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CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-316

JOHN R. BATES AND VAN O'STEEN, *Appellants*

v.

STATE BAR OF ARIZONA

On Appeal From the Supreme Court of Arizona

BRIEF AMICUS CURIAE ON BEHALF OF THE AMERCIAN OPTOMETRIC ASSOCIATION URGING AFFIRMANCE *

INTEREST OF THE AMERICAN OPTOMETRIC ASSOCIATION

The American Optometric Association, a non-profit membership organization incorporated in Ohio, is a national professional association of more than 19,000 members consisting of licensed Doctors of Optometry, optometry students and educators. The Association's objects, as set forth in its Constitution, are "to improve the vision care and health of the public and to pro-

* Pursuant to Rule 42(2) we have lodged with the Clerk the written consents of the parties to our filing a Brief Amicus Curiae.

mote the art and science of the profession of optometry".

The Doctor of Optometry (O.D.) is a primary provider of vital health services who examines, diagnoses and treats conditions of the vision system. He is specifically educated,[1] trained and licensed to examine the eyes and related structures to determine the presence of vision problems, eye diseases or other abnormalities. Where appropriate, the optometrist prescribes and may dispense and adapt lenses or other optical aids and may use vision training or other methods of treatment to improve, preserve or restore maximum visual efficiency.

As the national professional organization representing the optometric profession, the American Optometric Association has been, and is, deeply interested not only in legislation which seeks to improve the practice and standards of the profession itself, but also in regulations and legislation intended to assure to the public the availability of competent vision care and quality ophthalmic materials and to protect the public against deception and improper practices. Questions as to permissibility of advertising of professional vision care services, and of advertising the fees to be charged therefor, have played an important role in the regulatory systems developed by a very large proportion of States. Answers by the legislative and regulatory bodies have varied from one State to an-

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[1] Today's optometric curriculum requires the completion of a four-year program at one of the nation's thirteen State or private colleges of optometry, in addition to a minimum of two years (several institutions require three years) of prior undergraduate college study. Most students presently entering colleges of optometry have a bachelor's degree.

other—depending upon the particular State's assessment of its own local conditions and of how the balance should best be struck for the benefit of its citizens. This has, however, been a matter of State law, in the light of the actual conditions prevailing there.

The American Optometric Association is directly concerned, from a national perspective, with important litigation involving traditional State regulation of professional services. Accordingly, the American Optometric Association and its members have a substantial interest in the federal questions presented to the Court in this case.

SUMMARY OF ARGUMENT

There is no merit in Appellants' claim that the First Amendment overrides the long-exercised power of the States to prohibit attorneys from running paid advertisements in the newspapers to advertise their professional services and the fees they wish to charge. The "commercial speech" doctrine is by no means unlimited. From the decisions of this Court in a wide variety of contexts, it is manifest that the First Amendment does not immunize "commercial speech" against legitimate governmental regulation or prohibition.

Advertising by lawyers is a close analog to advertising by physicians, optometrists and other professionals in the field of health care services—a field where successive decisions of this Court have sustained the broad constitutional power of the States each to determine for itself whether, in the particular State and in the light of its own experience, the public interest will best be served if such advertising is prohibited or regulated. The rendering of professional services by

lawyers and doctors involves a unique relationship of trust with the client or patient; and individualized professional services involving the exercise of professional judgment and discretion must be furnished with a special commitment to the welfare of the client or patient which transcends the responsibilities present in a normal commercial transaction. On grounds such as these, the reasoning of the Court in last Term's *Virginia State Board of Pharmacy* decision, 96 S.Ct. 1817 —which invalidated a State prohibition against price advertising by retail druggists of the prices of the standardized and largely pre-packaged prescription drugs which they sell—is totally inapplicable here.

The claim which Appellants' assert under the federal antitrust laws is wholly without merit, but we rely on the Appellee's Brief for the detailed development of the responsive argument on this point.

