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In the

Supreme Court of the United States

Jeffrey Cole Bigelow,

Appellant,

v.

Commonwealth of Virginia,

Appellee.

No. 73-1309

Washington, D. C.
December 18, 1974

Pages 1 thru 50

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY COLE BIGELOW,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

Washington, D. C.,

Wednesday, December 18, 1974.

The above-entitled matter came on for argument at 2:11 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MELVIN L. WULF, ESQ., American Civil Liberties Union Foundation, 22 East 40th Street, New York, New York 10016; on behalf of the Appellant.

JOHN C. LOWE, ESQ., American Civil Liberties Union of Virginia, 1111 West Main Street, Charlottesville, Virginia; on behalf of the Appellant.

D. PATRICK LACY, JR., ESQ., Assistant Attorney General of Virginia, Supreme Court-Library Building, 1101 East Broad Street, Richmond, Virginia 23219; on behalf of the Appellee.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in Bigelow against Virginia.

Mr. Wulf, you may proceed.

ORAL ARGUMENT OF MELVIN L. WULF, ESQ.,

ON BEHALF OF THE APPELLANT

MR. WULF: Mr. Chief Justice, and may it please the Court:

This case is here on appeal from the Virginia Supreme Court following remand from this Court after the decisions here in Doe v. Bolton and Roe v. Wade.

The question, the principal issue that the Court has to decide, in broad terms, is whether the First Amendment, which extends a special and explicit protection to the press, allows a newspaper editor to be held criminally responsible for publishing in his newspaper an advertisement for lawful abortion services.

The facts are straightforward and were submitted by agreement on stipulation.

The appellant, Mr. Bigelow, is -- was a director, managing editor and responsible officer of a newspaper called the Virginia Weekly.

QUESTION: Would it make any difference, Mr. Wulf, to your, the position you've asserted in your brief if it were explicitly an ad which solicited, actively solicited,

-- you said this is just an announcement of services. But suppose they solicited and fixed prices and said credit terms can be arranged, an extensive treatment that's usually associated with the solicitation of business.

Would it make any difference?

MR. WULF: No, sir, I don't think it would make any difference at all, for the purpose of this case.

QUESTION: Then, it follows from that --

MR. WULF: I think it's purely --

QUESTION: -- a State has no power to regulate the advertising of professional services?

MR. WULF: Well, these were not directly professional services that were being regulated, in any case, these were referral services. This is not an advertisement by the physician who was performing the abortion. This was an advertisement by an independent institution organization which referred patients who came to them for the medical services.

QUESTION: That's a conduit to the professional services, isn't it? Directly.

MR. WULF: Sure, it is.

No, I don't say at all that the State cannot regulate professional conduct -- if that was your question. I say that this was not that one.

Two, that it can't do it in this case because they can't act against the press in this situation.

And three, they can't do it in this case because the service that was to be performed was outside the territorial power of the State, because the advertisement was for a service to be performed in New York, where Virginia has no power over medical services. And it was lawful; lawful in New York.

As I say, the facts consisted, in this case, of the advertisement, which is on page 4 of our brief, which announces that abortions are legal in New York, that there are no residency requirements there, that the agency will provide placement service, quote, at low cost; and provides a New York address and two New York phone numbers, where the services can -- where the information about the services can be provided.

Defendant -- appellant went to trial on those facts and was convicted under Section 18.1-63 of the Code of Virginia, which is also on pages 4 and 5 of our brief, which states that:

"If any person by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage he shall be guilty of a misdemeanor."

He was convicted, fined $500; $350 of that was suspended on the condition that he not violate the statute again.

The Virginia Supreme Court, in its decision, held that the ad satisfied the terms of the statute because it amounted to the encouraging or prompting of the procurement of an abortion, and that it was not merely informational; and then went on to say that in addition it was a commercial advertisement offering services for a fee, relying on Valentine v. Chrestensen and the Fourth Circuit decision in Hunter vs. United States very generally, and went further and, in particular, said that where the regulation of medical health practice is concerned, the public should be free of commercial practices and pressures.

And also finally held that the appellant had no standing to raise the overbreadth argument, because appellant's conduct was in the commercial zone.

I shall address myself to the first two issues; my co-counsel, Mr. Lowe, will address the overbreadth argument in his portion of the argument.

QUESTION: I suppose it follows from your position, Mr. Wulf, that a State would be constitutionally prohibited from telling newspapers they could not advertise cigarettes?

MR. WULF: Yes. Yes. I don't think that cigarette advertisers are immune from prohibitions on advertising. I think newspapers are immune from such regulation.

QUESTION: What about the Virginia newspaper carrying an ad for a Maryland lottery, assuming the lottery is illegal

in Virginia but legal in Maryland?

MR. WULF: I think that's lawful, too, because I don't think that that would be any different than the facts in the case here.

Yes, Your Honor?

QUESTION: What do you do with Pittsburgh Press?

MR. WULF: I disagree with it, Your Honor.

QUESTION: Well, you've got five people that are still here, though, that joined it. You've got to get at least one of them, I take it.

MR. WULF: Well, what I do with Pittsburgh Press is to try to persuade at least one of the members of that majority that this is not commercial speech that's involved in my case. And I will deal with that, because I think it's pretty clearly not.

Before getting to the commercial speech question, though, this statute -- the first argument is that the statute has to be struck down on its face and, as construed in this case by the Virginia Supreme Court, because it does not ban any of those categories of speech which this Court has held are prohibitable, nor does it require the -- nor in this case was there any clear and present danger that any evil which the State might prohibit would in fact be met.

We also argue that, as far as the Virginia Supreme Court's medical health interest, asserted interest goes, that

in so far as that invites the application of the balancing test here, that in the balance the appellant must prevail; and we also argue that the statute is overbroad.

But arching over all of those arguments which I make is the fact that the appellant here was a newspaper editor convicted solely because of words printed in his publication, his newspaper.

