The Burger Court Opinion Writing Database

In re Primus

436 U.S. 412 (1978)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

May 6, 1978

Dear Lewis:

Re: 77-56 In Matter of Edna Smith Primus

I join.

Regards,

WEB

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 1, 1978

Re: No. 77-56, In re Primus

Dear Lewis,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 1, 1978

Re: 77-56 - In re Edna Smith Primus

Dear Lewis,

Please join me.

Sincerely yours,

Byron

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 3, 1978

Re: No. 77-56 - In re Primus

Dear Lewis:

I am writing a separate circulated note as to this case with a suggestion you may or may not accept. In any event, you have written a careful and good opinion. I shall be with you at least as to most of it. In the meantime, I mention the following details for your consideration.

1. I wonder whether the word "primarily" is appropriately present in the 14th line on page 14. I am sure I have come across many cases in which the ACLU has engaged that are not in defense of "unpopular causes and unpopular defendants." The organization may profess otherwise, but I wonder.

2. I may have missed it, but is the appellee identified anywhere in the opinion? I think it is mentioned first on the last line of page 8. Would it be helpful to identify it?

Sincerely,

Harry

Mr. Justice Powell

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 3, 1978

Re: No. 77-56 - In re Primus

Dear Lewis:

You have written a careful and helpful opinion in this case. I wonder, however, whether you would consider omitting the first paragraph of part VI. The factual material contained there has been said before. I am bothered a little by the inclusion of the dicta, for I feel it is unnecessary to the decision of the present case and its First Amendment overtones. In New York Times v. Sullivan, the Court countenanced a misleading statement so long as the authors of the advertisement did not recklessly disregard the truth of their assertions. Similarly, in the area of political solicitation, I hesitate to say now that the State may prevent all misleading statements under the authority of professional regulation. It may be that it can, but I would prefer to put off meeting that issue until an appropriate case is presented.

Sincerely,

H. A. B.

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 8, 1978

Re: No. 77-56 - In Matter of Edna Smith Primus

Dear Lewis:

Thank you for your letter dated May 5. I am afraid that I cannot agree that the paragraph in Bates supports our cracking down now on misrepresentation. Bates is a commercial speech case, not a political speech case. I think what was said there merely suggested that the door is open for the consideration of future cases. It seems to me, on the other hand, that Part VI of the Court's opinion in Primus, in fact, draws a line without waiting for future cases.

I therefore have prepared a joinder in part and am circulating it today.

Sincerely,

H.A.B.

Mr. Justice Powell

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

From: Mr. Justice Blackmun

Circulated: MAY 8 '77

Recirculated: _____

No. 77-56 - In Matter of Edna Smith Primus

MR. JUSTICE BLACKMUN, concurring in part.

I join the Court's opinion except the first full paragraph of Part VI thereof. I refrain from joining that paragraph and the dicta it contains because the dicta are unnecessary to the decisior of the present case and its First Amendment overtones. I hesitate to say now that in the area of political solicitation the State may erect an absolute barrier, under the authority of professional regulation, to all statements that conceivably may be regarded as misleading in any degree. It may be that the State is able to do this, but I would prefer to put off meeting that issue until an appropriate case is presented and full arguments are carefully considered.

Brennan 0 77

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

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: MAY 9

No. 77-56 - In Matter of Edna Smith Primus

MR. JUSTICE BLACKMUN, concurring in part.

I join the Court's opinion except the first full paragraph of Part VI thereof. I refrain from joining that paragraph and the dicta it contains because the dicta are unnecessary to the decision of the present case and its First Amendment overtones. I hesitate to delineate now in the area of political solicitation the extent of state authority to proscribe misleading statements. Despite the disclaimer in footnote 32, the positive language of the text draws a line:

> "The State's special interest in regulating members of a profession it licenses, and who serve as officers of its courts, amply justifies the application of narrowly drawn rules to proscribe solicitation that in fact is misleading . . . ."

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

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: MAY 10 1978

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-56

In re Edna Smith Primus, Appellant. | On Appeal from the Supreme Court of South Carolina.

[May —, 1978]

MR. JUSTICE BLACKMUN, concurring in part.

