

The Burger Court Opinion Writing Database

Carey v. Population Services International
431 U.S. 678 (1977)

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



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

CHAMBERS OF
THE CHIEF JUSTICE

December 2, 1976

RE: 75-443 - Carey v. Population Services

Dear Harry:

The second paragraph of your memo of today about a local case being set as the final case is appropriate since that has long been the rule - if there is a local case available!

Regards,

LCB

Mr. Justice Blackmun

Copies to the Conference

cc: Mr. Michael Rodak, Clerk

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

CHAMBERS OF
THE CHIEF JUSTICE

✓

January 25, 1977

Re: 75-443 Hugh Carey et al v. Population Services
International et al

MEMORANDUM TO: Mr. Justice Powell
Mr. Justice Rehnquist

I will undertake a dissent in this case.

Regards,

WRB

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

CHAMBERS OF
THE CHIEF JUSTICE

March 3, 1977

Re: 75-443 Carey v. Population Services

MEMORANDUM TO THE CONFERENCE:

I will suppress my urge to write in dissent
in this case until I see whether Bill Rehnquist does
justice to the opportunity!

Regards,

A handwritten signature in black ink, appearing to read "W. B." or "WB".

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

CHAMBERS OF
THE CHIEF JUSTICE

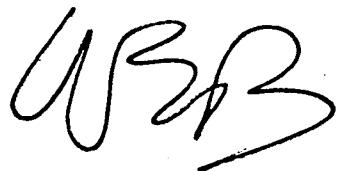
June 1, 1977

Re: 75-443 Carey v. Population Services International

Dear Bill:

Please show me at the appropriate point.
"The C.J. dissents."

Regards,



Mr. Justice Brennan

cc: The Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Sutherland
Mr. Justice Brandeis
Mr. Justice Holmes
Mr. Justice Taft
Mr. Justice Cardozo

Concordia 3/2/78

17. *Phragmites australis* (Cav.) Trin. ex Steud. (1840) 10: 100. (1840) 10: 100. (1840) 10: 100.

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-443

Hugh Carey, etc., et al.,
Appellants,
v.
Population Services
International et al. } On Appeal from the United States
District Court for the Southern
District of New York.

[March —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Under New York Education Law § 6811 (8) it is a crime (1) for any person to sell or distribute any contraceptive of any kind to a minor under the age of 16 years; (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons over 16; and (3) for anyone, including licensed pharmacists, to advertise or display contraceptives.¹ A three-

¹ New York Education Law § 6811 (8) provides: "It shall be a class A misdemeanor for:

"8. Any person to sell or distribute any instrument or article, or any recipe, drug or medicine for the prevention of contraception to a minor under the age of sixteen years; the sale or distribution of such to a person other than a minor under the age of sixteen years is authorized only by a licensed pharmacist but the advertisement or display of said articles, within or without the premises of such pharmacy, is hereby prohibited."

After some dispute in the District Court the parties apparently now agree that Education Law § 6807 (b) constitutes an exception to the prohibitions of § 6811 (8). Section 6807 (b) provides:

"This article shall not be construed to affect or prevent:

"(b) any physician . . . who is not the owner of a pharmacy, or registered store, or is not in the employ of such owner, from supplying

4,6

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

From: Mr. Justice B.

Clerk's Office

Refiled 3/10/77

2nd DRAFT

SUPREME COURT OF THE UNITED STATES**No. 75-443**

Hugh Carey, etc., et al.,
 Appellants,
 v.
 Population Services
 International et al. } On Appeal from the United States
 District Court for the Southern
 District of New York.

