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# Constitutional Law - Religious Discrimination in Employment--Title VII of the Civil Rights Act of 1964 and the FCC Nondiscrimination Regulations--King's Garden, Inc. v. FCC

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**Constitutional Law** — RELIGIOUS DISCRIMINATION IN EMPLOYMENT — TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND THE FCC NONDISCRIMININATION REGULATIONS — *King's Garden, Inc. v. FCC,* 498 F.2d 51 (D.C. Cir. 1974), *cert. denied,* 95 S. Ct. 309 (1974).

King's Garden, Inc. is a religious organization which owns and operates two radio stations. A letter of complaint was filed with the Federal Communications Commission alleging that King's Garden was violating the Commission's nondiscrimination regulations[1] by discriminating on the basis of religion in choosing employees. In response, King's Garden filed a memorandum of law based upon the Civil Rights Act of 1964[2] and the free exercise clause of the first amendment, contending that as a religious organization engaged in religious activity, it should be exempt from the Commission's ban on religious discrimination in employment. The Commission rejected this contention[3] and ruled that only "those persons hired to espouse a particular religious philosophy over the air should be exempt from the nondiscrimination rules."[4] Prior to this ruling, but subsequent to the filing of the memorandum of law, the Civil Rights Act was amended to allow religious organizations to discriminate in employment on the basis of religion in all activities, not only in religious activities as previously allowed.[5] King's Garden notified the Commission of this amendment and requested that the Commission alter its holding to conform with the new legislation. The Commission, however, reaffirmed its prior ruling.[6] The Court of Appeals for the District of Columbia affirmed, holding that the Commission is not required to incorporate the 1972 amendment to the Civil Rights Act into its nondis-

[1]47 C.F.R. §§ 73.125, 73.301 (1972). Section 73.125 applies to AM broadcasting, and section 73.301 applies to FM broadcasting. The two sections are identically worded, stating, in part:

> (a) *General Policy.* Equal opportunity in employment shall be afforded by all licensees or permittees of commercially or noncommercially operated standard, FM, television or international broadcast stations (as defined in this part) to all qualified persons, and no person shall be discriminated against in employment because of race, color, religion, national origin or sex.

[2]42 U.S.C. §§ 1981 *et seq.* (1970). The memorandum relied primarily on 42 U.S.C. § 2000e-1 (1970) which (prior to the 1972 amendment) allowed religious organizations to discriminate "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation . . . of its religious activities. . . ." The memorandum also relied on 42 U.S.C. § 2000e-2 (e) (1970) which permits discrimination in employment "on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

[3]Trygve J. Anderson, 34 F.C.C.2d 937 (1972), *aff'd sub nom.* King's Garden, Inc., 38 F.C.C. 2d 339 (1972), *aff'd sub nom.* King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir. 1974), *cert. denied,* 95 S. Ct. 309 (1974).

[4]*Id.* at 938.

[5]Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-1 (Supp. II, 1972), *amending* 42 U.S.C. § 2000e-1 (1970).

[6]King's Garden, Inc., 38 F.C.C.2d 339 (1972), *aff'd sub nom.* King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir. 1974), *cert. denied,* 95 S. Ct. 309 (1974).

crimination regulations, and that the FCC regulations give adequate protection to the first amendment freedoms of religious broadcasters.[7]

## I. BACKGROUND

### *A. The Communications Act of 1934*

Congress created the Federal Communications Commission by the Communications Act of 1934.[8] This Act gives the Commission the mandate to license radio stations "as public convenience, interest, or necessity requires,"[9] and the authority to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter."[10] The Commission wields "expansive powers"[11] under this Act, as long as it stays within the "vagueish, penumbral bounds expressed by the public interest."[12]

Pursuant to this authority the Commission in 1968 promulgated regulations providing that "no person shall be discriminated against in employment because of race, color, religion, national origin or sex."[13] These regulations were based both upon the policies expressed by the "public interest" mandate of the Communications Act and the "national policy against discrimination in employment . . . embodied in Section VII of the Civil Rights Act of 1964."[14]

### *B. The Civil Rights Act of 1964*

The Civil Rights Act is one of the basic legislative weapons against discrimination. Title VII of the Act is specifically directed toward the elimination of discrimination in employment, and the legislative history behind this title clearly indicates that it establishes the national policy against discrimination in employment.[15]

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[7]King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir. 1974), *cert. denied*, 95 S. Ct. 309 (1974).

[8]47 U.S.C. §§ 151 *et seq.* (1970).

[9]*Id.* § 303 (1970).

[10]*Id.* § 303(r) (1970).

[11]National Broadcasting Co. v. United States, 319 U.S. 190, 216 (1942).

[12]FCC v. RCA Comminications, Inc., 346 U.S. 86, 91 (1953).

[13]47 C.F.R. §§ 73.125, 73.301 (1972). The text of the regulations is set forth, in part, at note 1 *supra*.

[14]Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 13 F.C.C.2d 766, 767 (1968). In this memorandum, the Commission announced its intent to foster the policies of the Civil Rights Act by promulgating nondiscrimination regulations. It recognized that the Civil Rights Act provisions were applicable to a significant number of broadcast licensees (*Id.* at 768), and acknowledged that, in upholding its public interest mandate, it must consider such policies (*Id.* at 769).

