IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF MARYLAND

UNITED STATES OF AMERICA, Plaintiff, v. BILL R. HUNTER, d/b/a THE COURIER, Defendant.	CIVIL ACTION NO. 70-816T REPLY MEMORANDUM OF THE UNITED STATES

INTRODUCTION

We do not believe that defendant's memorandum significantly controverts the principal contentions set forth in our principal memorandum that:

(1) The unambiguous language of 42 U.S.C. 3604(c) not only permits but compels the conclusion that newspapers were intended to come within its proscriptions;

(2) This construction is consistent with the First Amendment because the prohibition is against discrimination in a commercial context and not against the dissemination of political ideas; and

(3) The injunctive remedy in such cases is appropriate and, indeed, the only effective means for carrying out the intention of Congress to eliminate discrimination in housing.

The arguments tendered by the defendant rest, in our view, on basic premises and assumptions which do not

withstand close scrutiny. If the underlying premises fail, so must the conclusion.

ARGUMENT

A. The Prohibitions of Section 804(c) apply to Newspapers

Defendant makes no response in its memorandum -- nor can it -- to our contention that, since the introductory language to Section 804(c) is the unqualified "It shall be unlawful" [to do the proscribed acts], there is no way in which the statute can be read not to cover newspapers. Defendant likewise ignores the carefully drawn structure of the statute, under which it is unlawful both to "publish" discriminatory advertisements and to "cause [them] to be . . . published." Instead, defendant claims to rely on the maxim "expressio unius est exclusio alterius," and on a passage from this Court's decision in United States v. Mintzes, 304 F. Supp. 1305, 1309 (D. Md. 1969) which was addressed to a completely different issue.

First, there is nothing to which defendant's Latin maxim can apply. There is no "expressio unius" in Section 804(c), but rather an unqualified prohibition. */

*/ Compare In re Peterson's Estate, 230 Minn. 478, 42 N. W. 2d 59 (1950), relied on by the defendant. There the court held that a statute making it a crime for a non-lawyer to draft wills and allowing injunctions against such practices did not void wills drawn by non-lawyers, noting that the statute "has carefully designated the offense, the offender, and the penalty and has made specific provisions to insure enforcement." 42 N.W. 2d at 65. The court carefully reviewed the history and purposes of the statute finding that it was designed to protect, not trap, unwary testators. It offers no support for the proposition that a statute which by its terms forbids anyone from doing an act should be construed to exclude any category of persons.

The fact that the prohibition against discrimination in financing runs against financial institutions (42 U.S.C. 3605) and that "Mrs. Murphy" boarding houses are exempt (42 U.S.C. 3603(b)) has no bearing whatever on the issue here, since, unlike those provisions, Section 804(c) is, by its terms, one of unlimited applicability with respect to the persons whose conduct it restricts.

In the Mintzes case, supra, this court had before it the question whether the "blockbusting" provisions of 804(e) were subject to the "single-family home" exemption when the owners of such homes were the very persons whom Congress evidently intended to protect. In holding that the exemption was not applicable, this Court pointed out, in the passage quoted by defendant at page 5, that the home owner was a victim of the conduct proscribed by 804(e), whereas he was a potential party defendant in the situations envisaged by 804(a) through (d). This is a far cry from holding, or even suggesting, that the owner is the only possible defendant in actions brought under these sub-sections.

To read limitations such as those suggested by defendant into the plain language of the statute leads to other incongruous results. For example, Section 817 of Title VIII */ provides that "it shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of . . . any right granted or protected by Section

*/ 42 U.S.C. 3617.

803, 804, 805, or 806 . . ." Suppose a Negro tried to purchase a house through a real estate agent in a previously all-white town, and a local law enforcement officer threatened to shoot him if he did so. By the defendant's argument, since a local law enforcement officer is not an owner of a dwelling (or at least not acting in that capacity), real estate broker, agent, salesman, lending institution, or dwelling owned or financed by the Federal Government, Section 817 would not, under expressio unius, apply to his conduct.

