SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE

TITLE:	DATE & DEPT:	CASE NO.:
THE SCHARPEN FOUNDATION INC. vs. KAMALA HARRIS, et al.	June 23, 2017 Department 1	RIC1514022
COUNSEL: None present	REPORTER: None	

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE
JUN 23 2017
J. Castillo

STATEMENT OF DECISION

MOTION FOR JUDGMENT ON THE PLEADINGS

The Motion for Judgment on the Pleadings by Defendant Attorney General of the State of California is denied.

The Reproductive FACT Act, Health and Safety Code Sections 123470 et seq. requires the medical clinic operated by Plaintiff Scharpen Foundation to post a notification describing the availability of low cost abortion services. This mandate does not violate freedom of assembly or free expression of religion guaranteed by Article I, Sections 3 and 4 of the Constitution of the State of California, and Plaintiff is not granted leave to amend those counts. Plaintiff has sufficiently alleged, however, that the required notification is compelled speech which on its face violates freedom of speech protected by Article I, Section 2. Thus, the First Amended Complaint states a cause of action for which relief may be granted.

Statement of the Case

This is an action by Scharpen Foundation, a religious state licensed provider of prenatal medical and counseling services. For religious reasons Scharpen Foundation

G.C. TRASK, Judge
J. Castillo (cmg), Clerk

does not provide or make referrals for abortion services. The FACT Act requires Scharpen's licensed facility to either post or individually provide a specifically worded notice to patients that the State of California provides free or low cost services including abortions. The notice must contain a telephone number patients may contact to obtain those services. Failure to make the required notice is punishable by a civil penalty.

Article I of the California Constitution contains a "Declaration of Rights". Scharpen's First Amended Complaint seeks declaratory and injunctive relief in one cause of action, with three counts, asserting that the notice requirement of the Act violates Article I, Sections 2, 3, and 4 of the California Constitution guaranteeing the rights of free speech, freedom of assembly, and free expression of religion. Scharpen makes no allegation of a violation of rights protected by the Constitution of the United States.

In his official capacity, Defendant Attorney General of California[1] moves for Judgment on the Pleadings. The core issue presented by the Attorney General's motion is whether the State may compel a medical provider to notify patients how to obtain abortion services when the provider has strong moral and religious objections to doing so.

The court has taken judicial notice of all matters that may be judicially noticed. It has carefully read and considered the papers filed and arguments made by the parties, and thanks all counsel for the quality of those presentations.

The Attorney General's motion is meritorious in part. As a matter of law, the First Amended Complaint does not allege a violation of the rights of freedom of assembly or free expression of religion guaranteed by Article I, Sections 3 and 4 of the California

[1] The complaint initially named Kamela Harris, the then-Attorney General, as defendant in her initial capacity. On its own motion, the court hereby substitutes in her place as defendant Xavier Becerra, the current Attorney General, and dismisses the action as to now-Senator Harris.

Constitution. Scharpen correctly argues that the First Amended Complaint alleges that the compelled speech violates Article I, Section 2 of the California Constitution.

The California Constitution's "Declaration of Rights"

The California Constitution's "Declaration of Rights" is found in Article I. The protection of liberties afforded by the California Constitution is not dependent upon any provision of the federal Constitution's Bill of Rights. See Article I, Section 24 of the California Constitution. The Declaration of Rights dates to California's 1849 Constitution. At a time when the federal Constitution provided no protection from state action, the Declaration of Rights was adopted to protect the liberties of Californians from the soon to be created State. It was not until the 1868 adoption of the Fourteenth Amendment that the federal Constitution offered persons protection against state action, and not until 1925 that the United States Supreme Court applied the First Amendment to the States.

The Declaration of Rights' framers looked to the constitutions of other States including New York and Iowa. Those constitutions were not recitations of an existing federal Bill of Rights. New York had adopted its constitutional Declaration of Rights protecting the liberties years before the federal Constitutional Convention in Philadelphia ever convened. Iowa adopted its Declaration of Rights in 1846. See Joseph R. Grodin, *Some Reflections on State Constitutions* (1988) 15 *Hastings Const. L.Q.* 391, 395-397.

Actions of the State may not be prohibited by a constitutional limitation imposed by the Bill of Rights, yet still be independently prohibited by an analogous provision of the California Constitution's Declaration of Rights. See *People v. Houston*, (1986) 42 Cal.3d 595,610.

Freedom of Assembly (Count Two)

Scharpen Foundation asserts that the compelled posting of the availability of abortions in its waiting room violates Article I, Section 3 of the California Constitution.

