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APPEALS COURT RULING SEVERELY UNDERMINES SPEECH RIGHTS

by

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On November 18, 2008, a three-judge panel of the U.S. Court of Appeals for the First Circuit overturned a well-reasoned decision by Judge Paul Barbadoro in the District of New Hampshire¹ holding a state statute violates the First Amendment by prohibiting the transfer of prescriber-identifiable information for use by pharmaceutical sales representatives in the course of detailing prescription drugs. *IMS Health Inc. v. Ayotte*, No. 07-1945, 2008 WL 4911262 (1st Cir. 2008), *pet. for rehearing and rehearing en banc denied* (1st Cir. January 14, 2009). The lead opinion, replete with rhetorical flourish,² concluded that the New Hampshire statute did not regulate protected “speech” at all, but instead regulated only “conduct.” 2008 WL 4911262 at *9. On this analysis, it ruled that the First Amendment had no application to the statutory restraint at issue. *Id.* at *10-11. Alternatively, it held, as did a concurring and dissenting opinion, the New Hampshire statute was a justifiable restraint on commercial speech under the criteria established by the U.S. Supreme Court in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557 (1980). *Id.* at *17.

In holding that the prohibition on transfer of prescriber-identifiable information for use for a specific commercial purpose in pharmaceutical detailing is regulable “conduct” and not protected “speech,” the lead opinion misidentified the underlying rationale for the “conduct” vs. “speech” dichotomy. It then applies this erroneous rationale to justify its holding on the point. No matter what one’s views of the ultimate First Amendment balancing at play here, all thoughtful observers should be genuinely troubled by the lead opinion’s holding. Taken to its logical conclusion, this analysis would effectively insulate from meaningful judicial review a broad swath of governmental restrictions on protected speech by cloaking it in the guise of “conduct” regulation. That is not—and should not be—the law. Under the rule of law the ends,³ no matter

¹See *IMS Health Corp. v. Ayotte*, 490 F. Supp. 2d 163 (D. N.H. 2007).

²Consider, for example, the following: “While the plaintiffs lip-synch the mantra of promoting the free flow of information, the lyrics do not fit the tune.” 2008 WL 4911262 at *9.

³The “driver” for the New Hampshire statute was “cost containment”. *Id.* at *3. It was intended to work by impeding the effectiveness of detailer-to-doctor speech through foreclosure of the transfer of prescriber-identifiable information for use in detailing. Theoretically, therefore, it might decrease the number of prescriptions doctors write for brand name drugs, increase the number they write for generic drugs, and, as a result, contain costs without compromising the quality of patient care. See, e.g., *id.* at *12-14. Cost containment was the only “ends” evaluated in the lead opinion in the course of its alternative commercial free speech analysis. *Id.* at *12. The opinion concurring in the result flatly rejected patient or physician privacy as a legitimate “ends” because (a) the statutory restriction on the use of patient-identifiable information had not been challenged by the plaintiffs—only

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how laudable some pharmaceutical industry critics may think them to be, simply do not justify the means. *See, e.g. Osborn v. U.S.*, 385 U.S. 323, 344 (1966) (Justice Douglas, dissenting, critical of the “philosophy that the ends justify the means”).

In *United States v. O’Brien*, 391 U.S. 367 (1968), the Supreme Court considered whether a statute that prohibited draft card burning was unconstitutional under the First Amendment because it effectively suppressed symbolic “speech” by opponents of the Vietnam War. In concluding that it was not, the Court identified a number of justifications independent of “speech” regulation and necessary to the proper functioning of the selective service system that supported the statutory prohibition. *Id.* at 377-80. It held that: “[W]hen ‘speech’ and ‘nonspeech’ elements are combined in the same course of *conduct*, a sufficiently important governmental interest in regulating the non-speech element can justify *incidental limitations* on First Amendment freedoms.” *Id.* at 376 (emphasis supplied). Restraints on “conduct” are justifiable notwithstanding free speech concerns, if, among other things, “the governmental interest is *unrelated to the suppression of free expression*; and if the *incidental restriction* is no greater than is essential to the furtherance of that interest.” *Id.* at 377 (emphasis supplied).

