] Liberty Blog

PLF is America's oldest and most successful freedom-oriented public-interest legal organization, fighting in the nation's courts for private property rights, economic freedom, racial equality and a balanced approach to environmental regulation.

November 24, 2010

Second Circuit sides with PLF on speech rights in health care

Author: Timothy Sandefur

The Second Circuit Court of Appeals in New York issued a decision yesterday striking down a Vermont law that barred the sale of certain information to drug companies unless the prescriber–say, the pharmacist—consented. Drug companies use such information to find out who's prescribing what and where, and this allows them to advertise or market their drugs more precisely to those pharmacists who are more likely to be interested in those drugs. But Vermont banned the sale of such information, supposedly to protect patients—although the information at issue was already stripped of any patient-identifying information.

Pacific Legal Foundation joined several other groups to file this amicus brief in a lawsuit challenging this law under the First Amendment. This is part of our broader argument that freedom of speech should protect the right of businesses and entrepreneurs to advertise and promote their businesses and freely exchange information for commercial purposes. The First Amendment itself certainly makes no distinctions between "commercial speech" and other types of expression, and there is no reason at all to think that the authors of the First Amendment believed its protections covered only political speech but not commercial advertising. What's more, under today's law—which treats "commercial speech" as a second-class type of expression that the government can heavily regulate—businesses are systematically censored even when they engage in political activism (a subject I discuss at length in chapter 9 of *The Right to Earn A Living*).

In this case, the government argued that the data at issue wasn't speech, but was just a commodity and that the government can regulate the sale of a commodity however it wants. This is a dangerous argument, because under today's law, courts rarely enforce constitutional protections against legislative intrusion into freedom of exchange. If government can regulate the purchase and sale of information as if it were any other product, freedom of expression woudl be in grave danger. Fortunately, the Second Circuit rejected this argument. "[I]t is plain that speech in a form that is sold for profit is entitled to First Amendment protection." Treating information as an "asset" or a commodity is "an insufficient basis for giving the government leeway" to control the spread of information with the type of extremely lenient judicial oversight that today's law gives to economic regulations:

> The statute is therefore clearly aimed at influencing the supply of information, a core First Amendment concern. Instead of mere rational basis review, the First Amendment teaches that courts should assume that truthful commercial information "is not in itself harmful," and conclude that when a statute aims to restrict the availability of such information for some purposes, that restriction must be judged under the First Amendment.

This is an important decision safeguarding freedom of expression from an innovative and dangerous legal

argument. It is to be hoped that courts will expand constitutional protections for "commercial speech," rather than contracting all speech into that arbitrary category and thereby allowing government even more autonomy to limit our freedom.

More here from our allies at the Cato Institute.

Posted on November 24, 2010 at 11:21 AM in Free Enterprise and Economic Liberty | Permalink

TrackBack

TrackBack URL for this entry:
http://www.typepad.com/services/trackback/6a00d8350ce4d753ef0134897d147b970c
Listed below are links to weblogs that reference Second Circuit sides with PLF on speech rights in health care:

Pacific Legal Foundation
Powered by TypePad