[15]

> The purpose of this title [title VII Civil Rights Act of 1964] is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment

The Act originally provided that the ban on religious discrimination in employment 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 *religious* activities.[16]

The Equal Employment Opportunity Act of 1972 amended this section, *inter alia,* by striking the word "religious" before "activities." The legislative history of the amendment clearly indicates that Congress intended the exemption to be broad enough to reach all activities of all religious organizations.[17] The far-reaching implications of this amendment must be examined against the religion clauses of the first amendment.

### *C. The Religion Clauses of the First Amendment*

1. *Free Exercise.* The free exercise clause prohibits governmental regulation of religious beliefs and practices, and bars governmental inter-

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based on race, color, religion, or national origin. The title authorizes the establishment of a Federal Equal Employment Opportunity Commission and delegates to it the primary responsibility for preventing and eliminating unlawful employment practices as defined in the title.

Section 701 (a) sets forth a congressional declaration that all persons within the jurisdiction of the United States have a right to the opportunity for employment without discrimination on account of race, color, religion, or national origin. It is also declared to be the national policy to protect the right of persons to be free from such discrimination.

1964 U.S. CODE CONG. & AD. NEWS 2401.

[16]42 U.S.C. § 2000e-1 (1970), *as amended,* 42 U.S.C. § 2000e-1 (Supp. II, 1972) (emphasis added). For a discussion of title VII prior to the 1972 amendment see Note, *Title VII — Religious Discrimination in Employment — Is "Effect on Individual Religious Belief" Discrimination Based on Religion under the Civil Rights Act of 1964?* 16 WAYNE L. REV. 327 (1969); Comment, *Religious Observance and Discrimination in Employment,* 22 SYRACUSE L. REV. 1019 (1971).

[17]Senator Sam J. Ervin, Jr., in introducing the amendment, stated that it

> would exempt religious corporations, associations, and societies from the application of this act insofar as the right to employ people of any religion they see fit is concerned.... In other words, this amendment is to take the hands of Caesar off the institutions of God, where they have no place to be.

SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 1645 (Comm. Print 1972).

Similarly, the Joint Explanatory Statement of the Managers at the Conference on the Bill states:

> [T]he Senate provision expanded the exemption for religious organizations from coverage under this title with respect to the employment of individuals of a particular religion in all their activities instead of the present limitation to religious activities.

1972 U.S. CODE CONG. & AD. NEWS 2180.

*See generally* G. Sape & T. Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972,* 40 GEO. WASH. L. REV. 824 (1972); Note, *Civil Rights — Religious Discrimination in Private Employment Under Title VII of the Civil Rights Act of 1964,* 3 CUMBER-SAM. L. REV. 497 (1972).

ference with the dissemination of religious ideas.[18] Numerous special privileges and exemptions from state control have been granted to individuals and religious organizations under this clause.[19]

In determining whether a government activity or regulation violates the free exercise clause, the Supreme Court uses a balancing test. First, the Court looks to the nature of the religious interest involved to determine whether it is a legitimate belief or practice[20] entitled to constitutional protection.[21] Second, it looks to the conflicting state interest in regulating the religious belief or practice to determine whether the state interest is of sufficient magnitude to override the religious interest.[22] There is a presumption favoring the religious interest, for the Supreme Court has said that only those state interests "of the highest order and those not otherwise served" will take precedence over religious interests.[23] If the state fails to carry its burden of showing an overriding state interest, the free exercise claim will prevail.

2. *Establishment.* The establishment clause insures governmental neutrality in religious matters. It is specifically intended to guard against the evils of sponsorship, financial support, and active involvement of the sovereign in religion.[24] The Supreme Court has held that a law may violate the establishment clause even though it does not promote a state religion and does not aid one religion more than another.[25] However, the Court has long recognized that the establishment clause does not de-

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[18]Gillette v. United States, 401 U.S. 437, 462 (1971). *See* Sherbert v. Verner, 374 U.S. 398 (1963); Fowler v. Rhode Island, 345 U.S. 67 (1953); Follett v. Town of McCormick, 321 U.S. 573 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943).

[19]*See* Shetreet, *Exemptions and Privileges on Grounds of Religion and Conscience*, 62 KY. L. J. 377 (1973); Pfeffer, *The Supremacy of Free Exercise*, 61 GEO. L. J. 1115 (1973); Walz v. Tax Commissioner, 397 U.S. 664 (1970) (property tax exemption); United States v. Seeger, 380 U.S. 163 (1965) (draft exemption); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (flag salute).

[20]The traditional distinction between belief and practice established by such cases as Reynolds v. United States, 98 U.S. 145 (1878) and followed by such cases as Braunfeld v. Brown, 366 U.S. 599 (1961), has not been adhered to by such recent cases as Wisconsin v. Yoder, 406 U.S. 205 (1972). *See* note 23 *infra*. Also, the Supreme Court has indicated that the protections of the free exercise clause extend beyond traditional concepts of religion. United States v. Seeger, 380 U.S. 163 (1965).

[21]Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972).

[22]*Id.* at 214-15.

[23]*Id.* at 215. The facts in *Yoder* provide a good illustration of the balancing test employed under the free exercise clause. There a state requirement that all persons attend school until the age of 16 years conflicted with the Amish belief that education beyond the eighth grade was improper and would undermine their religious organization. The Court considered the relative importance of the state's interest in requiring school attendance in relation to the importance of the asserted religious claims, and found the state interests insufficient to outweigh the presumption favoring free exercise.

