

# The Burger Court Opinion Writing Database

## *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*

413 U.S. 376 (1973)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

February 23, 1973

Re: No. 72-146 - Hunter v. U. S.  
No. 72-419 - Pittsburgh Press Co. v. Pittsburgh  
Comm. on Human Relations

MEMORANDUM TO THE CONFERENCE:

In giving the Orders today we were confronted with a situation which may possibly alter the voting or at least the handling of both of the above cases.

The vote today on the Hunter case was to grant the petition and set for argument with Pittsburgh Press. Pittsburgh Press is set for argument in March, and it is very unlikely that the Hunter case can be brought on for argument this Term. At the very least, if it were brought on, it would mean postponing the Pittsburgh Press argument, along with Hunter to the last few days of oral argument, and we are already crowding that period.

There are three alternatives: (1) to proceed with the argument in the Pittsburgh Press as now calendared; (2) to make an effort to expedite Hunter and set both cases for the last few days of argument, even though this is a very unlikely possibility, or (3) to put both cases over until the next Term.

I would appreciate hearing from you on this. Meanwhile we will not list the action in the Hunter case on Monday's Order List but perhaps put it on a special order Tuesday or Wednesday if necessary.

Regards,

WE

*I would not press to  
have the cases argued together  
The common issue is the constitutional  
one & we can decide it in Pittsburgh  
Press. So therefore hear Pittsburgh Press  
& let Hunter come on when it's ready*

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WB

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

March 31, 1973

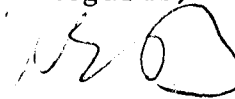
Re: No. 72-419 - Pittsburgh Press Co. v. Pittsburgh  
Comm. on Human Relations

Dear Bill:

I think I have come to rest on this case and, while it is still tentative, it is a tentative REVERSE. That being my learning, with Bill Douglas more firmly to reverse, I think you had better assign the case.

This is another one of our close cases in which some final votes will doubtless "turn on the writing".

Regards,



Mr. Justice Brennan

Copies to the Conference

9  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 12, 1973

Re: No. 72-419 - Pittsburgh Press Company v.  
The Pittsburgh Commission on  
Human Relations, et al.

Dear Lewis:

Please note at the end of your opinion that I dissent. Given all the pending problems I will not try to articulate my reasons although I may refer to a citation. Until we conclude the bounties that government gives the press, e.g., special anti-trust immunity and favored mail subsidies, render their acts "governmental action," I think government cannot deal with the content of a newspaper.

Regards,

WE B

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

June 20, 1973

Re: No. 72-419 - Pittsburgh Press Co. v. Pittsburgh  
Comm. on Human Relations

Dear Lewis:

Your added footnote is helpful and I add only a few words and a footnote so that the old page 4 will read as per the enclosed two sheets.

Regards,

WRB

Mr. Justice Powell

Copies to the Conference.

W-1111

reassurance. That conclusion is assertedly based on the view that the order affects only a "continuing course of repetitive conduct. P. \_\_\_\_\_, ante. Even if that were correct, I would still disagree since the Commission's order appears to be in effect an outstanding injunction against certain publications -- the essence of a prior restraint. In any event, my understanding of the effects of the Commission's order differs from that of the Court. As noted in the Court's opinion, the Commonwealth Court narrowed the injunction to permit Pittsburgh Press to use sex-designated column headings for want-ads dealing with jobs exempt under the Ordinance. The Ordinance does not apply, for example,

"to employers of fewer than five persons, to employers outside the city of Pittsburgh, or to religious, fraternal, charitable or sectarian organizations, nor does it apply to employment in domestic service or in jobs for which the Commission has certified a bona fide occupational exception."

P. \_\_\_\_\_, ante. If Pittsburgh Press chooses to continue using its column headings for advertisements submitted for publication by exempted employers, it may well face difficult legal questions in deciding whether a particular employer is or is not subject to the Ordinance. If it makes the wrong decision and includes a covered advertisement under a sex-designated column heading it runs the risk of being held in summary contempt for violating the terms of

or distributed without the specific authorization of the Hoover Institution Archives.

