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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-419

PITTSBURGH PRESS COMPANY,

Petitioner,

—v.—

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,

—and—

THE NATIONAL ORGANIZATION FOR WOMEN, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND WESTERN PENNSYLVANIA CHAPTER OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

NORMAN DORSEN
New York University School of Law
40 Washington Square South
New York, N. Y. 10012

RUTH BADER GINSBURG
ANDREA STAVIN HAYMAN
American Civil Liberties Union Foundation
22 East 40th Street
New York, N. Y. 10016

Attorneys for Amicus Curiae

JEFFREY A. KAY
SHELDON H. NAHMOD
Of Counsel

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We respectfully move, pursuant to Rule 42 of this Court's Rules, to file the within brief amicus curiae. Counsel for the respondent has consented to the filing of this brief; counsel for the petitioner has refused.

The American Civil Liberties Union is a nationwide, non-partisan organization of over 180,000 members solely dedicated to defending the liberties guaranteed by the Bill of

Rights. In its 52-year existence it has been particularly concerned with protecting the freedom of the press, so that the great promise of the first amendment can be fulfilled. At the same time, the Union has been scrupulously dedicated to the equal protection of the laws, as guaranteed explicitly by the fourteenth amendment and implicitly by the fifth amendment.

In accord with these concerns, which are at the heart of the organization's purposes, we have filed scores of briefs in this Court in free press and equal protection cases. See, e.g., *New York Times Co.* v. *United States,* 403 U.S. 713 (1971); *Brown* v. *Board of Education,* 347 U.S. 483 (1954). With particular regard to the problem of discrimination on account of sex that is presented in this case, lawyers for the American Civil Liberties Union presented the appeal in *Reed* v. *Reed,* 404 U.S. 71 (1971), and acted as amicus curiae in *Frontiero* v. *Laird,* No. 71-1694, now pending in this Court.

The purpose of this brief is to suggest that the arrangement of help-wanted advertisements by sex is not protected by the first amendment and that the decision below, which upheld a ban on such discriminatory advertisements, should be affirmed. Because this is the first action in which the question has been presented to this Court, we wish to offer our reasons for concluding that the action of the court below does not impinge on the important protections guaranteed the press by the Constitution.

Norman Dorsen
New York University School of Law
40 Washington Square South
New York, N. Y. 10012
Attorney for Movant

In the

Supreme Court of the United States

October Term, 1972

No. 72-419

Pittsburgh Press Company,

Petitioner,

—v.—

The Pittsburgh Commission on Human Relations and the City of Pittsburgh,

—and—

The National Organization for Women, Inc.,

Respondents.

On writ of certiorari to the Commonwealth Court of Pennsylvania

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND WESTERN PENNSYLANIA CHAPTER OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of Amicus

The interest of the amicus appears from the foregoing motion.

Statement of the Case

Amicus incorporates the Statement of the Case by the Respondent.

ARGUMENT

I.

A newspaper's arrangement of help-wanted advertisements by sex classification is purely commercial activity not protected by the first amendment.

The position of amicus in this case is twofold: (1) the free press protected by the Constitution is an imperative civil liberty that is basic to our system of government; (2) the grand mission of the first amendment does not encompass activity that is singularly and exclusively commercial in purpose and function.

The press is identified by the Constitution itself as special beneficiary of the "profound national commitment" to safeguard from governmental intrusion "uninhibited, robust and wide-open" debate on matters of public concern. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964).[1] But that profound commitment is demeaned when it is invoked as a shield against regulation in the public interest of activity that is wholly commercial in character. Rationally characterized, the column headings at issue in this case, "Jobs-Female Interest"/"Jobs-Male Interest," are not mini-editorials; rather, the help-wanted columns and their captions are singularly and exclusively commercial in purpose and function and therefore fall beyond the pale of the first amendment.

In *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942), this Court distinguished information communication and opin-

[1] *See Near* v. *Minnesota,* 283 U.S. 697 (1931); *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936); *Pennekamp* v. *Florida,* 328 U.S. 331 (1946); *Mills* v. *Alabama,* 384 U.S. 214 (1966); *New York Times Co.* v. *United States,* 403 U.S. 713 (1971).

ion dissemination entitled to full protection under the first amendment, from "purely commercial advertising," a brand of communication subject to regulation in the public interest. The *Valentine* principle, now "enshrined among the commonplaces of constitutional law," [2] has been tailored to appropriately narrow proportions. This Court has emphasized that the principle does not apply generally to activities that have a commercial aspect. The activity must be, as it is in the instant case, singularly and exclusively commercial in purpose and function. Communications, whether paid for or not, designed to convey ideas or opinions on political, religious, social, moral, and artistic matters are squarely within the ambit of the first amendment. Communications designed to attract customers for goods and services, on the other hand, ordinarily are not.[3]