[24]*See* Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Gillette v. United States, 401 U.S. 437 (1971); Epperson v. Arkansas, 393 U.S. 97 (1968); Everson v. Bd. of Educ., 330 U.S. 1 (1947).

[25]Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973).

mand complete separation between church and state;[26] numerous types of government involvement with religion have been held constitutional.[27] A three-part test has evolved for determining whether a law is valid under the establishment clause. First, the law must reflect a clearly secular legislative purpose; second, the law must have a primary effect that neither advances nor inhibits religion; and third, it must avoid excessive government entanglement with religion.[28]

The instant case focused on the status of religious discrimination in employment under the Communications Act, the Civil Rights Act, and the religion clauses of the first amendment.

## II. Instant Case

In affirming the Federal Communications Commission's ruling, the Court of Appeals for the District of Columbia held that the 1972 amendment to the Civil Rights Act of 1964 did not preempt the Commission's nondiscrimination regulations, and that the Commission's regulation adequately protected the constitutional rights of religious broadcasters.[29] The court, relying heavily on the fact that the legislative history of the 1972 amendment made no explicit reference to the FCC, inferred that Congress silently approved the nondiscrimination regulations which were in effect at the time of the amendment's enactment.[30] The court acknowledged that the Commission has a duty to examine new legislation to determine its relevance to the broadcasting industry,[31] and recognized that the literal language of the amendment is broad enough to cover religious broadcasters such as King's Garden.[32] But it emphasized that the amendment was debated in the context of religious educational institutions, with few references to its broader application, and concluded that the FCC was justified in finding that the amendment was not intended to cover such regulated, quasi-public institutions as radio stations.[33]

The court also reasoned that no religious organization has a constitutional right to hold a broadcast license, and therefore restrictions upon the use of a license should not be viewed as interference with free exercise.[34] The court described a broadcast license as a public privilege to use part of the public domain. The scarcity of this broadcast privilege,

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[26]Zorach v. Clauson, 343 U.S. 306 (1952).

[27]*See* note 19 *supra*.

[28]Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973) (and cases cited therein).

[29]498 F.2d 51, 53-54 (1974).

[30]*Id.* at 53.

[31]*Id.* at 58.

[32]*Id.*

[33]*Id.* at 54, 58-59.

[34]*Id.* at 60.

coupled with the fact that the privilege is voluntarily assumed by the licensee, influenced the court to hold that the licensee must adhere to the regulations established by the FCC without complaint regarding first amendment freedoms.[35]

Nevertheless, the court did recognize that a religious broadcaster such as King's Garden does have a constitutional right to express its religious beliefs and to give a sectarian tone to its programming.[36] It also acknowledged that the Commission's regulations are susceptible to unconstitutional abuse if the FCC were to forbid religious discrimination in programming which constituted a significant expression of the religious organization's sectarian viewpoint.[37] But the court did not resolve this problem, since the attack was to the facial validity of the FCC regulations, not to their application.

Because the court held the 1972 amendment was inapplicable to the Commission's regulations, it did not need to reach the issue of the amendment's constitutionality. Yet, a large part of the opinion is dicta devoted to this issue, and the court concluded that the amendment contravenes the establishment clause and is much broader than necessary to protect free exercise.[38] The court did recognize that under the free exercise clause some religious discrimination in employment may be allowed, and conceded "that Congress may, without violating the Establishment Clause, expand a religious exemption *somewhat* beyond the minimal

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] Arguably, the exemption granted under the 1972 amendment to the Civil Rights Act of 1964 is merely a necessary extension of the free exercise clause insuring that religious expression is not chilled by governmental intrusion into the internal affairs of religious organizations. However, most free exercise cases involve religious practices which are more fundamental to religious doctrine than the right to discriminate in employment. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972). Even assuming that there is a bona fide free exercise interest in being allowed to discriminate in employment, the 1972 amendment seems broader than necessary. As the court of appeals points out, the free exercise clause was not intended to permit religious organizations to discriminate in staffing "a trucking firm, a chain of motels, a race track, a telephone company, a railroad, a fried chicken franchise, or a professional football team," yet under the 1972 amendment such discrimination would be condoned. King's Garden, Inc. v. FCC, 498 F.2d 51, 54 (D.C. Cir. 1974).

The court's more compelling argument is that the amendment violates the establishment clause. The amendment does not have a clearly secular legislative purpose, though it does facilitate separation between church and state. Since the amendment allows religious organizations to discriminate in employment, it seems that the primary effect is the advancement of religious organizations over nonreligious organizations. The only one of the three traditional criteria for validity under the establishment clause with which the amendment clearly complies is that it avoids excessive government entanglement with religion. Nevertheless, the amendment seems to grant no special privileges to religious organizations more violative of the establishment clause than those approved in such cases as Wisconsin v. Yoder, 406 U.S. 205 (1972), and Sherbert v. Verner, 374 U.S. 398 (1963), where the secular legislative purpose was equally absent and the primary effect was equally religious.

Here it is intended only to pose the question of the constitutionality of the 1972 amendment, for the court did not find it necessary to resolve this issue. But even assuming,

boundaries created by the several First Amendment liberties."[39] Nevertheless, the court firmly concluded that there is "no precedent for the unlimited 1972 exemption."[40]

## III. Analysis

### *A. The FCC Regulations and the Civil Rights Act*

*King's Garden* initially raises two related questions. First, do the FCC nondiscrimination regulations conflict with the amended Civil Rights Act? Second, if such conflict does exist, should the statute take precedence over the regulations?

