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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,

v.

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

Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF OF APPELLANTS

OPINION BELOW

The opinion and order of the three-judge District Court is reported at 373 F. Supp. 683. That opinion and order, as well as the order denying the motion of appellants to amend the findings or judgment, or in the alternative for a new trial is set forth in the Appendix to the Jurisdictional Statement, App. 1 through App. 9.[1]

[1] The appendices in the Jurisdictional Statement and Motion to Dismiss, have not been reproduced again. References to those appendices will be made accordingly. Reference to the joint appendix, prepared pursuant to Rule 36 will be cited J.A. .....

JURISDICTION

This Court has jurisdiction over the instant appeal as provided for by 28 U.S.C. § 1253 (1948).

The opinion and order of the court below was filed on March 21, 1974. The order of the court denying the motion of appellants to amend findings or judgment, or in the alternative for a new trial, was entered on October 4, 1974. Notice of appeal was filed on November 4, 1974. Probable jurisdiction was noted by this Court on March 17, 1975.

STATUTE INVOLVED

This appeal involves the validity of Virginia Code Annotated § 54-524.35(3) (1974) which deems pharmacists guilty of unprofessional conduct if they advertize prescription drugs in a certain manner.

The statute involved provides:

> *"When pharmacist considered guilty of unprofessional conduct.*—Any pharmacist shall be considered guilty of unprofessional conduct who * * *
>
> (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription."

QUESTION PRESENTED

Whether the First Amendment grants consumers an independent "right-to-know" thus allowing invalidation of a statute which validly prohibits the ~~desimination~~ dissemination of commercial advertising.

STATEMENT OF THE CASE

In 1968 the Virginia General Assembly declared that a pharmacist would be guilty of unprofessional conduct if he published, advertised or promoted the price or discount terms for prescription drugs. 1968 Acts of Assembly, Chapter 803. The statute immediately came under attack by a pharmacy contending that the statute violated First and Fourteenth Amendment rights. Both contentions were rejected. *See Patterson Drug Co.* v. *Kingery*, 305 F. Supp. 821 (W.D. Va. 1969) (three-judge court).

On July 1, 1973, the Appellees, Virginia Citizens Consumer Council, Inc., Virginia State AFL-CIO and Lynn B. Jordan, instituted an identical challenge in the United States District Court for the Eastern District of Virginia. The Appellees sought an injunction against the enforcement by the Appellants of Va. Code Ann. § 54-524.35(3) which declares the publishing, advertising, or promotion of prices, fees discounts, rebates or credit terms for prescription drugs to be unprofessional conduct subjecting offending pharmacists to possible disciplinary sanctions. While recognizing that the State may prohibit the advertising of prescription drug prices by pharmacists, *Patterson Drug Co.* v. *Kingery, supra,* the District Court enjoined the enforcement of the statute as violative of the consumers' "right-to-know."

Section 54-524.35 (3) in no way subjects the Appellee or any persons they purport to represent to the jurisdiction of the Appellants. It does subject pharmacists, licensed by the State Board of Pharmacy, to disciplinary action, although no such action has been taken. In addition, it has never been claimed, nor have the Appellants indicated in any way, that price information may not be disseminated or otherwise be made available to the public by other methods such as in response to telephonic or oral requests.

While statistics reflect a disparity in the price of prescription drugs between individual pharmacies and, indeed, between different pharmacies in the same chain of pharmacies, there is no evidence in the record that the inability to advertise prescription drug prices results in higher prices to the consumer. It was stipulated in the court below that there is at least as great a disparity in the prices of non-prescription drugs which are freely advertised and promoted.

It was also stipulated that pharmacy is a profession which requires its practitioners to have five years of university level training, one year's practical training and the successful completion of an examination prior to licensure. Va. Code Ann. §§ 54-524.2(a) and 54-524.21.

ARGUMENT

Prohibiting The Commercial Dissemination Of Prescription Drug Price Information Does Not Violate Any First Amendment Rights Of Consumers.

