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October 26, 2001

Unitarian Universalist List Funding Program  
P.O. Box 40  
Boston, Mass 02117  
Attention: Hillary Smith

Dear Ms. Smith:

Pursuant to the request of Rev. Paul Sawyer, enclosed is a complete first draft of the Memorandum in support of the challenge of the Democratic Media Legal Project to the constitutionality of the Telecommunication Acts and the current structure of the media industry.

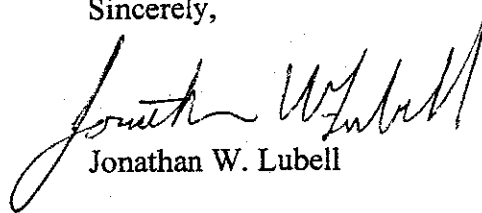
As you will see, the Memorandum considers and advocates two major constitutional issues: The Telecommunications Acts and the media structure under the supervision of the responsible government agency (the FCC): (1) violate the First Amendment by failing to protect freedom of speech and a free press necessary to secure the diversity of information and viewpoints required for the people's self-governance, and (2) violate the equal protection clause of the Fifth Amendment by denying to distinctive classes of people information, viewpoints and access available to a controlling corporate group.

In an introduction, this memorandum briefly examines the background and factual setting of the case. Finally, the Memorandum discusses several basic procedural issues: who should bring the action, who should be sued and where suit should be brought. These final points are not for inclusion in a Memorandum in Support of our Constitutional claims; rather, they are matters to be decided before a draft of a complaint is completed.

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Attention: Hillary Smith  
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Needless to say, this Challenge is innovative and the outcome difficult to predict. I believe our Constitutional arguments are sound and will accomplish a significant step forward in braking the media's drive to control the thoughts and culture of the millions of people who are currently without an effective legal weapon to remedy the situation.

Sincerely,



Jonathan W. Lubell

JWL/lb  
Enclosures

cc: ~~Rev. Paul Sawyer~~  
✓ Mr. Henry Kroll, Democratic Media  
Legal Project

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**MEMORANDUM IN SUPPORT OF CONSTITUTIONAL CHALLENGE TO THE  
TELECOMMUNICATION ACTS AND THE MEDIA STRUCTURE**

I. INTRODUCTION

We present here a preliminary draft of the various sections of the Constitutional Challenge that the Democratic Media Legal Project proposes to bring. The Challenge encompasses two basic claims. The first, that the current telecommunications/media structure violates the purpose of the First Amendment to protect freedom of speech and free press so as to secure the diversity of information and viewpoints necessary for the people's self-governance. This claim highlights the view enunciated in the Constitution and by legal scholars that America's fundamental notion of democracy rests on the principle of the people's self-governance which requires that the people receive and have access to a diversity of information and viewpoints. The second claim is that the current telecommunication/media structure has denied distinctive classes of people - including African-Americans, Native Americans, people from Latin America countries, women, distinctive cultural groups and other groups, information and viewpoints and access which is available to a distinctive controlling class. This pattern constitutes a denial of equal protection under the Fifth Amendment and was a foreseeable and inevitable result of the terms of the statutes governing the media and their application by the Federal Communications Commission.

This draft further generally discusses the law regarding the parties and the venue for the Constitutional Challenge. The appropriate conclusions on these matters will require a closer and more particular examination. [These subjects and discussions are not to be included in a final memorandum in support of the Constitutional Challenge but are matters that must be considered in bringing the lawsuit.]

## II. BACKGROUND

### A. The Power of the Media

1. Over the last two decades the technological changes in telecommunications have changed the media industry. The media now include a diverse variety of techniques for conveying to the earth's population information, viewpoints, values, consciousness. Through television, cable, radio, print, internet and the growing satellite technology, media's reach is many times greater and more intense than ever before.

2. Control over the knowledge of what is happening. What this means is that the knowledge of what has happened, is occurring and will be occurring in the future is spread to every corner of the earth by this highly technological media. The information conveyed by the media has been distorted and fabricate, while other information, highly relevant to the population having knowledge of events and people to enable them to make the decisions necessary to the governance of the country, has been concealed. The impact of the media is so powerful that fictional entertainment presented by the media is treated as reality. Thus, after the death of a character from NBC's "The West Wing", a fictionalized drama of the White House, the Assembly of the California legislature on May 10, 2001 actually observed a moment of silence in memory of the fictional character's death. The media, thus, have crossed the magic line of converting for the population fiction into fact, illusion into reality, by reason of the powerful persuasiveness of the media's techniques.

3. The power of the mega-media is expressed not only in their technological reach throughout the globe and their control of knowledge by their dominance of communication but also by their ability to recreate the very consciousness of the people. Thus, the individual's

identification with a group has been redefined. The concept of a "working class" has evaporated and now the media have the population viewing themselves as middle-class, homeowners, the baby-boom generation or something else. Sometimes, the media may recognize a group classified as "poor" but always making clear that no one wants to be identified with that group. Similarly, the media have redefined our system of values. Through television, radio, newspapers, magazines and internet, wealth and property have become the true values because - as the media convey - they are the signals of success. Human values have been subordinated to property values. This has been accomplished by the media's message - not only through their regular programming features and entertainment shows - but also by their ubiquitous ads in which fancy cars, mansions, luxurious vacations are what we are told we want and should aim for.

The consciousness of the population has also been changed by the media's role as image maker. The real person is never presented, rather that person's image as the media desire to construct it is all the public sees - whether it is George W. Bush, Dick Cheney, the fabrication of intelligent and fair news commentators, and others. In the main, and except for dramatic and overwhelming events that can not be ignored, the news is not about events that will affect the lives of the people and their societies - not about peace negotiations, sales of arms, destruction of the environment. Rather the news is about entertainment: who is going with whom, who is getting a divorce, box office and record sales, etc. A prime example is the media's treatment of drugs where there is more information about celebrities using drugs than the international billion dollar drug trade conducted by governments, armies, large corporations, etc.

*In a fundamental way the media have significantly influenced reality for billions of people and have determined how people react to what is happening around them.*

### III. THE CURRENT SCHEME / STRUCTURE OF THE MEDIA

The telecommunications media picture today consists of six world-wide mega corporations that dominate through ownership and control the media industry. Briefly, they are Time Warner, Disney (ABC), Viacom (CBS and Westinghouse), NewsCorp (Fox), Bertelsmann and General Electric (NBC). Their prime media assets are: Time Warner: Warner Bros., HBO, CNN, CNN International, CNN/Sports Illustrated, TBS Superstation, TNT, and many others, *Time*, *Fortune*, *Life*, *Sports Illustrated*, *Vibes*, *People*, and at least 15 other magazines, Little Brown & Co., Warner Books, Book of the Month Club; Disney: ABC, Disney Channel, A&E, Lifetime Network, ESPN, 10 network news programs, 12 TV stations, 11 newspapers, 1,400 retail stores featuring many of its television, motion picture and print products; Viacom: Paramount Pictures, CBS, MTV, VH1, Nickelodeon, TV Land, Showtime, UPN, 18 U.S. television stations, over 400 stations carrying CBS News, Simon and Schuster, Pocket Books, Blockbuster Video rental, five theme parks, a widespread movie theater empire outside of the United States; News Corp.: Twentieth Century Fox, Fox Television Network, 22 television stations, FX cable network, Fox News channel, Harper Collins, over 130 daily newspapers including *New York Post*, *The Times (of London)*, *Boston Herald*, 23 magazines including *TV*, *Seventeen*, *New York Magazine*, 70% of Australia's newspaper circulation. Bertelsmann: Random House, Knopf, Pantheon, Crown Fawcett, Ballantine, Vintage, Anchor, Bantam Doubleday, Dell and Delacorte, Barnesandnoble.com (50% intr.); General Electric (NBC): NBC Network, 9 television stations, 15 cable facilities, numerous television programs purporting to present the news and its analysis including: The Today Show, Weekend Today, Meet the Press, NBC Nightly News with Tom Brokaw, Nightline, NBC News at Sunrise.

The further consolidation and control of the media industry in the last few years has been overwhelming. The situation is getting worse and not only is democracy in jeopardy, but from a constitutional viewpoint, the very purpose of the First Amendment has been violated by the telecommunications media structure created by the Telecommunications Acts and utilized by the media giants while proclaiming they are protected by the First Amendment.

IV. THE RESTRICTION ON DIVERSITY OF INFORMATION AND VIEWPOINTS RESULTING FROM THE STRUCTURE OF THE MEDIA AND THE APPLICATION OF THE TELECOMMUNICATIONS ACTS VIOLATES THE FIRST AMENDMENT, ITS PURPOSES OF SECURING THE INFORMATIONAL DIVERSITY NECESSARY FOR SELF-GOVERNANCE AND THE DEMOCRATIC NOTION OF THE POWER OF THE PEOPLE TO GOVERN EMBODIED IN THE U.S. CONSTITUTION

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A. The Fundamental Theory of Democracy and the First Amendment

The core democratic notion of our country is that "we the people" govern. This is the opening phrase of the Constitution and it was intended to establish the nature of the government and society. In order to assure that principle of democracy the First Amendment was enacted. *It proclaimed that freedom of speech and free press would secure the diversity of information and viewpoints necessary for the people's self-governance.*

The current structure of the media under the federal communications acts where a few mega for-profit corporations control the vital flow of mass communications in our nation has crippled the First Amendment guarantee and undermined the possibility of democracy.

B. The Analysis of Professor Alexander Meiklejohn

This analysis of the First Amendment and scheme of self-governance, of democracy, was examined and urged by the educator and scholar Alexander Meiklejohn - a person highly respected in both the educational and legal fields. Justice William Brennan described Dr. Meiklejohn's argument:

He argued that the people created a form of government under which they granted only some powers to the federal and state instruments they established; they reserved very significant powers of government to themselves. This was because their basic decision was to govern themselves, rather than to be governed by others. This was a fundamental departure from the English and other existing forms of government and was this country's great contribution to the science of government. The first amendment, in his view, is the repository of these self-governing powers that, because they are exclusively reserved to the people, are by force of that amendment immune from regulation by the agencies, federal and state, that are established as the people's servants. (79 Harvard L. Rev.1, 11-12, 1965).

The self-governance principle of the Constitution finds its support not only in the Preamble but also in the First Amendment itself, the Tenth Amendment which speaks of powers reserved "to the people", and Article I, Sec. 2 which speaks of a reserved power which the people have decided to exercise by providing for the election of members to the House of Representatives.

C. The Historical Roots

The nature of the democracy and of free speech provided by the Constitution was recognized by the Framers to be different than the English form of government. The difference is found in the self-governance principle. Thus, in Madison's Report on the Virginia Resolution it is stated:

In England, with its hereditary and nonresponsible monarch, it was a maxim that the king can do no wrong, and Parliament, two thirds of

whose membership was also hereditary and nonresponsible, claimed omnipotence. In America, however, the executive was not held to be infallible nor the legislature unlimited, and both, being elective, were responsible. Necessarily, therefore, a different degree of freedom of the press was contemplated by American constitution-makers. An elective, limited, and responsible government required a much greater freedom of animadversion that might be tolerated by such a government as that of Great Britain. And since the electoral process was the essence of a free and responsible government, a wide latitude for political criticism was indispensable to keep the electorate free, informed, and capable of making intelligent choices.