*1. The FCC regulations conflict with the Civil Rights Act.* The Commission's nondiscrimination regulations clearly contradict the equal employment provisions of the Civil Rights Act as amended by the Equal Employment Opportunity Act of 1972. The original Civil Rights Act provision on religious discrimination in employment was similar to the current FCC regulations, allowing discrimination only in the religious activities of religious organizations. However, the 1972 amendment altered that national policy by explicitly stating that religious organizations are to be exempt from the ban on religious discrimination in *all* activities.[41]

No conflict would exist if the term "activities," as used in the Civil Rights Act, were narrowly construed so as not to include such commercial ventures as owning radio stations. But, as the court of appeals recognized, such a strained construction would avert the clear meaning of the statute.[42] The legislative history of the amendment clearly indicates that the exemption is to apply to *all* activities of religious organizations.[43] Thus, the court must concede, as it did, that "[t]he literal terms of the exemption do cover sectarian radio . . . ."[44]

The court, however, reasoned that no conflict exists between the regulations and the Civil Rights Act because Congress did not indicate that the 1972 amendment should apply to the FCC's regulation of "quasi-

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*arguendo*, that the 1972 amendment is unconstitutional, the FCC should consider itself bound by it until it is struck down by a court of competent jurisdiction. *See* text accompanying note 62 *infra*. Furthermore, even if the amendment were struck down, the FCC nondiscrimination regulations themselves are violative of the free exercise clause. *See* text accompanying notes 64-93 *infra*.

[39]498 F.2d at 56.

[40]*Id.* at 61. Chief Judge Bazelon filed a short concurring opinion, stating that although the FCC may not contradict a direct congressional enactment, he would hold the 1972 amendment to the Civil Rights Act unconstitutional, and therefore not binding on the FCC.

[41]*See* text accompanying notes 16-17 *supra*.

[42]498 F.2d at 54 n. 7, 58.

[43]*See* notes 16-17 and accompanying text *supra*.

[44]498 F.2d at 58 (footnote omitted).

public" radio stations.[45] This conclusion is incorrect since a major purpose of the 1972 amendment was to make the provisions of the Civil Rights Act applicable to governmental agencies and other public entities.[46] Furthermore, the court recognized that the Commission has a duty to examine new legislation and to conform FCC policies to relevant congressional policies.[47] It cited with approval the case of *McClean Trucking Co. v. United States*[48] where the Supreme Court held that the Interstate Commerce Commission, in approving a merger of motor carriers, could not ignore the national policies contained in the antitrust laws, even though, once having been approved by the ICC, the merger was exempt from the antitrust laws. The Supreme Court declared that an administrative agency cannot ignore legislative policies that conflict with its own actions, but must incorporate them into the agency's administrative action.[49] The Court did say that the adjustments which an agency must make will vary according to the extent to which Congress indicates a desire to have those policies implemented by the agency.[50] Congress is not required, however, under the *McClean Trucking* doctrine, to specifically enumerate all agencies which should apply a national policy like the Civil Rights Act. The Commission should have recognized from the clear wording and legislative history of the 1972 amendment that *all* religious organizations, including religious broadcasters under FCC jurisdiction, were intended objects of the legislation. Furthermore, the fact that the amendment was broadening the coverage of the Civil Rights Act to include public entities should have been signal enough that the law was relevant to the FCC's mandate and that the nondiscrimination regulations should be altered to conform to this new national policy.

2. *Administrative agencies are bound by Congressional policies.* It is clear that a real conflict exists between the regulations and the statute, and under a well-accepted principle of statutory interpretation the statute

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[45] *Id.* at 53.

[46] 42 U.S.C. § 2000e (Supp. II, 1972). Clearly the amendment was intended to broaden the Civil Rights Act to reach public entities and governmental agencies as well as private activities. The legislative history states:

> The bill amends section 701 of the Civil Rights Act of 1964 (section 2 of the bill) to include State and local governments, governmental agencies and political subdivisions within the definition of an "employer" under Title VII.
>
> . . .
>
> The bill adds a new section 717 (section 11 of the bill) which . . . gives the Equal Employment Opportunity Commission the authority to enforce the obligations of equal employment opportunity in Federal employment.

1972 U.S. CODE CONG. & AD. NEWS 2152, 2155.

[47] 498 F. 2d at 58.

[48] 321 U.S. 67 (1944), appearing at 498 F. 2d at 58.

[49] *Id.* at 80.

[50] *Id.*

must govern the regulations.[51] This basic principle is incorporated in the Communications Act of 1934, the source of the FCC's rule-making authority, which states that the Commission may only make such regulations as are "not inconsistent with law."[52]

The Commission argued that the regulations are not inconsistent with law, but merely implement the policies of the Civil Rights Act through more stringent standards for the broadcast industry.[53] Indeed, other FCC regulations do differ from the Civil Rights Act in some respects.[54] But the case law clearly establishes that administrative agencies may not impair congressional policies by proscribing conduct which Congress by statute has allowed. For example, in *FCC v. American Broadcasting Co.*[55] Congress had enacted a statute proscribing certain types of lotteries. The FCC, by regulation, attempted to prohibit certain giveaway programs which were not proscribed by the statute. The Supreme Court held that the FCC had "overstepped the boundaries of interpretation and hence [had] exceeded its rulemaking power" when it attempted to go beyond the statute.[56] A similar situation exists in the instant case. Congress by statute has established a clearly defined policy on religious discrimination, but the FCC is attempting to prohibit conduct which the amendment to the Civil Rights Act allows.

