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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies | ) | MM Docket No. 98-204 |
| and | ) | MM Docket No. 96-16 |
| Termination of the EEO Streamlining Proceeding | ) | |

# COMMENTS OF CHRISTIAN LEGAL SOCIETY'S CENTER FOR LAW AND RELIGIOUS FREEDOM; CONCERNED WOMEN FOR AMERICA; AND FOCUS ON THE FAMILY

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## Introduction and Summary

The Center for Law and Religious Freedom of the Christian Legal Society, Concerned Women for America and Focus on the Family submit the following comments in the above-captioned proceeding. The interests of the commenters are set forth in the attached Appendix.

We have long urged the Commission to amend its EEO policies to provide that a religious broadcaster may prefer individuals of a

particular faith in employment in all of its activities.[1] Therefore, we support in general the proposed modification of Section 73.2080 to provide that "[r]eligious radio broadcasters may establish religious belief or affiliation as a job qualification for all station employees." In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding (Notice of Proposed Rule Making), MM Docket No. 98-204 (1998)(hereinafter "NPRM"), at page 32.

Nonetheless, we cannot support the narrow definition of "religious broadcaster" that the Commission proposes. For the reasons outlined in Part II below, the proposed definition of "religious broadcaster" creates both practical and constitutional problems.

The practical problems with the proposed definition are two-fold: 1) the proposed definition excludes too many religious broadcasters from the essential ability to require that employees share the religious convictions underlying the religious messages the broadcaster carries; and 2) the narrowness of the proposed definition is unnecessary because the government lacks a substantial interest in limiting the exemption, as there is no real benefit from the exemption for a nonreligious broadcaster, making abusive or fraudulent claims unlikely.

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[1]We filed comments in In the Matter Streamlining Broadcast EEO Rules and Policies Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules to Include EEO Forfeiture Guidelines, MM Docket No. 96-16, dated July 16, 1996, and a reply statement dated October 25, 1996, in the same matter.

The constitutional problems with the proposed definition include the following: 1) the proposed definition would permit governmental discrimination among religions, which the Establishment Clause prohibits; 2) religious broadcasters do not forfeit their First Amendment or federal statutory protections under the Religious Freedom Restoration Act, 42 U.S.C. 2000bb, simply because they may operate for-profit; and 3) the proposed definition fails to give religious broadcasters sufficient guidance as to whether they may claim the exemption, which creates issues of unconstitutional vagueness and unconstitutional excessive entanglement between government officials and religious doctrine.

We would suggest that the Commission instead employ a two-part definition of a "religious broadcaster." First, a broadcaster that carries a substantial amount of religious programming should be considered a religious broadcaster. This should be true regardless of whether the broadcaster is affiliated in any way with a church or other religious entity. Nor should the "for-profit" or "nonprofit" status of the broadcaster be a determinative factor in its designation as a religious broadcaster. A significant proportion of religious broadcasters are "for-profit" and are not affiliated with a church. Yet those broadcasters carry a religious message that is the heart of their corporate purpose and programming.

Second, we would suggest that the Commission provide an independent exemption for religious broadcasters who are affiliated with a church, synagogue, or other religious institution. Such

broadcasters may or may not broadcast substantial amounts of religious programming. For example, the religious broadcaster in Lutheran Church--Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998), was a classical music station.

In its admirable effort to meet the concerns of the broadcaster in that case, the Commission has proposed a definition of "religious broadcaster" that fails to protect the more typical religious broadcaster. Neither class of religious broadcaster should be denied the right to require that its employees share its religious convictions.

We respectfully suggest, therefore, that the Commission should adopt a broad definition of "religious broadcaster," rather than the proposed narrow definition. In the context of religious broadcasting, the governmental interest in a stringent, rather than broad, definition of "religious broadcaster" is relatively inconsequential. That is, the exemption confers no substantive benefit on religious broadcasters that nonreligious broadcasters are likely to desire. Unlike some exemptions--for example, tax exemptions or exemptions from military conscription--in which the desirability of the exemption creates a real risk of abuse or fraud, nonreligious broadcasters would gain little benefit by being allowed to discriminate on the basis of religion. Discrimination on the basis of race or gender--the source of most employment discrimination claims--is still prohibited.

If anything, discrimination on the basis of religion actually burdens a broadcaster, impeding the hiring process and constricting

the likelihood of getting the broadest pool of qualified applicants. NPRM, at Para. 3. Given the important religious liberty considerations supporting religious broadcasters' ability to hire employees who share their religious ideology--and the relatively scant appeal of the exemption for nonreligious employers--a liberal, rather than a grudging, definition of "religious broadcaster" is necessary and appropriate.

