No. 72-419

In the Supreme Court of the United States

OCTOBER TERM, 1972

PITTSBURGH PRESS COMPANY, PETITIONER

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS, ET AL.

ON WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

CITATIONS

497-524—73——1

Cases—Continued

Constitution and statutes—Continued

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QUESTIONS PRESENTED

1. Whether the application to petitioner of a local ordinance making it unlawful to publish help-wanted advertisements under column headings designating a sex preference was consistent with the due process clause of the Fourteenth Amendment.

2. Whether the ordinance as construed and applied to petitioner violates the First Amendment.

INTEREST OF THE UNITED STATES

The United States has a continuing interest in, and responsibility for, eradicating discriminatory prac-

tices which deny persons, on account of race, color, national origin, religion, or sex, an equal opportunity to enjoy the benefits of society.

National policy in the area of civil rights has long favored the assumption by state and local governments of primary responsibility for protecting the civil rights of their citizens. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, as amended by the Equal Employment Opportunity Act of 1972, P.L. 92–261, reflects this policy by requiring federal deference to state and local agencies responsible for enforcing fair employment practices until 60 days after commencement of proceedings under the state or local law.[1] Accordingly, the United States has a direct interest in the effective functioning of agencies such as the Pittburgh Commission on Human Relations that are empowered under local ordinances to combat discriminatory employment practices.

In addition, Congress, like the City of Pittsburgh, has determined that the proscription of certain types of commercial advertising in newspapers is essential to the protection of civil rights. Section 804(c) of Title VIII of the 1968 Act, 42 U.S.C. 3604(c), prohibits advertising that indicates discriminatory preferences in the sale or rental of dwellings. Thus, this

[1] 42 U.S.C. 2000e–5(b). Similarly, Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a, (public accommodations), and Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601, *et seq.*, (fair housing), require deference in some circumstances to state remedial action. See 42 U.S.C. 2000a–3 and 42 U.S.C. 3610(c).

Court's resolution of the First Amendment issues raised in this case may bear on the constitutionality of that provision of federal law.[2]

STATEMENT

The facts are described in detail in the briefs of the parties. We summarize here the procedural history of this litigation.

On October 9, 1969, the National Organization for Women, Inc., (NOW) filed a complaint with the Pittsburgh Human Relations Commission, charging that petitioner was violating Section 8(j) of the Pittsburgh Human Relations Ordinance, as amended, by using sex segregated column headings in its classified advertisement section. After a public hearing, the Commission, on July 23, 1970, ordered the Press to cease and desist from using the sex-interest headings and to utilize a classification system of employment advertisements with no reference to sex (Pet. App. 18a).[3]

[2] A First Amendment question similar to the one presented here is involved in *Hunter* v. *United States*, No. 72–146, certiorari denied, 409 U.S. 934. A petition for rehearing was filed in that case on December 7, 1972, and on February 7, 1973, pursuant to this Court's request for a response, the United States filed a memorandum suggesting that no action be taken on the petition until the present case is decided.

[3] To enforce this order, the Commission must certify "the case and the entire record of its proceedings to the City Solicitor, who shall invoke the aid of an appropriate court to secure enforcement or compliance with the order or to impose the penalties" of a maximum fine of $300, or in default of payment thereof up to ninety days in jail (ordinance, Sections 14 and 15, A. 431a).

Petitioner appealed the Commission's order to the Court of Common Pleas of Allegheny County, Pennsylvania, which affirmed the findings of fact, conclusions of law, and the order of the Commission (Pet. App. 45a). On further appeal, the Commonwealth Court of Pennsylvania also affirmed, two judges dissenting. It did, however, modify the Commission's order by permitting use of the headings for advertising positions exempt under the ordinance or certified as exempt by the Commission—*i.e.*, positions where sex is a bona fide occupational qualification (A. 400a). The Supreme Court of Pennsylvania denied a petition for review of this decision, but stayed the order of the Commonwealth Court pending determination of the case by this Court (Pet. App. 80a–81a).