As recently explained in *United States* v. *Hunter,* 459 F.2d 205, 211-13 (4th Cir.), *cert. denied,* 93 S.Ct. 235 (1972), freedom of communication of news and opinion enjoys the fullest protection of the first amendment. Paid advertisements are encompassed within this protection when they communicate grievances, seek financial aid for a cause, or involve other protected expression. But commercial advertisements in a business context, unrelated to dissemination of ideas, are not immune from regulation designed to implement national social or economic policy.[4]

[2] Developments in the Law: Deceptive Advertising, 80 Harv. L. Rev. 1005, 1027 (1967). *See also* Note, Freedom of Expression in a Commercial Context, 78 Harv. L. Rev. 1191 (1965).

[3] See T. Emerson, The System of Freedom of Expression, ch. XII (1970).

[4] *See, e.g., Lorain Journal* v. *United States,* 342 U.S. 143 (1951); *Citizens Publishing Co.* v. *United States,* 394 U.S. 131 (1969). Inevitably, there is a gray area between. In keeping with the purpose of the first amendment, wide latitude is appropriate for

Hunter upheld a federal ban on newspaper publication of racially discriminatory advertisements for the sale or rental of a dwelling. In rejecting a first amendment claim bearing a marked similarity to the one asserted here, the court did not "balance" free press against a countervailing interest, but simply concluded, in accordance with the *Valentine* principle, that purely commercial speech was involved. Surely the same principle applies to advertisements that are sexually discriminatory, which are equally commercial in nature.

The straws tugged by petitioner in the instant case resemble the tactic regarded by this Court as subterfuge in *Valentine*. There, an advertiser sought to insulate his commercial handbill from prohibition under a local ordinance by printing on the reverse side a political protest that, standing alone, could not constitutionally have been banned. Here, petitioner presents similarly transparent avoidance arguments: protection by proximity and a claim of shorthand editorializing.

Had petitioner posted the help-wanted advertisements on a billboard or placard outside its office building, the challenged proscription would raise no specter of interference with a newspaper's editorial prerogative.[5] Similarly, if

advertisements that in fact communicate information on issues of public concern. *Cf. Thornhill* v. *Alabama,* 310 U.S. 88 (1940); *Martin* v. *Struthers,* 319 U.S. 141 (1943); *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965). The special first amendment protection of the print media requires a degree of vigilance beyond that required with respect to media subject to broad federal regulatory authority. *See Banzhaff* v. *FCC,* 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied sub nom. Tobacco Institute Inc.* v. *FCC,* 396 U.S. 842 (1969); *Friends of the Earth* v. *FCC,* 449 F.2d 1164 (D.C. Cir. 1971).

[5] *See Valentine* v. *Chrestensen, supra; Giboney* v. *Empire Storage & Ice Co.,* 336 U.S. 490 (1949).

help-wanted pages were distributed as a separate journal so that the advertisements were the only "news," a press freedom claim would be implausible.[6] When help-wanted ads are included, as they are in the Pittsburgh Press, as a discrete portion of a newspaper, they remain a wholly distinctive feature and do not acquire protection through physical proximity to news, editorials or editorial advertisements of the kind involved in *New York Times Co.* v. *Sullivan, supra.*

Characterization of the separate "male"/"female" captions as abbreviated editorial comment defies common sense and is contrary to the evidence before the Commission and the Pennsylvania courts. The captions "Jobs-Male Interest"/"Jobs-Female Interest" contain no information or arguments that might contribute to public debate on sex roles in society.[7] Most significantly, however, the column arrangements do not reflect any judgment or even a passing thought by petitioner's editors or staff as to whether advertised jobs interest men or women or both. Petitioner's staff simply asks for the advertiser's preference and then follows the advertiser's instructions. According to the practice described, if an advertiser sought a woman for a "typically male job" and therefore requested placement of the ad under the "Female Interest" column, petitioner would comply. In short, the column headings are a convenience

[6] *Cf. San Francisco Shopping News Co.* v. *South San Francisco,* 69 F.2d 879 (9th Cir. 1934).