Another case announcing the rule that administrative agencies are bound by congressional policies, *Southern Steamship Co. v. NLRB,*[57] was cited by Chief Judge Bazelon in his concurrence in *King's Garden.* There Congress had enacted legislation which classified any rebellion by seamen against their officers on board a vessel anywhere within the admiralty jurisdiction of the United States as a mutiny, but the NLRB in a fair labor practices hearing declared that a strike by seamen against their officers was not a mutiny. The Supreme Court struck down this ruling as contradictory to the congressional policy, declaring that although an administrative agency enjoys a great deal of independence, it has no authority to ignore other congressional objectives and must accommodate its administrative functions with other statutes.[58]

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[51]United States v. Symonds, 120 U.S. 46 (1887).

[52]47 U.S.C. § 303(r) (1970).

[53]498 F.2d at 58 (D.C. Cir. 1974).

[54]For example, the Commission's equal employment regulations apply to all broadcasters regardless of size, while the Civil Rights Act only applies to employers having more than 15 employees. *See* King's Garden, Inc., 38 F.C.C.2d 339, 343 (1972).

[55]347 U.S. 284 (1954).

[56]*Id.* at 296.

[57]316 U.S. 31 (1942).

[58]*Id.* at 47. Although *Southern Steamship* differs from *King's Garden* in that the former case involved an agency decision excusing conduct which Congress had declared illegal, instead of an agency declaring conduct illegal which Congress had excused, the principle that

In a case similar to *King's Garden, Station WCBS-TV*,[59] the Commission recognized that FCC regulations could not contravene statutory policies. There the Commission held that its cigarette advertising regulations promulgated under the authority of the Communications Act did not contradict the federal policies embodied in the Cigarette Labeling and Advertising Act. But the Commission, in dictum, did recognize that it could not go beyond those federal policies and enforce stricter regulations that would require equal time for anti-cigarette advertising. It acknowledged that stricter regulations would "be inconsistent with congressional direction in this field" and that its "action, therefore must be tailored so as to carry out the above congressional purpose."[60] As in *Station WCBS-TV*, the Commission recognized its obligation to stay within the bounds prescribed by the Cigarette Advertising Act, it should recognize its obligation to adhere to the policies embodied in the Civil Rights Act in the instant case.

*3. Prior reliance by the FCC upon the Civil Rights Act.* In formulating and applying its nondiscrimination regulations, the Commission, until the 1972 amendment, has relied heavily on the provisions of the Civil Rights Act and the policies implicit therein.[61] This express reliance upon the Civil Rights Act implies that, in formulating its nondiscrimination regulations, the Commission was attempting to follow the policies of that Act. Similarly, when that Act was amended, the FCC, in furtherance of this practice of aligning its policies on civil rights with those of Congress, should have amended its regulations or at least set forth reasons why it should depart from its prior efforts to stay in step

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administrative agencies are bound by congressional policies is well illustrated. *See also* City of Pittsburgh v. FPC, 237 F.2d 741 (D.C. Cir. 1956).

[59] 8 F.C.C.2d 381 (1967), *aff'd sub nom.* Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

[60] *Id.* at 382.

[61] *See* text accompanying note 14 *supra*. In Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 13 F.C.C.2d 766, 769 (1968), the Commission explicitly acknowledged the Civil Rights Act as delineating the national policy against discrimination and expressed its intention of enforcing it:

> When these two considerations are taken together — the National policy against discrimination and the nature of broadcasting — we simply do not see how the Commission could make the public interest finding as to a broadcast applicant who is deliberately pursuing or preparing to pursue a policy of discrimination — of violating the National policy.

Similarly, in the initial ruling in the King's Garden matter, the Commission stated:

> *In keeping with the exemptions you cite from 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. *But also in keeping with the very limited nature of the exemptions afforded by the 1964 Act*, the Commission does not see any reason for a broad interpretation that would permit discrimination in the employment of persons whose work is not connected with the espousal of the licensee's religious views.

Trygve J. Anderson, 34 F.C.C.2d 937, 938 (1972) (emphasis added).

with Congress. Yet no attempt has been made to demonstrate why the nature of the broadcast industry makes stricter provisions necessary, or why the "public interest" mandate of the Communications Act requires nondiscrimination in employment at the expense of free exercise of religion.

Furthermore, the court erred in reasoning that the Commission was justified in retaining its stricter regulations, which conflict with the 1972 amendment, because the amendment might be unconstitutional. Every congressional enactment is presumed constitutional until declared otherwise by a court of competent jurisdiction and an administrative agency must follow a statute until it is struck down.[62]

### *B. The FCC Regulations Impinge upon Free Exercise*

The court of appeals also held that the Commission's nondiscrimination regulations adequately protected the rights guaranteed by the free exercise clause by allowing religious discrimination in employment where the position to be filled is connected with espousal of religion.[63] There are, however, several ways the regulations impinge on a religious broadcaster's rights under the first amendment's free exercise provision.