Indeed, a narrow definition of "religious broadcaster" runs contrary to the Commission's interest in promoting diversity in programming. NPRM, at Para. 2 and 3. The greater the number of religious broadcasters who are allowed to self-define their operation and communication through employment of individuals sharing their religious beliefs, the greater the diversity of programming available to listeners in a particular community.

In Part I, we review the basic constitutional and policy reasons in favor of permitting a religious broadcaster to prefer employees who share its religious beliefs in all job positions. We previously urged the Commission to reject the "King's Garden"[2] approach for many of the reasons set forth below, which were included in our comments dated July 16, 1996, In the Matter Streamlining Broadcast EEO Rules and Policies Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules to Include EEO Forfeiture Guidelines, MM Docket No. 96-16, and our reply statement dated October 25, 1996, in the

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[2]See Complaint by Trygve J. Anderson, 34 F.C.C.2d 937, aff'd, 38 F.C.C.2d 339 (1972), aff'd, King's Garden, Inc. v. F.C.C., 498 F.2d 51 (D.C. Cir. 1974), cert. denied, 419 U.S. 996 (1974).

same matter. It is important, however, to revisit those arguments in order to understand why the proposed definition of "religious broadcaster" creates constitutional and practical concerns, which we will discuss in Part II.[3]

## I. Permitting Religious Broadcasters to Hire Employees Who Share Their Religious Convictions Protects Basic Principles of Religious Liberty and Achieves Greater Equality of Treatment With Other Ideologically-Oriented Broadcasters.

There is a critical difference between discrimination on the basis of race or sex and a religious organization's "discrimination" in its employment decisions on the basis of religion. Preventing race and sex discrimination is at the heart of the nation's equal employment policies. The Supreme Court has made clear that generally private racial discrimination "has never been accorded affirmative constitutional protections." Runyon v. McCrary, 427 U.S. 160, 176 (1976) (adding that "the Constitution . . . places no value on [such] discrimination"). Indeed, the background of the 13th, 14th, and 15th Amendments indicates that racial discrimination (and by analogy sex discrimination) are constitutionally disfavored.

By contrast, the formation and maintenance of religious communities -- groups of like-minded religious believers -- is an important part of the constitutionally guaranteed exercise of

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[3]We would note an important omission in the language of Section 73.2080. The language "belief or" should be inserted in the second complete sentence of Section 73.2080(c)(1) to read as follows: "Religious radio broadcasters who establish religious belief or affiliation as a bona fide occupational qualification for a job position are not required to comply with these recruitment requirements with respect to that job position only...." NPRM, at p. 33.

religion. See, e.g., Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 342 (1987)(Brennan, J., concurring) ("For many individuals, religious activity derives meaning in large measure from participation in a larger religious community."). We do not advocate and would not support the use of the expanded religious exemption as a subterfuge for illicit discrimination against women and minorities.

To deny, however, religious broadcasters the ability to hire on the basis of religion undermines their right to convey the religious message they wish to advocate--a right protected by freedom of speech, freedom of the press, freedom of association, and, of course, free exercise of religion and the establishment clause. Broadcasters devoted to the promotion of a cause or ideology that is not religious are free to require that their employees specifically express a commitment to that cause. For example, there is no question that if the Sierra Club owned and operated a radio station, it could require that all employees sign a statement of support for environmental goals, or even that all employees join the organization. The Sierra Club has the right to take these steps to ensure employees' loyalty; and it may do so in all positions, not just those directly "connected with the espousal of [its] views," as the previous King's Garden policy limited religious broadcasters' employment decisions.

Similarly, a religious broadcaster needs the critical ability to require that its employees agree with and commit to the organization's goals. Religious broadcasters should enjoy the same

rights in this respect as broadcasters committed to a non-religious ideological cause. Indeed, in several recent cases, the Supreme Court has recognized that religious citizens and groups bring distinct viewpoints to public issues and thus, under the Free Speech Clause, may not be subject to discriminatory treatment. Religion may not be roped off as a separate subject matter distinct from other public views. See, e.g., Rosenberger v. Rector of Univ. of Virginia, 515 S. Ct. 819 (1995).

A religious broadcaster has a significant religious liberty interest in preferring members of its own faith in employment, in order to ensure that its activities are carried out by persons committed to the station's religious views and mission. The King's Garden policy permitted the Commission to second-guess the religious broadcaster's understanding of its mission and also put the Commission in the position, impermissible for a government agency, of determining the essentially theological question of whether an activity is religious. The result was that religious broadcasters were denied the power of self-definition enjoyed by broadcasters who are committed to non-religious ideological causes.