HOVER INSTITUTION  
ON WAR, REVOLUTION AND PEACE  
Stanford, California 94305-0001



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To: Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall ✓  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: The Chief Justice

Circulated: JUN 20 1973

Recirculated: \_\_\_\_\_

No. 72-419 - Pittsburgh Press Co. v. Pittsburgh Comm. on  
Human Relations

THE CHIEF JUSTICE, dissenting.

Despite the Court's efforts to decide only the most narrow question presented in this case, the holding represents, for me, a disturbing enlargement of the "commercial speech" doctrine, Valentine v. Chrestensen, 316 U.S. 52 (1942), and a serious encroachment on the freedom of press guaranteed by the First Amendment. It also launches the courts on what I perceive to be a treacherous path of defining what layout and organizational decisions of newspapers are "sufficiently associated" with the "commercial" parts of the papers as to be constitutionally unprotected and therefore subject to governmental regulation. Assuming, arguendo, that the First Amendment permits the States to place restrictions on the content of commercial advertisements, I would not enlarge that power to reach the layout and organizational decisions of a newspaper.


Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

February 26, 1973

Dear Chief:

As respects 72-146, Hunter and 72-419, Pittsburgh Press I think the best thing to do is to hear Pittsburgh Press and hold Hunter until after that argument to see if in light of our disposition of Pittsburgh Press. Hunter should be argued in the Fall, or disposed of summarily this Spring.

  
William O. Douglas

The Chief Justice

cc: Conference



March 21, 1973

Dear Potter:

You, Harry and I voted to  
reverse in No. 72-419 - Pittsburgh Press  
v. Commission.

Would you like to prepare  
a dissent?

W.O. D.

Mr. Justice Stewart

WD


Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

June 11, 1973

Dear Potter:

Please join me in your dissent in  
72-419, Pittsburgh Press Co. v. Pittsburgh  
Commission.

  
William O. Douglas

Mr. Justice Stewart

cc: The Conference

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file

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 72-419

Circulated: 6-13

Recirculated: \_\_\_\_\_

Pittsburgh Press Company, Petitioner, v. The Pittsburgh Commission on Human Relations et al.	}	On Writ of Certiorari to the Commonwealth Court of Pennsylvania.
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[June —, 1973]

MR. JUSTICE DOUGLAS, dissenting.

While I join the dissent of MR. JUSTICE STEWART, I add a few words. As he says, the press, like any other business, can be regulated on business and economic matters. Our leading case on that score is *Associated Press v. United States*, 326 U. S. 1, which holds that a news-gathering agency may be made accountable for violations of the antitrust laws. By like token, a newspaper, periodical, or TV or radio broadcaster may be subjected to labor relations laws. And that regulation could constitutionally extend to the imposition of penalties or other sanctions if any unit of the press violated laws that barred discrimination in employment based on race or religion or sex.

Pennsylvania has a regulatory regime designed to eliminate discrimination in employment based on sex; and the commission in charge of that program issues cease and desist orders against violators. There is no doubt but that Pittsburgh Press would have no constitutional defense against such a cease and desist order issued against it for discriminatory employment practices.

But I believe that Pittsburgh Press by reason of the First Amendment may publish what it pleases about any law without censorship or restraint by Government. The

7 Feb for no 72-419

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

February 26, 1973

RE: No. 72-146 Hunter v. United States  
No. 72-419 Pittsburgh Press v. Pittsburgh Comm.  
on Human Relations

Dear Chief:

I would not press to have the cases argued together. The only common issue is the constitutional one and we can decide it in Pittsburgh Press. I'd therefore hear Pittsburgh Press and let Hunter come on when it's ready.