[7] In glaring contrast to the purported editorializing by cryptic caption involved in the instant case is the advertisement conveying precise information on an issue of public debate involved in *Bigelow* v. *Virginia,* 213 Va. 191 (1972), jurisdictional statement filed, December 30, 1972.

offered employers with sex preferences. Any "judgment" involved in determining whether advertised jobs interest one sex or the other is the advertiser's, not the newspaper's. This judgment of course can be mistaken, and often is; in such a case the column headings are probably false and certainly misleading.[8]

Realistically described, then, petitioner arranges its help-wanted columns so that "editorial judgments" about job preferences can be made by employers and employment agencies. The service is plainly directed to the advertiser, not to the readers, whose interests are not ascertained. But this service does raise revenue for the paper and spares the advertiser the bother of attracting qualified applicants of the sex he does not want to hire, perhaps too the further bother of responding to an employment discrimination charge made by a qualified applicant of the unwanted sex.[9]

Lorain Journal v. *United States,* 342 U.S. 143 (1951), which held a newspaper publisher's attempts to control local advertisements to be a violation of the Sherman Act,

[8] It is well established that false advertising enjoys no first amendment protection. *See, e.g., Donaldson* v. *Read Magazine,* 333 U.S. 178 (1948); *E. F. Drew & Co.* v. *FTC,* 235 F.2d 735 (2d Cir. 1956), *cert. denied,* 352 U.S. 969 (1957); Developments, 80 Harv. L. Rev. 1005 (1967). As to the effect of the advertisements here, see note 10, *infra.*

[9] *See* Want-Ads Tomorrow: Neutral With Respect to Sex, in Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Educ. of the Comm. on Educ. and Labor, 91st Cong., 2d Sess. pt. 2 at 894, 896 (1970). Even if the advertiser believed his column placement judgment was in the best interest of the unwanted sex, his belief, and the newspaper's indulgence of it, would be no more persuasive than the judgment of the advertiser in *E. F. Drew & Co., supra,* that people who bought margarine believing it to be a dairy product would benefit by virtue of the lower price.

rejected a claim of "editorial judgment" similar to that of the Pittsburgh Press. In *Lorain Journal* the right of the press to determine what advertisements it would accept was held subject to restriction when that determination was based on an unlawful economic practice. Here, the Press is asserting a similar right to circumvent the law, also premised on economic considerations. Advertisers who seek to discriminate on grounds of sex but are barred from indicating a sex preference within their own ad obviously find it preferable to advertise with the Press. Such considerations find no protection in the first amendment. This principle was recently reaffirmed in *Citizen Publishing Co.* v. *United States,* 394 U.S. 131, 139 (1969), where the Court said:

> Neither news gathering nor news dissemination is being regulated by the present decree. It deals only with restraints on certain business or commercial practices.

The judgment below does not impede petitioner from communicating its own judgment that, despite the documented chilling effect of sex segregated advertising,[10] most

[10] *See* Bem & Bem, Sex-Segregated Want Ads: Do They Discourage Female Job Applicants, in Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Educ. of the Comm. on Educ. and Labor, 91st Congs., 2d Sess. pt. 2 at 891, 892-893 (1970):

> Do sex-segregated want ads discourage women from seriously considering those jobs which the Press classifies as "male interest"? Our results show this to be the case. When jobs were segregated and labeled on the basis of sex . . . only 46% of the women in this study were as likely to apply for "male interest" jobs as for "female interest" jobs. . . . But does this really reflect a true preference on the part of women for so-called "female interest" jobs? No, it does not. For when the same jobs appeared in an integrated alphabetical listing with

people prefer perpetuation of sex-typed occupational patterns. Petitioner may editorialize and report the news on this subject as it sees fit and it may publish editorial advertisements from others who oppose desegregated columns.

Finally, it should be stressed that the problem of reviewing advertisements for content presented in *Hunter*[11] is not a factor here. Under the decision below, no affirmative burden whatever is imposed on petitioner to screen for discriminatory statements. It is not called upon to "divine" whether a particular ad may be placed under a "male" column or a "female" column. It will encounter no risk of error in judgment on a particular ad. It is required to follow an unambiguous directive: unless the advertiser presents a bona fide occupational qualification exemption certificate from the Commission, the advertisement is to be placed under a heading that invites female and male interest.

In sum, amicus urges this Court to affirm the decision below with respect to the very narrow question presented. The first amendment does not protect a newspaper's publication of sex separated help-wanted advertisements, for this publication is singularly and exclusively commercial in purpose and function. A decision so circumscribed will take no "chip" out of the first amendment, for the right asserted was never part of the first amendment's protection.

> no reference to sex, fully 81% of the women preferred the "male interest" jobs to the "female interest" jobs. . . .
>
> It seems clear [for example] that the newspaper editor who wishes to hire only male reporters—in violation of the law—can place his ad in the "male interest" column, secure in the knowledge that this will effectively discourage female applicants. It is in this way that sex-segregated want ads can "aid and abet" discrimination in employment on the basis of sex. . . .