And the specific protection extended to the press by the First Amendment and the construction application of the free press provision by this Court, at least since Grosjean and on through Mills, New York Times v. Sullivan, Pentagon Papers case and Tornillo, requires that the conviction in this case be reversed and that the appellant not be allowed to be convicted of a crime merely for printing material in his newspaper.

And, indeed, even Pittsburgh Press assured us that the First Amendment protection of the free press would not go so far as to allow the appellant here to be convicted, because Pittsburgh Press, the majority opinion distinguished between the material involved there in the advertisements, and advertisements which express a position on matters of social policy, and also distinguish between the situation regarding the classified ads in the Pittsburgh Press case, and the exercise -- distinguishing it from the exercise of editorial judgmental discretion in the content of advertisements.

And the Pittsburgh Press majority indeed promised, and I quote, "that we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial."

This speech cannot be banned because it does not fall into any of the standard categories which this Court has allowed to be prohibited, namely, it's not obscene, it's not libelous, nor does the advertisement constitute fighting words.

Nor does it present, assuming that the State may prohibit this, prohibit abortions, this statute does not require that advertisements for abortions satisfy the clear and present danger test.

And the fact is clear that the mere advertisement allows ample time, and Mr. Justice Brandeis's words, "for a full discussion of the question whether the woman, citizen of Virginia, will in fact undergo the abortion."

But that rests -- even that argument rests on the dubious assumption that the State of Virginia has any power at all to prohibit Virginia residents from being informed of the availability of lawful abortions outside the State.

There is a District Court, three-judge District Court case in Georgia, the Atlanta Cooperative News case, cited in our brief, which in fact struck down what is the federal equivalent of the Virginia statute in 1972, precisely

on the grounds which I advance here in our argument.

And another District Court case in Michigan that supports the application of clear and present danger test to abortion advertisements, in that case it was a ban on billboard advertisements of lawful abortions -- of abortions lawful in New York.

As far as the regulation of the medical health field interest of the State is concerned, it has no merit. The Virginia Supreme Court put forward the reason, describing its interest in terms of assuring the pregnant citizens of Virginia receive proper medical care. But that, in this case, although generally of course a fair interest of the State where medical care is concerned, doesn't apply here.

First, the First Amendment is involved in this case, on behalf of the appellant, who is an editor of a newspaper, and for the reasons I've already briefly canvassed, that is one of the other ingredients that has to go into the balance here.

There is the correlative First Amendment right of readers of the newspapers to receive the information about the availability of lawful abortions in New York and on a subject which concerns the right, held by this Court to be fundamental, to choose whether to -- the right that women have to choose whether or not to bear a child.

There is, in addition, the balance, in the

constitutionally protected right to travel across State borders, there is a constitutionally protected right to privacy, which I've alluded to; and there is, finally, the absence of power in the State of Virginia at all to regulate the -- or in any State, the absence of power in any State to regulate the conduct of its citizens out of State in ways that have no contact with Virginia at all, except the fortuditous fact of residency.

And I think in fact that the last reason is virtually dispositive of this case, because it seems to me unarguable that the States cannot forbid its citizens from engaging in acts which are lawful outside the State.

And if it cannot forbid that, then it cannot forbid the advertising of those activities.

QUESTION: Do I correctly understand you to concede that the State of Virginia or any State could forbid members of the medical profession from advertising to perform any kind of services, including abortion?

MR. WULF: No, I didn't --

QUESTION: Specifically abortion.

MR. WULF: No, I didn't concede that, Your Honor. I conceded there is great power in the State to regulate the delivery of medical services.

QUESTION: Well, I thought you said they could forbid the doctor, but they couldn't forbid the newspaper from taking

the ad.

MR. WULF: I said more generally that producers of -- I think what I said, at least what I intended to say was that producers of goods and services could be prohibited from advertising in some cases, which I don't have to define, that there was a difference between prohibiting them from advertising and prohibiting and penalizing newspapers for running the advertisements.

No, I did not -- I did not concede that physicians could be prohibited from advertising.

QUESTION: Some of the members of the Court in the Pittsburgh Press case thought that employers might be prohibited from specifying certain factors in employment ads, but that the newspapers could not. I think there was some concession working in the case.

MR. WULF: Yes. Yes.

No, I say in general I agree with the minority's view in Pittsburgh Press, about how to deal with that problem. Prohibit the advertiser and not the newspaper.

Your question was specifically whether the States could totally ban physicians from advertising their services.

QUESTION: Yes.

MR. WULF: The Court has never decided that. It has come close to it, perhaps, in the Head case, although that -- there were no First Amendment issues raised there.

I suppose I'm affected by our culture in thinking perhaps that States can prohibit physicians from doing it, because they do; but I don't know that there has ever been a serious First Amendment objection to that presented to this Court or any other court.

QUESTION: Isn't it true that the pressure is usually put on the doctor, who does the advertising, not on the paper for carrying it?

MR. WULF: I beg your pardon?

QUESTION: Isn't the usual pressure on the doctor not to use the newspaper, rather than the newspaper publishing it?

MR. WULF: Well, sure; surely, I think the pressure is the threat of being disbarred -- unfrocked. Yes.

Yes, and not on the newspaper, because I think in practical terms doctors -- I don't recall ever seeing an advertisement by a physician for standard medical services.

QUESTION: Only there have been dental cases.

MR. WULF: I'm sorry?

QUESTION: There have been dental cases.

MR. WULF: Yes. There was a case, a similar case here, of course upheld the power to prohibit that. But again there wasn't any First Amendment issue raised there.

QUESTION: That was the Head case, wasn't it? At least that was one case. That was an oculist, I think.

MR. WULF: That was an oculist, an optometrist.

QUESTION: An optometrist perhaps.

MR. WULF: Yes. Yes.

Again no First Amendment claim --

QUESTION: No, it wasn't raised.

