In the

Supreme Court of the United States

PITTSBURGH PRESS COMPANY,

Petitioner,

v.

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

Respondents,

and

THE NATIONAL ORGANIZATION FOR WOMEN, INC.,

Intervening Respondent.

No. 72-419

Washington, D. C.
March 20, 1973

Pages 1 thru 50

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PITTSBURGH PRESS COMPANY, Petitioner,	:	
v.	:	No. 72-419
THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH, Respondents, and THE NATIONAL ORGANIZATION FOR WOMEN, INC., Intervening Respondent.	:	

Washington, D. C.,

Tuesday, March 20, 1973.

The above-entitled matter came on for argument at 11:23 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

CHARLES R. VOLK, ESQ., Thorp, Reed & Armstrong, 2900 Grant Building, Pittsburgh, Pennsylvania 15219; for the Petitioner.

APPEARANCES [Cont'd.]:

EUGENE B. STRASSBURGER, III, ESQ., Assistant City Solicitor, 313 City-County Building, Pittsburgh, Pennsylvania 15219; for the Respondents.

MRS. MARJORIE H. MATSON, 822 Frick Building, Pittsburgh, Pennsylvania 15219; for the Intervening Respondent.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-419, Pittsburgh Press Company against The Pittsburgh Commission on Human Relations.

Mr. Volk.

ORAL ARGUMENT OF CHARLES R. VOLK, ESQ.,

ON BEHALF OF THE PETITIONER

MR. VOLK: Mr. Chief Justice, and may it please the Court:

The Pittsburgh Press Company has, as most newspapers in the country did have, a system -- and still do, I might add -- a system of classifying its Help Wanted advertisements under either Male or Female.

Sometime after the passage of the Civil Rights Act and after EEOC Guidelines, which indicated that male and female, as such, might be proscribed, and after the EEOC promulgated some Alternative Guidelines, which have since been overturned again by the EEOC in one of their changes of guidelines, The Pittsburgh Press went to a system of Male Interest and Female Interest and a third column heading, Male-Female.

Appropriately and prominently displayed in this -- in the wantads themselves, at the heads of the columns, were a rather large disclaimer box, entitled "Notice to Job Seekers", which pointed out that the classification was for

reader interest only and should not be construed as being a limitation, since most laws were laws in most jurisdictions, which proscribe discrimination on the basis of sex.

QUESTION: Who made the decision, just as a matter of fact, as to which column each ad went in?

MR. VOLK: As to which column each ad went in? The record is fairly complete on that, Mr. Justice White. The system is that the advertisement calls up and in essence says where he wants it. If he does not express a preference for placement of the ad, the newspaper will help him, where most ads of this type, Secretaries-Female, would appear.

QUESTION: So in this case there are instances, I suppose we're talking ads, part of which the newspaper made the decision as to which column it went in?

MR. VOLK: Yes, the newspaper will help.

QUESTION: Will help -- where it's the one that makes the decision as to which column to put it in.

MR. VOLK: It makes the final -- it reserves for itself the final determination; but I would be fatuous and untrue if I told this Court that that's the way it happens in actual practice. In actual practice, the advertiser who is seeking an employee calls in --

QUESTION: Invariably, then, the advertiser is the one who finally says to the newspaper, "Well, now that I've talked to you, I suggest it go into this column"?

MR. VOLK: Yes. Yes, sir, that's essentially the way it works.

And now we have Male Interest and Female Interest.

The City of Pittsburgh passed an ordinance --

QUESTION: So this isn't an independent judgment of the newspaper as to which -- it isn't its judgment as to whether this job is more attractive to males or females?

MR. VOLK: It isn't its judgment in any specific case, no. I would be fatuous if I said that.

However, we do contend that the newspaper gets into the act by making an editorial decision that there are jobs -- there is a large body of differing interests between males and females as they relate to the job market. And it is the decision of the newspaper to run column headings appealing to this read interest and permitting advertisers to place jobs, in that column.

QUESTION: Yes, but if the advertiser said -- if in each case the advertiser said to put it in the other column, the newspaper would put it in the other column?

MR. VOLK: Yes, it would. In this particular case --

QUESTION: But it's not its judgment in any case as to which -- as to whether the job is more fitting for males or females?

MR. VOLK: Not on the record. There could be, of

course, occasions where the newspaper would nudge it into one, or refuse to carry it; refuse to carry, perhaps, a go-go dancer in the Male section. But we can search throughout the record and not find any reference to that, I don't believe, sir.

I've re-read the record very carefully prior to this hearing.

QUESTION: But is there -- again, as a matter of fact, is there any question but what the decision to set up the classified ads, the Help Wanted ads, under this format was exclusively the decision of your client, the newspaper?

MR. VOLK: Absolutely, sir. That's why we're here.

QUESTION: That's what I thought.

MR. VOLK: It is the very strongly held opinion of Scripps-Howard Newspapers, who have the controlling interest in the Pittsburgh Press, and in the Pittsburgh Press that this does serve a legitimate reader and advertiser function in providing a, well, similar to playing Twenty Questions; the first question is always, "Is it animal, vegetable, or mineral?" And this makes a gross categorization from which you take off.

We feel that the cultural patterns -- or biological; we won't get into that debate, I trust -- for some reason men and women in this country prefer different types of jobs and it is a legitimate newspaper function to cater to these

differences by putting the ads in -- well, by providing differing columns wherein advertisers can place these ads.

QUESTION: And the proof is that advertisers utilize them?

MR. VOLK: Yes. If one reads the record and the allegations of the original complainants in this case, one would assume that these are placed there solely for the purposes of invidious discrimination that everybody who places an ad for a secretary is seeking to discriminate against male secretaries.

On the contrary, I think we could take judicial notice of the fact that the average advertiser is merely seeking an employee, and the idea of discrimination, one way or another, doesn't come into his mind. He's looking for an employee. If he advertises for a truck driver, the odds of him getting a female truck driver are relatively limited, no matter where he puts the ad.

Therefore, it is, even for the reader, a service which permits maximum -- for the advertiser, I'm sorry; for the advertiser it is a service which permits maximum reader response.