Cf. Donaldson v. *Read Magazine, supra,* 333 U.S. at 189 ("Questions of fraud may be determined in the light of the effect advertisements would most probably produce on ordinary minds.").

[11] *See* 459 F.2d at 213.

II.

The due process objection to the decision below is without merit.

Petitioner's resort to a substantive due process argument to invalidate the Commonwealth Court's construction of the statute is misplaced. This argument was not raised in the courts below or in the Petition for Certiorari, and is therefore not properly before this court at this time. See *Lawn* v. *United States,* 355 U.S. 339, 362 note 16 (1958), Supreme Court Rule 23 (1) (c).

On the merits, the claim is without basis. This Court has long held that where a state legislative choice is reasonable it will not substitute its view of the underlying social or economic policy. See, e.g., *Giboney* v. *Empire Storage & Ice Co., supra.* Prohibition of the column headings is plainly a permissible means of achieving the State's valid objective of preventing discrimination in employment. For example, in *Head* v. *New Mexico Board of Examiners,* 374 U.S. 424, 432, note 12 (1963), this Court rejected summarily a due process challenge to an order enjoining a newspaper from publishing a commercial advertisement prohibited by State law. See also *United States* v. *Hunter, supra.*

The Commonwealth Court found that the promotion of equal employment opportunity between the sexes was a

valid objective of state policy. Petitioners do not dispute this finding. They argue however that unlike columns arranged by race or nationality their arrangement of advertisements is tied to a rational differentiation in "job interest" based on sex:

> [T]he press believes that the employment patterns in this country *generally* reflect job interest and qualifications along sex lines. Most secretaries and nurses are women and most laborers and managers are men, and therefore it is not unreasonable to believe that most qualified applicants for a job advertised will be attracted from the men or the women presently filling such positions. Petitioner's Brief, at 26.

The Commonwealth Court rejected this argument, 287 A.2d 161, 168 (1972):

> Pittsburgh Press insists that this manner of arranging employment advertisements is oriented to the interests of persons seeking employment. The record does not support this contention. The record clearly demonstrates that this sex segregated system of want ad column classification is geared primarily to the interests and desires of employers.

The conclusion of the court below that advertisements of jobs in sex-segregated columns tended to perpetuate discrimination in employment is supported by the decisions of other courts, the Equal Employment Opportunity Commission, and Scholarly Studies.[12] This is a sufficient justification for prohibiting advertising policies which so clearly clash with the legitimate objective of the state statute. *Hailes* v. *United Airlines,* 464 F.2d 1006 (5th Cir. 1972); *United States* v. *Hunter, supra.*

[12] See, e.g., Bem & Bem, Sex-Segregated Want Ads: Do They Discourage Female Job Applicants, *supra,* note 10. See also the Model Anti-Discrimination Act approved by the Commissioners on Uniform State Laws, section 306(b)(3) (1966) (it is a discriminatory practice for "an employer or employment agency . . . to make or use a written or oral inquiry or form of application that expresses a preference, limitation or specification based on sex of a prospective employee").

Petitioner's final due process claim, relying on *Tot* v. *United States,* 319 U.S. 463 (1943), and *United States* v. *Romano,* 382 U.S. 136 (1965), is equally without merit. It is suggested that because an employer has not been shown to have discriminated against a woman the order against the newspaper cannot stand. But the *Tot* and *Romano* cases, which reversed convictions because evidence of guilt was presumed from facts having no relationship to the crime charged, are inapplicable for two independent reasons. First, the Court below found that, as a matter of law, the arrangement of help-wanted columns by sex aids in discriminatory advertising. This is plainly a justifiable inference because there is a rational connection between the fact proved (the segregated columns) and the fact presumed (discrimination). But it is unnecessary to rely on inference. There was ample evidence before the Commission as well as independent studies (see note 10, *supra*) justifying the finding that the Commission made and the court below upheld.

CONCLUSION

For the reasons set forth above the decision of the Commonwealth Court of Pennsylvania should be affirmed.

Respectfully submitted,

NORMAN DORSEN
New York University School of Law
40 Washington Square South
New York, N. Y. 10012

RUTH BADER GINSBURG
ANDREA STAVIN HAYMAN
American Civil Liberties Union Foundation
22 East 40th Street
New York, N. Y. 10016

*Attorneys for Amicus Curiae**

JEFFREY A. KAY
SHELDON H. NAHMOD
Of Counsel

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