A.

The Prohibition Of Price Advertising Is A Valid Exercise Of States' Rights To Regulate A Health Profession.

This is a First Amendment case. It is not a Fourteenth Amendment case. In light of this Court's decision in *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973) appellees are estopped from arguing that the statute bears no relationship to public health and safety. The evidence introduced in the lower court demonstrated a relationship between the challenged statute

and the protection of the public health, safety and welfare.[2] As stated by the court in *Patterson,* 305 F. Supp. at 824-25:

> "Pharmacists must have extensive knowledge of a wide range of drugs. Accuracy is essential; mistakes can be serious. A few prescriptions, but nevertheless a significant number, cannot be filled from drugs available in manufactured form, so the medicine must be compounded by the pharmacists. Some pharmacists, probably a minority, systematically monitor prescriptions by family records to avoid allergic reactions or the simultaneous use of antagonistic drugs, of which the patient's doctor may not be aware. Although monitoring is not completely effective because of the mobility of customers and the availability of nonprescription drugs which may be antagonistic, it is a benefit to the public.
>
> "From the evidence we find that dispensing prescription drugs affects the public health, safety and welfare. And we conclude that the state's classification and regulation of pharmacy as a professional practice is not arbitrary or invidious."

No infirmity to that opinion was escribed by the lower court, 372 F. Supp. at 685. And whether the anticompetitive effect of the ban on advertising outweighs the classification

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[2] Appellants introduced into evidence exhibits and testimony of pharmacists, doctors and leading scholars in pharmacology demonstrating 1) the important role a pharmacist has in the medical health field and 2) how such role safeguards the public taking antagonistic drugs, especially with the utilization of patient profile records. Family prescription or patient profile records generally are kept alphabetically by family name. The record reflects the drugs being taken by each member of the family unit. Also included are known sensitivities to drugs, and any other information that might affect the healh of the individual by consuming drugs. With this information in one place the pharmacist, at a glance, is able to evaluate whether a particular drug should be given without further inquiry of the physician or the patient. Obviously, the system breaks down and becomes useless when the patient uses many different pharmacies. See for example proposed testimony of Wallace B. Thacker, J.A. 29-30; Thomas E. Rorrer, J.A. 31-32 and Dr. Harold I. Nemuth, J.A. 32-35.

and regulation of pharmacy as a profession[3] is a legislative choice, not judicial. To emphasize, some believe, as do appellees, that removing the ban on advertising prescription drug prices would induce retailer incentive for price competition and will assist consumers in a decision regarding where to purchase medication. Others feel that there in fact is a need for strict regulation of all aspects of pharmacy, including advertisement of price. As the *Patterson* court held, however, 305 F. Supp. at 826 the judiciary is "not empowered to determine whether the statute is wise or foolish, economically sound or improvident." The "two opposed views of public policy are considerations for the legislative

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[3] The Virginia statutory scheme strictly regulates the dispensing of drugs. See for example:

§ 54-524.2(a)

"The practice of pharmacy in the State of Virginia is declared a professional practice affecting the public health, safety and welfare and is subject to regulation and control in the public interest."

* * *

§ 54-524.2(b)
(26a)

" 'Practice of pharmacy' is the personal health service that is concerned with the art and science of procuring, recommending, administering, preparing, compounding and dispensing of drugs, medicines and devices used in the diagnosis, treatment, or prevention of disease, whether compounded or dispensed on a prescription or otherwise legally dispensed or sold, and shall include the proper and safe storage and distribution of drugs, the maintenance of proper records therefor, and the responsibility of poviding information, as required, concerning such drugs and medicines and their therapeutic values and uses in the treatment and prevention of disease.

The words 'drug' and 'devices' as used in this definition, shall not include surgical or dental instruments, physical therapy equipment, X-rays apparatus, their component parts or accessories.

The 'practice of pharmacy' shall not include the operations of a manufacturer or wholesaler."