MR. WULF: -- raised there. There is, of course, the related interesting case -- not cited in our brief, but in the brief of the amicus curiae -- the Virginia Consumer Council case, brought by consumers rather than pharmacists, attacking a prohibition against pharmacists advertising prices of prescription drugs.

And I would think that perhaps the same constitutional approach might successfully be taken with respect to advertising by physicians, where it's a consumer issue.

Indeed, as to advertising by attorneys as well.

QUESTION: Well, you pointed out that this advertisement related to abortions in New York, where they were perfectly legal.

MR. WULF: Yes, sir.

QUESTION: Suppose you had an advertisement for narcotics in Virginia, the ad indicating that if you got in touch with a certain individual he could direct you to a place where narcotics could be obtained?

MR. WULF: I think that could be prohibited. Indeed, I don't know that that's speech, I think that's probably

criminal solicitation, assuming that the -- particularly narcotics was forbidden validly by the statutes of Virginia or whatever State.

QUESTION: Would your answer be the same if five years ago, before this Court's decision on abortions, this ad had related to abortions in Virginia, where, at that time, they were illegal except under certain circumstances?

MR. WULF: I don't think so, Your Honor, because I think that we must look not only at the question of whether a particular service or goods is prohibited, but we also have to look at the nature of the service or the goods.

And I think that, whereas an abortion, there was even then -- where it was then a very controversial issue, there was very substantial constitutional argument to be made out on behalf of the constitutional right of women to have abortions, which was of course the ultimate result in this Court; and that there were the very substantial privacy claims on behalf of abortions, that it would be a different case than the prohibition against adve-tisements for narcotics or for an assassin, for example, things of that sort. Where there was not the counterveiling claims available on behalf of the consumer of the particular banned products.

QUESTION: I thought you would say you'd make the same argument based on imminence or danger, clear and present

danger, just from an ad?

MR. WULF: I wouldn't, Your Honor, where -- no, I didn't say -- I don't think I said that. If I did I didn't intend to.

What I was saying was that --

QUESTION: But I think you would make the same arguments then.

MR. WULF: Well, I might make it, but I would have the additional argument that it could be prohibited because it was solicitation of a criminal offense.

But I don't -- you're asking me whether I would argue that if there were an advertisement for an assassin in a newspaper, whether the --

QUESTION: Yes, assassinations for hire -- assassins for hire, and a certain phone number.

MR. WULF: Yes. I might make it, but I wouldn't make it very confidently. Although I might argue that you couldn't proceed against the newspaper, that you would have to proceed against the advertiser. I might make that argument in that case also.

On the question -- Mr. Lowe has his ten minutes due right this minute.

We spell out in our brief why the advertisement isn't purely commercial, which is the words used in Valentine, and I would ask the Court to examine our reasons there in the

brief. It surely is not a purely commercial advertisement in the circumstances of the subject being advertised.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Lowe.

ORAL ARGUMENT OF JOHN C. LOWE, ESQ.,

ON BEHALF OF THE APPELLANT

MR. LOWE: Mr. Chief Justice, and may it please the Court:

Mr. Wulf has addressed the question of the First Amendment protections involved here, and I will speak to the issue of the overbreadth doctrine relating to First Amendment issues on this advertisement that was placed here.

First, we certainly contend that this advertisement was not pure commercial advertising, and I will address that specifically in a moment.

We believe that there is ample evidence in the record of editorial position being taken within the advertisement, and that this is a part of the editorial position of this paper.

The overbreadth question, of course, --

QUESTION: Do newspaper ordinarily accept pay for exercising their editorial function? Are you suggesting this paper accepts -- will publish editorials for pay?

MR. LOWE: Your Honor, I am most certainly suggesting that in the context, particularly of an underground

newspaper, where it's a hand-to-mouth operation, where a do-lar here and there helps to keep the paper going, that they do accept funds from whatever source, including accepting advertisement which follows their editorial policy and supports it, but which will provide some revenues. And in fact this is the case here. And I think that one of the points that has been raised is that this was a paid advertisement for a commercial profit organization.

Now, the fact that it was paid has been disposed of in New York Times v. Sullivan, that clearly does not remove the First Amendment protection.

The fact that it was allegedly a profit-making organization is only in the record because of the May-June issue of the Virginia Weekly, which is in the record in kind, relating to an acknowledgement by the weekly staff, on page 5, where it states, and I quote: "The weekly collective has since learned that this abortion agency, as well as a number of other commercial groups, are charging women a fee for a service which is done free by Women's Liberation Planned Parenthood."

In other words, this -- and this was submitted by the Commonwealth, and does support factually the contention that at the time this ad was inserted, at the time the offense took place, the staff of this newspaper thought that they were simply one more group of the radical left wing, or whoever it

is that is urging the editorial policy of this newspaper, which was supporting it and was doing a free service to people that they genuinely felt needed abortion counseling.

Only later did they find that these abortion advertisement services, Women's Pavilion, was actually making money on it. And, to their great chagrin, they announced it here with some anger.

I think that points out graphically that this was not a commercial advertisement in the sense that they knew this was a profit-making venture, but rather it was a part and extension of their editorial policy.

QUESTION: If an editor is so enthusiastic about a particular activity, he can promote that in his editorial columns and in his news columns without calling on ads, can't he?

MR. LOWE: He can and he does. In fact, in the May-June issue, there is editorial writing. And I might point out, Mr. Chief Justice, that the Attorney General of Virginia has stated that this is not an underground newspaper, or at least that there's nothing in the record.

I think within the limits of the English language in the minds of men to create an underground newspaper, the May-June 1971 issue is such a newspaper, if there are any at all. It has all the revolutionary rhetoric, all of the anti-establishment epithets, the whole spectrum of underground

newspapership.

And in fact it has, in many issues, and I believe in this one also, little boxes of information: If you want abortion counseling, contact Diane at a certain number; or that type of information.

QUESTION: Are these newspapers in the record?