[March —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

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 (1) for any person to sell or distribute any contraceptive of
 any kind to a minor under the age of 16 years; (2) for anyone
 other than a licensed pharmacist to distribute contraceptives
 to persons over 16; and (3) for anyone, including licensed
 pharmacists, to advertise or display contraceptives.¹ A three-

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"This article shall not be construed to affect or prevent:

"(b) any physician . . . who is not the owner of a pharmacy, or
 registered store, or is not in the employ of such owner, from supplying

8,9

To: The Chief Justice
 Mr. Justice [redacted]
 Mr. Justice [redacted]

8:00 AM [redacted]

[redacted]

R. [redacted]

3/29/77

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-443

Hugh Carey, etc., et al.,
 Appellants,
 v.
 Population Services
 International et al. } On Appeal from the United States
 } District Court for the Southern
 } District of New York.

[March —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Under New York Education Law § 6811 (8) it is a crime (1) for any person to sell or distribute any contraceptive of any kind to a minor under the age of 16 years; (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons over 16; and (3) for anyone, including licensed pharmacists, to advertise or display contraceptives.¹ A three-

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 20, 1977

RE: No. 75-443 Carey v. Population Services

Dear Lewis:

I have read your circulation in the above with interest, and I don't think we are as far apart as might appear. I will shortly circulate a new draft that attempts to accommodate some of your concerns, and answer others.

Sincerely,

Wm. J. Brennan, Jr.

Mr. Justice Powell

cc: The Conference

9, 13, 17, 19-21

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

From: Mr. Justice Brennan

Circulated

Transcribed: 5/22/77

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-443

Hugh Carey, etc., et al.,
 Appellants,
 v.
 Population Services
 International et al. } On Appeal from the United States
 District Court for the Southern
 District of New York.

[March —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Under New York Education Law § 6811 (8) it is a crime (1) for any person to sell or distribute any contraceptive of any kind to a minor under the age of 16 years; (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons over 16; and (3) for anyone, including licensed pharmacists, to advertise or display contraceptives.¹ A three-

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"This article shall not be construed to affect or prevent:

"(b) any physician . . . who is not the owner of a pharmacy, or registered store, or is not in the employ of such owner, from supplying

8-9, 19, 21

stylistic changes
footnotes renumbered

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Scalia

FBI - NY - Justice Brennan

FBI - NY - Justice Stewart

FBI - NY - Justice White

FBI - NY - Justice Marshall

FBI - NY - Justice Black

FBI - NY - Justice Douglas

FBI - NY - Justice Brennan

5th DRAFT

FBI - NY - Justice Stewart

FBI - NY - Justice White

FBI - NY - Justice Marshall

FBI - NY - Justice Black

FBI - NY - Justice Douglas

SUPREME COURT OF THE UNITED STATES

No. 75-443

Hugh Carey, etc., et al.,
Appellants,
v.
Population Services International et al.

On Appeal from the United States
District Court for the Southern
District of New York.

[May —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Under New York Education Law § 6811 (8) it is a crime (1) for any person to sell or distribute any contraceptive of any kind to a minor under the age of 16 years; (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons over 16; and (3) for anyone, including licensed pharmacists, to advertise or display contraceptives.¹ A three-

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"(b) any physician . . . who is not the owner of a pharmacy, or registered store, or is not in the employ of such owner, from supplying

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 23, 1977

RE: No. 75-443 Carey v. Population Services International

Dear John:

May I suggest some "puzzlement" as to your treatment of my Part V. at pp. 5-6 of your opinion. You say that "The last paragraph of the opinion may be read . . . as implying that no . . . regulation of the content of contraceptive advertising is permissible as long as the advertisement is within the zone protected by the First Amendment." But throughout that paragraph, I attempted to suggest that various arguments do not justify the "suppression" or "total suppression" of such advertising. I was particularly careful, I thought, not to say anything about possible state regulation of contraceptive advertising, and to that end expressly reserved in n. 28 the question of time, place and manner restrictions, including those based on the offensiveness of the advertising. Hence my "puzzlement" that you find the implication you object to.

If and when that question of limited regulation arises, you and Lewis may well differ with me over its resolution, Cf. Mini-Theatres, but I had hoped that nothing in Part V, as it reads now, would prevent either of you from joining it, even if you were to express now your views on that question.

