

exemptions . . . [in] the Civil Rights Act of 1964, the Commission believes that those persons hired to espouse a particular religious philosophy over the air should be exempt from the nondiscrimination rules.” Discriminatory Employment Practices by King’s Garden, Inc., 34 F.C.C. 2d at 938. In fact, however, the Commission’s ruling was *not* “in keeping” with the Civil Rights Act of 1964 -- two months earlier, on March 24, 1972, the Equal Employment Opportunity Act of 1972 had been approved, Public Law 92-261, 86 Stat. 103, and had amended Title VII to permit religious discrimination by religious organizations in hiring any person “to perform work connected with its activities.” not just *religious* activities. 42 U.S.C. § 2000e-1 (1972).<sup>1</sup>

King’s Garden sought reconsideration, referring to the actual Section 702 that had been enacted shortly before the FCC’s ruling, and filed a petition for rulemaking to amend the Commission’s EEO Rule to exempt religious organizations consistent with Title VII. The Commission concluded that King’s Garden was not relieved of its obligation to comply with the letter ruling because of the change in Title VII, but added that religious licensees’ obligations would be changed if King’s Garden’s proposals were adopted in the rulemaking proceeding. The Commission promised to consider the petition for rulemaking at a later time. King’s Garden, 38 F.C.C. 2d at 337.

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<sup>1</sup> Section 702 provides:

The subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

In February 1973, the National Religious Broadcasters requested a declaratory ruling as to the applicability of King's Garden to various employee categories. The Commission stated that writers and research assistants hired for the preparation of programs espousing a licensee's religious views and those hired to answer religious questions on a call-in program would be exempt from the nondiscrimination rules, but that announcers, as a general category, would *not* be exempt. Acknowledging that the area involved First Amendment rights, the Commission indicated that it preferred to have religious stations present specific factual settings before issuing rulings. National Religious Broadcasters, Inc., 43 F.C.C. 2d 451, 452 (1973) ("NRB").

In 1974, this Court rejected King's Garden's facial challenge to the FCC's refusal to exempt religious licensees from the FCC's strictures against religious discrimination. See King's Garden, 498 F.2d 51. Opining that Section 702 was "of very doubtful constitutionality," the Court upheld the Commission's letter ruling providing for a limited religious exemption for religious organizations. However, the Court observed that "[t]he Commission has set itself the difficult task of drawing lines between the secular and religious aspects of the broadcasting operations of its sectarian licensees," and cautioned that future application of King's Garden would require continuing judicial scrutiny. Id. at 61. The Court noted that King's Garden "had requested institution of rulemaking proceedings on the Commission's exemption policy" and held that the issue of *application* of the exemption ruling was not before it. Id. at 53 n.1.<sup>2</sup> King's Garden's May 1972 rulemaking was never docketed, much less concluded, according to

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<sup>2</sup> Chief Judge Bazelon disagreed with the Court's decision that the FCC could impose employment requirements in direct conflict with the standards established by Congress in Section 702, but joined in the decision because he believed Section 702 was unconstitutional and not binding on the FCC. King's Garden, 498 F.2d at 61.

the Commission's records.

C. The Church and Its Stations

The 117-year history of the Church's work with African Americans demonstrates an aggressive attitude against racism and a longstanding commitment to outreach toward African Americans. ID ¶ 36. For example, in 1953, the Church formed the Lutheran Human Relations Association of America to make efforts to eliminate segregation and discrimination, and in 1977 the Church created the Commission on Black Ministry to expand the Church's African American membership. ID ¶ 37. The Church has approximately 50,000 African American members (out of a total of 2.6 million) and has 86 African American pastors. ID ¶ 38. Since 1975, the national Church leadership has included an African American vice president. ID ¶ 39.

The Church, either directly or through its Concordia Seminary, has owned and operated Station KFUO(AM) since 1924, and KFUO-FM since 1948. KFUO's personnel are employees of the Church. See Church Ex. 4, att. 6. The Stations both operate out of the same studios on the campus of the Church's Concordia Seminary and share many support personnel. ID ¶ 7; Church Ex. 4, att. 6.

KFUO(AM), which operates noncommercially, has the distinction of being the world's oldest religious broadcast facility. It was the first daily station to air and continuously maintain a religious format. KFUO-FM is the only full-time classical music station in the St. Louis market. It broadcasts sacred as well as non-liturgical classical music and some religious programming. ID ¶ 7. The FM station operated noncommercially from its inception until March 1983, when the Church found it necessary to accept commercial advertising on the FM station because voluntary contributions and bequests, which had been the source of revenue for both Stations,

were insufficient. ID ¶ 17. In the Church's view, both Stations are dedicated to the task of carrying out in their way the Church's Great Commission from Christ -- to preach the Gospel to every creature and to nurture and serve people in a variety of ways. ID ¶ 8.

