



79.1(d)(8) and/or (ii) grant of an *individual exemption*, pursuant to Section 79.1(f)(1), and/or (iii) the grant of a *waiver*,<sup>2</sup> from the FCC's closed captioning rules.

Following a recent Supreme Court decision, Petitioner further submits that, pursuant to any lawful regulatory regime, (iv) the FCC's imposition of a closed-captioning requirement on the SLMC's Sunday Service would constitute a constitutionally impermissible restriction on, *inter alia*, the religious rights and freedoms of both SLMC and also the millions of Methodists and other Houston-area residents to whom the Sunday Service is now available. *See Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 10-553, \_\_\_ U.S. \_\_\_, January 11, 2012 (Supreme Court strikes down federal agency's attempt to impose rules on religious organization in violation of the First Amendment).<sup>3</sup> The FCC lawfully cannot mandate practices that interfere with the religious dictates and longstanding traditions of SLMC, such as how to visually present its weekly Sunday Worship Service telecast. *Id.* As Chief Justice Roberts recently wrote --the government may not constitutionally interfere in the internal judgments of religious groups. *Id.*

**I. The FCC Must Broadly Construe the Congressional Intent to Expansively Grant Exemptions to its Closed-Captioning Rules**

Congress was unusually cautious some 20 years ago, when it adopted legislation authorizing the FCC to impose a "closed captioning requirement" on TV broadcasts. Congress expressly provided numerous automatic, *self-executing exemptions* for TV broadcasts<sup>4</sup> but Congress even provided one *additional exemption* for TV broadcasts – to prevent any “undue burden” on any entity that produces TV programming.<sup>5</sup> The intent of Congress was to preclude

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<sup>2</sup> A Petitioner may seek a waiver of any FCC rule for "good cause" shown. *See, generally, WAIT Radio v. FCC*, 418 F. 2d 1153 (D.C. Cir. 1969).

<sup>3</sup> *Cf. National Federation of Independent Business et al. v. Sebelius, Secretary of HHS*, 567 U.S. \_\_\_, No. 11-393, June 28, 2012, (Supreme Court holds unconstitutional the government's attempt to “mandate” certain behavior, although it ruled the action as permissible only by framing the mandate as a “tax”).

<sup>4</sup> *See* 47 CFR § 79.1(d)(8).

<sup>5</sup> *See* 47 CFR § 79.1(f).

the FCC from burdening a TV station with a closed-captioning requirement that might, effectively, result in a *reduction* in locally produced programming -- a historical underpinning of the statutory "public interest" standard, upon which all federal regulation of the TV industry is premised.<sup>6</sup> It is, thus, uniquely instructive that Congress expressly provided yet another explicit *exemption* for broadcasters – the “undue burden” exemption in Section 79.1(f)(1) -- beyond the many *categorical* exemptions available under subsection 79.1(d).<sup>7</sup>

This broad array of **Congressionally mandated exemptions** for broadcasters was intended to *preclude* any inappropriately broad regulatory reach of the FCC's closed-captioning regime. Not only has the FCC recognized the Congressional mandate to avoid any *burdensome* harm to program producers<sup>8</sup> but, in recent months, FCC Commissioner Robert Mc Dowell has added his express concern that the FCC pay close attention in closed-captioning cases to avoid such harm.<sup>9</sup>

Against the background of this exceptionally limited delegation of authority by Congress to the FCC in the matter of TV closed-captioning, it is imperative that the FCC broadly construe both the “individual categorical exemption” and also the "undue burden" exemption and, specifically, to avoid any overly restrictive constructions.<sup>10</sup> In such rare circumstances, reasoned FCC decision-making requires nothing less.<sup>11</sup>

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<sup>6</sup> See note 18, *infra*.

<sup>7</sup> As noted *supra*, these multiple explicit statutory exemption provisions are in addition to the FCC's established procedures that enable a party to seek a “waiver” of any FCC rule for “good cause shown.” See note 2, *supra*.

<sup>8</sup> See, e.g., *Closed Captioning Report and Order*, 13 FCC Rcd 3272, 3364-5 ¶ 202 (1997).

<sup>9</sup> “I recognize the importance of our action... for the disabled community. Such rules, however, have to be *carefully crafted to weigh these benefits against the costs they may place on programming owners and distributors.*” *Report and Order (Internet Closed Captioning)*, FCC 12-9, released January 13, 2012, (Concurring Statement of Commissioner Robert M. McDowell), at 111 (emphasis added).

