United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed On: June 19, 2001

No. 00-1094

MD/DC/DE Broadcasters Association, et al.,
Petitioners

v.

Federal Communications Commission and
United States of America,
Respondents

Minority Media and Telecommunications
Council, et al.,
Intervenors

Consolidated with
00-1198

BEFORE: Edwards, Chief Judge, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland, Circuit Judges.

O R D E R

Petitioner's, respondents', and intervenors' petitions for rehearing en banc and the responses thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court inregular active service did not vote in favor of the petitions.

Upon consideration of the foregoing, it is

ORDERED that the petitions be denied.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

Circuit Judge Garland did not participate in this matter.

A statement of Circuit Judge Tatel, joined by Chief Judge Edwards and Circuit Judge Rogers, dissenting from the denial of rehearing en banc is attached.

Tatel, Circuit Judge, joined by Edwards, Chief Judge, and Rogers, Circuit Judge, dissenting from the denial of rehearing en banc: "A facial challenge ... is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). The same principle governs facial challenges to regulations. See INS v. Nat'l Ctr. for Immigrants' Rights, Inc., 502 U.S. 183, 188 (1991). In this case, the panel found that Option B could not be applied without harming white males and therefore declared it facially unconstitutional. Because in so ruling the panel departed from basic principles of judicial restraint--going beyond the record, speculating about how the Commission will enforce the rule and how broadcasters might react, and refusing to defer to the Commission's reasonable interpretation of its own rule--I respectfully dissent from the denial of the three suggestions for rehearing en banc. See also FCC Pet. for Reh'g & Suggestion for Reh'g En Banc at 3 ("The limited scope of our rehearing petition ... should not be misread as reflecting the Commission's agreement with the Court's conclusion that Option B pressures broadcasters to recruit women and minorities in violation of the equal protection component of the Fifth Amendment. The Commission disagrees with the Court's conclusions in that regard and would welcome grant of rehearing on the Court's equal protection analysis.").

I agree with the panel that Adarand "requires strict scrutiny only of governmental actions that lead to people being treated unequally on the basis of their race." MD/DC/DE Broadcasters Ass'n v. FCC, 236 F.3d 13, 20 (D.C. Cir. 2001). But I do not agree that, on its face, Option B--which is entirely optional--triggers strict scrutiny. Contrary to the panel opinion, Option B merely requires outreach to the entire community, and broadcasters can accomplish such out-reach without reducing their recruitment of white males.

"We require," the Commission said of the entire rule, that broadcasters "reach out in recruiting new employees beyond the confines of their circle of business and social contacts to all sectors of their communities." Review of the Commission's Broadcast Equal Employment Opportunity Rules and Policies, 15 F.C.C.R. 2329, p 3 (2000) ("R&O"). Broadcasters choosing Option B may "design their own outreach program to suit their needs, as long as they can demonstrate that their program is inclusive, i.e., that it widely disseminates job vacancies through the local community." Id. at p 104. The Commission explained further:

> [W]e believe that the objective of ensuring that minority and female applicants have the opportunity to apply for positions ... may be achieved without a specific requirement that broadcasters in every situation use recruitment methods that specifically target those groups. Out-reach that is truly broad and inclusive will necessarily reach minorities and females.

Id. at p 77. Moreover, Option B requires submission of racial data only to enable "evaluat[ion of] whether the program is effective in reaching the entire community." Id. at p 104. Although "few or no" minority or female applicants "may be one indication ... that the station's outreach efforts are not reaching the entire community," id. at p 120, the Commission emphasized that having few or no female or minority applicants would not be dispositive in its analysis of the adequacy of a broadcaster's recruitment program:

> [T]here is no requirement that the composition of applicant pools be proportionate to the composition of the local workforce.... We may ultimately determine that outreach efforts are reasonably designed to reach the entire community, even if few females or minorities actually apply for openings. Conversely, the fact that a sizeable number of females or minorities have applied for 'openings will not necessarily establish the inclusiveness of the station's efforts. Also, we recognize that an employer cannot control who applies for jobs.

Id.

Broadcasters electing Option B could thus satisfy their obligation simply by undertaking broad, non-racially-targeted recruiting. For example, advertising in a local newspaper read by both minorities and nonminorities could reach "the entire community." Id. No record evidence suggests that such advertising would reduce the number of white males receiving job information. Indeed, broad outreach might reach more white males.

Because there exist "circumstances ... under which" broadcasters can comply with Option B with no adverse effect on white males, the broadcasters' facial challenge should have failed. See Salerno, 481 U.S. at 745. The panel should have dismissed their petition, leaving them free to bring an as-applied challenge when and if the Commission applies the rule in a discriminatory manner. Instead, misinterpreting Option B and engaging in its own fact-finding, the panel found that Option B would inevitably curtail recruitment of white males, and so subjected it to strict scrutiny.

To avoid the fact that broadcasters could totally ignore Option B, the panel said "the Commission does not argue that Option B creates no pressure to recruit women and minorities because a licensee could always elect Option A." 236 F.3d at 20 n.*. In its Report and Order, however, the Commission stated precisely that:

> [W]e note that the alternative recruitment program is completely optional; any employer who prefers not to collect data concerning the race, ethnicity or gender of its applicants can comply with [Option A's requirements], none of which requires the collection of such data. No broadcaster or cable entity has cause to complain about a program with which it is not required to comply.