Sincerely,

Bice

The Chief Justice

cc: The Conference

WB

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN JR

April 2, 1973

MEMORANDUM TO THE CONFERENCE

RE: No. 72-419 Pittsburgh Press Co. v. Pittsburgh  
Comm. on Human Rights

The Chief having advised me that I am to assign the  
above, I am assigning it to Lewis Powell.

W. J. B. Jr.

3  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

May 29, 1973

RE: No. 72-419 Pittsburgh Press Co. v.  
Pittsburgh Commission on Human Rights

Dear Lewis:

I agree.

Sincerely,

*Bul*

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

February 26, 1973

Re: No. 72-146, Hunter v. U. S.  
No. 72-419, Pittsburgh Press Co. v.  
Pittsburgh Comm. on Human Relations

Dear Chief,

Responding to your memorandum of February 23,  
I should prefer to proceed with the argument in Pittsburgh  
Press as now calendared, and to hold the Hunter petition  
for the Pittsburgh Press case.

Sincerely yours,

P.S.  
/

The Chief Justice

Copies to the Conference

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WP

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

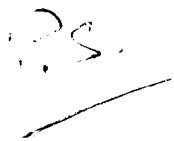
March 26, 1973

72-419, Pittsburgh Press v.  
Commission

Dear Bill,

Thank you for your note. I'll  
be glad to undertake a dissent in this  
case.

Sincerely yours,

*W.S.*  


Mr. Justice Douglas

WD



3  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

May 29, 1973

MEMORANDUM TO THE CONFERENCE

Re: No. 72-419, Pittsburgh Press Co. v.  
Commission

In due course I shall circulate a dissenting  
opinion in this case.

P.S.  
/

5 /  
Joined 28

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall ✓  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-419

From: Stewart, J.

Circulated: JUN 11 1973

Pittsburgh Press Company,  
Petitioner,  
v.  
The Pittsburgh Commission  
on Human Relations et al.

Recirculated: \_\_\_\_\_  
On Writ of Certiorari to  
the Commonwealth  
Court of Pennsylvania.

[June —, 1973]

MR. JUSTICE STEWART, dissenting.

I have no doubt that it is within the police power of the city of Pittsburgh to prohibit discrimination in private employment on the basis of race, color, religion, ancestry, national origin, place of birth, or sex. I do not doubt, either, that in enforcing such a policy the city may prohibit employers from indicating any such discrimination when they make known the availability of employment opportunities. But neither of those propositions resolves the question before us in this case.

That question, to put it simply, is whether any government agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot. Under the First and Fourteenth Amendments I think no government agency in this nation has any such power.<sup>1</sup>

It is true, of course, as the Court points out, that the publisher of a newspaper is amenable to civil and criminal laws of general applicability. For example, a newspaper publisher is subject to nondiscriminatory general

<sup>1</sup> I put to one side the question of governmental power to prevent publication of information that would clearly imperil the military defense of our Nation, *e. g.*, "the publication of the sailing dates of transports or the number or location of troops." *Near v. Minnesota*, 283 U. S. 697, 716.

— 4  
file

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall ✓  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-419

Circulated: \_\_\_\_\_

Recirculated: JUN 18 1973

Pittsburgh Press Company,  
Petitioner.

v.

The Pittsburgh Commission  
on Human Relations et al.

On Writ of Certiorari to  
the Commonwealth  
Court of Pennsylvania.

[June —, 1973]

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS joins, dissenting.

I have no doubt that it is within the police power of the city of Pittsburgh to prohibit discrimination in private employment on the basis of race, color, religion, ancestry, national origin, place of birth, or sex. I do not doubt, either, that in enforcing such a policy the city may prohibit employers from indicating any such discrimination when they make known the availability of employment opportunities. But neither of those propositions resolves the question before us in this case.