Sincerely,

Brennan

Mr. Justice Stevens

cc: The Conference

✓
Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 24, 1977

RE: No. 75-443 Carey v. Population Services International

Dear John:

Your suggested changes in Part V are entirely satisfactory and I very much appreciate them.

Sincerely,

Brennan

Mr. Justice Stevens

cc: The Conference

4-5, 13, 14, 16, and
typographical corrections

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

5/15/77

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-443

Hugh Carey, etc., et al.,
Appellants,
v.
Population Services
International et al. } On Appeal from the United States
District Court for the Southern
District of New York,

[May —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court.
Under New York Education Law § 6811 (8) it is a crime
(1) for any person to sell or distribute any contraceptive of
any kind to a minor under the age of 16 years; (2) for anyone
other than a licensed pharmacist to distribute contraceptives
to persons over 16; and (3) for anyone, including licensed
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¹ New York Education Law § 6811 (8) provides:
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licensed pharmacist but the advertisement or display of said articles,
within or without the premises of such pharmacy, is hereby prohibited."
After some dispute in the District Court the parties apparently now
agree that Education Law § 6807 (b) constitutes an exception to the
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"This article shall not be construed to affect or prevent:

"(b) any physician . . . who is not the owner of a pharmacy, or
registered store, or is not in the employ of such owner, from supplying

1, 12, 22 ✓

footnotes renumbered after 12

To: The Chief Justice
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Brewster
 Mr. Justice Stevens

Brennan

7th DRAFT

6/2/77

SUPREME COURT OF THE UNITED STATES

No. 75-443

Hugh Carey, etc., et al.,
 Appellants,
 v.
 Population Services
 International et al. } On Appeal from the United States
 District Court for the Southern
 District of New York.

[May —, 1977]

MR. JUSTICE BRENNAN delivered the opinion of the Court (Parts I, II, III, and V), together with an opinion (Part IV), in which MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN joined.

Under New York Education Law § 6811 (8) it is a crime (1) for any person to sell or distribute any contraceptive of any kind to a minor under the age of 16 years; (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons over 16; and (3) for anyone, including licensed pharmacists, to advertise or display contraceptives.¹ A three-

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"This article shall not be construed to affect or prevent:

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 26, 1977

Re: 75-443, Carey v. Population Services

Dear Bill,

I am glad to join your opinion for the Court in this case. Please forgive my delay in responding.

Sincerely yours,



Mr. Justice Brennan

Copies to the Conference

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

From: Mr. Justice White

Circulated: 5-26-77

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 75-443

Hugh Carey, etc., et al.,
 Appellants,
 v.
 Population Services
 International et al. } On Appeal from the United States
 District Court for the Southern
 District of New York.

[May —, 1977]

MR. JUSTICE WHITE, concurring in part and concurring in the result in part.

I join Parts I, III and V of the Court's opinion and concur in the result with respect to Part IV.*

Although I saw no reason in *Eisenstadt v. Baird*, 405 U. S. 438 (1972), to reach "the novel constitutional question whether a State may restrict or forbid the distribution of contraceptives to the unmarried," *id.*, at 465 (WHITE, J., concurring in the result), four of the seven Justices participating in that case held that in this respect the rights of unmarried persons were equal to those of the married. Given *Eisenstadt* and given the decision of the Court in the abortion case, *Roe v. Wade*, 410 U. S. 113 (1973), the result reached by the Court in Part III of its opinion appears warranted. I do not regard the opinion, however, as declaring unconstitutional any state law forbidding extramarital sexual relations. On this assumption I join Part III.

I concur in the result in Part IV primarily because the State has not demonstrated that the prohibition against distribution of contraceptives to minors measurably contributes to the deterrent purposes which the State advances as justifi-

*There is no need for present purposes to agree or disagree with the Court's summary of the law expressed in Part II.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

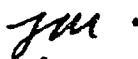
March 3, 1977

Re: No. 75-443, Carey v. Population Services International

Dear Bill:

Please join me.

