ORIGINAL

In the

Supreme Court of the United States

VIRGINIA STATE BOARD OF PHARMACY, et al.,

Appellants

vs.

VIRGINIA CITIZENS CONSUMER COUNCIL, INC., et al.

No. 74-895

Washington, D. C.
November 11, 1975

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v.	No. 74-895
VIRGINIA CITIZENS CONSUMER COUNCIL, INC., ET AL	

Washington, D. C.

Tuesday, November 11, 1975

The above-entitled matter came on for argument at 1:27 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:

ANTHONY F. TROY, ESQ, Chief Deputy Attorney General, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia 23219 For Appellants

ALAN B. MORRISON, ESQ., 2000 P Street, N.W., Washington, D. C. 20036 For Appellees

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-895, Virginia State Board of Pharmacy against Virginia Citizens Consumer Council, et al.

Mr. Troy.

ORAL ARGUMENT OF ANTHONY F. TROY, ESQ.,

ON BEHALF OF APPELLANTS

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

It has been traditional that the practice of professions are to be above the morals of the market place. This case presents the question of whether the practice of pharmacy and the dispensing of drugs should be subject to the morals of the market place.

Should presecription drugs be advertised?

The concerns of this case, however, are not only in the professional pharmacy but, rather, in each and every profession, law, medicine, optometry, dentistry and any other prefession controlled by the state.

The true question, then, is the ability of a legislature to regulate these professions within the economic and social policies deemed provident.

In Virginia, the practice of pharmacy is a profession. It has been deemed a profession by the general assembly. It has been found a profession by the courts.

It is a profession from the time that the pharmacist secures a drug through the time that he prepares it, compounds it, dispenses it and delivers it to the patient.

Our brief, in footnote three, pages 6 and 7, sets forth some of the statutes which comprise the scheme by which the profession of pharmacy is regulated in the Commonwealth.

QUESTION: MR. Troy, let me get this straight out. How do you define a profession?

MR. TROY: Your Honor, the General Assembly has defined this profession. It has defined it within the scheme-work of what has traditionally been defined as profession. A learned profession, requirement of a degree, a requirement of some protection to the health, safety and welfare of the people and in this case, it has been shown, not only by statute but in the record itself that the pharmacist is the last professional who interposes himself between a patient and a drug.

He has a vital role in the medical health team.

Now, in 1968, the Virginia General Assembly enacted a measure prohibiting the advertisement of the price of prescription drugs.

The history of that statute is set forth in the Appendix at page 20 and I would point out here in response to the Appellee's statement that the legislature enacted this without any basis whatsoever.

The short answer is that since that 1968 enactment the statute has been enacted or amended twice with full knowledge of the 1969 federal court decision sustaining the validity of this statute.

Now, the legislature declared by this statute that any pharmacist who advertised would be guilty of unprofessional conduct.

The statute regulates only the conduct of the pharmacist.

As the Appendix demonstrates and as Judge Butzner of the Fourth Circuit found, speaking for the three-judge court in Patterson Drug Company v. Kingery, a pharmacist, "Must have extensive knowledge of a wide range of drugs. Accuracy is essential. Mistakes can be serious."

Just four pages of the Appendix, pages 44-47 demonstrate, by the testimony of Mr. Carl Emswiller, a pharmacist in nearby Loudon County, that a pharmacist plays a vital role in the health field and the dispensing of drugs.

A pharmacist, in dispensing drugs, is doing more than what I, as a layman, would comprehend. That is, taking pills from a big bottle, counting to 25 or 30 and pouring pills into a small bottle.

The entire educational training of a pharmacist is geared to impart to him a knowledge greater than a

physician as relates to drugs, their chemical composition and their reactions, contraindications or synergystic effects of such chemical elements.

QUESTION: Well, if that is the case, why doesn't he write prescriptions?

MR. TROY: I'm sorry, your Honor?

QUESTION: If that is the case, why doesn't he write prescriptions?

MR. TROY: The reason that he does not write prescriptions, of course, is that his education is to the extent of knowing the chemical elements of drugs and their contraindications.

The doctor, of course, is the one that knows what the therapeutic effect of these drugs is for the particular disease that the doctor is prescribing [for.]

QUESTION: And their contraindication.

MR. TROY: And their contraindications in some cases. But as the record in this case --

QUESTION: In some cases?

MR. TROY: In some cases, yes, your Honor, because, as the record shows in this case, pharmacists do keep medical profile records containing a patient's allergies, sensitivities or reactions to drugs.

For example, Mr. Emswiller detailed -- again on the Appendix pages 44 through 47 -- two instances of the

utilization and value of the medical profile card.

Among typical examples, he detailed two instances where medical profile records assisted in the dispensing of drugs. One, an example of a patient taking a blood pressure tablet which would have, due to a chemical element in such tablets, potentiated the anesthesia that was about to be administered preparatory to surgery.

Another specific example was a patient taking a tranquilizer who was then prescribed a different type of tranquilizer. The second one had what was known as an MAO inhibitor, in short, a drug which would interfere in the manner in which the body was utilizing the former drug.

Due to the nature of these drugs, it was necessary that a two-week period elapse prior to the administration of the second drug for a prolonging and intensifying of the former drug would have occurred in the body with serious overdose and drug side effects.

The record before this Court demonstrates that the profession of pharmacy is completely entwined in the dispensing of prescription drugs.

QUESTION: What happens if somebody gives a prescription to their butler and tells him to go over and get it filled?

MR. TROY: Under the medical profile records that a pharmacist would have, your Honor, the prescription, of

course, would be written in the name of the individual; the record would be in the name of the individual. The pharmacist, by looking at the record and comparing the prescription about to be filled, could tell if there would be any side effects.

QUESTION: Well, can he fill one with somebody that he doesn't have a record of?

MR. TROY: Can he? Yes, he can, your Honor.

QUESTION: Well, of course. So this isn't universal. I mean --

MR. TROY: No, by no means universal.

QUESTION: Sometimes people just send it in and send the money and if you put down the money, you get the prescription.