Since the Appellants' federal claims should all be rejected, the Arizona Supreme Court's judgment should be affirmed, thus leaving it to the people of Arizona to decide, in the light of their own changing local situation, whether, and if so under what conditions, lawyers in Arizona should be permitted to advertise their professional services.

ARGUMENT

It is the position of the American Optometric Association that the federal claims being asserted by the Appellants under the First Amendment and under the antitrust laws are without merit and should be rejected. Accordingly, the Arizona Supreme Court's judgment should be affirmed, thus leaving it to the people of Arizona to decide—from time to time and in the light of their own local situation—whether, and if so under what conditions, lawyers in Arizona should be

permitted to advertise the professional services they wish to furnish and the fees they wish to charge for such professional services.

I. The First Amendment Does Not Oust the State of Its Power To Prohibit This Advertising by Lawyers of Their Professional Services and Fees

We start with full recognition that in recent years this Court has, as part of the process of balancing important interests, developed a doctrine that "commercial speech" is to be afforded a certain degree of protection under the First Amendment. *Bigelow* v. *Virginia,* 421 U.S. 809 (1975); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 96 S.Ct. 1817 (1976). We say a "certain degree" of protection because it must be evident that in developing the doctrine this Court has not intended to overrule long lines of decisions whereby this Court has adjudicated, in many different areas, that the government (be it Federal or State) does clearly have the power to impose prohibitions and regulations on various forms of "commercial speech."

These lines of decisions—including some of very recent vintage—show that, in a wide variety of contexts, the First Amendment does not immunize "commercial speech" against legitimate governmental regulation or prohibition, even apart from the recognized "time, place and manner" restrictions. We refer, for example, to *Associated Press* v. *United States,* 326 U.S. 1 (1945) (prohibiting antitrust violations); *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1972) (same); *Donaldson* v. *Read Magazine,* 333 U.S. 178, 192 (1948) (prohibition against using mails for fraudulent advertising); *Pittsburgh Press* v. *Human Relations Commission,* 413 U.S. 376 (1973) (prohibit-

ing unlawful help-wanted advertisements based on sex discrimination); *United States* v. *Reidel,* 402 U.S. 351 (1971) (prohibition against business of selling obscene materials through the mails); *Hamling* v. *United States,* 418 U.S. 87 (1974) (same); *California* v. *LaRue,* 409 U.S. 109 (1972) (prohibition against certain types of entertainment in places where liquor is sold); *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49 (1973) (prohibition of showing of obscene motion picture films in theater).

For further illustrations we refer to decisions such as *N.L.R.B.* v. *Virginia Electric & P. Co.,* 314 U.S. 469 (1941) (prohibiting coercive management speeches as unfair labor practice); *Capital Broadcasting Company* v. *Acting Attorney General* and *National Association of Broadcasters* v. *Acting Attorney General,* 405 U.S. 1000 (1971), affirming *Capital Broadcasting Company* v. *Mitchell,* 333 F. Supp. 582 (D.D.C. 1971) (prohibition of cigarette advertising on radio and television); *Erlenbaugh* v. *United States,* 409 U.S. 239 (1972) (prohibition against circulating racing "scratch sheet" via a facility of interstate commerce); *Mourning* v. *Family Publications Service,* 411 U.S. 356 (1973) (prohibition of "dunning" letters violating Truth in Lending Act); *United States* v. *Walsh,* 331 U.S. 432 (1947) (prohibition of false guaranty violating Federal Food, Drug and Cosmetic Act); *Seven Cases* v. *United States,* 239 U.S. 510 (1916) (prohibition of misleading circulars making drugs misbranded).

Last term in *Virginia State Board of Pharmacy, supra,* this Court held that the First Amendment invalidates a State statute prohibiting price advertising by retail pharmacists—that is, advertising of the standardized and largely pre-packaged prescription drugs

which they sell. The opinion went out of its way to make clear that the Court was not there deciding the questions which come here now from Arizona. As the Court stated, 96 S.Ct. at 1831 note 25:

> "Although we express no opinion as to other professions, the distinctions, historical and functional, between professions, may require consideration of quite different factors. Physicians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising."