The complainants in this case and the City have made much that this is a service for the advertisers. It is a service for the advertiser, it is a service for the reader. It is an intention, a device to get maximum response to an ad.

QUESTION: How about the -- now, these were all ads for Help Wanted. How about ads for Positions Wanted, Jobs Wanted? That is job seekers advertising.

MR. VOLK: Job seekers are neutered. There aren't very many of them in regard to number, and they are merely placed in a Help Wanted, or Situations Wanted ad.

QUESTION: All just neutered, indiscriminately?

MR. VOLK: Yes, sir.

Now, --

QUESTION: Would you reject an ad if it said, "Middle-aged woman wants housekeeping job"?

MR. VOLK: Yes, they do that. They don't feel, necessarily, that they're compelled to; but the press does, in cooperation with the Pittsburgh Human Relations Commission, engage in a voluntary screening process on these ads.

It's part of our contention here that the First Amendment does not require them to do so; that's also the contention in the Hunter case, which is pending before this Court.

QUESTION: If it is a middle-aged woman who wants a job, isn't she -- and she wants to say she is a middle-aged woman who wants a job, you wouldn't reject her ad because of that, because she didn't say she was a man, would you?

MR. VOLK: I believe the City would attempt to get her -- to dissuade her from placing it --

QUESTION: Really?

MR. VOLK: -- because of their agreement with the Human Relations Commission.

Of course we reject all kinds of ads. I just got involved in massage parlors recently --

QUESTION: That's true, --

MR. VOLK: -- in rejecting ads for --

QUESTION: -- that's a different subject.

MR. VOLK: We do censor ad content voluntarily, based on the editorial judgment of the newspaper.

QUESTION: But you see no First Amendment problem in either rejecting or trying to control an ad, "Middle-aged woman wants housekeeping job"?

MR. VOLK: Yes, sir, I see a First Amendment problem in forcing a newspaper to do it. I think they've got the right to censor it if they wish.

But I see a First Amendment problem if the newspaper wished to resist, which is precisely the case in the Hunter case, which of course is sort of a companion to this one, in which petition for rehearing on certiorari is pending before this Court.

That was precisely the issue there. And --

QUESTION: Mr. Volk, sometime in the last two or three weeks I remember seeing some sort of a statement from some paper that it was going to start publishing wantads for

nothing, without charging people for them. And that led me to wonder whether want-ads, from the newspaper's point of view, are an inducement to buy the paper to the readers as well as a way of raising revenue, so far as the newspaper is concerned.

MR. VOLK: Yes. It's part of our contention -- I will have it later in my argument -- that a newspaper, Mr. Justice Rehnquist, is a forum, a country marketplace, if you will, a Roman forum of the flow of information and ideas.

And a very significant part of this is the want-ad columns. They are used by the Department of Labor, for example, as one of their indicators of economic health, the number of lines appearing in the accumulated want-ads throughout the country.

They are an interchange of people who have a right to a job, seeking a job, and people who wish to hire people, trying to find these people who are seeking jobs. It provides a very major community service.

Now, I'm not prepared to answer whether the company makes money on them or not. I suspect it does. They charge for want-ads, and they do make a lot of their revenue in the newspaper through advertising, of course; and I suspect it is profitable. The Pittsburgh Press has a massive organization, accepting, editing and setting up classified want-ads.

But it is, and we are hotly contending that it is a major community service, and we further contend -- that's why

we're here -- that the complainants find this to be a major throat through which job applications flow, the job seeker seeking employers; and if they can control the discrimination, what they feel to be a discriminatory aspect of this, at that throat, then they can take a big step forward in eliminating discrimination without the difficulty of proving any individual act of discrimination or any individual intent to discriminate.

They can get what they culturally seek, which is broader job opportunities of broader job opportunities for women, something which we don't not necessarily disagree with editorially; but we feel that the place to battle this is not in the want-ad pages of the newspaper, particularly as it relates to the judgment of the newspaper as to how they're going to run those ads.

I hope that convolute an answer adequately addressed itself to your question, sir.

The Pittsburgh Press was, after Commission hearings, eventually found to be violative of the Pittsburgh City Ordinance in the way they place these ads. They were found specifically guilty of Section 8(j), which is aiding an employer in the act of discrimination.

It is important to note that no -- in the findings of fact of the Commission -- no act of discrimination on the part of any employer was found as a fact. There was minimal

testimony presented at the hearing, on the basis of one potential discriminatee, but no proof was ever addressed that this particular job situation was covered by the Ordinance. The Ordinance has several exceptions. There can be a basic occupational qualification -- a bona fide occupational qualification exemption. It applies to only employers of five or more, and it is limited to the City of Pittsburgh itself, and does not apply to domestic help.

So there was no indication in the one bit of evidence presented that it met any of these tests, and the Commission did not so find that it was discriminatory.

When we appealed the case through Common Pleas and through the Commonwealth Court, we were arguing (a) no discrimination was found, and (b) it was a violation of the freedom of the press to impinge on this judgment of the newspaper as to how it was going to arrange its classified editorial pages.

In both cases we were, if I may use colloquial words, sloughed off, simply saying that it is the law of the land that commercial advertising is not subject to First Amendment rights.

These, of course, are all contained in the opinions in the record.

The case usually cited was Valentine vs. Chrestensen, and we are here today to ask this Court to extend its concepts

of what constitutes First Amendment rights in a commercial context. As Mr. Justice Douglas said in the concurring opinion in Cammarano vs. United States, in speaking of Valentine vs. Chrestensen, "The ruling was casual, almost offhand. And it has not survived reflection."

He also said the press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion, which is precisely what we're talking about in this free flow of information here.

And I think very well put was a comment in the Harvard Law Review article on Deceptive Advertising, in 80 Harvard Law Review, where the commentator said: Yet no court -- talking about Valentine vs. Chrestensen -- Yet no court has undertaken to explain why commercial advertising does not deserve the title "speech" which enobles and protects social and religious advocacy; and it went on to call it the step-child of the First Amendment.