Defendant's Suggested Fair Employment Analogy

Defendant next attempts to construct an analogy with the fair employment provisions of the Civil Rights Act of 1964, but the requisite similarity is absent. Section 704(b) of the 1964 Act */ specifically states that: "It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish" discriminatory advertisements relating to their own employment functions. (Emphasis added.) It was that limitation which raised the issue in Brush v. San Francisco Newspaper Printing Co., 315 F. Supp. 577 (N.D. Calif. 1970), appeal pending, as to whether the statute should be so liberally construed that a newspaper should be treated as an employment agency. If Section 804(c) made it unlawful only for owners of real property and real estate brokers to publish discriminatory advertisements, there would be some similarity between the two cases.

*/ 42 U.S.C. 2000e-3(b).

Since 804(c) contains no such limitations, no possible analogy may be drawn. In fact, the Court carefully distinguished statutes containing unlimited proscriptions against conduct by "all persons." 315 F. Supp. at 582-83.

Defendant's Suggested False Advertising Analogy

Defendant, relying primarily on decisions based on the New York false advertising law, which by its terms is limited to advertisers (a copy of the law as then in effect is attached) contends that newspapers should be exempt from the requirements of Section 804(c) because, he says in effect, it would be an intolerable burden on him to have to weed out discriminatory advertisements. We think that the two situations lack the underlying similarity for any kind of analogy to be drawn. Since there is no reasonable way in which a newspaper publisher can tell whether or not an advertiser is telling the truth about his product, a persuasive argument can be made for excepting him for liability for publishing them. */ In the case of a discriminatory housing advertisement, however, the advertiser is trying to communicate something to his patrons. He cannot do so by secret codes, and the publisher will be as able as the

*/ Even so, in Goldsmith v. Jewish Press Co., 118 Misc. 789, 195 N.Y. Supp. 37 (1922), on which defendant purportedly relies, the court held that a statute which proscribes only the conduct of advertisers could be applied against a newspaper as an "aider" or "abettor" if the publisher knew of the falsity of the advertisement he published.

prospective tenant or purchaser to detect any discrimination in the advertisement. */ In the few cases in which there may be doubt, the publisher can resolve it by simply asking the advertiser to redraft his advertisement. Moreover, the defendant by his own admission screens his advertising to make the highly subjective determination whether it is "racially offensive," (Stipulation 6) a task far more formidable than the relatively objective determination whether racial preference is expressed.

The foregoing also serves further to distinguish the Brush case, on which defendant claims to rely in this regard as well.

Title VII makes an exception to the ban on racially preferential advertisements with respect to religion, sex, or national origin when such a characteristic is a "bona fide occupational qualification" (B.F.O.Q.) for the particular job advertised. The court in Brush held that newspapers ordinarily did not have the expertise or personnel to decide whether religion, sex, or national origin was a B.F.O.Q. for a job. Section 804(c) has no B.F.O.Q. exemption, so it places no comparable burden on newspapers.

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*/ In this connection, the defendant mentions a report, "Bias in Newspaper Real Estate Advertising" by the Washington Center for Metropolitan Studies (July 1970). A copy of that report is available if the court wishes to examine it.

Moreover, in footnote 4 to its opinion, 315 F. Supp. at 582, the Court in Brush expressly contrasted the case before it from statutes, broadly applicable on their face to newspapers, which prohibit publication of material the unlawful nature of which "can be determined from the face of the ad itself without reference to knowledge of other pertinent matter." We think it indisputable that 804(c) is such a statute.

Legislative History

With the statute unambiguously excluding any limitations as to those to whom it applies, reference to legislative history is at most of secondary significance. Nevertheless, we pointed out in our original memorandum (p. 12) that what legislative history there was is entirely consistent with our contention -- Senator Ellender opposed the proposed law, among other things, because it reached publishers, and no one gainsaid him. To this defendant responds, (p. 6 of his brief) relying on Labor Board v. Fruit Packers, 377 U.S. 58, 66 (1964), that the court looks to the words of the sponsors rather than of the opponents of legislation to determine its intent. True enough, where what the opposition says is at odds with the views in the Senate Report of the bill, Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 394-95 (1951), or where to credit the opposition's fears would run afoul of established judicial precedent of which Congress must have been aware. N.L.R.B. v. Fruit Packers, supra, at 66-67. In this case, however, the statutory language applies to everyone, including newspapers. Senator Ellender recognized it. The sponsors never

denied it. It was not that kind of situation to which the defendant's quotation from Fruit Packers was addressed. As the Supreme Court pointed out in Arizona v. California, 373 U.S. 546, 583 (1963), the statements of opponents of a bill, while not conclusive, are "relevant and useful, where, as here, the proponents of the bill made no response to the opponents' criticisms."