R&O at p 224. True, the Commission did not make this argument to the panel, but given that the broadcasters challenged the constitutionality of Option A as well as B, it is understandable that the Commission never argued that Option B is not coercive because of the presence of Option A. Although the Commission could have so argued in the alternative, the fact that it didn't still does not justify ignoring the Rule's plain language.

To avoid the fact that nothing on the face of Option B requires that "people be[ ] treated unequally on the basis of their race," MD/DC/DE Broadcasters, 236 F.3d at 20, the panel found that

Option B "pressure[s]" broadcasters to "focus their recruiting efforts upon women and minorities, at least until those groups generate a safe proportion of the licensee's job applications." Id. at 19-20. According to the panel, this will occur because the Commission, having "life and death power" over broadcasters and "a long history of employing[ ] 'a variety of sub silentio pressures and "raised eyebrow" regulation,' " id. at 19 (quoting Cmty.-Serv. Broad. of Mid-Am., Inc. v. FCC, 593 F.2d 1102, 1116 (D.C. Cir. 1978)), "promises to investigate any licensee that reports 'few or no' applications from women or minorities." Id.; see also Supplemental Op. at 2 n.*. Licensees, the panel found, "reasonably might (and prudently would) conclude" that the Commission's "focus upon the race and sex of applicants belies its statement ... that its only goal is that licensees recruit with a 'broad outreach.' " MD/DC/DE Broadcasters, 236 F.3d at 19. The panel concluded that the Commission "is interested in results, not process, and is determined to get them." Id.

The panel's analysis finds no support in the record. The Commission never "promise[d]" to investigate licensees that report few or no applications from women or minorities. The only record reference to the Commission's investigative priorities is its statement that: "[E]ach year we will randomly select for audit approximately five percent of all licensees.... We may also conduct an inquiry if the Commission has evidence of a possible violation of the EEO Rule." R&O at p 145 (emphasis added). Moreover, the Commission made clear that, in evaluating a broadcaster's outreach program, it would not view as dispositive the number of women and minorities in the broadcaster's applicant pool. See supra at 2-3 (quoting R&O at p 120). Because broadcasters could thus accomplish broad outreach without race-targeted recruiting, speculation that some broadcasters, imagining pressure from the Commission or misreading the agency's intentions, might go beyond what Option B requires is no reason to declare it facially unconstitutional. Finally, the panel had no basis for suspecting the Commission's intentions. Not only do the phrases "sub silentio pressures" and " 'raised eyebrow' regulation" describe Commission behavior occurring over two decades ago, see supra at 4, but nothing in the record of this case indicates that such behavior continues today or that the Commission's goal is anything other than what it declares it to be broad outreach.

It is possible, as the panel suggested with its own hypothetical, that some broadcasters might redirect recruiting efforts so that "prospective nonminority applicants who would have learned of job opportunities but for the Commission's directive now will be deprived of an opportunity to compete simply because of their race." 236 F.3d at 21. Yet Option B does not require this result, nor does record evidence support the panel's assumption that nonminorities will inevitably receive less job information. Even assuming, as the panel speculated, that recruiting budgets are "fixed in the short run," id. at 20 & n.**, there is no reason to believe that broadcasters would not reallocate recruiting expenditures without depriving nonminorities of job information. Nor does record evidence support the panel's assumption that "even if an employer increases its recruiting budget," it will necessarily use those additional funds for recruiting that is "targeted at minorities." Id. at 20 n.**. In fact, the Commission expressly declined to require targeted recruiting. See supra at 2 (quoting R&O at p 77). Of course, community-wide outreach could mean that white males would face job competition from women and minorities, but not even the panel suggested that this would trigger strict scrutiny.

Determining whether an outreach program crosses the line from expanding opportunities for minorities to disadvantaging nonminorities, thus triggering strict scrutiny--and if so whether the

program survives--are difficult issues that neither we nor the Supreme Court has yet considered. We should be especially careful to resolve these important questions on a fully developed record, not on the basis of appellate fact-finding or broadcaster paranoia.

* * *

The panel's decision that Option B is not severable also warrants en banc review. See FCC Pet. for Reh'g & Suggestion for Reh'g En Banc. The decision conflicts with circuit precedent and, like the panel's resolution of the equal protection issue, rests on the panel's rejection of the Commission's reasonable interpretation of its own Rule.

Agency intent has always been the touchstone of our inquiry into whether an invalid portion of a regulation is severable. See, e.g., Davis County Solid Waste Mgmt. v. EPA, 108 F.3d 1454, 1459 (D.C. Cir. 1997); North Carolina v. FERC, 730 F.2d 790, 795-96 (D.C. Cir. 1984). In this case, the panel acknowledged that "the Commission clearly intends that the regulation be treated as severable." 236 F.3d at 22 (citing the Commission's statement that "[i]t is our intention ... that, if any provision of the rules ... [is] held to be unlawful, the remaining portions of the rules not deemed unlawful ... shall remain in effect to the fullest extent permitted by law," R&O at p 232). But relying on K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 294 (1988), the panel undertook an additional inquiry, asking "whether the remainder of the regulation could function sensibly without the stricken provision." 236 F.3d at 22. Answering no, the panel invalidated the entire Rule. According to the panel, "[t]he core of the rule, by Commission design, is to provide broadcasters with two alternatives," id., a goal unattainable by Option A alone.