MR. LOWE: The other ones are not, no, Your Honor. And one of the reasons -- and again I have to state that in the trial court, in the initial two trial courts, we have a two-tier system in Virginia, of course -- the issue of commercialism was never raised by the Commonwealth, never raised by the court and did not come up.

And there was no record made on it, other than these two issues, the issue which is in in whole and of course the advertisement itself.

But, in fact, the editorial policy is supported by advertisements, by notices which you might call advertisements, but which are really insertions of little boxes of information, where you go for certain types of information if you want it.

Now, in the context of the case of Broadrick v. Oklahoma, which we have cited in our brief, this Court discussed the overbreadth doctrine, but in fact I think Broadrick really related more to a changing view where the First Amendment activity was conduct rather than speech.

There, of course, the Court stated that conduct would

have to be real and substantial overbreadth, if it were going to be overruled, rather than in pure speech where a defendant or an appellant could assert hypothetical rights of others in overturning a statute.

Now, the Attorney General in this case does not really contest the idea that this might be overbroad if it is a First Amendment issue, but merely contests the standing and says there is no First Amendment issue here.

We have, of course, a pure speech question here. I don't think there's much question that we're not involved in conduct; this is an advertisement, it's a mere advocacy in so far as it had its editorial content, and we believe that the, as I've mentioned before, the commercialism does not really get in the way of the fact that it is pure speech.

We believe that the record itself shows that there is an editorial policy which is supported by the advertisement.

Now, in the context of Broadrick, we do have a very substantial overbreadth here. The hypothetical situations we have outlined in our brief are very substantial.

Under the Virginia law a doctor could not advise his patient to have an abortion; a husband could not urge his wife to have an abortion, if they had an unwanted pregnancy. And an editorial in a newspaper could not urge abortions, to cut down on population explosion. Speeches, the Zero

Population Group, all of these groups would be illegal if they so much as urged abortions.

This was a very burning social issue, particularly before the Roe v. Wade and Doe v. Bolton decisions, and it is still a very burning issue.

Now, the fact that there is a substantial chill on First Amendment activity is pointed out by the Commonwealth Exhibit No. 3 in the record, which is a Cavalier Daily, University of Virginia newspaper, of 1970, in which there was an article attributing to the Attorney general of Virginia a warning to the Virginia Commonwealth University School newspaper that they better not publish any abortion advertisements, for abortion referrals.

I think that clearly when the Attorney General of Virginia issues warnings, you must have chilling effects on rights.

Now, again following the Broadrick type of analysis, we do not have here an ordinary criminal law. This is a law which is specifically designed and aimed at abortion advertisements and not illegal advertisements in general; and in response to your -- further response to your question, Mr. Chief Justice, as to whether a State, for example, could prohibit absolutely advertisements with rates listed in there, I think that Pittsburgh Press teaches us that if the advertised information is itself illegal, such as discriminatory sex

hiring, then that is a different category entirely, and if the State, for example, prohibited physicians from advertising rates or from posting rates or from telling people rates of abortions, then I think clearly they could, then, under Pittsburgh Press, find the advertisement to be an illegal one.

Now, we disagree with Pittsburgh Press, but that I think I have to concede if I concede that the Court is talking about Pittsburgh Press.

In addition, I think the real danger there is that the State would come up with a law that says it shall be unlawful for a newspaper to publish an ad which is illegal, and leave it up to the press to worry in advance of every advertisement it put in whether it might violate some hiring law, or some housing law, or some professional law, at the risk of publishing at all, to where newspapers perhaps would have to restrict greatly the type of ads that it took.

Again I would emphasize that abortions were legal in Virginia when this case came down, when the charge was made.

True, there were certain types of abortions which were not legal, but there were legal abortions; so that this was not an advertisement for an illegal activity even in Virginia.

And following the Fifth Circuit case, which this

Court denied certiorari to, the Hiett v. United States, which we have cited in our brief; in Hiett there was an anti-divorce advertising statute, and the Fifth Circuit specifically said it would be one thing if you prohibited advertisements of divorces which were fraudulent or somehow illegal, and in this context if this were a well-drawn statute, narrowly drawn to prohibit illegal abortions in Virginia, those which were illegal under Roe v. Wade --

QUESTION: What about a law that said doctors may not advertise and newspapers may not carry their ads?

MR. LOWE: I think that, first of all, Mr. Justice White, that that is --

QUESTION: That's rather narrow, isn't it? That's narrow enough, isn't it?

MR. LOWE: I think that would -- but I think that would be overbroad in sweeping in much conduct which would not be proper. Now --

QUESTION: Like what?

MR. LOWE: Well, for example, I think that there -- well, of course, obviously a doctor may not advertise for --

QUESTION: They may not advertise for their medical services.

MR. LOWE: I would have to say, Mr. Justice White, that --

QUESTION: Well, let's just make it as narrow as you

can possibly imagine, so that you have to get down to the substance of it, --

MR. LOWE: Yes, sir.

QUESTION: -- and not -- not talk about over-breadth.

MR. LOWE: All right. Of course I --

QUESTION: May the press be forbidden to carry the ad of a person who is forbidden to publish an ad?

MR. LOWE: I would have to first answer somewhat as Mr. Karpatkin had just answered, that I must answer that in the context of the First Amendment as this Court has handed it down through decisions.

And I believe that this Court's decision would say that a State could do that. I don't happen to personally agree with it, but I believe that I would have to interpret it in that context, given the decisions which this Court has handed down. Yes, I think the State could do that.

QUESTION: Pittsburgh is the one that you would center on? Pittsburgh Press.

MR. LOWE: I think I would center on Pittsburgh, --

QUESTION: Because it's the most recent, or the most definitive?

MR. LOWE: No, I think it -- it's the most definitive on point there, and again I have not -- we have dealt in the terms of an abortion referral agency, which I think is a little

different than a professional, a doctor. Here they're offering information, they're offering perhaps a call to conduit, but they're offering directions, they're not offering a specific service that's performed on the patient.