Legislative history provides one further basis to differentiate this case from the Brush decision. In that case, the legislative history was to the effect that newspapers were not intended to be covered. 315 F. Supp. at 582. Such legislative history as exists here points, with the statutory language, to unrestricted coverage.

Administrative Interpretation

The court in the Brush case also noted that the General Counsel of the Equal Employment Opportunity Commission, the agency charged with enforcement of Title VII, had issued an Opinion Letter in 1965 stating that "A newspaper is not an employment agency within the meaning of Section 701(c)." 315 F. Supp. at 582. As the Supreme Court explained in Udall v. Tallman, 380 U.S. 1, 16 (1965), "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."

In this connection, the attached letter of April 16, 1970, from the General Counsel's Office of the Department of Housing and Urban Development, the agency charged with overall administration of Title VIII, to Mrs. Margaret Smith of the National Newspaper Association, is highly relevant, both in its statement that indicating the race of the residents of a home or area violates section 804(c), and its assumption that newspapers are covered. This again differentiates this case from Brush, and affirmatively supports the plaintiff's position here.

B. Application of Section 804(c) to Newspapers Does Not Violate the First Amendment.

To support his contention that an injunction against printing racially preferential advertising constitutes a prior restraint on freedom of the press, the defendant seems to be saying that (1) if an injunction is issued against his printing such advertisements, (2) he may one day be caught in a situation where he inadvertently prints such an advertisement in his newspaper, then (3) to comply with the injunction, he will have to scrap the entire issue, and therefore (4) the injunction will act as a prior restraint of that issue, a result forbidden by the Constitution under Near v. Minnesota, 283 U.S. 697 (1913). It is like arguing for the abolition

of libel laws because some day a publisher may find after an edition has gone to press that his lead story is libelous and the damages which might arise from a suit could put him in bankruptcy. The dilemma is no different, and the argument no more convincing.

The plaintiff agrees that no prior restraints may be laid upon freedom of the press, Near v. Minnesota, supra, and that a free press may not constitutionally be undermined by discriminatory taxes or regulations which destroy its advertising revenues, as Huey Long tried to do with some newspapers which opposed his political ambitions. Grosjean v. American Press Co., 297 U.S. 233 (1936). These situations have nothing in common with the present case, however, where all that is sought is injunctive relief against discriminatory advertising, and not against publication of the newspaper, editorial policy, or anything of the sort. As we have shown in our original memorandum (pp. 14-21), commercial advertising by itself has not been accorded the full protection of the First Amendment by federal courts. See also, Note, Freedom of Expression in a Commercial Context, 78 Harv. L. Rev. 1191 (1965).

Most of the constitutional attacks made on regulation of commercial advertising have been based on the due process clause, and the Supreme Court in such cases has upheld broad regulations, including injunctions against newspapers and radio stations from carrying certain advertisements. Head v.

New Mexico Board of Examiners, 374 U.S. 424, 432 (1963) (injunction restraining newspaper from publishing optometrist advertising affirmed). See also, Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (upholding a prohibition on advertising eye glass frames); Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1935) (upholding prohibition on certain advertisements by dentists, even if true); Railway Express Agency v. New York, 336 U.S. 106 (1949); Fifth Avenue Coach Co. v. City of New York, 221 U.S. 467 (1911) (both of the latter upholding prohibitions on vehicles carrying advertisements for persons other than their owners).

The defendant seems to concede that the advertisements themselves are not protected by the First Amendment, but claims that forbidding the newspapers to publish such advertisements places such a heavy burden on newspapers that it has a repressive effect of the type forbidden under Grosjean v. American Press Co., supra. Even granting the impact on the newspaper business as the medium which carries the greatest portion of real estate advertising -- and the size of this impact is undoubtedly a major reason for including newspapers within the statutory coverage -- the extra burden of screening out advertisements indicating forbidden preferences is not significant. At least some of the major newspapers already have substantial staffs and criteria for screening undesirable advertisements of various types. Note, The Regulation of Advertising, 56 Colum. L. Rev. 1018, 1087-

88 (1956). Moreover, in the case of the Courier, the burden is, as we have shown (pp. 5-6 , supra) quite trivial, and far less than that which the defendant has imposed on himself by screening "racially offensive" or"distasteful" */ advertisements. Every newspaper must guard, among other things, against libel.

