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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-895

VIRGINIA STATE BOARD OF PHARMACY, ET AL.,
Appellants,

vs.

VIRGINIA CITIZENS CONSUMER COUNCIL, INC., ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

BRIEF FOR ASSOCIATION OF NATIONAL ADVERTISERS, INC., AMICUS CURIAE

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

For the reasons hereinafter stated, the Association of National Advertisers, Inc., *amicus curiae,* respectfully submits that the judgment of the court below be affirmed.

INTEREST OF AMICUS CURIAE

The amicus curiae is an association of enterprises which utilize the advertising media for purposes of bringing information about their products and services to the attention of consumers and the public. The essence of this case is the question whether a governmental authority can freely censor such communications because of their commercial nature despite the First Amendment's assurance of freedom of speech and the press. It is plain, therefore, that the interests of the *amicus curiae* are directly at stake here. Any decision on the merits by this Court will have an important effect on *amicus curiae* and each of its members.

The appellants and appellees have consented to the filing of this brief and their letters of consent are filed in the Office of the Clerk.

ARGUMENT

"COMMERCIAL SPEECH" IS LIKE OTHER FORMS OF SPEECH. IT IS PROTECTED BY THE FIRST AMENDMENT AGAINST GOVERNMENTAL CENSORSHIP. THE GOVERNMENT MAY, THEREFORE, NEITHER PRESCRIBE NOR PROSCRIBE THE CONTENT OF SPEECH BECAUSE OF ITS COMMERCIAL NATURE.

The appellants' brief rests on the simple proposition that all "commercial speech" lies outside the perimeters of the First Amendment. The strength of this proposition derives solely from its repetition. Its historical base is best described as shaky. As Supreme Court doctrine, it is best described as invalid. Because appellants' case rests totally on this myth, we submit that the appellants' case must fall with a demonstration of the erroneous nature of its major premise. Indeed, the judgment below should be affirmed on the basis of this Court's recent decision in *Bigelow* v. *Virginia,* 43 U. S. L. W. 4734, 4739 (16 June 1975), where this Court said: "We conclude, therefore, that the Virginia courts erred in their assumptions that advertising, as such, was entitled to no First Amendment protection and that appellant Bigelow had no legitimate First Amendment interest."

I. Valentine v. Chrestenson Did Not Put "Commercial Speech" Outside the Protection of the First Amendment.

The "mere commercial speech" label, on which some courts have rested judgment, has been said to have originated in *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942),* where the

* "Two decisions prior to the *Valentine Case* approved broad regulation of commercial advertising. *Fifth Ave. Coach Co.* v. *New York,* 221 U.S. 467, was decided long before *Stromberg* v. *California,* 283 U.S. 359, extended the application of the First Amendment to the States. In *Packer Corp.* v. *Utah,* 285 U.S. 105, the First Amendment problem was not raised. The extent to which such advertising

(Foonote continued on next page)

Court held that, because no one had a right to conduct business on city thoroughfares, no one had the right to distribute commercial handbills on city streets. In *Valentine,* after holding that the streets were open for dissemination of some information and opinion under Constitutional command, the Court said:

> We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be judged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated. If the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the code provision was lawfully invoked against his conduct. [316 U.S. at 54-55.]

It is on this narrow ruling, that the First Amendment did not require access to the streets by a distributor of commercial handbills, that appellants' entire case of exclusion of commercial speech from the protections of the First Amendment is predicated. As this Court said in *Bigelow, supra,* at 4737, the opinion in *Valentine* cannot carry such a heavy burden:

> . . . the holding is distinctly a limited one: the ordinance was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed. The fact that it had the effect of banning a particular handbill does not mean that *Chrestenson* is authority for the proposition that all statutes regulating commercial advertising are

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could be regulated consistently with the First Amendment (cf. *Cantwell* v. *Connecticut,* 310 U.S. 296; *Martin* v. *Connecticut,* 310 U.S. 296; *Martin* v. *Struthers,* 319 U.S. 141; *Breard* v. *Alexandria,* 341 U.S. 622; *Roth* v. *United States,* 354 U.S. 476) has therefore never been authoritatively determined." *Cammarano* v. *United States,* 358 U.S. 498, 513 n.1 (1959). (Douglas, J., concurring.)

> immune from constitutional challenge. The case obviously does not support any sweeping proposition that advertising is unprotected *per se*.

As Mr. Justice Douglas, who was a member of the Court when the *Valentine* case was decided, has told us: "The ruling was casual, almost off hand. And it has not survived reflection." *Cammarano* v. *United States,* 358 U.S. 498, 514 (1959). But one need not have participated in the framing of the *Valentine* decision to see that it affords no rationalization but only a conclusion to justify its decision.

The fact that the Court tolerates a ban on a certain category of speech in a certain kind of place has not elsewhere been used to conclude that the kind of speech involved is totally beyond the protection of the First Amendment, but only to say that that kind of speech is not protected in that kind of place. See, *e.g., Cox* v. *Louisiana,* 379 U.S. 536, 559 (1965); *Adderley* v. *Florida,* 385 U.S. 39 (1966); *Lloyd* v. *Tanner,* 407 U.S. 551 (1972); *Kleindienst* v. *Mandel,* 407 U.S. 753 (1972).