<sup>10</sup> *Id.* Mindful that a petitioner always can seek a “waiver” of any FCC rule that is not also a statutory mandate, Congress rarely enacts a statute that *includes several express procedures for exemptions*, as part of the rules.

<sup>11</sup> See, e.g., *Public Media Center v. FCC*, 587 F.2d 1322, 1331 (D.C. Cir. 1978)(FCC must clearly and fully articulate its basis for a decision and engage in reasoned decision-making).

Thus, in the currently challenging economic circumstances of SLMC's Sunday Service,<sup>12</sup> a proper construction of both Sections 79.1(d) and also 79.1(f)(1) of the FCC's rules requires -- at a minimum -- the FCC's grant to the SLMC's Sunday Service of both a *categorical* exemption and also an "*undue burden*" exemption from the FCC's closed-captioning rules.

## **II. The Sunday Service is Entitled to a *Categorical* Exemption**

The Sunday Service is entitled to an (automatic) *categorical* exemption from the FCC's closed captioning rules because it is a weekly, locally produced and distributed non-news program of religious and social interest, which has no "repeat value." See 47 CFR § 79.1(d)(8).

The Sunday Service, a local production of SLMC, is telecast every Sunday morning on local Houston-area television station KUBE-TV and is available to more than four (4) million viewers in the rapidly growing Houston DMA. See Appendix A. Moreover, because it is SLMC's longstanding policy that each Sunday Service be "topical" -- both as to the sermon as well as to the related scripture readings-- the Sunday Service telecast is not repeated and, indeed, has no "repeat value." Id. The Sunday Service clearly qualifies for an "automatic" *categorical* exemption, pursuant to the FCC's rules. See 47 CFR 79.1(d)(8).<sup>13</sup>

## **III. The Sunday Service also is Entitled to an *Individual* Exemption**

The SLMC's Sunday Service also qualifies for an *individual* exemption, pursuant to Section 79.1(f)(1) of the FCC's rules, because the FCC's imposition of a closed-captioning requirement would constitute, *inter alia*, an "undue burden." The SLMC's Sunday Service meets each of the FCC's "undue burden" evidentiary criteria.

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<sup>12</sup> See Discussion, *infra*, at 5-7.

<sup>13</sup> Congressional statutes, the FCC's Report and Order, 13 FCC Rcd 3272 (1997) and the FCC's Reconsideration Decision, 13 FCC Rcd 19973 (1998), collectively support a **broad** interpretation of subsection 79.1(d)(8) of the FCC's closed-captioning rules, particularly where a narrow construction could unlawfully impinge on the First Amendment rights of religious broadcasts. See Discussion, *infra*, pages 9-10.

In both the FCC's April 2, 2012 "Public Notice" and in the FCC's October 20, 2011 Order,<sup>14</sup> the FCC made it clear that, in any subsequent petition for exemption (or Supplement) under the "undue burden" standard, any petitioner "must include up-to-date evidence, supported by Affidavit, demonstrating that it would be economically burdensome to provide closed captioning on the specific programming for which an exemption is sought" (emphasis added). The Order itself provides the "detailed requirements" for any new petition for exemption (or supplement), stating that "detailed documentation" should be provided to the FCC to support any contention by a petitioner that the imposition of a closed-captioning requirement would result "*in a significant difficulty or expense*," as defined by the following four (4) criteria:

1. **Type and Recent History of Operations of the Sunday Service Telecast**

The telecast of SLMC's Sunday Service is already facing a precarious financial situation. See Discussion, infra, at 6-7. Since the time that SLMC filed a Petition for Exemption with the FCC in 2007, it has been "a struggle each year simply to justify continuation operation of the Sunday Service telecast." See Appendix A.

Moreover, there is another, *unique* aspect of the SLMC's Sunday Service that **operationally** distinguishes it -- with respect to the FCC's closed-captioning rules -- from all other TV programs (and, thus, all other Petitions for Exemption). The very concept of "closed-captioning" of the Sunday Service telecast presents a threshold **operational problem for SLMC**. See Appendix A. The very nature of any telecast of the Sunday Service must be understood in a proper context, as closed captioning would entail a fundamental *alteration* to the visual format of the Sunday Service, contrary to historic telecasts of the Sunday Service as part of Methodist practices and established Methodist traditions. Id. In current circumstances, the

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<sup>14</sup> The Order, FCC 11-159, released October 20, 2011 ("Order"), reversed the Bureau's 2006 Decision regarding the FCC's closed-captioning rules.