*1. The right to broadcast.* The extent of the rights which religious broadcasters may claim under the free exercise clause has never been clearly defined, but the court's argument that broadcasters have "no constitutional right to convert a licensed communications franchise into a church" because such a franchise is a "temporary privilege"[64] is clearly inadequate. For at least a decade courts have rejected the right-privilege distinction in construing first amendment cases.[65] In *Banzhaf v. FCC* the Court of Appeals for the District of Columbia specifically rejected this distinction:

> First Amendment complaints against FCC regulation of content are not adequately answered by mere recitation of the technically imposed necessity for *some* regulation of broadcasting and the conclusory propositions that "the public owns the airwaves" and that a broadcast license is a "revocable privilege." It may well be that some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment.[66]

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[62]Sweet v. Rechel, 159 U.S. 380, 392-93 (1895).

[63]For the FCC regulations to be valid under the free exercise clause, they either must not interfere with a legitimate religious belief or practice, or must be in furtherance of a state interest of sufficient magnitude to override the religious interests. *See* text accompanying notes 20-23 *supra*.

[64]498 F.2d at 60.

[65]*See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963).

[66]405 F.2d 1082, 1100 (footnote omitted). *See* Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulations*, 52 MINN. L. REV. 67, 152 (1967).

Similarly, the Supreme Court in *Sherbert v. Verner* stated that "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[67] Thus, the court does not solve this constitutional issue by categorizing the holding of a broadcast license as a privilege. The FCC, in conditioning the "privilege" of holding a broadcast license by restricting the hiring practices of the religious organization which operates the radio station, is interfering with the free exercise of religion.[68]

2. *The right to maintain religious nature.* The FCC nondiscrimination regulations would also force King's Garden to abandon its essentially religious nature[69] as a condition for obtaining a broadcast license. The Commission has interpreted the regulations to allow religious discrimination only as to persons "who, as to content or on-the-air presentation, are connected with the espousal of the licensee's religious views."[70] Under this interpretation, announcers who broadcast musical or other programs which are not strictly espousing religious views must be hired without regard to their religious attitudes. No executive, secretarial, technical, sales, or other personnel could be questioned as to their beliefs. In short, King's Garden would be turned into a completely secular organization so far as its broadcasting activities are concerned, excepting only those who are hired specifically in connection with the espousal of religious views.

The Supreme Court, however, has held that no person can be forced in this manner to choose between pursuing religion and enjoying a state privilege or benefit. The leading case on this point is *Sherbert v. Verner.*[71] There a Seventh-Day Adventist was denied unemployment compensation because she refused to accept employment which involved working on Saturday, the day recognized as the Sabbath by her faith. The Court held that the denial of unemployment compensation forced her to choose between adhering to her religion and forfeiting benefits on the one hand, or abandoning one of the precepts of her religion in order to accept work on the other. "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship," and is thus unconstitutional.[72] The situation in the instant case is similar to *Sher-*

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[67]374 U.S. at 404 (1963) (footnote omitted).

[68]A discussion of the other FCC regulations to which a religious organization must adhere is beyond the scope of this case note. However, the nondiscrimination regulations can be distinguished from other FCC regulations because of the direct interference with free exercise of religion that results from the disallowance of religious discrimination.

[69]For a discussion of King's Garden's religious nature in relation to its broadcasting activities, *see* text accompanying notes 76-79 *infra.*

[70]National Religious Broadcasters, Inc., 27 P & F RADIO REG. 2d 875, 877 (1973).

[71]374 U.S. 398 (1963).

[72]*Id.* at 404.

*bert* in that the Commission's regulations force King's Garden to choose between maintaining its religious nature and holding a broadcast license.[73]

*3. The right to disseminate religious ideas.* The FCC, by forcing King's Garden to abandon its essentially religious nature, also thwarts King's Garden's efforts to "share Christ world-wide."[74] This is a clear interference with its constitutional right to promulgate its religious ideas.[75] While King's Garden would still be able to engage in its missionary effort to the extent of sponsoring programs directly expressing religious views, it also has a right, as the court of appeals recognized, to give a sectarian tone or perspective to its programming.[76] Such indirect expression of religious ideals, which is as essential to the espousal of a religious philosophy as the direct discussion of religious doctrine, would not be possible without religious discrimination in employment. All announcers, although not involved directly in the espousal of doctrine, create the personality of the radio station by their style of speaking, their taste in program selection, and even by the manner in which they present and comment on current affairs. All other personnel, while not involved in speaking over the air, contribute to the atmosphere and attitude of the station, which is ultimately reflected in its broadcasts. Indeed, the presence of a large proportion of "nonbelievers" working in the station would discourage and inhibit the religious personnel from exercising their beliefs, and may completely discourage such persons from working for the station. Thus, the court's decision will make it impossible to preserve the spiritual atmosphere that King's Garden desires to maintain in the station and reflect in its broadcasting.[77]

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[73]It should be pointed out that King's Garden is not being forced to give up its religious nature in its entirety, but only so far as related to broadcasting. However, in *Sherbert*, the appellant was only forced to abandon her religion so far as it related to Saturday worship. *See* text accompanying notes 87-89 *infra*.

[74]Petitioner's Brief at 4 states, "King's Garden operates these radio stations as part of its mission to 'share Christ world wide,' providing programming to fill the definite need of citizens in the area it serves for religious and inspirational programming." A detailed description of King's Garden's purpose is in the Record at 8-16.