Now, we hold that in a developing line of cases in this Court, that the Valentine decision, which was referred to in the circuit court in the Hunter case, as being an unbroken line of authority from Valentine on. On the contrary, it may be unbroken, but it is a hazy and indistinct line at best; and in my reading of the cases, occasionally, if not broken, it certainly disappears like a road line on a snowy day. And we feel that the concepts developing in this Court,

as enunciated in New York Times vs. Sullivan and in the dissents in Bread vs. Alexandria, and in all of the newspaper cases, from Grosjean on, indicate that the Valentine case was simplistic, that the words and phrases of the circuit court, which said absolute prohibition of expression in the market place is illegal and is not to be saved by any commercial taint attached to the expression, requires very serious redefinition by this Court.

We are asking you to do so, Honorable Justices.

QUESTION: But you're not -- does your case hang on that?

MR. VOLK: Does our case hang on that? Our case hangs on two points: one is the freedom of the press argument; and the --

QUESTION: Well, I know, but let's assume Valentine survives -- is to survive. Then do you lose?

MR. VOLK: If Valentine survives, in some of its grosser language, its simplistic language, if no distinctions can be drawn, we may very well lose.

QUESTION: Because I would assume you wouldn't -- if there is any way around Valentine, that's reasonable, you would sugges we do that first rather than overrule?

MR. VOLK: Yes. Valentine, as I am sure you know, Mr. Justice White, is a two-page opinion. The circuit court, I believe, is two pages, it could be three; it's very short.

The circuit court opinion was a long and very closely reasoned opinion, and Valentine, just as Mr. Justice Douglas said, the opinion appears casual, almost offhand. And yet everybody has cited it for authority, that commercial speech deserves no protection, has no First Amendment rights.

This has been repeated so often in the authorities, citing Valentine, that we find that it's an inverted pyramid, it's a --

QUESTION: Well, I thought a major part of your argument perhaps was that even if commercial speech isn't protected, there's more to this speech here than commerce.

MR. VOLK: Oh, there certainly is. There is an editorial --

QUESTION: Well, forget about that part of it, if -- I suppose you say that we could decide the case in your favor without overruling Valentine at all?

MR. VOLK: Yes, you could, by deciding -- unless you take an extremely simplistic view of Valentine, which is to say if it's commercial it has no protection. I think you've already said in New York Times vs. Sullivan that merely because a matter is commercial, newspapers are bought and sold, wages are paid, money changes hands, --

QUESTION: Well, the advertisement in Times was distinguished from Valentine, wasn't it?

MR. VOLK: Yes, it was.

QUESTION: That was an advertisement in New York Times v. Sullivan.

MR. VOLK: Yes, it was a political --

QUESTION: It was an advertisement.

QUESTION: It was paid.

MR. VOLK: An advertisement.

QUESTION: And it was said that it was --

MR. VOLK: And in Valentine --

QUESTION: Valentine v. Chrestensen had nothing to do with the First Amendment questions raised by that advertisement. That's what Times v. Sullivan held, wasn't it?

MR. VOLK: Yes. Valentine, of course, --

QUESTION: And are you suggesting you may make the same argument, perhaps for different reasons, as to this, as to these arguments?

MR. VOLK: Yes. Yes. I'm contending that as we begin to balance the various interests here, we can't simply say that just because it's commercial it has full First Amendment rights, just because -- I'm sorry, sir.

QUESTION: I just wonder, then, if the question Justice White put to you is one you ought to address yourself to; namely, assuming that Valentine v. Chrestensen is not to be overruled --

MR. VOLK: Yes.

QUESTION: -- like the advertisement in the New York

Times v. Sullivan, ought not we agree that these, too, should be distinguished?

MR. VOLK: We certainly think that you should, sir.

QUESTION: Why?

MR. VOLK: We feel that the help wanted arrangement, we have two points on that, both of which can be distinguished from Valentine unless, as you did in Sullivan, as I said, unless you would take an extremely rigid view of Valentine, that help wanted ads is editorial comment. It is a statement, -- the way we arrange them -- is a statement of the editor's opinion as to how best to service the readers and best appeal to the readers, just the way he arranges his paper vis-a-vis placing of television -- the television section, vis-a-vis the placing of the sports pages, and vis-a-vis where the editorial page is versus the front page where the average reader wouldn't be too enthused by it, to buy the paper, he puts it in the middle.

One may make a social commentary that maybe it should be on the front page. We say how he arranges his newspaper is an editorial judgment, and that this is not commercial.

And secondly, if it is, it is a mixed editorial and commercial policy.

Now, want-ads, as I pointed out in answer to a question, are a basic community service, they are like a

community billboard. And we feel that this is a forum that should be intruded upon only with great caution, as in New York Times vs. Sullivan.

I think it falls into Dr. Meiklejohn's theory of governing importance; as we know, that theory is an extremely broad one, governing importance is merely not politics. As quoted in Harvard Law Review, in that article on Deceptive Advertising, Meiklejohn's concept of governing interest is very broad indeed, including those forms of thought and expression within the range of human communication from which the voter derives the knowledge, intelligence, sensitivity to human values, required to sanely and objectively judge the power and duty of self-government.

QUESTION: There's a great difference between somebody using its expertise and its political thought and its editorial policy as to Vietnam and as to somebody getting a job as a plumber.

MR. VOLK: That argument has been made and has attractive merit, until we realize that we are in a law explosion, that we are -- those of us who labor in this vineyard out there see that every passage of every new Act of Congress, we have new guidelines, new regulations, and new rules that are imposed upon business. And we find that the newspaper business --

QUESTION: Well, business is not protected by the

First Amendment.

MR. VOLK: Well, I'd like to think that business has some protections under the First Amendment, Mr. Justice Marshall. I think a newspaper --

QUESTION: Well, I don't think the plumbing business has any protection under the First Amendment.

MR. VOLK: Well, I think the plumbing business, if he places a commercial advertisement in a newspaper, has certain First Amendment rights to express his -- to put his ad in. I think that's what our case is, to some degree, all about, that the commercial context is not totally devoid of First Amendment protection.