In New York Times v. Sullivan, 376 U.S. 254, Justice Brennan in 1964 wrote of the Framers'

approach to the nature of the government that the Constitution created:

"[Madison's] premise was that the Constitution created a form of government under which "The people, not the government, possess the absolute sovereignty." The structure of the government dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels. This form of government was "altogether different" from the British form, under which the Crown was sovereign and the people were subjects. "Is it not natural and necessary, under such different circumstances," he asked, "that a different degree of freedom in the use of the press should be contemplated?" *Id.*, pp. 569-570. Earlier, in a debate in the House of Representatives, Madison had said: "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people."

D. The Nature and Purpose of the First Amendment and the Principle of Self-Governance Have Been Recognized in Prior Decisions

The Courts have indicated their appreciation of the Meiklejohn analysis. As pointed out by a member of the Third Circuit Federal Court of Appeals, Professor Meiklejohn's "writing upon the speech-press clause have been enormously influential upon members of the Supreme Court." (Capital Cities Media Inc. v. Chester, 797 F.2d 1164, 1183 (3d Cir. 1986)).

And in words that reflect both the self-governance analysis and its significance in our current context, Justice Black stated in 1945:

[The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private parties (Associated Press v. U.S., 326 U.S. 1, 20 (1945) (emphasis supplied).

Past cases have recognized the serious First Amendment concerns in an era where means of expression have become dominated by a few corporations which, under the federal regulatory scheme, may prevent or circumvent communicating to the people diverse information, viewpoints or culture. These decisions recognize the dynamic impact on the purpose of the First Amendment resulting from the control of mass communications by the mega corporate media. Thus, in National Citizens Committee for Broadcasting v. F.C.C., 555 F.2d 938, 948-949 (D.C. Cir. 1977), the Court stated:

The Commission has recognized that a policy of diversity is central to the Communications Act, and it has denied licenses to otherwise qualified applicants on the strength of that policy. Since denying access to the airwaves to some involves a substantial though at this time necessary, restriction of speech, it follows that the Commission acts properly when it attempts to promote diversity by allocating stations to those without control over an alternative major media voice. The Supreme Court has given its approval to a diversity policy based on First Amendment and antitrust considerations. The First Amendment "rest on the assumption that the widest possible dissemination of information from diverse antagonistic sources is

essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2012 (1944). "The public interest' standard necessarily invites reference to First Amendment principles." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122, 93 S.Ct. 2080, 2096, 36 L.Ed.2d 772 (1972). [Footnotes omitted].

That a narrowing of the diverse voices that can communicate over the mass media will impair the First Amendment was recognized by C.J. Bazelon when he described the enhancement of the First Amendment resulting from a broadening of those who are able to communicate to the people their diverse information and views: "the First Amendment seeks to further the 'search for truth'. Surely that search will be facilitated by government policy that encourages the maximum numbers of searches." *National Citizen Committee for Broadcasting*, (555F.2d at 950-951).

In *Turner Broadcasting Sys. Inc., v. FCC*, 512 U.S. 622, 656-657, (1994), the Supreme Court recognized the impact of private control of the media on "the free flow of information and ideas" and that the First Amendment rather than shielding the media from government action has an interest in preventing the private media from restricting the flow of information and ideas to the public. There, the Court stated:

[w]hen an individual subscribes to cable the physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programing it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch.

The potential for abuse of this private power over a central avenue of communication cannot be overlooked. The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private

interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas. (Emphasis supplied.)

Court decisions have recognized the importance of diversity to the purpose of the First Amendment even when that diversity will impinge upon the activities of the media operator. In Telesat Cablevision, Inc. v. City of Riviera Beach, 773 F. Supp. 383, 412 (S.D. Fla. 1991) the Court found:

The public, educational, and governmental ("PEG") access requirements of the City's ordinance have been shown to be rationally related to a substantial government concern. The City has listed a variety of goals for the requirements, including: permitting fuller citizen participation in government by increasing information of government activities, encouraging the dissemination of diverse information, permitting the dissemination of information by public schools and universities to the communities in which they are located, and permitting access to the public for groups whose views might otherwise not be expressed due to limited financial resources or lack of popularity. Like the PGE channels, the requirement that cable operators provide free service to governmental buildings - schools, fire stations, police stations, and the like - expand available sources of information, multiply the diversity of view points, and thus foster First Amendment interests.

Similarly, the House of Representatives' Report accompanying the 1984 Cable Act legislation, recognized the primary purpose of the First Amendment to present a wide diversity of information sources to the public:

The development of cable television, with its abundance of channels, can provide the public and program providers the meaningful access that, up until now, has been difficult to obtain. A requirement of reasonable third-party access to cable systems will mean a wide diversity of information sources for the public - the fundamental goal of the First Amendment - without the need to regulate the content of programming provided over cable. . . .

H.R.Rep. No. 934, 98<sup>th</sup> Cong.2d Sess. 30, reprinted in 1984 U.S. Code Cong. & Admin. News. at 4667.

\* \* \* \*

Other cases, early documents from the founding of the government, discussions in learned journals show that the self-governance analysis has power and support. It has never been sought to be applied - and, therefore, never rejected - to require an alteration of our media system so that the First Amendment will play its role of securing the fundamental democracy at the core of the Constitution.

This legal challenge rests upon the reality of the media structure today: (1) The concept of self-governance lies at the core of the system of democracy created by the Constitution. (2) A system of self-governance requires that the people - those who ultimately are to govern - receive diverse, differing information and views without any group, because of lack of resources or political relations, being excluded from communicating that information and views. (3) The current media structure has fatally struck at the purpose of the First Amendment by allowing and even protecting the consolidation of the communication of information and views to a few mega media conglomerates reflecting homogenous viewpoints and culture and a duplicating of restricted information.

V. THE TELECOMMUNICATIONS ACT OF 1996 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT

The Telecommunications Act of 1996 ("the Act") violates the equal protection clause by purposefully creating a disparate impact against minority station owners. As a result of the legacy

of the intent requirement in Washington v. Davis and its progeny, courts require that a plaintiff prove legislative intent when making a prima facie case of discrimination. While no longer the "sole touchstone" in proving discrimination, courts look at evidence of disparate impact as a good starting point in making out a prima facie case. However, courts require additional indicia of intent. While courts do not set forth a specific set of factors to identify intentional discrimination, they look to various factors that suggest legislative intent, including evidence of past discrimination and knowledge of and failure to remedy a known disparate impact. The Federal Communications Commission was aware of the disparate impact caused by the application of the Act. This knowledge, coupled with past discrimination against minority station owners satisfies the intent requirement for a prima facie case of discrimination.

Alternatively, the 1996 Telecommunications Act denies equal protection rights to minority media station owners by creating a discretionary process by which the FCC awards station licenses. The Supreme Court applies different standards to prove discriminatory intent on a case by case basis by applying an objective test to prove discriminatory intent in cases where the application of the law under scrutiny permits little to no discretion and a subjective test to prove discriminatory intent in cases where the application of the law under scrutiny is discretionary. Under the framework established by the Supreme Court, the discretionary application of the 1996 Telecommunications Act should be evaluated by the subjective test because it requires that the FCC exercise discretion when awarding station licenses to applicants. The plaintiffs must prove that 1) they belong to an identifiable group claiming an unequal application of the Act; 2) the identifiable class is under represented in the media station owner field; and 3) the process by which the FCC awards mass media licenses is susceptible to abuse.

Because of past discrimination against Plaintiffs, the FCC's failure to correct the current disparate impact created by the Act and because the process by which the FCC awards mass media licenses satisfies the purposeful discrimination doctrine set forth in Washington v. Davis, the Court should find that the Act violates Plaintiff's Equal Protection rights.

A. The Telecommunications Act of 1996 Violates the Equal Protection Clause of the Fifth Amendment by Purposefully Discriminating Against Minority Station Owners

The Equal Protection Clause of the Fifth Amendment provides in part that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." This literally means that the government or its agent is prohibited from treating some of its citizens with disparity. However, even though the Constitution guarantees the right of equal protection, the Supreme Court has created difficult hurdles whenever a challenge to a governmental policy is made.

According to Washington v. Davis, 426 U.S. 229 (1976) when there is evidence of a disparate impact upon minorities, a plaintiff must show that discriminatory intent or discriminatory purpose exists. A showing of a disparate impact coupled with evidence of "something else" that shows legislative intent will satisfy the intent requirement. The Davis court while recognizing that a policy may be facially neutral and absent of explicit intent proceeded to state that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact that the law bears more heavily on one race than on another." *Id* at 242. See Yick Ho v. Hopkins, 118 U.S. 356 (1886). A policy designed to serve neutral ends can be nevertheless discriminatory if it benefits or burdens one race more than another, that is, "more burdensome to the average black than to the more affluent white." Washington v. Davis, 426 U.S. at 248. The relevant facts may provide circumstantial evidence of discriminatory purpose since "a purpose to discriminate must be

present which may be proven by systematic exclusion . . . or by the unequal application . . . to such an extent as to show intentional discrimination." Atkins v. Texas, 325 U.S. 398, 402-4-3 (1945).

In this instance, the FCC applies the Telecommunications Act of 1996 to regulate the broadcast industry, promote diversity and to eliminate entry barriers that would hinder minorities' quest to become a part of this industry. The Commission has recognized that the public suffers when minorities are under-represented among owners of television and radio stations: "Acute under representation of minorities among broadcast owners is troublesome . . . unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial portion of our citizenry will remain under served." Statement of Minority Ownership, FCC Task Force Report, 68 FCC 2d 979, 981 (2000). However, although the FCC promulgates diversity in both programming and ownership, the record shows that minority ownership barely exists and programming is not diversified. The Commission's attempts to foster diversity is ineffective since "the FCC's definition of diversity has remained conspicuously elusive since the FCC refers to diversity to mean race, gender, ideology among other things and given the protean nature, the concept of diversity in mass media is in danger of becoming amorphous." Krotoszynski, R.J. & Blaiklock, R.A., Enhancing the Spectrum, U. Ill. L. Rev., 813, 819 (2000). In a recent case, the court sated that the FCC "has failed to define the goal of diversity in a minimally coherent fashion." Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 351-356 (D.C., Cir. 1998). See Capital Cities v. FCC, 29 F. 3d 309, 311 (7<sup>th</sup> Cir. 1994) and Schurz Comm., v. FCC, 982 F.2d 1043, 1045-1045 (7<sup>th</sup> Cir. 1992).

1. Disparate Impact Coupled with Additional Indicia of Intentional Discrimination Satisfies Washington V. Davis Requirement of Legislative Intent

Washington v. Davis and its progeny require a plaintiff to prove intent when claiming an unconstitutional discrimination. In Washington v. Davis, a case involving a challenge to an employment examination that excluded four times as many African Americans as whites applying for positions on the DC police force, the Supreme Court indicated that discriminatory purpose was required in cases challenging facially neutral state action having a disparate impact against minorities. See Washington v. Davis, 426 U.S. at 240. Furthermore, a belief that racial animus is a motivating factor based on disproportionate impact is simply not enough since the Equal Protection Clause is violated "only if that impact can be traced to a discriminatory purpose." Personal Administrator of Massachusetts v. Feeney, 442 U.S. 256, 271 (1979).