KFUO has had a long and close relationship with Concordia Seminary. Seminary students and the Seminary itself contributed funds for the construction of KFUA(AM) and for its initial operation. The Seminary has permitted KFUA to remain on its campus, first in St. Louis and later in Clayton, Missouri, on a rent-free basis. Seminary faculty members and students have performed as talent on KFUA and have worked as announcers on KFUA as part of a "work-study" program, usually on a part-time basis. ID ¶¶ 9-11, 23-29. Through KFUA's operations, seminarians "were reminded of the importance of radio in their total ministry to the needs of the people in their community." ID ¶ 26. KFUA has been "part of the campus family and part of a campus community." ID ¶ 29.

The Church's KFUA had a spotless FCC record over a seventy year period. Neither the FCC nor its predecessor agency had ever cited KFUA for any violations of FCC rules or policies. ID ¶ 18.

D. The Petition to Deny, Hearing Designation Order and Hearing

On September 29, 1989, KFUA filed license renewal applications based on the license term beginning February 1, 1983 and ending February 1, 1990 (the "License Term"). On January 2, 1990, the Missouri State Conference of Branches of the NAACP and various local NAACP branches (collectively, the "NAACP") filed a petition to deny the license renewals of several Missouri radio stations, including KFUA. Although KFUA showed minority employees during the two week payroll period reflected in each annual employment report for the License

Term except 1987 and 1988, the NAACP argued that the Church did not comply with the FCC's EEO Rule based on an analysis of the minority employees at KFYO shown on the annual reports as compared with the percentage of minorities in the St. Louis MSA labor force. Pet. to Deny 3.

Between 1990 and late 1992, the Commission's staff sent the Church several letters requesting recruitment and hiring data. In a response, the Church's then counsel, Arnold & Porter, explained that the Stations' formats "required" that nearly all upper-level positions be filled with persons with theological or classical music expertise or training. ID ¶ 152. The staff then asked the Church to explain what *aspects* of particular positions required theological training. MM Bur. Ex. 13 at 1.

On February 1, 1994, the Commission designated the Church's license renewal applications for an evidentiary hearing.<sup>2</sup> The hearing designation order ("HDO") faulted a legal argument made by counsel at Arnold & Porter based on the use of statistics concerning minorities with Lutheran training and knowledge of classical music because, in the Commission's view, the argument "appear[ed] to evidence a preconceived notion about the

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<sup>2</sup> The same day, the Commission also announced several actions "reaffirming" its commitment to its EEO Rule, including the release of a number of orders imposing more substantial fines than had previously been imposed for alleged EEO violations. News Release #41580. See, e.g., Eagle Radio, Inc., 9 FCC Rcd 836 (1994), recon. denied, FCC 95-434 (released January 19, 1996). However, only the Church's renewal applications, at the request of the NAACP, were designated for hearing. The Church had two options: go to hearing or sell its Stations at a "fire sale" price to a minority group and avoid the hearing. The Commission will not allow a licensee whose licenses have been designated for hearing to sell its stations except under the FCC's "minority distress sale" policy which creates the opportunity for minority-controlled entities to purchase such stations at 75% or less of fair market value. When there is such a sale, there is no hearing. Statement of Policy of Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d 979 (1978), as revised, 92 F.C.C. 2d 849 (1982).

suitability of minorities to perform certain jobs.” The Commission alleged that “Lutheran training” and “classical music expertise” were “vague, unascertainable criteria” which “had a direct adverse impact on Blacks . . . .” HDO ¶ 26. In addition, the HDO alleged that the Church’s arrangement with Concordia Seminary to employ seminary students and their spouses at KFUDO violated the EEO Rule. Id.

The Church’s license renewals were designated for hearing to determine whether the Church had complied with the FCC’s affirmative action requirements and to determine whether the Church had made misrepresentations of fact or lacked candor. The misrepresentation/lack of candor issue was designated primarily because there was a discrepancy in the Church’s responses concerning the number of total hires (full and part-time) during the 12 months preceding the filing of the renewal applications. HDO ¶ 27. Both the burden of proceeding and the burden of proof were placed upon the Church. HDO ¶ 33.<sup>±</sup>

During the evidentiary hearing, Church witnesses were questioned by the FCC’s counsel concerning KFUDO’s employment practices and the reasons for hiring personnel who were familiar with the Church’s teachings, including as follows:

Q. Let me call your attention to your Exhibit 4, p.7. There you indicated it was helpful for certain secretaries to be familiar with the Lutheran Church because part of their job was to contact pastors to enlist volunteers for share-a-thons. As I understood your testimony yesterday, the secretary’s principal role was in scheduling ministers for these share-a-thons and for other programs that the church had. Is that

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<sup>±</sup> At the NAACP’s request and over opposition by both the Church and FCC trial staff, the Administrative Law Judge subsequently expanded the issue to determine whether the Church had engaged in discrimination. The Church had the burden of proving that it did not discriminate. MO&O of Mar. 25, 1994.

correct?