The legislative history of Article I, Section 3 suggests that the California rights of assembly and petition are at least as broad as the First Amendment's. *City of Long Beach v. Bozek* (1982) 31 Cal.3d 527, 534, n.4. Absent cogent reasons, however, California courts do not depart from the construction placed by the United States Supreme Court on a similar provision of the federal constitution. *Gabrielli v. Knickerbocker* (1938) 12 Cal.2d 85. The United States Supreme Court has permitted significant intrusions upon relationships and the right to assemble without running afoul of the First Amendment's rights of assembly and association. See *Roberts v. Jaycees* (1984) 468 U.S. 609, 612-615.

The burdens the Reproductive FACT Act places on the right of assembly and petition are minimal. Posting the required sign in a waiting room presents no more of an impediment to its use for assembly or religious purposes than a no smoking sign. When not providing pre-natal services Scharpen is free to remove the sign and use the room for any lawful purpose. When it is providing services, the required signage is no more burdensome on assembly than mandatory signs identifying exits, maximum room capacity, or the minimum wage. When providing services, the required notification can be provided individually without posting the sign. The FACT Act imposes substantial burdens on freedom of speech, but not on assembly.

As a matter of law, the notice provisions of the Reproductive FACT Act do not violate Article I, Section 3 of the California Constitution.

Free Exercise of Religion (Count Three)

Article I, Section 4 protects the free exercise of religion. The First Amendment's text reads as a restriction on legislative power. The relevant text of Article I, Section 4 is a specific positive guarantee of a liberty described as "liberty of conscience".

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State.

The California Supreme Court has avoided relying on the text of this provision in its interpretation. It applies a First Amendment analysis while leaving open the possibility that our State Constitutional free exercise provision may offer some greater level of protection. We are left to infer that religious liberty of conscience is best interpreted in light of the First Amendment. *Catholic Charities v. Superior Court*, (2004) 32 Cal.4th 527, 569-562, *North Coast Women's Care Medical Group v. Superior Court*, (2008) 44 Cal.4th 1145, 1148.

An analysis of Scharpen's free exercise claim begins with U. S. Supreme Court precedent. The Court has held that the right of free exercise of religion does not relieve an individual of the obligation to comply with "a valid neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Employment Div., Dept. of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872, 879. Our California Supreme Court applied the same analysis in holding that Article I, Section 4 did not immunize a physician's religiously based refusal to conduct a medical procedure. *North Coast Women's Medical Care Group, inc. v. Superior Court, supra,* 44 Cal.4th 1145, 1148.

If the Reproductive FACT Act is a valid and neutral law of general applicability, the free exercise clause of the California Constitution does not excuse Scharpen's non-

compliance. Scharpen argues that this statute is not neutral, that hostility to Christianity was the driving motive for its enactment. If the object of a law is to infringe upon or restrict religious practices it is not a neutral law of general applicability and thus not valid unless it is narrowly tailored to advance a compelling state interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520, 533.

This statute is facially neutral; it makes no mention of Christianity. It is applicable to all clinics except clinics operated by the federal government, which are beyond the State's regulatory reach and clinics that provide abortion services, and have no need to refer patients to any other clinic. Scharpen argues that the legislative history points out that the facilities coming under the signage requirement are largely pro-life, Christian organizations. That may be true, but the fact that a statute has the incidental effect of burdening a particular religious practice does not render it invalid. Id. at 531. Exempting compliance with general laws by those whose religious beliefs conflict with those laws would invite anarchy. A diverse society cannot excuse violations of general laws by all those who profess religious objections to monogamous marriage, mandatory vaccinations, military conscription, taxes, or compulsory education. See Justice Scalia's opinion in *Employment Div. Department of Human Resources of Oregon v. Smith*, *supra*, 494 U.S. 872, 888-889.

In determining legislative motive, the evidence a court may consider is constrained by Separation of Powers, Article III, Section 3. A court must rely exclusively upon the text of the challenged statute, the record of the proceedings in the Legislature, and matters that may be judicially noticed. *County of Los Angeles v. Superior Court* (1975) 13 Cal.3d 721, 727. Extrinsic evidence may not be admitted on the issue of legislative motive and

discovery into the issue of legislative thought process is prohibited. *Board of Supervisors v. Superior Court* (1995) 32 Cal.App.4th 1616, 1626-1627.

As a matter of law, the text of the statute in question, its legislative history, and the matters of which this court may take judicial notice do not establish a prohibited religious animus on the part of the Legislature.

Freedom of Speech (Count One)

There is neither a California nor a federal case examining the Reproductive FACT Act under the California Constitution's provision protecting freedom of speech, Article I, Section 2. Again, we look first to U.S. Supreme Court First Amendment precedent for guidance. *Gabrielli v. Knickerbocker, supra*, 12 Cal.2d 85.