Sincerely,



T. M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 2, 1976

Re: No. 75-443 - Carey v. Population Services

Dear Chief:

I do "dissent" to having this case go over to January rather than to next Monday, but there is now nothing I can do about it. I understand that, unfortunately, counsel had their families here for the argument. This was a personal dis-appointment.

I wonder whether it wouldn't be a good idea, whenever possible, to schedule a local case at the end of each week of argument.

Sincerely,

HAB

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 2, 1976

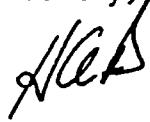
Re: No. 75-443 - Carey v. Population Services

Dear Chief:

This is in response to your earlier note of today. There are local cases available, to wit, No. 74-1106 and No. 75-978 (and companion cases), set for next week, in addition to No. 75-811, which properly is set for the last of next week.

I mention this because counsel and litigants were subjected to expense and personal disappointment. I suppose we should have continued to a finish on Tuesday just as we did on Monday.

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 8, 1977

Re: No. 75-443 - Carey v. Population Services International

Dear Bill:

You have written a good and strong opinion in this case. I appreciate your taking it on, for I have been too much in evidence in this area in the past few years. I shall, of course, be with you, but I pass on the following comments for your present consideration:

1. I am pleased with the presence of footnote 12, beginning on page 13. This rejects, properly in my view, the argument of the appellees that a State cannot legitimately concern itself with the sexual conduct of minors. As you intimate, that is an issue for another day, and we may assume for now the constitutional propriety of some state regulation.
2. I would not find constitutionally offensive an appropriate "time, place, and manner" restriction, and I probably would prefer a greater emphasis on this aspect and on the fact that we are not concerned with such in this litigation. You do make passing reference to it on page 19.
3. For some time now, as you are aware, I have been troubled by the use of the "compelling state interest" test. It seems to me that the phrase almost dictates the result. Yet, having said that, I must confess that I used the phrase in Roe v. Wade, and in fact used it with some emphasis. Since then, I have been inclined to favor other phrases (perhaps equally as unsatisfactory). In the present opinion, of course, you use the "compelling state interest" approach with a good bit of emphasis, see pages 6 and 8 for example, and again I must concede that you use it with appropriate reference to Roe v. Wade. I do not know whether this can be toned down somewhat. If it could, I would be more comfortable, but if it cannot, I shall have to be content. I could rationalize by saying that the Court has used the phrase consistently in the privacy area, and perhaps that is acceptable.

4. Lewis, of course, will dissent on the issue of standing of PPA. He is disturbed because he regards that corporation as a purely commercial operation. I wish we could extend the standing argument to some of the other plaintiffs, particularly the physicians. I attempted to do this in Singleton v. Wulff, part II-B, but was one vote short of a Court on that proposition. If we could establish standing for another plaintiff in addition to PPA, we might tend to lessen the breadth of Lewis' forthcoming partial dissent.

5. In any event, we could probably strengthen the argument for allowing vendors to assert ius tertii because the rights asserted in this case fall within the sensitive area of personal privacy. Potential vendees may be reluctant to assert their own rights because of a desire to keep these personal matters from public scrutiny. For some of us, therefore, a recognition of standing in the present case may have more appeal than for the tavern operator-plaintiff in Craig v. Boren.

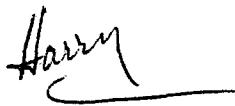
6. I might be a little happier if the following language were to replace the first two lines on page 6:

"regulation in this area. The business of manufacturing and selling contraceptives may be regulated in ways that do not infringe protected individual choices. And even a burdensome regulation may be validated by a sufficiently compelling state interest. In Roe v."

In addition, on line 13 of page 6, would it be better to substitute "imposing a burden" for the words "affecting it." These changes, I believe, would make it clearer that some burdensome regulation of the contraceptive industry (sales taxes, standardized packaging, quality control, etc.) does not require a compelling state interest in order to be valid. This thought probably is implicit in the present wording but could be made explicit.