[75]For the proposition that promulgation of religious ideas is a constitutionally protected activity, see Fowler v. Rhode Island, 345 U.S. 67 (1953); Follett v. Town of McCormick, 321 U.S. 573 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943).

> I believe that nothing enjoys a higher estate in our society than the right . . . to practice and proclaim one's religious convictions.

Martin v. City of Struthers, 319 U.S. 141, 149 (1943) (Murphy, J., concurring).

[76]498 F.2d at 60.

[77]Petitioner's Brief at 27-28, citing the trial records, states that:

> King's Garden's staff is comparable in many respects to a religious congregation in that it is a group of persons who come together out of a shared religious belief and who carry on various helpful activities as an expression of their religious belief . . . . For example, King's Garden's staff conducts regular religious meetings.

In addition, all employees of the station are representatives of King's Garden to the public and all contribute in this manner to the public's impression of the King's Garden philosophy.[78] In this sense each employee is involved in the espousal of religious views through example, and a requirement that nonbelievers be hired is an unconstitutional burden on the dissemination of King's Garden's religious beliefs.[79]

*4. The right to be free from government definition of religion.* The FCC regulations, which allow discrimination only where a person is "hired to espouse a particular religious philosophy over the air,"[80] raise the additional problem of defining "espousal of religion." There is substantial authority for the proposition that the very existence of discretionary power to define what is and what is not religious activity violates the free exercise clause.[81] For example, in *Cantwell v. Connecticut*[82] the Supreme Court examined a statute which prohibited the solicitation of money for religious causes without first obtaining a license. Under the statute a state official was given authority to deny a license whenever he determined that the cause was not religious. The Court, in striking down this discretionary licensing system as "a previous restraint upon the free exercise of religion," stated:

> [t]o condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.[83]

Similarly, in the instant case the Commission conditions the applicability

[78]Petitioner's Reply Brief at 21 draws this analogy:

> Comparison might be made to a religious leader who proposed to hold a public meeting, and in connection therewith chooses to hire ushers on the condition that they must share his religious beliefs. There would be ample justification for this, although it is perhaps a "non-religious" job, since the ushers in all their actions would be witnessing to the philosophy the religious leader sought to convey.

[79]The application of the regulations to King's Garden could have been challenged on this ground, for the Commission has found no espousal of religion in an activity which King's Garden feels is a significant expression of its sectarian viewpoint. However, the attack was only on the facial validity of the regulations, and the court of appeals did not regard the question of application as properly before it.

[80]Trygve J. Anderson, 34 F.C.C.2d 938 (1972); *See also* King's Garden, Inc., 38 F.C.C.2d 339 (1972).

[81]

> [I]t is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment.

Fowler v. Rhode Island, 345 U.S. 67, 70 (1953). *See* United States v. Seeger, 380 U.S. 163 (1965).

[82]310 U.S. 296 (1940). This case was actually decided on the broader ground of freedom of expression, but is often cited in support of the narrower ground of freedom of *religious* expression. *See* Gillette v. United States, 401 U.S. 437, 461-62 (1971).

[83]Cantwell v. Connecticut, 310 U.S. 296, 307 (1940). *See* Lovell v. City of Struthers, 303 U.S. 44 (1938); Martin v. City of Struthers, 319 U.S. 141 (1943).

of its nondiscrimination regulations upon a discretionary determination of what constitutes "religious espousal." By forcing the religious organization to bear the burden of establishing that its hiring practices are connected with the espousal of religious views, the Commission places a "forbidden burden upon the exercise of liberty."

Also, the term "espousal of religion" has serious vagueness problems. The Supreme Court has reasoned that, because first amendment freedoms must be given "breathing space" to insure that their exercise will not be chilled, government may regulate in the area only with "narrow specificity."[84] The Commission's regulations are not narrowly specific. No definable standards sufficient to give notice to the licensee or to be reviewed by a court have been produced. Thus the regulation must be regarded as unconstitutionally vague.

*5. The right to be free from regulation of internal affairs.* The final basis upon which the Commission's regulations could be found unconstitutional is that they constitute an impermissible intrusion by the government into the internal affairs of a religious sect. For over a century the Supreme Court has held that matters of church government and administration are beyond the purview of civil authorities.[85] This position was recently affirmed by the Fifth Circuit in *McClure v. Salvation Army*[86] where a female minister, who received a smaller salary and fewer benefits than male ministers, claimed the protection of the Civil Rights Act provisions on equal employment. The court, explicitly limiting its holding to the church-minister relationship, held that the equal employment provisions of the Civil Rights Act could not be applied to religious organizations in the hiring of clergy.

Admittedly there is a difference between hiring a minister and hiring employees for a radio station; the former is much more central to the sect's hierarchy. But the difference is one of degree, not of kind. Where broadcasting activities are an essential part of the sect's missionary effort for the promulgation of its religious beliefs, as was claimed in the instant case, the operation of the radio station does come within the scope of church administration and government and should be free from government interference.

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[84]NAACP v. Button, 371 U.S. 415, 433 (1963).

The court in *Banzhaf* stated:

> Especially with First Amentment issues lurking in the near background, the "public interest" is too vague a criterion for administrative action unless it is narrowed by definable standards.

Banzhaf v. FCC, 405 F.2d 1082, 1096 (D.C. Cir. 1968) (footnote omitted).