In short, Section 804(c), as applied to newspapers, is a rational and appropriate means to assist in the elimination of housing discrimination in accordance with the legitimate purpose of Title VIII, not a "deliberate and calculated device . . . to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties," Grosjean v. American Press Co., supra at 250, nor "an artificial licensing device" with oppressive and disproportionate requirements unrelated to the defendant's business, by which his publication "can be curtailed or terminated." United Interchange, Inc. v. Harding, 154 Me. 128, 145 A.2d 94, 99 (1958). Under such circumstances, an injunction against carrying certain types of advertisements does not constitute an unconstitutional previous restraint on freedom of the press.

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*/See also Camp-of-the-Pines, Inc. v. New York Times Co., 184 Misc. 389, 53 N.Y. Supp. 2d 475 (Sup. Ct. 1945), where a newspaper was held not liable to an advertiser for changing or not printing an advertisement for a resort including the phrase "selected clientele," after the District Attorney had advised the newspaper that it might be prosecuted under the state civil rights law for printing such an advertisement. See also the authorities cited in the Defendant's Memorandum, pages 30-31, to the effect that a newspaper cannot be forced into a contractual obligation to publish advertisements.

* * * *

Since the original memorandum was filed, we have learned that, in one of this Division's cases, the constitutionality of Section 804(c) has been expressly upheld as against allegations that it was unconstitutionally vague and that it denied freedom of expression in violation of the First Amendment. */ In United States v. A. B. Smythe Co. (N.D. Ohio, E. Div., C.A. No. C 69-885, Nov. 24, 1970), the Government sued a land company and a real estate broker for violation of Section 804(c). The thrust of the complaint was that the land company engaged in discriminatory practices, and that the broker communicated to its customers, albeit truthfully, the fact that members of minority groups could not purchase land there. The broker argued that Section 804(c), if applicable to its conduct, denied its right to speak the truth and operate its business. The Court summarily rejected the claim. A copy of the opinion is attached.

The broker, of course, was not a newspaper. As we have shown, however, this affects neither coverage nor constitutionality.

C. Section 804(c) Does Not Violate the Fifth Amendment

The defendant contends (Memorandum, pp. 21-25)

*/By administrative error, the decision was not sent to us when entered. We apologize to the Court for not including it in our original memorandum.

(a) that persons exempted by the "Mrs. Murphy" provisions of Section 803(b) may express their racial preferences, either as a matter of statutory construction or as a matter of constitutional right, and (b) therefore depriving newspapers of the right to publish such statements denies the newspapers the equal protection of the laws, or deprives them of liberty or property without due process of law. Like defendant's other contentions this one rests on faulty premises.

First, even if the homeowners themselves were exempted or constitutionally excluded from the obligations of Section 804(c), Congress would still have the power to prohibit newspapers from carrying their discriminatory advertisements. See Railway Express Agency v. New York, 336 U.S. 106 (1949)(prohibition against vehicles advertising someone else's goods valid, though they may advertise their own); Fifth Avenue Coach Co. v. City of New York, 221 U.S. 467 (1911) (same). Indeed, it might have been a legitimate reason for Congress to have extended the ban in Section 804(c) to advertisements for Mrs. Murphy's apartments to make it easier for newspapers to apply the law. Moreover, newspapers are in no fashion singled out for discriminatory treatment; radio stations, brochures, pamphlets and billboards are equally subject to the interdiction of the Act.

Even the homeowners themselves are not exempted from the prohibitions of Section 804(c), a fact quickly apparent from a reading of the first line of Section 803(b). Section

803(b)(1)(B) does not exempt anyone from the coverage of Section 804(c), but, on the contrary, deals with exemptions from the prohibition of discriminatory sales or rentals in Sections 804(a), (b), and (d). So far as the defendant's constitutional argument is concerned, whatever may have been the rule in the absence of the decision in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), 42 U.S.C. 1982 covers all dwellings, necessarily including Mrs. Murphy, and the Supreme Court repeated several times in the course of that decision that the 1968 Act had no effect upon the earlier statute or its coverage. Id. at 415-17. */

D. The Advertisements in this Case Indicate a Racial Preference on Their Face

The defendant states: "It is not unreasonable to assume that prospective tenants desire to know the race of the occupants in a private home in which the owners lease one or two rooms." (Defendant's Memorandum, p. 26) Such an assumption is reasonable only if one further assumes a widespread unfavorable emotional reaction to living with someone of another race. It is then another reasonable assumption that the advertiser who mentions race shares in that reaction, and that a prospective tenant reading the advertisement will realize that, and will be inhibited from attempting to purchase or rent the dwelling. On

*/We share defendant's puzzlement about the words "after notice" in 803(b)(1)(B). This enigma, however, has not even the remotest bearing on the issues here.

defendant's own theory, the advertisement indicates a preference, as, indeed, it was designed to do.

