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In The

Supreme Court of the United States

October Term, 1974

No. .....

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

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JURISDICTIONAL STATEMENT

PRELIMINARY STATEMENT

The State Board of Pharmacy of the Commonwealth of Virginia and the members thereof appeal from the order of the three-judge District Court below declaring § 54-524.35(3) of the Code of Virginia (1950), as amended, violative of the First Amendment to the Constitution of the United States insofar as it prohibits the publishing, advertising, or promoting of any price, fee, premium, discount, rebate or credit terms for prescription drugs, and the order of the three-judge District Court denying Appellants mo-

tion to amend findings or judgment or in the alternative for a new trial, entered herein on October 4, 1974.

OPINION OF THE COURT BELOW

The order of the three-judge District Court denying the motion of the Appellants to amend findings or judgment, or, in the alternative, for a new trial, is not reported and is set forth in the Appendix, *infra,* at 1a. The opinion of the three-judge District Court is reported at 373 F. Supp. 683 and is set forth in the Appendix, *infra,* at 2a.

JURISDICTION

The order of the Three-judge District 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,[1] and a notice of appeal was filed in that court on November 4, 1974. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by 28 U.S.C. § 1253.

STATUTE INVOLVED

"*When pharmacist considered guilty of unprofessional conduct.*—Any pharmacist shall be considered guilty of unprofessional conduct who (1) is found guilty of any crime involving grave moral turpitude, or is guilty of fraud or deceit in obtaining a certificate of registration; or (2) issues, pub-

[1] Appellees, relying on *F.T.C.* v. *Minneapolis-Honeywell R. Co.,* 344 U.S. 206 (1952) will assert that the October 4, 1974 Order merely reiterated the court's original decision and thus this appeal is untimely. This ignores the fact that the original decision of March 21, 1974, was never final since a motion was timely filed, on April 1, 1974, pursuant to Rules 52 and 59 of the Federal Rules of Civil Procedure. Any complaint that a brief in support of such motion was not properly filed in accord with the local rules of the United States District Court for the Eastern District of Virginia must be and in fact was addressed to that Court. The lower court ignored appellee's argument.

lishes, broadcasts by radio, or otherwise, or distributes or uses in any way whatsoever advertising matter in which statements are made about his professional service which have a tendency to deceive or defraud the public, contrary to the public health and welfare; or (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." Va. Code Ann. §54-524.35.

QUESTION PRESENTED

Does the First Amendment grant consumers an independent "right-to-know" thus allowing invalidation of a statute which validly prohibits the desemination of commercial advertising. Phrased another way, the question is, does the First Amendment grant a right to be commercially advertized to, when there is no correlative right to commercially advertize.

STATEMENT OF THE CASE

On July 1, 1973, the Appellees, Virginia Citizens Consumer Council, Inc., Virginia State AFL-CIO, and Lynn B. Jordan, instituted in the United States District Court for the Eastern District of Virginia this class action against the Appellants, the Virginia State Board of Pharmacy and each of the members thereof. 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 pro-

hibit the advertising of prescription drug prices by pharmacists, *Patterson Drug Co.* v. *Kingery,* 305 F. Supp. 821 (W.D. Va. 1969) (three-judge court) (App., *infra,* at 6a), 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.

THE QUESTION IS SUBSTANTIAL

For a number of reasons, the question decided by the court below is of such a substantial nature as to require plenary consideration by this Court, with briefs on the merits and

oral argument. Initially in this connection, the decision of the court below, is inconsistent with the decisions of this Court in *Valentine* v. *Chrestensen,* 316 U.S. 52 (1942), *Semler* v. *Dental Examiners,* 294 U.S. 608 (1935) and *Williamson* v. *Lee Optical,* 348 U.S. 483 (1955). 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,* 305 F. Supp. (W.D. Va. 1969), which upheld, against First and Fourteenth Amendment attack, identical statutory provision attacked in the court below and to which the court below expressly refused to ascribe any infirmity. (App., *infra,* at 6a.) In addition, the decision of the court below enunciated an 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. (App. *infra,* p. 4a.) The statutory provision under scrutiny merely prohibits individuals who undertake the profession from advertising the prices they charge for prescription drugs. Such advertisements, of course, do no more than propose a commercial transaction—the sale of drugs. Because it is a classic example of commercial speech, *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations,* 413 U.S. 376, 385 (1973), price advertising 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 principle en-

nunciated 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 US 424 (1963), Semler v. Oregon State Board of Dental Examiners, 294 US 608 (1935) or Williamson v. Lee Optical Co., 348 US 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

> authentic 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. In *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.