* * *

choice." *North Dakota Pharmacy Board* v. *Snyders Stores,* 414 U.S. at 167; *Dean* v. *Gadsen Times,* 412 U.S. 543 (1973).

B.

COMMERCIAL ADVERTISEMENT OF DRUGS IS NOT ENTITLED TO FIRST AMENDMENT PROTECTION.

It is conceded, as it must be, "that speech is not rendered commercial by the mere fact that it relates to an advertise-

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§ 54-524.16

"The Board shall regulate the practice of pharmacy and the manufacturing, dispensing, selling, distributing, processing, compounding, or other disposal of drugs, cosmetics and devices, control the character and standard of all drugs, cosmetics and devices within the State, investigate all complaints as to the quality and strength of all drugs, cosmetics, and devices and take such action as may be necessary to prevent the manufacturing, dispensing, selling, distributing, processing, compounding and other disposal of such drugs, cosmetics and devices as do not conform to the requirement of law and in so regulating the Board shall consider any of the following criteria as they are applicable:

* * *

(d) Maintaining the integrity of, and public confidence in, the profession and improving the delivery of quality pharmaceutical services to the citzens of Virginia.

(e) The maintenance of complete records of the nature, quantity or quality of drugs or substances distributed or dispensed, of all transactions involving controlled substances or drugs so as to provide adequate information to the patient, the practitioner or the Board."

§ 54-524.50

"No person shall, in the course of his normal activities and pursuant to solicitation, dispense a prescription under any plan, arrangement, or practice which does not provide for a bona fide physician-pharmacist-patient relationship. The physician-pharmacist-patient relationship is that situation which permits either the physician, pharmacist, or patient to inquire concerning factors relating to the prescription and which permits the physician and pharmacist to render such other professional services as required for protection of the health and welfare of the patient."

ment," *Pittsburgh Press* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376, 384 (1973), or by the fact that a newspaper is compensated for publishing the advertisement. *New York Times* v. *Sullivan,* 376 U.S. 254, 266 (1964). The crucial factor in determining the nature of an advertisement is whether it does no more than propose a commercial transaction. *Pittsburgh Press, supra,* at 385. As evidenced in the Appendix to appellee's Motion to Dismiss, A. 8 to A. 10, the advertisements herein are purely commercial. Phrases such as "dial-a-discount," "compare," "save," "pay less," "10% senior citizens discount," "full service pharmacy," "over 150 million prescriptions filled," and many others of such ilk, do not begin to rise to the dignity of "social, political, aesthetic, moral, and other ideas and experiences," *Kleindienst* v. *Mandel,* 408 U.S. 753, 763 (1972), traditionally granted First Amendment protection. The advertisements in the instant case do no more than propose a commercial transaction, the sale of drugs. The ads simply seek to induce consumers into purchasing the services offered.[4] (Compare page A. 10 of appellees' Motion to Dismiss which at least makes a pretext of commenting on the wisdom of the statute prohibiting advertising.) This court made it clear in *Pittsburgh Press, supra,* that First Amendment protection will not be afforded purely commercial advertising. See also *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942). State regulation of such advertisements is permissible, especially where the advertisements relate to the medical-health field. *Williamson* v. *Lee Optical Co., Inc.,* 348 U.S. 483 (1955); *Semler* v. *Dental Examiners,* 294 U.S. 608 (1935). As the record amply shows the advertisement under scrutiny here

[4] The Federal Trade Commission, while changing its policy regarding "image" ads that are deceptive, nonetheless still exercises strict regulatory power over "ads that might have a commercial effect." *See* Antitrust & Trade Regulation Report, 712 ATRR at A-4 (May 6, 1975).

is of a purely commerciadl nature and thus is subject to the valid regulatory scheme embodied in § 54-524.35(3), Va. Code Ann.