ARGUMENT

INTRODUCTION AND SUMMARY

The courts below held that the petitioner violated the Pittsburgh Human Relations Ordinance No. 75, as amended (A. 410a–436a),[4] by utilizing column headings indicating sex preferences in its help-wanted advertisements. The ordinance makes it an unlawful employment practice for "any person * * * to aid * * * or participate in the doing of any act declared to be an unlawful employment practice by this ordinance" (Section 8(j), A. 422a), and "[f]or any 'employer' * * * to cause to be published or circulated any notice or advertisement relating to 'employment' * * * which

[4] The original ordinance does not refer to sex. These references were added by Ordinance Number 395 (A. 433a–436a).

indicates any discrimination because of * * * sex" (Section 8(e), A. 421a, 436a).[5]

The Commission and the courts below construed this language as making the publication of advertisements under discriminatory headings independently prohibited by the ordinance. Petitioner contends that the ordinance as so construed violates due process, since there was no finding that any advertising employer discriminated in hiring on the basis of sex.[6]

The ordinance, however, as construed by the Commission and the courts below, clearly defines the placing of discriminatory advertisements as an unlawful employment practice entirely independent of discrimination in hiring (which is covered by Section 8a of the ordinance, A. 420a). The legislative determinations that discriminatory hiring and discriminatory advertising constitute separate violations, and, in addition, that aiding or participating in either is also an independent violation, are rationally related to the goal of ending discrimination in employment practices, a matter of legitimate local concern.[7] This Court

[5] The quotation marks apparently are designed to call attention to the ordinance definitions of these terms. It is undisputed that advertisers in the Press help-wanted columns included "employers" offering "employment" as defined in the ordinance (A. 156a–157a).

[6] The court below noted that there was in fact testimony in the record indicating such discrimination; it held that such evidence was not necessary (A. 389a). Petitioner apparently had agreed, arguing before the Commission that the testimony was irrelevant (*ibid.*).

[7] The determination that the classification used by petitioner constituted participation in discriminatory advertising, far from being irrational, is almost self-evident.

497–524—73——2

has long held that it will not overturn the legislative judgment of local authorities on Fourteenth Amendment grounds where, as here, such judgment is rationally related to a problem of local concern.

Petitioner's claim that the First Amendment prohibits application of the ordinance to its conduct also fails. The ordinance's narrowly drawn regulation of the commercial aspects of petitioner's business, which in no way affects petitioner's news reporting or editorial functions, is a permissible form of regulation by the State to protect the interest of its citizens in equal employment opportunity.

I

IT IS NOT A DENIAL OF DUE PROCESS OF LAW TO PROHIBIT THE ARRANGING AND PUBLICATION BY A NEWSPAPER OF HELP-WANTED ADVERTISEMENTS IN SEX-DESIGNATED COLUMNS

The Pittsburgh Commission on Human Relations and the courts below construed the Pittsburgh Human Relations Ordinance, as amended, as prohibiting both the placement by employers of discriminatory advertisements and the publication by newspapers of such advertisements (Pet. App. 16a–17a, 41a–42a; A. 388a–392a). They specifically held that petitioner's arrangement of help-wanted advertisements in categories headed "Jobs—Male Interest" and "Jobs—Female Interest" constituted discriminatory advertising prohibited by the ordinance. Petitioner's challenge to

these findings on due process grounds raises only very narrow issues for decision here.

This Court has long held that it does "not sit to weigh evidence on the due process issue in order to determine whether the regulation is sound or appropriate; nor is it our function to pass judgment on its wisdom." *Railway Express Agency* v. *New York,* 336 U.S. 106, 109. See also *Old Dearborn Co.* v. *Seagram Corp.,* 299 U.S. 183. Instead, the due process clause of the Fourteenth Amendment requires only that exertions of regulatory power "shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained." *Nebbia* v. *New York,* 291 U.S. 502, 525.

The Pittsburgh ordinance, as interpreted, easily meets this test. One of the stated purposes of the ordinance is to protect the population of the City of Pittsburgh from employment practices that have the effect of denying them job opportunities because of their sex. Section 2 of Ordinance No. 75, as amended, A. 434a–435a. To accomplish this goal, the Council of the City of Pittsburgh not only prohibited discrimination in hiring (Sec. 8a, A. 420a), but also prohibited employers, employment agencies and labor organizations from publishing employment advertisements that indicate a difference of treatment based upon sex (Sec. 8(e), A. 421a), and prohibited all persons, including newspapers, from participating in or aiding such publication (Sec. 8(j), A. 422a). Such aid or participa-

tion is itself designated an unlawful employment practice (*ibid.*).[8]

There is nothing arbitrary or irrational in the judgment that employment advertisements indicating a difference of treatment based on sex tend to deny job opportunities to persons because of their sex.[9] Such advertising, like the similar housing advertising prohibited by 42 U.S.C. 3604(c), discriminates by discouraging applicants from the unwanted group.

