Docket No. 13-15023

In the

United States Court of Appeals

for the

Ninth Circuit

DONALD WELCH, ANTHONY DUK and AARON BITZER,

Plaintiffs-Appellees,

v.

EDMUND G. BROWN, Jr., Governor of the State of California, in His Official Capacity, ANNA M. CABALLERO, Secretary of California State and Consumer Services Agency, in Her Official Capacity, DENISE BROWN, Case Manager, Director of Consumer Affairs, in Her Official Capacity, CHRISTINE WIETLISBACH, PATRICIA LOCK-DAWSON, SAMARA ASHLEY, HARRY DOUGLAS, JULIA JOHNSON, SARITA KOHLI, RENEE LONNER, KAREN PINES, CHRISTINA WONG, in Their Official Capacities as Members of the California Board of Behavioral Sciences, SHARON LEVINE, MICHAEL BISHOP, SILVIA DIEGO, DEV GNANADEV, REGINALD LOW, DENISE PINES, JANET SALOMONSON, GERRIE SCHIPSKE, DAVID SERRANO SEWELL and BARBARA YAROSLAVSKY, in Their Official Capacities as Members of The Medical Board of California,

Defendants-Appellants.

Appeal from a Decision of the United States District Court for the Eastern District of California, No. 2:12-cv-02484-WBS-KJN · Honorable William B. Shubb

SUPPLEMENTAL BRIEF OF APPELLEES

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INTRODUCTION

In this Court's Order of May 15, 2013, the parties were directed to brief whether the Court should undertake plenary review of this interlocutory appeal. The Plaintiffs-Appellees (Welch) answer this question in the negative, for three primary reasons. First, the District Court utilized the correct standard to assess the speech claims. Second, the facts in the underlying case are anything but irrelevant and indeed were crucial to Judge Shubb's ruling. Third, the remaining claims and arguments that factored into the lower court's order, but are not presently before this Court, counsel against plenary review.

ARGUMENT

I. The Distinction Between Abuse Of Discretion And Plenary Review Is Subtle But Significant.

In granting Welch a preliminary injunction, the District Court carefully followed the four-part test of *Winter v. Nat. Res. Def. Council*, 555 U.S. 7 (2008), analyzing each element in turn. Excerpts of Record (ER) at 6. The pertinent question, then, is the degree to which this Court should second-guess the lower court on this interlocutory appeal, particularly in its application of First Amendment principles.

a. Standard Of Review For An Interlocutory Appeal Of A Preliminary Injunction

i. Abuse of discretion is the norm.

A district court's decision on a motion for preliminary injunction is ordinarily reviewed for abuse of discretion and is subject to "limited and deferential" review. *Shell Offshore v. Greenpeace*, 709 F.3d 1281, 1286 (9th Cir. March 12, 2013) citing *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam). Indeed, abuse of discretion review of an order granting or denying a preliminary injunction is considered the norm. *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 732 (9th Cir. 1999). "Under this standard, [a]s long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011) (quoting *Dominguez v. Schwarzenegger*, 596 F.3d 1087, 1092 (9th Cir. 2010)).

ii. Plenary review is relatively rare, because it requires an erroneous legal standard and uncontroverted or irrelevant facts.

Plenary review is triggered when the district court uses an "erroneous legal premise." *America W. Airlines v. National Mediation Bd.*, 986 F.2d 1252, 1258 (9th Cir. 1992). In other words, the lower court must have stumbled right out of

the gate by applying the wrong legal standard when granting or denying a preliminary injunction. *Id.* Not surprisingly, there are comparatively few instances where this Court has determined that plenary review was needed because the threshold legal standard was wrong.

Additionally, the two standards are distinct in that courts searching for abuse of discretion tend to assume the case has yet to be fully briefed and evidence adduced, while courts taking plenary review assume the facts have either been stipulated, are not controlling, or will not change materially before summary judgment. *See, e.g., Thornburg v. Amer. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) . As discussed below, this cannot be said of the highly relevant facts in this case. But first, it will be explained that the District Court's basic approach did not rely on a faulty premise or apply the wrong standard.