I join the Court's opinion except the first full paragraph of Part VI thereof. I refrain from joining that paragraph and the dicta it contains because the dicta are unnecessary to the decision of the present case and its First Amendment overtones. I hesitate to delineate now in the area of political solicitation the extent of state authority to proscribe misleading statements. Despite the disclaimer in footnote 32, the positive language of the text draws a line:

> "The State's special interest in regulating members of a profession it licenses, and who serve as officers of its courts, amply justifies the application of narrowly drawn rules to proscribe solicitation that in fact is misleading . . . ."

The only possible stated exception to this ban is the "innocent misstatement." It may be that the State is able to do this. But the Court announces its rule without balancing the important First Amendment interests that may lurk in even a negligent misstatement. I would prefer to put off meeting the issue until an appropriate case is presented and full arguments are carefully considered.

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

From: Mr. Justice Blackmun

No. 77-56 - In re Edna Smith Primus

Circulated: _____

Recirculated: MAY 12 19

MR. JUSTICE BLACKMUN, concurring.

Although I join the opinion of the Court, my understanding of the first paragraph of Part VI requires further explanation. The dicta contained in that paragraph are unnecessary to the decision of this case and its First Amendment overtones. I, for one, am not now able to delineate in the area of political solicitation the extent of state authority to proscribe misleading statements. Despite the positive language of the text, */ footnote 32 explains that the Court also has refused to draw a line regarding misrepresentation:

> "We have no occasion here to delineate the precise contours of permissible state regulation. Thus, for example, a different situation might be presented if

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-56

In re Edna Smith Primus, Appellant. | On Appeal from the Supreme Court of South Carolina.

[May —, 1978]

MR. JUSTICE BLACKMUN, concurring.

Although I join the opinion of the Court, my understanding of the first paragraph of Part VI requires further explanation. The dicta contained in that paragraph are unnecessary to the decision of this case and its First Amendment overtones. I, for one, am not now able to delineate in the area of political solicitation the extent of state authority to proscribe misleading statements. Despite the positive langague of the text,* footnote 32 explains that the Court also has refused to draw a line regarding misrepresentation:

> "We have no occasion here to delineate the precise contours of permissible state regulation. Thus, for example, a different situation might be presented if an innocent or merely negligent misstatement were made by a lawyer on behalf of an organization engaged in associational or political interests."

It may well be that the State is able to proscribe such solicitation. The resolution of that issue, however, requires a balancing of the State's interests against the important First Amendment values that may lurk in even a negligent misstatement. The Court wisely has postponed this task until an appropriate case is presented and full arguments are carefully considered.

*"The State's special interest in regulating members of a profession it licenses, and who serve as officers of its courts, amply justifies the application of narrowly drawn rules to proscribe solicitation that in fact is misleading . . . ." *Ante*, at 24.

SUPREME COURT OF THE UNITED STATES

No. 77-56

In re Edna Smith Primus, Appellant. | On Appeal from the Supreme Court of South Carolina.

[May —, 1978]

MR. JUSTICE POWELL delivered the opinion of the Court.

We consider on this appeal whether a State may punish a member of its Bar who, seeking to further political and ideological goals through associational activity, including litigation, advises a lay person of her legal rights and discloses in a subsequent letter that free legal assistance is available from a nonprofit organization with which the lawyer and her associates are affiliated. Appellant, a member of the Bar of South Carolina, received a public reprimand because she had written such a letter. As this appeal presents a substantial question under the First and Fourteenth Amendments, as interpreted in *NAACP* v. *Button*, 371 U. S. 415 (1963), we noted probable jurisdiction.

I

Appellant, Edna Smith Primus, is a lawyer practicing in Columbia, S. C. During the period in question, she was associated with the "Carolina Community Law Firm," [1] and an officer of and cooperating lawyer with the Columbia branch of the American Civil Liberties Union (ACLU).[2] She re-

[1] The court below determined that the Carolina Community Law Firm was "'an expense sharing arrangement with each attorney keeping his own fees.'" 268 S. C. 259, 261, 233 S. E. 2d 301, 302 (1977). The firm later changed its name to Buhl, Smith & Bagby.