[8] Petitioner, therefore, errs in asserting (Pet. Br. 25) that this case involves an application of the principle enunciated in *Tot* v. *United States*, 319 U.S. 463, that there must be a rational connection between the fact proved and the ultimate fact presumed. The ordinance prohibits persons from participating in publishing employment advertising that indicates discrimination based on sex. The court below correctly found that petitioner had so participated by its practice of arranging want ads under column headings that indicate a sexual preference on the part of employers. No evidentiary presumptions were required or used in reaching this conclusion; petitioner's conduct was unlawful because it violated the ordinance, not because the conduct proved permitted an inference that employers were discriminating in hiring. The placing of advertising under petitioner's headings is in itself a violation of the ordinance by an employer, and the very evidence that showed that petitioner published such advertising necessarily showed that it aided or participated in such violations by employers.

[9] The ordinance specifically provides for a certificate of exemption where bona fide occupational requirements are involved (Section 8, 7(d), A. 420a, 418a). No such certificates have been requested since the ordinance was amended in 1969 to prohibit sex discrimination (Pet. App. 13a). Nevertheless, the court below modified the Commission's order to permit petitioner to use sex-designated want-ad columns for advertisements by employers with certificates indicating a bona fide requirement for a particular sex (A. 399a–400a). Therefore, no jobs with bona fide sexual qualifications are involved in this case.

Nor is there anything irrational about the legislative determination here that the prohibition of such advertising should run not only against employers placing the advertisements, but also against those whose publication of the advertisements is also essential to their existence. The soundness of that decision is particularly evident in this case, since the system of sex-segregated want-ad columns chosen by the petitioner not only affords advertisers the vehicle for discrimination, but also places obstacles in the path of those wishing to comply with the ordinance. Because of petitioner's conduct, such advertisers are forced to assume additional expense by placing advertisements in both the male and female columns or to resort to the male-female column conceded by petitioner to be less effective (A. 161a). It is thus clear that petitioner was here held accountable for its own acts, and not for those of anyone else, however culpable others may also be.

There remains only the question whether there is a rational basis for concluding that the placing of want-ads in columns headed "Job—Female Interest" and "Jobs—Male Interest" indicated "any discrimination because of * * * sex" (Section 8(e), as amended, A. 421a, 436a).[10]

The inherently discriminatory effect of sex-designated advertising was correctly recognized in *Hailes* v. *United Airlines*, 464 F. 2d 1006 (C.A. 5), a case

[10] "Discrimination" is defined in the ordinance to "include any difference in treatment based on" the described characteristic (Section 4(b), A. 413a).

dealing with sex discrimination against males. The court there explained that "* * * the placing of * * * [an advertisement] in the 'Help Wanted-Female' column without a corresponding ad in the 'Help Wanted-Male' column * * * plainly indicates a preference for females" (*id.* at 1009).

The fact that petitioner here has changed the headings from the "Male Help Wanted" and "Female Help Wanted" designations previously used (Pet. App. 22a), and added a disclaimer, does not change the utility of the categories as a means of indicating to persons seeking employment that those in the specified sexual category will be given preferential consideration. That remains the intended message,[11] and it continues to be so interpreted.[12] Therefore, the

[11] As the Commission noted (Pet. App. 9a), this was admitted by the Classified Advertising Manager for the Press, who stated, "we try to find out what type of person they are looking for. Are they looking for a man, or are they looking for a woman? They know this. And they are interested or more interested in a man or more interested in a woman. They know this, and they state this. This is where they want it." A. 173a. See also A. 117a–118a.