Initially in this connection, the decision of the court below, is inconsistent with the *Valentine* v. *Chrestensen, Williamson* v. *Lee Optical* and *Semler* v. *Dental Examiners* decisions of this Court. It is also in diametric opposition to the decision of the three-judge District Court for the Western District of Virginia in *Patterson Drug Co.* v. *Kingery,* which upheld, against First and Fourteenth Amendment attack, the identical statutory provision attacked in the court below and to which the court below, as indicated, expressly refused to ascribe any infirmity. In addition, the decision of the court below enunciated and entirely novel principle of constitutional law, which is not only without decisional support, but is also squarely in contravention of the controlling principles approved by this Court in *Valentine, Semler* and *Williamson.*

The Commonwealth of Virginia has found "The practice of pharmacy . . . [to be] a professional practice affecting the public health, safety and welfare and . . . subject to regulation and control in public interest," Va. Code Ann, § 54-524.2(a), and it was so stipulated by the parties. The statutory provision under scrutiny merely prohibts individuals who undertake the profession from advertising the prices they charge for prescription drugs. Such advertisements, of course, clearly do no more than propose a commercial transaction—the sale of drugs. Because it is a classic example of commercial speech, *Pittsburgh Press* it is unprotected by the First Amendment. *Valentine* v. *Chrestensen, supra.* In striking down the advertising proscription of §54-524.35(3), the district court's opinion is at war with the principals ennunciated by this Court in *Valentine* that the First Amendment does not protect purely commercial advertising.

Because we are dealing here with pure commercial speech unprotected by the First Amendment, the question becomes whether the advertising proscription bears some rational relationship to a legitimate state end. *McDonald* v. *Board of Election Com'rs.*, 394 U.S. 802 (1969). Clearly, the authority to act in the interest of public health, which is at the very core of the police power of a state, supports the statute in question. The decision of the court below, however, eschews this authority.

First in *Semler* and again in *Williamson* this Court upheld statutes prohibiting advertising in the health field as a valid exercise of the state's authority to protect the public health, safety and welfare. While recognizing the continuing validity of those decisions, the court below erroneously held that the statutes involved in those decisions differed from that under scrutiny here:

> "We do not find adversely dispositive of the issue here Head v. New Mexico Board of Examiners, 374 U.S. 424 (1963), Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1935) or Williamson v. Lee Optical Co., 348 U.S. 483 (1955). State statutes there approved condemned generally advertisements of the door-to-door sale of eyeglasses with guarantees of satisfaction; advertisements of professional superiority of certain dentists and the carrying of their fees; and advertisements "soliciting" the sale of eyeglasses and frames by "baiting "and "enticing" the public into buying them.
>
> Clearly these publications were ex facie suppressible under State police powers and the interdicting statutes unquestionable. Just as clearly, however, the Virginia statute in suit is not of this ilk. It excludes an advertisement of a named drug which has been written into an authetic prescription issued to a patient individually by his doctor to be filled only by a licensed pharmacist. The laws sustained in *Head, Semler* and *Williamson*

> surely did not encompass prescription holders like the claimants in this suit."

The district court's failure to apply the principles of *Semler* and *Williamson* was improper, however. The statute under attack in *Semler* prohibited *inter alia* the advertising of prices for professional services 294 U.S. at 609. In *Williamson* the statute made it unlawful "to solicit the sale of frames, mountings . . . or any other optical appliances." 348 U.S. at 489. The statute in question here prohibits advertisements of prescription drug prices. Clearly, there is no legally significant difference between the statutes upheld in *Semler* and *Williamson* and the statute here.

Furthermore, the district court's attempt to distinguish *Semler* and *Williamson* on the grounds that this statute deals with prescription drugs filled by licensed pharmacists is utterly without merit. I*n Semler,* the statute was directed against licensed dentists. In *Williamson* the statute was directed against licensed opticians who had to follow the prescriptions of ophthalmologists or optometrists; a situation identical to that of pharmacists dispensing prescription drugs. In short, there is no difference between the *Semler* and *Williamson* cases and this case other than the crucial fact that the district court here refused to follow those cases.