There is a substantial 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:

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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,

> "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."

It cannot seriously be maintained that the statute does not bear a rational relationship to a legitimate State end. Indeed, to find otherwise would require a reversal of *Williamson* and *Semler*.

The opinion of the court below is also 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

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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 health 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.

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, 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 Amendment 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.

The court below erred in arrogating 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,* 414 U.S. 156, 164 (1973). 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 pro-

hibit advertising by doctors, lawyers and all others in professional fields.[3]

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 breath new life.

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[3] 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.

CONCLUSION

For the reasons stated probable juris should be noted.

Respectfully submitted,

VIRGINIA STATE BOARD OF PHARMACY, *et al.*

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CERTIFICATE OF SERVICE

I, Anthony F. Troy, 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 Jurisdictional Statement 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 20th day of January, 1975, as follows:

James W. Benton, Jr., Esquire
Hill, Tucker and Marsh
214 East Clay Street
Richmond, Virginia 23219

Raymond T. Bonner, Esquire
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Attorneys for Appellees

All persons required to be served have been served.

ANTHONY F. TROY
Deputy Attorney General

ORDER

Filed October 4, 1974

Deeming it proper so to do, it is ADJUDGED and ORDERED that the defendants' motion to amend findings or judgment, or, in the alternative, for a new trial, be, and the same is hereby, denied.

Let the Clerk send a copy of this order to all counsel of record.

/s/ Albert V. Bryan
United States Circuit Judge

/s/ John A. MacKenzie
United States District Judge

/s/ Robert R. Merhige, Jr.
United States District Judge

Date: Oct 4 1974

FINAL ORDER OF DECLARATORY JUDGMENT AND INJUNCTION

Filed March 21, 1974

For the reasons stated in the written opinion of the court this day filed, it is ADJUDGED, ORDERED and DECREED as follows:

1. That so much of the statute of Virginia, cited as 1950 Code of Virginia, as amended (1972 Supp.) § 54.524.35(3), as prohibits the publishing, advertising or promoting, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for any drugs which may be dispensed only by prescription, is hereby declared to be void and of no effect; and

2. That the defendants in this action, and each of them, their officers, agents, servants, employees and attorneys, as well as their successors in office, be and they are hereby forthwith restrained and enjoined from enforcing the said statute insofar as it has hereinbefore been declared void and of no effect.

The Clerk is directed to send a copy of the said opinion and of this order to counsel of record in this case, and to tax the costs of this action against the defendants, the court awarding costs to the plaintiffs.

March 21, 1974.

/s/ Albert V. Bryan
United States Circuit Judge

/s/ John A. MacKenzie
United States District Judge

/s/ Robert R. Merhige, Jr.
United States District Judge

* * *

OPINION OF THE COURT

Filed March 21, 1974

Albert V. Bryan, Senior Circuit Judge:

A Virginia law[1] is here decried as unconstitutional[2], as well as violative of Federal law[3], in imputing "unprofessional conduct" to any pharmacist who "publishes, advertises or promotes" in any manner "the price, fee . . . discount, rebate or credit terms . . . for drugs which may be disposed of only by prescription". The State Board of Phar-

[1] 1950 Code of Va., as amended (1972 Supp.), § 54.524.35(3).

[2] First and Fourteenth Amendments.

[3] 42 USC 1983, providing right of action for deprivation of civil rights.

macy may rescind the license of any pharmacist engaging in the forbidden activity. The result is that no such price dissemination prevails in Virginia. Declaration of its invalidity and injunction of its enforcement are requested of us[4]; we accede.

At once it must be emphasized that the plaint here is that of *consumers,* not the pharmacists. Again, this suit does not involve the illegitimate use of drugs, or even the free use of legitimate drugs, or the illegal procurement or disposal of them. Only professionally prescribed drugs compounded by professional pharmacists are the subject of this litigation, and then only their prices, entirely devoid of comment or advice as to their healing capabilities.