[12] There is ample evidence in the record that the captions do have an inhibiting effect, particularly on women seeking employment. Of particular relevance is the testimony of Dr. Bem, a research scientist and professor of psychology at Carnegie-Mellon University (A. 64a), concerning a study she made which indicated that when jobs were segregated under the captions used by the Press, with the Press disclaimer prominently included, only 46% of the women in the study expressed as much interest in jobs labeled "male interest" as in those labeled "female interest," whereas when these same jobs appeared without reference to sex, 81% of the women preferred "male-interest" jobs. Dr. Bem testified that these figures probably underestimate the extent to which sex-segregated want-ads discourage female applicants, since several women in the study

change in the form in which the message is delivered at most only diminishes its effectiveness, and was properly held to be immaterial. Indeed, since the amended ordinance, as construed, applies "*equally* to 'any difference in treatment based on race, color, religion, ancestry, national origin, place of birth, or sex'" (A. 392a; emphasis by the court below), this case would be essentially no different if petitioner had arranged its help-wanted advertisements into categories designated: "Jobs-White Interest" and "Jobs-Negro Interest." And as the court below further stated, "[w]e have long passed that point in the advancement of civil rights whereby a declaration of intent can be used to screen or [as a] defense for actual discrimination" (A. 390a). Accord, *Hailes, supra,* 464 F. 2d at 1009.

Nor were the courts below required to accept as a defense petitioner's contention (Pet. Br. 26–27) that there was no intent to discriminate, and that the headings merely recognize the fact that some positions are generally of more interest to women, and others to men.[13] The States are as free as Congress to adopt the policy in the equal employment field that if the effect of a particular practice is discriminatory, a good faith

stated that it had never before occurred to them to look for jobs in the "male interest" column. Moreover, the women involved in the study were called upon only to express willingness to apply and were not actually obliged to expose themselves to the risk of encountering discrimination. A. 236a–241a. See also A. 40a, 51a–53a, 109a–113a.

[13] Of course, the study referred to in n. 12, *supra*, indicates that many of the advertised positions were ones in which many women would be interested if they were not deterred by the inhibiting effect of the sex-designated headings.

intent will not justify the practice in the absence of overriding business necessity for it. See *Griggs* v. *Duke Power Co.,* 401 U.S. 424.

In sum, petitioner's contention that it was denied due process of law is not well taken. Far from being irrational or arbitrary, the legislative policy reflected irrational or arbitrary, the Pittsburgh ordinance, as construed and applied, reflects an entirely suitable means of implementing the underlying legislative policy.

II

THE PITTSBURGH ORDINANCE, AS CONSTRUED AND APPLIED TO PETITIONER, IS CONSISTENT WITH THE FIRST AMENDMENT

It has long been settled that the fact that newspapers are engaged in the dissemination of protected ideas does not insulate them from otherwise valid regulation of their economic activities. *Lorain Journal Co.* v. *United States,* 342 U.S. 143; *Associated Press* v. *United States,* 326 U.S. 1; *Associated Press* v. *National Labor Relations Board,* 301 U.S. 103.[14] As Mr. Justice Harlan explained the matter for four members of the Court in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 150:

> The fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed

[14] Nor is it unconstitutional for such regulation to impose a reasonable, nondiscriminatory economic burden on a newspaper publisher. See, *e.g., Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186 (upholding application of the Fair Labor Standards Act to a newspaper publishing business); *Murdock* v. *Pennsylvania,* 319 U.S. 105; *Grosjean* v. *American Press Co.,* 297 U.S. 233.

> cherished activity does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others. A business "is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." *Associated Press* v. *Labor Board,* 301 U.S. 103, 132–133.

The narrow prohibition against the arrangement of classified advertisements here involved applies only to purely commercial advertising and does not affect the editorial, reporting or news gathering functions of the newspaper. A State, in the interest of protecting the right to equal employment opportunity, may properly regulate such commercial advertising of products or services. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States,* 354 U.S. 476, 484. It does not protect expression which is not an "essential part of any exposition of ideas." *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 572.

Advertisements may, as this Court held in *New York Times* v. *Sullivan,* 376 U.S. 254, fall within the protection of the First Amendment when they serve an editorial purpose of communicating ideas or provoking discussion. The undue burdening of "editorial advertisements" was there held impermissible since it "might shut off an important outlet for the promulgation of information and ideas by persons who do

not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press." 376 U.S. at 266.

