Supreme Court Finds Vermont Statute Restricting Pharmaceutical Marketing Unconstitutional Under the First Amendment

On June 23, 2011, in *Sorell v. IMS Health Inc.*,[1] the Court invalidated under the First Amendment a Vermont statute prohibiting pharmaceutical manufacturers from marketing their products to doctors by using prescriber-specific pharmacy records. Affirming the Second Circuit Court of Appeals with a 6-3 majority, the Court held that Vt. Stat. Ann., Tit. 18, §4631(d) unconstitutionally burdened the speech of pharmaceutical marketers and data miners without adequate justification.[2]

Sorrell held that "heightened judicial scrutiny is warranted" when a "law enacts content- and speaker-based restrictions" that "burden[] disfavored speech by disfavored speakers" and "[c]ommercial speech is no exception."[3] Vermont could "not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements . . . ."[4]

I. Facts and Procedural History

Sorrell involved two consolidated suits brought against the Vermont Attorney General and other Vermont officials acting in their official capacities.[5] Plaintiffs -- three Vermont data miners and an association of pharmaceutical manufacturers that produce brand-name drugs -- sought declaratory and injunctive relief, contending that Vermont Prescription Confidentiality Law §4631(d) violated their First Amendment rights.

In short, the Vermont law prohibited the sale of prescriber-specific pharmacy records for use by brand-name drug companies in marketing their drugs to doctors.[6] Specifically, Vermont Prescription Confidentiality Law §4631(d) states:

> "A health insurer, a self-insured employer, an electronic transmission intermediary, a pharmacy, or other similar entity shall not sell, license, or exchange for value regulated records containing prescriber-identifiable information, nor permit the use of regulated records containing prescriber-identifiable information for marketing or promoting a prescription drug, unless the prescriber consents . . . . Pharmaceutical manufacturers and pharmaceutical marketers shall not use prescriber-identifiable information for marketing or promoting a prescription drug unless the prescriber consents . . . ."[7]

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1 No. 10-779, slip op. (2011), available at http://www.supremecourt.gov/opinions/10pdf/10-779.pdf. Citations to the Court's decision are to the slip opinion.

2 *Id*. at 1.

3 *Id.* at 8.

4 *Id.* at 22-23.

5 *Id*. at 5-6.

6 The process through which pharmaceutical manufacturers promote their drugs is called "detailing." Pharmacies receive "prescriber identifying information" when processing prescriptions and sell that information to "data miners," who in turn produce reports detailing which doctors are prescribing which drugs. Pharmaceutical manufacturers use that information to refine their marketing tactics and increase their overall sales. *See Id.* at 1-2.

7 *Id.* at 2-3.

The Court of Appeals for the Second Circuit found §4631(d) unconstitutional under the First Amendment. That decision was in conflict with decisions of the First Circuit concerning similar legislation enacted by Maine and New Hampshire.[8] Recognizing the division of authority, the Supreme Court granted certiorari.

II. The Supreme Court's Decision

In the majority opinion, Justice Kennedy explained that the Court faced two questions: "whether §4631(d) must be tested by heightened judicial scrutiny and, if so, whether the State can justify the law."[9]

First, the Court held that "speech in the aid of pharmaceutical marketing is a form of expression protected by the Free Speech Clause of the First Amendment."[10] Turning to the Vermont law, the Court held that it imposed "content- and speaker-based rules" because it barred pharmaceutical manufacturers from using prescriber information for marketing, even though the same information could be used "by a wide range of other speakers." Indeed, Vermont's law went "even beyond mere content discrimination, to actual viewpoint discrimination" because, for example, "Vermont could supply academic organizations with prescriber-identifying information to use in countering the messages of brand-name pharmaceutical manufacturers and in promoting the prescription of generic drugs."[11] As a result, "[t]he law on its face burdens disfavored speech by disfavored speakers" and it follows "that heightened judicial scrutiny is warranted."[12]

The Court made clear that the same heightened scrutiny must be applied to laws that burden speech as would be applied to laws banning the speech outright. "The Court has recognized that the 'distinction between laws burdening and laws banning speech is but a matter of degree' and that the 'Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.' Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content."[13]

Applying heightened scrutiny, the Court focused on the purpose of the Vermont law. In doing so, the Court looked at the statutory language "[o]n its face," the legislature's "expressed statement of purpose," and the "practical operation" and effect of the statute, to determine that the law was designed to target pharmaceutical manufacturers and their messages for disfavored treatment.[14] It was not enough to consider only whether the statute appeared neutral because "[a] government bent on frustrating" a particular type of speech might pass a seemingly neutral law to do so. "Even if the hypothetical measure on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional."[15]

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8 *See IMS Health Inc.* v. *Mills*, 616 F.3d 7 (1st Cir. 2010) (Maine); *IMS Health Inc.* v. *Ayotte*, 550 F.3d 42 (1st Cir. 2008) (New Hampshire).

9 *Id*. at 8.

10 *Id.* at 1.

11 *See Id*. at 8.

12 *Id.* at 8-9.

13 *Id.* at 10 (quoting *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 812 (2000)).

14 *Id.* at 8-9.