Therefore, to make a prima facie case of discrimination, plaintiff must show that the government policy has a disproportionate impact on a specific class of persons as well other indicia that, when combined with the totality of the evidence, suggest an "invidious discriminatory purpose." See Washington v. Davis, 426 U.S. at 242. In the present case, the plaintiff must prove that the Act has a disparate impact on minority station owners, and that the FCC has failed to implement programs to correct this disparity. Together, these factors satisfy the intent requirement as set forth in Washington v. Davis, and accordingly, make out a prima facie case of discrimination.

When a prima facie case is made out, as long as there is a showing of discriminatory intent, "the burden of proof then shifts to the government to rebut the presumption of unconstitutional action by showing that permissible racially neutral state action produces monochromatic results." Washington v. Davis, 426 U.S. at 241. See also, Alexander v. Louisiana, 405 U.S. 625, 632 (1972).

Surely, with statistical evidence indicating a significant disparate impact on minorities coupled with the FCC's acknowledgment of such disparate impact and failure to remedy the same, the onus will then shift to the FCC to prove that the Act of 1996 does not discriminate against minorities.

a. The Supreme Court Looks to Disparate Impact as a Threshold Issue in Proving Discriminatory Intent

The importance of disparate impact and intent on the Telecommunications Act is the manner in which it simultaneously achieves and hides its discriminatory purpose through its policies and licensing requirements. Ortiz, Daniel R., The Myth of Intent in Equal Protection, 41 Stan L. Rev. 1105, 1107. Although overt racial animus may not have led Congress to enact the Telecommunications Act, its "failure to account for a substantial and foreseeable disparate impact violates the spirit and letter of equal protection." U.S. v. Clary, 34 F.3d 709, 777 (1994). Disproportionate impact alone "cannot be the sole touchstone of an invidious racial discrimination claim forbidden by the Constitution." McLaughlin v. Florida, 379 U.S. 184 (1964). Nevertheless, the Supreme Court has specifically stated that disparate impact is "not irrelevant" when attempting to prove discriminatory intent. See Washington v. Davis, 426 U.S. at 242. In fact, the Court stated that the impact of an official action that bears more heavily on one race than on another provides "an important starting point" to determine discriminatory intent. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977).

Although the Supreme Court makes it difficult to prove racial discrimination in facially neutral government policies, such proof may still be established as demonstrated by a recent 10th Circuit decision affirming a lower court's judgment that the state of New Mexico singled out Navajos for unfavorable treatment when grants were reduced without cause. The district court held

that the more than forty percent cut in funding "was motivated by discriminatory intent in violation of the Equal Protection Clause." Navajo Nation v. State of New Mexico, 975 F.2d 741, 742 (1992). The court found that the cut in funding was "discriminatory because it singled out Navajos for unfavorable treatment and that the cut had a disparate impact on the Navajo community." *Id* at 743. See also Personnel Administrators v. Feeney, 442 U.S. at 272. The *Navajo* court first looked to the disparate impact of the government action to determine the State's discriminatory purpose. It then found that since the state was aware of the disparate effects of the cut on the Navajo nation, this knowledge and failure to remedy was enough to satisfy the intent requirement as set out in Washington v. Davis.

b. Even with the Presence of Disparate Impact, the Supreme Court Requires Additional Evidence of Intent When Proving Discriminatory Purpose

The Davis court held that a neutral law does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact; instead, the disproportionate impact must be traced to "a purpose to discriminate on the basis of race." Washington v. Davis, U.S. 426 at 238-244. While impact is an important starting point, Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 made clear that "[disparate] impact alone is not determinative absent a stark showing [of disparate impact]." Arlington Heights 429 U.S. at 465. The Court requires additional indicia of governmental intent to prove a prima facie case of discrimination. "Something else" in addition to evidence of disparate impact can be offered as long as discriminatory policies that inhibit minorities are "so overt and pervasive that the state agency must be held to have known of them and to have acquiesced in their operation." See Bell, Derrick: Race, Relation and American Law, Aspen Law & Business, (4<sup>th</sup> ed. 2000). It may also be recognized that the required

intent can be proven by raising the standard from the natural, probable and foreseeable result to the inevitable result of state policies. Curry Diane, The Equal Protection Clause Defined, Distorted or Disregarded (April 10, 2001) (unpublished conference paper, Sarah Lawrence College).

While the Court has never analyzed a specific list of factors when determining governmental intent, the court has looked at a variety of factors to determine whether a government policy discriminates; 1) disparate impact; 2) foreseeability of the consequence of the action, 3) historical background; 4) history of the decision making process; 5) departures from normal substantive factors or procedures; 6) legislative or administrative history. The Supreme Court has indicated that the test is not exhaustive and in fact its application has been inconsistent. Arlington Heights, 429 U.S. at 266.

The Court examined the first two factors, namely disparate impact and foreseeability of such disparate impact, in Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256 (1979), where a woman challenged Massachusetts' employment preferences to men, thereby creating a disparate impact against women and violating equal protection under the constitution. The court found that "discriminatory purpose implies that a violation of intent is an awareness of one's action, that the government actor reaffirmed a particular course of action despite the effects upon an identifiable minority group." Feeney 442 U.S. at 278, 280. Although the court held that the foreseeability of a disparate impact would not be sufficient to prove discrimination, it nevertheless stated that it would consider "the foreseeability of a neutral rule [when it had a] bearing upon the existence of discriminatory intent;" that is, where a "strong inference that the adverse events were desired can be reasonably drawn" from the foreseeability of those adverse events. *Id* at 279, 280.

The third factor looks to the historical background including prior decisions to determine the presence of discriminatory intent. In a school segregation case, the court looked at the school board's practices during the preceding forty years and determined that the failure to hire minorities presented "historical practices that created an inference motivated by a discriminatory purpose." People Who Care v. Rockford Board of Education, 851 F.Supp. 905, 924 (N.D. Ill. Feb. 18, 1994). In another case, the court considered the "racially limited housing opportunities," Angell v. Zinsser, 473 F. Supp. 488, 498 (D. Conn. 1979), as relevant historical evidence when analyzing discriminatory purpose.

The fourth factor focuses on the history of the contested decision. The court considered the "sequence of events" preceding a government decision to pass an ordinance that had a disparate impact on an identifiable group. See Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 540-542, (1993). Courts also look to the "failure to address the disparate impact in the first place and its failure to take steps to ameliorate it," United States v. Texas, 628 F. Supp. 304, 315, (E.D. Tex. 1985) as relevant factors in determining discrimination.

The fifth factor looks to whether a decision represents a departure from the substantive procedures and whether the government actor used another procedure to the detriment of a protected group. In Navajo Nation, supra, the court found that the funding reduction "occurred outside of the normal procedural process and without consideration to the normal substantive criteria" to find discrimination. See Navajo Nation, 975 F.2d at 744.

The final factor in the Arlington Heights test looks to the legislative or administrative history which could include reports, minutes and statements made regarding the government's policy. Courts have reviewed the official minutes of a village's deliberations when determining legislative

intent. See Arlington Heights, 429 U.S. at 268. Similarly, the Supreme Court has inferred discriminatory intent from comments made by city officials with respect to members of the Santaria faith in order to conclude that a government policy discriminated against a specific group. Church of the Lukumi Babalu Aye, 508 U.S. at 541-542.

Professors Eisenberg and Johnson observed that one of the most frequent indicators of Plaintiff success is "evidence of discriminatory statements made by members of the decision making body." Eisenberg, T & Johnson, S, The Effects of Intent, 76 Cornell L. Rev. 1151, 1187. In the case at bar, the FCC has acknowledged that the Act discriminates against minority station owners. The official FCC report states that there are significantly less minorities in the broadcast industry and that there is discrimination against minorities due to "several factors that impede minorities from entering, successfully competing and/or surviving such as limited access to debt and equity, exclusion from powerful network of information and congressional laws, court rulings and FCC rules, regulations and policies, which operated to the detriment of small and minority owners." Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing, The Office of General Counsel, FCC (2000).

Since the FCC has acknowledged that the Act affects minorities negatively, then according to Washington v. Davis and Arlington Heights, plaintiff must prove that these adverse effects were foreseeable to satisfy Washington v. Davis' intent requirement. The Feeney Court said that for the purpose of equal protection analysis, "the inevitability or foreseeability of consequences of a neutral policy may bear upon the existence of discriminatory intent, and when the adverse consequences of a law upon an identifiable group are inevitable, a strong inference that the adverse effects were intended." Feeney at 278. Even if the FCC did not explicitly intend by their actions to create a

negative disparity toward minorities, the Supreme Court looks to "awareness of consequences" as evidence of discriminatory purpose. See United Jewish Organizations v. Carey, 430 U.S. 144, 179, (1977). In this case, the record clearly shows that the FCC is aware of its discriminatory actions, and therefore the Act violates plaintiff's equal protection rights as set out by Washington v. Davis.

2. The 1996 Telecommunications Act Creates a Disparate Impact On Minority Station Owners, the Knowledge of Which and Failure to Remedy by the Fcc Satisfies the Intent Requirement As Set out in Washington v. Davis
- a. The Application of the Telecommunications Act of 1996 Fails to Promote Diversity and to Remedy past Discrimination Against Minority Broadcast Owners

The Telecommunications Act of 1996 was created to regulate the telecommunications industry and requires the FCC to identify and eliminate market entry barriers toward minorities thus ensuring diversity in both ownership and programming. *See in the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, 11 FCC Rcd. 6280 (May 21, 1996). Additionally, Section 257 (b) specifically states that the Commission "shall seek the policies and purposes of this Act favoring diversity of media voices." However, since the passage of the Act in 1996, the FCC has failed in its mission to diversify the telecommunications industry and has created a disparity in ownership by eliminating many of the programs that gave favorable treatment to minority licensees. The FCC's licensing methods and procedures have created an inference of discriminatory exclusion towards minorities and a monopolistic playing field for major communication conglomerates. In a report on market entry barriers and discrimination, it was found that the FCC's action or inaction on regulatory issues has exacerbated the discriminatory effect on minorities. These actions and inactions include: the uneven enforcement of policy; underutilization

of minority favorable programs; permitting use by non minority "fronts" to obtain programs designed to benefit minorities. *Ivy Planning Group, Llc, Federal Communications Commission, Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing*, (2000)(available at [http://www.fcc.gov/opportunity/meb\\_study/historical\\_study.txt](http://www.fcc.gov/opportunity/meb_study/historical_study.txt)), at p. 3. The market entry barriers, discrimination, and changes in broadcast licensing have violated the Fifth and First Amendment rights of minority licensees and the general public.

b. The FCC's Failure to Promote Diversity and Eliminate Market Entry Barriers Has a Discriminatory Effect on Minorities in the Broadcast Industry, of Which the Fcc Is Aware

Despite claims by the FCC that diversity exists within the broadcast industry, a small homogenous group of mega corporations have a virtual monopoly on broadcast ownership. In 1949 Jessie Blayton became the first black radio station owner (he purchased the station on the secondary market). In 1960, Andrew Langston began his 13 year process of acquiring a radio broadcast license from the FCC. Mr. Langston finally was awarded his license in 1974. In 1973, the FCC issued a construction permit to WGPR-TV, the first black owned television station. However, the first African American woman to own a television station was Dorothy Brunson; she obtained the license in 1989 after years in comparative hearings. In 1996 the minority ownership rose to a dismal 3.1% in spite of purported affirmative action policies implemented by the FCC. By 1998, this percentage declined to 2.9% and the decline was attributed to the dissolution of affirmative action policies and to the consolidation of the radio industry when the FCC raised the ceiling on ownership allowed to current licensees. Leonard M. Baynes, *Life After Adarand*, 33 UMIJLR 87, 88-89 (1999). These figures indicate that minorities are not given the opportunity to be a part of the FCC's quest to promote diversity.