And as indicated, there is a substantial relationship between the challenged statute and the protection of the public health, safety and welfare. *See Patterson,* 305 F. Supp. at 824-25.

In sum, then, the Court is not confronted in this case with the traditional role of the press of disseminating information and communicating opinion. See *New York Times* v. *Sullivan, supra,* at 266. The advertisements do not express a position whether, as a matter of social policy, drugs should be advertised, nor do they criticize the statute or its enforcement. The advertisements here do not even

remotely resemble the advertisement in *New York Times* v. *Sullivan.* Quite simply, they do no more than propose a commercial transaction. And this is all that consumers request, price competition through the removal of the ban on advertising. Thus, the advertisements are "classic examples of commercial speech," *Pittsburgh Press, supra,* at 385, which is in no way stripped of its commercial nature by editorial judgment. *Capitol Broadcasting Co.* v. *Acting Attorney General,* 333 F.Supp. 582 (D.D.C. 1971), aff'd, 405 U.S. 1000 (1972). As pure commercial speech, it is subject to regulation by the Commonwealth. *Pittsburgh Press, supra; Valentine* v. *Chrestensen, supra.* Cases such as *Capitol Broadcasting, New York State Broadcasters Ass'n.* v. *United States,* 414 F.2d 990 (2nd Cir. 1969), *cert. denied,* 396 U.S. 1061 (1970), and *Banzhaf* v. *F.C.C.,* 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied sub nom., Tobacco Institute, Inc.* v. *F.C.C.,* 396 U.S. 842 (1969), are also significant in their recognition that advertising can be regulated although the activity sought to be advertised is legal. See also *Valentine* v. *Chrestensen, supra.*

See also this Court's decision in *Lehman* v. *City of Shaker Heights,* 418 U.S. 298, (1974) holding that a city's decision, "as part of [a] commercial venture" to limit advertising card space to commercial and service oriented advertising, to the exclusion of issue-oriented advertisements did not "rise to the dignity of a First Amendment violation." 418 U.S. at 303-304.

C.

SINCE THERE IS NO RIGHT TO COMMERCIALLY ADVERTISE, CONSUMERS HAVE NO CORRELATIVE "RIGHT TO KNOW."

The opinion of the court below is in irreconcilable conflict with the decision of the three-judge district court in *Patterson.* In *Patterson* the court had before it the identical

advertising proscription. As here, the statute was being subjected to First Amendment attack. Unlike the court here, however, the court in *Patterson* correctly found no violation of First Amendment rights and upheld the enforceability of the statute.

The court below expressly refused to reject the holding in *Patterson:*

> "Validity of the Virginia law, say the defendants, is secured in the able opinion of *Patterson Drug Company* v. *Kingery,* 306 F. Supp. 821 (3-judge court, W.D. Va. 1969). No infirmity is now ascribed to that decision, but notably there the suit was cast in a context quite the opposite of that pleaded here. In *Kingery,* the unsuccessful assailants were pharmacists, sellers of the drugs and, of course, theirs was a prima facie commercial approach. The opinion mentions the First Amendment only to note its inapplicability because the case involved commercial advertising. Consumers' consequences, though, understandably were not discussed since they were not raised." 373 F. Supp. at 685-686.

The lower court's attempted distinction of the *Patterson* case, however, is without merit. First, as indicated, the advertising proscription under attack in *Patterson* was identical to that under attack in this case. The *Patterson* court upheld the proscription against First and Fourteenth Amendments attack, a holding with which the court below was in agreement. The court below attempted to distinguish the cases on the basis that *Patterson* was brought by pharmacists while the instant litigation was instituted by consumers. This is, indeed, a distinction without a difference. If the proscription did not violate First Amendment rights in *Patterson,* it cannot do so now. If the proscription was a lawful exercise of the State's police power in *Patterson,* it can be no less here.