In similar vein was the Chief Justice's concurring opinion, 96 S.Ct. at 1831-1832:

> "Our decision today, therefore, deals largely with the State's power to prohibit pharmacists from advertising the retail price of prepackaged drugs. As the Court notes, . . . quite different factors would govern were we faced with a law regulating or even prohibiting advertising by the traditional learned professions of medicine or law. "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and historically been 'officers of the courts.' " [Citations omitted]. We have also recognized the State's substantial interest in regulating physicians. [Citations omitted]. Attorneys and physicians are engaged primarily in providing services in which professional judgment is a large component, a matter very different from the retail sale of labeled drugs already prepared by others."

A decision by this Court relating to the State's power to prohibit or regulate advertising by lawyers will almost certainly have important implications for the power of the States to prohibit or regulate advertising in the field of professional health care services. In the overwhelming majority of the States, price advertising of optometric services is regulated by State statutes or by regulations adopted by States agencies. In many of those States there exists a strong body of opinion, supported by prior experience with actual abuses, that such advertising leads to results which are highly detrimental to the consuming public.

As this Court has expressly recognized, such statutes were enacted not to advance the economic well-being of any profession, but to protect the public health and welfare. *Head* v. *New Mexico Board of Examiners in Optometry,* 374 U.S. 424, 428 note 4 (1963); *Williamson* v. *Lee Optical of Oklahoma,* 348 U.S. 483 (1955); *Wall* v. *Hardwick,* No. 74-194, 419 U.S. 888 (1974); *Roschen* v. *Ward,* 279 U.S. 337 (1929); *Carp* v. *Texas State Board of Examiners in Optometry,* 389 U.S. 52 (1967); see also *Semler* v. *Dental Examiners,* 294 U.S. 608 (1935); *Barsky* v. *Board of Regents,* 347 U.S. 442 (1954); *Toole* v. *State Board of Dentistry,* 316 U.S. 648 (1942).

Such State laws have been in existence for many years. They have been upheld not only by this Court in the decisions just cited, but also by numerous decisions in other State court proceedings.[2]

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[2] *E.g., Louisiana State Board of Optometry Examiners* v. *Pearle Optical,* 248 La. 1062, 184 So. 2d 10 (1966); *Economy Optical Co.,* v. *Kentucky Board of Optometric Examiners,* 310 S.W.2d 783 (Ky. 1958); *Ullom* v. *Boehm,* 392 Pa. 643, 142 A.2d 19 (1958); *Norwood* v. *Paranteau,* 75 S.D. 303, 63 N.W.2d 807 (1954);

In *Williamson* this Court sustained the constitutional validity of such a State statute as applied to the advertising of the sale of frames by opticians, holding that the statute did not violate the Due Process or Equal Protection Clauses of the Constitution. There the Court said (348 U.S. at 490):

> "An eyeglass frame, considered in isolation, is only a piece of merchandise. But an eyeglass frame is not used in isolation, as Judge Murrah said in his dissent below; it is used with lenses; and lenses, pertaining as they do to the human eye, enter the field of health. . . . We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers."

In *Head,* this Court upheld New Mexico's statutory prohibition against price advertising of eyeglasses. In ruling that this did not violate the Due Process or Commerce Clauses of the Constitution, the Court said (374 U.S. at 428-429):

> "the statute here involved is a measure directly addressed to protection of the public health, and the statute thus falls within the most traditional concept of what is compendiously known as the police power. The legitimacy of state legislation in this precise area has been expressly established.

Klein v. *Department of Registration and Education,* 412 Ill. 75, 105 N.E.2d 758 (1952), *certiorari denied,* 344 U.S. 855 (1952); *Ritholz* v. *Commonwealth,* 184 Va. 339, 35 S.E.2d 210 (1945); *Melton* v. *Carter,* 204 Ark. 595, 164 S.W.2d 453 (1942); *Commonwealth* v. *Ferris,* 305 Mass. 233, 25 N.E.2d 378 (1940); *Bennett* v. *Indiana State Board of Registration and Examination in Optometry,* 211 Ind. 678, 7 N.E.2d 977 (1937); *Seifert* v. *Buhl Optical Co.,* 276 Mich, 692, 268 N.W. 784 (1936); *Texas Optometry Board* v. *Lee Vision Center, Inc.,* 515 S.W.2d 380 (Tex.Ct.of App. 1974).