Prior to the Act of 1996, the Communications Act of 1934 permitted the FCC to regulate broadcasters in an effort to promote diversity of viewpoints. However, many of these 'affirmative action' policies were abandoned by the Act of 1996. Programs such as (1) the distress sale policy, which created a market only of minorities for a station in jeopardy of losing its license; (2) the comparative hearings policy, which gave prospective licensees a 'plus' for being a minority; (3) tax certification program, which gave the seller a deferment of any capital gain tax on a sale and (4) lottery, which gave the FCC power to ensure that preferential treatment would be granted to members of under represented groups and (5) auctions which gave twenty-five percent "bidding credit" to minority owned businesses that partook in auctions. Then Chairman Kennard of the FCC stated that there is a "compelling governmental interest in developing programs to promote minority ownership" and recommended "congress should institute minority programs, increase funding for minorities and, reexamine the means by which minority ownership is determined." Press Release, Federal Communications Commission, Studies Indicate Need To Promote Wireless & Broadcast License Ownership By Small, Women- And Minority-Owned Businesses (December 12, 2000) (*available at* [http://www.fcc.gov/Bureaus/Enforcement/News\\_Releases/2000/nren0034.html](http://www.fcc.gov/Bureaus/Enforcement/News_Releases/2000/nren0034.html)). The FCC may face challenges if they reinstate minority favorable programs such as was the case in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), where white applicants challenged the FCC's policies involving minority favorable programs. However, the court held that benign race conscious measures are constitutionally permissible to the extent that they serve important governmental objectives of enhancing diversity. *Id.* at 566.

The FCC is cognizant that since the enactment of the Telecommunications Act, statistically, there has been no improvement in the number of minority licensees and this stagnation may be

partially due to the financial criteria that licensees must meet. Since the major telecommunication corporations can easily meet this financial threshold, minorities are left out of the loop. The financial threshold established by the FCC creates the discrimination. Knowing the results of the statutory scheme implies that the FCC deliberately ignores the effect on minorities and therefore its actions can be traced to discriminatory purpose. Discriminatory purpose implies that the decision maker, in this case the FCC, selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of,' its adverse effects upon an identifiable group." Personnel Administrator of Massachusetts v. Feeney, 442 US 256, 279. The FCC is aware of the discriminatory effect of the Act and because they are aware that minorities cannot meet the necessary market barriers, their failure to correct indicates intent.

There is widespread fear that in the absence of governmental control, "the subordination to monopolistic domination in the broadcasting field," FCC v Pottsville Board, 309 US 134 (1940), will become a greater reality unless the FCC, instead of talking about the need for diversity, acts on it. The FCC has stated that diversification is a factor that needs to be weighed. See Bamberger Broadcasting Service, Inc. 3 Pike & Fischer 914, 925 (1946) and Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 394 (1965). The FCC's failure to act under the circumstances, and knowing that the absence of diversification has not been cured, supports a finding of discriminatory intent.

c. The FCC's Past Discrimination and Failure to Remedy the Disparate Impact Are the "Something Else" Required to Prove That The Telecommunications Act of 1996 Has a Discriminatory Purpose Towards Minorities

Section 257 of the Telecommunications Act states that the Commission must promote the policies and purposes of the Act favoring diversity of media voices and to identify and eliminate market entry barriers. The act also claims that the widest possible dissemination of information from diverse sources is essential to the welfare of the public, which is important to the First Amendment values of the nation. *See Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d. 979, 981 (May 25, 1978). Safeguarding the public's right to receive a diversity of views and information is an integral component of the FCC's mission. However, no significant attempts at remedying past discrimination have been enacted by the FCC or by Congress. Although the FCC has identified the need for a more diversified airways, nothing has been done to correct past discrimination or to close the great digital divide. The FCC has continually given lip service for the need for diversity in the broadcast industry while failing to correct past discrimination and continuing to participate in the disparate impact created by the Telecommunications Act of 1996.

Elimination of past discrimination could constitute a compelling governmental interest if the FCC feels that re-institution of affirmative action policies that favor minorities will be challenged. Justice O'Connor declared, "government is not disqualified from acting in response to the practice and lingering effects of past discrimination against minority groups." Adarand Constructors, Inc. v. Pena, 515 U.S. at 200, 237 (1995). The court held that any federal program that uses race as a basis for decision-making, must serve a "compelling governmental interest such as the remedying of past discrimination." City of Richmond v. Croson, 488 U.S. 469, 502 (1989). The FCC has the

power to correct past discrimination but they have not acted. The acknowledgement of such a disparate impact against minority station owners and the failure to remedy such disparate impact constitutes intent under the Supreme Court's analysis of the Arlington Heights factors.

The FCC's licensing methods and procedures also create an inference of discriminatory exclusions of minorities so that the FCC becomes at best a passive participant in the discrimination towards minorities. The Supreme Court observed that "discrimination requiring re-mediation could be either discrimination by the governmental actor [FCC] or by its 'passive complicity' in the discrimination of others, specifically, the FCC has unwittingly perpetuated patterns of private discrimination through its rules for license allocation." Ivy Planning Group, supra, at p. 3 (quoting City of Richmond v. Croson, supra, 488 U.S. at 504, 509). The Supreme Court found governmental policies discriminatory when the government agency does not remedy past discrimination and where the agency was a passive participant in a system of racial complicity.

B. The Telecommunications Act of 1996 Denies Equal Protection Rights to Minority Media Station Owners by Creating a Discretionary Process by Which the Fcc Awards Station Licenses

The Supreme Court applies different standards to prove discriminatory intent on a case-by-case basis by applying an objective test to prove discriminatory intent in cases where the application of the law under scrutiny permits little to no discretion and a subjective test to prove discriminatory intent in cases where the application of the law under scrutiny is discretionary. Under the framework established by the Supreme Court, the discriminatory application of the 1996 Telecommunications Act should be evaluated by the subjective test because it requires that the FCC exercise discretion when awarding station licenses to applicants. The plaintiffs must prove that 1) they belong to an identifiable group claiming an unequal application of the Act; 2) the identifiable class is

underrepresented in the media station owner field; and 3) the process by which the FCC awards mass media licenses is susceptible to abuse. Because the process by which the FCC awards mass media station licenses satisfies the purposeful discrimination doctrine set forth in Washington v. Davis, the Court should find that the Act violates Plaintiffs' Equal Protection rights.

To prove that a law is discriminatory, the Supreme Court has held that a plaintiff must prove legislative intent. The Court has struggled to devise a clear definition of intent and instead has relied on different standards applicable on a case-by-case basis. For cases regarding an objective application of a statute, the Court has looked to objective criteria that indicate legislative intent. However, when the application of the law requires some level of discretion, the Court has had a more difficult task of determining intent. The Court began to apply a subjective test by looking to other indicia of intent which "supports the presumption of discrimination" raised by the statistical evidence of underrepresentation. See Castaneda v. Partida, 430 U.S. 482, 494 (1977).

The Court first applied a subjective criteria test in Castaneda v. Partida, *supra*; when it found that significant underrepresentation of Mexican Americans on petite juries violated the Plaintiff's Equal Protection rights guaranteed by the Fifth Amendment. The Castaneda standard continued to apply to future cases involving a subjective application of the law at bar, such as "key man" jury commission selection, petite jury selection and gerrymandering cases. The Court utilizes a three prong test to determine if the subjective process creates an unconstitutional violation of Equal Protection Rights: 1) the plaintiff belongs to a cognizable class singled out for unequal treatment of the law, 2) that the cognizable class is significantly underrepresented in the licensing awarding process under the Act, and 3) the challenged process is susceptible to abuse which would presume discrimination.

In the present case, the 1996 Telecommunications Act creates a discretionary process by which the FCC awards mass media station licenses and must therefore be evaluated by the subjective standard. The Act outlines a series of requirements that an applicant must satisfy in order to be considered for a license. However, since the Act is silent on how to award the license to multiple qualified applicants, the process mandates a discretionary decision process by the FCC. Therefore under the framework established by the Supreme Court, to determine whether the 1996 Telecommunications Act discriminates against minority mass media station owners, a court should apply the subjective criteria test first applied in Castaneda. See 430 U.S. at 494-495.

1. The Supreme Court Applies Different Standards to Prove Discriminatory Intent on a Case-by-case Basis.

In 1976, the Supreme Court held that disparate impact alone is insufficient to prove Equal Protection violations, but rather that the "invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." Washington v. Davis, 426 U.S. 229, at 240 (1976). In his famous concurrence, Justice Stevens warned that "the line between discriminatory purpose and discriminatory impact is not nearly as bright and perhaps not quite as critical" as the majority offered. *Id.*, at 253 (Stevens, J., Concurring). Consequently, the Court has attempted to define this concept of discriminatory purpose through a series of tests applied to specific situations on a case-by-case basis. The Court recognized that a petitioner may make a prima facie case of purposeful racial discrimination "by relying solely on the facts...*in his case*." See Batson v. Kentucky, 476 U.S. 79, 95 (1986) (emphasis in original). If the plaintiff succeeds in making a prima facie case, the burden shifts to the state either to rebut the claims or to forward

legitimate interests that outweigh the plaintiff's right to the equal protection of the laws. See Washington v. Davis, 426 U.S. at 241.

The Supreme Court has specifically recognized the importance of distinguishing between objective and subjective criteria when determining discriminatory intent. See McKlesky v. Kemp, 481 U.S. 279, 295, n.14 (1987). In discrimination cases where objective evidence other than the discretion of a governmental agent are available to the Court, the Court applies an objective test to determine discriminatory intent. On the other hand, when the application of the law at bar requires a government agent's discretion, the Court has applied a subjective test to determine discriminatory purpose.

a. The Supreme Court Applies the Objective Test to Prove Discriminatory Intent in Cases Where the Application of the Law under Scrutiny Permits Little to No Discretion

In cases where legislative intent can be determined objectively, the Supreme Court has established an objective test to determine whether the law at bar violates a plaintiff's equal protection rights. The Court applies the objective test when the persons applying the law in question should have no discretion on how the law is applied. The law requires that certain criteria be met for its application. Absent room for discretion, the law stands alone as the sole representation of the government's intent. Thus, in these cases the court looks to indicia of discriminatory intent.