There was no sufficient justification for these serious infringements of religious liberty -- as Congress repeatedly has found in enacting bright-line exemptions in Title VII that protect religious preferences by religious organizations in all their activities. Adoption of the modification to Section 73.2080 aligns the Commission's policy more closely to that enacted by Congress in Title VII of the Civil Rights Act of 1964, the nation's

fundamental equal employment law, which permits a religious organization to prefer members of its own faith in employment in any of its activities. Section 702, 42 U.S.C. § 2000e-1.[4]

**1. Permitting a religious broadcaster to hire employees who share its religious convictions lifts a substantial governmental burden on a religious broadcaster's pursuit of its religious mission.**

Religious broadcasters have a strong interest, grounded in religious freedom, in choosing to have their activities carried out by persons sharing their religious convictions. Thus, there is a strong rationale for exempting religious organizations from laws against religious preferences in employment -- as the Supreme Court found in Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987), upholding the constitutionality of the broad exemption in section 702 of Title VII. The Court concluded that laws forbidding religious preferences create "significant governmental interference with the ability of religious organizations to define and carry out their religious missions." Id. at 335; see id. (describing the effect as a "substantial burden"). As Justice Brennan recognized in his concurrence in Amos,

> 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 . . . a means by which a religious community defines itself.

Id. at 342-43 (Brennan, J., concurring). And in Texas Monthly v.

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[4]This section states in pertinent part that Title VII "shall not apply . . . to a religious corporation, association, 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, or society of its activities."

Bullock, 489 U.S. 1 (1989), a plurality of the Court reemphasized that laws forbidding religious preferences in employment erect a "substantial deterrent" to religious exercise. Id. at 18 n.8.

Government action that limits a religious organization's right to hire employees who share its religious message would trigger a strict scrutiny standard under both federal constitutional and statutory law. Under the Religious Freedom Restoration Act, 42 U.S.C. 2000bb (hereinafter "RFRA"), the federal government may not impose a "substantial burden" on religious exercise unless the burden is "the least restrictive means to a compelling state interest." Id. RFRA protects religious institutions from general application of antidiscrimination provisions to employment decisions involving the mission of the religious institution. Equal Employment Opportunity Commission v. Catholic University of America, 83 F.3d 455, 467 (D.C. Cir. 1996).[5] Therefore, RFRA requires the FCC to demonstrate a compelling interest achieved by the least restrictive means to justify any regulation that restricts the right of religious broadcasters to employ persons sharing the religious convictions the broadcaster seeks to communicate.

The imposition of such a burden on religious broadcasters also

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[5]In City of Boerne v. Flores, 521 U.S. 507 (1997), the Supreme Court invalidated RFRA as it applied to the states, but RFRA remains applicable to federal laws. In Re: Young, 141 F.3d 854 (8th Cir. 1998). See Statement of the President on Religious Freedom in the Federal Workplace (August 14, 1997)("I was disappointed that the Supreme Court struck down parts of [RFRA] in June, but pleased that its provisions still apply to federal agencies, entities and institutions.")

would trigger strict judicial scrutiny under the federal free exercise clause because it would infringe on several "hybrid" constitutional rights identified by the Supreme Court in Employment Division v. Smith, 494 U.S. 872 (1990). The Court in Smith held that the First Amendment remains a strict bar to laws that burden religious exercise "in conjunction with other constitutional protections, such as freedom of speech and of the press" and "freedom of association." Id. at 881, 882. See Thomas v. Anchorage Equal Rights Commission, 165 F.3d 692 (9th Cir. 1999)(application of antidiscrimination provisions violated religious landlords' hybrid free speech-free exercise right under Smith). See also, Society of Separationists, Inc. v. Herman, 939 F.2d 1207 (5th Cir. 1991), aff'd on other grounds, 959 F.2d 1283 (en banc), cert. denied, 506 U.S. 866 (1992)(recognition of free speech-free exercise hybrid claim); Chalifoux v. New Caney Ind. Sch. Dist., 976 F. Supp. 659 (S.D. Tex. 1997)(same); Alabama & Coushatta Tribes v. Big Sandy Indep. Sch. Dist., 817 F. Supp. 1319 (E.D. Tex. 1993), remanded for further consideration in light of RFRA, 20 F.3d 469 (5th Cir. 1994)(same); First Covenant Church v. City of Seattle, 120 Wn.2d 203, 840 P.2d 174 (1992)(church exempted from landmarking provisions that violated its hybrid free speech and free exercise right under Smith). Governmental prohibition of a religious broadcaster's right to employ persons who share its religious beliefs would infringe on speech and press rights by denying the broadcaster the ability to ensure that its employees in all positions will reflect the station's religious values and

