Testimony of

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Subcommittee on the Constitution

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Mr. Chairman and Members of the Committee:

I am pleased to be here this morning to testify about the impact of racial and gender preference programs administered by the federal government. I have a short written statement, which I would like to read and, with the permission of the Chair, submit for the record.

My name is Jerome Thomas Lamprecht and I am the President and owner of Atlantic Coast Communications, a radio production and broadcast consulting firm.

In 1982, I filed an application with the FCC to build a radio station that would broadcast out of Middletown, MD -- a town located about 40 miles northwest of Washington, DC. At the time I was 28, managing a radio station in Towson, Maryland and completing my B.S. degree in radio, television and film at the University of Maryland. Three other competitors also filed applications and the FCC had to decide among us which was best qualified to operate the license.

The FCC evaluated our applications according to two general criteria. First, it examined each of our applications to determine what other media properties we owned, with the idea of trying to maximize the diffusion of ownership of media properties. Second, it awarded each applicant a so-called "quantitative-integration credit," a term of art that describes the degree to which the prospective owners would be actively involved with their stations' day-to-day management.

The Commission then "enhanced" the "quantitative-integration credit" based on "qualitative" factors, such as an owner's broadcasting experience, local residence, and local civic involvement. In addition, the "quantitative-integration" scores were enhanced in cases where the applicant was owned by a racial minority or a woman. According to the Commission, such preferences were granted in order to increase the diversity of viewpoints heard on radio and television broadcasts.

My chief competitor for the construction permit, Ms. Barbara Marmet, was accorded such gender enhancement, scored highest, and was awarded the construction permit. My application was ranked second in the initial review. Here is what the initial Administrative Law Judge had to say concerning the Minority or Female Enhancement:

"On this criterion, Lamprecht suffers from a birth defect: he was born a white, Anglo-Saxon, male. They are not in demand under the Commission's present deregulatory, comparative scheme. There was a day in the dim and distant past, when Lamprecht might well have prevailed in this comparative contest. His educational background is broadcast oriented. He has both management and non-management broadcast experience. He is a young man who appears aggressive enough to make a substantial contribution to his chosen career. In short, he's ready for an ownership role. But, in this day and age, it is doubtful that he could win any comparative proceeding."

I appealed the Commission's use of sex preferences, first to the Commission's Review Board, then to the full Commission and finally to the U. S. Court of Appeals for the D.C. Circuit. I felt then and I feel now that the use of sex preferences is not rationally or even substantially related to the Commission's stated goal of increasing broadcast diversity.

In my opinion, women are just as divided amongst themselves in their social and political opinions as are men and it is not reasonable to think that granting an additional number of broadcast licenses to women will affect broadcast diversity one way or the other.

Certain members of the committee no doubt will disagree with me and with each other on this point. What is relevant for our discussion today, however, is whether such gender preferences are legal under the U.S. Constitution. As it turns out, the Court of Appeals in the 1992 Lamprecht v. FCC decision said they were not. This was the first, and until recently, the only time that a Federal court found a federal set aside program to be unconstitutional.

Although I am not a lawyer, the legal standard for evaluating gender preferences is straightforward. According to the Supreme Court, gender preferences are constitutional only if they are "substantially" related to some "important" government objective.

In my case, the Court determined that the FCC had not borne its burden of showing how granting extra numbers of broadcast licenses to women was likely to increase broadcast diversity. Indeed, the only study that the Court could find on the subject -- a study conducted by the Congressional Research Service -- showed the opposite: stations owned by women typically broadcast about 35% of what the study called "women's programming" whereas stations owned by men broadcast only a slightly lower percentage -- 28%.

A major issue of concern ought to be the subsequent inability of the FCC to promptly and forthrightly remedy the discrimination once the Court of Appeals made its decision. Sadly, my experience with the FCC in the more than five years since the constitutional question was decided points to the need for the Congress to reform affirmative action programs through legislation, rather than relying on bureaucrats to comply with court decisions about what is and what is not legally permissible.

After deciding that the FCC had unconstitutionally discriminated against me, the Court of Appeals remanded the case back to the FCC with instructions to determine whether, but for the existence of the FCC's openly discriminatory gender preference program, I would have received the construction permit. Typically, a judicial finding that the government has engaged in invidious discrimination lead to the victim being made "whole."

Following the remand, however, the FCC again awarded the construction permit to Ms. Marmet. Although they had not been dispositive or even dominant factors in the original decision, the FCC now

stated that Ms. Marmet's part-time, local residence and community activities outweighed my broadcast experience. I again appealed this decision to the Court of Appeals on the grounds that the FCC didn't even attempt to show that its decision would have been the same in the absence of its unconstitutional discrimination. The FCC simply re-weighted the evaluative criteria in order to justify its original tainted decision.