E. The Evidence Shows a Pattern or Practice in Violation of Title VIII and Grounds for an Injunction

Two isolated advertisements might not necessarily constitute a pattern and practice of resistance, if they were isolated, a-typical departures from the defendant's prior policy. United States v. Mintzes, supra, and authorities there cited. In this case, however, the defendant not only published two discriminatory advertisements but made it plain to the Government by handwritten note, and by indignant editorial, that he will continue to do so. That is not the kind of "isolated" variation from the norm of nondiscriminatory activity that defeats a claim of pattern or practice. */

*/For authorities, other than those cited in Mintzes, which explain "pattern or practice," see United States v. West Peachtree Tenth Corp., ____ F. 2d ____ (5th Cir. January 4, 1971) (two post-Act incidents, pre-Act discrimination, and a qualified admission more than sufficient); United States v. Medical Society of South Carolina, 298 F. Supp. 145, 152 (D.S.C. 1969) (conduct predictably resulting in the exclusion of Negroes is pattern or practice); United States v. Jordan, 302 F. Supp. 370 (E.D. La. 1969) (same).

In United States v. Gray, 315 F. Supp. 13, 20 (D.R.I. 1970), on which defendant claims to rely, the Court, after examining the facts, found no evidence of discrimination at all, and obviously no pattern or practice. The court then discussed the various cases, including Mintzes, which hold that sporadic and isolated incidents of discrimination are insufficient to show pattern or practice. The case has no bearing on a situation where the defendant knowingly accepted the discriminatory advertisements, told the Government he would do it again, and declined to instruct his employees not to do so.

It now appears that the defendant has retreated from his prior more absolute declarations. When the plaintiff first contacted him, he stated flatly that:

> the statement that the home in which the apartment is located is occupied by white people should not in our opinion be offensive to anyone. (Stipulation 6)

He went on to say that he would not instruct his employees to turn down such advertisements. He refused to answer two further letters on the subject. Now he claims that he did in fact decide to turn a third such advertisement down because it was "discriminatory or distasteful" under his wholly subjective standards, which are apparently sufficiently malleable to permit turnabout in the face of litigation.

Even in his latest version, the defendant has provided no assurance of any kind that he will not continue to publish unlawful advertisements. The defendant's judgment as to what is "discriminatory or distasteful to any group of individuals" is not necessarily coextensive with the statutory criterion of what indicates a preference based on race, color, religion or national origin; in fact, his cryptic note to the Government shows that it is in fact opposite. Under such circumstances, an injunction should issue. "It is the duty of the courts to beware efforts to defeat injunctive relief by protestations of repentance and reform, */ especially when abandonment seems timed to anticipate suit, and there is

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*/This is not to suggest that the defendant here has shown the slightest repentance.

probability of resumption." United States v. Oregon Medical Society, 343 U.S. 326, 333 (1952). Accord, Gray v. Sanders, 372 U.S. 368, 378 (1963); Lankford v. Gelston, 364 F. 2d 197, 203 (4th Cir. 1966); United States v. Beach Associates, Inc., 286 F. Supp. 801, 808 (D. Md. 1968); United States v. All Star Triangle Bowl, Inc., 283 F. Supp. 300 (D.S.C. 1968). Under "public interest" statutes, such as those prohibiting racial discrimination, courts of equity retain their traditional discretion, but the exercise of that discretion must be "conditioned by the necessities of the public interest which Congress has sought to protect . . . For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases." Hecht Co. v. Bowles, 321 U.S. 321, 330-31 (1944). See also, Virginian Railway v. System Federation No. 4, Railway Employees, 300 U.S. 515, 552 (1937). The government need not plead or prove irreparable injury, for the injury is presumed from the fact of violation. United States v. Hayes International Corp. 415 F. 2d 1038 (5th Cir. 1969); Shafer v. United States, 229 F. 2d 124 (4th Cir.), cert. denied, 351 U.S. 931 (1956).