Plaintiffs comprise a resident of the State, suffering from a disease requiring her to take prescription drugs frequently, and unincorporated associations representing their respective groups who, in many instances, are dependent on prescription drugs. As to their standing to sue see, *Flast* v. *Cohen,* 392 US 83, 101 (1968); *NAACP* v. *Button,* 371 US 415, 428 (1963). Defendants are the Board of Pharmacy, with its individual members, which is responsible for the enforcement of the Virginia law regulating the practice of pharmacy in Virginia.

Plaintiffs complain that the State law precludes them from information as to where prescription drugs may be bought at the least expense, and there are costly disparities in the amounts charged therefor, but that without knowledge of these differences they cannot take advantage of the lower costs commensurate with their means. They further assert that the ages and physical infirmities of many of the individual plaintiffs prevent their ascertaining the most economical purchase; that a material part of elderly persons'

[4] 28 USC 2281—requiring 3-judge court for such an injunction.

income is laid out on medicine; that at many times the medicine prescribed is vital to their well-being; and that their finances may control where they can procure desperately needed drugs. Consequently, plaintiffs earnestly contend that the enactment is a substantial infringement of their privileges under the First Amendment in withdrawing from them necessibility to the benefits of price publications.

The facts just advanced—but not the legal conclusions—are not disputed. It is stipulated, too, that pharmacy is a profession, its licensing and practice demanding thorough collegiate academic application of several years in preparation for entrance into the professional study, with graduation from an accredited school of pharmacy. Expenditures annually for prescription drugs are vast, running into the billions of dollars. Prices therefor do in truth vary tremendously throughout the State. In substantiation the parties have stipulated:

> "22. (a) In Northern Virginia the price of 25 Darvon capsules (standard dosage) ranges from $2.35 to $3.65, a difference of 55%; the price of 40 Achromycin tablets (standard dosage) from $2.50 to $4.70, a difference of 90%; of 40 Tetracycline tablets (standard dosage) from $1.68 to $3.90, a difference of 132%.
>
> (b) In Richmond, the cost of 40 Achromycin tablets ranges from $2.50 to $6.00, a difference of 140%.
>
> (c) In the Newport News-Hampton, Virginia peninsula area the following variations exist:
>
> (1) Tetracycline: $1.20 to $9.00, a 650% difference;
>
> (2) Achromycin: $2.20 to $7.80, a 241% difference;
>
> (3) Darvon: $1.90 to $4.70, a 147% difference."

Danger to the public would not be threatened by the advertisement of prescription drugs, the plaintiffs accent, because every sale must be accompanied by a prescription from a licensed physician. The medication would still be the result of the doctor's diagnosis of the patient. Furthermore, the drug would be the product of a rigidly licensed pharmacist. Consequently, the advertisement, it is further pressed, does not encourage the use of drugs, for they would not thereby become more readily obtainable through price publication. Thus, it is avouched that price advertisement does not either potentially or actually affect the health of the user.

The Argument

Initially, Fourteenth Amendment due process protection was invoked by the plaintiffs on behalf of the consumer. This position is no longer pressed. In a written statement filed with the court at argument, the plaintiffs say they "have concluded that they should not pursue in this Court their position that the Virginia law which prohibits advertising of prescription drug price information violates the Fourteenth Amendment", citing as their reason North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., ... US ....., 42 Ill 4035 (December 5, 1973)[5].

However, a First Amendment safeguard, constrictive of the State through the Fourteenth, DeJonge v. Oregon, 899 US 353, 364 (1937), is interposed:

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[5] "We [plaintiffs] do, however, wish to reserve such argument in order to urge before the Supreme Court (should this case be appealed) that the *North Dakota State Board of Pharmacy* case exempts only purely economic legislation from the scrutiny of the Fourteenth Amendment, and that the legislation at issue here, which significantly affects the health of the public must satisfy the real and substantial relation test." See, *Statement of Plaintiffs' Position,* (December 11, 1973).