In 1994, the Court of Appeals remanded my case back to the FCC a second time in light of its decision in another case, Bechtel v. FCC. Following that case, it became questionable whether the local residence of the owner continued to be relevant to the decision of whether to grant a license. In Bechtel, the Court also ordered the FCC to give greater weight to broadcast experience, a major factor in my application.

Instead of reformulating its criteria for evaluating construction applications in light of the Bechtel decision, the FCC instead "froze" all pending comparative licensing proceedings beginning in February, 1994 while it considered new regulations. To date, none have been issued, and my application remains in limbo.

On May 9, 1994 the FCC ordered that Chief Administrative Law Judge Joseph Stirmer serve as a "Settlement Judge" in my case. At this conference, attorneys for Barbara Marmet, my attorney and Judge Stirmer were present. According to a sworn declaration signed by my attorney, during this conference Judge Stirmer stated to Ms. Marmet's representatives that she should have an incentive to settle the case because she would not be awarded the contested license until this comparative proceeding was resolved. Judge Stirmer expressly stated that all Ms. Marmet was entitled to while awaiting the appeal was a construction permit and that she would not be allowed to sell or transfer the station. On February 6, 1996, I was astonished to learn that the FCC had actually granted the license to Ms. Marmet, notwithstanding the terms of its "freeze" order, which precluded any agency action while it was contemplating new regulations. This license was granted without any notice to me or my lawyers. Upon inquiry, it turned out that the license had been granted over two years earlier, on December 20, 1994, while the remand was pending following the second appeal. Then, incredibly, one year later, the FCC granted its consent to Ms. Marmet to assign her license, again without any notice to me or my lawyers.

I have now spent over 14 years of time and energy trying to get a fair evaluation of my application for an FM broadcast license. Although the Court of Appeals held that the FCC violated my constitutional rights, I have been unable to get the Commission to remedy its discrimination. Under well-settled law, the FCC must show that its original decision would have been the same absent discrimination. Instead, the FCC flagrantly seems to think it is permissible to devise a new rationale for its original lawless decision. This is typical, I fear, of the attitude of federal government agencies toward "reverse" discrimination cases.

More fundamentally, however, my experience shows just how difficult it is for individuals who have been unconstitutionally discriminated against by federal affirmative action programs to get redress. I was fortunate in that I was able to persuade the Center for Individual Rights -- a non-profit public interest law firm -- to take my ongoing case on a pro-bono basis and to find such skilled constitutional attorneys as Shaw, Pittman, Potts & Trowbridge and Hunton & Williams to cooperate with it in the litigation.

Unfortunately, there are few public interest law firms willing to handle cases such as mine. As far as I know, CIR is the only public interest firm that would even entertain a reverse discrimination lawsuit on a pro-bono basis.

Had CIR been unable to take my case, I would have been forced to litigate it at my own expense. As the

Committee can imagine, litigating such a case for over fourteen years is very expensive. After exhausting my personal savings in defending my constitutional rights, I estimate that this litigation, in time and expense, has cost CIR and its cooperating counsel, between $250,000 and $300,000 since 1992, and it is by no means over yet.

It is unfair to ask individuals to bear the expense and uncertainty of reforming federal affirmative action plans through litigation. The defense of my basic constitutional rights has cost years of time and tens of thousands of dollars. Ironically, government agencies who violate these constitutional rights have merely increased the job security of staff attorneys at taxpayer's expense while dragging out cases like mine for years. I might have a different view if these issues could be settled once and for all by one or two precedent-setting cases. Unfortunately, the attitude of most federal bureaucracies makes this impossible. As my case illustrates, there is no point at which federal agencies concede that there has been a violation of constitutional rights and no point at which they try to make whole the victims of such discrimination.

There is a compelling need for Congress to act now to eliminate all unconstitutional affirmative action programs across the board. Congress cannot count on the federal bureaucracy to reform itself in this regard. It is simply too expensive and risky to continue to leave this important issue to the whims of civil litigation. Even when the courts find a clear violation of constitutional rights, it is almost impossible to obtain meaningful redress. These federal agencies and employees knowingly continue unconstitutional discrimination practices unscathed while hiding in the sanctuary of sovereign immunity. Regardless of what federal agencies such as the FCC call their policies and programs, these un-elected bureaucrats have in essence appointed themselves without any authority to be lawmakers, as they force unconstitutional policy upon American citizens. It is unrealistic and unfair to ask individual litigants to bear the expense and uncertainty of trying to remedy these unconstitutional programs that Congress could do away with through carefully crafted legislation.

For these reasons, I heartily endorse HR 1909, the Civil Rights Act of 1997.

Thank you Mr. Chairman. I would be glad to answer any questions you or the other members of the Committee might have.