In *Washington v. Davis*, 426 U.S. 229 (1976), the plaintiff challenged a literacy test, the passing of which was required for all police cadet applicants, on constitutional grounds, arguing that the test discriminated against blacks. The cadet applicant either passed or failed the test, leaving no discretion on the part of the police department. Absent a showing of the Police Department's discretion in applying the law, the plaintiffs were required to prove that the state devised the test with

intent to discriminate. Justice White, in his majority opinion in *Davis*, held that the test was racially neutral on its face and that the plaintiffs failed to prove that the state created the test purposefully to discriminate against blacks. *Id.* Therefore, the Court denied the plaintiff's claim.

b. The Supreme Court Applies the Subjective Test to Prove Discriminatory Intent in Cases Where the Application of the Law under Scrutiny Is Discretionary

In cases where application of the law requires discretion on the part of the administrator, however, the courts have greater leeway in determining the legislature's intent. Where the Court previously looked to the disparate impact of the law, the Court instead has substituted a subjective standard in accordance with Washington v. Davis, *supra*, to account for this discretion. This subjective standard evaluates: 1) whether the plaintiff belongs to an identifiable group; 2) whether that protected group is underrepresented in the field being challenged; and 3) whether the challenged process is susceptible to abuse. Thus, the Court can determine the legislature's intent by isolating and accounting for any discretionary behavior on the part of the administrator.

In jury commissioner, or "key-man," cases, the Court has utilized this subjective test to evaluate the constitutionality of laws determining the jury pool selection process. In Castaneda v. Partida, 430 U.S. 482 (1977), the Court upheld a prisoner's appeal for a writ of *habeas corpus*, finding that he had established a prima facie case of discrimination against Mexican-Americans in grand jury selection. In establishing the three-prong test for discrimination in jury commissioner cases, Justice Blackmun recognized the subjective nature of jury selection. He outlined the first step as being able to "establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written *or applied*." *See id.*, at 494 (emphasis added). The second prong of the test relies upon Hernandez v. State of Texas, 347 U.S. 475 (1954), in requiring

proof of underrepresentation in the challenged field. *Id.* Finally, Justice Blackmun interprets Washington v. Davis, *supra*, for the final prong requiring a showing that the selection procedure is susceptible to abuse. See Castaneda, 430 U.S. at 494. This "showing" heavily supports the presumption of discrimination raised by the statistical showing of the second prong. Thus, the Court established a subjective three-prong test to determine the constitutionality of the discretionary process of selecting a grand jury and by which the Court analyzed the legislature's discriminatory intent.

Similarly, the Court utilized the Castaneda subjective test in analyzing the legislature's discriminatory intent in petite jury selection cases. See, e.g., Batson v. Kentucky, 476 U.S. 79 (1986). In Batson, the petitioner challenged the state's use of its preemptory challenges, claiming that the state eliminated jury members on the basis of race. Reiterating the three-prong test used in Castaneda, the Court recognized the inherent discretion involved in determining a petite jury. The majority wrote, "the defendant is entitled to rely on the fact, *as to which there can be no dispute*, that preemptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Id.*, at 96 (quoting Avery v. Georgia, 345 U.S. at 562 (1953))(emphasis added). The three factors outlined in Castaneda "[raise] the necessary inference of purposeful discrimination" in determining a petite jury. *Id.* In using the Castaneda subjective test, the Court further widened the gap between the standard to determine discriminatory intent in cases involving objective application of a law, such as that used in Washington v. Davis, and in cases that address a discretionary application of a law.

The Court follows the same subjective test in deciding gerrymandering cases, as well. In Davis v. Bandemer, 478 U.S. 109, (1986), plaintiffs claimed that the 1981 apportionment

discriminated against Democrats on a statewide basis. Although the Court ultimately denied the plaintiff's prima facie claim, it addressed the same three factors that the Court established in Castaneda. The majority noted the inherently discretionary nature of redistricting by explaining that "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Id.*, at 129. The Court then continued an analysis similar to that conducted in Castaneda. First, the Court noted that the plaintiffs were Democrats, and that the claim was the statute discriminated against Democrats on a statewide basis. *Id.*, at 127. This distinction satisfies the first prong of the Castaneda test, requiring a cognizable, distinct class to claim that it was victim to an unequal application of the law. However, the Court held that the plaintiffs failed to prove that the Democrats were sufficiently underrepresented by the reapportionment, thereby failing the second prong of the Castaneda test. *Id.*, at 129-131. In determining its holding, the Court relied upon the subjective test to analyze the inherently discretionary process of redistricting.

Since 1976, the Court has considered several classifications of discriminatory intent cases. The choice of applicable standard varies on a case-by-case basis. When the application of the law left no room for administrative discretion, the Court applies the objective test similar to that established in Washington v. Davis, to determine the legislature's discriminatory intent. However, when the application of the law requires some discretion on the part of the administrator, then the Court applies a subjective test similar to that established in Castaneda to determine legislative intent. In either case, the respective test determines whether the plaintiff has made out a prima facie case of discriminatory intent. If so, the burden shifts to the government. If not, the plaintiff fails the

threshold requirement of showing a purposeful discrimination required by the Court in Washington v. Davis.

- c. Under the Framework Established by the Supreme Court, the Discriminatory Application of the 1996 Telecommunications Act Should Be Evaluated by the Subjective Test

The U.S. Supreme Court analyzes by a subjective test those laws that require discretionary application to determine whether the plaintiff has established a prima facie case of discriminatory purpose as required by Washington v. Davis, supra. When two or more applicants apply for the same license, the FCC ultimately decides to whom the license will be awarded. Assuming all applicants satisfy the minimal technical and financial requirements dictated by the 1996 Telecommunications Act, the license recipient is the applicant deemed best suited by the FCC agent's subjective criteria for awarding the license. Therefore, the Court should apply the subjective standard to the discretionary manner by which the Federal Communications Commission awards station licenses. Consequently, the plaintiff must satisfy the three factors established in *Castaneda* in order to establish a prima facie case of discrimination and shift the burden to the government. Once plaintiff makes out a prima facie case of discrimination, the government must either rebut plaintiff's case or present an affirmative governmental interest that outweighs the plaintiff's Constitutional right to the equal protection of the law.

2. The Discretionary Process of Awarding Station Licenses Requires That The Court Apply the Subjective Standard When Analyzing Plaintiff's Prima Facie Case of Discrimination
- a. The Telecommunications Act Requires That the FCC Exercise Discretion When Awarding Station Licenses to Applicants

The plaintiffs have the burden of showing that the FCC's role in awarding station licenses to applicants is discretionary instead of "controlled by mandatory statutes or regulations." See Brotman v. U.S., 118 F.Supp. 2d, 418, 423 (S.D.N.Y., Sept. 5, 2000) (quoting U.S. v Gaubert, 499 U.S. 315, 328 (1991)).

Section 309 of the Act outlines the procedures for granting mass media licenses. See 47 U.S.C. § 309 (1996). Furthermore, when considering two or more applications for the same license, the Commission must devise a competitive bidding system by which the "Commission shall grant the license or permit to a qualified applicant..." *Id.*, at § 309(j)(1) (emphasis added). While guided by five objectives and one limitation designed to "include safeguards to protect the public interest in the use of the spectrum..." the Act mandates that the FCC publish regulations to meet these criteria. *Id.*, at § 309(j)(3).

These regulations ultimately rotate around the FCC's discretionary decision of whether or not "the public interest, convenience and necessity will be served by the granting of such application." *See Id.*, at § 309(a). Furthermore, the FCC must use its discretion to choose between the final applications since the Act is silent on the FCC's procedural requirements when two or more qualified applicants meet these three vague and subjective prerequisites. The Act is littered with subjectivity and vague requirements, creating a discretionary process by which the FCC awards mass media station licenses.

b. The Court Should Apply the Subjective Standard to Determine That the Discretionary Process of Awarding Mass Media Licenses Violates Plaintiffs' Equal Protection Rights

The act of awarding licenses for mass media stations requires some discretion on the part of the FCC agent who applies the law. Consequently, the court should apply the subjective test to determine legislative intent when analyzing the plaintiff's claims that the Act violates their equal protection rights.

(1) The plaintiff is an identifiable group claiming an unequal application of the Act

The Court requires that the plaintiffs prove they are part of an identifiable group. Assuming the plaintiffs will be African American, Latino, Asian, Native Americans, women, poor citizens with income below the poverty line or political groups, the Court has held that each group is clearly an identifiable class. See Brown v. Board of Education, 347 U.S. 483 (1954) (African Americans are a recognized class protected by the Equal Protection Clause of the Constitution); Hernandez v. Texas, 347 U.S. 475, 480 (1954) ("it is no longer open to dispute that Mexican-Americans are a clearly identifiable class"); Regents of University of California v. Bakke, 438 U.S. 265 (1978) (referring to blacks, Chicanos, Asians and American Indians as "minority groups"); Taylor v. Louisiana, 419 U.S. 522 (1975) (holding that women constitute a recognizable and distinct class); Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Com'rs, 622 F.2d 807, 818 (5th Cir. 1980) (Court refused "to hold as a matter of law that [groups with income below the poverty level] are not legally cognizable."); Davis v. Bandemer, *supra*, 478 U.S. 109 (recognizing Democrats as an identifiable class). Therefore, plaintiffs will have no difficulty in satisfying the first prong of the *Castaneda* test.

- (2) Plaintiffs must prove that the identifiable class they represent is underrepresented in the media station owner field

To prove the second prong of the subjective test, plaintiffs must prove that they are underrepresented as owners of media stations. The primary method by which a plaintiff proves underrepresentation is by statistics. Courts have not devised a magical formula to apply to every factual situation. See Bryant v. Wainwright, 686 F.2d 1373, 1776 (1982). Instead of such a rigid approach for "the wide variety of circumstances and unique factual patters of discrimination cases arising under the Equal Protection Clause," the Court has addressed each case on an individual basis. See Alexander v. Louisiana, 405 U.S. 625, 630 (1972).

Nevertheless, most courts have adopted a method for evaluating statistical evidence. First, a determination is made of the percentage of the relevant general population composed of the particular group or class allegedly singled out for discriminatory treatment. A similar finding must then be made of the percentage of the same group or class represented in the challenged process. If the results of the two figures reveal a significantly large disparity, then there "arises a presumption of discrimination." See Bryant v. Wainwright, 686 F.2d 1373, 1176 (11th Cir., 1982).

Courts have found a wide variety of disparate percentages that violate the plaintiff's equal protection right. See Turner v. Fouche, 396 U.S. 346 (1970) (The Court concluded that a disparity of 23% was sufficient showing to prove racial discrimination); Whitus v. Georgia, 385 U.S. 545 (1967) (holding that 30% disparity between the population at large and the population of black jury members was sufficient showing of discrimination); Jefferson v. Morgan, 962 F.2d 1185 (6th Cir., 1992)(finding that a 12.6% difference between the percentage of African Americans in the county's

population and the percentage of African Americans participating in grand juries was sufficient to prove discrimination).