K Mart concerned a different question than the one presented here. There, the question was whether a statute's function would be impaired if, after invalidating a portion of an implementing regulation, the Court left the rest of the regulation in place. 486 U.S. at 294. Here, the question is whether the Commission's Rule can function without Option B. As in the case of any agency interpretation of its own regulation, this is an issue on which we owe the Commission's views special deference. See Trinity Broad. of Fla., Inc. v. FCC, 211 F.3d 618, 625 (D.C. Cir. 2000) ("[W]e accord [the Commission's] interpretation of its own regulations a high level of deference, accepting it unless it is plainly wrong.") (internal citation omitted).

Regardless of whether the panel may have had cause to doubt whether Option A alone could have accomplished the Commission's goals, such doubt no longer exists. In its petition for rehearing, the Commission makes it unmistakably clear not only that it "intended Option B to be severable from the remainder of the rule," see FCC Pet. for Reh'g & Suggestion for Reh'g En Banc at 10, but also that Option A alone can accomplish the agency's "core" goal of ensuring broad outreach. Id. at 13. When agencies clarify their intentions regarding severability through petitions for rehearing, we normally correct our opinion and reinstate the valid portions of the regulation. See Virginia v. EPA, 116 F.3d 499, 500-01 (D.C. Cir. 1997) (reinstating part of a rule in response to EPA's petition for rehearing explaining that the part was severable from sections invalidated in the original panel decision); Davis County Solid Waste Mgmt., 108 F.3d at 1455-56, 1459-60 (same). In this case, however, the panel summarily rejects the Commission's clarification, attributing it to "counsel's" position. See Supplemental Op. at 4-5 ("counsel for the Commission argues ... "; "Commission counsel unequivocally states ... "; "counsel's claim"). To the extent the

panel is implying that the petition does not reflect the Commission's views and is thus unworthy of deference, that notion is flatly inconsistent with decisions of the Supreme Court and the law of this circuit. In Auer v. Robbins, 519 U.S. 452 (1997), the Supreme Court held that unless a court has "reason to suspect" that an interpretation of a regulation set forth in an agency brief does "not reflect the agency's fair and considered judgment," the agency's interpretation deserves deference. Id. at 462; see also Bigelow v. Dep't of Def., 217 F.3d 875, 876, 878 (D.C. Cir. 2000) (deferring to an agency interpretation of a regulation set forth for the first time in a brief signed only by a United States Attorney). In this case, we have no basis for suspecting that the rehearing petition does not "reflect the [Commission's] fair and considered judgment." The filing is signed by the Commission's "Acting General Counsel," the Justice Department has told us that it "defer[s] to the FCC on the importance of the severability issue," Resp. to Pets. for Reh'g at 7 (emphasis added), and Commissioner Gloria Tristani, in a press release issued the day the petition was filed, referred to the action of the "Commission." Press Release, Commissioner Gloria Tristani, Re: MD/DC/DE Broadcasters Ass'n v. FCC Pet. for Reh'g (Mar. 2, 2001) ("Today, the FCC petitioned the D.C. Circuit Court for a partial rehearing of its January 16, 2001, opinion invalidating our EEO outreach rules for broadcasters. While I support the submission as far as it goes, I am disappointed the Commission declined to seek review of the entire decision.") (emphasis added).

In addition, the panel has no reason for finding the Commission's position "implausible." Supplemental Op. at 5. Although the panel points to a few paragraphs in the Report and Order suggesting that Option A by itself might provide less flexibility than Options A and B together, there is enough flexibility in Option A alone to demonstrate that the Commission's statement that it would have promulgated Option A by itself is not "plainly wrong." Trinity Broad., 211 F.3d at 625. The thirteen program choices within Option A, the Commission explained, avoided "inflexible requirements" and "enable[d] broadcasters to select the approaches that they believe will be most effective in their situations." R&O at p 100. The Commission, moreover, emphasized that Option A would independently meet its outreach goals. See id. at p 113. According to the Commission, it reluctantly included Option B in response to broadcasters' urging: "We are willing to allow broadcasters to forego the supplemental recruitment measures [of Option A] and to design their own outreach program to suit their needs, as long as they can demonstrate that their program is inclusive, i.e., that it widely disseminates job vacancies throughout the local community." Id. at p 104 (emphasis added). As the Commission argues, the "core of the rule" is Option A. See FCC Pet. for Reh'g & Suggestion for Reh'g En Banc at 13.

There is, in other words, no "substantial doubt" that the Commission would have adopted Option A "on its own." See Davis County Solid Waste Mgmt., 108 F.3d at 1459. In reaching a different conclusion, the panel improperly substituted its own views for the Commission's.