FCC's mandate of a closed-captioning requirement for SLMC's Sunday Service would present an irreconcilable "significant difficulty" that could be sufficient, alone, to force the cancellation of the weekly telecast of the Sunday Service. Id.

2. **Significant Cost of Closed Captioning of the SLMC's Sunday Service Telecast**

In addition to the foregoing *operational* difficulty, the FCC's imposition of a closed-captioning mandate with respect to the weekly SLMC's Sunday Service telecast also would be "a significant expense" and "economically burdensome." From quotes recently received, SLMC estimates that the cost of closed-captioning of the Sunday Service would result in more than a 20% increase in operation costs for the Sunday Service telecast, which is already stretched to the *maximum limits*. Id.<sup>15</sup> Given the current economic challenges *already* facing the Sunday Service telecast (see Discussion, infra), it is obvious why the *additional* cost of "closed-captioning" could not practicably be absorbed. Id.

3. **Financial Resources of the Sunday Service Telecast Preclude Closed Captioning**

If closed-captioning of the Sunday Service telecast is mandated by the FCC, the SLMC's available financial resources simply *are currently inadequate*. Id. The fundamental economics of the Sunday Service telecast have worsened in recent years, with the onset of the current Recession. Id. A mandated 20% increase in the telecast's costs would be "crippling." Id. Given today's economic conditions, it is likely that the FCC's mandated closed captioning of the Sunday Service telecast would lead to SLMC halting the telecast." Id.

4. **"Significant Difficulty" and "Economic Burden" for the Sunday Service Telecast**

In sum, the present financial condition of SLMC's Sunday Service telecast is such that, simply and unquestionably, the imposition of a closed-captioning requirement would both present a "**significant difficulty**" and also be "**economically burdensome**" for SLMC. See

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<sup>15</sup> This cost estimate is more than 20% higher than the estimated cost cited in SLMC's 2007 Petition (at page 4).

Appendix A. Indeed, such an FCC action would be more than an "**undue burden**"-- under current conditions, it likely would lead to a halt of the very programming that is the subject of this Petition. In such circumstances, there should be no serious debate that such a "**burden**" imposed by the FCC must *ipso facto* be judged legally to meet the statutory exemption requirement of "**undue.**" See 47 CFR 79.1(f)(1).

**5. Other Factors in Support of an Individual Exemption for the Sunday Service**

Other factors support Petitioner's request for an *individual* exemption for the telecast of the Sunday Service. Any alternatives would present "significant difficulties." Petitioner has considered other alternatives to closed-captioning of the Sunday Service telecast but none are appropriately viable.

For example, utilizing "signing" or "graphic display" of the content of SLMC's Sunday Service telecast would be prohibitively expensive and, as noted by FCC Commissioner McDowell, may practically be "unworkable."<sup>16</sup> Moreover, it is also not appropriate. See Appendix A. First, the required purchase of an additional camera and hiring of additional staff for "signing" would be "**economically burdensome,**" as that would add even more costs than those that already have been shown, supra, to preclude closed captioning. Id. In any event, providing "signed" coverage of the SLMC's Sunday Service would be "unworkable" because it would require a distracting "wide shot" that would unacceptably degrade the solemn Sunday Service itself, contrary to the religious dictates of the Church. Id.<sup>17</sup>

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<sup>16</sup> See Report and Order, supra (Commissioner McDowell is "concerned" that captioning and "display standards" may be "unworkable").

<sup>17</sup> "Signed" coverage of the Sunday Service would degrade the solemnity of this sacred religious observance. Id. For example, part of the sacred liturgy is to maintain focus on the Speaker -- on his gestures and his expressions. Such sacred traditions of the Sunday Service would be violated by, *inter alia*, the distraction of a second camera. The Church's pastoral guidelines prohibit such distractions as desecrations. Id.

6. **Public Interest Factors Require the Grant of an Individual Exemption**

The FCC may not lawfully apply its closed-captioning rules, in any given adjudicatory case, in a vacuum. Beyond the enumerated specific factors listed in Section 79.1, the FCC must determine *in every adjudicatory proceeding* wherein lies the overall “public interest,” so that the ends of justice are met. See 47 USC § 154(j); see also 47 CFR 79.1(f)(3).