A. Certain secretaries, yes.

Q. Did the scheduling of these ministers require the secretaries to have familiarity with Lutheran doctrine?

A. It was helpful if they were familiar with the calendars of the Lutheran Church and the, and the biblical teachings of the Lutheran Church.

Q. Well, why if all they were doing was scheduling ministers or other Lutherans to appear on programs did they have to themselves have knowledge of the Lutheran calendar?  
And --

A. Because the ministers that come to the radio station to speak or to do a Bible study or to appear on a worship program want to know what church day they'll be addressing, what part of the Bible they will be addressing and --

The Church's counsel objected that this inquiry raised constitutional concerns under the First Amendment. Tr. 734-737.

E. The Equal Employment Opportunity Issues

Based on the hearing record, the FCC Administrative Law Judge ("ALJ") found that the Church was and is committed to nondiscrimination and has had a long history of fighting racial discrimination and of continuous outreach toward African Americans. ID ¶ 195. The ALJ found:

The findings establish[] that no individual was discriminated against by the Stations because of race, color, religion, national origin, or sex. There is not one scintilla of evidence in the record to indicate that any adverse discriminatory act ever occurred, or that any individual ever even made an allegation of racial or other discrimination regarding the Stations' employment practices.

ID ¶ 94.

On appeal, the Commission's Review Board affirmed the holding that the Church had not engaged in discrimination. Rev. Bd. Dec. ¶¶ 14-17. Upon review, the Commission affirmed the holdings of the ALJ and the Review Board that the Church had not discriminated and the statistical record did not raise any inference of discrimination. MO&O ¶ 17.

The ALJ's Initial Decision also acknowledged that during the License Term, KFUE recruited for minorities in several ways, including through its existing minority employees and through Lutheran sources such as local parish networks and a magazine targeted to Church members, including 50,000 African Americans. ID ¶¶ 76, 79, 82, 88, 91, 120, 126, 130. Of KFUE's full-time hires, 58.1% were female and 16.3% were minority. ID ¶ 68. During the License Term, the St. Louis MSA labor market included 43.2% females and 15.6% minorities. ID ¶ 12 n.9. Thus, KFUE hired at a rate of 104.5% of minority "parity."

For the period from February 1, 1983 through August 3, 1987, the Judge concluded that the Church's overall affirmative action efforts were "flawed" but in substantial compliance with the Commission's EEO Rule. While acknowledging that KFUE used various recruiting techniques such as referrals from an African American employee, newspaper advertisements, the Broadcast Center in St. Louis and Lutheran sources, the Judge criticized the facts that the major source of African American employees during this period was one of the Stations' African American employees and that referral sources specifically targeted to minorities had not been used for every vacancy. ID ¶¶ 205, 209-10.

The ALJ held that from August 3, 1987 through January 31, 1990, the Church's efforts were inadequate to meet the Commission's newly revised EEO standards. The Judge reached this conclusion by holding, first, that the Church violated the ruling in King's Garden by giving preferential hiring treatment to individuals with knowledge of Lutheran doctrine, and to active members of Christian or Church congregations, for positions for which the Church believed such preferences were desirable to serve the Church's mission. ID ¶¶ 200-204. The ALJ acknowledged that the Church believed that many of the job functions at its Stations require a knowledge of Lutheran doctrine and philosophies. ID ¶ 50. However, the Judge deemed that certain of the job functions for which KFUE had such a preference were not reasonably connected with the espousal of the Church's religious views and penalized the Church for using religious preferences for positions such as receptionist, secretary, engineer, and business manager.<sup>5</sup> ID ¶¶ 200-05.

In addition, the ALJ ruled that KFUE failed to implement a "consistent" or "systematic" EEO affirmative action program adequate to meet the FCC's standards, as revised effective August 1987. ID ¶ 217. The Judge acknowledged that in the year prior to filing their renewal applications the Stations placed advertisements in the St. Louis Post Dispatch, sent letters to 10 local universities and personnel agencies requesting minority and female referrals, and sought referrals from the Lutheran Employment Project of St. Louis, a clearinghouse run by various Lutheran churches for employment of minority group members. Indeed, KFUE hired a minority applicant through the Lutheran Employment Project. ID ¶¶ 88, 91, 120, 126. Nonetheless, the

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<sup>5</sup> In fact, the Stations did not recruit for or hire an engineer during the License Term. Church Ex. 4, att. 6.