And just because somebody buys it or sells it or offers a commercial product does not leave them to the tender mercies of the due process aspect of the Fifth Amendment alone; but does come under some First Amendment protection, and that it is the duty of the courts, I think, to balance the hazard involved, the harm to be remedied with the right to be expressed.

And one of these is the right of a newspaper -- a newspaper, when you know how -- I shouldn't phrase it that way, of course you know. The First Amendment doesn't make it all freedom of speech, it mentions the press separately; it says freedom of the speech and of the press. The press has been a peculiar institution in this country since the days

of the Framers of the Constitution, with Jan Pieter Zinger, in his trial. The press is a major complex business, which provides a basic interflow of communications and ideas, and one of them is want-ads.

One of the aspects here is the placement of want-ads. And it may be a small chip, as we say in our brief; I like to refer to it as the Lilliputians tying down Gulliver. He's a big giant, and every little rope that they put across him is no bigger than a sewing thread, eventually tied him with girth.

And that's what we have with the newspapers, as these guidelines proliferate and the newspapers become the enforcement arm of agencies seeking to produce meritorious -- or not meritorious, we don't pass judgment on that here. I'm not trying to redraft the ordinance. But as these agencies attempt to use the newspapers of the country as enforcement arms, as they have here, and as they did in Hunter, making them a screening agency, this impinges on the freedom of that newspaper to control its pages --

QUESTION: Does the newspaper retain the right to take what they like of it?

MR. VOLK: I'm sorry, sir, I missed the first part of your question.

QUESTION: The newspaper retains the right to take whatever regulations they like and reject those they don't like, as witness the fact that you said the middle-aged woman

couldn't put the ad in --

MR. VOLK: In the Pittsburgh Press.

QUESTION: Yes. So you take what regulations you like and you discard what you don't like.

MR. VOLK: Well, --

QUESTION: Is that your position?

MR. VOLK: -- the -- Our position is that those regulations -- well, yes, on that one; that was a voluntary act. Merely by committing a voluntary cooperation with the Human Relations Commission, I don't think obligates us to take the whole law, if it impinges on us some way we wish to challenge in court.

The Pittsburgh Press Company decided that it had a commitment to civil rights and to certain social change, and did indeed work with the city's Human Relations Commission and with the State Commission on the content of ads. But it did not do so under compulsion of law, were they were forced to do something which they, in their best judgment, did not think was proper, they fought; and here we are.

Now, I say that we can't pick and choose those regulations which we find meritorious, but most certainly, sir, we have the right to challenge those regulations which, in our opinion, impinge on the freedom to run that newspaper in an efficient manner in conducting the interflow of information in the way we see fit.

In that Hunter case, the circuit court said that the newspaper has no problem divining the intent of the ads that it publishes. And even though the HUD guidelines, under which they are working in the Civil Rights Act of 1968, say that the use of catch words, locations, which might indicate a discriminatory intent in housing are proscribed. And the newspaper is a co-defendant in these cases.

Yet the circuit court says the newspaper has the duty to divine the intent of those ads that it prints.

Here we have exceptions to this ordinance. The Commonwealth Court has found that the City of Pittsburgh cannot regulate the want-ad advertising of advertisers outside the city, merely because the paper is printed there. We have the under-five employment exemption; we have the domestic employment exemption. And yet we have to guess, or find out, whether the employer who is seeking an employee fits under one of these exemptions. And we do so at our peril.

QUESTION: Mr. Volk, some communities have an ordinance, for example, that prohibits a restaurant from employing waitresses between the hours of 2:00 A.M. and 6:00 A.M.

MR. VOLK: Yes.

QUESTION: Do you have such a one in Pittsburgh, do you know?

MR. VOLK: No, sir; not to my knowledge. We used

to have a barmaid law in Pennsylvania, but that's been repealed.

QUESTION: Well, if you did, and a restaurant operator wanted help for the graveyard shift, what would be the attitude --

MR. VOLK: Well, our attitude, we could take the ad any way we wanted it; the city's attitude is he's got to go and get a bona fide occupational exemption certificate from the city, and then when they present us the certificate we can print it.

QUESTION: Incidentally, you did print a disclaimer in your newspaper --

MR. VOLK: Yes.

QUESTION: Are you placing much emphasis on this?

MR. VOLK: Well, I wrote it.

[Laughter.]

MR. VOLK: Disclaimers have been challenged, of course, in civil rights cases for a long time. But I think where you have a record like this one and a legitimate body of desire for jobs, I think you can legitimately rely, to some degree, on a disclaimer. It's merely not a guise.

We say, too, that in publications of limited interest, such as Sports magazine, the magazine MS, the black newspapers that we have in most of our urban centers. If they take an ad, it is, in essence, an expression of a preference for the

limited readers, the limited group of readers that they represent. And that if our newspaper can't take a job -- put an ad under a Female Interest column, then it probably couldn't put it under the society page; and we seriously doubt, if you extend that, that putting it in a special-interest publication constitutes expression of a preference, we wonder what will happen to the LFCC regulations and affirmative action programs that forces government contractors to apply -- to advertise for jobs in black newspapers, Spanish-speaking newspapers in appropriate areas, and others. Because those are definitely an expression of a preference.

Are those newspapers to be placed on their peril to be sure that the advertiser also advertise some place else, to get a wide range or body of response to the ad?

Judge Crumlish of the Commonwealth Court addressed himself to that very point, he mentioned, I believe, MS magazine and Ebony, when he discussed: are we to really get in and censor, and by making them aiders, which is what we were accused of and found guilty of here, being an aider in discrimination merely because the Ku Klux Klan Journal runs a -- if they have such a thing -- runs a want-ad section.

And I think we can take judicial notice of the fact that if an employer placed a want-ad for an employee in the Ku Klux Klan Journal, he is not likely to get too many employees who were not white Anglo-Saxon Protestants, and

probably Southern.

I think we find that the newspapers are being impinged on with some significant degree, and as one court said, this may be an idea whose time has come; but we ask that it should be let come through the free interchange of ideas and through the interchange of advertisers and readers, and through cultural change, if it will. Let it not come through government fiat and the cultural predilections of local special-interest groups or government officials.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Strassburger.