In the abortion context, the case addressing compelled speech is *Planned Parenthood of Southern Pennsylvania v. Casey* (1992) 505 U.S. 833. There, the Court's plurality found no First Amendment deficiency in a statute that compelled a physician to provide specific information regarding abortion and childbirth to an abortion patient. *Id.*, 505 U.S. 833, 884:

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's rights not to speak are implicated. . . but only as part of the practice of medicine, *subject to reasonable licensing and regulation by the State*. . . . We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here. [Italics added.]

The Court did not discuss whether strict scrutiny, intermediate scrutiny, or rational basis was the appropriate level of review.

Five federal circuit courts have examined cases of state compelled speech by physicians in the abortion context. These federal circuit court cases are not binding

precedent for this court even on issues of federal law; they are secondary authorities this court may consult for guidance.

California's Reproductive FACT Act was analyzed as a First Amendment case by the Ninth Circuit Court of Appeals in *National Institute of Family and Life Advocates (NIFLA) v. Harris* (2016) 839 F.3d 823. That court held the statute is content based, but does not discriminate based on viewpoint. The court found the statute passed intermediate scrutiny. *Id.*, 839 F.3d 823, 838. The Attorney General urges the court to adopt the Ninth Circuit's opinion, except for the level of scrutiny it applied. The Attorney General urges adoption of the lowest level of scrutiny, rational basis.

Two federal circuits, the Fifth and the Eighth, applied the lower rational basis standard urged by the Attorney General. Both cases involve statutes compelling physicians to describe fetal development to the patient. In one case the State requires the physician to specifically inform the patient that abortion "...will terminate the life of a whole, unique, living human being." Using the rational basis analysis, both circuit courts found the statutes in question did not violate the First Amendment. *Texas Medical Providers v. Lakey* (5th Cir. 2012) 667 F.3d 570, 576; *Planned Parenthood of Minnesota v. Rounds*, (8th Cir. 2008) 530 F.3d 724, 734-735.

Without excluding strict scrutiny, the Fourth Circuit used intermediate scrutiny to analyze a statute requiring physicians to perform ultrasounds and sonograms, and to then describe the fetus to patients. The statute was similar to the statutes found constitutional by the Fifth and Eighth Circuits. The Fourth Circuit found that the statute failed intermediate and thus strict scrutiny. The court took a contextual approach, holding the statute regulated not professional conduct, but ideological speech. The burden on liberty

was too great to justify interfering with the physician's "freedom of mind". The court held the compelled speech unconstitutional. *Stuart v. Camnitz* (4th Cir. 2014) 774 F.3d 238, 246-250.

In a case examining an ordinance similar to the California statute at issue, the Second Circuit held a New York City ordinance compelling pregnancy centers to disclose whether they provided referrals for abortions was invalid. The court held the ordinance failed intermediate scrutiny and strict scrutiny as well. *Evergreen Association v. City of New York* (2nd Cir. 2014) 740 F.3d 233. The court focused on the context of the speech in question to determining the appropriate level of scrutiny. See *Id.*, 740 F.3d 233, 249:

> When evaluating compelled speech, we consider the context in which the speech is made. [Citation.] Here, the context is a public debate over the morality and efficacy of contraception and abortion, for which many of the facilities regulated...provide alternatives. 'Expression on public issues has always rested on the highest rung on the hierarchy of First Amendment values.' [Citation.] Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. [Citation.] A requirement that pregnancy centers address abortion, emergency contraception, or prenatal care at the beginning of their contact with potential clients alters the centers' political speech by mandating the manner in which the discussion of these issues begins.

In summary, we are left with no clear guidance by the Supreme Court in *Casey*, and the federal circuit courts in disagreement, but leaning toward intermediate or strict scrutiny. The Second and Fourth Circuits are consistent in that both find that compelled political or ideological speech leads to heightened scrutiny, possibly strict scrutiny. The contextual approach of the Second and Fourth Circuits is most compatible with the California's Supreme Court approach to Article I, Section 2.

California's protection of freedom of speech sometimes differs from that required by the First Amendment. In those cases the California Supreme Court has necessarily looked

to the context of the speech, either in its forum, its nature as commercial or political, and whether it is restricted or compelled. In *Robins v. Pruneyard Shopping Center* (1979) 23 Cal. 3d 899, Article I, Section 2 was found to protect a level of free expression on the grounds of a privately owned shopping center not sanctioned by the First Amendment. In *Gerawan Farming Inc. v. Lyons* (2000) 24 Cal.4th 468, 495 and 517, Justice Mosk explained the independent analysis afforded compelled commercial speech under Article I, Section 2, and the historical reasons for the that difference.

The speech required by the FACT Act is unquestionably compelled. The Attorney General describes its context as commercial in nature, thus justifying a rational basis review. It is true that Scharpen provides services, without cost, in the market for pre-natal care. But this compelled speech is not politically neutral. This speech is not merely the transmittal of neutral information, such as the calorie count of a Big Mac, or that smoking tobacco or drinking alcohol can be hazardous to health. It is not as benign as compelling a plum producer to contribute to a marketing campaign touting the benefits of plums. The State commands the clinics to post specific directions for whom to contact to obtain an abortion. It forces the clinic to point the way to the abortion clinic and can leave patients with the belief they were referred to an abortion provider by that clinic.