MR. TROY: Exactly, your Honor and as Judge Butzner found, speaking for the three-judge court, that although monitoring is not completely effective because of the mobility of customers or because of the availability of non-prescription, OTC items that could be antagonistic, it is not a perfect cure but it is a benefit to the public.

QUESTION: Mr. Troy, you have mentioned the importance of druggists compounding drugs. As I understand the stipulation, 95 percent of the drugs dispensed do not require compounding by the --

MR. TROY: That is exactly correct, your Honor and it could be even a little more but the point is, and as

pointed out in the Appendix, that today as compared to prior years when druggists used to compound drugs, today we are talking about drugs that have a benefit of curing rather than just a palliative effect as in the old days of compounding and these drugs, while they have the benefit of curing, have also the benefit and ability to do great harms and as in the example of Mr. Emswiller, where there was a drug that he dispensed that did not have to be compounded, nonetheless, he knew that if he gave that second drug, that that patient, since it had not been a two-week elapsed period of time, would have been harmed by that drug, notwithstanding that it was a drug that was not compounded.

QUESTION: Mr. Troy, may I ask, I don't quite understand how this argument addresses the question that you presented, whether or not the First Amendment, the prohibition of price advertising is a violation of the First Amendment. Is that the issue we have?

MR. TROY: Yes, exactly, your Honor.

QUESTION: And does everything you have been saying have any bearing if it does?

MR. TROY: Yes, your Honor, for this reason --

QUESTION: I can understand if you were arguing a compelling interest argument, assuming that there was a First Amendment protection, but I thought the question you gave us was whether or not commercial advertising had

First Amendment protection.

MR. TROY: Yes, your Honor and this is the connection. The statute here is a measure addressed to the public health. It is, as Mr. Justice Stewart found in Head and has described similar statutes, "Within the most traditional concept of what is compendiously known as the police power." But the local --

QUESTION: Wasn't Head a due process case, not a First Amendment case?

MR. TROY: Exactly, yes it was, your Honor.

The lower court paid lip service only to the principles announced in these cases in Semler, Head, Williamson and it found that this was not a 14th Amendment case but rather, was a First Amendment case because it violated consumers' right to know.

QUESTION: And you disagree with this?

MR. TROY: Yes, your Honor, for this reason.

QUESTION: You say, then, this is a due process case?

MR. TROY: No, your Honor, this is, in the context in which it has been framed for us by the lower court, a First Amendment case. But the lower court simply ignored Fourteenth Amendment cases and under the guise of the First Amendment, then examined the wisdom of the Virginia statute and absent a convincing explanation for its wisdom, it struck

it down.

Now, somehow it reasoned that approaching this from a consumer viewpoint would not be an intrusion upon the state's regulation of pharmacies.

I suggest that the court's decision is analytically unsound. It has set at war the First and the Fourteenth Amendments.

How can there be a constitutional right to receive information which the state has a legitimate and constitutional right under the Fourteenth Amendment in prohibiting the dissemination of that very same information?

There can only be two answers. One, that the right to know is a concommitant right. It is not an independent right which would allow access to any information, commercial or otherwise, which perhaps has an economic impact upon the consuming public.

The second answer is that an independent constitutional right would exist and consequently, if so, Semler, Head, Williamson and like cases must be overruled. The two are diametrically opposed and cannot stand together.

Now, this Court has not granted a right to know where there has not been a concommitant First Amendment right to speak.

QUESTION: What is the state's interest in permitting the advertising? To forbid -- to do away with

competition? Or what?

MR. TROY: No, your Honor, it is a health matter.

QUESTION: Well, I know, but how does it protect health?

MR. TROY: As I have indicated -- let me answer this directly. This is exactly as in the Head situation where the statute was upheld because consumers could put the needs of their pocketbooks above the remedial needs.

QUESTION: So if you advertised price -- so-called "price cutting," you think it might lead everyone to cut prices, which lowers profits which would put the druggist in a poorer position to do his job. Is that it?

MR. TROY: As an attorney with some anti-trust background, I would be the first to concede that advertising does generate price competition but the purpose of this statute is that the General Assembly, in its wisdom, has decided that the delivery of a prescription drug is part and parcel entwined with the health care that must be given.

QUESTION: All right, now, how does advertising impinge on that?

MR. TROY: The advertising, of course, would induce consumers to think of this as a mere commodity and would be deceptive in and of itself because they would not realize what --

QUESTION: Well, the General Assembly, in its

wisdom, hasn't -- doesnt fix prices on drugs and it doesn't prevent a druggist from cutting a price at the request of a consumer.

MR. TROY: That is correct, your Honor. This has no effect on prices.

QUESTION: And it wouldn't prevent, I suppose, consumers picketing a drugstore to say that the druggist was charging too high a price.

MR. TROY: No, I don't think it would at all.

QUESTION: And it wouldn't even prevent one druggist from picketing another.

MR. TROY: Well, the statute --

QUESTION: Would it? Would it?

MR. TROY: -- does not intend to regulate price.

QUESTION: So if a druggist wants to sell the drugs more cheaply than his competitors, he may do so without interference.

MR. TROY: That is correct.

QUESTION: Well, but doesn't -- if you are talking about a Fourteenth Amendment type of analysis where you talk about any conceivable set of of facts, don't you have to get back to Justice White's earlier question that if you have price advertising you are going to have price wars and if the pharmacist does have a responsible position the less he can charge for the unit the less time he is able

to devote to supervising its distribution.

MR. TROY: Well, that is perhaps an analysis, Justice Rehnquist.

QUESTION: Thank you.

[Laughter.]

MR. TROY: The -- sorry -- that came out. What I meant to say is that, though we did not rely on that analysis per se in the lower court, what we felt was that this monitoring situation, if you have advertising, you are going to induce patrons, patients, to shop around -- to shop from pharmacy to pharmacy and by not having price advertising, you are, in effect, creating a system whereby perhaps a physician-pharmacist-patient relationship would exist.

Now --

QUESTION: Does the law prevent me from writing a letter to my friends in the Lodge -- if I belong to one -- that there is an awful good price in certain drugs at a certain drugstore?

MR. TROY: No, sir.

QUESTION: So anybody -- everybody but the druggist can advertise the fact that there is a cut rate druggist down the street.