ORAL ARGUMENT OF EUGENE B. STRASSBURGER III, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. STRASSBURGER: Mr. Chief Justice, and may it please the Court:

I represent the City of Pittsburgh and its Human Relations Commission.

The Commission, like the EEOC and similar commissions in other States, many of which are represented by amicus briefs here today, was created in an attempt to eliminate discrimination, including employment discrimination.

A 1969 amendment to the Human Relations Ordinance of the City of Pittsburgh added a prohibition on the basis of sex to the other prohibitions on race, religion, national origin grounds.

The relevant section of the ordinance for our purposes is Section 8, Section 8(e) makes it an unlawful employment practice to publish or cause to be published an advertisement indicating any discrimination on the basis of sex.

Section 8(j) prohibits any person, which is defined so as to include a newspaper, from aiding or participating in the doing of an unlawful employment practice.

The National Organization for Women filed a complaint alleging that the press had violated Section 8(j) in permitting advertisers to advertise in these sex-segregated columns.

The Commission, after a hearing, and then the Common Pleas Court and the Commonwealth Courts of Pennsylvania, held that there were violations of the ordinance and that no constitutional rights of petitioner had been abridged.

There are two constitutional questions raised here. The First Amendment question, which I will deal with, and the due process question, which counsel for the National Organization for Women will discuss.

Respondents believe that there is no First Amendment violation in this case. This Court has continually held that constitutionally protected speech is less than absolute, and the courts have pointed out several ways. Justice Harlan, in the Konigsberg case, mentioned two.

First he said that speech in certain contexts did

not have First Amendment protection; and secondly, he said that general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, were permissible so long as the laws were justified by an important government interest.

I think that to these two limitations we can add a third, which may just be a sub-category of the second; and that is that conduct, even where there is some idea associated with it, does not have the First Amendment protection that pure speech has.

The petitioner's activity in this case, we believe, fails to qualify for First Amendment protection on not just one of these bases, but on all three.

First of all, it's commercial speech, and this is one of the contexts where this Court has held that the First Amendment does not apply. It began in the unanimous decision of this Court in Valentine v. Chrestensen, in 316 U.S., where the Court said that while freedom of communicating information of course enjoys a high degree of protection, the Constitution imposes no such restraint on government as respects purely commercial advertising.

We believe that Valentine is good law today, it's been cited with approval by this Court in many cases, which we point out in our brief; and it's been cited with approval in New York Times v. Sullivan, which we find very surprising

that the petitioner relies on. That was a political advertisement in that case. It recited grievances, it protested claimed abuses, it expressed opinion, and the Court was very careful to distinguish that political advertisement from the commercial advertisement in Valentine v. Chrestensen.

And I think that New York Times, the political advertisement there can be distinguished from the advertisements involved in this case on the same basis. This non-protection of commercial speech, we believe makes a great deal of sense. Professor Emerson has rationalized it as applying -- as commercial speech applying to a separate sector of economic activity, an area that involves economic interests rather than the interests of free expression, the production of goods and services.

In the terms that this Court used in Chaplinsky v. New Hampshire, we're not dealing with any essential part of exposition of ideas. I again find it surprising that petitioner would rely on the Meiklejohn view of First Amendment applying to governing speech, because we feel that that's a situation where -- his theory says that public affairs, speech that has to do with public affairs is protected. And I think that this Court indicated in New York Times that it was endorsing the Meiklejohn theory when it distinguished between public libel and private libel.

It would seem to me fairly obvious that this case

falls on the private side of the public-private dichotomy.

The petitioner's answer to this is, Well, the advertisements themselves may not be ideas, but the column headings are ideas. They're different.

MR. CHIEF JUSTICE BURGER: We will take up there after lunch, counsel.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: You may resume, Mr. Strassburger.

ORAL ARGUMENT OF EUGENE B. STRASSBURGER III, ESQ.,

ON BEHALF OF THE RESPONDENTS -- Resumed

MR. STRASSBURGER: Mr. Chief Justice, and may it please the Court:

Before the luncheon break, I was indicating that these commercial advertisements are non-ideas, and the petitioner's response to this is to say that the ads themselves may not be ideas but that the column headings are different, that they are abbreviated editorial comment that certain jobs are of more interest to men than to women.

However, this argument corresponds neither to the facts nor the law.

In answer to the question that Justice White asked, the paper does not give the slightest thought to whether the advertised job interests men or women, it goes wherever the advertiser wants the ad to go, regardless of whether the newspaper might have thought that this is a female type job or a male type job.

QUESTION: But the newspaper has, in setting up this setup on its help wanted pages, given advance thought to the proposition that some jobs may be of more interest to women,

and other jobs of more interest to men. It has given thought to the basic idea, and has conceptualized that idea in the setup of its classified advertising; hasn't it? And that was the newspaper's decision, at least that's what counsel answered to me.

MR. STRASSBURGER: Your Honor, I don't think that this is any more an idea than, say, that a violator of the antitrust laws says that, well, his violation of the antitrust laws shows his idea that monopoly is beneficial to society.

QUESTION: Well, but that doesn't involve -- perhaps you're quite right.

But you're not contending here that it's the advertisers who have forced the newspaper to do this, or have persuaded the newspapers to do this, or that it's the advertiser's idea for the newspaper to set it up this way, are you? Because I understood the facts were otherwise.

MR. STRASSBURGER: No. The newspaper sets up the framework, but the advertiser, by placing an advertisement in this sex-segregated column, is discriminating. I think Mrs. Matson will get into this in more detail, but the ordinance defines discrimination as any difference on the basis of sex.

QUESTION: Yes.

MR. STRASSBURGER: And by placing an ad in this sex-segregated column, the advertiser is discriminating and the newspaper is aiding that.

QUESTION: What about the hypothetical situation I put to your friend, about the woman who is middle-aged and has no skill except she knows how to take care of a house, putting an ad in the paper: "Middle-aged woman wishes housekeeping job, living in." No problem with that?

MR. STRASSBURGER: I completely disagree with the answer that Mr. Volk gave.

QUESTION: What would yours be?

