (MMTC) and National Organization for Women (NOW) (petitioners in No. 01-639) intervened to defend the FCC's EEO rules.

Following briefing and argument, the court of appeals granted the petitions for review and vacated the FCC's rules. The court first held Option A to be constitutional. Pet. App. 9a. Under Option A, the court pointed out, a licensee did not need to report the race or gender of job applicants or interviewees. Instead, the applicant could select from a list of 13 special recruiting devices. "Because * * * licensees remain free under Option A to select recruitment measures that do not place a special emphasis upon the presence of women and minorities in the target audience," the court concluded, "we do not believe the Broadcasters are meaningfully pressured under Option A to recruit women and minorities." Pet. App. 9a-10a.

The court of appeals, however, held Option B to be unconstitutional. The court first found that Option B put "pressure [on licensees] to focus recruiting efforts upon women and minorities." Pet. App. 10a. The court stated that, under Option B, licensees were required to report the race and gender of each applicant so that the FCC could determine whether a licensee's recruitment

efforts have reached the "entire community." *Ibid.* The court stated that the FCC would "investigate the broadcaster's recruitment efforts" "[i]f a licensee reports 'few or no' women and minorities in its applicant pool." *Ibid.* The potential for "[i]nvestigation by the licensing authority is a powerful threat," the court stated, and is "almost guaranteed" to make licensees "focus their recruiting efforts upon women and minorities, at least until those groups generate a safe proportion of the licensee's job applications." *Id.* at 11a, 11a-12a. The FCC's use of job applications generated by outreach to gauge effectiveness, instead of the nature of the outreach itself, the court also stated, "is evidence that the agency with life and death power over the licensee is interested in results, not process, and is determined to get them." *Id.* at 11a.

The court also found that the "pressure" to generate minority and female applicants allegedly created by Option B would result in disparate treatment of potential applicants based on race. Option B, the court stated, "compel[s] broadcasters to redirect their necessarily finite recruiting resources so as to generate a larger percentage of applications from minority candidates." Pet. App. 13a-14a & n.***. The court hypothesized that, because of that redirection of resources, "some prospective non-minority applicants who would have learned of job opportunities but for the Commission's directive now will be deprived of an opportunity to compete simply because of their race." *Id.* at 14a. The court therefore held that the FCC's program must be reviewed under the strict scrutiny standard applicable to racial classifications. *Ibid.*

The court concluded that Option B does not survive strict scrutiny because it is not narrowly tailored to the FCC's asserted interest in preventing discrimination.

Pet. App. 15a. The court reasoned that there is no basis for pressuring a broadcaster to recruit minorities absent a "predicate finding" that the particular broadcaster had discriminated or was likely to discriminate against minorities. *Id.* at 16a. The court also concluded that Option B's requirement that licensees document the race of each job applicant "is relevant to the prevention of discrimination only if the Commission assumes that minority groups will respond to non-discriminatory recruitment efforts in some predetermined ratio, such as in proportion to their percentage representation in the local workforce." *Ibid.* Such an assumption, the court observed, "stands in direct opposition to the guarantee of equal protection." *Ibid.* Thus, the court concluded that the data required under Option B "are not probative on the question of a licensee's efforts to achieve 'broad outreach,' much less narrowly tailored to further the Commission's stated goal of non-discrimination in the broadcast industry." *Id.* at 16a-17a.

Finally, the court held that the FCC's EEO rules had to be vacated in their entirety, because Option B is not severable from Option A. Pet. App. 17a-18a. The court agreed that the FCC "clearly intend[ed] that the regulation be treated as severable, to the extent possible." *Ibid.* But the court concluded that the FCC's EEO rules could not function sensibly without Option B. *Id.* at 17a-18a. The court observed that the FCC's intent was to give licensees flexibility by offering two means of complying, *id.* at 17a, and therefore concluded that eliminating one of those means "would undercut the whole structure of the rule" by giving licensees only a single option, *id.* at 17a-18a.