The FCC's imposition of a closed-captioning mandate on SLMC's economically stressed telecast of its Sunday Service – in circumstances where it would lead to a “*significant difficulty*” and “*economic burden*” contrary to legislative intent -- would also violate *other* FCC's rules and policies, designed to promote *increasingly scarce* locally produced television programming.<sup>18</sup>

IV. **The Sunday Service is Entitled to a Waiver of the Closed-Captioning Rules**

Assuming that the FCC were to ignore the Sunday Service telecast's entitlement to Congressionally enumerated *exemptions*, the Sunday Service should be granted a waiver of the FCC's closed-captioning rules for “good cause” shown. The legislative purposes underlying the “public interest” standard favor a grant of a waiver in these circumstances.<sup>19</sup>

V. **The Mandate of Closed Captioning for the Sunday Service would be Unconstitutional**

Finally, even if the FCC were to erroneously conclude that the Sunday Service telecast should not receive either (a) any of the exemptions under Section 79.1 of its rules (b) or a *waiver* under the FCC's broader “public interest” standard, the FCC's mandate of closed captioning for SLMC's Sunday Service telecast would be unconstitutional.

Included in the regulatory calculus of every federal agency is the overarching requirement of the First Amendment to the U.S. Constitution. An FCC closed-captioning mandate would *not*

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<sup>18</sup> See Report on Broadcast Localism, FCC 07-218, rel. January 24, 2008; see also FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 362 (1955).

<sup>19</sup> Id.

*only* result in “significant difficulties” and be “economically burdensome” but unlawfully would intrude on the internal decision-making of the Church, as to how its sacred Sunday Service should be visually presented. See Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, supra.

Moreover, given the current economic woes of SMLC’s telecast, such unlawful action would raise even more troubling constitutional problems. Should the Church be forced by the FCC’s mandate to **shutdown** the SLMC’s Sunday Service telecast, such an intrusive mandate by the FCC unlawfully would infringe upon the protected rights of both St. Luke’s United Methodist Church itself, as well as the rights of the Church’s congregants to have access to practice their constitutionally protected religious rights to worship. See Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, supra; see also Report and Order, supra, (Comm. McDowell expresses “fear” that new closed-captioning rules could “infringe” upon First Amendment rights of content creators). In short, a closed-captioning mandate by the FCC would cancel the religious rights of millions of Houstonians to whom the Sunday Service telecast is available every week -- the homebound, the elderly, and disabled who depend upon SLMC’s Sunday Service because they are unable to attend a weekly Church service. See Appendix A. Such unlawful FCC action would deprive these TV viewers of the spiritual “connection” that is essential each week to meet their basic religious needs. Id. Moreover, in the case of SLMC’s own devout congregants, any FCC-forced cancellation the SLMC’s weekly telecast would violate their religious rights to establish and maintain their religious connection with their own Church. Id.

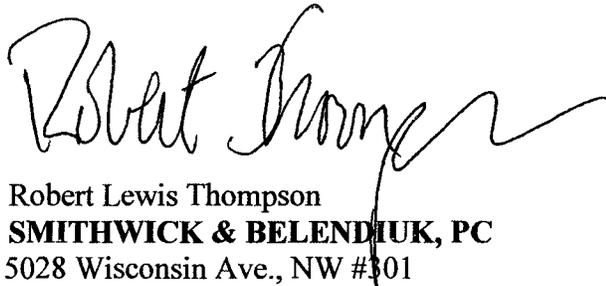
In short, for the millions of Houstonians who have access to the Sunday Service telecast each week, the telecast is a “lifeline” for the weekly exercise of their religious faith and the tenets

of the Methodist religion that has endured for centuries. Id. In these circumstances, the FCC's mandating closed captioning of SLMC's Sunday Worship Service telecast would not only be unreasonably contrary to the FCC's rules and policies, it would be facially unconstitutional.<sup>20</sup>

### **CONCLUSION**

In view of the foregoing, the Commission should grant a permanent exemption (or waiver) or otherwise decline to mandate closed-captioning for the SLMC's Sunday Service telecast.

Respectfully submitted,



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<sup>20</sup> Cf. Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, *supra*.