viewpoints. Religious broadcasters also have protected associational rights because, as the Court recognized in Smith, a station's "freedom to speak" its beliefs must also include "'freedom to engage in group effort toward those ends'" (id. at 882 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984)). And establishment clause violations, as detailed in Part II.A. and II.C. below, also create hybrid rights triggering strict scrutiny. See EEOC v. Catholic University, 83 F.3d at 467.

The King's Garden policy allowed religious broadcasters to hire members in positions that the Commission believed were "connected with the espousal of the licensee's religious views." As the Court noted in Amos, a similarly narrow interpretation of Title VII left "a significant burden on a religious organization," by

> requir[ing] 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 [or a Commission member] 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.

Id. at 336. In concurring, Justice Brennan agreed that "determining whether an activity is religious or secular requires a searching case-by-case analysis," which "results in considerable ongoing government entanglement in religious affairs" and "create[s] the danger of chilling religious activity" -- as religious organizations shy away from preferring their members in positions that the government might call "secular," even though the

organization believes them to be religious. Id. at 343.[6]

The Commission's past application of the King's Garden distinction demonstrated the danger of permitting the government to second-guess religious entities' understanding of their religious mission. The opinions in King's Garden, for example, stated that the exemption from the EEO rules would not extend to advertising salespersons, or to on-air announcers who did not read religious messages (34 F.C.C.2d at 938; see also National Religious Broadcasters, Inc., 43 F.C.C.2d at 452) -- even though both of these positions involve substantial public contact and could easily be seen as speaking for the station's religious values. And in Lutheran Church/Missouri Synod, 10 F.C.C.R. 9880 (1995), the Commission staff, pursuant to delegated authority, ruled that a Church-operated radio station associated with a Lutheran seminary could not favor members of that faith in the positions of business manager, engineer, secretary, or receptionist. Id. at 9908-09. In doing so, the staff simply dismissed the Church's evidence that employees in each of these positions interacted regularly with Church headquarters or with pastors or members of Lutheran congregations and thus played roles in the religious activities of

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[6]For precisely these reasons, Congress passed not only section 702, but also other protections for religion-based employment in Title VII, "to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.'" Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991). For example, section 703(e)(2) of Title VII permits a religiously affiliated educational institution "to hire and employ employees of a particular religion" in any of its activities. 42 U.S.C. § 2000e-2(e)(2).

the station. Id. at 9886-87.

The proposed modification of Section 73.2080 reestablishes the correct balance in the Commission's policy, if the definition of "religious broadcaster" is sufficiently broad. The modification will protect the liberty interests of religious broadcasters to ensure that their religious message will be conveyed by employees who share their religious viewpoints.

**2. Permitting a religious broadcaster to hire employees who share its religious convictions protects the right of self-definition enjoyed by other broadcasters.**

The intrusion on religious broadcasters from the Commission's rule is illegitimate in yet another way. The burden it places on religious broadcasters is discriminatory in nature and thus violates the Free Exercise Clause under a clear line of recent Supreme Court authority. See Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993); Employment Division v. Smith, supra.

Under the EEO rules, broadcasters devoted to the promotion of a cause or ideology that is not religious are free to require that their employees specifically express a commitment to that cause. For example, there is no question that if the Sierra Club owned and operated a radio station, it could require that all employees sign a statement of support for environmental goals, or even that all employees join the organization. The Sierra Club has the right to take these steps to ensure employees' loyalty; and it may do so in all positions, not just those directly connected with the espousal of its views.

Protecting religious broadcasters' ability to require their employees to agree with the organization's goals puts religious broadcasters on an equal footing with other broadcasters who can make hiring decisions on the basis of a shared ideology.

In several recent cases, the Supreme Court has recognized that religious citizens and groups bring distinct viewpoints to public issues and thus, under the Free Speech Clause, may not be subject to discriminatory treatment. See Rosenberger v. Rector of Univ. of Virginia, 515 S. Ct. 819 (1995); Lamb's Chapel v. Center Moriches School Dist., 508 U.S. 384 (1993). Religion may not be roped off as a separate subject matter distinct from other public views.