[85]Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871). *See also* Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1920).

[86]460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972).

*6. The significance of King's Garden's free exercise claims.* Arguably, the right to discriminate in employment on the basis of religion is not significant enough to warrant constitutional protection when balanced against other governmental interests. In *Sherbert*[87] the right to observe the Sabbath on Saturday was a fundamental element of the petitioner's religion, and in *Yoder*[88] the Court found that the right of parents to keep their children from attending public schools was essential to the perpetuation of the Amish way of life. The right to discriminate does not occupy such a fundamental position. However, the rights to maintain one's religion without giving up a state benefit, to disseminate religious ideas, to be free from governmental definition of religion, and to be free from the regulation of internal religious affairs *are* fundamental to religion.[89] These free exercise claims must be balanced against the interests of the state in enforcing the FCC nondiscrimination regulations,[90] and, as the Supreme Court held in *Yoder,* only those state interests "of the highest order and those not otherwise served" will take precedence over free exercise claims.[91]

The Commission cannot claim that it has an interest in promoting the national policy of equal employment opportunity, for it has been shown that the regulations conflict with the national policy contained in the Civil Rights Act.[92] The only other state interest that could be asserted by the Commission would be that the "public interest" mandate of the Communications Act requires stricter prohibitions on religious discrimination because of the peculiar nature of the broadcast industry. Arguably, the fact that airwaves are a limited resource requires that the government closely regulate broadcasting so as to best meet the needs of the public. It is reasonable to require that those holding licenses meet the needs of the public audience, and discrimination in employment could impair a radio station's ability to meet those needs. If this is accepted as a legitimate state interest, it must be balanced against the interest of the religious broadcaster in maintaining the religious nature of the organization.

However, the public interest argument cuts both ways, for a failure to allow religious discrimination will impair the radio station's ability to meet the spiritual and inspirational needs of the public audience. Furthermore, no showing has been made that religious discrimination does impair the station's ability to meet the public needs. It must be

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[87]374 U.S. 398 (1963). *See* text accompanying note 72 *supra.*

[88]406 U.S. 205 (1972). *See* note 24 *supra.*

[89]*See* text accompanying notes 64-86 *supra.*

[90]*See* text accompanying notes 18-23 *supra.*

[91]406 U.S. at 215. *See* text accompanying notes 22-23 *supra.*

[92]*See* text accompanying notes 41-50 *supra.*

remembered that the presumption favors the religious interests,[93] and unless the Commission can demonstrate some overriding state interest, the free exercise claims must prevail.

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**Consumer Credit** —TRUTH IN LENDING ACT — CREDITOR DEFINED AND DAMAGES AND RESCISSION JOINTLY AWARDED — *Eby v. Reb Realty, Inc.*, 495 F.2d 646 (9th Cir. 1974).

In October, 1969, Betty Eby purchased a residential dwelling from Reb Realty, Inc., for $16,700. To finance the transaction, Eby assumed a Veteran's Administration mortgage and executed a second mortgage in favor of Reb Realty. Eby made subsequent payments on the first mortgage, but ultimately defaulted on both mortgages, whereupon Reb Realty properly reentered and took possession of the property. Eby sued in the United States District Court for the District of Arizona for rescission and damages based on Reb Realty's admitted nondisclosure of credit terms and rescission rights at the time of sale as required by the Truth in Lending Act (the Act).[1] Reb Realty argued that it was not a "creditor" within the meaning of the Act and thus not subject to its provisions. Alternatively, Reb Realty contended that Eby must elect her remedies in that she was not entitled to both rescission and damages. The district court granted summary judgment in Eby's favor, awarding both rescission and damages, and the Ninth Circuit Court of Appeals affirmed.[2]

## I. BACKGROUND

The purpose of the Truth in Lending Act is to enhance economic stabilization and strengthen competition among those engaged in the extension of consumer credit. This purpose is accomplished by disclosure of certain credit terms to those who use such credit.[3] Among the matters required to be disclosed are the annual percentage rate of interest, the total amount financed, the amount of periodic payments, and

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[93] *See* text accompanying note 23 *supra*.

[1] 15 U.S.C. §§ 1601-65 (1970). For a general discussion of the Truth in Lending Act and related matters see *e.g.*, J. ABRAHAM, TRUTH IN REAL ESTATE LENDING (1970); Aldridge, *Truth-in-Lending in Real Estate Transactions*, 48 N. CAR. L. REV. 427 (1970); Boyd, *The Federal Consumer Credit Protection Act — A Consumer Perspective*, 45 NOTRE DAME LAW. 171 (1969); Griffith, *Truth-in-lending and Real Estate Transactions: Some Aspects*, 2 OHIO N.L. REV. 1 (1974); McLean, *The Federal Consumer Credit Protection Act*, 24 BUS. LAW. 199 (1968); Smyer, *A Review of Significant Legislation and Case Law Concerning Consumer Credit*, 6 ST. MARY'S L.J. 37 (1974); Warren & Larmore, *Truth in Lending: Problems of Coverage*, 24 STAN. L. REV. 793 (1972); Note, *Recent Developments in Truth in Lending Class Actions and Proposed Alternatives*, 27 STAN. L. REV. 101 (1974).

[2] Eby v. Reb Realty, Inc., 495 F.2d 646 (1974). The district court opinion is not officially reported.

[3] 15 U.S.C. § 1601 (1970).