That rationale does not apply here. The sex-designation headings for petitioner's want-ad columns do not serve any editorial purpose. If petitioner or anyone else wishes to publish news, editorial comment or an advertisement on the subject of employment discrimination or favoring or opposing the use of sex designations in advertising headings, its right to do so would be protected by the First Amendment. But the arrangement of help-wanted columns has an entirely commercial—not editorial—objective.[15] Petitioner is trying to sell the public its want-ads (including, perhaps, duplication of the same advertisement in both the "male" and the "female" columns by employers who do not wish to discriminate)—not to tell them about its stand on sex discrimination. Under the standard set forth in *New York Times* v. *Sullivan,* the headings have not "communicated information, expressed opinion, recited grievances, protested claimed abuses, [or] sought financial support on behalf of a movement * * * [involving] matters of * * * public

[15] Petitioner's apparent suggestion (Pet. Br. 12) that the assignment of particular advertisements to one or another column heading category represents petitioner's editorial judgment that the job offering is of greater interest to male or female readers is answered by the testimony of petitioner's classified advertising manager that the choice is made by the advertiser and that petitioner specifically asks the advertiser to specify his choice if the latter has not initially done so (A. 171a).

interest and concern." 376 U.S. at 266. Here, by contrast, petitioner's use of the headings is merely a commercial practice reflecting what is basically a matter of business judgment.[16] The prohibition of a commercial practice which tends to effectuate illegal discrimination in employment is a reasonable regulation of the commercial aspects of the press and hence, under the decisions of this Court, is within the power of the State.[17] *Valentine* v. *Chrestensen,* 316 U.S. 52;[18]

[16] Testimony introduced on behalf of petitioner indicated that it feared it would lose advertising if it eliminated the discriminatory headings (A. 161a–162a).

[17] Indeed, even if petitioner's use of the headings were to some extent intended to be a vague expression of its views, the prohibition would present no First Amendment problem. Not every activity which has some element of an expression of feeling is an exposition of an idea within the meaning of the First Amendment. See *United States* v. *O'Brien*, 391 U.S. 367. Petitioner has no more constitutional right to adopt commercial practices as an expression of its views concerning employment discrimination than it has to express those views by engaging in employment discrimination of its own or, for example, to express disapproval of an individual by engaging in assault or homicide. Moreover, to the extent that the ordinance may result in an "incidental burdening" (*Branzburg* v. *Hayes*, 408 U.S. 665, 682) of petitioner's expression of ideas, the burden on petitioner and its readers of the ordinance's narrow elimination of this particular means of cryptically vague and essentially uninformative self-expression by petitioner is, in light of petitioner's alternatives, clearly outweighed by the State's interest in promoting equal employment opportunity.

[18] Petitioner attempts to distinguish *Valentine* by pointing out that the handbill involved in *Valentine* "joined a commercial self-serving invitation to view a submarine with an admittedly protected political critique solely as a subterfuge to evade the ordinance" (Br. 14). But this merely shows that the present case follows *a fortiori* from *Valentine* since there is here not even colorable use of protected expression, and the question of subterfuge, therefore, does not arise.

Capital Broadcasting Co. v. *Acting Attorney General,* 405 U.S. 1000, affirming 333 F. Supp. 582 (D. D.C.); *Railway Express Agency* v. *New York,* 336 U.S. 106; *Federal Trade Commission* v. *Standard Education Society,* 302 U.S. 112.

Although petitioner contends (Pet. Br. 15) that its arrangement of employment advertisements implicitly involves protected communication of ideas, the only message meaningfully communicated by the headings is that employers advertising thereunder will discriminate in their hiring. Petitioner is, of course, free to publish news stories informing the public that certain employers are engaging in discriminatory hiring; but commercial advertising of prohibited services, activities or products—which is all that is involved here—is not constitutionally protected speech. See, *e.g., Donaldson* v. *Read Magazine, Inc.,* 333 U.S. 178, 191; and authorities collected in *New York State Broadcasters Ass'n* v. *United States,* 414 F. 2d 990, 996–997 (C.A. 2) ("Clearly an advertisement listing the names and addresses of sellers of narcotics or of fraudulent stock could constitutionally be banned.").

CONCLUSION

For the reasons stated above, the judgment of the Commonwealth Court of Pennsylvania should be affirmed.

Respectfully submitted.

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