4. The court denied petitions for rehearing and rehearing en banc. Pet. App. 26a. On rehearing, the

panel issued a supplemental opinion to respond to the FCC's argument that Option B should have been severed from the rest of the FCC's EEO rules.[3] Although the Commission argued that its orders and briefs had made its preference for severance clear, the court again concluded that it was not appropriate to preserve Option A while severing Option B. *Id.* at 22a-24a. The FCC order under review, the court stated, "had two goals—ensuring broad outreach and affording flexibility." *Id.* at 24a. Because Option B had been provided to afford broadcasters flexibility, the court stated, it played "an integral part in the Commission's evaluation of the rule as a whole," and "the Commission never once considered the implications of promulgating an EEO rule without Option B." *Id.* at 25a. The court therefore held that leaving the Commission's EEO outreach rules in place shorn of Option B "without further consideration * * * would leave in force a rule that, in view of the Commission's own stated goals, would be arbitrary and capricious." *Id.* at 26a.

Judge Tatel, joined by two other judges, dissented from the denial of rehearing en banc. Pet. App. 27a-36a. Judge Tatel disagreed with the panel's conclusion that the Commission's EEO regulations are subject to strict scrutiny. Because this case involves a facial challenge to the FCC's regulations, Judge Tatel explained, the regulations must be upheld unless "no set of circumstances exists under which" the regulations "would be valid." Pet. App. 27a (quoting *United States* v. *Salerno*, 481 U.S. 739 (1987)). Here, he observed, the court had

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[3] Petitioners sought rehearing and rehearing en banc. The FCC and the United States sought panel rehearing on the court's decision not to sever Option B from the remainder of the FCC's EEO rules. See Pet. App. 21a n.1.

invalidated the FCC's regulation by speculating about hypothetical scenarios that might render the rule unconstitutional in application. *Ibid.* In particular, the court had hypothesized that the Commission would enforce the rule in a manner that pressures broadcasters into generating applicant pools with the same racial composition as the local community, even though the Commission had expressly declared that it would not do so. *Id.* at 27a-28a. See also *id.* at 30a-31a. And the court had hypothesized that requiring broader dissemination to reach "the entire community" would necessarily "reduce the number of white males receiving job information," a result that was hardly inevitable. *Id.* at 29a. See also *id.* at 31-32a. "Because there exist 'circumstances . . . under which' broadcasters can comply with Option B with no adverse effect on white males," Judge Tatel concluded, "the broadcasters' facial challenge should have failed." *Id.* at 29a. Instead, the broadcasters should have been left to bring an "as applied challenge when and if the Commission applies the rule in a discriminatory manner." *Ibid.*

Judge Tatel also concluded that the court should have severed Option B from the remainder of the FCC's EEO rules. Pet. App. 32a-36a. The agency, Judge Tatel emphasized, had intended for the two options to be severable, and "[a]gency intent has always been the touchstone of [the] inquiry into whether an invalid portion of a regulation is severable." *Id.* at 33a.

ARGUMENT

This case concerns the constitutionality of the equal employment opportunity (EEO) outreach rules promulgated by the Federal Communications Commission (FCC or Commission) in February 2000. See Report and Order, *Review of the Commission's Broadcast and*

Cable Equal Employment Opportunity Rules, 15 FCC Rcd 2329 (2000) (*EEO Report and Order*) (Pet. App. 49a). The court of appeals upheld the most important feature of those rules, reflected in Option A, as constitutional. However, the court also concluded that an alternative provided by those rules—Option B, which established an alternate method of complying with EEO outreach obligations—was subject to strict scrutiny and unconstitutional on its face. As a result, the court vacated the FCC's EEO outreach rules in their entirety and remanded the matter to the FCC for further consideration.

Although the court of appeals misapplied the standard for resolving facial constitutional challenges, and erred in its severance analysis, further review is not warranted. The FCC has contended throughout this litigation that it can satisfy its statutory EEO obligations through Option A alone. Although the court of appeals erroneously failed to sever (and thereby preserve) Option A when it struck down Option B, the proper remedy for that mistaken severance decision is for the FCC to promulgate new regulations that omit the provisions held unconstitutional by the court of appeals. The FCC has already noticed such replacement rules.

The court of appeals' decision, moreover, does not announce any broad principles of law; it merely misapplies settled standards to the particular facts of this case. Nor is it clear that the decision will have a significant impact in future cases. In fact, because the decision appears to rest on agency-specific concerns and factual assumptions that will not bind future panels—panels that will review different regulations, potentially issued by different agencies, in different circumstances, and on different factual records—it may prove to have

little effect beyond this case. Finally, the decision does not create a division in circuit authority. Accordingly, further review is not warranted.