Again, I compliment you on what I think is a fine opinion in a developing and difficult and obviously controversial area.

Sincerely,



Mr. Justice Brennan

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 4, 1977

Re: No. 75-443 - Carey v. Population Services
International

Dear Bill:

Please join me in your circulation of April 22.

Sincerely,
H.A.B.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 3, 1977

No. 75-443 Carey v. Population Services

Dear Bill:

As I am not entirely at rest in this case,
I will await Bill Rehnquist's dissent. I even may
write briefly myself.

Sincerely,

Lewis

Mr. Justice Brennan

Copies to the Conference

LFP/lab

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

From: Mr. Justice Powell

APR 20 1977

Circulat

1st DRAFT

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 75-443

Hugh Carey, etc., et al.,
Appellants,
v.
Population Services
International et al. } On Appeal from the United States
District Court for the Southern
District of New York.

[April —, 1977]

MR. JUSTICE POWELL, concurring in part and concurring in the judgment.

I agree that Population Planning Associates has standing to maintain this action, and therefore join Part I of the Court's opinion. Although I concur in the judgment of the Court, I do not agree with the standard of review by which the Court tests the constitutionality of the New York statute. Nor am I persuaded that the Constitution requires the severe constraints that the Court's opinion places upon legislative discretion in the sensitive areas at issue here.

I

I consider first the statutory provision making it a crime for anyone other than a physician to sell or distribute contraceptives to minors under the age of 16 years.¹ This ele-

¹ The Court not infrequently refers to this statutory provision as a "blanket prohibition of the distribution of contraceptives to minors," *ante*, at 13, with an "arguable" exception for distribution by physicians, see *id.*, at 9 n. 5. I see no reason to treat the statute as a complete ban on distribution rather than a limitation on access. The statutory language establishes a physician distribution exception. The law enforcement officials of the State inform the Court that the criminal sanctions do not apply to distribution by physicians. The statute has been recognized as establishing an exception for physician distribution. National Center for Family Planning Services, Family Planning, Contraception, and

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 23, 1977

No. 75-443 Carey v. Population Services

Dear Bill:

Although your recirculation does help me, it does not - as you recognized - meet all of my concerns.

Your new draft no longer applies the "compelling state interest" standard to the restrictions on access by minors, a view with which I am in entire accord. The thrust of your analysis still suggests, however, that there are severe constraints on state legislation in this area, a view that I do not share.

Nor would I, on the record in this case, test the restriction on the number of retail outlets under a compelling state interest standard. Accordingly, although we are closer together and I will join your judgment, I still plan to write separately and hope to recirculate early next week.

Sincerely,



Mr. Justice Brennan

lfp/ss

cc: The Conference

*Substantial Changes
Throughout*

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

From: Mr. Justice Powell

Circulated:

2nd DRAFT

Recirculated: MAY 12, 1977

SUPREME COURT OF THE UNITED STATES

No. 75-443

Hugh Carey, etc., et al., Appellants, v. Population Services International et al.	On Appeal from the United States District Court for the Southern District of New York.
---	--

[April —, 1977]

MR. JUSTICE POWELL, concurring in part and concurring in the judgment.

I agree that Population Planning Associates has standing to maintain this action, and therefore join Part I of the Court's opinion. Although I concur in the judgment of the Court, I am not persuaded that the Constitution requires the severe constraints that the Court's opinion places upon legislative efforts to regulate the distribution of contraceptives, particularly to the young.

I

The Court apparently would subject all state regulation affecting adult sexual relations to the strictest standard of judicial review. Under today's decision, such regulation "may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." *Ante*, at 6. Even regulation restricting only the sexual activity of the young must now be justified by a "significant state interest," a standard that is "apparently less rigorous" than the standard the Court would otherwise apply. *Ante*, at 13 n. 13. In my view, the extraordinary protection the Court would give to all personal decisions in matters of sex is neither required by the Constitution nor supported by our prior decisions.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 3, 1977

Re: No. 75-443 - Carey v. Population Services International

Dear Bill:

I shall soon circulate a short, pungent dissent from your opinion.