That question, to put it simply, is whether any government agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot. Under the First and Fourteenth Amendments I think no government agency in this nation has any such power.<sup>1</sup>

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<sup>1</sup> I put to one side the question of governmental power to prevent publication of information that would clearly imperil the military defense of our Nation, *e. g.*, "the publication of the sailing dates of transports or the number or location of troops." *Near v. Minnesota*, 283 U. S. 697, 716.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

February 26, 1973

Re: No. 72-146 - Hunter v. United States  
No. 72-419 - Pittsburgh Press Co. v.  
Pittsburgh Comm'n on Human  
Relations

---

Dear Chief:

I would let Pittsburgh Press come on as  
presently scheduled and let Hunter take its  
own course.

Sincerely,



The Chief Justice

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5  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 31, 1973

Re: No. 72-419 - Pittsburgh Press Co. v. The  
Pittsburgh Commission on Human  
Relations

---

Dear Lewis:

Please join me in your opinion in this  
case.

Sincerely,

*Byron*

Mr. Justice Powell

Copies to Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

February 27, 1973

Re: No. 72-146 - Hunter v. United States  
No. 72-419 - Pittsburgh Press v. Pittsburgh  
Comm'n on Human Relations

Dear Chief:

I would prefer not to have Pittsburgh Press heard by itself.

In view of the time difficulty in your second suggestion, I think it would be wiser to follow your third suggestion. However, if your second one can be worked out it would be agreeable.

Sincerely,

  
T.M.

The Chief Justice

cc: Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL


May 31, 1973

Re: No. 72-419 - Pittsburgh Press Co. v.  
Commission on Human Relations

Dear Lewis:

Please join me.

Sincerely,

  
T.M.

Mr. Justice Powell

cc: Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 12, 1973

Re: No. 72-419 - Pittsburgh Press Co. v. Pittsburgh Commission  
on Human Relations

---

Dear Potter:

You have my joinder in your dissent almost -- but not quite.

I agree basically with what you say but, of course, I cannot subscribe to the one paragraph beginning at the bottom of page 3. In this you attack some opinions I have joined and one dissent I wrote. As to the latter, I submit that the quote is out of context. You will recall, furthermore, that Hugo joined me in that one.

If you could see your way clear to omit that paragraph, I would join you. If you insist on its retention, I, of course, would not.

Because Bill Douglas has already joined your opinion, I am sending him a copy of this letter.

Sincerely,

Mr. Justice Stewart

cc: Mr. Justice Douglas

WJH



3  
Joined L P

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall ✓  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Blackmun, ...

Circulated: 6/12/73

Recirculated: \_\_\_\_\_

No. 72-419 - Pittsburgh Press Co. v. Pittsburgh  
Commission on Human Relations

---

MR. JUSTICE BLACKMUN, dissenting.

I dissent substantially for the reasons stated by Mr.

Justice Stewart in his opinion. But I do not subscribe to the

statements contained in that paragraph of his opinion which

begins on the bottom of page 3.

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3

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall ✓  
Mr. Justice Powell  
Mr. Justice Rehnquist

*Printed*  
1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Blackmun, J.

No. 72-419

Circulated: \_\_\_\_\_

Recirculated: 6/13/73

Pittsburgh Press Company,  
Petitioner,  
v.  
The Pittsburgh Commission  
on Human Relations et al.

On Writ of Certiorari to  
the Commonwealth  
Court of Pennsylvania.

[June —, 1973]

MR. JUSTICE BLACKMUN, dissenting.

I dissent substantially for the reasons stated by Mr. JUSTICE STEWART in his opinion. But I do not subscribe to the statements contained in that paragraph of his opinion which begins on the bottom of p. 3.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

February 27, 1973

Re: No. 72-146 Hunter v. United States  
No. 721419 Pittsburgh Press v. Pittsburgh  
Comm. on Human Relations

Dear Chief:

I would prefer to proceed with the argument in Pittsburgh  
Press and hold Hunter.

Sincerely,

*Lewis*

The Chief Justice

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

April 2, 1973

Re: No. 72-419 Pittsburgh Press v. Pittsburgh  
Commission on Human Rights

Dear Bill:

I will be glad to accept the assignment of the above case.