Second, the court below stated that the *Patterson* court did not discuss the plight of consumers. This is erroneous. The *Patterson* court correctly recognized that it was not sitting as a superlegislature. As stated by that court:

> "We have not overlooked the anticompetitive effect of the ban on advertising.
>
> However, we are not empowered to determine whether the statute is wise or foolish, economically sound or improvident. Decision of these issues lies with the state legislature. Ferguson v. Skrupa, 372 U.S. 726, 729, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963)." *Patterson, supra,* at 825-26.

In *Kleindienst* v. *Mandel, supra,* 408 U.S. at 762 this Court recognized that it has referred to a "First Amendment right to 'receive information and ideas.' "

"It is now well established that the Constitution protects the right to receive information and ideas." *Id.*

> 'This freedom [of speech and press] . . . necessarily [408 U.S. 763] protects the right to receive . . . .' Martin v. City of Struthers, 319 U.S. 141, 143 (1943) . . . ." Stanley v. Georgia, 394 U.S. 557, 564 (1969). This was one basis for the decision in Thomas v. Collins, 323 U.S. 516 (1945). The Court there held that a labor organizer's right to speak and the rights of workers "to hear what he had to say," id., at 534, were both abridged by a state law requiring organizers to register before soliciting union membership. In a very different situation, Mr. Justice White, speaking for a unanimous Court upholding the FCC's "fairness doctrine" in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-390 (1969), said:
>
> "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . . It is the right of the public to receive suitable access to social, political, esthetic,

> moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." Id., at 390.
>
> And in Lamont v. Postmaster General, 381 U.S. 301 (1965), the Court held that a statute permitting the Government to hold "communist political propaganda" arriving in the mails from abroad unless the addressee affirmatively requested in writing that it be delivered to him placed an unjustifiable burden on the addressee's First Amendment right. This Court has recognized that this right is 'nowhere more vital' than in our schools and universities." (Citations omitted) 408 U.S. at 763.

Where, however, the "right to know" has been recognized by this Court it has been only in the context of the free exchange of ideas where the right asserted was a right to confer, debate and converse with another person who was expressing novel political and social ideas.

Even then, as indicated, by *Kleindienst,* which involved the First Amendment right to know in its purest form i.e., the right to debate and freely exchange ideas, a balancing test between First Amendment rights and a Government's regulatory authority is appropriate. In balancing these two interests, access to alternative means to receive the same information is a relevant factor.[5] *Id.*

There is nothing in *Kleindienst,* however, which suggests that the First Amendment right to know extends to the right to receive *commercial* speech in a *particular manner.* Commercial speech, such as the speech sought to be received in this case, does not involve an exchange of ideas or the opportunity for face to face debate and discussion which was at issue in *Kleindienst, supra.* Similarly, the right to

[5] It was stipulated that consumers had alternative means by which they could acquire information regarding the cost of medication. Stipulation of Facts ¶¶ 25 and 28, J.A. 15.

know asserted here differs markedly from the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which was at issue in *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. at 390 (1969). See also *Garrison* v. *Louisiana,* 379 U.S. 64 (1964). In short, the right to receive commercial speech is entitled to no broader protection than the right to publish commercial speech.

Moreover, the effect of the price advertising statute on consumers, though related to their health, is clearly economic. Consumers are not estopped from acquiring necessary drugs. As alleged, they must pay more for such drugs. Economic interests and considerations, do not, however, rise to the dignity of constitutional rights. *Shapiro* v. *Thompson,* 394 U.S. 618 (1969). Even if there is such a constitutional right, there is not thereby created a correlative right to receive or for others to dispense such information. Compare *Stanley* v. *Georgia,* 394 U.S. 557 (1969) and *U.S.* v. *Orito,* 413 U.S. 139, 141 (1973); *U.S.* v. *Thirty Seven (37) Photographs,* 402 U.S. 363 (1971). "Government has a legitimate interest in protecting the public commercial environment. . . ." *U.S.* v. *Orito,* 413 U.S. at 143.

