The Supreme Court
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Fall, 1991

SAMPLE CERTIORARI PETITION ARGUMENT SECTION

REASONS FOR GRANTING THE PETITION

I. THERE IS A DIRECT CONFLICT BETWEEN THE DECISION BELOW AND A RECENT DECISION BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

In the decision below, *Ragin v. New York Times Co.*, 923 F.2d 995 (2d Cir. 1991), the Second Circuit resolved the issue of whether a newspaper could be held liable for discrimination under Section 3604 (c) of the Fair Housing Act for publishing real estate advertisements over a period of twenty years solely based on the fact that the advertisements contained a disproportionate number of white models. The court held that liability was possible in such circumstances based on the aggregation of advertisements placed by individual advertisers so long as "an ordinary reader would understand the ad as suggesting a racial preference." *Id.* at 1002.

The same issue resolved by the Second Circuit in *Ragin* was recently the focus of a decision by the United States Court of Appeals for the Sixth Circuit. In *Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, No. 90-3176, 1991 U.S. App. LEXIS 20898 (6th Cir. Sept. 5, 1991), the plaintiff asserted liability based on the publication by the Cincinnati Enquirer of a single advertisement featuring only white models as well as the publication of multiple advertisements with only white models over a twenty year period. The Sixth Circuit dismissed both claims.

As a result of these two recent decisions, there is a clear conflict between the Second and Sixth Circuits on the issue of the proper interpretation of Section 3604 (c) of the Fair Housing Act as it applies to the liability of newspapers for the publication of advertisements which contain no overt discriminatory language.

II. THE PROPER INTERPRETATION OF SECTION 3604 (C) AS APPLIED TO ADVERTISEMENTS HAS LONG BEEN A SOURCE OF CONTROVERSY AMONG THE FEDERAL COURTS.

The Fair Housing Act was enacted in 1968 in order to eradicate housing discrimination in the United States. The reach of the statute is clear as applied to overt discrimination such as a refusal to rent to a member of a racial minority. However, the reach of the statute as applied to less direct acts of discrimination has long been a subject of controversy.

As early as 1972, this issue was raised in the Fourth Circuit Court of Appeals. In *United States v. Hunter*, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972), a suit was brought against a newspaper publisher based on the publication of a real estate advertisement which specified that the vacancy was in a "white home." The court confronted the question of whether the advertisement "indicates any preference ... based on race." The court refused to allow the distinction between the clearly actionable phrase "white only" and the use of the marginally less overt "white home" to be determinative. *Id.* at 215. The court held that so long as the "ordinary reader" would find the advertisement to indicate a racial preference liability could be found.

While the *Hunter* case raised the issue of newspaper liability, it did not involve the question of liability based on the race of models appearing in advertisements. This issue came before a federal court for the first time in *Saunders v. General Services Corp.*, 659 F. Supp.

1042 (E.D. Va. 1987). However, *Saunders* involved a lawsuit brought against a manager of apartment complexes who had published a brochure containing sixty-eight photographs with white models to advertise his apartments and not a suit against a newspaper based on its publication of advertisements. In the context of a case where liability was based on a single multi-page brochure and the defendant was the manager of the apartment complex, the *Saunders* court applied the ordinary reader test first adopted by the Fourth Circuit in *Hunter*. While agreeing that liability could be based on the virtual absence of black models in the brochure, the court refused to impose a duty to give proportional representation to black and white models. *Saunders*, 659 F. Supp. at 1060.

A federal court once again wrestled with the scope of Section 3604 (c) as applied to advertisements in *Spann v. Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir.), *cert. denied*, 111 S. Ct. 508 (1990). For the first time in *Spann*, liability was asserted based on the publication of a series of advertisements over a period of more than a year. However, the defendants in the suit were the owner of a condominium complex and an advertising agency that had produced all-white ads and thus the court was not faced with liability on the part of a newspaper. While the district court dismissed the suit based on the fact that the suit was time barred, it also went on to rule that the evidence of discrimination was insufficient under the statute. The Court of Appeals for the District of Columbia reversed the decision, finding the suit timely filed. *Id.* at 34. In its opinion, while the court remarked that it would be highly unlikely that liability could be found based on the publication of a single ad containing only white models, *id.* at n.6, it found the allegations in the complaint of a pattern of advertisements to be sufficient.