MR. STRASSBURGER: Well, first of all, it's not covered by the ordinance. We're talking about help wanted, not jobs wanted. The ordinance speaks of an employer, an employment agency or a labor union placing an ad indicating discrimination.

QUESTION: All right. Then turn it around the other way now. Now we have a man who has a wife who is a semi-invalid and two small, at least adolescent, children, and he wants a housekeeper who is a woman, and he'd like some stable, middle-aged woman. Can he specify all of that in the ad?

MR. STRASSBURGER: He can do that because, No. 1, he's not covered by the ordinance either, because the ordinance excludes situations of five or fewer employees.

QUESTION: All right. Let's move over. Now it's an employment agency doing this.

MR. STRASSBURGER: If the job is certified as a

bona fide -- as having a bona fide occupational qualification, then either an employer or an employment agency can place this type of ad.

This is why this screening argument that the petitioner makes is a complete red herring in this case. There is no screening argument. Even if this were a situation where the speech allegedly being chilled, as in Smith v. California, were protected speech, there wouldn't be any screening argument because it's perfectly clear to the newspaper whether this job has a bona fide occupation qualification. It doesn't have to guess whether there is a BFOQ for this job. Section 7(d) of our ordinance, as well as a parallel provision in the State ordinance, provides that if there is a -- if the employer wants a bona fide occupation exemption, it can apply to the Commission and get that exemption.

So there is no problem in your hypothetical.

QUESTION But the Commission isn't required to give that exemption, isn't that some judgment left with the Commission as to whether or not it will give such an exemption?

MR. STRASSBURGER: Well, certainly there is a judgment involved, there's a judgment involved in all of these Commissions as to whether a job cannot be performed by a male, or cannot be performed by a woman, and perhaps the exemption is somewhat broader than that; for instance, a man

probably could be a lingerie salesman, but probably it would qualify for a bona fide occupational qualification under our present situation.

This type of job has been granted a BFOQ, even though there is some testimony in the record that that shouldn't qualify.

I don't know what the Commission would necessarily do with that sort of case, but as far as the Pittsburgh Press is concerned, it doesn't have any problem as far as screening these advertisements. It knows, because there either is an exemption or there isn't.

QUESTION: Who has to get the exemption, the employer or -- the employment agency or the newspaper?

MR. STRASSBURGER: The advertiser, whomever that may be.

Now, in addition to the fact that the paper doesn't consider whether this is a job that interests men or women, even if this setup were created so as to cater to the reader preference, that would not excuse this violation of the Act, and the circuit courts have so held. In the Diaz case in the Fifth Circuit, involving a stewardess, the employer argued: Well, my customers prefer women as performing this job on airplanes.

And the court said that doesn't excuse discrimination, what your customers prefer. And even if --

QUESTION: Did that case involve a newspaper?

MR. STRASSBURGER: No, Your Honor, it didn't.

QUESTION: Well, that's the big difference here. I mean that's at least one of the two issues here is the First Amendment, and the First Amendment doesn't protect airline companies.

MR. STRASSBURGER: Well, Your Honor, the first contention is that this --

QUESTION: Unless they want to speak.

MR. STRASSBURGER: -- that these are non-ideas, and these headings can't raise non-ideas to the level of ideas. And I'd like to point out that this statute, this ordinance that we're dealing with here, is not an unusual statute. There are, I think a holding in this case that the First Amendment was violated would inferentially overturn many, many other statutes, all of which have been sustained by the courts on First Amendment grounds.

For instance, the Civil Rights Act of 1964, which was held by the Fifth Circuit, in the Hailes case, to prohibit an employer from placing a want-ad in a sex-segregated column.

QUESTION: Well, it's one -- excuse me.

QUESTION: Have those holdings been predicated on Valentine v. Chrestensen?

MR. STRASSBURGER: Most of them have, Your Honor.

QUESTION: It's one thing, it would occur to me, to prohibit an employer from discriminating in his hiring policies as among races or sexes or anything else, and also to prohibit him from advertising that would indicate any discrimination. But that's quite another thing from government putting a restriction on the newspaper as to what it can print.

MR. STRASSBURGER: Well, Your Honor, --

QUESTION: In advance.

MR. STRASSBURGER: Well, as far as the in advance argument is concerned, this Court and other courts have held that the prior restraint argument does not apply where this speech is not fully protected. For instance in the Lorain Journal case --

QUESTION: That all gets us back to Valentine v. Chrestensen, doesn't it?

MR. STRASSBURGER: No, Your Honor, it doesn't necessarily.

First of all, we feel that this falls directly within Valentine v. Chrestensen, the case is interpreting the '64 Civil Rights Act, the '68 Civil Rights Act, and various other statutes involving cigarettes, lotteries, corporate press releases, this sort of thing, have all held that commercial speech is not protected.

But in addition to this, even if we were to assume

that we are dealing with speech that in some circumstances might have been protected, this Court has also held that general regulatory statutes which incidentally affect speech can -- are permissible if there's a valid societal interest involved.

For instance, just last term, in Branzburg v. Hayes, which I'm sure you're familiar with, with all the publicity recently, eight of the nine Justices here said that we have to balance the First Amendment interest of newspaper reporters against the governmental interest in forced testimony.

You didn't all agree as to where that balance should be drawn, but you all said it had to be balanced.

QUESTION: Yes, but that case didn't, either, involve the government telling a newspaper what it could and could not put in its newspaper.

MR. STRASSBURGER: Well, there have been cases which have so held in this Court -- it's our feeling that what the petitioner says here is that we're entitled to special protection, because we're a newspaper.

But in this economic area, it's not entitled to more protection just because it has editorial functions than the art in Valentine was entitled to protection because it was appended to the back of a political protest.

This Court, in the cases involving the National Labor Relations Act, the Fair Labor Standards Act, the Sherman

Antitrust Act, has held that newspapers are subject to those Acts; and in the Lorain Journal case, that was a case where the newspaper was refusing certain advertisements because -- it refused advertisements whenever the advertiser advertised in a competitor, competing radio station. And this Court said it was permissible to tell that newspaper that you have to accept advertisements from those advertisers.