MR. TROY: Exactly.

And the fact is, of course, that the statute does not in any way intend to state to a consumer that you

cannot shop around. We cannot protect all consumers.

The General Assembly, however, on the basis of the record, found that there was a rational relationship between monitoring -- between having patients go to the same pharmacist and consequently, on that basis, enacted the statute.

QUESTION: Does the record show that they do go to the same pharmacist?

MR. TROY: Well, in those cases where the monitoring has worked, of course, yes, your Honor. The record would show that there are examples where people have come back time and time again and have been stopped from taking antagonistic drugs.

Now, to remove the price restrictions would, I agree, create retail incentive for price competition but where is the constitutional right for the lowest price possible?

QUESTION: Does this law reach the pharmacist who puts a sign on his prescription counter that says, "I sell drugs 10 percent less than you can buy them anywhere else"?

MR. TROY: Yes, it would, your Honor. There is, under the Patterson v. Kingery decision, which was in 1969, an agreement, of course, that you could issue a discount.

When that case first came before the court, the words"issue, advertise or promote a prescription drug" was

the language of the statute.

The court, in upholding the statute, struck out the word "issue" and on that basis, of course, senior citizen discount plans of 10 percent have been in effect in the Commonwealth but --

QUESTION: Well, can he put on something -- my price for some of these, oh, say, Achromycin tablets -- on his prescription counter as $2? Can he do that?

MR. TROY: No, I don't think he could under this statute.

QUESTION: But if you ask him what his price is, he can certainly tell you.

MR. TROY: Yes, sir.

QUESTION: And then you can go outside and tell everybody else you want to.

MR. TROY: You could, or you could go down to the next pharmacist. You could shop around.

QUESTION: Yes, right.

MR. TROY: The state, just because it creates a system which it feels protects health, does not necessarily mean that you as a consumer have to accept what the state is, in fact, trying to protect you from.

QUESTION: Well, must we take account of a First Amendment here of the druggist? Or not?

MR. TROY: The First Amendment interest of the

druggist, your Honor --

QUESTION: Is there any First Amendment interest to the druggist to take account of in this case?

MR. TROY: No, I do not think so, for this reason --

QUESTION: Well, what if there is.

MR. TROY: Well, if there is, then I suggest that you have a balancing test and the balancing would be the governmental interest in regulating versus any First Amendment rights that may be existing.

This brings us to this Court's recent decision in Bigelow.

QUESTION: Mr. Troy, I wanted to be sure you would touch upon Bigelow because you didn't -- your brief, of course, was filed before Bigelow came down --

MR. TROY: Yes, your Honor.

QUESTION: -- and you haven't seen fit to file a supplemental so I am particularly interested in your comment.

MR. TROY: Simply because Bigelow is simply not applicable for this reason:

In this case, what is advertised is commercial advertising in its purest sense. Phrases such as "compare, save, pay less or dial-a-discount" do not, as found in Bigelow, convey information of interest regarding the form, the subject matter of the law in another state or advertised activity which pertains to a constitutional interest,

abortion, in Bigelow.

Such phrases do no more than simply propose a commercial transaction. They are entitled to little, if any, constitutional weight.

Now, as I have said, those phrases would create, perhaps, a retail incentive for price competition but again, where is the constitutional right to the lowest price possible?

Trying to ensure the lowest price is, in a context in itself, a wise economic policy. It is not, however, I suggest, a constitutional prerequisite.

For example, does every victim of an anti-trust price-fixing conspiracy have a cause of action for violation of First Amendment rights, notwithstanding the Parker Brown decision.

If a balancing of whatever First Amendment interests are involved must be made, then, as I have stated, it should be done in light of this Court's recognition for over 40 years of the inherent interests of the state through its police power to regulate the various professions.

Since, in this case, it is the manner by which price information is disseminated and not the actual dissemination of price information itself that is regulated, then the balancing, if any, must be done as it was in McDonald, not under a compelling interest doctrine but under

the rational relationship test.

In the instant case, that test has been applied and the statute has been found not wanting. It has been found, by a district court whose decision was declared to have no infirmity by the lower court, to have a statute before it which had a rational and reasonable basis. The Virginia statute, wise or foolish, economically sound or improvident, should be sustained.

By doing so, this Court will be sustaining the constitutional framework that legislative bodies, not courts, must decide the wisdom of economic and social policies.

We cannot and should not turn back the clock for 40 years under the guise of an independent right to know which would begin anew the scrutiny of wisdom of legislative choices in the health regulatory and other professional fields.

MR. CHIEF JUSTICE BURGER: Mr. Morrison.

ORAL ARGUMENT OF ALAN B. MORRISON, ESQ.

ON BEHALF OF APPELLEES

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

This is a First Amendment case. There is only one question and that is the constitutionality of the Virginia statute which prohibits the advertising of the price of prescription drugs.

The Pharmacy Board below, on its brief in this Court, relied on Valentine against Chrestensen for the proposition that commercial advertising is entitled to no protection under the First Amendment.

Now, whatever the merits of that position may have been before June 16th of last year when this Court decided Bigelow, that position simply has no merit today.

Bigelow clearly and unmistakeably forecloses any fraud argument based on Valentine that all commercial advertising is outside the First Amendment.

Bigelow said you have got to look at the information being conveyed. You have got to balance the interest in having that information conveyed against the interest of the state in prohibiting the dissemination, the traditional kind of First Amendment balancing.

Bigelow said you have to find a clear relationship between the prohibitions and the goals of the state. Now, Bigelow did not specifically decide whether, under the line of cases, it did rely upon the cases such as the New York Times and Sullivan and Pittsburgh Press, which were precursors and we say whatever Valentine once stood for, it now only relates to the manner in which the distribution may be controlled by the state.

Counsel for the Pharmacy Board today said, well, Bigelow is not a commercial advertising case.

Let me read you from the brief that the State of Virginia put in the Bigelow case last year.

Counsel for the State of Virginia was the same counsel exactly as on the brief today and let me read you from page 7, referring to the advertisement in Bigelow:

"Appellant's conduct is clearly within the hard core of commercial activity unprotected by the First Amendment."