For the first time since *Hunter* was decided by the Fourth Circuit in 1972, the issue of newspaper liability was raised in the court below. The court applied the *Hunter* "ordinary reader" test without adequately considering the factual differences between the two cases. This same issue came before the Sixth Circuit in *Housing Opportunities* decided only months later and this time the court took a different view of the scope of newspaper liability.

While a direct conflict over the issue of newspaper liability has only recently surfaced in the courts, confusion over the proper interpretation of Section 3604 (c) as applied to advertisements has existed since shortly after the enactment of the Fair Housing Act. Given the long series of federal court cases that have struggled to resolve the scope of liability arising from the publication of advertisements, this issue is now ripe for Supreme Court review.

III. THE FIRST AMENDMENT ARGUMENT PRESENTED BY PETITIONER RAISES IMPORTANT QUESTIONS ABOUT THE INTERSECTION OF DISCRIMINATION LAWS AND THE FIRST AMENDMENT RIGHTS OF NEWSPAPER PUBLISHERS.

The First Amendment objection raised by Petitioner to a broad interpretation of Section 3604 (c) suggests a clash of values between the aggressive enforcement of antidiscrimination laws and protection of the autonomy of publishers to control the content of their newspapers.

The difficulty inherent in resolving this values clash is apparent from a comparison of the Second Circuit's opinion in *Ragin* and the Sixth Circuit's opinion in *Housing Opportunities*. Both courts conceded that the advertisements should be classified as commercial speech which this Court has long considered to be protected by the First Amendment. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). In addition, both courts agreed that the proper standard of review for examining the First Amendment claim was to

be found in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980). However, what the courts could not agree on was the proper application of the *Central Hudson* test.

The court below, in applying the first prong of the *Central Hudson* test, found the speech involved to be illegal and therefore undeserving of any First Amendment protection. *Ragin*, 923 F.2d at 1003. By contrast, the Sixth Circuit argued that the speech involved was a real estate advertisement, a legal variety of commercial speech. *Housing Opportunities*, 1991 U.S. App. LEXIS 20898 at *22. Since the ultimate question was the propriety under the First Amendment of prohibiting such speech, the illegality of the speech could not be prejudged by a statutory declaration of illegality. According to the court, such a bootstrap analysis would allow the government to insulate all statutes declaring illegal a variety of speech from judicial review. *Id.* at n.9.

Given the difficult clash between values protected by the First Amendment and the goals of the Fair Housing Act, this Court should agree to review the decision below in order to resolve this dilemma.

IV. THE DECISION BELOW CREATES A CHILLING EFFECT ON THE ACTIVITIES OF PUBLISHERS THROUGHOUT THE UNITED STATES.

The decision of the court below imposes a duty on all publications which accept advertisements to serve as a censor on the content of those ads. Moreover, the censorship obligation is an extremely difficult one. It cannot be satisfied by an examination of the content of an individual ad placed by an advertiser.

It is legitimate to impose a reasonable burden to scrutinize ad copy on publishers. For example, in *Hunter*, the newspaper was obligated to censor any language in an ad which would appear to an ordinary reader to indicate a racial preference. Phrases such as "white home" are easily identifiable by a newspaper as indicating a discriminatory preference.

However, in *Ragin*, liability is not based on anything in the text of an ad. Instead, liability is based on the racial characteristics of the models appearing in an advertisement. Moreover, in focusing on the featured models, the court does not adopt an easy to apply bright line rule, such as an ad cannot contain only models of a single race. In fact, a publisher will not be insulated from liability no matter how carefully the publisher scrutinizes the ad currently being considered for publication. Indeed, liability cannot be assessed based on the racial characteristics of the models in a single ad. Instead, the publisher must examine the ads of particular advertisers over time to make sure that at no time do the advertiser's submissions, judged in the aggregate, involve a disproportionate number of models of a single race.

Great uncertainty exists in the application of this standard. How many ads are enough to create a pattern? Must the publisher require that the aggregate number of models at any given time be in proportion to the percentage of the population that belongs to that race in a given community? If proportionality is not required, how far below proportionality can an advertiser slip before the ordinary reader can find the existence of a racial preference?

The burdens of policing such a vague standard are unmanageable. A newspaper will be forced to engage in a high degree of self censorship in order to insure that liability does not attach. This will create a chilling effect on the exercise of First Amendment rights. In order to

clarify the burdens imposed on newspapers and periodicals throughout the United States, this Court should agree to review the decision of the court below.