ALJ ruled that the Church's efforts were too "irregular" (ID ¶ 220) and that KFUE failed to evaluate its employment profile and success in attracting minority applicants and interviewees against minority availability in the MSA labor force, thereby violating the FCC's affirmative action requirements. ID ¶¶ 220, 221. Based on these rulings, the ALJ granted the Church's license renewal applications for full license terms, but required the Church to file four detailed EEO reports to the FCC at six month intervals concerning the Church's affirmative action efforts for both full and part-time positions. ID ¶ 282.

On appeal, the Review Board stated that it lacked authority to modify the holding in King's Garden, and thus did not rule on the Church's constitutional or statutory arguments. Rev. Bd. Dec. ¶ 37. The Board affirmed the Judge's ruling that the Stations were not in substantial compliance with the Commission's EEO requirements during the latter part of the License Term, and imposed the same EEO conditions as the ALJ but changed the renewal grants to a shorter term ending January 1, 1997, one month prior to the next scheduled expiration date. Rev. Bd. Dec. ¶¶ 14, 34.<sup>6</sup>

Upon review, the full Commission rejected the Church's First Amendment, Fifth Amendment and statutory challenges to the King's Garden decision, reaffirmed that ruling and applied it to the Church. The Commission emphasized that its EEO requirements are not founded on Title VII and "[t]he EEO rule is not intended to replicate federal and state antidiscrimination laws but rather to advance the Commission's unique program diversity-related

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<sup>6</sup> The Board Chairman appended "Additional Views" to the Decision in which he quoted various Biblical passages in suggesting that the parties should "settle their differences." Rev. Bd. Dec. 8.

mandate.” MO&O ¶ 10. The Commission also affirmed the holding that the Church’s recruitment program was “inadequate” for the last portion of the License Term. Although the Commission modified the Review Board Decision by granting the Church full term license renewals, the Commission imposed annual EEO monitoring reports for three years covering all full-time and part-time hires. MO&O ¶¶ 27-29.

F. The Misrepresentation/Lack of Candor Issue

The ALJ found, based on the record evidence, that the discrepancy in the Church’s filings concerning the total number of employees hired that had led to the misrepresentation issue was the result of an innocent misunderstanding and was not a misrepresentation. ID ¶¶ 224-229. However, the Judge held that the Church “lacked candor” by (a) using the word “required” rather than “preferred” in a legal argument advanced by counsel at Arnold & Porter concerning the need for classical music knowledge on the part of FM sales personnel; and (b) stating in its renewal applications that the Church “actively” sought minority and female referrals. ID ¶¶ 234, 251. While noting that the Church’s witnesses were credible and testified truthfully and that the misconduct was an aberration, the Judge imposed a \$50,000 forfeiture for these two supposed incidents of “lack of candor.” ID ¶ 261.

The Review Board did not accept the ALJ’s conclusion that the Church lacked candor by stating in a pleading that knowledge of classical music was a “requirement” for the position of FM salesperson. The Review Board stated that “because the critical word was embedded in and essential to a pre-conceived legal argument contrived by counsel, a laymen [sic] may not have fully appreciated the significance of its use.” Rev. Bd. Dec. ¶ 27 (citing Fox Television Stations, Inc., 10 FCC Rcd 8452, 8501 n.68 (1995), recon. denied, 3 CR 526 (1996) (“Fox

Television))). However, the Board affirmed the ALJ's holding that the Church lacked candor in describing its recruitment efforts as "active" because it did not engage in recruitment efforts for all of its hiring vacancies. Rev. Bd. Dec. ¶ 21. Although the Board narrowed the ALJ's lack of candor ruling, it did not reduce the \$50,000 forfeiture. Rev. Bd. Dec. ¶ 39.

The Commission overruled the Review Board in connection with both purported incidents of "lack of candor." First, it held that the applicable statute of limitations barred any sanction for the Church's statement that it "actively" sought minorities and women. MO&O ¶ 26. Second, the Commission resurrected the ALJ's finding that the Church "lacked candor" in using the word "require" despite the Review Board's conclusion that it was embedded in a legal argument suggested by counsel. MO&O ¶ 22. The Commission's MO&O reduced the forfeiture for the one instance of "lack of candor" to \$25,000. MO&O ¶ 30.

### **SUMMARY OF ARGUMENT**

In the MO&O, the FCC ruled that the Church violated the Commission's EEO Rule by giving preferential treatment to individuals with Lutheran knowledge for job positions that the Government deemed were not reasonably connected with espousal of the Church's religious views over the air. This ruling violates both the Religious Freedom Restoration Act and the Free Exercise Clause of the First Amendment by substantially burdening the Church's religiously motivated communicative conduct. The ruling burdens, for example, the Church's ability to define itself as a community, to assign its staff with flexibility, and to train its seminarians on whose campus the Stations are located without the need for Government approval. The FCC cannot show that it has narrowly tailored its ruling and the burdens imposed on the Church to

serve any compelling governmental interest.