Indeed, the Court has recently made it clear that the Free Exercise Clause forbids government from singling out religious conduct for prohibition. The "essential" guarantee of the clause, the Court has said, is that government may not "in a selective manner impose burdens only on conduct motivated by religious belief." Lukumi, 508 U.S. at 543. The prime focus of the Clause, in the Court's view, is to ensure that any interference with religious exercise is merely "the incidental effect" of "a neutral, generally applicable law." Smith, 494 U.S. at 878, 881; Lukumi, 508 U.S. at 531.

A law against religious preferences is simply not neutral with respect to religion. It is not even neutral on its face, since its very terms refer to religion and distinguish permissible from impermissible conduct on the basis of that reference. As applied to a religious broadcaster, it singles out religious preferences

from the ideological preferences a secular broadcaster might use and, therefore, denies religious broadcasters the same rights of self-definition enjoyed by broadcasters espousing other views. Accordingly, the Court's analysis in Lukumi and Smith requires that such laws be struck down unless they satisfy the strictest scrutiny. Lukumi, 508 U.S. at 531-532.

### 3. There Is No Compelling Interest In Preventing a Religious Broadcaster From Employing Persons Who Share Its Religious Convictions.

In view of these weighty intrusions on religious liberty, both the First Amendment and the Religious Freedom Restoration Act require that the government have a compelling reason to forbid religious hiring by religious broadcasters. But the rationale for such a prohibition would be weak, particularly in the light of Congress's contrary decision in Title VII.

The Commission adopted its EEO rules to "complement, not conflict with, actions" by Congress and other bodies to enforce general policies of equal employment. In re Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 18 F.C.C.2d 240, 243 (1969). At the time of adoption of the EEO rules, Title VII only exempted religious preferences by religious organizations in their "religious" activities. But since then, in 1972, Congress extended the Title VII exemption to all activities of a religious organization, and the Supreme Court upheld that extension against constitutional challenge in Amos. Congress, in effect, declared that there is no compelling governmental interest in prohibiting

religious preferences in employment, and indeed that religious freedom interests call for an exemption. See EEOC v. Catholic University, 83 F.3d at 467 (finding "that the Government's interest in eliminating employment discrimination is insufficient to overcome a religious institution's interest in being able to employ the ministers of its choice"). With its subsequent passage of RFRA, Congress again declared that it has no compelling interest in prohibiting religious employers' selection of employees based on their sharing common religious ideology. See generally, Michael Stokes Paulsen, A RFRA Runs Through It: Religious Freedom and the U.S. Code, 56 Montana L. Rev. 249, 263-274 (1995).

## II. The Proposed Definition of Religious Broadcaster is Too Narrow and Likely Violates the First Amendment.

### A. The underinclusiveness of the proposed definition encourages governmental discrimination among religions, which the Establishment Clause prohibits.

The proposed modification of Section 73.2080 adopts an unnecessarily narrow definition of "religious broadcaster" for purposes of permitting a religious broadcaster to "establish religious belief or affiliation as a job qualification for all station employees." The definition excludes too many religious broadcasters from the essential ability to establish religious belief or affiliation as an employee job qualification. A substantial number of religious broadcasters simply are not "closely affiliated with a church, synagogue, or other religious entity." Furthermore, the fact that many religious broadcasters operate "for profit" does not diminish the overriding purpose of

those broadcasters, which is to convey a religious message.

Importantly, the governmental interest in a narrow rather than broad definition of "religious broadcaster" in the context of religious broadcasters is relatively inconsequential. That is, the exemption confers no substantive benefit on religious broadcasters that nonreligious broadcasters are likely to desire. Unlike some exemptions--for example, tax exemptions or exemptions from military conscription--in which the desirability of the exemption creates a real risk of abuse or fraud, nonreligious broadcasters gain nothing by being allowed to discriminate on the basis of religion, particularly since discrimination on the basis of race or gender--the source of most employment discrimination claims--is still prohibited. Thus, nonreligious broadcasters have little incentive to hire using religious criteria.

If anything, discrimination on the basis of religion impedes the hiring process and constricts the likelihood of getting the broadest pool of qualified applicants. As the NPRM emphasizes, discrimination harms broadcasters by restricting the pool of qualified employees. NPRM, at Para. 3. The only broadcaster likely to self-impose a religious restriction on its discretion in hiring would be a broadcaster to whom it really mattered that its employees have particular religious beliefs or affiliations.

Instead, a narrow definition of "religious broadcaster" runs contrary to another Commission interest. A major premise of the NPRM is that diversity in programming is an important governmental interest. NPRM, at Para. 2,3. According to the NPRM, it is

important that "viewers and listeners will be exposed to varying perspectives, and become familiar with a wider range of issues affecting their local community." Id. Yet, a narrow definition of "religious broadcaster" works contrary to the Commission's interest in diversity in programming. The greater the number of religious broadcasters who are allowed to self-define their operation and communication, the greater the diversity of programming available to listeners in a particular community.