No reason has been suggested why a time, place, or manner regulation, such as involved in *Valentine,* should be precedent for the total censorship of information that is the concern of this case. Whatever *Valentine* may have meant, it is clear that it did not say that the content of the message was subject to governmental censorship. The decision there was concerned not with banning what was said, but only with limiting the place where it could be said and the manner in which it was said. Surely Mr. Chrestenson was free to advertise his wares on his own property, in newspapers, or on the radio. What appellants have sought to do here, as distinguished from *Valentine,* is to ban the substance of the communication and there is no warrant in the law for that.

Valentine, in principle if not in its conclusion, may be justified by the same doctrine that is applied to other categories of speech clearly incorporated in the First Amendment. Mr.

Justice Marshall stated that proposition in *Grayned* v. *Rockford,* 408 U.S. 104, 116-17 (1972):

> The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." Although a silent vigil may not unduly interfere with a public library, *Brown* v. *Louisiana,* 383 U.S. 131 (1966), making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest.

II. Any Two-Tiered Theory of the First Amendment That Placed Categories of Speech Beyond the Ken of the Amendment Was Invalidated by New York Times v. Sullivan.

Perhaps the most important point to be made with reference to an evaluation of *Valentine* is that it was decided at the beginning of the development of First Amendment doctrine by this Court, and long before *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), restructured this Court's First Amendment theory. Before *New York Times,* the Court had spoken as though there were some categories of speech totally beneath or beyond protection of the First Amendment. Thus, shortly before the decision in *Valentine,* the Court, in *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 571-72 (1942), wrote:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or fighting words.

Accurately reading the Court's decision in *New York Times* for its effect on the two-tier theory thus stated in *Chaplinsky,*

the late Professor Harry Kalven, Jr., wrote, in *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* 1964 Supreme Court Review 191, 217:

> In this instance, however, the point is not passed over in silence. The plaintiffs had urged as a principal argument in defense of the judgment that libel was not constitutionally protected. The Court confronted the issue directly and disposed of it firmly: . . . "libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." [367 U.S. at 269.] No matter how speech is classified, there must still be First Amendment consideration and review. No category of speech is any longer beneath the protection of the First Amendment.

The *New York Times* case itself removed "the libelous" from the area of "the limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem." And it no longer suffices to label speech "lewd and obscene," or "profane," or "insulting or fighting words" to take it out of the protection of the First Amendment. See, *e.g., Stanley* v. *Georgia,* 394 U.S. 557 (1969); *Cohen* v. *California,* 403 U.S. 215 (1971); *Gooding* v. *Wilson,* 405 U.S. 518 (1972); *Rosenfield* v. *New Jersey,* 408 U.S. 901 (1972); *Lewis* v. *City of New Orleans,* 408 U.S. 913 (1972); *Brown* v. *Oklahoma,* 408 U.S. 914 (1972). It remained only for this Court to recognize that "commercial speech" is not a label that suffices to exclude the speech from the proper realm of the Free Speech Clause of the First Amendment. This Court did exactly that in *Bigelow* v. *Virginia, supra,* at 4739, where it said:

> The Court has stated that "a State cannot foreclose the exercise of constitutional rights by mere labels."*NAACP* v. *Button,* 371 U.S., at 429. Regardless of the particular label asserted by the State—whether it calls speech "commercial" or "commercial advertising" or "solicitation"—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation. . . .

Regulation of "commercial speech", like regulation of other categories of speech, "can claim no talismanic immunity from constitutional limitation. It must be measured by standards that satisfy the First Amendment." *New York Times* v. *Sullivan,* 367 U.S. at 269.

III. There Is No Rational Basis Offered to Sustain the Argument that "Commercial Speech" Is Not "Speech" Within the Meaning of the First Amendment.

It was in a "commercial" context, that of a labor dispute, that this Court announced the proposition: "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama,* 310 U.S. 88, 102 (1940). Certainly it cannot be said that information about the prices of prescription drugs does not fall within this proposition.

The fact is that, in our society, the individual exercises his personal preferences, has greater control over his own behavior, in the area of commercial transactions than in any other sphere of his life. More people are directly concerned with "commercial speech" than with any other category of speech. This cannot be a reason for excluding such speech from the protection of the First Amendment. As Mr. Justice Douglas said in his dissent from denial of certiorari in *Dun & Bradstreet* v. *Grove,* 404 U.S. 898, 905-06 (1971):

> The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector decisionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources. W. Baumol, Economic Theory and Operations Analysis 249-256 (1961); A. Braff, Microeconomic Analysis, 259-276 (1969); A. Dorfman, Prices and Markets, 128-136 (3d ed. 1967).