Page 9, "The advertisement, therefore, can only be viewed as a proposal for the sale of services."

Page 11, "Quite simply, it --" the advertisement -- "does no more than propose a commercial transaction."

That is exactly what they contended here today. That is what they contended last year and that is what we suggest today is what went on in Bigelow.

There was, essentially, a commercial transaction. True, it was for the sale of services for abortions as opposed to the sale of pills but, essentially, in terms of the First Amendment kind of analysis, that is, the First Amendment has no applicability to commercial transactions, the proposition is the same.

Now, as the Court is aware, the traditional First Amendment analysis requires that the state is unable to prevail unless it can show both a compelling state interest and that it has accomplished that interest by the least

restrictive alternative possible.

That particular mode of analysis was not specifically adopted in Bigelow, nor was it rejected. The court simply said a clear relationship has to be shown.

Now, we believe that as in Bigelow, it wasn't necessary to decide whether all First Amendment analyses carry forth with those compelling state interests and the least restrictive alternative.

You don't have to decide that question here today because whichever way you strike the balance, the scales tips so heavily in favor of public disclosure of this information under the First Amendment that under even the most relaxed rational relationship test the plaintiffs will prevail.

I'd like to turn for just a moment before weighing --

QUESTION: Bigelow involved, did it not, the criminal conviction of the publisher of the newspaper?

MR. MORRISON: It did, your Honor.

QUESTION: And this case involves -- there is no newspaper, of course, involved in this case.

MR. MORRISON: That is correct.

QUESTION: This case involves, what, an action for declaratory judgment?

MR. MORRISON: And Injunction.

QUESTION: And an injunction?

MR. MORRISON: Yes, sir, we sought the convening and retainment -- the conveing of a three-judge court and hence the direct appeal to this Court because of the injunction that was granted below.

QUESTION: Right.

MR. MORRISON: Let me say a word about --

QUESTION: No free press question in this case, is there?

MR. MORRISON: Well, none of the plaintiffs is a newspaper. Although, of course, the effect of this law -- although none of the plaintiffs is a newspaper -- is to prohibit newspapers -- indeed, newspapers in the District of Columbia that sell in Maryland and in Virginia from dissipating information about prescription drugs in Virginia so while none of the plaintiffs is a newspaper, it plainly has an effect on newspapers and it is only an indirect effect because, of course, no pharmacist would place an ad in a newspaper knowing that he would be subject to disciplinary proceedings for having done so.

QUESTION: Is this law directed at all against newspapers?

MR. MORRISON: I don't --

QUESTION: Or only against pharmacists?

MR. MORRISON: It is not a -- it's -- the way the

law works is it prohibits pharmacists from doing certain things and --

QUESTION: Are there criminal sanctions?

MR. MORRISON: No, I don't believe so, your Honor.

QUESTION: No criminal sanctions against anybody?

MR. MORRISON: I am pretty certain that is correct.

QUESTION: What are the sanctions against pharmacists?

MR. MORRISON: Disciplinary proceedings -- the equivalent of disbarment. I don't know what it is called in the pharmacist's profession but --

QUESTION: You are drummed out of the profession, in other words.

MR. MORRISON: Yes, sir, your white coat is removed or whatever.

[Laughter.]

I'd like to talk a little bit about these Fourteenth Amendment cases and what we have here.

QUESTION: If you are right that this will not -- the Virginia statute would not survive even a rational basis test, I would think you could prevail on the Fourteenth Amendment as well as on the First.

MR. MORRISON: Well, it is not clear that after North Dakota Pharmacy that I can even make a substantive due process argument under the Fourteenth Amendment.

Indeed, we had such a count in our complaint. We were about to go to argument before the three-judge court. A week or two before, this Court decided North Dakota Pharmacy. Seeing that that was not our best point at that time, we withdrew that claim from the District Court and believed that we had a strong First Amendment claim and that we chose to base our contention on that.

I don't think North Dakota Pharmacy can be read so broadly as to prohibit any substantive due process challenge, but we didn't consider that it was appropriate for us to go under it here and we made that decision.

Talking about the Fourteenth Amendment cases cited, Williamson, Semler and Head, there is two important points to note about that.

First, that those cases analyzed the question only from the Fourteenth Amendment point of view.

Footnote 10 in the Bigelow case last year at page 15 of the slip opinion specifically notes the fact that Head, in particular, did not consider the First Amendment challenge because it had not been properly brought before this Court.

Second, the same thing is true and was emphasized in the Pittsburgh Press case. Again, footnote 10 at page 387 of 413 U.S. so this Court has recognized on two separate occasions that those cases do not involve First

Amendment.

But aside from the fact that they don't involve the First Amendment, I think the most important thing to note about reading those cases is that there is not one word of mention any place in there about the interest that the consumers have in finding out this information and I'll talk about that interest in a minute but regardless of whatever the extent of the interest is, the fact that consumers have an interest in finding out how much they are going to have to pay for drugs that may save their lives in this case is a kind of question that was never even considered.

QUESTION: Is that a constitutional interest that you are talking about?

MR. MORRISON: Yes, it is, Mr. Justice Rehnquist. It is the right to receive information under the First Amendment and the concommitant right on the part of the pharmacist to speak freely and while the pharmacist is subject to regulation under the Fourteenth Amendment, there are still specific First Amendment prohibitions that cannot be overruled.

For instance, this Court, in NAACP against Button, absolutely clear that lawyers are subject to regulation as a profession under the Fourteenth Amendment but when the lawyers tried to cloak all of their actions in, we are a profession, we are subject to regulation, this Court said no, you can't

ride roughshod over the First Amendment associational rights specifically guaranteed under the general guise of regulations.

QUESTION: But what about your -- if your argument is applied to the legal profession, putting aside the anti-trust problem, is the state bar regulation prohibiting lawyers from advertising a violation of the First Amendment?

MR. MORRISON: Well, I want to answer that question directly because it is something that has been alluded to a number of times.

QUESTION: That is your next case.