The underinclusiveness of the definition creates real constitutional problems, including the danger of governmental preference among religious denominations. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Larson v. Valente, 456 U.S. 228, 244 (1982). Any preference among religions requires strict scrutiny of the government's action. 456 U.S. at 246.

Government officials' determinations regarding who qualifies as a "religious broadcaster" under the narrow proposed definition could lead to discrimination among different religions in at least two ways. First, the proposed definition in effect protects religious broadcasters whose denominations are likely to own religious stations, while not protecting religious broadcasters whose programming is intended to reach across various denominational lines. The proposed definition favors religious broadcasters who are closely affiliated with churches while denying the same protection to religious broadcasters who are not affiliates of "a particular religious organization." Cf., Frazee

v. Ill. Dept. of Empl. Secur., 489 U.S. 829, 834 (1989)(Free Exercise Clause protects religious beliefs of individual who does not belong to an organized religion). Under the proposed definition, a religious broadcaster who is not "closely affiliated with a church, synagogue, or other religious entity" could be punished for establishing a religious requirement for employees while another religious broadcaster could escape such punishment simply because the broadcaster was "closely affiliated with a church."

Substantial numbers of religious broadcasters do not wish to affiliate with a specific religious entity. For example, many evangelical Christian broadcasters aim their programming at Christians from a broad variety of denominations. These broadcasters are likely to feel quite strongly that their employees must share their evangelical Christian beliefs but not wish to limit their employees to particular denominations.

Indeed, the government is not permitted to limit protection of religious liberty to "established" religious groups. A religious individual may "claim the protection of the Free Exercise Clause" even if the person is not "responding to the commands of a particular religious organization." Frazee, 489 U.S. at 834. The proposed definition violates this free exercise protection by requiring a religious broadcaster to affiliate with "a particular religious organization" in order to preserve its right to hire employees who share its religious ideology.

Indeed, the likely effect of the proposed definition is to

burden evangelical Protestants to a far greater degree than broadcasters from other religious backgrounds. Religious broadcasters affiliated with specific large churches or other religious entities, such as Catholic or Mormon broadcasters, will be allowed to hire on the basis of religious belief or affiliation. Many evangelical Protestant broadcasters, however, will either fail to demonstrate an affiliation with a specific church or will have to undertake a much lengthier, more intrusive, and more expensive showing of affiliation with a religious entity in order to qualify for the exemption. Even if this discriminatory impact is unintentional, it violates the free exercise rights of the affected broadcasters, as well as violating the Establishment Clause prohibition on governmental preference among religious sects.

Second, the proposed definition increases the potential for governmental preference among religions because the vagueness of the definition leaves too much latitude in the hands of a government official to determine which religious broadcaster qualifies for the exemption and which does not. The term "other religious entity" is too vague and gives the government great discretion in determining whether a religious broadcaster may hire employees of its faith. The term "closely affiliated" is too malleable to ensure that governmental preference among denominations will not occur. Even among religious broadcasters who choose to affiliate with a church, the degree to which the broadcasters are controlled or influenced by the church, synagogue or other religious entity, will differ greatly among various

denominations, giving some denominations greater protection than others for the same conduct. This differential treatment violates the Establishment Clause.

**B. Religious broadcasters do not forfeit their First Amendment protections simply because they may operate for-profit.**

In determining whether a broadcaster is a "religious broadcaster," FCC officials propose to consider whether the broadcaster is a religious entity, or closely affiliated with a religious entity, that "operates on a non-profit basis." NPRM, at Para. 71. A religious broadcaster's First Amendment rights do not hinge on whether it operates on a non-profit basis.

In an important way, the broadcasting industry is distinguishable from many other industries. The "product" a broadcaster markets is speech that is generally protected by the First Amendment. For most broadcasters, however, the ability to convey the product, i.e., the communicative message, is highly dependent upon the ability of the broadcaster to generate a profit from the sale of commercial messages. The message and the profitmaking activity are closely intertwined.

Generally, the government cannot require a broadcaster to hire employees who do not share the ideology the broadcaster wishes to communicate in its programming. The right to hire employees that agree with a broadcaster's viewpoint does not depend upon whether the broadcaster operates on a profit or non-profit basis. Cf., F.C.C. v. League of Women Voters, 468 U.S. 364 (1984)(government cannot withhold funding of noncommercial educational broadcasting

stations on condition that they refrain from editorializing or endorsing political candidates).