The FCC apparently bases its decision to limit the Church's discretion to prefer those with Lutheran knowledge, including minorities, on the desire to promote "programming diversity." But even assuming for the sake of argument that this Court were to agree that this is a compelling interest, the FCC is wrong when it suggests that the only alternatives are either imposition of its EEO Rule or an absence of minority recruitment by religious organizations. Indeed, the record shows that KFUD sought out Lutheran minorities during the period at issue in this case. Thus, there is no inconsistency between the Church's religious freedom expressed in its hiring practices at KFUD and the FCC's diversity goals. In fact, a broad religious exemption modeled on Section 702 of Title VII is more likely to *increase* programming diversity by permitting religious organizations to keep a unified sense of mission and thus to add a unique perspective to the programming universe.

The FCC's ruling also violates the Establishment Clause of the First Amendment by excessively entangling the Government in a continuing process of testing and evaluating religious matters. Moreover, the ruling discriminates against religious broadcasters on the basis of their viewpoints in violation of the Free Speech and Free Exercise Clauses of the First Amendment because it prohibits discrimination only on the basis of religious viewpoints and not on the basis of other viewpoints or categories of speech.

If it is the FCC's position that a religious exemption modeled on Section 702 is inconsistent with the premise of the Commission's EEO Rule, the FCC's application of its EEO Rule to the Church also violates the Equal Protection Clause of the Fifth Amendment. The FCC cannot show that there is a compelling state interest in refusing to allow the Church to prefer

applicants with Lutheran knowledge while forcing the Church to be race conscious at every step in its employment decisions. In addition, the FCC's ruling is arbitrary and capricious because it applies the King's Garden "policy" limiting the right of religious organizations to prefer candidates with religious knowledge, adopted in a 1972 letter ruling, without reexamining the basic propositions undergirding the ruling.

The Commission cannot justify its "lack of candor" ruling and an associated forfeiture based on the word "required" rather than "preferred" in an argument framed by the Church's former counsel. Counsel believed that the argument was legitimate whether or not the Church had an absolute requirement. Thus, there was no motive to use the word "require" instead of "prefer" and no intent to deceive, the *sine qua non* of lack of candor under longstanding Commission precedent.

### ARGUMENT

The Church's claims under the First and Fifth Amendments of the United States Constitution present questions of law that the Court reviews *de novo*, 5 U.S.C. § 706 (2)(B) (1994). Indeed,

[i]ndependent judicial judgment is especially appropriate in the First Amendment area. Judicial deference to agency fact-finding and decision-making is generally premised on the existence of agency expertise in a particular specialized or technical area. But in general, courts, not agencies, are expert on the First Amendment.

Porter v. Califano, 592 F.2d 770, 780 n.15 (5th Cir. 1979). The Court also reviews *de novo*, without deference to the FCC's interpretation, the Church's claims under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, et seq. (Supp. V 1993) ("RFRA"); see Callejo v.

Resolution Trust Corp., 17 F.3d 1497, 1501 n.4 (D.C. Cir. 1994). The subsidiary issues as to whether the FCC's actions "substantially burden" the Church, and whether the Government has a compelling reason for imposing these burdens, are also questions of law which the Court reviews *de novo*. Young v. Crystal Evangelical Free Church, 82 F.3d 1407, 1418-19 (8th Cir.), reh'g denied, 89 F.3d 494 (1996) ("Young").

If the Court rejects the Church's constitutional challenges and its claim under RFRA, the Court reviews the Commission's decision applying the King's Garden ruling against the Church in order to determine whether continued application of that ruling was arbitrary and capricious. Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993) ("Bechtel II").

In reviewing the FCC's conclusion that the Church "lacked candor," and the Commission's imposition of a forfeiture imposed on that basis, the Court determines whether the the rulings were arbitrary and capricious. 5 U.S.C. § 706 (2)(A) (1994).

**I. By Second-Guessing the Church's Judgment as to Which Jobs at the Radio Stations Are Important to its Religious Mission, the FCC Violates Both the Religious Freedom Restoration Act and the First Amendment**

The MO&O penalized the Church by ruling that it violated the EEO Rule and requiring EEO monitoring reports based on the FCC's conclusion that the Church "improperly" gave preferential hiring treatment to individuals with knowledge of Lutheran doctrine for job positions which the Commission deemed were "not reasonably connected with espousal of the Church's religious views" over-the-air. MO&O ¶¶ 9-14. The FCC's arrogation to itself of the Church's right to determine which job functions required religious qualifications in order to best serve the Church's mission is unlawful under both RFRA and the First Amendment. First, the MO&O

allows -- indeed, requires -- the FCC to second-guess the Church's judgments as to which jobs are important to its religious mission. It is well established that such second-guessing by a government agency is itself a substantial burden on religion. See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 340-46 (1987) ("Amos"). The FCC's action is unlawful under RFRA because it is not narrowly tailored to further a compelling government interest, much less the least restrictive means of doing so. Second, the MO&O is the kind of government action that remains subject to "strict scrutiny" under the Free Exercise Clause, even after the Supreme Court's decision in Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, reh'g denied, 496 U.S. 913 (1990) ("Smith"). The MO&O cannot survive strict scrutiny. Third, by causing excessive government entanglement in the Church's internal management, the MO&O violated the Establishment Clause of the First Amendment. See EEOC v. Catholic Univ. of America, 83 F.3d 455, 467 (D.C. Cir. 1996) ("Catholic University").