* * * *

In perhaps the most astonishing statement in his brief, defendant now says (p. 29) that it "should be clear that this case does not raise an issue of public importance . . ." Apparently, the issue as to the constitutionality of dreadful

asserted restrictions on freedom of the press of which so much of his brief complains, and which prompted the assumption of his case by the American Newspaper Publisher's Association, */ is so unimportant that the cases holding the Attorney General's determination to be unreviewable (see our memorandum, p. 24) **/ must all be overruled in the name of its insignificance. This all suggests, in Judge Wisdom's apt phrase, the "eerie atmosphere of never-never land." Meredith v. Fair, 298 F. 2d 696, 701 (5th Cir. 1962).

* * *

Moreover, the defendant's duties do not end with the cessation of violations; he is also obligated to take affirmative steps to correct the effects of past discrimination. Accordingly, even if he promised not to do it again and the court found the promise reliable, injunctive relief would still be needed. United States v. West Peachtree Tenth Corp., supra; Cypress v. Newport News Gen. Mem. Hospital, 375 F. 2d 648 (4th Cir. 1967).

F. The Requested Affirmative Relief is Proper

The defendant claims (brief, pp. 29-31) that he cannot constitutionally be required to carry out the affirmative relief requested in the plaintiff's proposed decree, because such relief (in this assertedly unimportant case) violates freedom of the press to a hitherto unprecedented scale (pp. 29, et seq.). The cases on which he relies for that

*/ Washington Post, February 27, 1971.

**/ See also, United States v. Gray, supra, at 22-24, and cases cited therein.

proposition however, do not support it. They all deal with attempts by would-be advertisers to compel newspapers, in one case by statute, to publish their advertisements on a contractual basis. The law of contracts is not involved here. The plaintiff is not seeking a contract with the defendant.

The relief requested is based on the defendant's obligation to correct the injury he has done to the public welfare in violation of the law. "The court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965). The remedy here is appropriate to the violation, and not unduly burdensome. It no more violates the defendant's right not to speak than the provision of the decree in United States v. West Peachtree Tenth Corp., ____ F. 2d ____ (5th Cir., No. 29431, January 4, 1971), that the apartment owner must include in his newspaper advertisements that his apartments are rented without discrimination, (Slip opinion, p. 19, copy attached to Plaintiff's Pre-Trial Memorandum) or that a beach owner must state on his advertising materials that his facilities are available on a non-racial basis. United States v. Beach Associates, Inc., supra. See also, Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (injunction under anti-trust law not to refuse certain advertisements).

* * *

Obviously, the affirmative relief here prayed for is not earth-shaking, nor is it the prime issue in the case. The continuing effect of two discriminatory advertisements over a period of months does not call for the same kind of comprehensive affirmative action as, for example, a sustained pattern of discrimination which has kept an apartment house all-white for many years. United States v. West Peachtree Tenth Corp., supra. However, the little nondiscriminatory box is hardly burdensome and seems reasonably related to the violation. It will educate the defendant's readers to their rights and responsibilities under the law. We believe that the Court should affirmatively consider inclusion of this item of relief in its decree.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert J. Wiggers, hereby certify that I have served a copy of the attached Reply Memorandum of the United States on the attorneys for the defendant, by mailing a copy of same, postage prepaid, to them at the address shown below, this 12th day of March, 1971.

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Robert J. Wiggers

ROBERT J. WIGGERS
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APR 16 1970

Mrs. Margaret Smith
National Newspaper Association
491 National Press Building
Washington, D. C. 20004

Dear Mrs. Smith:

Mr. Samuel J. Simmons, Assistant Secretary for Equal Opportunity, has advised me that you recently directed a telephone inquiry to his office with respect to a proposed newspaper advertisement. I understand that you had received a request to advertise a home for sale with a specific reference in the advertisement to the location of the home in a colored neighborhood.

I believe that such an advertisement would violate Title VIII--Fair Housing of the Civil Rights Act of 1968, which makes it unlawful to publish any advertisement with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin.

The two leaflets enclosed, explaining the coverage of Title VIII, may be of interest to you.

If I can be of further service, I would be pleased to hear from you.