[2] The ACLU was organized in 1920 by individuals who had worked in the defense of the rights of conscientious objectors during World War I and political dissidents during the postwar period. It views itself as a

May 5, 1978

No. 77-56, In re Edna Smith Primus

Dear Harry:

Thank you for your notes of May 3, 1978. I have not been able to respond to them until today as I have been away at a Moot Court at the University of Chicago.

I have no difficulty with the suggestions made in your first letter: the word "primarily" will be deleted from page 14, and I will indicate on page 1 that "the appeal is opposed by the State Attorney General, on behalf of the Board of Commissioner on Grievances and Discipline of the Supreme Court of South Carolina." The Clerk's Office has no precise information on who the appellee is, but State Assistant Attorney General Kale indicated in his notice of appearance that he was representing the Board of Commissioners.

I do have some difficulty with the suggestion in your second letter that Part VI be deleted. While we should reserve decisions on questions not properly before us, Part VI, in my view, follows closely upon the heels of the discussion in Part V. On page 21, for example, I state that "appellant cannot be disciplined unless her activity in fact involved the types of misconduct at which South Carolina's broad prohibition is said to be directed." Since we do not find actual misconduct in this case, it is true that part V does not spell out precisely what States may do in this area. But as your opinions in Virginia Pharmacy and Bates indicate, it is important to offer some guidance to the Bar.

Indeed, my view derives support from the language in the third from the last paragraph in your opinion in Bates, recognizing that "because the public lacks

sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising," and that "different degrees of regulation may be appropriate in different areas." In any event, I am adding a footnote on page 24 that distinguishes inadvertent or innocent misstatements. Even where associational or political solicitation is involved, I would think that false or deceptive conduct (speech) in the context of lawyer approaches to prospective clients certainly would justify disciplinary action.

As I do not believe that the Times v. Sullivan standard, in its full vigor, would be applied in the context of lawyer solicitation of lay persons, I prefer not to make specific reference to that line of cases.

I do appreciate your interest, and hope these changes will be acceptable.

Sincerely,

Mr. Justice Blackmun

lfp/ss

31. We have no occasion here to delineate the precise contours of permissible state regulation. Thus, for example, there would be a different case if an innocent misstatement were were made by a lawyer on behalf of an organization engaged in furthering associational or political interests and there was no detrimental reliance by the prospective client.

✓ — pp. 1, 14, 16, 23, 24, 25

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

Stylistic Changes Throughout.

From: Mr. Justice Powell

Circulated: _____

2nd DRAFT Recirculated: 3 May

SUPREME COURT OF THE UNITED STATES

No. 77-56

In re Edna Smith Primus, Appellant. | On Appeal from the Supreme Court of South Carolina.

[May —, 1978]

MR. JUSTICE POWELL delivered the opinion of the Court.

We consider on this appeal whether a State may punish a member of its Bar who, seeking to further political and ideological goals through associational activity, including litigation, advises a lay person of her legal rights and discloses in a subsequent letter that free legal assistance is available from a nonprofit organization with which the lawyer and her associates are affiliated. Appellant, a member of the Bar of South Carolina, received a public reprimand because she had written such a letter. The appeal is opposed by the State Attorney General, on behalf of the Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina. As this appeal presents a substantial question under the First and Fourteenth Amendments, as interpreted in *NAACP* v. *Button*, 371 U. S. 415 (1963), we noted probable jurisdiction.

I

Appellant, Edna Smith Primus, is a lawyer practicing in Columbia, S. C. During the period in question, she was associated with the "Carolina Community Law Firm,"[1] and an officer of and cooperating lawyer with the Columbia branch

[1] The court below determined that the Carolina Community Law Firm was "'an expense sharing arrangement with each attorney keeping his own fees.'" 268 S. C. 259, 261, 233 S. E. 2d 301, 302 (1977). The firm later changed its name to Buhl, Smith & Bagby.

18, 19, 21, 24

Stylistic 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: _____

Recirculated: 10 MAY 1978

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–56

In re Edna Smith Primus, Appellant. | On Appeal from the Supreme Court of South Carolina.