The dispute over the issue of abortion is contentious and raises issues that are religious, cultural, political, and legal. It has been a matter of continuous legal and political controversy for more than four decades. The dispute is essentially over how we define when human life begins, a purely moral and philosophical question that cannot lend itself to scientific resolution. This conflict goes to the heart of our debates regarding individual liberty, judicial power, feminism, federalism, and now, free speech. It is a subject of

paramount importance when evaluating nominees to the U.S. Supreme Court, and candidates for all manner of elected office find it necessary to declare their positions on the issue.

There is no question that the State has a legitimate regulatory interest in the practice of the healing arts. But this is more than the State requiring informed consent. In the midst of this contentious political dispute, the State commands that specific State authored words be mouthed by the clinic at the very beginning of its relationship with those who come to it for guidance. In at least in some cases the compelled speech alters that relationship. *Evergreen* (*supra*), at 249. The statute distorts the clinic's speech, which can confuse the patient. The statute interferes both with the right of the clinician to speak and with the right of the patient to hear what the clinician would say in the absence of State censorship.

It is entirely proper for the State to take its position supporting access to abortion, a right protected by both State and federal Constitutions. It may enact laws that support abortion access and tax its citizens to make abortions available. It can require informed consent for all medical procedures. But its ability to impress free citizens into State service in this political dispute cannot be absolute; it must be limited.

In *West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624, the U.S. Supreme Court examined a case where West Virginia compelled public school students to salute the national flag and recite the pledge of allegiance, which at that time had no reference to God. Students who were Jehovah's Witnesses believed that the salute was a form of idolatry. They refused to give the salute and pledge. Refusal to participate was punished as an act of disobedience resulting in expulsion. The Court found West Virginia's compelled salute and recitation violated the First Amendment because it invaded the

speaker's "individual freedom of mind", (*Id.*, 319 U.S. 624, 637), and the "sphere of intellect and spirit", (*Id.*, 319 U.S. 624, 642). The Court relied entirely upon the right of free expression, requiring no religious motive on the part of the refusing student. *Id.*, 319 U.S. 624, 636-637.

The case is notable because of its historical context. In 1943, the United States was in the midst of history's most destructive war against totalitarian governments at their most evil. West Virginia had sons who already had, and more who soon would perish or return maimed from that war. West Virginia's requirement of a modest patriotic affirmation could be viewed as a necessary measure at a time when the nation's future depended on national unity. The Supreme Court refused to allow West Virginia to require school children to surrender "individual freedom of mind" even under those compelling circumstances.

Article I, Section 2 offers little protection if a rational basis test is used to evaluate compelled political speech. The majority of the federal circuit court cases previously cited, taken together, suggest that no less than intermediate scrutiny is required, with the court in *Evergreen, supra*, 740 F.3d 233, specifically noting that freedom of expression on public issues enjoys the highest level of protection.

This court finds that Article I, Section 2 of the California Constitution is in accord with the standard suggested by *Evergreen* and *Camnitz*. This statute should to be analyzed using strict scrutiny. That standard for compelled statements for political speech is neutral on the political issue of abortion. The Legislature may not use the wall of the physician's office as a billboard to advertise the availability of low cost abortions, but neither may it compel physicians to describe a fetus as a "whole, unique, living human being" as was

approved using a First Amendment rational basis test in *Rounds, supra,* 530 F.3d 724, 734-735

Using intermediate scrutiny, this statute also fails. The burden placed on the compelled speaker must be subject to some reasonable limitation. This statute compels the clinic to speak words with which it profoundly disagrees when the State has numerous alternative methods of publishing its message. This statute places too heavy a burden upon the liberty of free thought. The State can deliver its message without infringing upon anyone's liberty. It may purchase television advertisements as it does to encourage Californians to sign up for Covered California or to conserve water. It may purchase billboard space and post its message directly in front of Scharpen Foundation's clinic. It can address the issue in its public schools as part of sex education. It can require that its signs be prominently posted in every public school classroom and in every women's restroom located on public property. It can do everything but compel a free citizen to deliver that message.

The court finds that Plaintiff Scharpen Foundation's First Amended Complaint states a cause of action for a violation of Article I, Section 2 of the California Constitution.

Court sets a Trial Setting Conference for July 21, 2017, at 8:30 a.m., in Dept. 1.

Dated: 6/23/17

Gloria C. Trask

Hon. Gloria C. Trask,
Judge of the Superior Court

G.C. TRASK, Judge
J. Castillo (cmg), Clerk