QUESTION: Well, wasn't there some flavor of this in the Virginia court's opinion in this case?

MR. LOWE: Oh, I think that there was such a flavor, yes.

QUESTION: That doctors shouldn't advertise and newspapers shouldn't carry their ads?

MR. LOWE: I believe that that is part of the basis of it, yes.

Mr. Chief Justice, I see that my time is up, and I accordingly will have to sit down.

MR. CHIEF JUSTICE BURGER: Mr. Lacy.

ORAL ARGUMENT OF D. PATRICK LACY, JR., ESQ.,

ON BEHALF OF THE APPELLEE

MR. LACY: Mr. Chief Justice, and may it please the Court:

The question in this case is not whether 18.1-63 denies a woman a right to have an abortion or interferes with the right of a woman to have an abortion. Clearly it does not.

This is not an abortion case, it is a First Amendment case.

It's important to note at the outset, however, that

the appellant does not contend that the statute was passed with the intent to muzzle or curb the press, or that the statute has the effect of threatening the financial viability of the newspaper, or that the statute impairs in any significant way the newspaper's ability to be published or distributed, or that the statute infringes upon the layout or organizational decisions of the newspaper.

Nor will the record support any such contentions.

The appellant was convicted for running in his newspaper a purely commercial advertisement for a commercial abortion referral agency.

The question in this case, then, is whether the State is barred from prohibiting purely commercial advertisements for the sale of medical services.

The Supreme Court of Virginia found the advertisement to be purely commercial. This finding is amply supported by a fair reading of the advertisement itself.

As stated by the Court below,the advertisement constituted an active offer to perform a service. It clearly does not have the attributes, nor does it serve the vital function of constitutionally protected speech.

The Court below correctly recognized the fact that the ad clearly exceeded an informational status.

Where the appellant would have this Court extract a few lines here and there from the advertisement, and be

blinded to the remainder, this cannot be done.

The advertisement is a single document, contained within four corners. It appears on page 3 of our brief. Each line, each statement is geared to making the offer sufficiently attractive to entice would-be purchasers of the service.

QUESTION: Do you find any evidence that the statute was based on anything other than an assumption that newspapers shouldn't advertise for services that were illegal?

MR. LACY: No, sir, the underlying -- as stated by the Supreme Court of Virginia, and given the construction of the statute, the underlying basis of the statute is that there should be no advertising, commercial advertising of medical services, there should be no commercial pressure or practices through the use of commercial advertising.

The case, as it was decided by the Supreme Court of Virginia, was not decided on the basis of whether abortion was or was not illegal.

There's a --

QUESTION: Do you think that it was just a specialized application of a general prohibition against advertising by doctors?

MR. LACY: That certainly was the holding of the Supreme Court of Virginia. They didn't state it in those words, but they said this is a prohibition against commercial

practices and pressures directed to free the medical health field of commercialism. And it cited Semler vs. Dental Examiners and Williamson vs. Lee Optical Company standing for that proposition.

QUESTION: Well, what business is it of Virginia what happens in New York, medically?

MR. LACY: Well, the business of it in Virginia, obviously we cannot tell New York what its laws should be, we cannot prosecute a woman who goes from Virginia to New York -- at that time -- to obtain an abortion. But we can say that if you come to Virginia and you want to advertise medical services in Virginia, we have the --

QUESTION: But they're not advertising medical services in Virginia.

MR. LACY: They're advertising --

QUESTION: They're advertising medical services in New York.

MR. LACY: But the advertisement is in Virginia. The actual advertisement of medical services is in Virginia. Although the medical services are going to be performed in New York, the advertisement for those medical services is in Virginia.

QUESTION: How does that injure the Commonwealth of Virginia?

MR. LACY: Well, the same way an advertisement for

medical services that would be performed in Virginia could harm a woman.

QUESTION: Really?

MR. LACY: That is, it --

QUESTION: You're talking about, quote, "medical services in New York City" -- or, rather, quote, "medical services outside of the Commonwealth of Virginia", end quote. That's what you're seeking to regulate.

MR. LACY: The statute --

QUESTION: You're seeking to prohibit it.

MR. LACY: We're not seeking to prohibit it. This statute is not a statute prohibiting abortion, no, sir.

QUESTION: Well, it's prohibiting people from traveling to New York to get one.

MR. LACY: No, sir, it is not. There is no --

QUESTION: Well, what is it?

MR. LACY: There is no statutory prohibition against a woman leaving --

QUESTION: Well, what is it? It's just penalizing the newspaper for publishing it?

MR. LACY: No, sir, it's a statute intended to keep commercial, purely commercial advertising out of the medical health field. There would be no difference between this statute if --

QUESTION: Well, could you prohibit them from

advertising Alka-Seltzer?

MR. LACY: Well, Alka-Seltzer, I don't think is within that frame of medical health. It's a non-prescription --

QUESTION: Well, aspirin?

MR. LACY: I think they could prohibit --

QUESTION: Aspirin is slightly medical.

MR. LACY: I think they could prohibit prescription drugs. Then you get into --

QUESTION: Could they prohibit the advertising to people of Virginia that you can buy aspirin in New York?

MR. LACY: No, sir, but not for the reason --

QUESTION: And the difference between that and this case is just what?

MR. LACY: The difference between that case and this case is the fact that abortion is a medical procedure. This Court has so held. In Roe v. Wade and Doe v. Bolton, this Court held that an abortion is a medical procedure. It struck down the statutes before it in Roe v. Wade and Doe v. Bolton precisely because the States in those particular instances refused to recognize the fact that it was a medical procedure.

And those cases extolled the virtues of professionalism in the abortion decision in the first trimester. Those cases extolled the virtues of the physician-patient relation-

ship in the first trimester.

To strike this statute down would be totally inconsistent with Roe v. Wade and Doe v. Bolton. The purpose of the statute is to promote professionalism, to keep, to make sure that persons --

QUESTION: Professionalism in New York?