1. As this Court has explained, a party bringing a facial challenge to the constitutionality of a statute or regulation bears a heavy burden. See *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). "The fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.* at 745. Instead, a statute or regulation is invalid on its face only when it is "apparent that" the statute or regulation "could *never* be applied in a valid manner." *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 797-798 (1984) (emphasis added).

In this case, the court of appeals held that one alternate method of complying with the FCC's EEO rules, known as Option B, was subject to strict scrutiny and unconstitutional on its face. In reaching that conclusion, the court of appeals in essence made factual findings regarding the manner in which the FCC would enforce the regulations and the effect that such enforcement would have on licensee behavior. First, the court found that the record-keeping requirements imposed by Option B—that licensees must report the race, gender, and source of referral for each applicant for employment—will pressure licensees to focus recruiting efforts on women and minorities in order to generate applications from those groups; that was true, the court stated, because the FCC would investigate licensees if the data showed significant disparities. Pet. App. 10a-12a (data collection and threat of investigation "almost guaranteed" to make licensees "focus their recruiting efforts upon women and minorities, at least until those groups generate a safe proportion of the

licensee's job applications"). Second, the court found that such pressure would cause licensees to focus their "necessarily finite recruiting resources" on generating a larger percentage of minority applicants, and thus would divert resources from providing notice to nonminority applicants. *Id.* at 13a-14a. As a result, the court found, the Commission's regulations will deprive nonminority candidates of the opportunity to compete for openings on account of their race. *Id.* at 14a n. ***.

We agree with petitioners that speculation about how the FCC might enforce its regulations is not a proper basis for striking down those regulations on their face, particularly in the absence of any supportive record evidence. See MMTC/NOW Pet. (No. 01-639), at 16-21. The use of statistical imbalances as a means of identifying potentially discriminatory practices is well established, *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 340 n.20 (1977); MMTC/NOW Pet. 22-23 (citing additional authorities), and many agencies collect such data to ensure compliance with nondiscrimination requirements. See, *e.g.*, 29 C.F.R. 1602.7 (EEOC regulations), and 41 C.F.R. 60-2.11 to 60-2.15 (Department of Labor regulations). Here, there is no basis for finding that the FCC would use such data and its enforcement powers in a manner that pressures licensees to achieve racial proportionality in recruiting. The FCC, after all, has specifically declared that "there is no requirement that the composition of applicant pools be proportionate to the composition of the local work force," and has disavowed any intent of relying on statistical data in isolation. See *EEO Report and Order*, 15 FCC Rcd at 2378, ¶ 120 (Pet. App. 142a). "The only purpose of the data collection," the FCC explained, "is to give the broadcaster, the public, and the Commission *more information* by which to monitor the effec-

tiveness of a station's outreach efforts so that the broadcaster can take appropriate action to modify its outreach efforts should the information indicate that they are not reaching the entire community." *Id.* at 2378-2379, ¶ 120 (Pet. App. 143a) (emphasis added).[4]

Similarly, we agree with petitioners that the court of appeals should not have assumed that, by requiring licensees to reach out to the entire community, the FCC's rules would deprive one particular part of the community—nonminorities—of job-availability information they otherwise would have received. The distribution of information about job openings is not necessarily a zero-sum game in which providing the information to one group automatically results in the exclusion of others. To the contrary, some means of distributing notice (postings in the community, electronic notices, use of publications with broader circulation to all groups) may increase the reach of notice to all, particularly when compared to other (*e.g.*, informal and word-of-mouth) methods. See Pet. App. 29a (Tatel, J., dissenting from denial of rehearing en banc).

Of course, if the difficulties identified by the court of appeals in fact were to arise in a particular case, that might raise serious constitutional concerns and provide grounds for an as-applied challenge. But mere speculation about such hypothetical events is not a proper basis for striking down a regulation *on its face*. In that respect, the court of appeals misapplied settled

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[4] It is also hard see how the FCC's collection of data could be thought to *pressure* broadcasters to recruit minorities over nonminorities. After, all broadcasters remain subject to a nondiscrimination requirement. Broadcasters concerned about collecting and reporting data on the identity of applicants also could avoid collecting such data by selecting Option A, which has no data collection requirements, instead of Option B.

law governing the disposition of facial constitutional challenges.

