IN THE

Supreme Court of the United States

October Term, 1976

No.

JOHN R. BATES and
VAN O'STEEN,

Appellants,

v.

STATE BAR OF ARIZONA,

Appellee.

On Appeal From the Supreme
Court of Arizona

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No.

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VAN O'STEEN,

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v.

STATE BAR OF ARIZONA,

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APPELLEE'S MOTION TO AFFIRM

Appellee moves to affirm on the ground that the case does not need further argument.

STATEMENT OF THE CASE

The substance of this matter is whether the American Bar Association ethical prohibition of lawyer advertising, adopted in essence by the Arizona Supreme Court as a rule under its indisputable rule making power, is valid. The rule was

challenged by a newspaper advertisement of the Appellants, a law firm. The Arizona Supreme Court has upheld the Rule. The questions are purely federal and have been raised at all points.

REASONS FOR AFFIRMING

The First Amendment question is so obviously substantial that we cannot in candor make the usual motion to dismiss. Four three-judge courts have taken jurisdiction of these questions, in each case illustrating substantiality. *Consumers Union of the United States, Inc. v. American Bar Association*, Civil No. 75-0105-R (E.D. Va., filed Feb. 27, 1975); *Consumers Union of the United States, Inc. v. Board of Governors, State Bar of California*, Civil No. C-75-2385 S.C. (N.D. Cal., filed Nov. 13, 1975); *Niles v. Lowe*, 407 F. Supp. 132 (D. Hawaii 1976); *Person v. The Association of the Bar of New York*, Civil No. 75-C-987 (E.D. N.Y., filed June 23, 1975). These appellants brought suit in the United States District Court for the District of Arizona and made application for a three-judge court. That case was assigned to the Honorable Leland Neilsen, San Diego. We are authorized to state that Judge Neilsen held the matter under advisement pending the decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 96 S. Ct. 1817 (1976), and then abstained from calling in a three-judge court on agreement of counsel that the matter had progressed so far in the state system as to make it unproductive to involve the federal district court further. Finally, footnote 25 in the *Virginia Pharmacy* case would make the question substantial if there were nothing else.

If this Court wishes to give plenary treatment to the

question, the instant case will do as a vehicle. The case has been handled throughout with full realization that it would be the first case here squarely to present this problem in the new era; the record is good.

But for reasons set forth by the Chief Justice in his concurrence in the *Virginia Pharmacy* case, 96 S. Ct. at 1831, followed by the court below, this Court may conclude that there is no need for more talk. So far as free speech is concerned, this case can be affirmed on the authority of the Chief Justice's opinion and the cases cited therein. So far as the antitrust argument is concerned, this state regulation is permitted under *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943). If this is anti-competitive action at all, it is "compelled by the State acting as a sovereign," *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791, 95 S. Ct. 2004 (1975), quoted with approval in the plurality opinion, *Cantor v. Detroit Edison Co.*, n.28, No. 75-122, July 6, 1976. In the circumstances, we suggest that if probable jurisdiction should be noted, it be confined to Question One of the Appellants' Questions Presented, since there is surely nothing new to say as to the second Question.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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