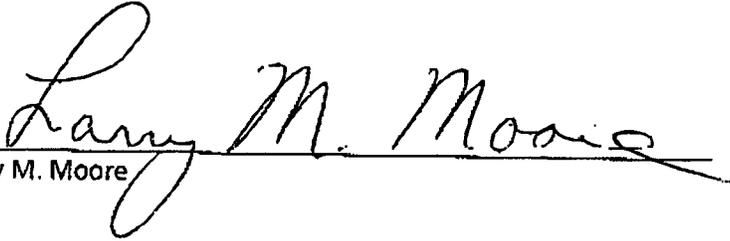
**SWORN STATEMENT**

My name is Larry M. Moore, a resident of Katy, Texas, and Executive Director of St. Luke's United Methodist Church ("SLMC") in Houston, Texas. This Statement is given in support of SLMC's Supplement to Petition for Exemption, which seeks a permanent exemption from the FCC's closed-captioning rules for the weekly telecast of its Sunday Worship Service ("Sunday Service" or "telecast").

1. The Sunday Service is locally produced by SLMC and is telecast weekly on Houston-area TV station KUBE-TV every Sunday morning at 10AM (CST); it is available to millions of television viewers in the Houston area. Because it is a requirement of the Church's core pastoral guidelines that every Sunday Service be topical, both as to the sermon and as to the related scripture readings, the weekly telecast is not repeated.
2. The Sunday Service is a unique production of SLMC and is intended to evangelize all individuals, but the telecast is especially important for the Church's goal in reaching the homebound, residents of nursing homes, and those in hospices. THERE IS A UNIQUE ASPECT OF SLMC'S SUNDAY SERVICE THAT MAKES IT PARTICULARLY UNSUITABLE FOR CLOSED CAPTIONING. The alteration of the visual presentation of the sacred Sunday Service, through closed captioning, would seriously interfere with the Sunday Worship Service's visual integrity, as it is presented each week by Pastors who solemnly conform to historic Methodist teachings and practices. Moreover, there is no alternative, even including "signing," where an *expensive* additional camera would be required and which also would significantly alter the very service itself (as attention of the TV viewer necessarily would be distracted from the Pastor as he conducts the sacred service, as it has been conducted by Methodist ministers generally for centuries). The guidelines of the Church prohibit any such "visual desecration." In short, closed captioning (or signing) would denigrate the solemnity of the Sunday Service as it has been historically conducted by Methodist ministers. Thus, SLMC agrees with the recent statement of FCC COMMISSIONER ROBERT MC DOWELL that requiring such closed captioning might unlawfully interfere with the religious rights of a Church to conduct its sacred observances without Government involvement, mandates or demands.
3. Even assuming that closed captioning of the Sunday Service were not operationally precluded, the FCC's mandate of closed-captioning for SLMC's telecast of the Sunday Service would result in at least a 20 percent increase in operating costs for the Service telecast, whose economic circumstances currently are stretched to the limits. The underlying financial underpinnings of the telecast have worsened during the prolonged national recession. The telecast has increasingly faced a very precarious financial situation. Since the filing of SLMC's Petition for Exemption in 2007, SLMC has found it a struggle each year simply to justify continued operation of the Sunday Service telecast. The increasing costs of operation for the SUNDAY Service telecast are an existential threat to the telecast's operational future as things stand today. It is uncertain – EVEN WITHOUT CLOSED CAPTIONING BEING MANDATED BY THE FCC – how much longer SLMC will be able to continue the telecast under current economic conditions. Additional costs for closed captioning could not be absorbed. Additional resources simply are not available for a substantial increase in costs for the telecast that would be necessary if the FCC mandated closed captioning. A 20% increase in costs for closed captioning would be crippling. Given current economic challenges already facing the telecast, such a mandate by the FCC would currently force SLMC to cancel the telecast.

4. In sum, if the FCC were to require closed captioning of the Sunday Service telecast, it would be not only "economically burdensome" and a "significant difficulty;" but, under current conditions, it would force the termination of the very TV program at issue. In doing so, I respectfully submit that the FCC – if it were effectively to force the shutdown of the telecast today -- the FCC also effectively would be cancelling the religious rights of millions of Houston-area viewers who now have access to the Sunday Service telecast. The FCC would be depriving those viewers of a spiritual connection with the weekly Sunday Worship Service – a vital religious observance which has played a unique role for centuries in fulfilling the religious needs of Methodists and others who cannot attend any weekly religious service.

I AFFIRM UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND COMPLETE TO THE BEST OF MY INFORMATION AND BELIEF. EXECUTED THIS THIRD DAY OF JULY, 2012.

  
Larry M. Moore