Likewise in *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376 (1973), the Supreme Court had little difficulty in sustaining a city ordinance that prohibited sex discrimination in employment and help-wanted advertisements in sex-designated want-ad columns except where the employer could lawfully discriminate on the basis of sex in making the ultimate hiring decision. “[W]hen the commercial activity [i.e. discrimination based on sex] itself is illegal and the restriction on advertising is *incidental* to a valid limitation on economic activity,” then the First Amendment will not insulate the “speech” restriction from rational basis regulation. 413 U.S. at 389 (emphasis supplied). Because gender-based discrimination in employment was unlawful and the advertising restraint merely “incidental” to the regulation of *that* underlying conduct, the Court found the prohibition unproblematic from a free speech standpoint. The constitutionality of such an “incidental” speech restraint was much like the self-evident constitutionality of a prohibition on publishing “a want ad proposing a sale of narcotics or soliciting prostitutes,” *id.* at 388, where the underlying activity—the sale of narcotics or prostitution—is itself unlawful.

By contrast, in *IMS Health*, the New Hampshire statutory restraint on the transfer of prescriber identifiable information for use by pharmaceutical sales representatives in detailing—promoting—prescription drugs is anything but “incidental”. On the contrary, the content of the “speech” itself is the very “conduct” at which the legislation is targeted. That persuasive “speech” by detailers is the specific “conduct” at which the statute is targeted is corroborated by the exemption in the law that allows transfer of the very same information when used for “pharmacy reimbursement; formulary compliance; care management; utilization review by a health care provider, the patient’s insurance provider or the agent of either; health care research; or as otherwise provided by law”,⁴ but not for use in detailing. If the transfer of the information was the target of the “conduct” restraint, then, at a minimum, *all information transfers for all commercial uses* would have been forbidden, instead of just those having to do with the ensuing

patient de-identified information is used, and (b) the statute allowed prescriber-identifiable data “to be used for a myriad of purposes,” although not in detailing. *Id.* at *37. Rejection of patient or physician privacy as a potentially valid justification for the New Hampshire statute itself erodes one of the primary bases for New Hampshire’s argument on the inapplicability of the First Amendment to the ostensible “conduct” in question. That argument, predicated largely on a law review article (*see* Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149 (2005), cited in Concurring Opinion, 2008 WL 4911262 at *33) was based on the thesis that, in the context of data transfers of the kind in question here, privacy interests could trump First Amendment rights. But as there are no meaningful patient or physician privacy interests—“ends”—even arguably protected by the statute, the privacy-trumps-First Amendment rationale cannot support regulation of the data transfers at issue here as “conduct.”

⁴ *See* N.H. REV. STAT. ANN. §318:47-f, quoted at 2008 WL 4911262 at *3-4.

commercial use in influencing physician prescribing behavior.

The decision in *Washington Legal Foundation v. Friedman*⁵ likewise stands for the proposition that where the “speech” itself is the intended focus of the governmental regulation, it *is* the very “conduct” in question and is not merely “incidental” to the “conduct,” thereby negating the application of the First Amendment. In that case, the U.S. Food and Drug Administration (FDA) attempted to justify its prohibition on the dissemination of reprints of peer-reviewed journal articles dealing with “off-label” use of otherwise FDA-approved prescription drug by arguing that it targeted “conduct”—“off-label” promotion—that was prohibited by the underlying statute and did not target “speech” as such. In language equally applicable to the lead opinion in *IMS Health*, Judge Lamberth had little difficulty in summarily rejecting FDA’s argument: “This court is hard pressed to believe that the agency is seriously contending that ‘promotion’ of an activity is conduct and not speech . . .” 13 F. Supp. 2d at 59. “[T]he activities at issue in this case are only ‘conduct’ to the extent that moving one’s lips is ‘conduct,’ or to the extent that affixing a stamp and distributing information through the mails is ‘conduct’.” *Id.*

The lead opinion in *IMS Health* does not address this point or even acknowledge that “speech” itself is the self-evident “conduct” at which the New Hampshire prohibition on the transfer of prescriber identifiable information for use in detailing is directed. To his credit, Judge Lipez, who authored the concurring opinion, argued that the matter should be decided on its First Amendment merits and should not be determined based on a largely irrelevant—indeed unsupportable—“conduct” vs. “speech” construct. 2008 WL 4911262 at *33-36. Indeed, Judge Lipez acknowledged that “speech” itself *is* the “conduct” at issue here, and not merely “incidental” to that “conduct”: “Here . . . the Legislature . . . restricted the substance of the messages being communicated by pharmaceutical detailers in their sales pitches by curtailing information previously available to detailers. In other words, the State targeted, albeit indirectly, the speech of the detailers in order to achieve its multiple objectives. Such a regulation is a limitation on commercial speech [and not a limitation on ‘conduct’].” 2008 WL 4911262 at *36.