Courts have also looked to the ratio of the percentage of plaintiff's group in the appropriate general population to the percentage of represented plaintiff's group in the challenged process. For example, a court might compare the percentage of African Americans in the general American public to the percentage of African Americans who own television stations in the same year to determine a ratio that can then be used to determine the group's representation in the television station industry. Similar to disparate percentages, the courts have not settled on a magic ratio that determines discrimination if met or exceeded. See Castaneda, supra (finding a presumption of discrimination where the ratio was over 2 to 1, or 79.1% to 39%); Whitus v. State of Ga., 385 U.S. 545 (1967)(a ratio of nearly 3 to 1, or 27.1% to 9.1% disparity); Sims v. Georgia, 389 U.S. 24 (1967)(a ratio of over 5 to 1, or 24.4% to 4.7% disparity); Jones v. Georgia, 389 U.S. 24 (1967)(a ratio of nearly 4 to one, or 19.7% to 5% disparity); see also Rideau v. Whitley, 237 F.3d 472 (5th Cir., Dec. 22, 2000) (finding a ratio of over 3 to 1, or 18.5% to 5% disparity, "striking," but ruling in petitioner's favor on other grounds).

However, the Supreme Court has warned of the precise use of statistical evidence. Concerned with improper statistical comparisons, the Court held that a standard deviation method was necessary as a measure of the predicted fluctuations from the sample. See Hazelwood School District v. United States, 433 U.S. 299, 309 n.17 (1977). The source of statistics utilized and specific sample size can either strengthen or weaken a plaintiff's case, depending on the factual situation of each case. Therefore, the Court has stressed that the same relative population pool be the source of

all statistics when determining the underrepresentation of the plaintiffs in the alleged discriminatory process.

Note: further statistical facts and analysis required: [In the current case, the plaintiffs must prove that, based on the specific factors concerning the awarding of mass media licenses, they are significantly underrepresented in the field. However, courts will be wary of the statistical source and the relative sample sizes, so the plaintiffs must be careful to draw their information from similar resources. They should compare the number of minority applicants who applied for licenses with the number of that minority group who owned licenses at the time in order to draw correct correlations. For example, plaintiffs must compare African American applicants to African American owners, and Mexican American applicants to Mexican American owners, instead of comparing African American applicants to total minority owners, or Mexican American applicants to African American owners. Similarly, plaintiffs must draw information from the same geographic boundaries; i.e., compare county to county, state to state and national to national statistics. For example, if analyzing data for African Americans in New York, plaintiffs must be sure to use the same data sets (i.e., census records) for both minority and non-minority station owners and applicants. Similarly, plaintiffs must be careful to examine consistent records when analyzing information from smaller subsets, such as New York City, New York County, New York State and the total U.S population.]

Information regarding this underrepresentation should be readily available from municipal, county and state census records for the general population information, and from FCC records for information regarding applications. Additional information should be available from websites that have interest in tracking minority and non-minority owned station ownership. For example, the

National Telecommunications and Information Administration has posted minority station ownership data for the years 1996-1998. See National Telecommunications and Information Administration's findings on minority commercial broadcast ownership totals, available at <http://www.ntia.doc.gov/opadhome/minown98/totals.htm>. This study, based on the Federal Communication Commission information, reports that minorities represented 2.9% of all commercial broadcast station owners as of August, 1998. This number is up slightly from 1997, where minorities represented 2.8% of all commercial broadcast station owners. Comparing this percentage to the percentage of minority citizens in the United States would present an enormous finding of disparity. However, since the courts utilize no magic formula to determine discrimination, the court will have the ultimate discretion of whether or not the plaintiffs have made a sufficient showing of underrepresentation in the mass media station owning field.

c. The Process by Which the FCC Awards Mass Media Licenses  
Is Susceptible to Abuse

In order to prove a prima facie case of discrimination and to shift the burden to the government, plaintiffs must show that the process of awarding station licenses is susceptible to discriminatory abuse. This showing must give rise to a presumption of discrimination. See Washington v. Davis, *supra* at 242. Courts have held that "[a] selection process which can be easily maneuvered in a discriminatory fashion is more likely to give rise to a presumption of discrimination than a selection process which would be difficult, but not impossible, to manipulate." See Bryant v. Wainwright, 686 F.2d 1373, 1377 (11th Cir. 1982).

Courts have consistently held that selection processes are discriminatory when pools are denoted with easily identifiable symbols. See, e.g., Avery v. Georgia, 345 U.S. 559 (1953)(names

of black jurors on yellow pieces of paper compared to names of white jurors on white pieces of paper allowed "those to discriminate who are of a mind to discriminate"); Alexander, 405 U.S. at 630 ("The racial designation on both the questionnaire and the information card provided a clear and easy opportunity for racial discrimination."); Whitus, 385 U.S. at 548-9 (finding a selection system was susceptible to abuse where potential grand jurors were selected from a list where African-Americans were denoted with a "c"). Furthermore, the court in Dobbs v. Kemp, 740 F.2d 1499 (11th Cir. 1986) found that names of women denoted with an "f" compared to names of men denoted with an "m" represented a process that allowed for constitutionally significant underrepresentation of women on a grand jury. However, the Dobbs court, as well as many courts, refused the plaintiff's discrimination claim since the actual process of selecting jurors was not easily manipulated. The court held that the jury commissioner in that case acted "in a completely mechanical fashion" by selecting every 5<sup>th</sup>, 6<sup>th</sup> or 10<sup>th</sup> name from the jury pool list. *Id.*, at 1510. The 11th Circuit found this "mechanical" process to be free from any possibility of manipulation because the commissioners used no criteria other than the numerical system.

In the present case, the process by which the FCC awards licenses is certainly susceptible to abuse. The process is not random nor is it tied to a racially neutral process like voter registration. Applications for licenses request information on the applicants' minority status. The FCC agents decide the fate of station licenses based on applications that specifically identify the applicant's personal information including race and gender. Clearly the process is susceptible to discriminatory abuse since the agents who ultimately decide to whom the licenses are awarded have the information necessary to discriminate. Furthermore, with the underrepresentation as drastic as in this case, not

only was the process susceptible to abuse, but evidence of that abuse should be ascertainable or readily available.

VI. PARTIES WHO MAY QUALIFY AS POTENTIAL PLAINTIFFS

There are four categories of parties that could be named as plaintiffs in the Constitutional Challenge to provisions of the Communications Act of 1996, which regulate and are the basis for the governing of the media industry in the United States. These potential parties include: (1) organizations which do not have access to television and radio outlets but are involved with trying to attain more diversity in the media; (2) micro-broadcasters which have lost their access to the broadcast spectrum as a result of the 1996 Act; (3) organizations who have had their culture, as well as their diverse social and political views, broadcast over the airwaves, but do not have them over the airwaves any longer as a result of the 1996 Act; and (4) organized groups of viewers and listeners who are effected by the broadcast ownership provisions of the 1996 Act.

A. Organizations Which Do Not Have Access to Television and Radio Outlets But Are Involved With Trying to Attain More Diversity in the Media

In order to be a named plaintiff, a party must be both a real party in interest, with standing, and have capacity to sue. Fed. R. Civ. p. 17(a), (b). In this media challenge, organizations which do not have access to television and radio outlets but are involved with trying to attain more diversity in the media might not be deemed a real party in interest, which would prevent them from being a party.

Fed. R. Civ. p. 17(a) states that "[e]very action shall be prosecuted in the name of the real party in interest." A real party in interest is defined as "the persons or entities possessing the right

or interest to be enforced through litigation... [whose] right or interest must be legally protected." A party not possessing a substantive legal right is not the real party in interest with respect to that right. James Wm. Moore et Al., Moore's Federal Practice, §17.10[1] (3d ed. 1999); see also South African Marine Corp. v. United States, 640 F. Supp. 247, 254 (Ct. Int'l Trade 1986) (action must be brought by a person who possesses the right to enforce the claim and who has a significant interest in the litigation).

In the present case, the defendants will argue that organizations which do not have access to television and radio outlets but are involved with trying to attain more diversity in the media do not possess the right or interest sought to be enforced. Defendants will urge a narrow approach to support their argument: these organizations do not have a legally protected right since they did not have their freedom of speech impinged by the provisions of the 1996 Act because they did not have any ownership or access to broadcast outlets restricted by the 1996 Act due to the fact that they did not own nor have access to any broadcast outlets at all. However, an approach based upon the public having a First Amendment right to diverse news, viewpoints, etc. so as to assure their right of self-governance might be treated by the Court as establishing that these organizations do have a legally protected right.

An argument that this type of organization would benefit from a judgment upholding the plaintiffs' contentions and should, therefore, be considered as a real party in interest, would probably not prevail since "[o]ne who merely stands to benefit from the action, economically or otherwise, is not necessarily a real party." See Moore's Federal Practice. The Court in Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 464-465 (1980) held that although business trust shareholders would benefit from an action by trustees, the shareholders who had no power to manage or dispose of trust assets were

not real parties in interest. In the context of the media, while it is true that an organization seeking to attain more diversity would benefit as a result of having a change in the structure of the media industry, such an organization, similar to the lack of control by the shareholders in the unsuccessful claim in Navarro, is not effected directly by the FCC and the ownership provisions of the 1996 Act.

Due to an insufficient amount of information regarding these organizations, any further analysis is not possible regarding whether or not any of these organizations might be named as a plaintiff in this media challenge, which is discussed by the Court in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (plaintiff must, first, have suffered an "injury in fact" - an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; second, there must be a casual connection between injury and the conduct complained of; third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision).

However, even if these organizations fail to be a real party in interest or have the requisite standing to be named a plaintiff in this media challenge as an organization which does not have access to television and radio outlets but are involved with trying to attain more diversity in the media, any one of these organizations might be able to be named as a plaintiff if it can show that it is, or was, a viewer or listener of television or radio broadcasting which has been effected by the ownership provisions of the 1996 Act.

B. Selection Issues Regarding the Three Other Groups of Potential Plaintiffs

In order to be a named plaintiff, a party must be both a real party in interest and have capacity to sue. Fed. R. Civ. p. 17(a), (b). In this media challenge, micro-broadcasters which have lost their access to the broadcast spectrum as a result of the 1996 Act; organizations who, in the past, had their

culture, as well as their diverse social and political views, broadcast over the airwaves, but do not have them over the airwaves any longer as a result of the 1996 Act; and organized groups of viewers and listeners who are effected by the broadcast ownership provisions of the 1996 Act may be deemed real parties in interest in this media challenge. According to Fed. R. Civ. p. 17(a), micro-broadcasters which have lost their access to the broadcast spectrum as a result of the 1996 Act would be a real party in interest because they are entities that possess a right to be enforced through litigation, (i.e., their freedom of speech and equal protection rights) They did have their ownership and access to broadcast outlets restricted by the broadcast ownership provisions of the 1996 Act. See Moore's Federal Practice supra. [There needs to be a further analysis of the characteristics of the individual organizations to determine if these types of organizations will satisfy the standards for standing as detailed in Lujan. This group of potential plaintiffs has a strong basis for being accepted as named plaintiffs. League of Women Voters v. FCC, 547, F. Supp. 379, 382 (1982) (plaintiff owner of several broadcast stations has standing to challenge certain provisions of the Public Broadcasting Act of 1967 which directly effect the ability of the owner to control his station's broadcast content). League of Women Voters should apply to this type of organization since the ownership provisions of the 1996 Act have directly effected a micro-broadcaster's ability to control its station's broadcast content because it no longer owns its stations due to the 1996 Act. Organizations who had their culture, as well as their diverse social and political views, broadcast over the airwaves, but do not have them over the airwaves any longer as a result of the 1996 Act, would be deemed real parties in interest in this media challenge. These organizations are entities that possess a right to be enforced through litigation - their freedom of speech and equal protection rights. [Here too, there needs to be a further analysis of the characteristics of the individual

organizations to determine if these types of organizations will satisfy the standards for standing as laid out in Lujan. The second and third portions of Lujan cannot be clearly determined based upon the information now available regarding the characteristics of the individual organizations and the remedies sought through this litigation.]