QUESTION: Or at least you can't refuse them on that ground, wasn't it more narrowly than that?

MR. STRASSBURGER: I think that's probably true. I know this Court has before it cases now as to whether various media have to accept certain advertisements, as to whether they have the full freedom of contract there or not. I don't think that's involved in this case.

QUESTION: But you seem to separate the First Amendment completely from the economic aspect, but could a newspaper survive if it just sold the newspapers to readers without any advertising?

MR. STRASSBURGER: Your Honor, we're not saying that the newspaper can't have this advertising. All they have to do is put it in a single column.

According to their argument, they're losing money by putting it in separate columns. I don't know whether that's true or not, but it's clear from this record that there is not much difference one way or the other as far as money

is concerned in this case.

This isn't a situation like the Grosjean case, where there was an advertisement -- excuse me, a statute aimed directly at a newspaper. And here it's a situation where there's a general anti-discrimination statute, a statute premised on an important governmental interest here. I think it's an overwhelming reason here. The vast amount of discrimination against women, the statistics are in the record here, and Mrs. Matson will go into this.

And in addition to the overwhelming reason for this, the burden on the press is absolutely minimal. If the press, if the newspaper is expressing any kind of idea here --

QUESTION: Mr. Strassburger, supposing that your Commission applied the regulations and ordinance that it now has and felt it just wasn't getting far enough in eliminating employment discrimination, because there were still nuances in the want-ads that it just couldn't seem to eliminate, and suppose the City of Pittsburgh then decided that there will be no help wanted ads permitted in the newspapers, we're going to funnel them all through public employment agencies, where we can make sure that these nuances are eliminated.

Now, would you think that was constitutional?

MR. STRASSBURGER: Then you have the situation like the Grosjean case, where the newspaper is really being deprived of its life-blood, and I would think that that would be an

entirely different situation than we have here.

I would just like to say one other thing with regard to the fact that this Court, even the absolutists on this Court, with regard to free speech, have said that conduct can be regulated. And that's what we have here. The newspaper isn't prohibited from expressing its idea. If all it were doing was expressing an idea, it would be satisfied to express it in an editorial or a news column.

But it says, Well, we have to do it in the want-ad headings.

QUESTION: What is the conduct?

MR. STRASSBURGER: The conduct is participating in this discriminatory scheme. And again and again, just in the last few months ago in California v. LaRue, Justice Rehnquist said that conduct does not have the protection that pure speech has.

QUESTION: Mr. Strassburger, in connection with the distinction you are now drawing between editorial and commercial advertising, may I put this hypothetical:

Suppose an employer, who profoundly disagreed with the social utility of the ordinance in question, went to the newspaper and said, I want to buy a full-page ad in which to express my disapproval of the ordinance and include in it a statement to the effect that I want to engage women only for whatever his business may be, and I want to state the

reasons why I think they should be exempt from this law or that the law is invalid.

Would that be something that, in your view, the newspaper would be prohibited from publishing?

MR. STRASSBURGER: Your Honor, if we're dealing with just the editorial type advertising, if they're not actually hiring people, then I think it's a New York Times V. Sullivan situation, and this is protected speech under the First Amendment.

They could have this editorial advertisement.

If, on the other hand, this is just a subterfuge like Valentine v. Chrestensen, with protected speech on one side and unprotected speech on the other, then I feel that there's no protection for this, and they're governed by the ordinance, that they are violating the ordinance.

I want to conclude by saying that both the press in its amicus, the Newspapers Publishers' Association, seem much more concerned about future cases than this case. And it seems to us that so long as this Court sits, it can prevent the intrusions on the First Amendment, which petitioner fears and which we desire no more than they.

Thank you.

MR. CHIEF JUSTICE BURGER: Mrs. Matson, Mr. Strassburger, your colleague, has used up some of your time, but in view of these arguments we will give you your full ten

minutes.

ORAL ARGUMENT OF MRS. MARJORIE H. MATSON,

ON BEHALF OF THE INTERVENING RESPONDENT

MRS. MATSON: Thank you, Chief Justice Burger, members of the Court:

I am representing in this proceeding the National Organization for Women.

The National Organization for Women, as I am sure you must have heard or read in the newspapers, if nowhere else, is an organization which is committed to the advancement of the rights of women, to the elimination of discrimination based upon sex. It has been in existence for a number of years, and in this case the original complaint was filed by a male member of NOW, Gerald Gardner, the treasurer of the organization and an active member in the group.

The organization participated in offering testimony at the Commission, and was instrumental in bringing in the federal officials who testified in support of the policy which was adopted by the city ordinance, and which was being, we contended, violated in terms of the want-ad classifications used in the Pittsburgh Press, and the only other metropolitan newspaper, the Post-Gazette.

The Commission found in our favor and made specific findings of fact, which were then, when affirmed by the highest state court to review this, our Commonwealth Court,

should be fairly conclusive of the issues involved here. Particularly in terms of the limitations which this Court has observed in recent years as to the reviewal of substantive due process questions.

Now, of course, the real thrust of this case is the attempt by women to abolish a very important, albeit it may seem subtle, attempt to keep women in the place that they have traditionally been. And in fact the argument for petitioner suggests this, they talk about women being secretaries, and apparently this is the basis for their whole classification system.

That is, that there are certain kinds of jobs which women have had traditionally, and therefore they should ought to go on having in the future.

Now, this is the kind of thing that is involved in this case, the feeling on the part of, no doubt, some of the employers who advertise in the paper and certainly by their own admission on the part of the newspaper, that women should be kept in their place.

And this is the issue involved here, as to whether they may in fact do that in view of the Equal Protection Clause, the Due Process Clause, the other aspects of the Federal Constitution which have served to bring black people out of bondage, and which now we are calling up to serve as a way of meeting the economic problems of women.

At the hearings before the Commission, and we have given you some statistics in our brief as well, and other of the amicus briefs contain economic data here which is of great significance in this case, because it does establish that women have been discriminated against jobwise.