When one recognizes as this Court must, that depictions and advocacy of lawlessness and violence in comic books and on television, that the vivid verbal and pictorial portrayals of normal and abnormal sexual behavior in magazines and motion pictures, all fall within the protection of the First Amendment, it must be seen that advertising, *i.e.*, commercial speech, both on an absolute and on a comparative basis, has a firm claim on First Amendment coverage. For, as Mr. Justice Harlan said in *F. T. C.* v. *Procter & Gamble Co.*, 388 U.S. 568, 603-04 (1967) (concurring opinion):

> Proper advertising serves a legitimate and important purpose in the market by educating the consumer as to available alternatives. This process contributes to consumer demand being developed to the point at which economies of scale can be realized in production. The advertiser's brand name may also be an assurance of quality, and the value of this benefit is demonstrated by the willingness of consumers to pay a premium for advertised brands. Undeniably advertising may sometimes be used to create irrational brand preferences and mislead consumers as to the actual differences between products, but it is very difficult to discover at what point advertising ceases to be an aspect of healthy competition. See Bork, Contrasts in Antitrust Theory: I, 65 Col. L. Rev. 401, 411, n.11. It is not the Commission's function to decide which lawful elements of the "product" offered the consumer should be considered useful and which should be considered the symptoms of industrial "sickness." It is the consumer who must make that election through the exercise of his purchasing power. . . .

The reasons for including "commercial speech" within the confines of the First Amendment are, thus, clearly stated. The opinions of this Court certainly do not suggest any reason for its categorical exclusion. Mr. Justice Holmes reminded us, when the theory of the First Amendment was being framed, "that the ultimate good desired is better reached by free trade in ideas, — that the best test of truth is the power of the thought to get

itself accepted in the competition of the market." *Abrams* v. *United States,* 250 U.S. 616, 630 (1919). The argument for freedom of the marketplace of ideas is equally applicable to freedom for the ideas of the marketplace.

IV. This Court Has Recognized Exceptions to First Amendment Protections Against Government Regulation of Speech, Including "Commercial Speech." None of These Exceptions Is Applicable Here.

Even that kind of speech which is clearly included with the First Amendment's protection may take a form that would subject it to government regulation. Thus, as the Court said in *Brandenburg* v. *Ohio,* 395 U.S. 444, 447 (1969):

> These later decisions have furnished the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Where the speech in issue is so closely brigaded with "imminent lawless action" it may fall outside the protection of the First Amendment. That is, in an economic context, the lesson of the labor picketing cases. See, *e.g., Local Union No. 10, A. F. of L.* v. *Graham,* 345 U.S. 192 (1953); *Building Service Employees Union, Local No. 262* v. *Gazzam,* 339 U.S. 532 (1950); *Hughes* v. *Superior Court,* 339 U.S. 460 (1950); *Cole* v. *Arkansas,* 338 U.S. 345 (1949); *Giboney* v. *Empire Storage & Ice Co.,* 336 U.S. 490 (1949); *International Union, U. A. W.* v. *Wisconsin Employment Relations Board,* 336 U.S. 245 (1949).

This, too, in the more immediate context of "commercial speech," is the lesson of *Pittsburgh Press* v. *Human Relations Commission,* 413 U.S. 376, 388 (1973), where the Court said:

> Insisting that the exchange of information is as important in the commercial realm as in any other, the newspaper here would have us abrogate the distinction between commercial and other speech.

> Whatever the merits of this contention may be in other contexts, it is unpersuasive in this case. Discrimination in employment is not only commercial activity, it is *illegal* commercial activity under the ordinance. [Emphasis in original.]

The time, place, and manner of speech, but not its content may also be subject to injunction. See cases cited *supra* at p. 5.

And, speech may be incidentally restrained in order for government to effect other ends that are within its constitutional authority. The standard here was set out in *United States* v. *O'Brien,* 391 U.S. 367, 376-77 (1968), in these terms:

> This Court has held that when "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest.

The case before this Court falls outside all these exceptions. There is no illegal action coupled with the expression of information about pharmaceutical products, to wit, their price. The regulation is not concerned with time, place, or manner, but with the content of the speech itself. It is not a regulation with an incidental effect on speech, but one of direct censorship of speech. Nor is there any showing that the publication of prices of pharmaceutical wares would have any adverse effect on "the quality of [pharmaceutical] services within Viriginia." *Bigelow, supra,* at 4739.

It follows that the publication of the price data at issue herein may not constitutionally be inhibited by state law without falling afoul of the principles of the First Amendment long espoused and elaborated by this Court. Unless the Court is prepared to revert to the proposition that the invocation of the shibboleth "commercial speech" is sufficient to afford the State "talismanic immunity from constitutional limitation," 367 U.S. at 269, the judgment below should be affirmed.

CONCLUSION

"Commercial speech" like other forms of speech is entitled to the protections of the First Amendment. The First Amendment requires the invalidation of the law in question here which consists of direct and total censorship of communications that would publish the price of prescription drugs. The judgment of the court below should, therefore, be affirmed.

Respectfully submitted,

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