Williamson v. *Lee Optical of Oklahoma,* 348 U.S. 483."

The Court also held that the statute did not violate the privileges and immunities of national citizenship, and that it was not preempted by the Federal Communications Act, stating that "we cannot believe Congress has ousted the States from an area of such fundamentally local concern" (374 U.S. at 432). A contention that there was an invalid restraint on freedom of speech protected by the Fourteenth Amendment was not expressly considered because it had not been properly presented (374 U.S. at 432 note 12); but from the tenor of the opinion it can hardly be doubted that if any such contention had been properly presented it would have been firmly rejected.

Thus the prior decisions of this Court involving optometry statutes have consistently upheld their constitutional validity. As *Head* recognized (374 U.S. at 426), the purpose of such legislation has been to " 'protect . . . citizens against the evils of price advertising methods tending to satisfy the needs of their pocketbooks rather than the remedial requirements of their eyes'."

In *Bigelow* v. *Virginia, supra,* this Court said (421 U.S. at 825 note 10):

> "We have no occasion, therefore, to comment on decisions of lower courts concerning regulation of advertising in readily distinguishable fact situations. . . . In those cases there usually existed a clear relationship between the advertising in question and an activity that the government was legitimately regulating. . . .
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> "Our decision also is in no way inconsistent with our holdings in the Fourteenth Amendment

cases that concern the regulation of professional activity. See *North Dakota Pharmacy Bd.* v. *Snyder's Stores,* 414 U.S. 156 (1973); *Head* v. *New Mexico Board,* 374 U.S. 424 (1963); *Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955); *Barsky* v. *Board of Regents,* 347 U.S. 442 (1954); *Semler* v. *Dental Examiners,* 294 U.S. 608 (1935)."[3]

Long history and extensive experience have established that the furnishing of vision care and prescription eyeglasses—which are provided specially to meet the particular vision needs of the individual patient and involve the exercise of professional judgment and discretion—is in the context of rendering individualized health services furnished by eye-care providers.[4] These

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[3] In addition to these references in the *Bigelow* opinion and to the comparable references in the *Virginia State Board of Pharmacy* opinion, 96 S. Ct. at 1829, it should be noted that this Court has also referred to *Williamson* and *Head* with approval in other recent decisions such as *North Dakota Pharmacy Bd.* v. *Snyder's Stores,* 414 U.S. 156, 167 (1973); *California* v. *LaRue,* 409 U.S. 109, 116 (1972); *Geduldig* v. *Aiello,* 417 U.S. 484, 495 (1974); *Miller* v. *California,* 413 U.S. 15, 32 note 13 (1973); *Kelley* v. *Johnson,* 425 U.S. 238, 248 (1976).

[4] The numerous procedures and tests which may be performed by an optometrist are discussed in the more than 1200 page textbook *Clinical Refraction* (3rd ed. 1970), by Irvin Borish, Professor of Optometry at Indiana University. From the hundreds of productive tests which may be utilized, the doctor must select the battery of procedures needed to diagnose and treat each patient's particular visual condition. Not only is there a legion of procedures for adults, but Ames, Gillespie and Streff of the Gesell Institute of Child Development state that "A thorough eye and vision abilities examination of a child should take from forty-five minutes to one and a half hours of testing and conference time. This examination should include (1) an evaluation of the child's eyes and eye health; (2) an evaluation of the flexibility and skills of eye and vision changes; and (3) an evaluation of efficiency in using vision to obtain and utilize information." Ames, Gillespie and Streff, *Stop School Failure,* p. 122 (1972).

professional services are activities which—as this Court's decisions have established time and time again —are subject to extensive regulation by the State in order to protect the public interest. A State which determines, in the light of its own experience, that, on balance, the public will be best served if the providers of such services are prohibited from advertising their fees is exercising a legislative judgment which, by wise tradition, is well within its powers. In this respect the vision care and other precedents in the professional health services field furnish a close analog which here supports the power of Arizona to prohibit lawyers from running advertisements in the newspaper concerning the fees they wish to charge.