That they have been deterred from applying for jobs, because they believe that they were not welcome. And it is at this point in the process the deterrence from even applying for a job that the Pittsburgh Press comes into the picture.

These classification headings, as you by now are very well aware, were set up by the press, but the place where the ad is to go, whether it is to go under Female Interest or Male Interest is determined, according to the testimony of the press employees who appeared, as being the decision of the employer himself.

Now, the covered employer who comes to advertise and who wants to discriminate against women, but knows that it's against the law, and that he can't put in an ad saying Males Only, or can't put it under a Males Only heading, can turn from this euphonism which is now being used by the paper, the same headings that were used before -- the headings that were used before were Jobs, Male Jobs, Female Jobs, Help Wanted for Male or Female; now they have changed that only slightly, only to say Male Interest, Female Interest. So that the seamstress will look under Female Interest jobs,

and the tailor who makes much more will look under the Male Interest jobs.

And this is such a --

QUESTION: Well, why wouldn't it be enough for the State to move against the employer and forbid the employe from indicating to the paper any preference whatsoever, unless he had a certificate?

MRS. MATSON: Well, Your Honor, the ordinance itself provides for people to get a certificate if they want a -- if there is a bonda fide occupational qualification.

QUESTION: I understand that.

MRS. MATSON: But we are trying to break down the classification system.

QUESTION: Do you think the press would continue this if the employer was forbidden, when the paper asked him to specify a column? Let's for the moment assume that no employer would ever break the law if it was forbidden to indicate a preference, and that whenever they were asked, they'd say: Awfully sorry, we just couldn't care less.

Do you think the press itself would then go on with this scheme?

MRS. MATSON: Well, that question, I guess, would have to be addressed to the press.

QUESTION: Well, don't you have to answer that question in terms -- before you can justify putting a prohibition

on the press itself?

MRS. MATSON: Well, Your Honor, the thing is that we could knock off one employment agency after another and go through all of those that's the clearest cut case here, I suppose get each of them enjoined from carrying the --

QUESTION: All right. So it's a conservation of resources. There's only one newspaper.

MRS. MATSON: It's a way -- well, there are two, but they are published together, so it's the same difference.

QUESTION: That's what I mean.

MRS. MATSON: But what we're trying to do is to get at the advertising, which is the thing which -- the advertising headings which are the message which is being conveyed to woman that they should stay away from applying for a particular job.

And as the Solicitor General said in the amicus brief filed in this case, the only message meaningfully communicated by the headings is that employers advertising thereunder will discriminate in their hiring, and that thus it does serve as a deterrence, you see, to women applying.

It's not anything that is said in the ad itself, rather, it is the headings under which the ads appear which deters women from applying for jobs for which they may very well be qualified.

QUESTION: Well, I take it that you concede, don't you, that if you could get an injunction against the press you could also get an injunction against the employer from communicating with the press as to what column to put it in?

MRS. MATSON: Well, then, you see, you would --

QUESTION: Well, could you or couldn't you?

MRS. MATSON: I don't know that you could, as a communication of that kind, I shouldn't think that we could reach that very readily, Your Honor.

QUESTION: Well, not readily but legally, could you?

MRS. MATSON: It seems to me that you would have to enjoin the individual employment agency or employer from advertising under a Male Help Wanted column, or a Female, as the case may be.

And in that case, I suppose that those employers could resort to the Male-Female heading which is available and which is practically not used at all, in terms of the column inches of spaces, only 100 in an average issue of a Sunday paper, as compared with 1600 column inches of Male ads and 400 for Female ads.

So that you would have an immensely difficult problem of reaching each of the employers, and it is a job which really is not forced upon us when we have the ordinance which says that anyone who aids in discrimination, and we say

that these headings are an aid, can be reached directly. And this is what we are trying to do in this case, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Volk, you have about four minutes left.

REBUTTAL ARGUMENT OF CHARLES R. VOLK, ESQ.,

ON BEHALF OF THE PETITIONER

MR. VOLK: I don't think I'll need that, Mr. Chief Justice.

May it please the Court:

Mr. Strassburger said something I think needs to be corrected. When he pointed out that the press is not called to do any screening.

This is an error which was picked up by the Appellate Division Courts of New York in the National Organization for Women vs. the State's Division of Human Rights, which was just reported in the CCH Employment Practices Decision Service, wherein they distinguished the Pittsburgh Press case in one of their own, where they did not permit a court to bar the -- in other words, they ruled our way in this particular given-fact situation. They permitted the sex-segregated want-ads to continue.

They distinguished the Pittsburgh Press case in that the Pittsburgh Press had a ready screening device with this certificate. But that only applies to the one exemption, the bona fida occupational qualification exemption. The

ordinance also excludes domestics and it excludes who do not live in the City of Pittsburgh, by Commonwealth Court order, and it excludes employers of less than five.

So that the press would still have thrust upon it the burden of screening out these other criteria.

QUESTION: Mr. Volk, if Equal Rights Amendment is ratified, is your First Amendment argument in any difficulty?

MR. VOLK: No, I don't think so. Pennsylvania has an Equal Rights Amendment to its own Constitution, and I apprehend the Constitution as it reads today to provide equal protection to women. I don't hold myself out as a major constitutional scholar, but I have personal difficulty in seeing any rights that will be granted to women by the Equal Rights Amendment that they don't already have by our own glorious document, that has served us so well for so many years.

I think they have all the rights that anybody else has.

The only other point I wanted to point out is that Mrs. Matson indicates that the Pittsburgh Press is in essence acting as a discourager of women. Actually this is not the case, the Pittsburgh Press is not attempting to keep women in its place, whatever that may be, and I think that's a racial epithet calculated to cause certain emotional reaction in the Justices. The Pittsburgh Press is not engaged

in any such an action at all.

The Pittsburgh Press just simply wants to reflect in its want-ads the status as it exists in job preferences, and whether the National Organization for Women likes it or not, they do not wish to be conscripted as unwilling hanissaries in the fight for social change, as the National Organization for Women foresee it.

Thank you, gentlemen.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Volk.

Thank you.

The case is submitted.

[Whereupon, at 1:30 o'clock, p.m., the case was submitted.]