MR. MORRISON: The first point I want to make is that the mode of analysis employed in Bigelow that we are seeking to have employed here requiring the recognition of a First Amendment right and requiring the balancing of the two kinds of interests, that is, the interest on the one hand in obtaining the information, the specific items of information that we are talking about as against the interest that the state has in precluding the dissemination of that information, that kind of balancing test would most definitely have to be engaged in in a case similar to the one that you suggested.

Now, the second point I want to make and this is, again, very important, we cannot predict the outcome of that

case now because we don't know, first, what kind of information we are talking about.

I can see wide distinctions, for instance, between information about what a lawyer charges on a specific per-hour basis on the one hand and a lawyer who attempted to make the same kind of guarantees that the dentist did in a similar case, saying "I guarantee no pain --" whatever the legal equivalent of that may be -- and"I guarantee satisfaction."

Those are different kinds of questions and they would have to be looked at differently on one side of the scale.

Similarly, we don't know and we don't have a record, as we have here, on what specific justifications the Bar would put forth. Here, we have the monitoring justification.

We can sit down. We can analyze it. We can say, "Does that make any sense? Does it come close to promoting a goal that the state has an interest in and does --

QUESTION: Now, in weighing, on your submission, the state's interest, do we get any help in evaluating the state's interest out of Williams and those other cases?

MR. MORRISON: Well, I think that those cases do stand for the proposition that the state has an interest in seeing that professionals do not engage in what we call overreaching activities and it may very well be that in the

context of analyzing what professionals who, after all, are licensed by the state, given an imprimatur of going out to the public and say, you are a professional. The state says that you can do a good job.

The state may well -- and I don't suggest that there is a definite answer -- but may well be able to say, hold on. YOu can't say the same thing to soap makers.

QUESTION: But you can't do that, I gather, from what you are suggesting there. Your next step is going to be that you can't do that as to the consumer.

MR. MORRISON: Well, the --

QUESTION: If they are evaluating the conduct of the professionals themselves, that is one thing, but here you are talking about whether the consumer is entitled to this information.

MR. MORRISON: No, I would say, Mr. Justice Brennan, that both of those interests can properly be focused. We can focus on the entire transaction.

QUESTION: Right.

MR. MORRISON: And I do not mean to suggest that the state could not focus on it.

QUESTION: All right.

MR. MORRISON: Indeed, I think there are very many important consumer interests that can be protected against by deceptive and fraudulent advertising. All I am suggesting

is that in the context of a particular case with regard to the regulations of a particular profession, we have to look at the particular information under the kind of analysis we are suggesting here and look at the state's rationale for prohibiting the dissemination of it judged against the interests of both parties, the disseminator of the information and the person who is going to receive it.

QUESTION: And what do you perceive as the reasons for preventing this dis --

MR. MORRISON: In this case?

QUESTION: Yes. In preventing the dissemination.

MR. MORRISON: Well, the only ones that have been suggested is the fact that pharmacy is a profession and I think that the NAACP against Button case eliminates that as a blanket excuse for all kinds of First Amendment restrictions.

And the second is the monitoring argument. That is the only other one that has been put forward here. I would suggest arguments that have been raised in other cases and I'll just deal with them quickly, if I may.

First, it is suggested --

QUESTION: Well, what about the monitoring? How do you tie that in? I mean, why does that fit in as a reason?

MR. MORRISON: Well, I don't think it fits in at all, obviously --

QUESTION: Well, yes, but I gather that unless the pharmacy makes an adequate profit they won't be able to engage in this kind of activity. Is that their argument?

MR. MORRISON: No, that is not the monitoring argument.

QUESTION: Well, what is it?

MR. MORRISON: Let me give you the monitoring argument, as I understand it.

QUESTION: That is what I want to know.

QUESTION: That is the other side.

MR. MORRISON: Monitoring is a practice --

QUESTION: You are being asked, in other words, to argue your opponent's case now. Is that it?

MR. MORRISON: No, I am stating their case. I am not going to argue it, I can assure you of that. I --

[Laughter.]

QUESTION: You are the one who says that your interests outweigh the state's. Now, you can't tell me how it outweighs the state's unless you tell me what the state's are.

MR. MORRISON: That is right and that is what I am going to do right now.

QUESTION: That is right.

MR. MORRISON: The state claims that monitoring, which is the keeping of records of what prescription drugs

are taken by each patient, will encourage -- will permit a pharmacist to be able to look at a record -- profile -- and tell whether a patient is taking a drug that may be antagonistic to the one which he is about to fill a prescription on.

Now, they claim that what this statute does is, it does not tell consumers what prices are being charged at different drugstores around town or around the county and therefore, consumers presumably won't know enough to shop around and get a better buy and therefore they will, just out of habit, go back to the stame drugstore they have always been going to. That is what I understand the argument is.

Now, the difficulty with that argument is about three-fold. The first is that there is not the slightest evidence any place that this is anything but an invention and that the legislature had the foggiest notion that they were creating a monitoring system.

The statute we have in front of us is the product of a regulation which was issued in 1967 by the State Pharmacy Board. That regulation said, no advertising the price of prescription drugs.

The Attorney General in Virginia said, uh uh, you don't have authority to issue that regulation.

So, 1968, the statute was passed. Not a word about monitoring. They didn't pass a monitoring statute.

They passed a no price advertising statute.

QUESTION: Well, did they have a word about anything else in the statute?

MR. MORRISON: Not a word.

QUESTION: Well, then, how do you know what was in the back of their minds? How do you know that monitoring was --

MR. MORRISON: I am suggesting that there was no evidence of it and there is subsequent evidence of conduct which supports that inference and that is, first, that the Pharmacy Board has never urged upon the state to pass a regulation, a statute.

They have never attempted to pass a regulation which would require monitoring.

The state pharmacists' own code of ethics,which doesn't require any state authority at all --

QUESTION: Would you be out of here if, in fact, what they had in mind and said so was, we think it is best that people who have to use drugs patronize a single dispenser so that we can have a record of everything that the patient buys?

That is what you understand to be monitoring.

MR. MORRISON: That is right. If that was in the legislative history of this statute?

QUESTION: Yes.

MR. MORRISON: No, it wouldn't -- that is the

next reason I am going to get to, and that is, that the statute goes much too far. It is vastly over-inclusive. It does much more than needed to accomplish this end.