MR. LACY: Professionalism -- anybody that wants to render medical services to individuals in Virginia.

QUESTION: In New York?

MR. LACY: We have the right to make sure --

QUESTION: To make sure that New York does its medical job properly?

MR. LACY: Make sure that anybody who comes down to Virginia and advertises in Virginia. A doctor from New York who came down, who had come down and advertised --

QUESTION: Well, we don't have this.

MR. LACY: -- and then goes back.

QUESTION: I don't think you had anything to do with this, if this was an advertisement that was mailed down to them through the mail, you don't have a blame thing to do with that, because that's interstate commerce.

And they sent it down, they sent a check, and they then published it.

And now how did that injure Virginia?

MR. LACY: It's not a question of -- you can't point

to the injury right there.

QUESTION: Could you pass a statute to say that no woman in Virginia can go to New York and get an abortion?

MR. LACY: Absolutely not.

Absolutely not.

QUESTION: They seem to put it on the basis of Virginia's sovereign power to protect its citizens, did it not?

MR. LACY: Precisely, sir. The police power to protect the health and welfare of its citizens. obviously, it could not pass a statute saying that if you advertise medical services in New York you can be convicted, that's not the case at all. The case is here, that a Virginia doctor who advertises can be regulated, an out-of-State doctor who advertises can be regulated, because the purpose -- the purpose is to make sure that the person who is rendering the services is interested in the welfare of the patient and not in financial gain.

QUESTION: Mr. Lacy.

MR. LACY: Yes, sir?

QUESTION: Suppose the advertisement had advised readers where they could get the best appendectomy in Virginia. Is there any statute in Virginia that would proscribe that type of advertisement?

MR. LACY: Am I to understand, Your Honor, from

the hypothetical, that it would be no profit, it's just an informational bulletin?

QUESTION: No. Let's assume it's a commercial ad. You have pointed out that this case does not turn on whether or not abortions are legal or illegal, you are emphasizing, as I understand your argument, that Virginia has the right to proscribe advertisements of medical services whether they are legal or illegal.

I was just wondering, I don't know, whether there is a statute in Virginia that would prevent somebody advertising what is a perfectly normal legal service in Virginia; and I'm not talking about medical ethics at the moment, I'm talking about (1) is there a statute, and, if there is, would that statute withstand a First Amendment attack?

MR. LACY: Well, to answer your first question -- your second question first, Your Honor: I believe it would withstand. I believe the State has a valid interest in seeing that medical services, medical procedures are not advertised, seeing that doctors don't say: I perform or I specialize in hemorrhoidectomies, or whatever it may be called, and my price is thus-and-so; or something of this sort.

I think the State has a valid interest.

Secondly, there is a statute in Virginia, Mr. Justice Powell, 18.1-417.2, if my memory serves me correctly, that

addresses itself to medical referral agencies. It was passed subsequent to this case even -- well, it was paseed just recently.

But I do not believe it reaches directly the advertising question. But, of course, advertising could, I think, come within its penumbra there.

But to answer your second question first: Very definitely, that's the very point we're making. It's not the question of whether the services are legal or illegal, it's the fact that the State of Virginia, the General Assembly of Virginia has the authority to determine that the advertisement of medical services, the advertisements of doctors' services, would be --

QUESTION: I wonder how far this goes. Suppose this ad, instead of appearing in this newspaper published in Virginia had appeared in the New York Times; could this statute be applied to a distributor of the New York Times in the State of Virginia?

MR. LACY: Well, the statute itself only pertains to the people who publish it or cause it to be published. Now, whether it could be -- I really don't think it would be enforced as to the newsboy who might deliver it.

QUESTION: Whether it's enforced or not, if the statute reaches the distributor of the newspaper, it did, could the --

MR. LACY: Well, first of all, I don't think it would apply to the distributor.

Did you ask me a second question -- would be what -- what would be the --

QUESTION: Yes, I'm wondering how far you carry your power of the State argument.

MR. LACY: As to who can be prohibited?

QUESTION: Yes.

MR. LACY: Well, we --

QUESTION: And the advertisement appeared not in this paper but in the New York Times, and the New York Times, I gather, is sold in Virginia, isn't it?

MR. LACY: It is sold in Virginia, yes, sir.

QUESTION: Could its distributor be --

MR. LACY: No, sir.

QUESTION: -- prosecuted under this?

MR. LACY: No, sir.

QUESTION: Why not? What's the difference between the distributor of the New York Times and the publisher of this little paper?

MR. LACY: Well, one big factual difference is that this person, the appellant in this particular case is the person who actually published it. The distributor, the poor newsboy out on the corner.

QUESTION: Well, I'm assuming a statute which reached

also the distributor.

MR. LACY: Oh, I'm sorry, sir.

Without any scienter or anything involved in --

QUESTION: Nothing except what -- you had this advertisement in the New York Times instead of in this paper distributed in Virginia.

MR. LACY: I think so. I think so for this reason --

QUESTION: It could?

MR. LACY: Yes, sir, I think so for this reason: let's assume that a doctor works up a handbill, setting forth that he specializes in tonsillectomies, and he has specials on every Wednesday and Friday in a certain hospital, if you care to come by. He prints them up, and he gives them to people, friends of his, and says, How about handing them out?

I think we could stop those people from handing those things out.

QUESTION: And from putting the ad in the New York Times? Or in a newspaper. Advertising in a newspaper.

MR. LACY: Precisely, yes, sir.

QUESTION: Unh-hunh.

QUESTION: And do you think your statute 18.1-63, as it existed, went that far?

MR. LACY: No, sir. Oh, no. I'm not --

QUESTION: Well, it says if any person, by publication, lecture, advertisement, or by the sale or circulation of any publication.

Wouldn't that cover Mr. Justice Brennan's hypothetical?

MR. LACY: The sale or circulation, I think is the economic activity, obviously it probably would in that particular instance. Had it --

QUESTION: So the New York Times is in trouble if it carries these ads, isn't it, in Virginia?