15 *Id.* at 10. Similarly, the Court rejected the argument that the Vermont statute was a regulation of conduct (i.e. the sale, transfer, and use of information) and not speech. While it is permissible to regulate commerce in ways that may have an "incidental" burden on speech, the regulation at issue did not incidentally burden speech because it "imposes a burden based on the content of speech and the identity of the speaker" (*Id.* at 11). The Court rejected the argument that the

The Court recognized that "[c]ommercial speech is no exception" to the First Amendment's prohibition against laws that seek to suppress speech and place unjustified burdens on expression. However, the Court's use of the term "heightened scrutiny" encompasses both strict scrutiny and intermediate scrutiny, and while it indicates that strict scrutiny is appropriate for the Vermont law at issue,[16] the Court expressly declined to decide whether commercial speech restrictions were subject to lesser scrutiny because, as in previous cases, the law at issue here failed even under the intermediate scrutiny test often applied to commercial speech.

> "As in previous cases, however, the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied. *See, e.g., Greater New Orleans Broadcasting Assn., Inc.* v. *United States*, 527 U. S. 173, 184 (1999). For the same reason there is no need to determine whether all speech hampered by §4631(d) is commercial, as our cases have used that term."[17]

The Court proceeded to demonstrate that the Vermont law failed even the intermediate scrutiny applied to commercial speech under *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*,[18] characterizing that test as requiring the Government to demonstrate "that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." Importantly, the Court explained that that test was designed to ensure "not only that the State's interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message."[19]

The State asserted two justifications for §4631(d). First, it contended that its law was necessary to protect medical privacy, including physician confidentiality, avoidance of harassment, and the integrity of the doctor-patient relationship. The Court rejected this argument because the statute was not tailored to that interest. Prescriber-identifying information could still be made widely available to other speakers, and doctors retained control over whether or not to allow pharmaceutical salesmen to visit their offices. In considering whether the law was sufficiently tailored, the Court considered available alternatives, such as "allowing the information's sale or disclosure in only a few narrow and well-justified circumstances."[20] The "State offer[ed] no explanation why remedies other than content-based rules would be inadequate," and the Court thus interpreted the lack of tailoring as further evidence of the State's true purpose. "The limited range of available privacy options instead reflects the State's impermissible purpose to burden disfavored speech."[21]

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information at issue was a mere commodity and made clear that the First Amendment protects the creation and dissemination of even "dry information" such as "beer labels" and "credit report[s]" because "[f]acts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and the conduct of human affairs." *Id.* at 15. It did not matter whether the information was characterized as a commodity because its purpose was to suppress particular speech. "Vermont's statute could be compared with a law prohibiting trade magazines from purchasing or using ink." *Id.*

16 In reciting the "heightened scrutiny" standard, the Court cites *Cincinnati* v. *Discovery Network, Inc.*, 507 U. S. 410, 418 (1993), which applied intermediate scrutiny, as having applied "heightened scrutiny." However, the Court continues in the same string citation to cite *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 658 (1994) for the proposition that "strict scrutiny applies to regulations reflecting 'aversion' to what 'disfavored speakers' have to say."

17 *Id.* at 16.

18 447 U. S. 557, 566 (1980).

19 *Id.* at 16.

20 *Id.* at 18 (citing, *e.g.*, Health Insurance Portability and Accountability Act of 1996, 42 U. S. C. §1320d-2; 45 CFR pts. 160 and 164 (2010)).

21 *Id.* at 20.

Vermont also argued that §4631(d) was integral to the achievement of policy objectives of improved public health and reduced healthcare costs.[22] The Court rejected the State's invocation of these broad objectives. "While Vermont's stated policy goals may be proper, §4631(d) does not advance them in a permissible way. . . . Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the 'fear that people would make bad decisions if given truthful information' cannot justify content-based burdens on speech. . . . That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers."[23]

III. Significance of the Decision

Sorrell is significant both for what it held and for what it declined to reach. The Court once again declined to resolve whether commercial speech is subject to the same standard as non-commercial speech. However, the Court made clear that for both commercial and non-commercial speech, First Amendment scrutiny is designed not only to ensure that any burden on speech is proportional to the state's interest, but also to identify a "State's impermissible purpose to burden disfavored speech."[24] Determining the statute's purpose may require considering the statutory language, the legislature's "expressed statement of purpose," the practical operation and effect of the statute, and the extent to which the law was tailored to the State's asserted interests.

Having determined that the purpose of the statute was to suppress speech, the Court imposed a nearly insurmountable burden on the State to justify the law. "Absent circumstances far from those presented here, the fear that speech might persuade provides no lawful basis for quieting it. . . . The State can express [its] view through its own speech. But a State's failure to persuade does not allow it to hamstring the opposition. The State may not burden the speech of others in order to tilt public debate in a preferred direction."[25]

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Kayvan Sadeghi at 212.701.3049 or ksadeghi@cahill.com.

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22 *Id.* at 17.

23 *Id.* at 21-22 (quoting *Thompson* v. *Western States Medical Center*, 535 U. S. 357, 374 (2002)).

24 *Id.* at 19.

25 *Id.* at 21, 25.