After all, we have a doctor who is involved in this transaction. We are dealing only with drugs which the doctor has told the patient,"You better take this drug because this may save your life. It may cure an illness that you have." So we are not dealing with something that is optional. We are dealing with prescription drugs and the doctor has a professional obligation to be sure that antagonistic drugs aren't taken.

Now, of course, no doctor is perfect as no lawyer or no pharmacist is perfect and there may be times when they will miss.

The book will not be accurate or they will not take the time to check. That simply means that we have got malpractice and on the other hand, it does suggest to me that the pharmacist can provide a useful function but only as a back-up function.

The primary responsibility is on the doctor and that is where it ought to continue to be placed and if the state elected a number of less-restrictive ways of accomplishing this monitoring, short of a price control regulation, which is almost what they have here, then we would have a different case.

We don't. They have done with this no-advertising statute that which they ought to have done -- if it is worth doing at all, with the monitoring statute.

Now, the second reason is that the monitoring, that the statute is vastly ineffective for achieving even the limited ends that it is supposed to achieve and it is ineffective for a number of reasons.

First, only a small minority of pharmacists actually monitor these days.

The second, consumers shop around in any event. They don't always go to the same store for a variety of reasons. One may be closer to one doctor, may be closer to their home, their office. There may be non-prescription drug sales at one place and they decide, well, as long as I am in here, I might as well fill my prescription.

Indeed, the way the advertising rules work, the pharmacist can advertise nonprescription drugs, nondrug items. They can even advertise that they will give you a free cup of coffee while you wait and they can advertise free delivery, but the one thing that the consumer really wants to know is, what is it going to cost? Where in this range of 100 to 600 percent variation are you, Mr. Pharmacist, going to fall?

That information you can't get under this statute.

QUESTION: Do you agree with Mr. Troy that this prohibition goes so far as to prevent the pharmacist from

putting a sign even on his prescription counter that "I sell suchandsuch for $1.20"?

MR. MORRISON: I certainly think that it could be interpreted that way and I would say that with respect to Mr. Justice White's question earlier about whether a consumer could go in and circulate, obtain the factual information from the pharmacist by asking him and go out an put a consumer's bulletin or guide out.

I would say that there are situations in which not the pharmacist but other laws similar to this -- those laws have been construed to say, a doctor who cooperates or a lawyer who cooperates in that situation, simply giving out factual information, is engaged in unethical conduct the way a pharmacist would be here.

QUESTION: There is nothing to suggest that a labor union, for example, couldn't go to a pharmacist or to a chain drugstore and negotiate for lower prescription rates for its members.

MR. MORRISON: Absolutely nothing in the statute that says --

QUESTION: And nothing to forbid the labor union from circulating that among its members.

MR. MORRISON: Circulating that fact among its members?

QUESTION: Umn hmn.

MR. MORRISON: Well, I don't know whether the pharmacists who cooperate in that venture -- if he knew that the information was going to be circulated might be guilty of this rather broad statute. It hasn't been pressed that far, although I suggest that other similar statutes have been pressed --

QUESTION: Well, this law is directed only against pharmacists. It is not directed against --

MR. MORRISON: That is correct.

QUESTION: -- either labor unions or members of the Elks or anybody else.

MR. MORRISON: That is right because that -- but that only goes to the mechanism for enforcing it.

QUESTION: Right.

MR. MORRISON: And I would suggest that, similar to the other statutes that I mentioned earlier also involved only doctors -- only doctors in the one case I am thinking of, particularly.

Only a doctor could be disciplined but that if the doctor knowingly cooperates being aware that the result is going to be this kind of information dissemination, he would be guilty of --

QUESTION: Well, as a matter of fact --

QUESTION: Just a moment ago, Mr. Morrison, I think that this was almost a price control law. Was that --

was there anything implicit in that suggestion that --

MR. MORRISON: No, I --

QUESTION: -- a state would violate the Constitution by enacting a law regulating prices?

MR. MORRISON: No, and I misspoke and I wanted to correct that and I was in the middle of another thought.

QUESTION: Well, I am glad I gave you an opportunity.

MR. MORRISON: Thank you very much, sir.

What I wanted to say is, indeed, it is just the opposite because, as was earlier pointed out, the state doesn't even have a policy prohibiting price competition.

If, indeed, it had a policy prohibiting price competition -- if, for instance, all pharmacists had to charge prices in accordance with what the State Pharmacy Board determined after appropriate hearing was a reasonable price, in the way a utility has to charge, for instance, the Telephone Company, Electric Company -- and in that situation, somebody was advertising a price below the price we would have a case like Pittsburgh Press, aiding and abetting an illegal activity.

But here we are not aiding and abetting anything that is illegal. It is perfectly legal for a pharmacist to charge any price the pharmacist chooses.

Indeed, it is perfectly legal and the state has

no policy against consumers shopping around. All it has a policy against, as far as we can determine, is consumers shopping around in a meaningful way by newspaper advertising and other forms of media advertising so they can find out what the prices are reasonably instead of having to walk around in a fog.

QUESTION: Well, the state has a policy, rightly or wrongly, or rationally or irrationally, against advertising, price advertising by pharmacists, that is all.

MR. MORRISON: That is the policy, yes, sir. That is what the statute says and they claim it is to enforce the policy having to do with monitoring.

QUESTION: Well, it is that policy, whatever it is.

QUESTION: Mr. Morrison, let me ask you this and I hope it isn't irrelevant.

I think it is a fact that drugs by trade names generally are more expensive than drugs by their basic chemical --

MR. MORRISON: Generic names.

QUESTION: -- or generic name. Suppose Virginia had a statute requiring physicians to prescribe in the generic name. Would this be unconstitutional, do you think?

MR. MORRISON: Well, I would first say that I -- my first offhand reaction is that that would not be a First Amendment issue.

My second reaction is that it would not be constitutional -- not be unconstitutional, excuse me, because I would think that the state would have a legitimate interest if it made a factual determination that pills are pharmacologically identical, to be able to say to the doctor, "You must prescribe that unless there is some medical reason for doing so."