Sincerely,

WHR/dca

Mr. Justice Brennan
Copies to the Conference

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Black
 Mr. Justice Douglas
 Mr. Justice Harlan
 Mr. Justice Blackmun

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-443

Hugh Carey, etc., et al.,
 Appellants,
 v.
 Population Services
 International et al. } On Appeal from the United States
 District Court for the Southern
 District of New York.

[March —, 1977]

MR. JUSTICE REHNQUIST, dissenting.

Those who valiantly but vainly defended the heights of Bunker Hill in 1775 made it possible that men such as James Madison might later sit in the first Congress and draft the Bill of Rights to the Constitution. The post-Civil War Congresses which drafted the Civil War Amendments to the Constitution could not have accomplished their task without the blood of brave men on both sides which was shed at Shiloh, Gettysburg, and Cold Harbor. If those responsible for these Amendments, by feats of valor or efforts of draftsmanship, could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men's room of truck stops, notwithstanding the considered judgment of the New York Legislature to the contrary, it is not difficult to imagine their reaction.*

*As well as striking down the New York prohibitions of commercial advertising and sales to persons under 16, the Court holds invalid the State's requirement that all sales be made by licensed pharmacists. Whatever New York's reasons for this particular restriction on distribution—and several can be imagined—I cannot believe that it could significantly impair the access to these products of a person with a settled and deliberate intention to procure them.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 19, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 75-443 Carey v. Population Services

Due to the back-up at the printer, I am circulating a typewritten copy of the attached footnote, to be appended to the end of the first sentence on the second page of my dissenting opinion.

Sincerely,

WHR/da

✓
R.2

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

From: Mr. Justice REHNQUIST

Commissioned: _____

Reproduced: March 1977

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

—
No. 75-443

Hugh Carey, etc., et al.,
 Appellants,
 v.
 Population Services
 International et al. } On Appeal from the United States
 } District Court for the Southern
 } District of New York.

[March —, 1977]

MR. JUSTICE REHNQUIST, dissenting.

Those who valiantly but vainly defended the heights of Bunker Hill in 1775 made it possible that men such as James Madison might later sit in the first Congress and draft the Bill of Rights to the Constitution. The post-Civil War Congresses which drafted the Civil War Amendments to the Constitution could not have accomplished their task without the blood of brave men on both sides which was shed at Shiloh, Gettysburg, and Cold Harbor. If those responsible for these Amendments, by feats of valor or efforts of draftsmanship, could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men's room of truck stops, notwithstanding the considered judgment of the New York Legislature to the contrary, it is not difficult to imagine their reaction.¹

As well as striking down the New York prohibitions of commercial advertising and sales to persons under 16, the Court holds invalid the State's requirement that all sales be made by licensed pharmacists. Whatever New York's reasons for this particular restriction on distribution—and several can be imagined—I cannot believe that it could significantly impair the access to these products of a person with a settled and deliberate intention to procure them.

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

From: Mr. Justice Stevens
MAY 23 1977
Circulated:

Circulated:

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-443

Hugh Carey, etc., et al.,
Appellants,
v.
Population Services
International et al. } On Appeal from the United States
District Court for the Southern
District of New York.

[May —, 1977]

MR. JUSTICE STEVENS, concurring in part and concurring in the judgment.

For the reasons stated in Parts I and III of the opinion of the Court, which I join, I agree that Population Planning Associates, Inc., has standing to challenge the New York statute and that the grant to licensed pharmacists of a monopoly in the distribution of nonmedical contraceptives is unconstitutional. I also agree that Part II of the opinion accurately summarizes prior decisions of the Court dealing with the so-called right of privacy. I would simply add the reminder that this right is a species of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment rather than a concept floating at large without any mooring in the text of the Constitution itself. *Whalen v. Roe*, No. 75-839, Slip op., at 9 n. 23 (Feb. 23, 1977).