In view of the Appellants' claimed reliance (Brief, pp. 37-42) on decisions such as *NAACP* v. *Button,* 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen* v. *Virginia State Bar,* 377 U.S. 1 (1964); *United Mine Workers* v. *Illinois State Bar,* 389 U.S. 217 (1967), it is worth noting that nothing in the case now before the Court involves any restriction on the right of any association or union to make arrangements for the furnishing of group legal services to its members or to inform its members as to what their costs are likely to be if and when they avail themselves of such services. Nor does the case involve any restriction on the right of any association or union to recommend to its members any one or more attorneys, or to advise its members what the probable costs of such attorneys' services might be. What this case does involve is Arizona's power to prohibit the attorneys themselves from placing in the newspapers certain paid advertisements concerning themselves, their services and their fees. While the desirability of a total prohibition on such self-advertising by lawyers may be open to de-

bate, the debate is within the orbit of a State's power to resolve one way or the other without finding itself in collision with the First Amendment.

A word should be added concerning the fact that the Appellants' Brief (pp. 11-13) makes some extravagant claims as to asserted beneficial effects of price advertising in reducing prices. In the course of doing so, Appellants rely on certain asserted data concerning the price of eyeglasses. Apart from the fact that such possible economic considerations would in any event not be controlling here, it should be noted, first, that no findings were made by the Arizona Supreme Court concerning these matters; and second, that the sensitivity of price to advertising in the field of ophthalmic goods and services is very much in issue in a pending Federal Trade Commission rulemaking proceeding (noticed in the Federal Register for January 16, 1976; 41 F.R. 2399), where the record also includes extensive evidence contradictory to what is being relied on by Appellants here. For example, San Francisco Consumer Action, a consumer organization, conducted a study of prices for ophthalmic goods and services and concluded, among other things, (i) that there has not been any apparent increase in price competition or any disappearance of price dispersion where price advertising is permitted, and (ii) that corporations which do, or might be likely to, price advertise incur other economic and non-economic costs which offset any economies of scale or lowered prices they might otherwise offer. Moreover, in that pending FTC proceeding strong arguments are being made that the record there does not establish that patients would receive any substantial economic benefits from the advertising of ophthalmic goods and services.

II. Appellants' Claim Under the Federal Antitrust Laws Is Lacking in Substance

We leave to the Appellee the detailed development of the response to the wholly unmeritorious claim which Appellants assert under the federal antitrust laws. But we do wish to note that nothing in this Court's recent decision in *Cantor* v. *Detroit Edison Co.*, 96 S.Ct. 3110 (1976)—nor indeed in any other decision—lends the slightest semblance of substance to the claim being asserted.

CONCLUSION

The services provided by lawyers and doctors are of crucial importance to the individual client or patient because they truly affect his very life and well-being, his ability to function in society and to enjoy life. The lawyer or doctor has a unique relationship of trust with his client or patient, and must have a special commitment to the welfare of the client or patient which transcends the responsibilities present in a normal commercial transaction. The proper performance of these services and responsibilities by the professions not only affects the individuals immediately involved, but also may have a direct and substantial impact on the community at large. The State's power to continue to prohibit or to regulate paid advertisements by such professionals is fully justified by the long-standing interpretation of our Constitution and the critical and unique importance of individualized legal services and professional health care services to the persons involved and to society as a whole. In our dynamic federalism, this is not an area from which the States should be ousted.

For the reasons stated, in addition to those being urged by the Appellee, the judgment of the Supreme Court of Arizona should be affirmed.

Respectfully submitted,

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