

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE

TITLE: THE SCHARPEN FOUNDATION INC. vs. KAMALA HARRIS, et al.	DATE & DEPT: October 30, 2017 Department 1	CASE NO.: RIC1514022
COUNSEL: None present	REPORTER: None	

STATEMENT OF DECISION

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

OCT 30 2017

J. Castillo

STATEMENT OF DECISION

This action seeks a judicial declaration that the Reproductive FACT Act, Health and Safety Code Sections 123470 et seq., is unconstitutional and a permanent injunction prohibiting its enforcement. Trial was held on October 18, 2017.

Based on the law and evidence presented at trial, the Court finds that the notice requirement of the FACT Act is compelled speech violating Article I, Section 2, of the Constitution of the State of California.

Judgment is for Plaintiff Scharpen Foundation. The Court grants injunctive and declaratory relief.

STATEMENT OF THE CASE AND PROCEDURAL BACKGROUND

The Reproductive FACT Act, Health and Safety Code Sections 123470 et seq. requires Scharpen's licensed clinic to either post or individually provide the following specifically worded notice to patients:

California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].

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Failure to make the required notice is punishable by a civil penalty. The statute is enforced by the Attorney General, County Counsels, and City Attorneys.

For religious reasons Scharpen Foundation does not provide or make referrals for abortion services and refuses to post the required notice.

Scharpen Foundation filed this action alleging in its First Amended Complaint that the FACT Act violates the freedoms of speech, assembly, and free expression of religion guaranteed by Article I, Sections 2, 3 and 4 the Constitution of the State of California. The Attorney General, County Counsel of Riverside County, and City Attorney of the City of Temecula all answered the First Amended Complaint. The County Counsel and City Attorney left the defense of the challenged legislation in the hands of the Attorney General and agreed to be bound by the results of this trial.

Plaintiff Scharpen Foundation moved for a preliminary injunction. That motion was denied on the grounds that Plaintiff was unlikely to succeed on the merits.

The Attorney General moved for Judgment on the Pleadings. That motion was denied on June 23, 2017. The Court granted the motion with respect to the Counts 2 and 3 of the First Amended Complaint related to freedom of assembly and free expression of religion. The resulting trial was thus limited solely to the issue of whether the Fact Act violates Plaintiff Scharpen Foundation's freedom of speech under Article I, Section 2. This Court's June 23, 2017, ruling on the Attorney General's motion for Judgment on the Pleadings is incorporated herein by reference.

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THE EVIDENCE AND FACTUAL FINDINGS

There is little contradiction in the evidence presented by the parties. The dispute lies in the inferences the Court should draw from that evidence and what law governs the State's power to compel the speech at issue.

The parties stipulated to the admissibility of almost all exhibits, transcripts, declarations and of matters subject to judicial notice. For reasons the Court will explain, the disputed evidence is of minimal relevance, and does not alter the outcome of the case. The Court overrules all objections and receives into evidence all exhibits, declarations, transcripts and matters to be judicially noticed offered by the parties.

The Court finds that Scharpen Foundation operates a clinic subject to the required notice provisions of the FACT Act. The clinic is mobile and operates out of a motor home in the County of Riverside and at times in the City of Temecula. For religious reasons, Scharpen Foundation does not comply with the posting and notice requirements of the statute.

The FACT Act compels speech, and regulates its content.

VIEWPOINT DISCRIMINATION

Sharpen Foundation asserts that the FACT Act discriminates based upon viewpoint. In support of that argument Scharpen produced a spreadsheet showing that only about 90 of the State's 1,200 or so clinics are subject to the FACT Act, and the vast majority of affected clinics are pro-life. This may be so. But for the reasons stated in the Court's ruling of June 23, 2017, finding no violation of Article I, Section 4 right to free expression, the Court finds no viewpoint discrimination. By its terms, FACT Act is a neutral statute of general applicability. It may affect mostly pro-life clinics, but laws requiring mandatory

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vaccinations burden persons who view vaccinations as harmful more those that view them as beneficial. Such laws do not discriminate on viewpoint.

The Plaintiff Scharpen Foundation points to the legislative history suggesting that the statute was supported by pro-abortion groups and that a legislative author was concerned about pro-life Christian clinics misleading women who came to those clinics with false information regarding abortion. Some legislators may have had discriminatory intent. But the Legislature is a corporate body, and its intent is always a mix of the motives of its members, best understood by looking at the words they enact. This is especially true in a case such as this where there is no ambiguity in the statute and the Legislature has made specific legislative findings. Those findings state that thousands of California women are not knowledgeable regarding the availability of comprehensive family planning services, including abortion services. The statute was enacted to address that problem. The legislative findings make no mention of Christian pro-life clinics, or any misrepresentations by those clinics.