[May —, 1978]

MR. JUSTICE POWELL delivered the opinion of the Court.

We consider on this appeal whether a State may punish a member of its Bar who, seeking to further political and ideological goals through associational activity, including litigation, advises a lay person of her legal rights and discloses in a subsequent letter that free legal assistance is available from a nonprofit organization with which the lawyer and her associates are affiliated. Appellant, a member of the Bar of South Carolina, received a public reprimand for writing such a letter. The appeal is opposed by the State Attorney General, on behalf of the Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina. As this appeal presents a substantial question under the First and Fourteenth Amendments, as interpreted in *NAACP* v. *Button*, 371 U. S. 415 (1963), we noted probable jurisdiction.

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Appellant, Edna Smith Primus, is a lawyer practicing in Columbia, S. C. During the period in question, she was associated with the "Carolina Community Law Firm," [1] and an officer of and cooperating lawyer with the Columbia branch

[1] The court below determined that the Carolina Community Law Firm was "'an expense sharing arrangement with each attorney keeping his own fees.'" 268 S. C. 259, 261, 233 S. E. 2d 301, 302 (1977). The firm later changed its name to Buhl, Smith & Bagby.

pp. 12, 19, 25

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: _____

Recirculated: [redacted] MAY

23 MAY 1978

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-56

In re Edna Smith Primus, Appellant. | On Appeal from the Supreme Court of South Carolina.

[May —, 1978]

MR. JUSTICE POWELL delivered the opinion of the Court.

We consider on this appeal whether a State may punish a member of its Bar who, seeking to further political and ideological goals through associational activity, including litigation, advises a lay person of her legal rights and discloses in a subsequent letter that free legal assistance is available from a nonprofit organization with which the lawyer and her associates are affiliated. Appellant, a member of the Bar of South Carolina, received a public reprimand for writing such a letter. The appeal is opposed by the State Attorney General, on behalf of the Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina. As this appeal presents a substantial question under the First and Fourteenth Amendments, as interpreted in *NAACP* v. *Button*, 371 U. S. 415 (1963), we noted probable jurisdiction.

I

Appellant, Edna Smith Primus, is a lawyer practicing in Columbia, S. C. During the period in question, she was associated with the "Carolina Community Law Firm," [1] and an officer of and cooperating lawyer with the Columbia branch

[1] The court below determined that the Carolina Community Law Firm was "'an expense sharing arrangement with each attorney keeping his own fees.'" 268 S. C. 259, 261, 233 S. E. 2d 301, 302 (1977). The firm later changed its name to Buhl, Smith & Bagby.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 24, 1978

No. 77-56 In re Primus

MEMORANDUM TO CONFERENCE:

I propose to add in my opinion in the above case the following footnote that will appear at the bottom of the first complete paragraph on page 24, with a cross reference to page 18.

L.F.P.

L.F.P., Jr.

SS

32. Normally the purpose or motive of the speaker is not central to First Amendment protection, but it does bear on the distinction between conduct that is "an associational aspect of 'expression'" Emerson, Freedom of Association and Freedom of Expression, 74 Yale L.J. 1, 26 (1964), and other activity subject to plenary regulation by government. Button recognized that certain forms of "cooperative organizational activity," 371 U.S., at 430, including litigation, are part of the "freedom to engage in association for the advancement of beliefs and ideas," NAACP v. Alabama, 357 U.S. 449, 460 (1958), and that this freedom is an implicit guarantee of the First Amendment. See Healy v. James, 408 U.S. 169, 181 (1972). As shown above, appellant's speech - as part of associational activity - was expression intended to advance "beliefs and ideas". In Ohralik v. Ohio Bar Ass'n, post at ___, the lawyer was not engaged in associational activity for the advancement of beliefs and ideas; his purpose was the advancement of his own commercial interests. The line, based in part on the motive of the speaker and the character of the expressive activity, will not always be easy to draw, cf. Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 787-788 (1976) (Rehnquist, J., dissenting), but that is no reason for avoiding the undertaking.