2. The misapplication of settled law to a particular set of facts, however, is not the sort of matter that ordinarily warrants this Court's review. The court of appeals did not make any broad pronouncements regarding how facial challenges should be adjudicated. It did not hold that courts must or should make questionable factual assumptions about how a regulation will be applied. Nor did it hold that a regulation can be unconstitutional on its face even though it is capable of constitutional application. Instead, the court made the apparently case-specific error of relying on inappropriate factual assumptions in the context of this case.

Further review of that case-specific error is neither necessary nor appropriate. As an initial matter, the effect on the FCC's enforcement efforts is unlikely to be significant. To the contrary, the FCC has determined that it can meet its statutory EEO obligations even without the use of Option B. In the petition for panel rehearing below, the FCC called the court's attention to language in its orders making clear that it "did not view Option B as essential to achieving its goal of ensuring that broadcasters engage in broad outreach in recruiting new employees." FCC Petition for Rehearing at 3. The FCC explained that Option B had been "adopted at the request of broadcasters to provide them with additional flexibility," and that Option A would be more than adequate to permit the FCC to ensure that broadcasters broadly advertise job vacancies. *Ibid.* Although the court of appeals erroneously rejected the FCC's severance analysis, the clear remedy for that lies in the FCC's repromulgation of its rules without the optional provision held unconstitutional by the decision below. To that end, the FCC

recently announced its adoption of a Second Notice of Proposed Rule Making, in which the Commission proposes repromulgating Option A without Option B, together with certain other conforming changes. *See FCC Proposes New Equal Employment Opportunity (EEO) Rules for Broadcast and Cable*, MM Docket No. 98-204 (Dec. 12, 2001). Indeed, it is precisely because the FCC can fully achieve its EEO objectives without Option B and that option's record-keeping requirements that the FCC declined to seek further review. Consequently, the case does not present an issue of programmatic significance warranting this Court's review.

Moreover, far from establishing a broad precedent regarding the nature of facial challenges or the permissibility of data collection requirements, the court of appeals' decision rests primarily on putative facts that are potentially unique to this case and context. For example, even though the FCC's data collection rules do not require licensees to ensure that their applicant pools reflect the racial composition of the local community—and the FCC has disavowed any such requirement— the court of appeals found that licensees would still feel pressure to achieve such a result. That was true, the court found, because the FCC "has a long history of employing" a "variety of sub silentio pressures and 'raised eyebrow' regulation," Pet. App. 10a, and had "promise[d] to investigate any licensee that reports 'few or no' applications from women or minorities," *id.* at 11a. Such an investigation, the court found, is a "powerful threat, almost guaranteed to induce" licensees "to focus their recruiting efforts upon women and minorities, at least until those groups generate a safe proportion of the licensee's job applications." *Id.* at 11a, 11a-12a. The threat was particularly powerful, the court also suggested, given the FCC's supposed "life

and death power over the licensee," *i.e.*, the fact that an FCC decision denying renewal of or revoking a station's license will preclude that station's further operation and may put the broadcaster out of business. *Id.* at 11a. See also *Contemporary Media, Inc.* v. *FCC*, 214 F.3d 187 (D.C. Cir. 2000), cert. denied, 121 S. Ct. 1355 (2001).[5] Further, the court of appeals found that licensees would respond to the FCC's "pressure" by focusing resources on recruiting minorities and diverting resources from the recruitment of white males. Pet. App. 13a-14a & n.***.[6]

Of course, we disagree with each of those assertions. There is no reason to believe that the FCC would enforce its EEO guidelines in an unconstitutional fashion (*sub silentio* or otherwise). Nonetheless, no matter how questionable the court's factual suppositions may have been, they were *critical* to the court of

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[5] Under the Communications Act, the FCC has the responsibility of controlling radio and television channels and the power to license their use for limited periods of time. 47 U.S.C. 301. The FCC establishes qualifications for broadcasters, can compel the disclosure of certain information from them, and may grant or deny license applications in the public interest. 47 U.S.C. 303, 307, & 308 (1994 & Supp. V 1999). The FCC may alter, suspend, or revoke a license subject to certain procedural safeguards. 47 U.S.C. 312.