This Court is cognizant of the Legislature's role as the public policy making body of California government. Legislators are sworn to and have a duty to support the California Constitution no less ardently than members of the Judiciary. Constitutional protections for free speech serve to legitimize the Legislature's role in formulating public policy by ensuring the People, in whose name the Legislature acts, are informed on issues of public importance. Courts must be vigilant in protecting constitutional free speech in order to preserve our republican democracy, but unless clearly acting outside its constitutional limitations, the Legislature's acts are entitled to great judicial deference.

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Based upon the text of the legislation, the legislative findings, and the legislative history, the Court finds that there was no prohibited legislative discriminatory intent in the FACT Act's enactment. Similarly, even though the legislation may primarily affect Christian pro-life clinics, there is no prohibited discriminatory affect in its operation.

SCOTT SCHARPEN TESTIMONY

The deposition transcript of Scott Scharpen, the president and founder of the Scharpen Foundation, was also received into evidence. His testimony generally describes how the Scharpen organization is pro-life, that it does not advertise as pro-life, and that it attempts to have women who would otherwise obtain an abortion go to the clinic and subsequently choose to give birth. As a whole, the testimony establishes that Mr. Scharpen goes to great lengths to have women who may be contemplating abortion come to his clinic, and makes no effort to inform them beforehand of the clinic's pro-life position.

The legislative findings do not address potential abuses by Scharpen or any other pro-life clinic. The legislative findings could have targeted behaviors similar to those described in Mr. Scharpen's deposition testimony, but the legislative findings only discuss the need to provide women with information regarding comprehensive family planning services without any mention of abuses by clinics of any description. The legislation is facially neutral and applies to all clinics that meet certain neutral criteria, regardless of whether they are religious or not, whether they are pro-life or not, and regardless of the content of their advertising, their motives, or their behavior.

Mr. Scharpen's activities are not relevant to the constitutionality of the statute.

THE STATE'S EFFORTS TO INFORM WOMEN OF THE AVAILABILITY OF SERVICES

The legislative findings state that many women remain uninformed of available services. That lack of information serves as the State's justification to compel clinics such as Scharpen Foundation's to "supplement" its own efforts to inform women of its reproductive health programs. The Attorney General offered a number of declarations and exhibits. They describe those steps the State has taken, and which Scharpen Foundation must now supplement, to educate women regarding the availability of low cost public contraceptive, prenatal, and abortion services.

While the educational steps taken by the State are described as "myriad" by the Attorney General, they are actually quite minimal. And while the evidence is voluminous, it describes very little. And even those few entities making an effort to inform women of the availability of services appear nearly as loathe as Scharpen Foundation to specifically use or post the word "abortion".

The evidence consists of declarations describing the contents of Health Department websites for 15 of the State's 58 counties, and a State website for the Office of Family Planning. After one navigates through each of these 16 websites to the Health Department and one can see the services offered. In most of these websites the services are merely described as "family planning" or by a similar euphemism. The word "abortion" appears on only 2 county websites.

These website based attempts at educating women are completely passive. A woman must decide, on her own initiative, to go to the website seeking services. Even if she can navigate through information concerning vaccinations, the importance of flossing,

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hazardous waste, and other topics, in all but 2 counties, she must then ascertain that “family planning” or “contraceptive” includes post-conception contraception and abortion.

The only evidence of an active effort to educate women was a 12-week project in Alameda County in 2015. Signs were posted on buses advertising a “Free Pregnancy Test” with a phone number. Wallet-sized cards with the same message were also distributed. The word “abortion” did not appear in the advertising, and no other services beyond free pregnancy testing were listed. If a woman knew she was pregnant and desired an abortion, or was not pregnant and only desired contraception, this advertising would not direct her to the desired services.

Based on the record at trial the Court finds the State does not require counties or other political entities to make any significant efforts to inform women of the availability of family planning services. The Court finds that the State, which controls public education from K-12, community colleges, State Universities, the UC system, and which controls the funding of the services at issue, makes no other effort to inform women about the availability of those services.

FREEDOM OF SPEECH UNDER ARTICLE I, SECTION 2

This action is brought under Article I, Section 2 of the California Constitution, a provision of California’s Declaration of Rights. The civil liberties granted by the California Constitution are independent of rights guaranteed by the United States Constitution’s Bill of Rights. See California Constitution Article I, Section 24. 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.

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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. We look first to U.S. Supreme Court First Amendment precedent for guidance. In the abortion context, the seminal U.S. Supreme Court 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.

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

STRICT SCRUTINY, INTERMEDIATE SCRUTINY, OR RATIONAL BASIS

There is no question that the FACT Act compels speech and the content of that speech. This Court must determine the appropriate level of scrutiny to apply, and whether the statute passes that level of scrutiny.

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. They are secondary authorities this Court may consult for guidance. The cases are not in agreement on what level of scrutiny to apply.