Certainly, nonreligious broadcasters do not forfeit their First Amendment protections simply because they earn a profit. To condition the ability to exercise one's First Amendment rights upon forfeiting profits would be an unconstitutional condition, financially penalizing persons for exercising their constitutional rights. See, e.g., Sherbert v. Verner, 374 U.S. 398, 404 (1963)(government may not condition benefits on foregoing exercise of religious liberty rights). Neither should religious broadcasters be denied their First Amendment rights simply because they may operate on a "for- profit" basis.

Religious broadcasters must be allowed equal footing with the nonreligious broadcasters to promote their "product," that is, their particular religious messages. Like nonreligious broadcasters, the religious broadcasters' "product"--the religious message--is protected First Amendment speech. See Widmar v. Vincent, 454 U.S. 263, 269 (1981). Like nonreligious broadcasters, many religious broadcasters must sell commercial messages to finance broadcasting the religious programming. Like nonreligious broadcasters, the profitability of the operation does not make the broadcasters' message less ideological or less protected by the First Amendment.

Indeed, religious broadcasters enjoy greater protection of their right of self-definition than do nonreligious broadcasters. The free speech right of broadcasters to take ideological positions

on political, social, or other issues, see FCC v. League of Women Voters, supra, is augmented by the protection the First Amendment gives to the institutional autonomy of religious groups. As the Supreme Court ruled in Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 450 (1969), "the First Amendment forbids civil courts" from "determin[ing] matters at the very core of a religion--the interpretation of particular church doctrines and the importance of those doctrines to the religion." Commissioner Furchtgott-Roth in his Statement of February 25, 1998, voiced these concerns:

> The First Amendment protects the ability of religious entities "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine," Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America, 344 U.S. 94, 116 (1952), and "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire," Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984). In implementing our EEO rules, we must take care not to infringe the rights of religious organizations to self-identification, or the associational rights of persons belonging to such organizations, by launching governmental inquiries into whether a person shares the same faith as others who believe that he does not.

Id. at 4.

Denying religious broadcasters the right of self-definition accorded nonreligious broadcasters specifically violates the Free Exercise Clause's prohibition on discriminatory treatment of religious persons. Government may not allow secular broadcasters

to employ persons based on their shared ideological viewpoints and yet disallow religious conduct on the same basis. See Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. at 543. The "for-profit" status of a religious broadcaster does not diminish its First Amendment rights.

**C. The proposed definition fails to give religious broadcasters sufficient guidance as to whether they may claim the exemption, which creates issues of unconstitutional vagueness and excessive entanglement between government officials and religious doctrine.**

The proposed definition defines a religious broadcaster as "a licensee which is, or is closely affiliated with, a church, synagogue, or other religious entity, including a subsidiary of such an entity." The term "other religious entity" and "closely affiliated" are too vague to give adequate notice as to which broadcasters meet the definition and which do not. The NPRM implicitly recognizes that the definition is too vague when it explains:

> Should a question arise as to whether a broadcaster falls under this definition, we propose to make an individual determination based upon an evaluation of the religious entity's characteristics, including whether the entity operates on a non-profit basis, whether there is a distinct religious history, and whether the entity's articles of incorporation set forth a religious purpose.

NPRM, at Para. 71.

The proposed definition leaves far too much discretion with the Commission to determine whether a broadcaster is a religious entity or closely affiliated with a religious entity. As Commissioner Harold W. Furchtgott-Roth explained in his Statement of February 25, 1998, in MM Docket No. 96-16, "it would appear

difficult, if not impossible, to know ex ante whether a particular licensee is covered by the policy." Id. at 1. As Commissioner Furchtgott-Roth observed, no current FCC precedent on the issue exists, and the FCC, while noting that the EEOC conducts a "similar" inquiry, has not indicated whether EEOC caselaw will guide the FCC's determinations of who is a religious broadcaster. Id. We reiterate Commissioner Furchtgott-Roth's concern that the FCC "may have merely shifted the uncertainty and attendant chilling effect surrounding the rights of religious broadcasters from the back end of our policy (the determination of jobs involving religious espousal) to the front (the determination whether a licensee is a religious broadcaster)." Id., citing Corporation of the Presiding Bishop v. Amos, 483 U.S. at 343-344 (Brennan, J., concurring)("A case-by-case analysis for [religious and secular] activities...would both produce excessive government entanglement with religion and create the danger of chilling religious activity.")