**A. The MO&O violates RFRA**

There can be no dispute that the FCC's MO&O imposes a substantial burden on the Church's religious practice. As noted already, evangelization and teaching of the Gospel are fundamental duties of the Lutheran faith. ID ¶ 8. Operating a radio station is a very important means of achieving those goals, as is hiring station personnel who share those goals and have the requisite knowledge of Lutheran doctrine. The Church has explained, sincerely and in good faith, why it deems these personnel important to its ability to achieve its religious mission. The FCC may not, as a government entity, second-guess that explanation without injecting itself into the unconstitutional role of evaluating the correctness of a claimant's professed religious beliefs.

Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707, 713-16 (1981) (impermissible for courts to reject religious freedom claim by Jehovah's Witness because other Jehovah's Witnesses did not share his sincere religious belief that working in a weapons factory was wrong); Fowler v. Rhode Island, 345 U.S. 67, 70 (1953) (no business of courts to determine what are the legitimate practices of a particular religious group); see also Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Church, 393 U.S. 440, 450 (1969) (rejecting departure-from-doctrine standard for review of church property disputes because it "require[d] the civil court to determine matters at the very core of a religion -- the interpretation of particular church doctrines and the importance of those doctrines to the religion").

Yet, pursuant to its EEO policy, the FCC engages in precisely this sort of intrusive second-guessing. The Commission scrutinizes the specific duties of every job function to determine whether it agrees that particular positions should be exempt. The Commission refuses to exempt even announcers on religious stations as a general category. NRB, 43 F.C.C. 2d at 452.

The FCC's second-guessing is a substantial burden on the Church's exercise of religion because it necessarily affects the way the Church carries out its religious mission. As Justice White, writing for the majority in Amos, put it:

[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Amos, 483 U.S. at 336 (citation omitted). Justice White's comments about courts and judges

apply with equal, if not greater, force to agencies and their staff. Similarly, in his concurrence in Amos, Justice Brennan prophesied that substantial burdens would result from agency second-guessing of church decisions as to which personnel were important or “integral” to its religious mission:

[T]his prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community’s process of self-definition would be shaped in part by the prospects of litigation.

Amos, 483 U.S. at 343-44 (Brennan, J., concurring).

This case amply illustrates and substantiates the fears expressed in Amos. The FCC staff asked the Church to explain what *aspects* of particular positions required theological training. MM Bur. Ex.13 at 1. Both FCC trial counsel and the ALJ engaged in constitutionally unsavory questioning of a Church witness about whether it was helpful for certain station personnel to have knowledge of the Lutheran calendar, an inquiry that delved into theological matters. Tr. 734-37. The Church’s counsel reported to the FCC that the invasive questioning had concrete effects on the Church’s free exercise activities, causing the Church to discontinue its decades old on-air internship program for Seminary students for fear of inviting continuing government intrusion. MO&O 8 n.6. Under the FCC’s ruling, religious organizations are forced to artificially compartmentalize their stations into religious and non-religious departments, thereby losing both the necessary flexibility to assign different functions to various employees in managing stations (an especially difficult loss for small stations such as KFUE). For example,

the FCC's ruling constricts the station employees qualified to assist with listener phone-in religious counseling conducted by a religious station in conjunction with one of its programs, thereby limiting the creativity and diversity of the station's programming. The ruling also limits the employees who are available to be effective fund raisers in the religious community. See Tr. 500 (testimony about the need for Church employees to have Lutheran knowledge to help in fundraising). Such compartmentalization also prevents the Church from bringing seminarians into full or part-time entry level positions with an eye towards grooming them for positions in management.

The EEO monitoring reports imposed by the FCC in the MO&O will also burden the Church by requiring it to determine whether each position at KFUC is "related to the espousal of religious views over-the-air" and therefore exempt. to seek FCC approval of each such determination, and then to make work assignments at the small stations in accordance with the artificial distinction. The Church will also need to return to the FCC for approval every time there is a change in job descriptions to ensure that it is not penalized again. For all these reasons, the FCC's bald assertion in the MO&O that its application of a case-by-case exemption does not "substantially burden" religious activity is untenable.

