Legal Strategy Brief:
The Hijacking of the First Amendment: Public Health in Jeopardy

The George Consortium

The Problem

The right to free speech, enshrined in our Constitution's First Amendment, is vital to any healthy democracy. But a multi-year litigation and advocacy campaign by special interests has wrenched the Constitution's free speech protections from their fundamental moorings. Even as corporate and other vested interests have co-opted the First Amendment to further entrench their political and economic power (in *Citizen's United* and other cases), they have also hijacked free speech doctrine to undercut vital public health tools. Today, U.S. courts are increasingly embracing a novel interpretation of the First Amendment under which protection of "commercial speech" bars or severely limits the regulation of the pharmaceutical, tobacco, and food and beverage industries. At the same time, the First Amendment rights of health professionals is under attack, forcing providers to espouse non-scientific, ideological information and hampering their ability to help their patients. Until now, the methodical capture of First Amendment doctrine in service of special interests has received scant attention or organized counteraction from those committed to protecting public health and safety. Urgent action is now needed to shore up meaningful consumer and patient safeguards.

Constitutional Right to Deceptive, Harmful Marketing?

Information is a critical public health tool. Federal, state, and local regulators use advertising restrictions and mandated disclosures to combat misleading marketing practices and to ensure that the public has accurate, easily understood information about pharmaceuticals, food and drinks, tobacco products, and more. These essential public health powers can often be wielded more readily than blunter instruments such as product bans and taxes.

Until the 1970s, Supreme Court doctrine considered advertising and other forms of commercial speech outside of the scope of the First Amendment. When the Court in the mid-1970s held that commercial speech could enjoy some First Amendment protection, it did so based on the rationale that consumers had a right to receive information relevant to their purchasing decisions.[1] Even so, the Court made clear that important government interests such as public health should justify limits on commercial advertising and other forms of commercial speech.

[1] Virginia State Pharmacy Brd. v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

In recent years, special interests have strategically pressed cases inching the legal doctrine away from that longstanding approach. A series of Supreme Court and other judicial opinions have blurred the distinction between commercial and "core" First Amendment speech.[2] This campaign has enabled corporations to undercut well-established public health safeguards. For example, several lower courts have now moved towards accepting the pharmaceutical industry's claims that it has a broad First Amendment right to market drugs and other products to physicians for "off-label" uses.[3] If reaffirmed by the Supreme Court, these decisions would substantially thwart the FDA's ability to require that drugs, devices, and biologic products are scientifically shown to be both safe and effective before they can be publicly marketed as such. Such a situation could roll back the clock to the 19th Century, when thousands of Americans were routinely killed or injured by unproven or adulterated "remedies."

Likewise, courts have used an expansive interpretation of commercial free speech rights to protect the alcohol industry's advertising to underage college students,[4] to block states from restricting youth-oriented tobacco advertising,[5] and to bar states from regulating aggressive marketing of pharmaceuticals to doctors.[6] In these cases, courts have shifted the focus from the interests of (often vulnerable) consumers to the newly-discovered free-speech rights of corporations. Meanwhile, emboldened by court decisions expanding First Amendment protection for commercial speech, food and beverage companies are making ever-bolder arguments aimed at limiting longstanding government authority to protect the public's health.

Taken collectively, these decisions have real consequences, measured in lives. For example, in 2002 the Supreme Court struck down FDA rules regulating marketing by compounding pharmacies operating as unlicensed manufacturers.[7] The Court was skeptical about the government's assertion that the regulation was needed to protect patient health. Ten years later, 64 people died and over 750 became ill from tainted medications manufactured by the New England Compounding Center.[8] As the courts continue to read the First Amendment to limit government's ability to protect the public from dangerous products, more such tragedies are inevitable.

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[2] Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011); Thompson v. Western States Med. Ctr., 535 U.S. 357 (2002); Wash. Legal Found. v. Henney, 56 F. Supp. 2d 81 (D.D.C. 1999), *vacated in part*, 202 F.3d 331 (D.C. Cir. 2000).
[3] U.S. v. Caronia, 703 F.3d 149 (2d Cir. 2012); Amarin Pharma, Inc. v. FDA, 119 F. Supp. 3d 196 (S.D.N.Y. 2015).
[4] Educ. Media Co. v. Insley, 731 F.3d 291 (4th Cir. 2013).
[5] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).
[6] Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011).
[7] Thompson v. Western States Med. Ctr., 535 U.S. 357 (2002)
[8] Centers for Disease Control and Prevention, *Multistate Outbreak of Fungal Meningitis and Other Infections*, Oct. 30, 2015, https://www.cdc.gov/hai/outbreaks/meningitis.html.

Meaningful Product Disclosures: Tyranny or Health Promotion?
When the Supreme Court ruled that commercial speech was entitled to some constitutional protection in the 1970s, it held that laws compelling the disclosure of truthful information did not raise First Amendment concerns. As the Court recognized, mandated warnings are an important tool for informing the public and counteracting confusing or misleading labeling or advertising tactics.