[6] The court of appeals' skepticism also appears to have been influenced by its view of the FCC's earlier regulatory efforts in this area. The court invalidated the FCC's predecessor regulations in *Lutheran Church-Missouri Synod* v. *FCC*, 141 F.3d 344 (D.C. Cir. 1998), because they were "built on the notion that stations should aspire to a workforce that attains, or at least approaches, proportional representation," *id.* at 352, and had been criticized by the Justice Department for that very reason, *id.* at 353 (noting Justice Department concern that prior regulations operated as a "*de facto* hiring quota").

appeals' decision and, as a result, may render the decision *sui generis*. Indeed, precisely because the court's decision rests on what are, in essence, findings of fact regarding the nature of the program, its enforcement, and its likely effects, the decision is unlikely to bind future panels to any particular result in cases involving different agencies, with different histories, enforcing different compliance programs, on different factual records.[7] Indeed, the District Court for the District of Columbia relied on similar observations in distinguishing *Lutheran Church-Missouri Synod* v. *FCC*, 141 F.3d 344, 351-353 (D.C. Cir. 1998); see note 6, *supra*, and upholding the FDIC's EEO regulations, notwithstanding some similarities between them and the FCC EEO rules invalidated in *Lutheran Church*. *Sussman* v. *Tanoue*, 39 F. Supp. 2d 13, 26 (D.D.C. 1999) (distinguishing FDIC EEO rules because the FCC regulations were thought by the D.C. Circuit to "create pressure on stations to eliminate under-representation through racial preferences" whereas the FDIC's program did "*not* lead to racial preferences"). In other words, the court's critical assumptions in this case—

[7] It seems rather unlikely that the court of appeals will be willing to attribute to another agency a practice of using "raised eyebrow" pressure in the absence of record evidence so proving. Similarly, no other regulations are likely to have the sort of historical antecedents that the FCC's had. See note 6, *supra*. Further, it is not common for an agency to have the sort of "life or death" power the court attributed to the FCC. For example, agencies that provide contracting opportunities to private-sector companies, or grants for research projects to private organizations, do not have that kind of power. Most private enterprises can do business without contracting with the federal government. Broadcast licensees, in contrast, must deal with the FCC, because the FCC determines (subject to judicial review) whether or not they can receive or retain their broadcast licenses.

and its ultimate finding that the record-keeping requirement of Option B forces licensees to recruit minorities and women to the exclusion of nonminority males—are factual in nature and thus necessarily limited to this case. They are, furthermore, based on unique characteristics the court imputed to the FCC and the FCC's alleged enforcement practices, making it unlikely that the court's holding will have application beyond the FCC and this particular program.[8]

3. Finally, petitioner UCC is mistaken to assert (UCC Pet. (No. 01-662), at 27-28) that the court of appeals' decision creates a conflict in the circuits. Instead, each case cited by UCC involved distinct facts, and none involved the unique circumstances relied upon by the decision below.

For example, in *Raso* v. *Lago*, 135 F.3d 11, 17 (1st Cir.), cert. denied, 525 U.S. 811 (1998) (cited UCC Pet. (No. 01-662), at 27), the plaintiffs challenged a HUD decision which required certain apartments to be made

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[8] Petitioners MMTC and NOW also argue that the court of appeals, *sub silentio*, invalidated 47 U.S.C. 334(a), which prohibited the FCC from revising the EEO regulations in existence in 1992 or the forms used by licensees. MMTC/NOW Pet. (No. 01-639) at 25-28. However, as petitioners MMTC and NOW concede (at 27), it was not the decision below that required the FCC to revise its EEO regulations, but the earlier decision in *Lutheran-Church Missouri Synod* v. *FCC*, 141 F.3d 344 (D.C. Cir. 1998); this case merely addressed the validity of the replacement regulations. Moreover, it is not at all obvious that Congress's direction that the FCC "shall not revise" its EEO regulations includes an obligation not to revise them in the face of a decision holding them unconstitutional. The effect of 47 U.S.C. 334(a), in any event, was not passed upon by the court of appeals, and no court has ever addressed it. Accordingly, this Court's review is unwarranted. *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999); *Glover* v. *United States*, 531 U.S. 198, 205 (2001).