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. As this Court finds, the Ninth Circuit court held the FACT Act is content based, but does not discriminate based on viewpoint. The Ninth Circuit court found the statute passed intermediate scrutiny. *Id.*, 839 F.3d 823, 838. The

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Attorney General urges the Court to adopt the Ninth Circuit's opinion, except for the level of scrutiny it applied. The Attorney General urges this Court to adopt the lowest level of scrutiny, rational basis.

The Fifth and the Eighth Circuits 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 compelled physicians 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.

In *Stuart v. Camnitz* (4th Cir. 2014) 774 F.3d 238, 246-250 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 scrutiny. By necessary implication it failed strict scrutiny as well. 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.

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

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failed both intermediate scrutiny and strict scrutiny. *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 determine 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, the federal circuit courts are in disagreement, but lean 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 Supreme Court's 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.

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The speech required by the FACT Act is unquestionably compelled and content based. 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 food product, or the octane of gasoline purchased at a pump. Here, the State commands 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 Attorney General argues forcefully that the FACT Act only requires an affected clinic to post true, factual information. That argument is accurate, but only to a point. The required posting directs the reader to a telephone number. And if that number is called, one can undoubtedly be referred to an abortion provider if one so desires. But the specific language of the required signage is also misleading, in that it can leave the reader with the belief that the referral is being made by the clinic in which it is posted. In Scharpen's case that would be inaccurate, profoundly inaccurate.

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, a political

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process. Political candidates for all manner of public office find it necessary to declare their positions on the issue. The issue of abortion is undoubtedly political in nature.

There is no question that the State has a legitimate regulatory interest in the practice of the healing arts. 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 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.

The State is requiring more than informed consent. The statute requires the clinic to give information to a woman at the start of her relationship with the clinic. Women who come to the clinic and are found not to be pregnant must be told of the availability of abortion. Women who find out they are pregnant and are thrilled to be so must be told about abortion. Women with unplanned, but not unwanted pregnancies must also be told. The State inserts itself into the private and sensitive relationship between a woman and her physician.

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.

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RATIONAL BASIS

Article I, Section 2 offers little protection if a rational basis test is used to evaluate compelled political speech. The rational basis test could be used to subject women and their physicians to compelled descriptions of fetal development. The majority of the federal circuit court cases previously cited 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, and the Court in *Camnitz, supra*, 774 F.3d 238-246 noting that the compelled statements required of physicians interfered with a physician's "freedom of mind".

INTERMEDIATE SCRUTINY

This statute fails even intermediate scrutiny.

In *McCullen v. Coakley*, 573 U.S.____, 134 S.Ct 2518 (2014), the United States Supreme Court examined a Massachusetts statute creating a 35 foot buffer area around reproductive health care facilities, that excluded all but patrons and employees of the facilities. There were problems with protesters blocking public sidewalks and preventing women from entering the clinic. The statute was enacted as a public safety measure after the State found less intrusive measures inadequate. The Court held the statute was subject to intermediate scrutiny.

Writing for the majority, Chief Justice Roberts found that while the Commonwealth provided evidence of pro-life advocates obstructing access at only one clinic, the statute applied to every clinic in the State. The Court rejected the State's argument that other approaches to the problem were unworkable, holding that the evidence in the record was insufficient to support that position. The State had not tried other approaches to the

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problem that were effective in other states. The Chief Justice wrote that it is not enough that a restriction on free speech is easier for the State to administer, that the “prime objective of the First Amendment is not efficiency.” *Id.*, at 134 S.Ct. 2540.

Here, the State’s very modest efforts at delivering information to its target audience regarding the availability of services, including abortion services, do not establish the necessity of compelling private citizens to “supplement” those efforts. The legislative finding that the FACT Act is “necessary” to “supplement” the State’s minimal efforts is not supported. The statute fails intermediate scrutiny.

STRICT SCRUTINY

This Court finds that Article I, Section 2 of the California Constitution is in accord with the standards suggested by *Evergreen*. The compelled speech is political in nature. 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.

COMPELLED SPEECH

Compelled speech is that which forces a speaker to say that which he or she may not believe. Compelled speech is undoubtedly necessary in many circumstances. But compelled speech of a political or cultural nature is not the tool of a free government.

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

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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. 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 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 FACT Act violates "individual freedom of mind". 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.

Compelled speech must be subject to 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.


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In this case, however virtuous the State's ends, they do not justify its means.

RULING

The Court finds that the FACT Act violates Article I, Section 2 of the California Constitution. Plaintiff Scharpen Foundation is entitled to a declaration that the FACT Act is unconstitutional and a permanent injunction prohibiting the Attorney General, the County Counsel of Riverside County, and the City Attorney of the City of Temecula from taking any action to enforce that statute against it, its officers, and its employees.

Dated: 10/30/17


Hon. Gloria C. Trask
Judge of the Superior Court

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