That the New Hampshire legislation achieves its objective only “indirectly” does not mean that the regulation of “speech” is merely “incidental” to its regulation of “conduct”. It only means that the Legislature took a more circuitous route to get to the same result than would have been achieved by a direct, but otherwise transparently unconstitutional, ban on detailer-to-doctor “speech” based on prescriber-identifiable information. Such indirect restraints on speech have been actionable, as Judge Lipez observed, at least since the Supreme Court’s decision in *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936), and he implicitly distinguished between “indirect” restraints on “speech,” which *are* evaluated under the First Amendment, and “incidental” restraints that are only ancillary to valid underlying “conduct” regulation. 2008 WL 4911262 at *36.

The conceptual justification offered in the lead opinion for concluding that the statute targets “conduct” not “speech” missed entirely the “incidental” restraints First Amendment rationale of *O’Brien* and *Pittsburgh Press*; overlooked the straightforward logic of *Washington Legal Foundation*; and misidentified the underlying rationale for the “conduct” vs. “speech” dichotomy. Indeed, the lead opinion reasons that the prohibition on the transfer of prescriber identifiable information for use in detailer-to-doctor communications is a restraint on “conduct” largely because the “putative speech comprises items of nugatory informational value” and is of “scant societal value”.⁶ But avoiding First Amendment scrutiny by

⁵13 F. Supp. 2d 51 (D.D.C. 1998), *vacated as moot sub nom. Wash. Legal Found. v. Hennery*, 202 F.3d 331, 337 n.7 (D.C. Cir. 2000) (“in disposing of the case in this manner we certainly do not criticize the reasoning or conclusions of the district court).

⁶*Id.* at *9. The lead opinion also described it this way: “Unlike stereotypical commercial speech, new information [i.e. prescriber-identifiable information] is not filtered into the marketplace with the possibility of stimulating better informed consumer choices (after all, physicians already know their own prescribing histories) and the societal benefits flowing from the prohibited transactions pale in comparison to the negative externalities produced. This unusual combination of features removes the

classifying the statute as a regulation of “conduct” while analyzing that very question on the basis of the informational value of the communication is by definition a syllogism. And Judge Lipez, in his concurring opinion, recognized as much. *Id.* at *33-36.

The lead opinion’s failure to identify accurately the doctrinal justification for the “conduct” versus “speech” dichotomy is particularly disappointing given its pithy quotation from Chief Justice Roberts’ decision in *Rumsfeld v. Forum for Acad. & Instit. Rich, Inc.* (*FAIR*), 547 U.S. 47, 62 (2006) admonishing that “it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” *IMS Health*, 2008 WL 4911262 at *7. But immediately preceding this statement in *FAIR*—in fact, in the very same sentence—the Court concluded that the “speech” at issue in the case “is plainly incidental to [the statute’s] regulation of conduct.” *FAIR*, 547 U.S. at 62. In *IMS Health* the “speech” in question is the very “conduct” at which the legislation is targeted. It is hard to understand how one can conclude that it is merely “incidental” to a valid restraint on otherwise unlawful “conduct”.

It is not an answer to say, as the lead opinion does, that only pharmaceutical companies and doctors have constitutional standing to challenge the statute and that none are parties to the case. 2008 WL 4911262 at *5-6. The plaintiffs’ First Amendment rights are violated when they can transfer prescriber-identifiable information for all uses *except* for use in detailer-to-doctor communications. It is the content of the ensuing communication, not the transfer itself, that is the target of the statutory prohibition. Plaintiffs are in no different shoes than would be a bookstore owner who could sell a book with prescriber-identifiable information to every Tom, Dick, and Harry, except if he happens to be employed as a pharmaceutical sales representative and if he intends to use the information in persuading doctors to prescribe his employer’s products. Surely the book store owner would have “standing” to challenge a statutory restraint of this kind as would a pharmaceutical company or a doctor.

Taken to its logical conclusion, the lead opinion in *IMS Health Inc. v. Ayotte* would render the First Amendment utterly inapplicable whenever a court decides, subjectively, that the “speech” in question is not worthy of constitutional protection and hence may be characterized simply as unlawful “conduct”. This would turn First Amendment doctrine on its head. It would potentially eliminate constitutional protection for broad categories of otherwise protected speech. No matter what one’s views of the ultimate merits of the First Amendment inquiry, we should all be able to agree that such a broad and unsupported reading of the “conduct” vs. “speech” dichotomy represents a dangerous and unwise precedent.

challenged portions of the statute from the proscriptions of the First Amendment.” *Id.* at *1 (parenthetical in original; bracketed text added).