No. 72-146

In the Supreme Court of the United States

OCTOBER TERM, 1972

BILL R. HUNTER, d/b/a THE COURIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner published two advertisements announcing the availability of an apartment "in a white home" and "in private white home." When petitioner refused to agree to discontinue publication of such advertisements, the United States brought suit pursuant to 42 U.S.C. 3613. The district court issued a declaratory judgment holding that the advertisements indicated a racial preference in violation of Title VIII of the Civil Rights Act of 1968, specifically of 42 U.S.C. 3604(c).[1] The defendant appealed, and on April 27, 1972, the court of appeals affirmed (459 F. 2d 205). A timely petition for a writ of certiorari was filed on July 25, 1972.

[1] The text of the statute is set forth at page 3 of the petition.

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Petitioner claims that Section 3604(c) does not apply to newspapers, and that to so apply it violates the First and Fifth Amendments. He also claims the advertisements did not indicate any racial preference in violation of Section 3604(c). These arguments were unanimously rejected by the courts below, in accord with well-established precedents. Further review by this Court is not warranted.

1. Petitioner contends that the courts below "failed to recognize that by its terms, Title VIII covers only dwelling owners, brokers, and lending institutions" (Pet. 8). But 42 U.S.C. 3604(c) makes it unlawful to make, print or publish, or cause to be made, printed or published, all discriminatory advertisements, and in no way restricts the class of persons to whom the prohibition applies. Unlike other Sections of the Act,[2] Section 3604(c) does not provide any specific exemptions or designate the persons covered, but rather, as the courts below noted, applies to *anyone* who engages in the prohibited conduct. Moreover, even if there were ambiguity in the statutory language (and we agree with the courts below that there is none), the legislative history cited by the court of appeals (Pet. App. 4a–5a) shows that the Act was designed to pro-

[2] *E.g.*, 42 U.S.C. 3603(b), 3605, and 3607. In *Brush* v. *San Francisco Newspaper Printing Co.*, 315 F. Supp. 577 (N.D. Cal.) (appeal pending No. 26,666, C.A. 9), relied on by petitioner, the prohibition against discriminatory employment advertising applied to employers, unions, and employment agencies, and the court held that a newspaper is not an employment agency.

hibit, among other things, publication of discriminatory newspaper advertising.[3]

2. Petitioner contends that the decisions below deny him freedom of expression protected by the First Amendment. As noted by the courts below, however, it is clearly established that while the communication of information and the dissemination of opinion are broadly protected by the First Amendment, purely commercial advertising is not. *Valentine* v. *Chrestensen*, 316 U.S. 52.[4]

3. 42 U.S.C. 3604(c) prohibits discriminatory advertising with respect to all dwellings, whether or not their rental policies are reached by the Act. Petitioner perceives a "due process" violation in the failure of Congress to exempt from the advertising proscriptions of Section 3604(c) the "Mrs. Murphy" type of dwelling, which is exempt from the prohibition against discrimination in rentals. 42 U.S.C. 3603 (b)(2). But cf. *Jones* v. *Mayer Co.*, 392 U.S. 409. As observed by the court below, however, Congress might reasonably believe that the widespread appearance of discriminatory advertisements in the media would promote segregation in housing by deterring nonwhites from seeking housing in white areas. This judgment being rational, the statute does not violate

[3] The Advertising Guidelines for Fair Housing recently promulgated by the Secretary of Housing and Urban Development, 37 Fed. Reg. 6700 (April 1, 1972), which are entitled to great weight, *Udall* v. *Tallman*, 380 U.S. 1, 16, provide that newspapers are subject to the Act and that phrases like "white home" are presumptively discriminatory.

[4] And see additional authorities collected in the opinion below (Pet. App. 6a–7a).

the Fifth Amendment. See, *e.g.*, *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489.

4. The discriminatory character of the advertisements in question here is apparent on their face. To run afoul of the statute, an advertisement need not certify a racial exclusion; it is unlawful if it indicates a racial preference. The ordinary reader could hardly fail to conclude that the phrase "white home" indicates a preference for white tenants, the district court so found, and the writer of the advertisements himself described them as " 'really a kindness to colored people. There's no use making them * * * come here when I'm not going to rent to them ' " (Pet. App. 13a). To hold that "white home" is beyond the reach of the Act while "white only" is covered would so exalt form over substance as to nullify the statute. The court of appeals properly declined to do so (Pet. App. 13a–14a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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