The MO&O is not narrowly tailored to serve a compelling government interest, much less the least restrictive alternative for achieving such an interest. To be sure, the FCC purports to enforce its EEO Rule in order to improve programming diversity. MO&O ¶ 11. But even if such diversity were determined to constitute a compelling interest, but see Hopwood v. State of Texas, 78 F.3d 932, 944-48 (5th Cir.), reh'g denied, 84 F.3d 720, cert. denied, 116 S.Ct. 2581 (1996), the FCC has not explained why restricting the hiring practices of religious broadcasters

like the Church is narrowly tailored to serve this goal, much less do so in the least restrictive manner. If anything, the FCC's limitations on religious organizations are likely to have an opposite effect, for they prevent religious broadcasters from hiring personnel who fully share their sense of religious mission. The policy is thus likely to dilute the strength of each individual station's religious message, thereby encouraging homogeneity, rather than diversity, among religious owned stations across the frequency spectrum. Conversely, permitting religious broadcasters to hire personnel who share their religious outlooks is likely to increase programming diversity, by permitting them to keep a unified sense of organizational mission without fear of governmental interference, and thus to add a unique perspective to the programming universe. Amos, 483 U.S. at 342 (noting benefits of respecting autonomy of churches).

Nor can the FCC justify its MO&O as the least restrictive means of eliminating religious discrimination -- an interest the agency disclaims in any event. MO&O ¶ 11. The primary piece of federal legislation that governs the problem of religious discrimination -- Section 702 of Title VII -- expressly allows religious institutions to hire only personnel who share its religious mission, *no matter what the job position*. Unlike the FCC's policy, Section 702 is not limited to positions that Congress, the courts or an agency deem to be "essential" to the employer's religious mission. In Amos, for instance -- the case in which the Supreme Court upheld Section 702 against Establishment Clause challenge -- the employee in question worked as a building engineer in a gymnasium owned by the Mormon Church, a position far less "essential" to the Mormon Church's religious mission than are the positions of business manager and secretary of the radio stations in this case. If Congress deems the blanket exemption of Section 702 sufficient

to fulfill its compelling interest in eradicating religious discrimination, then the FCC is in no position to claim that its more intrusive EEO policy is the least restrictive means of achieving that same interest.

Most of all, the FCC cannot justify its restrictions on the Church's hiring practices as the least restrictive means of eliminating racial discrimination or encouraging minority recruitment by the Church. The FCC did not find that the Church had ever discriminated on the basis of race. To the contrary, the ALJ praised the Church for its commitment to racial equality and for seeking to hire minority Lutheran employees throughout the License Term. ID ¶¶ 36-65. Lutherans can belong to any racial or ethnic group. Thus, if greater minority representation were truly the FCC's aim, the FCC could simply ensure that the Church did not discriminate against minorities in admission to its membership, permitting it to hire minorities within its ranks, rather than restrict the Church's right to require that KFUA personnel, of whatever race or ethnicity, be familiar with its doctrine and practices.

Under RFRA, which plainly applies to FCC decisions,<sup>2</sup> a government body may not

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<sup>2</sup> In City of Boerne v. P.F. Flores, 117 S.Ct. 2157, (1997) ("City of Boerne"), the Supreme Court did hold that Congress lacked authority to promulgate RFRA under § 5 of the Fourteenth Amendment and hence that RFRA was unconstitutional as applied to state governments. The Court did not hold, however, that Congress had exceeded its constitutional powers in applying RFRA to federal agencies and to federal laws or rulings. The Court premised its ruling in City of Boerne on Congress's lack of authority to impose burdens upon the states and specifically to impose upon the states an interpretation of the Constitution contrary to the interpretation adopted by the Supreme Court. Id. at 2164-67; see also id. at 2162 ("Congress relied on its Fourteenth Amendment enforcement power in enacting the most far reaching and substantial of RFRA's provisions, those which impose requirements on the States."); id. at 2164 ("The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's

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“substantially burden” a person’s exercise of religion even if the burden results from a rule of general applicability, unless that burden “(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1(b) (Supp. V 1993). For the reasons explained above, the FCC cannot satisfy either of these conditions. See Young, 82 F.3d at 1418-19 (rejecting the district court’s order under RFRA because it “meaningfully curtail[ed] a religious practice of more than minimal significance in a way that [wa]s not merely incidental.”); see also Mack v. O’Leary, 80 F.3d 1175 (7th Cir. 1996), reh’g denied, 1997 U.S. App. LEXIS 540 (January 8, 1997) (under RFRA, adherents to a religion are substantially burdened when forced to refrain from religiously motivated conduct).

**B. The MO&O also violates the Free Exercise Clause**

For similar reasons, the MO&O also violates the Free Exercise Clause. To be sure, Smith holds that strict scrutiny does not necessarily apply to all government action that substantially burdens religion. Smith, 494 U.S. at 883-87. But strict scrutiny *does* apply here for at least two independent reasons.