The Court below, in short, failed to consider the obvious distinction between First Amendment speech and commercial advertising. It, without explanation, extended to consumers a right to receive information that it acknowledged pharmacies had no such right to publish.

The Court below arrogated unto itself the powers of the Virginia General Assembly. It is clear that the court considered the advertising proscription economically unsound and substituted its wisdom for that of the Virginia legislature. The decision of the court below is a throwback to the days in which courts "exalted substantive due process by

striking down state legislation which a majority of the Court deemed unwise." *North Dakota Pharmacy Bd.* v. *Snyder's Stores, supra.* The decision of the court below is "a derelict in the stream of the law," *Id.* at 167, clearly deserving reversal.

No decision of this Court has ever gone so far. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), *Martin* v. *Struthers,* 319 U.S. 141 (1942) have emphasized the correlative right to receive information where there was a protected right to speak or distribute. This is but common sense. It would certainly stymie an individual's ability to communicate if the state could interfere with the receipt of such information.

The instant decision, however, holds that notwithstanding a state's legitimate interest in controlling advertising of services by professions, a consumer has a First Amendment "right-to-know" which abrogates such control. Such a holding means a possible invalidation of those statutes which prohibit advertising by doctors, lawyers and all others in professional fields.[6]

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[6] The right to know is already being used as the basis for challenging a Maryland statute which prohibits doctors from advertising. *Public Citizens Health Research Group, et al.* v. *Commission on Medical Discipline of Maryland,* Civil Action No. B74-56 U.S.D.C. for the District of Maryland, is the basis for a suit seeking invalidation of the prohibition against advertisement of attorneys' fees *Consumer's Union et al.* v. *American Bar Association and the Virginia State Bar Association,* C.A. No. 75-0105-R, United States District Court, Eastern District of Virginia, and was used in a number of other pharmacy related cases. *See* for example, *Massachusetts Public Interest Research Group, Inc., et al.* v. *Massachusetts State Board of Registration in Pharmacy, et al.;* C.A. No. 74-5221-C, United States District Court, District of Massachusetts, action stayed pending decision of the Virginia case, and *Terry* v. *California State Board of Pharmacy, et al.,* C.A. No. C-74-1091-RFP, United States District Court, Northern District of California, ... F. Supp. ..... (May 12, 1975). In *Terry* the California court simply balanced the need for the ban against the need of the consumer to know. It made a "legislative" decision that the ban was not justified; further the state was required to justify the ban with a compelling inerest.

The validity of state statutes cannot be dependent upon who sues. In Virginia, the very statute involved herein was declared valid when pharmacists brought suit, *Patterson* v. *Kingery, supra,* and then was declared invalid when consumers brought suit. This is, as indicated, an anomaly in the law, which cannot stand.

What appellees and the lower court are doing, is merely substituting for the Fourteenth Amendment, a First Amendment "right to know." Once the substitution is completed the courts will once again be deciding which legislation is wise. The wisdom of legislation is not a field for the judiciary. It was rejected by this court over 40 years ago and should not be allowed to once again breathe new life, in a different guise.

CONCLUSION

To grant a First Amendment "right to know" in the field of commercial advertising will return courts to that vintage of decisions wherein legislation was struck down where it was deemed unwise. And to return to that era in the guise of the First Amendment, where states will have to justify their internal and commercial affairs by a compelling interest standard, would indeed put a derelict in the stream of law which could not be bypassed. The decision of the lower court should be reversed.

Respectfully submitted,

VIRGINIA STATE BOARD OF PHARMACY, ET AL.

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CERTIFICATE OF SERVICE

I, Anthony F. Troy, Chief Deputy Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of the counsel for the Virginia State Board of Pharmacy in the above-captioned matter, hereby certify that three (3) copies of this Brief of Appellant have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office with first class postage prepaid, this 2nd day of June, 1975, as follows:

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All persons required to be served have been served.

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