MR. LACY: No, sir, it's not in trouble now. This statute is no longer here; we're talking about a statute that has been effectively repealed by amendment over two and a half years ago now, in essence.

We will never know. The statute was in existence from 1877, and this is the first --

QUESTION: You say "effectively repealed", what does that mean? Has been repealed or --

MR. LACY: Well, no, sir, what I mean is that it was amended. I said effectively repealed by amendment. What I mean it's been changed now to refer to abortions which are intended to be performed in this State, which are illegal in the State.

QUESTION: I see.

MR. LACY: And there are no illegal abortions in

Virginia.

QUESTION: In other words, that would be procedures by other than a licensed physician; is that --

MR. LACY: Excuse me, sir, I didn't -- I'm sorry.

QUESTION: Well, if I understood your last statement, it was limited to abortions that were illegal in Virginia.

MR. LACY: That's the amended version of the statute.

QUESTION: Yes.

MR. LACY: Yes, sir.

QUESTION: Well, that simply means that it's one that's performed by someone other than a physician, then.

MR. LACY: Precisely. We had -- we have to follow the decisions of this Court in Roe v. Wade and Doe v. Bolton.

QUESTION: But they had nothing to do with advertising of medical services, as I think Mr. Justice Powell pointed out.

I think your friends agreed with that, by implication.

MR. LACY: I'm sorry?

QUESTION: This is a case involving advertising, not illegal conduct.

MR. LACY: Precisely, but what the General Assembly did, Your Honor, after this, after the appellant's conviction,

and there's nothing in the record to show they did it with regard to this case and not just -- it was done. It's just a cold, hard fact that the statute was amended. They just changed the terms of the statute --

QUESTION: Did you tell us that this was the first prosecution under this statute in modern times?

MR. LACY: The best information I have -- the best information I have is not only in modern times, but at any time.

I think the statute was passed in 1878, if my memory serves me correctly, and this has been the only -- I would also draw the Court's attention to the fact that when Mr. Lowe was up, he called the Court's attention to an editorial on abortion, which appeared in a subsequent issue of this very paper published by the appellant. And for which the appellant was never arrested or convicted, of any sort.

The statute is not meant to address itself to editorials. It's not meant to address itself to informational bulletins. It's meant -- the Supreme Court of Virginia has construed the statute to pertain only to commercial advertising of these abortion services.

The advertisement does not express a position whether a woman should bear a child, nor does it criticize Virginia's abortion laws or their enforcement.

Now, the appellant does contend that the mere running

of the advertisement constitutes an implicit editorial opinion on the subject matter of the ad. Such a contention however is totally lacking of support in he record.

There is no evidence in this record that the newspaper had a publicly acknowledged policy of accepting certain advertisements and rejecting others.

To be sure, the concept that the mere running of an advertisement constitutes an editorial endorsement of the subject matter of the ad, would undoubtedly appal the editorial staffs of the nation's newspapers.

The fact that they ran an ad in their newspaper and the mere running of that advertisement constitutes an editorial opinion would undoubtedly appal them.

In short, the commercial advertising in this case is not stripped of its commercial character in any way, shape, or form by editorial judgment.

The advertisement published by the appellant does nothing more than pose a commercial transaction, and because it is pure commercial speech, it is unprotected by the First Amendment.

Unlike the commercial advertisement -- excuse me, unlike the non-commercial advertisement in New York Times vs. Sullivan, this advertisement did not express opinion, recite grievances, protest claimed abuses, or seek financial support on behalf of any movement.

Pure commercial speech is neither intended to be, nor does it have the effect of contributing to public debate. Like the ad in question here, its intent and effect is simply to propose a business transaction.

Because we are dealing with pure commercial speech unprotected by the First Amendment, we turn then to what is the interest of the Commonwealth.

The interest of the Commonwealth, as I related earlier to Mr. Justice Marshall, is that the Commonwealth has a right, a valid interest in seeing that people who render these important services are not motivated by pure financial gain. They do not get into unseemly cut-rate actions. That they are interested in the welfare of the patient.

If my reading of Roe v. Wade and Doe v. Bolton is correct, this Court bottomed its decisions on the professionalism, on the professional judgment of the doctor in the first trimester.

This statute, like Roe v. Wade and Doe v. Bolton, vindicates that professional judgment.

The Supreme Court of Virginia found that this statute was directed to commercial advertising, and was directed to the purpose of keeping these commercial practices and pressures out of this field.

I would call the attention of the Court to the

New York cases cited by the Supreme Court of Virginia in its decisions, cases in which it was found that abortion referral agencies, the for-profit abortion referral agencies were doing substantial amount of advertising, were acting as middlemen for doctors, were soliciting for and splitting fees with doctors; and, most importantly, those cases disclosed that these abortion referral agencies had no follow-up procedures after abortions, that the women were cast off after the service had been performed.

QUESTION: How does that interpret an Act passed in 1872? As to what New York is doing now?

MR. LACY: Well, the Supreme Court of Virginia interpreted the Act.

QUESTION: On the basis of what's going on now, compared to 1872.

MR. LACY: It could have just as easily gone on then, Your Honor, but, I submit -- but the Supreme Court of Virginia spoke. We have no legislative history. As you may know, in Virginia very seldom do we have legislative history.

QUESTION: Neither you nor the Supreme Court of Virginia know one single thing about what goes on in the medical profession in the State of New York; am I correct?

MR. LACY: We know from the New York cases that -- the Supreme Court of Virginia cited the New York cases.

QUESTION: That's all you know. Because you don't know how it -- does the Commonwealth of Virginia take the position that the medical profession in New York is wrong or --

MR. LACY: No, sir.

QUESTION: You don't mean that, of course.

MR. LACY: No, sir.

But the thing is -- the point is, Your Honor, that we don't have to wait. We're not saying that all physicians in New York, Wisconsin, or Texas, we're not saying that at all.