In reviewing my notes, they reflect a comment by you that this is a close and difficult case requiring a balancing of the important interests involved. I certainly agree fully.

You also remarked that you place some reliance on sex as being a suspect classification. As you know from our discussion in Frontiero, I am not prepared to conclude that sex is a suspect classification. But in my view of the case, we need not consider what level of scrutiny would be applied in an equal protection challenge to a statute discriminating on the basis of sex.

I start from the fact we have a valid exercise of the police power in an ordinance, the validity of which is unchallenged, prohibiting sex discrimination. The ordinance is directed against employers but, as one of the means of enforcement, it has been construed to prevent press advertisements which in a sense would aid and abet employers in the violation of the ordinance. Thus, the only limitation on the press is incidental to, and merely coextensive with, the valid prohibition against sex discrimination by employers. This is not a case where government has acted against the press per se.

There is, in addition, the point of distinction, in measuring the degree of interference with the press, between "commercial" and "editorial" content. I find this - at least initially - somewhat tenuous. It may, however, be a supportive argument.

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WP

- 2 -

If the foregoing is generally in accord with your thinking, I will produce a draft in due time.

Sincerely,

*Levin*

Mr. Justice Brennan

lfp/ss

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WB

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
- Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Powell, J.

Circulated: MAY 29 1973

No. 72-419

Recirculated:

Pittsburgh Press Company,  
Petitioner,  
v.  
The Pittsburgh Commission  
on Human Relations et al.

On Writ of Certiorari to  
the Commonwealth  
Court of Pennsylvania.

[June —, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

The Human Relations Ordinance of the City of Pittsburgh (the "Ordinance") has been construed below by the courts of Pennsylvania as forbidding newspapers to carry "help-wanted" advertisements in sex-designated columns except where the employer or advertiser is free to make hiring or employment referral decisions on the basis of sex. We are called upon to decide whether the Ordinance as so construed violates the freedoms of speech and of the press guaranteed by the First and Fourteenth Amendments. This issue is a sensitive one, and a full understanding of the context in which it arises is critical to its resolution.

I

The Ordinance proscribes discrimination in employment on the basis of race, color, religion, ancestry, national origin, place of birth, or sex.<sup>1</sup> In relevant part.

<sup>1</sup> The full text of the Ordinance and the 1969 amendment adding sex to the list of proscribed classifications is reproduced in the Appendix. App., pp. 410a-436a.

3 — P.14  
Joined  
5/31

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Powell, J.

Circulated: \_\_\_\_\_

No. 72-419

Recirculated: JUN 12 1973

Pittsburgh Press Company, Petitioner, v. The Pittsburgh Commission on Human Relations et al.	}	On Writ of Certiorari to the Commonwealth Court of Pennsylvania.
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[June —, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

The Human Relations Ordinance of the City of Pittsburgh (the "Ordinance") has been construed below by the courts of Pennsylvania as forbidding newspapers to carry "help-wanted" advertisements in sex-designated columns except where the employer or advertiser is free to make hiring or employment referral decisions on the basis of sex. We are called upon to decide whether the Ordinance as so construed violates the freedoms of speech and of the press guaranteed by the First and Fourteenth Amendments. This issue is a sensitive one, and a full understanding of the context in which it arises is critical to its resolution.

I.

The Ordinance proscribes discrimination in employment on the basis of race, color, religion, ancestry, national origin, place of birth, or sex.<sup>1</sup> In relevant part.

<sup>1</sup> The full text of the Ordinance and the 1969 amendment adding sex to the list of proscribed classifications is reproduced in the Appendix. App., pp. 410a-436a.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 16, 1973

Cases Held for No. 72-419 Pittsburgh Press v.  
Pittsburgh Commission on Human Relations

MEMORANDUM TO THE CONFERENCE:

Two cases were held for Pittsburgh Press.