> "[A State] shall make no law . . . abridging the freedom of speech, or of the press . . ."

to forestall Virginia's instant stricture. Here the plaintiffs reiterate the circumstances of the sick and needy patients who seek the price information to ease their suffering and perhaps aid their survival. Plaintiffs urge that the First Amendment assures its freedoms to the auditor and reader as stoutly as it does the speaker and writer. Kleindienst v. Mandel, 408 US 753, 762-764 (1972; Stanley v. Georgia, 394 US 557, 564 (1969).

In rebuttal, defendants contend that the First Amendment does not shield commercial speech or writing, and that advertisement of prescription drug prices is a commercial publication, citing Valentine v. Chrestensen, 316 US 52, 54 (1942). However, rejoin the consumers, the predominant factor here is that the barring of publication could retard access to a means of medical relief for the invalid and thus affront the First Amendment.

The Point for Decision

The controversy here comes, therefore, to whether the State may legally exclude from publication prescription drug prices *not otherwise fairly available* to those consumers who vitally need the drugs, but who, because of disability, illness or poverty, can only afford the very lowest price.

The Authorities

Validity of the Virginia law, say the defendants, is secured in the able opinion of Patterson Drug Company v. Kingery, 306 FS 821 (3-judge court, WDVa. 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.

Instantly, the actual suitors are consumers; their concern is fundamentally deeper than a trade consideration. While it touches commerce closely, the overriding worry is the hindrance to a means for preserving health or even saving life. Speaking of Valentine v. Chrestensen, supra, 316 US 52, the opinion in Pittsburgh Press Co. v. Human Relations Commission, 413 US 376, 384 (June 21, 1973) somewhat tempers the former's downright exclusion: "Subsequent cases have demonstrated, however, that speech is not rendered commercial by the mere fact that it relates to an advertisement". It adds that implicitly constitutional protection could be accorded where First Amendment interest "might arguably outweigh the governmental interest supporting" a prohibition. P. 389.

Additionally, this cause has no design to curtail the State's discipline of pharmacies—the statute's evident aim. It was drawn with the pharmacy in mind, certainly not the needy consumer. Consideration by the courts of the consumers' necessities is thus not an intrusion upon the State's regulation of pharmacies, frowned upon in North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., supra, But even there the Court excepted those occasions where the State law would "run afoul" of constitutional prohibitions, of course including the First Amendment.

Florida, Maryland and Pennsylvania have fully removed the bars to the publication of prescription drug prices.

Florida Board of Pharmacy v. Webb's City, Inc., ... Fla. ....., 219 S.2d 681 (1969); Maryland Board of Pharmacy v. Sav-A-Lot, Inc., ... Md. ....., ... A.2d ..... (1973) and Pennsylvania State Board of Pharmacy v. Pastor, 441 Pa. 186, ... A.2d ..... (1971)[6]. The most trenchant relevancy and force of these precedents are their due acknowledgment and just accordance of the necessity of price information. These holdings are pro bono publico enunciations but nonetheless persuasive, though without constitutional footing.

We do not find adversely dispositive of the issue here Head v. New Mexico Board of Examiners, 374 US 424 (1963), Semler v. Oregon State Board of Dental Examiners, 294 US 608 (1935) or Williamson v. Lee Optical Co., 348 US 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 authentic 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.

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[6] While the opinions in *Sav-A-Lot* and *Pastor* observe passim that the Federal courts no longer disapprove State economic legislation on substantive due process grounds, nothing is said in disparagement of the Federal courts' duty to preclude abrogations of Constitutional equal protection or freedom of press guarantees.

Conclusion

The right-to-know is the foundation of the First Amendment; it is the theme of this suit. Consumers are denied this right by the Virginia statute. It is on this premise that we grant the plaintiffs the injunction and the declaration they ask.

Why the customer is refused this knowledge is not convincingly explained by the State Board of Pharmacy and its members. Enforcement of the ban gives no succor to public health; on the contrary, access by the infirm or poor to the price of prescription drugs would be for their good. This information "serves as a tool to educate rather than deceive". Maryland Board of Pharmacy v. Sav-A-Lot, Inc., supra (slip opinion, p. 11).

The belief that price advertising will inflate the market for the drugs is wholly untenable, since the medicine is controlled by prescriptions of physicians and so the sale of the drugs is not even at the druggists' will.

An order of injunction and a declaratory judgment will be entered as prayed in the complaint, with costs to the plaintiffs.