P. 25

Chief Justice
Justice Brennan
Justice Stewart
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Mr. Justice Stevens

Stylistic Changes Throughout.

From: Mr. Justice Powell

Circulated: _____

5th DRAFT

Recirculated: 25 MAY 1978

SUPREME COURT OF THE UNITED STATES

No. 77-56

In re Edna Smith Primus, Appellant. | On Appeal from the Supreme Court of South Carolina.

[May —, 1978]

MR. JUSTICE POWELL delivered the opinion of the Court.

We consider on this appeal whether a State may punish a member of its Bar who, seeking to further political and ideological goals through associational activity, including litigation, advises a lay person of her legal rights and discloses in a subsequent letter that free legal assistance is available from a nonprofit organization with which the lawyer and her associates are affiliated. Appellant, a member of the Bar of South Carolina, received a public reprimand for writing such a letter. The appeal is opposed by the State Attorney General, on behalf of the Board of Commissioners on Grievances and Discipline of the Supreme Court of South Carolina. As this appeal presents a substantial question under the First and Fourteenth Amendments, as interpreted in *NAACP* v. *Button*, 371 U. S. 415 (1963), we noted probable jurisdiction.

I

Appellant, Edna Smith Primus, is a lawyer practicing in Columbia, S. C. During the period in question, she was associated with the "Carolina Community Law Firm," [1] and an officer of and cooperating lawyer with the Columbia branch

[1] The court below determined that the Carolina Community Law Firm was "'an expense sharing arrangement with each attorney keeping his own fees.'" 268 S. C. 259, 261, 233 S. E. 2d 301, 302 (1977). The firm later changed its name to Buhl, Smith & Bagby.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 1, 1978

Re: No. 77-56 - In re Edna Smith Primus

Dear Lewis:

I anticipate circulating a dissent in this case.

Sincerely,

Mr. Justice Powell

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 Stevens

From: Mr. Justice Rehnqu

Circulated: MAY 2 3 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–56

In re Edna Smith Primus, Appellant. | On Appeal from the Supreme Court of South Carolina.

[May —, 1978]

MR. JUSTICE REHNQUIST, dissenting.

In this case and the companion case of *Ohralik* v. *Ohio State Bar Assn.*, No. 76–1650, the Court tells its own tale of two lawyers: One tale ends happily for the lawyer and one does not. If we were given the latitude of novelists in deciding between happy and unhappy endings for the heroes and villains of our tales, I might well join in the Court's disposition of both cases. But under our federal system it is for the States to decide which lawyers shall be admitted to the Bar and remain there; this Court may interfere only if the State's decision is rendered impermissible by the United States Constitution. We can of course develop a jurisprudence of epithets and slogans in this area, in which "ambulance-chasers" suffer one fate and "civil liberties lawyers" another. But I remain unpersuaded by the Court's opinions in these two cases that there is a principled basis for concluding that the First and Fourteenth Amendments forbid South Carolina from disciplining Primus here, but permit Ohio to discipline Ohralik in the companion case. I believe that both South Carolina and Ohio acted within the limits prescribed by those Amendments, and I would therefore affirm the judgment in each case.

This Court said in *United Transportation Union* v. *State Bar of Michigan*, 401 U. S. 576, 585 (19717), "The common thread running through our decisions in *NAACP* v. *Button*, [371 U. S. 415 (1963), *Brotherhood of Railroad*] *Trainmen* [v. *Virginia State Bar*, 377 U. S. 1 (1964),] and *United Mine Workers* [v. *Illinois State Bar Ass'n.*, 389 U. S. 217 (1967),]

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 26, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 77-56 In re Primus

I have inserted the following sentence on page 4 of my dissent in this case, between the first and second sentences of the first full paragraph:

> Despite the Court's assertion to the contrary, ante at 25 n. 32, the difficulty of drawing distinctions on the basis of the content of the speech or the motive of the speaker is a valid reason for avoiding the undertaking where a more objective standard is readily available

Sincerely,

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 1, 1978

Re: 77-56 - In re Edna Smith Primus

Dear Lewis:

Please join me.

Respectfully,

Mr. Justice Powell

Copies to the Conference