But I don't think, whatever the outcome of that case may be, it would control the facts of this case.

QUESTION: Would you think that in further answer to Justice Blackmun's question that a physician had a First Amendment right not to prescribe in the generic name and you would then balance the state's interest to see whether he would prevail or the state?

MR. MORRISON: Well, I don't see the speech element of First Amendment coming in.

QUESTION: Well, call it freedom of expression. He is writing on a prescription pad rather than speaking.

MR. MORRISON: Well, I would say that would very much come under the O'Brien -- United States against O'Brien, where it is a mixed act of speech and conduct and it is much more having to do with the conduct and the content.

I think almost anything that any of us does could be a speech --

QUESTION: Well, why shoudln't the doctor be able

to prescribe a certain proprietary drug if he just thinks it is better or he just wants his customers to use that drug?

MR. MORRISON: Well, my --

QUESTION: I mean, why isn't it at least a First Amendment issue?

MR. MORRISON: Well, it might be. As I say, I haven't focused on it. It would seem to me that it is not a traditional kind of expression issue. He may have a Fifth or a Fourteenth Amendment right to engage in his occupation in accordance with what he determines to be the best dictates of his profession and training and I would certainly want to think about it and I would want to see what the justifications were.

My own belief is that such a statute would be constitutional because of the state's interest in ensuring that people who are in need of medical assistance are permitted to -- are able to buy at the least possible price where the is no medical difference.

Now, if there were medical differences, of course, we would be at a different kind of inquiry.

QUESTION: Mr. Morrison, has there ever been any advertising in Virginia of prescription drugs?

MR. MORRISON: Oh, yes, since we won this case almost a year and a half ago there has been advertising

going on.

QUESTION: And that is what --

MR. MORRISON: There has been no stay.

QUESTION: The point I am driving at is, how come the pharmacists are not involved?

MR. MORRISON: The pharm -- I'm sorry, your Honor. Why aren't they plaintiffs?

QUESTION: Yes.

MR. MORRISON: Well, the pharmacists had a try at this in 1969 in Patterson against Kingery. They didn't win that case.

QUESTION: I see. I see.

MR. MORRISON: These are consumers and we thought that we could do a little better.

QUESTION: So far you have.

MR. MORRISON: Yes, sir.

QUESTION: Mr. Morrison, before you go on, in responding to a question about lawyers and whether or not the principles you advocate here today also would be applicable to lawyers, you stated, as I understood you, that it would depend on the facts.

I'll try to put a fairly straightforward factual situation.

As you know, most lawyers have an hourly rate, at least for internal record purposes and the first step in most

legal charge computations is to look at one's record and see how many hours have been devoted to the representation.

Let's assume a desire on the part of lawyers or assume that the issue were whether or not lawyers would be allowed to advertise that their hourly rate for non-litigation advice was $25 an hour or whatever it might be. What would your reaction to that be?

MR. MORRISON: Well, my first reaction would be that that is certainly an item of information that consumers would want to know.

QUESTION: Right.

MR. MORRISON: That the lawyer would want to be able to disseminate that, either because he wants to be sure the people he is attracting can pay the fees or because he thinks that he will get people to come in at that rate because he thinks it is a good, competitive rate.

Now, on the assumption that we are talking about a dignified notice or simply a statement someplace in a legal register of some kind that says $25 an hour is what this lawyer charges, I would see no interest of the state of the kind that I would think would be sufficient to overturn it but as I said before, I think that before we prejudge a case like that, the state ought to be able to have an opportunity to present whatever justification, the equivalent of monitoring or whatever else the state has to put forth and we

can make a determination at that time. My own judgment would be, since I think that is what you have asked, is that there is no sufficient interest of the state involved but, again, I would say that I would want, finally, to wait until we saw exactly what the facts were before we --

QUESTION: Well, even if there were, according to your submission, as I understand it, the First Amendment of the Constitution would override it.

MR. MORRISON: Well, the First Amendment --

QUESTION: If there is a right to know. If there is, as you submit, a constitutional right to know on the part of potential clients or potential customers of pharmacists.

MR. MORRISON: Well, in every case, of course, there would be a strong presumption that the right to know would be --

QUESTION: Well, if he has a right to know.

MR. MORRISON: Yes. But there could -- there is always engaged in the permissible balancing test that there are certain kinds of cases --

QUESTION: Well, some people think so, but others don't.

MR. MORRISON: That is right.

QUESTION: Others think if there is a clear constitutional right, that is the end of it and any state

statute that impedes or interferes with that right is invalid.

MR. MORRISON: I think that is correct, Mr. Justice Stewart.

QUESTION: That is not your submission, as I understand it.

MR. MORRISON: No, it --

QUESTION: Your submission is that in this instance, the state interest does not override the right to know. Isn't that it?

QUESTION: That is one way of looking at it, but that is not the way that some constitutional lawyers do.

MR. MORRISON: I think that is right. I don't believe that the absolutist view of the First Amendment commands a majority of the justices of this Court at this time and I have said that, of course, under an absolutist view we would be entitled to win but even without that, even under the traditional view that if the state could show the compelling state interest and it was the least restrictive way they could prevent this dissemination, then that case might be cited against the dissemination of the information. But we have to look at the facts.

The analysis would be the same.

QUESTION: First of all, on a absolutist view or any other view, you have to look at the Constitution, don't

you?

MR. MORRISON: That is correct.

QUESTION: And where do you find in the Constitution any right to know?

MR. MORRISON: Well, it is the correlative --

QUESTION: Particularly if you were an absolutist?

MR. MORRISON: It is the correlative, I would say, of the right to speak. Freedom of speech that I think Justice Brennan said that the marketplace would be a barren place indeed if we had only sellers and no buyers and we have recognized the right to receive information specifically in a number of contexts, Lamont --

QUESTION: I don't think anyone joined in saying that, though, did they? Wasn't I alone?

MR. MORRISON: You were concurring.

QUESTION: That is Lamont, isn't it?

MR. MORRISON: Yes.

QUESTION: One may fully accept that and still say that the Constitution protected the right to know by guaranteeing the right to speak or the right to a fair press, to a free press and that those were the constitutional guarantees and anything else is derivative and is not protected directly by the Constitution.