1. Hunter v. United States, No. 72-146 (Petition for Rehearing). Petitioner is the editor of a newspaper which published a classified advertisement offering a furnished apartment in a "white home". In this action brought by the United States, the district court held that such an advertisement is barred by 42 U. S. C. § 3604(c). The court of appeals affirmed, and this Court denied cert. After cert was granted in Pittsburgh Press, petitioner filed a petition for rehearing.

We held in Pittsburgh Press that at least where the discrimination itself is illegal, a newspaper may be barred from carrying a discriminatory advertisement or from conveying the same meaning by its placement of advertisements beneath captions which indicate that the advertiser will discriminate. Since the landlord who placed the advertisement involved in Hunter was himself entitled to discriminate in his rental practices, Hunter presents the question left open in Pittsburgh Press: whether a newspaper can be forbidden from carrying advertisements which promote legal economic activity. I am nonetheless inclined to vote to deny the petition for rehearing, for two reasons: (1) it may be desirable to allow the lower courts to wrestle with the problem before readdressing it ourselves so promptly after Pittsburgh Press; and (2) Hunter may not be a good vehicle for deciding the question reserved in Pittsburgh Press because Congress has special power under the Fourteenth Amendment to combat racial discrimination.

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WP



2. Bigelow v. Virginia, No. 72-932. Appellant is the managing editor of a newspaper. He was fined for carrying an advertisement indicated that abortions were legal in New York and supplying telephone numbers and an address at which further information could be obtained. The statute under which he was punished made it a misdemeanor for a person to "encourage or prompt the procuring of abortion". The Virginia Supreme Court affirmed by a vote of 4 to 2.

The statute under which petitioner was convicted was not limited to a prohibition against commercial speech - all encouraging of abortion was prohibited, whether by editorial or by the carrying of a want-ad. Accordingly, even if petitioner could properly be punished for carrying this advertisement under Pittsburgh Press, the statute would very probably be overbroad in its sweep.

I would not, however, decide the overbreadth question at this juncture, nor would I address the Pittsburgh Press problems buried in the case. The courts below decided this case before Roe v. Wade and Doe v. Bolton, when the state's laws against the performing of abortions were assumed to be constitutional. Moreover, the Virginia statute under which petitioner was fined was amended last summer to limit the prohibition to the encouraging of abortions within the state and in violation of state law. Because of this confusion, I am inclined to note probable jurisdiction, vacate the judgment of conviction, and remand for reconsideration in light of Roe v. Wade and Doe v. Bolton in the expectation that the court below will conclude that the statute under which petitioner was fined did not survive Roe and Doe.

L. F. P., Jr.

SS

L. F. P.

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WB

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 20, 1973

No. 72-419 Pittsburgh Press

MEMORANDUM TO THE CONFERENCE:

In view of the dissent circulated today by the Chief Justice, I  
enclose herewith a footnote to be added in the Court's opinion on page  
14.

L. F. P., Jr.

*L. F. P.*

LFP/ gg

14. The dissent of the CHIEF JUSTICE argues that Pittsburgh Press is in danger of being "subjected to summary punishment for contempt for having made an 'unlucky' legal guess". Post, p. \_\_\_\_\_. The Commission is without power to punish summarily for contempt. When it concludes that its order has been violated, "the Commission shall 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 [a fine of not more than \$300.00] or both." § 14 of the Ordinance. Pet. App., p. 103a. But more fundamentally, it was the newspaper's policy of allowing employers to place advertisements in sex-designated columns without regard to the exceptions or exemptions contained in the Ordinance, not its treatment of particular want-ads, which was challenged in the complaint and was found by the Commission and the courts below to be violative of the Ordinance. Nothing in the modified order or the opinions below prohibits the newspaper from relying in good faith on the representation of an advertiser that a particular job falls within an exception to the Ordinance.

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7

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 30, 1973

Re: No. 72-419 - Pittsburgh Press v. Pittsburgh  
Commission on Human Relations

Dear Lewis:

Please join me.

Sincerely,

*WHR*

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 13, 1973

Re: No. 72-419 - Pittsburgh Press Co. v. Pittsburgh

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