I agree with the Court's conclusion that New York's prohibition against the distribution of contraceptives to persons under 16 years of age is unconstitutional, and also with its conclusion that the total suppression of advertising or display of contraceptives is invalid, but my reasons differ from those set forth in Part IV and I disagree with a possible reading of a portion of Part V.

I

There are two reasons why I do not join Part IV. First,

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 23, 1977

RE: 75-443 Carey v. Population Services International

Dear Bill:

In an effort to minimize the "puzzlement," suppose I make these two changes in my opinion:

Page 1, substitute the following as the final clause in the second paragraph immediately preceding my Roman numeral "I":

". . . but my reasons differ from those set forth in Part IV and I wish to add emphasis to the limitation on the Court's holding in Part V."

Page 5, substitute the following for the second sentence in the second paragraph in Roman numeral II:

"It is on the understanding that the opinion does not foreclose such regulation simply because an advertisement is within the zone protected by the First Amendment that I have joined Part V.

The fact that . . ."

If you are satisfied that these changes do not unfairly characterize your opinion, I will be happy to join Part V as well as Parts I - III.

Respectfully,



Mr. Justice Brennan

Copies to the Conference

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

From: Mr. Justice Stevens

Circulated: MAY 24 1977

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-443

Hugh Carey, etc., et al.,
 Appellants,
 v.
 Population Services
 International et al. } On Appeal from the United States
 } District Court for the Southern
 } District of New York.

[May —, 1977]

MR. JUSTICE STEVENS, concurring in part and concurring in the judgment.

For the reasons stated in Parts I and III of the opinion of the Court, which I join, I agree that Population Planning Associates, Inc., has standing to challenge the New York statute and that the grant to licensed pharmacists of a monopoly in the distribution of nonmedical contraceptives is unconstitutional. I also agree that Part II of the opinion accurately summarizes prior decisions of the Court dealing with the so-called right of privacy. I would simply add the reminder that this right is a species of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment rather than a concept floating at large without any mooring in the text of the Constitution itself. *Whalen v. Roe*, No. 75-839, Slip op., at 9 n. 23 (Feb. 23, 1977).

I agree with the Court's conclusion that New York's prohibition against the distribution of contraceptives to persons under 16 years of age is unconstitutional, and also with its conclusion that the total suppression of advertising or display of contraceptives is invalid, but my reasons differ from those set forth in Part IV and I wish to add emphasis to the limitation on the Court's holding in Part V.

I

There are two reasons why I do not join Part IV. First,

pp. 1-2, 5

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

From: Mr. Justice Stevens

Circulated:

Recirculated: MAY 27 1977

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-443

Hugh Carey, etc., et al.,
 Appellants,
 v.
 Population Services
 International et al. } On Appeal from the United States
 District Court for the Southern
 District of New York.

[May —, 1977]

MR. JUSTICE STEVENS, concurring in part and concurring in the judgment.

For the reasons stated in Parts I, II and III of the opinion of the Court, which I join, I agree that Population Planning Associates, Inc., has standing to challenge the New York statute and that the grant to licensed pharmacists of a monopoly in the distribution of nonmedical contraceptives is unconstitutional. I also agree with the conclusion that New York's prohibition against the distribution of contraceptives to persons under 16 years of age is unconstitutional, and with the Court's conclusion that the total suppression of advertising or display of contraceptives is invalid, but my reasons differ from those set forth in Part IV of MR. JUSTICE BRENNAN's opinion and I wish to add emphasis to the limitation on the Court's holding in Part V.

I

There are two reasons why I do not join Part IV. First, the holding in *Planned Parenthood of Central Missouri v. Danforth*, 428 U. S. 52, 72-75, that a minor's decision to abort her pregnancy may not be conditioned on parental consent, is not dispositive here. The options available to the already pregnant minor are fundamentally different from those available to nonpregnant minors. The former must bear a