Finally, Fed. R. Civ. p. 17(a) allows for a real party in interest designation to be given to organized groups of viewers and listeners who are effected by the broadcast ownership provisions of the 1996 Act. These organizations are entities that possess a right to be enforced through litigation - their freedom of speech and equal protection rights. Further, these types of organizations may be named as plaintiffs and have standing if standing is granted to the groups of microbroadcasters which have lost their access to the broadcast spectrum as a result of the 1996 Act or to the organizations that no longer have their culture and diverse social and political views broadcast over the airwaves. In general, recipients of information have First Amendment rights which are reciprocal of the sender's rights. Free Speech v. Reno, No. 98 Civ. 2680, 1991 U.S. Dist. LEXIS 3058, at \*9 n.2 (S.D.N.Y. Mar. 18, 1999) (standing of plaintiff listeners of a radio station may be established concurrently with that of the station in a First Amendment challenge against the constitutionality of the Communications Act of 1934); see also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 757 (1976) ("If there is a right to advertise, there is a reciprocal right to receive the advertising."); see also Board of Educ v. Pico, 457 U.S. 853, 866 (1982) (explaining that "the right to receive ideas follows ineluctably from the sender's First Amendment right to send them").

C. Capacity to Sue

If these organizations are to be named as plaintiffs in this media challenge, they also must have capacity to sue. Fed. R. Civ. p. 17(b), states that:

[t]he capacity of an individual...to sue...shall be determined by the law of the individual's domicile. The capacity of a corporation to sue...shall be determined by the law under which it was organized. In all other cases capacity to sue...shall be determined by the law of the state in which the district court is held, except...that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States.

[A separate analysis of capacity is required for each potential plaintiff, whether an individual, a corporation, a partnership, or an unincorporated association. That analysis is currently not possible since the domicile or state of incorporation for each potential plaintiff is unavailable.]

## VII. POTENTIAL DEFENDANTS

The Federal Communications Commission ("FCC"), by virtue of its enforcement of the 1996 Act, and the United States Government ("U.S."), due to its enactment of the 1996 Act, should be the defendants in the media challenge against the 1996 Act. Potential defendants, which should not and are not required to be named defendants but may be joined as necessary and indispensable parties or through intervention, include the corporations which have benefitted the most from the 1996 Act and have greatly contributed to limiting the public's First Amendment rights: Time Warner, Disney, Viacom, News Corp., Bertelsmann, and General Electric.

A. Federal Communications Commission

The FCC should be named as a defendant in the media challenge because of its primary responsibility in overseeing the media industry under the telecommunications acts, the direct impact of its acts on the plaintiffs' First Amendment rights, and its involvement in carrying out the court's order and decision. Its absence as a defendant would impair its ability to protect its interests in the 1996 Act.

The plaintiffs have a cause of action against the FCC since the Commission enforces and regulates the 1996 Act, which is alleged to be unconstitutional because its enforcement has violated the plaintiffs' First Amendment rights of free speech and Fifth Amendment rights of equal protection. The FCC should be named as an original defendant because it will be bound to any judgement that might limit the scope of or void the 1996 Act. Finally, the FCC should be named as a defendant because if it is not a party, then the Commission's ability to protect its interests in this litigation, as the agency which is governed by and enforces the 1996 Act, might be improperly impaired. Fed. R. Civ. p. 19(a)(2)(i), provides that a person must be a party if "... the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may as a practical matter impair or impede the person's ability to protect that interest."

B. United States

The U.S. should be named as a defendant because the Government has limited the plaintiffs' First and Fifth Amendment rights, would be bound by the judgment, and its absence as a defendant would impair its ability to protect its interests in the 1996 Act.

The Government's legislation created and made the Telecommunications Act of 1996, the Federal law which plaintiffs claim is unconstitutional. The U.S. should be named as an original defendant because it will be bound to any judgement that might limit the scope of or void the 1996 Act. Finally, the U.S. should be named as a defendant because if it is not a party, then its ability to protect its interests in this litigation, in the legislation that it created and made Federal Law, might be improperly impaired, in violation of the Federal Rules of Civil Procedure.

C. Time Warner, Disney, Viacom, News Corp., and General Electric

The five major media corporations in the United States ("U.S. Five") are not required to and should not be named as original defendants. However, even though a plaintiff has the right to initially decide who shall be the parties to a lawsuit, any of the five might be made parties by the court through joinder or intervention.

1. It is Not Beneficial to the Plaintiffs to Name the U.S. Five as Original Defendants

The U.S. Five should not be named as original defendants to the media challenge because it may be possible to attain the remedies which are sought without the major media corporations involvement. If the plaintiffs succeed in this lawsuit and the 1996 Act is held unconstitutional, then the FCC and the U.S. will be forced to enact and enforce new and different media regulations upon the entire industry, which would include those that effect the U.S. Five. Since they would be a party to the action, the FCC and U.S. would be bound by the court's holding

in regard to the industry regulations, which would eventually effect the U.S. Five, regardless of whether or not the U.S. Five or any other media corporations were a party to the media challenge\*.

2. The U.S. Five Need Not Be Named as Original Defendants

While the U.S. Five might be named as parties by the court after successful motions for joinder by the FCC or U.S. or by a motion for intervention by the media corporations, it is not necessary to name them as original defendants.

A failure to name the U.S. Five will not furnish grounds for dismissal of the media challenge because "[m]isjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just". Fed. R. Civ. p. 21. Each of the U.S. Five will probably be able to be made a party to the media challenge litigation via joinder or intervention. However instead of conceding the issue now, it would be wiser to force them to make the motion for intervention or have the U.S. and FCC make the motion for joinder and then for the plaintiffs to deal with those issues when they are brought up. There may not be any motions for joinder or intervention if the FCC or U.S. does not want the U.S. Five involved in the litigation or if any of the members of the U.S. Five do not desire to be engaged in this lawsuit.

3. The Joinder Issues Regarding the U.S. Five

While the U.S Five should not and need not be named as original defendants, they may be individually added as a necessary party to the litigation through a motion for compulsory joinder.

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\* Making the U.S. Five or any other major media corporation a party to this litigation would allow the major media corporations to delay the litigation, use its financial and political influence to affect public opinion, and give its large legal teams the opportunity to get involved; all of which should be avoided as much as possible to give the plaintiffs the best opportunity to gain the relief that they are seeking.

However, the U.S. Five may not be individually added as a proper party through a motion for permissive joinder by any of the named defendants, only by any of the plaintiffs.

Even though there is a general practice that gives the plaintiff the right to decide who shall be the parties to a lawsuit, Simpson v. Providence Washington Ins. Group, 608 F.2d 1171, 1174 (9<sup>th</sup> Cir. 1979), compulsory joinder allows for the plaintiff's choice to be compromised when significant countervailing considerations make the joinder of particular absentees desirable. Fed. R. Civ. p. 19(a) provides:

[a] person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party.

In this litigation, a motion for joinder would not be dismissed because of a failure of any of the U.S. Five to be subject to service of process; it can be shown that all of the corporations will be subject to service through long-arm statutes in any venue since there is enough evidence to satisfy minimum contacts requirements of almost any venue in the United States because of their extensive multi-jurisdictional activities.

Also, a motion for joinder would not be dismissed because of any claimed failure to maintain the court's subject matter jurisdiction of the litigation. The lawsuit will be brought in the U.S. District Court, which would gain subject matter jurisdiction of this litigation through federal

question and not diversity; therefore compulsory joinder of parties may occur regardless of diversity. 28 U.S.C. §1331, 1367(a) (The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States; which extends to cover any claims involving joined parties that are part of the same Constitutional case or controversy as the original claim).

If there is a motion for joinder of any of the U.S. Five under Fed. R. Civ. p. 19, the court should issue an order to join that corporation because this litigation is designed to take away the corporations' interest which relates to this action, which is their ability to own and control a substantial portion of television and radio stations in the United States, without giving them the ability to protect it. See also James Wm. Moore et Al., Moore's Federal Practice, §19.03[3], [4] (3d ed. 1999) (If the absentee has an interest in the action that could be impaired or impeded..., [then] the absentee is a necessary party). See also Id. at §19.02 [2][c], 19.03 (If a party is considered necessary under the analysis of Rule 19(a), the court must order joinder of that party).

If there is a motion for joinder of any of the U.S. Five corporations, a determination of whether or not that corporation is an indispensable party according to Fed. R. Civ. p. 19(b) will not be required. According to Moore's Federal Practice at 19.04[1], [2], joinder is only infeasible if there is no subject matter jurisdiction over the claims by or against the absentee or if the court cannot acquire personal jurisdiction over the absentee through valid service of process. In the present case, subject matter jurisdiction will not be an issue because the Federal court gains jurisdiction through federal question. Also, in this litigation, personal jurisdiction will not be an issue either because it can be shown that all of the corporations will be subject to service through long-arm statutes in any

venue since there is enough evidence to satisfy minimum contacts requirements of almost any venue in the United States because of their extensive multi-jurisdictional activities.

4. The Intervention Issues Regarding the U.S. Five

While the U.S Five should not and need not be named as original defendants in the media challenge, they may be individually named as a party to the litigation through a motion for intervention. There are two different ways for anyone to become a party through intervention: intervention of right and permissive intervention. Fed. R. Civ. p. 24(a) addresses the requirements for there to be an intervention of right:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In this litigation, the U.S. Five may not seek intervention of right through a statute because the 1996 Act does not require any major media corporations to be allowed to intervene if the Constitutionality of the act is at issue; therefore Fed. R. Civ. p. 24(a)(1) is not applicable in this litigation. However, the U.S. Five may be able to seek intervention through a motion under Fed. R. Civ. p. 24(a)(2). This media challenge is designed to take away the corporations' interest which relates to this action, their ability to own and control a substantial portion of television and radio stations in the United States, without giving them the ability to protect it. Under these circumstances, the court should grant a motion for intervention of right by any of these parties. See Moore's Pamphlet @ §24.3[2] (An applicant for intervention must demonstrate that it has an interest

relating to the property or transaction that is the subject matter of the action and that the disposition of the action will, as a practical matter, impede or impair its ability to protect that interest). If any of the U.S. Five seek an intervention of right, it must also show that its interests are not adequately represented by one of the existing parties in order to satisfy the requirements of Fed. R. Civ. p. 24(a)(2). In this litigation there might be an argument that the U.S. Five's interest are adequately represented by the FCC and U.S. A Government body is presumed to adequately represent the interests of its citizens. Moore's Pamphlet @ §24.3[2]. However, this presumption is rebuttable if the prospective intervener can show divergent interests. Clark v. Putnam County, 168 F.3d 458, 461-462 (11<sup>th</sup> Cir. 1999). In the present litigation, there is the argument that the FCC and U.S. are representative of all citizens, including television and radio station or network owners, which might allow any of the individual U.S. Five corporations to show that because of its dominant position its interest in this litigation will be divergent from that of other citizens, including other television and radio station or network owners who have been foreclosed from the airwaves.