available to everyone, notwithstanding a state law that would have given preference to displaced residents who were predominantly white. The court found that the plaintiffs had "alleged no facts that, if proven, would reveal any secret discriminatory standard, pattern of past practice, or motive" of distinguishing among applicants based on race. *Id.* at 17. Similarly, there was no suggestion that the agency had an extraordinary power of "life and death." Here, in contrast, the court of appeals attributed a prohibited intent to the FCC (based on a variety of factors) and suggested that the FCC would use its allegedly extraordinary powers to achieve the desired result. See pp. 9, 18-19 & note 5, *supra*; Pet. App. 11a (declaring it "evident" that the FCC "with life and death power over the licensee is interested in 'results,'" (*i.e.*, ensuring racial proportionality in the applicant pool) "not process" (broad outreach), "and is determined to get them."). If *Raso* had arisen in the D.C. Circuit rather than the First Circuit, moreover, it very likely would have been resolved the same way. See *Lutheran Church*, 141 F.3d at 351 n.8 (distinguishing the HUD rulings at issue in *Raso* from the FCC's EEO regulations, because HUD's "racially neutral" requirement "that some of the apartments * * * be opened to all applicants" no "more implicated the equal protection guarantee than a nondiscrimination statute like Title VII").

Duffy v. *Wolle*, 123 F.3d 1026 (8th Cir. 1997), cert. denied, 523 U.S. 1137 (1998) (cited UCC Pet. (No. 01-662) at 27), is similarly distinguishable. In that case, the plaintiff contended that he was the victim of gender discrimination in promotion, and argued that the defendant's use of outreach in recruiting was evidence of its intent to discriminate in promotion. *Id.* at 1038. Thus, there was no claim that the outreach program

itself violated the Constitution; no claim that the agency was coercing race- or gender-conscious decisions through "life-and-death" powers; and no claim that the outreach program *reduced* the scope of outreach to nonminority applicants. To the contrary, the court of appeals concluded that the outreach program there had created "a larger pool of qualified applicants." *Id.* at 1039. *South-Suburban Housing Center* v. *Greater South Suburban Board of Realtors*, 935 F.2d 868 (7th Cir. 1991), cert. denied, 502 U.S. 1074 (1992) (cited UCC Pet. (No. 01-662, at 28) is distinguishable for similar reasons. It did not involve an equal protection challenge—it was a First Amendment challenge—and the outreach program in any event did not "deter" potential buyers based on race, reducing opportunities, but rather "create[d] additional competition in the housing market." 935 F.2d at 884.

The remaining cases cited by petitioner UCC (at 27-28)—*Peightal* v. *Metropolitan Dade County*, 26 F.3d 1545 (11th Cir. 1994); *Ensley Branch, NAACP* v. *Seibels*, 31 F.3d 1548, 1571 (11th Cir. 1994); and *Billish* v. *City of Chicago*, 962 F.2d 1269, 1290 (7th Cir. 1992), cert. denied, 510 U.S. 908 (1993)—are similarly inapposite. None of the factual predicates relied on by the decision below (see pp. 18-19, *supra*) were present in those cases. Those cases, moreover, involved the selection of remedies for past discrimination that had been proved, and merely used the label "race neutral" in passing to describe outreach recruiting remedies that were viewed as less drastic than racial preferences in hiring or promotion. Because those cases involved the narrow tailoring of remedies for proven discrimination, they have no bearing on whether, in the absence of proven discrimination and under the facts posited by

the D.C. Circuit in this case, the FCC's EEO outreach regulations would be deemed constitutional.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

RALPH F. BOYD, JR.
Assistant Attorney General

JANE E. MAGO
General Counsel
Federal Communications Commission

MARK L. GROSS
LISA WILSON EDWARDS
Attorneys

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[9] Petitioners MMTC and NOW also suggest that the Court hold the petition pending decision in *Adarand Constructors, Inc.* v. *Mineta*, No. 00-730. This Court dismissed the petition for a writ of certiorari in that case as improvidently granted. See 122 S. Ct. 511 (2001). Accordingly, there is no reason to hold this case pending decision in *Adarand*.