QUESTION: You just decided in Virginia that to advertise in New York is wrong; that's the way you handle it.

MR. LACY: Well, we --

QUESTION: Just tell the people don't go.

QUESTION : Mr. Lacy, do you have -- is there before us, in the briefs or anywhere, the new statute in Virginia?

The text of it?

MR. LACY: Yes, sir, very definitely. Page 4 of our brief, in the footnote, if Your Honor please, footnote 2 on page 4.

QUESTION: And you -- oh, yes. That is the effective statute?

MR. LACY: Yes.

QUESTION: Now, is it your position that if there

was any overbreadth problem, it's cured by that statute?

MR. LACY: If the rationale -- if -- our rationale is underlying the overbreadth doctrine's chilling effect on First Amendment rights, or maybe possibly selective enforcement of the statute; if the statute is unenforcible, those things cannot even exist.

QUESTION: So you're saying that the present statute merely prohibits advertisings about illegal abortions?

MR. LACY: Well, that's what the statute says.

QUESTION: Well, the present statute wouldn't reach this advertisement now.

MR. LACY: Precisely. Precisely.

Nor would it reach -- nor would it reach anybody.

QUESTION: It wouldn't reach anything except promoting what would be an illegal abortion.

MR. LACY: Precisely.

QUESTION: Well, there are still illegal abortions, aren't there, by people who aren't doctors, I suppose?

MR. LACY: Oh, excuse me. You're precisely correct. There would be in instances.

QUESTION: There are still some abortions that are illegal, are there not?

MR. LACY: I'm talking in terms -- we had a statute in Virginia almost identical to the Georgia statute

in Doe v. Bolton, as referring to that.

Because the overbreadth doctrine represents an exception to the traditional rule of standing, that people cannot raise the hypothetical cases of others, it should be used only sparingly and as a last resort. As I just mentioned just then, application of the overbreadth doctrine in this case would strike down a statute which is unenforcible.

Secondly, I would like to point out that the appellant has raised this morning the hypothetical cases of a doctor, the hypothetical cases of a lecturer, and the hypothetical cases of a woman and her husband, and of an editorial writer.

First of all, we know that the appellant in this case has written editorials, which have not been prosecuted. But also the Supreme Court of Virginia expressly rejected those hypothetical cases, it expressly rejected them. Now, the appellant says it's dictum.

But, if the Court please, when the Supreme Court of Virginia says we do not consider this statute to encompass those cases, we read that to mean that's precisely what they mean, that it does not encompass those cases.

Furthermore, the Supreme Court of Virginia has authoritatively construed this statute to prohibit only commercial advertising. So, therefore, it would not even reach a husband and wife discussing it, or a doctor and a

patient discussing it.

It's our position that an application of the overbreadth doctrine in this case would simply result in a windfall for the appellant.

QUESTION: What do you think the -- if the overbreadth -- let's assume the overbreadth argument is, for all practical purposes, out of the case; what do you think the issue is with respect to -- that it's left in this case -- this -- there was a criminal prosecution?

MR. LACY: Precisely, Your Honor.

QUESTION: And a conviction?

MR. LACY: A conviction, yes, sir.

QUESTION: For doing what?

For carrying an advertisement about an abortion or an illegal abortion or a legal abortion?

MR. LACY: For carrying an advertisement about a medical service, to wit, abortion. Abortion services. Not illegal abortion services.

QUESTION: And, in your view, it doesn't make any difference whether legal or illegal?

MR. LACY: Precisely -- it's the same point about dental services, and Semler vs. Dental Examiners, the service were not legal or -- you know, it could have been legal or illegal, it was still proscribed.

QUESTION: Well, I gather your whol point, Mr.

Lacy, is that your Supreme Court has said this reaches only commercial ads, this is a commercial ad, ergo the First Amendment argument fails.

QUESTION: Yes, well, that --

QUESTION: Is that it?

That's your argument?

MR. LACY: Purely commercial, right.

QUESTION: That may be right about the old statute, but the conduct for which this defendant was convicted wouldn't violate this new statute?

MR. LACY: No, sir, because it would have to -- well, it would have to be -- you gave me one example. I was too soon when I said, you know, that there are no illegal abortions in Virginia, and you corrected me.

QUESTION: Well, there are.

MR. LACY: That if he advertised that: Come down to the local --

QUESTION: Is there some -- there isn't some general statute that prevents doctors from advertising in --

MR. LACY: Yes. Yes, sir, there is.

QUESTION: Is there any general statute that says newspapers can't publish doctor's ads for their services?

MR. LACY: No, but they could be subject to aiding and abetting doctors who do publish ads --

QUESTION: Well, then, why did you tell me carrying

an ad, that the ad that's involved in this case wouldn't be illegal in Virginia?

MR. LACY: Oh -- this is not an ad by a doctor.

QUESTION: Well, it's an ad about a medical service, isn't it?

MR. LACY: Well, you asked me whether we had a statute specifically drawn to doctors, and I'm --

QUESTION: Well, do you? Do you or not?

MR. LACY: Yes, sir, we do. Specifically drawn to doctors.

QUESTION: If the doctor had his nurse, his receptionist put the ad in the paper, just simply giving it a name, such as this one --

MR. LACY: Could we prohibit --

QUESTION: -- Reliable Medical Referral Service.

MR. LACY: Could we prohibit that, sir, is that your question?

QUESTION: Does the present statute of Virginia prohibit that? I'm not talking about this new statute on advertising. You said Virginia has a statute prohibiting doctors from advertising medical services.

MR. LACY: It's section 54-317. 54-317, sub-paragraph 13, and says: any doctor, either directly or indirectly. So, if it were proven that he told his nurse to go do it, that's precisely correct.

If I left you with the wrong impression, I am extremely sorry.

We respectfully submit that the judgment of the Supreme Court of Virginia should be affirmed.

Thank you, sir.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:11 o'clock, p.m., the case in the above-entitled matter was submitted.]

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