MR. MORRISON: Well, we would certainly say that to the extent that there is a direct right to speak, that

would plainly support the right to receive the information but there have been a couple of cases in which the question about the right to speak has not been at issue, Kleindienst against Mandel, for instance. No one claimed that Professor Mandel had a constitutional right under our Constitution, as someone from Belgium, to speak; nor did anyone say that the Hanoi government in Lamont had a right to speak, yet we upheld the constitutional rights in those cases.

QUESTION: Well, you are not suggesting, are you, that the consumers have a right to know even though the pharmacists don't have a right to speak?

MR. MORRISON: Well, I think the pharmacists do have a right to speak in this case.

QUESTION: But they are not here.

MR. MORRISON: But they are not here and I do say that there have been cases in this Court and I simply make the observation, I think that the rights are equal and the same and that when you view the entire transaction together considering all of the rights involved, that you do have a constitutional right to have this information disseminated and received in this case.

What I am saying is that there have been a couple of cases where the right to receive has seemingly been elevated above the right that the person who was making the statement had under our Constitution.

QUESTION: Mr. Morrison, maybe this is why I, for one, anyway, am always a little uneasy about using a phrase such as the right to know.

I think I had rather plump for something like the free flow of information. It puts a little less emphasis on right to know on one party and the right to speak on the other and we have restricted them here a little bit. I am groping, obviously.

MR. MORRISON: I agree with you, one hundred percent, Mr. Justice Blackmun. I don't think, and I read my brief again with that specific in mind, that we specifically adopted the right to know phraseology in this Court, largely relying upon your Honors' opinion.

In Bigelow, where that phrase was not involved, and I agree that the free flow of information is what the First Amendment is really all about, and we are suggesting here that the consumers have a very important part to be heard in explaining why this information should be disseminated.

QUESTION: But you don't suggest that the First Amendment, the right to free speech, means that you must have something to say, do you?

MR. MORRISON: No, I don't.

QUESTION: Then, if you --

MR. MORRISON: Something meaningful to say?

QUESTION: Yes. Then, if you are going to measure

it by the free flow of information, information presumably meaning something to say, you have put a limit on the First Amendment, haven't you?

MR. MORRISON: Well, I don't think so. I am only talking about --

QUESTION: A person has the same right to speak or to write even if what he is speaking or writing is utterly foolish, doesn't he?

MR. MORRISON: That is absolutely correct. I am only talking about those cases in which a state is claiming that some interest in prohibiting certain kinds of information may be raised and in those cases I think that it is proper, as this Court did in Bigelow last year, to take a look at the kind of information that we are talking about.

That was my only point.

QUESTION: Well, if we are speaking of information.

MR. MORRISON: Yes, yes.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Troy?

REBUTTAL ARGUMENT OF ANTHONY F. TROY, ESQ.

MR. TROY: Yes, your Honor.

First, as to Bigelow, let me quote from their brief that they filed, pages 28 and 29, describing the advertisement in question.

"The advertisement contained much more than a proposal for a commercial transaction. The information that New York had legalized abortion was important, not just to persons dealing with pregnancy but to citizens in Virginia generally. Knowledge that other states had altered their laws on such a controversial subject as abortion is likely to have a tangible impact on the attitude of persons concerning restrictive laws in their own state."

Now, that was the argument that was made in Bigelow and it is, I suggest, the argument that was adopted by this Court when it found that the advertisement did contain certain information. Now --

QUESTION: Well, you concede this as a First Amendment case, don't you?

MR. TROY: In the context that we have brought it to this Court it has come by an independent right to know granted under the First Amendment and therefore is a First Amendment case.

QUESTION: Well, by that you mean, that it was on the basis of the First Amendment that this case was decided by the District Court.

MR. TROY: Exactly.

QUESTION: Do you mean anything more than that?

MR. TROY: Nothing more than that at all.

QUESTION: I read from your brief, "This is a

First Amendment case. It is not a Fourteenth Amendment case."

MR. TROY: In the context that the court decided of the case below, it was decided on a First Amendment basis and the entire argument that we are presenting is that that First Amendment basis was analytically unsound. How can you regulate --

QUESTION: That is not a First Amendment case, in your view?

MR. TROY: No, your Honor. In other words, there cannot be a First Amendment right to know as decided by the lower court which would destroy the inherent power of the states to regulate the professions.

Now, I sympathize with the consumers that prices are high and as they have stated in their brief at page 25, "The effective dissemination of drug price information would revive competition in Virginia, reduce the price of prescription drugs, significantly benefit the consumer and would benefit the public generally by implementing sound economic and social policy, but --"

QUESTION: Was there any challenge to the standing of these people to sue in the District Court?

MR. TROY: Yes, there was, your Honor, but it was overruled and it was overruled on the very basis that, as the Court said, the Patterson case concerned pharmacy. The

case here concerns First Amendment rights of consumers to know.

We find no infirmity in the Patterson case. Here, we are dealing with consumers. I suggest that you cannot.

I'd like to, if I may, just close by indicating two things.

QUESTION: I suppose the consumers would never be hurt or only hurt to the extent that the druggists would advertise if it weren't for this law.

MR. TROY: Well, as they have indicated in the --

QUESTION: And I suppose they allege --

MR. TROY: -- monitoring situation, as Mr. Morrison indicated, if a doctor prescribes a drug that is bad, we have a malpractice suit on our hands. Why does the state have to await a malpractice suit? Why can't it try to devise a scheme whereby a pharmacist can stop that bad drug from getting into the hands of the consumers?

I suggest that is a legitimate state interest. We don't have to wait for the redress of citizens harmed by drugs through malpractice suits.

Now, in the Fourteenth Amendment case of Head, the statute there "prohibits advertising by any means whatsoever, the quotation of any prices or terms on eyeglasses."

And that statute was upheld. It was upheld under the state's power to regulate. Sound or imprivident, the

state regulated in that manner.

I say, sound or improvident here, the state has chosen this road. If it is to be changed, it should be changed by the consumers at the ballot box and not in the court.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:27 o'clock p.m., the case was submitted.]