Sincerely yours,

Robert A. Sauer

Robert A. Sauer
Assistant General Counsel
for Community Programs

cc: CF 10137
Simmons 5100
Unger 10110
Hargulies 10232
Sauer 10248
GCC:WALLER:lee:4/13/70
Enclosures G.C.305

10248 file - Legal Interp.

NEW YORK PENAL LAW §421 (PARKER ED. 1920)

§421. Untrue and misleading advertisements.

If any person, firm, corporation or association, or agent or employee thereof, with intent to sell or in any wise dispose of merchandise, real estate, service, or anything offered by such person, firm, corporation, or association, or agent or employee thereof, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, knowlingly makes, publishes, disseminates, circulates, or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, magazine or other publication, or in the form of a book, notice, circular, pamphlet, letter, handbill, poster, bill, sign, placard, card, label, or tag, or in any other way, an advertisement, announcement or statement of any sort regarding merchandise, service or anything so offered to the public which contains any assertion, representation or statement of fact that is untrue, deceptive or misleading, or that amounts to an offer to sell, barter or exchange real estate, by means of prizes, rewards, distinctions, or puzzle methods, such person, corporation or association,

or the members of such firm, or the agent of such person, corporation, association or firm, shall be guilty of a misdemeanor, punishable by a fine of not less than twenty-five dollars nor more than one thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Added by L. 1915, ch. 569. In effect Sept. 1, 1915.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. C 69-885
	)	
v.	)	
	)	MEMORANDUM OPINION
A.B. SMYTHE COMPANY, INC., and IRENE MICHAEL, et al.,	)	AND ORDER
	)	
Defendants	)	

LAMBROS, DISTRICT JUDGE

This cause of action was instituted by the Government under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601 et seq. The defendants, A.B. Smythe Company and Irene Michael, now move to dismiss the complaint. The motion is denied in its entirety.

Two basic issues are raised by the defendants' motion to dismiss. One, whether or not the defendants are exempt from the provisions of the Act for the conduct alleged in the complaint because of the exemption provided to any single family house sold or rented by an owner under 42 U.S.C. §3603(b)(1). Two, whether or not 42 U.S.C. §3604(c) is unconstitutional as a violation of the First Amendment.

The first issue arises since the Act does not have a specific effective date for all its provisions but becomes effective in certain stages. Upon enactment, it is applicable to dwellings[1] which have federal assistance or are

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1. Under the Act, a dwelling is defined as "any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof." 49 U.S.C. §3602(b).

of federal ownership. 42 U.S.C. §3603(a)(1). After December 31, 1968, it applies to all other dwellings, except for two exemptions. 42 U.S.C. §3603(a)(2). One of these exemptions is for any single-family house sold or rented by an owner. 42 U.S.C. §3603(b)(1). After December 31, 1969, the Act applies to any single-family house sold or rented by an owner "if such house is sold or rented...[with] the use in any manner of the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings or of any employee or agent of any such broker, agent, salesman, or person ...." 42 U.S.C. §3603(b)(1)(A).

The defendants argue that they come within the exemption accorded to the sale or rental of a single-family house for the year of 1969. Particularly, they contend that for the year of 1969, a real estate broker or agent is included within the exemption for a single-family house. They claim that since the sale or rental of a single-family house with the assistance of a real estate broker or agent is specifically included in the Act for the period of time after December 31, 1969, the sale or rental of such a house with the aid of real estate men is implicitly excluded prior to that time.

The Court need not reach the validity of the defendants' contention. The Government alleges that the defendants engaged in discriminatory conduct in regard to vacant land in the Lake Lucerne subdivision and with respect to all the houses in the subdivision. The Court finds that the exemption accorded to a single-family house for the year of 1969 is not applicable to vacant land nor to a subdivision as an entity.

Thus, notwithstanding the alleged exemption, the Government has still stated a claim for relief against the defendants.

As for the second issue, that is the constitutionality of 42 U.S.C. §3604(c), the Court finds that it is constitutional. The section reads as follows:

> "To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, or national origin, or an intention to make any such preference, limitation, or discrimination."

The Court finds that the statute is not void for vagueness. This section is not violative of the First Amendment.

The defendants' other contentions in regard to their motion are also without merit.

Accordingly, the motion to dismiss the complaint is denied in its entirety.

Thomas D. Lambros
United States District Judge