In the context of religious liberty, if a regulation creates problems of constitutional vagueness, it is also likely to create constitutional problems of excessive entanglement and unconstitutional intrusion of government into the internal decisionmaking of religious institutions that violate the Establishment Clause and the Free Exercise of Religion Clause.

A determination of whether a broadcaster is or is not religious requires careful deliberation to avoid violating the First Amendment Religion Clauses. Cf., e.g., Rosenberger v. Rector

& Visitors of the University of Virginia, 515 U.S. at 844-845. Such determinations run the risk of violating the Establishment Clause because government officials will make determinations regarding religious doctrine. Widmar v. Vincent, 454 U.S. at 269 n.6 (1981).

As Commissioner Furchtgott-Roth noted in his Statement of February 25, 1998, supra, excessive entanglement is likely to occur not only in the process of determining whether a broadcaster is a "religious broadcaster" but also in determining whether an applicant or employee holds the same religious beliefs or affiliations as the religious broadcaster. As Commissioner Furchtgott-Roth explained:

> If and when an individual claims that they are a member of a certain religious faith but were nevertheless denied a job based on impermissible factors, and the religious broadcaster in turn asserts that the person is not in fact a member of their religious group, it is imperative that the Commission not involve itself in the determination of who is and who is not a bona fide member of a particular religious organization. Even under the umbrella of one religious denomination, there may be factions that disagree about the tenets of that denominational faith; the history of religion is replete with examples of such schisms. These are intensely personal debates into which government ought not inject itself. If the factual question of who is a "true" member of a particular religious group arises in the context of an EEO proceeding, government should defer to the considered judgment of the particular group with which the broadcaster is affiliated.

Id. at 4.

We recognize that an exemption for religious broadcasters will require some linedrawing by the Commission, but the linedrawing

must be done with care. Our proposed definition would require a baseline determination of whether a substantial amount of the programming was "religious" or, in the alternative, whether the broadcaster was affiliated with a religious institution. But we believe that such determinations entail much less entanglement of government officials in religious doctrine than does the narrow definition proposed in the NPRM.

Under any definition, Commission officials should be careful to administer its definition of "religious broadcaster" with a presumption of deference to broadcasters' claims as to whether their programming is substantially religious or whether they are affiliated with a religious institution. Such deference is particularly appropriate because the government interest in restricting the availability of the exemption to only a handful of religious broadcasters is relatively inconsequential. Furthermore, a broad definition of religious broadcasters advances the Commission's interest in promoting a diversity of programming in local communities, while steering well clear of constitutional infringement.

**Conclusion**

For both constitutional and practical reasons, the proposed definition of "religious broadcaster" is inadequate to protect the right of a religious broadcaster to hire employees who share its religious viewpoints. We respectfully request that a two-part definition be adopted that separately protects broadcasters who carry substantial religious programming as well as protects

broadcasters who are affiliated with a church, synagogue, or religious institution.

Respectfully submitted,

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## Appendix

The **Christian Legal Society**, founded in 1961, is a nonprofit ecumenical professional association of 4,700 Christian attorneys, judges, law students and law professors with chapters in every state and at 85 law schools. Since 1975, the Society's legal advocacy and information arm, the Center for Law and Religious Freedom, has advocated the protection of religious exercise and autonomy in the U.S. Supreme Court and in state and federal courts throughout the nation.

Using a network of volunteer attorneys and law professors, the Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise and the autonomy of religious institutions. In addition, the CLS Center has filed briefs amici curiae on behalf of many religious denominations and civil liberties groups in virtually every case before the U.S. Supreme Court involving church-state relations since 1980.

The Society is committed to religious liberty because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment

by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our Nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom, is "Congress shall make no law. . . ."

The CLS Center's national membership, two decades of experience, and professional resources enable it to speak with authority upon religious expression.

**Focus on the Family** is a California religious non-profit corporation committed to strengthening the family in the United States and abroad. Focus on the Family distributes a radio broadcast about family issues that reaches approximately 1.7 million listeners each day in the Untied States, Canada and other western countries. Focus on the Family publishes and distributes *Focus on the Family* magazine and other literature that is received by more than 2 million households each month. From its widespread network of listeners and subscribers, Focus on the Family receives an average of more than 33,000 letters each week.

**Concerned Women for America** ("CWA") is a national non-profit organization representing approximately 600,000 people. CWA's purpose is to preserve, protect, and promote traditional and Judeo-Christian values through education, legislation, aid, and related public and media activities which represent the concerns of men and women who believe in these values. One of the foremost concerns of CWA is the protection of fundamental religious liberties.