First, the MO&O unquestionably interferes with the Church’s management of its internal affairs. In Catholic University, this Court determined that Smith did not abrogate the

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restrictions on States.”). This reasoning does not extend to federal rulings such as the MO&O. Congress applied RFRA to the federal government pursuant to a different constitutional source -- its substantive Article I powers coupled with its broad authority under the Necessary and Proper Clause, U.S. Const., art. I, cl. 18. See S. REP. No. 103-111, 103d Cong., 1st Sess. 13-14 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1903; H.R. REP. No. 103-88, 103d Cong., 1st Sess. 9 (1993). RFRA thus remains applicable to this case and requires reversal of the MO&O.

longstanding rule that any sort of government intrusion into a church's ministerial hiring decisions was subject to strict scrutiny. See Catholic, 83 F.3d at 460-63; accord Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America, 344 U.S. 94, 116 (1952) (the Free Exercise Clause protects the power of religious organizations "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.") As this Court explained in Catholic University, "the burden on free exercise that is addressed by the ministerial exception is of a fundamentally different character from that at issue in Smith. . . . The ministerial exception is not invoked to protect the freedom of an individual to observe a particular command or practice of his church. Rather, it is designed to protect the freedom of the church to select those who will carry out its religious mission." Catholic University, 83 F.3d at 462. This Court ultimately decided that the University's decision to fire a nun who taught at the University was shielded from judicial review by the Free Exercise Clause. Accord Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991) (upholding a Catholic school's dismissal of a Protestant teacher, because a secular court should not second-guess the school's determination that the teacher was unfit to advance its mission).

Similarly, in Amos, the Supreme Court upheld the constitutionality of the Section 702 exemption, while reserving the question of whether the exemption was required by the First Amendment. The Court specifically recognized the link between the Church's right of religious community protected by the First Amendment and the process of religious "self-definition" facilitated by the Church's autonomy in determining the job functions that need religious training:

For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.

Amos, 483 U.S. at 342 (citation omitted). Amos thus confirms what is clearly established in Catholic University, namely, that government action remains subject to strict scrutiny, even after Smith, if it interferes with a religious entity's management of its internal affairs.

Second, the MO&O's second-guessing of the Church's judgments burdens the Church's exercise of constitutional rights in addition to its rights under the Free Exercise Clause. This is thus a "hybrid situation" of the sort discussed in Smith. In that discussion, the Supreme Court made clear that the First Amendment still "bars application of a neutral, generally applicable law to religiously motivated action" that enjoys other constitutional protections, such as freedom of speech, in addition to freedom of religion. Smith, 494 U.S. at 881 (citing, *inter alia*, Cantwell v. Connecticut, 310 U.S. 296, 304-07 (1940)) (freedom of religion plus freedom of speech); Wisconsin v. Yoder, 406 U.S. 205 (1972) (freedom of religion plus freedom of parents to direct the education of their children).

The MO&O intrudes on a number of constitutional protections enjoyed by the Church. The Church's operation of KFUE is communicative activity that is protected by the Free Speech Clause of the First Amendment. FCC v. League of Women Voters of California, 468 U.S. 364, 378 (1984). By disrupting the Church's personnel decisions, the MO&O also interferes with the

Church's right to free association for expressive purposes, as well as its right *not* to associate -- both of which are implicit in the First Amendment. See Amos, 483 U.S. at 342; Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 858 (2d Cir.) cert. denied, 117 S.Ct. 608 (1996) (describing First Amendment right to free expressive association and right not to associate). All of these effects stem from the FCC's second-guessing of the Church's decisions regarding which jobs are important to the fulfillment of its religious mission.

Because the MO&O is subject to strict scrutiny under the Free Exercise Clause, and because the FCC cannot justify its decision under that standard, the FCC's action is unconstitutional and should be vacated. This Court need not follow its 1974 decision in King's Garden which rejected an attack only to the *facial* constitutionality of the FCC's exemption, and in which this Court did not consider a challenge based on the burdens caused by the intrusive questioning and second-guessing of church decisions described in Amos and evidenced by this case.

**C. The MO&O also violates the Establishment Clause**

The FCC's process of second-guessing the Church's judgments also causes excessive governmental entanglement with religion and thus violates the Establishment Clause. See Catholic University, 83 F.3d at 465-66; see also Lemon v. Kurtzman, 403 U.S. 602, 612-13, reh'g denied, 404 U.S. 876 (1971) (establishing three-part test for determining whether a law violates the Establishment Clause, including the requirement that it not foster an excessive government entanglement with religion).

As noted above, both FCC trial counsel and the ALJ engaged in questioning of a Church witness that delved into theological matters. Tr. 734-37. The "searching case-by-case analysis"