Succumbing to arguments presented by powerful economic interests, the courts have now begun to question mandated disclosure laws. For example, a federal appellate court in 2012 struck down a requirement that cigarette packaging carry graphic warnings.[9] This proven public health intervention has helped control tobacco-related harms in more than 80 countries.[10]

Reflecting concern for corporate interests rather than consumers, judicial decisions have also claimed that companies cannot be required to "publicly condemn [themselves]" through mandated disclosures,[11] and that preventing potential public health harms is not a sufficient governmental interest to justify requiring warnings.[12] Disputes over warnings on sugar-sweetened beverages,[13] high-sodium foods,[14] and other potentially harmful products[15] are currently playing out in courtrooms across the U.S. Decisions affirming industry objections to labeling or disclosures on First Amendment grounds will continue to gut our collective ability to communicate important information to consumers about issues and products that affect their health.

Gagging Health Professionals
Paradoxically, as the courts have expanded the First Amendment rights of marketers, they have curtailed those of health care professionals. Patients rely upon physicians and other health providers to communicate truthful information about the risks and benefits of medical remedies, as well as those of health-related behaviors such as smoking, exercise, and nutrition. These communications are central to the patient-provider relationship, and are critical to disease prevention.

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[9] R.J. Reynolds v. FDA, 696 F.3d 1205 (D.C. Cir. 2012).
[10] David Hammond, *Health Warning Messages on Tobacco Products*, 20 Tobacco Control 327 (2011), available at http://tobaccocontrol.bmj.com/content/early/2011/05/23/tc.2010.037630.abstract.
[11] Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2015).
[12] R.J. Reynolds v. FDA, 696 F.3d 1205 (D.C. Cir. 2012).
[13] American Beverage Ass'n v. City and Cnty. of San Francisco, No. 3:15-cv-03415 (N.D. Cal. May 17, 2016).
[14] Nat'l Restaurant Ass'n v. NYC Dept. of Health and Mental Hygiene, et al., No. 654024/15 (N.Y. App. Div. Feb. 26, 2016).
[15] CTIA-The Wireless Ass'n v. City of Berkeley, California, 139 F. Supp. 3d 1048 (N.D. Cal. 2015).

Recent First Amendment jurisprudence jeopardizes the ability of health care providers to engage in such communication. For example, in three separate decisions, each of which was later retracted, the U.S. Court of Appeals for the Eleventh Circuit shielded from challenge a Florida law barring physicians from routinely discussing gun ownership with their patients.[16] In its first decision, the court held that communications between physicians and their patients in the course of treatment were outside of the scope of the First Amendment.[17] In its next two decisions, the panel accepted that the speech was entitled to First Amendment protection, but nevertheless upheld the ban, despite a lack of any evidence that the ban would support patient health.[18] The case is now under appeal.

Other cases limit the First Amendment rights of health care providers against compelled speech. For example, several courts have upheld state laws that require physicians to provide misleading information to patients about the risks of abortion.[19] Like the Florida gun case, these cases threaten the patient-provider relationship by forcing medical professionals to act as a mouthpiece for political or ideological viewpoints. Such requirements impinge on the free speech rights of these professionals while also jeopardizing patient health. Nevertheless, when health professionals have challenged restrictions prohibiting them from truthfully discussing health risks with their patients on First Amendment grounds, their arguments have been rejected.

Urgent Action Needed

Judicial appointees and high level administrative officials who understand these trends and the underlying doctrine can help shore up fundamental public health safeguards. Key decision makers must recognize that long-established First Amendment principles do not and cannot be seen to undercut the state's meaningful role in protecting health and safety, nor the integrity of the doctor-patient relationship. We believe that all federal judicial nominees and administration health and human services appointees should be asked their views on the recent shift in First Amendment jurisprudence that is steadily choking off traditional avenues for meaningful public health regulation.

About the George Consortium

The George Consortium is a network of legal academics, practitioners, and their allies working to advance public health through the law. More information about what animates the Consortium can be found here.

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[16] Wollschlaeger v. Governor of Florida, 760 F.3d 1195 (11th Cir. 2014), *vacated*, 797 F.3d 859 (11th Cir. 2015), *vacated*, 814 F.3d 1159 (11th Cir. 2015), rehearing en blanc granted.
[17] Wollschlaeger, 760 F.3d 1195 (11th Cir. 2014).
[18] Wollschlaeger, 797 F.3d 859 (11th Cir. 2015), *vacated*, 814 F.3d 1159 (11th Cir. 2015), rehearing en blanc granted.
[19] Planned Parenthood of Minn., N.D., S.D. v. Rounds, 686 F.3d 889 (8th Cir. 2012) (en blanc); Tex. Med. Providers Performing Abortion Servs v. Lakey, 667 F.3d 570 (5th Cir. 2012).