If any of the U.S. Five is denied intervention of right under Fed. R. Civ. p. 24(a), it may attempt to intervene through permissive intervention. This form of intervention is decided by the court according to Fed. R. Civ. p. 24(b), which provides:

[u]pon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The individual members of the U.S. Five do satisfy the second portion of Fed. R. Civ. p. 24(b)(2), which allows permissive intervention if the party seeking intervention has a question of

law or fact that is common to the litigation, because it has an interest concerning the television and radio ownership rules of the 1996 Act. Nevertheless, the motion for permissive joinder might be denied since the decision to permit or refuse intervention is within the district court's discretion. Moore's Federal Practice at 24.10. See Daggett v. Commission on Governmental Ethics & Election Practices, 172 F.3d 104, 110 (1<sup>st</sup> Cir. 1999) (when district court found that assistance of prospective interveners could be obtained through amicus briefs or witness testimony, and that addition of claims would delay case, it was not an abuse of discretion to refuse permissive intervention). In this litigation, it appears that the U.S. Five might be able to try to assist and persuade the court to favor the constitutionality of the 1996 Act without being a named party, therefore a motion for permissive intervention may be denied.

D. Bertelsmann

1. Bertelsmann Should Not Be Named as an Original Defendant

Bertelsmann, which has a major influence in the print media industry in the United States, should not be named as an original defendant to the media challenge because the 1996 Act does not deal with print media. Also, Bertelsmann's television and radio empire is based in Europe. The FCC and U.S. do not and cannot enact and enforce ownership rules that would effect any of Bertelsmann's television or radio holdings.

2. The Joinder and Intervention Issues Regarding Bertelsmann

Bertelsmann may not be made a party to this litigation through joinder or intervention under Fed. R. Civ. p. 19, 20, 24. It does not have an interest relating to the subject of the action which is so situated that the disposition of the action in the person's absence may as a practical matter impair or impede its ability to protect that interest nor does it have a claim or defense that is common

to a question of law or fact with the main action. This is because the 1996 Act does not deal with print media and because Bertelsmann's television and radio ownership interests do not fall under the authority of the FCC or U.S. since they are not based in the United States.

E. In conclusion, the plaintiffs should name only the FCC and the U.S. as original defendants in its First Amendment media challenge. It should not initially name the U.S. Five as original defendants, even though they may be added at a later date through joinder or intervention. Bertelsmann should not be named as an original defendant and also may not be added as a party through joinder or intervention. ]

## VIII. THE POSSIBLE VENUES

The plaintiffs, by virtue of 28 U.S.C. §1346, 1391, 1402, will be able to bring this media challenge against the FCC and U.S. in a Federal District Court in the judicial district where any plaintiff resides. The potential addition of any of the U.S. Five, or any alien media corporations with similar characteristics to the U.S. Five, through permissive joinder or intervention should not have an effect on the plaintiffs' choice of venue. However, an addition of any of the U.S. Five through compulsory joinder might have an effect on venue.

### A. Plaintiff's Choice of Venue in Regards to Original Defendants U.S. and FCC

The plaintiffs most likely will be able to commence legal action in this media challenge only in a Federal District Court in a judicial district where any plaintiff resides since the U.S. is listed as a defendant.

#### 1. Venue Issues Regarding the FCC

According to 28 U.S.C. §1391(e),

[a] civil action in which a defendant is... an agency of the United States... may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred... or (3) the plaintiff resides...

In this action, this statute applies since the FCC is an agency of the United States. The venues available from subsections (1) and (3) would be easy to determine, but the venues from subsection (2) would be difficult to determine because it would be hard to determine in which judicial district a substantial part of the events or omissions giving rise to the claim occurred.

2. Venue Issues Regarding the U.S. Override Venue Options Regarding the FCC

The issue of where a substantial part of the events or omissions giving rise to the claim occurred does not need to be determined for venue purposes because subsections 28 U.S.C. §1391 (e)(1), (2) are not applicable since the U.S. is involved. 28 U.S.C. §1402(a) states that

[a]ny civil action in a district court against the United States under subsection (a)[(2)] of section 1346 of this title [(which states that the district courts shall have original jurisdiction of any civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution or any Act of Congress)] may be prosecuted only: (1)... in the judicial district where the plaintiff resides.

Assuming that the plaintiffs will be seeking an injunction only, plaintiffs' claim will be brought in a Federal District court under 28 U.S.C. §1346(a)(2) since the plaintiffs are seeking a claim against the U.S. which is based on the Constitution under the First Amendment, the Fifth Amendment equal protection clause), an Act of Congress under the 1996 Act, and is less than \$10,000. Therefore, 28 U.S.C. §1402(a) applies and the plaintiffs may bring this action only in a judicial district in which any plaintiff resides. See also Holtzman v. Richardson, 361 F Supp 544 (E.D.N.Y. 1973) (venue is proper for all plaintiffs if only one plaintiff is a resident of the district).

If the plaintiffs do seek monetary damages in excess of \$10,000, they will not be asserting a claim in a Federal District court under 28 U.S.C. §1346(a)(2), thereby making the venue provisions of 28 U.S.C. §1402(a) irrelevant. The plaintiffs may then bring suit in any of the venues discussed in 28 U.S.C. §1391(e), which will include the District of Columbia.

3. Change of Venue Issues Regarding the FCC and the U.S.

According to 28 U.S.C. §1404, venue may be changed to any other district court in which the media challenge might have been originally brought. This would only be allowed upon a motion for the convenience of the parties and witnesses, by consent, or stipulation of all parties. In regards to 28 U.S.C. §1404, since the choice of other venues will most likely be limited to one in which a plaintiff resides, when counsel is selecting the plaintiffs to be named in the action there should be a concern to avoid the selection of a plaintiff that might be a resident of a Federal District or Circuit which might not rule favorably for the plaintiffs' claims. Therefore, having this action being brought under 28 U.S.C. §1402(a) is important if the plaintiffs wish to avoid the venue being changed to one that the plaintiffs might not desire.

B. Venue Issues Regarding Potential Joinder of U.S. Five

If any of the U.S. Five are added to the suit after a successful motion for compulsory joinder under Fed. R. Civ. p. 19 the issue of venue might cause the suit to be dismissed because of the absence of a party needed for just adjudication. In contrast, a motion for permissive joinder according to Fed. R. Civ. p. 20 may be denied if the venue would be inappropriate for the potential party sought to be joined.

1. Venue Issues Regarding Compulsory Joinder

If a party is added to the lawsuit through a successful motion for compulsory joinder under FED. R. CIV. P. 19(a), it has the option to object to venue. If it does not timely object to venue, then it has waived any possible objections to venue. Wright, Miller, & Kane, Federal Practice and Procedure: Civil §1610 (3<sup>rd</sup> ed. 2001). However, if it does object to venue and the court rules that the venue is improper, then that party shall be dismissed from the action. Fed. R. Civ. p. 19(a). If

that necessary party is dismissed, then the court must make a determination, according to Fed. R. Civ. p. 19(b), as to whether the party is regarded as indispensable. If that party is deemed to be indispensable, then the action must be dismissed; however, if it is not deemed indispensable, then the action may proceed without that party. To avoid the possibility of dismissal because of a failure to join a Fed. R. Civ. p. 19(a),(b) party, the plaintiff must take into account which venues the U.S.

Five may properly be a defendant in, which includes:

(1) a judicial district where any defendant resides, if all defendants reside in the same state, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought. 28 U.S.C. §1391(b)

To determine a corporation's residency, 28 U.S.C. §1391(c) states that:

a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

## 2. Venue Issues Regarding Permissive Joinder

A motion for permissive joinder of a non-party member of the U.S. Five by a party may be denied under Fed. R. Civ. p. 20 if the venue would be inappropriate for the potential party sought to be joined. Therefore, in order for a motion for permissive joinder to be able to be granted, the corporation which is sought to be joined must fulfill the venue requirements of 28 U.S.C.

§1391(b),(c). If that party cannot be added due to venue considerations, then the action may proceed without that party.

C. Venue Issues Regarding Potential Intervention by U.S. Five

If there were to be an intervention of right or permissive intervention by any of the U.S. Five, that corporation has waived its rights to question venue. Also, a motion for permissive intervention might be denied if venue would be improper for the potential intervening party.

None of the U.S. Five corporations may object to venue, if added as a party through intervention via Fed. R. Civ. p. 24 because an intervener cannot question venue. "In voluntarily bringing himself into the action he has waived his privilege not to be required to engage in litigation in that forum." Wright, Miller, & Kane, Federal Practice and Procedure: Civil §1918 (2d ed. 1986); See also Trans World Airlines, Inc. v. CAB, 339 F.2d 56, 64 (2<sup>nd</sup> Cir. 1964). Also, venue issues regarding a possible intervening party are not to be entertained by any of the existing parties during the proceedings for an intervention of right under FED. R. CIV. P. 24. Federal Practice and Procedure 1986 at §1918. However, venue issues may be reviewed during proceedings for possible permissive intervention by any of the U.S. Five. "Permissive intervention should not be allowed if venue would be improper for the action with the intervener as a party." *Id.* The proper venue would be those as stated in 28 U.S.C. §1391(b),(c). Therefore, since there is the possibility that the venue chosen by the plaintiffs will not fall under any of the § 1391 (b),(c) categories, then permissive intervention might not be allowed.

D. Venue Issues Regarding Potential Addition of a Non-U.S. Media Corporation as a Defendant

The addition of a non-U.S. media corporation as a defendant, either through intervention or joinder, will not impact any venue issues. This is because "[a]n alien may be sued in any district." 28 U.S.C. §1391(d).

E. In conclusion, when selecting a venue for their challenge to the current corporate-dominated structure of the telecommunications industry, the plaintiffs may bring the action in a judicial district that any of the plaintiffs reside if the U.S. is named a defendant and the action is not for more than \$10,000; if this is not the case, then the venue may be one in which a defendant in the action resides, a substantial part of the events or omissions giving rise to the claim occurred, or where any plaintiff resides. There will not be any venue considerations regarding any potential permissive joinder, permissive intervention, or intervention of right by any of the U.S. Five; however, there might be venue issues regarding a potential compulsory joinder of any of the U.S. Five. Also, there cannot be any venue issues regarding any potential intervention or joinder of any alien media corporations.