II. The District Court Utilized The Proper Legal Premise And Framework.

The overarching premise and legal framework employed by the District Court was application of the First Amendment to SB 1172. Under authority such as *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), a statute may regulate conduct. But as it relates to a particular plaintiff, that conduct will fall under the Speech Clause when the conduct is the communication of a message. *Id.* at 2724. The lower court committed no error in using that legal premise. Indeed, it

is difficult to conceive of a ruling on a speech claim without the application of a First Amendment framework. Judge Shubb wisely declined the State's invitation to dispense with the well-established approach to such expressive claims. This Court could disagree with the District Court's further application of the law to the facts. For instance, this Court might believe these particular Plaintiffs cannot ultimately show that SB 1172 constitutes a content- or viewpoint-based restriction on speech. Or, it could disagree with the lower court and hold that the statute is justified by a narrowly tailored, compelling interest. But as a threshold matter, the District Court's reliance on the time-tested First Amendment framework is unremarkable and certainly does not constitute a false premise.

As both *National Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043 (9th Cir. 2000) (herein *NAAP)* and *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), demonstrate, professional regulations trigger the First Amendment when they focus on the content of speech. Whether the regulations can ultimately be salvaged depends on application of the entire framework. But application of the framework itself—the First Amendment inquiry—is hardly erroneous.

III. The Facts Were Highly Relevant.

Plenary review of an order on a preliminary injunction is appropriate where "the district court's ruling rests solely on a premise as to the applicable rule of law,

and the facts are established or of no controlling relevance." *Thornburgh*, 476 U.S. at 757 (emphasis added). As to this second prong, there should be "an unusually complete factual and legal presentation from which to address the important constitutional issues at stake." *Id*.

Unlike *Thornburgh*, in the present case there was no stipulation as to uncontested facts. Indeed, both parties filed lengthy evidentiary objections to the evidence. ER 133-140; Supplemental Excerpts of Record (SER) 89-125.

Moreover, there is a fundamental disagreement as to whether or not sexual orientation change efforts (SOCE) can be effective. Like most, if not all, psychological theories and practices, SOCE may not be susceptible to any sort of reliable test to either prove or disprove its validity. *See*, *e.g.*, *NAAP*, 309 F.3d at 1046 (noting the psychoanalysts' use of dream interpretation and other non-scientific methods). Whether or not these factual disputes have any "controlling relevance" to the case has not been resolved.

Reviewing the facts as presented through the declarations of Drs. Welch and Duk in support of the preliminary injunction, the District Court determined that, at least for these Plaintiffs, SOCE was performed through speech. ER 19. The lower court reviewed the uncontroverted evidence that Dr. Duk is Roman Catholic and "discusses tenants of the Catholic faith" relative to human sexuality with patients who share his faith. ER 25. Similarly, Dr. "Welch has explained that he shares

the views of his church that homosexual behavior is a sin and that SB 1172 will 'disallow [his] clients from choosing to execute biblical truths as a foundation for their beliefs about their sexual orientation.'" *Id.* Those facts led Judge Shubb to conclude that this type of counseling is "integrally intertwined with viewpoints and messages." *Id.* Thus, even assuming the Plaintiffs' counseling is conduct, the *evidence* showed that speech – not just talking – was involved.

It is possible that one or more members of this Court would have reached a different result in applying the law to the facts in this case. *Sport Form v. United Press International*, 686 F.2d 750, 752 (9th Cir. 1982). But this is not a review of a permanent injunction. "Review of an order granting or denying a preliminary injunction is therefore much more limited than review of an order involving a permanent injunction where all conclusions of law are freely reviewable." *Id.* The lower court considered unique facts to this particular case. Hence, the *Thornburgh* test for plenary review does not fit.

By contrast, in *Gorbach v. Reno*, 219 F.3d 1087 (9th Cir. 2000), this Court considered a straightforward question of statutory interpretation and authority. Unlike the Welch Plaintiffs, whose attestations have noticeably affected the State's proffered interpretations of SB 1172, the particular circumstances of the *Gorbach* plaintiffs were largely irrelevant to the question of whether the Attorney General possessed statutory authority to de-naturalize citizens. To the limited extent that

the Court took note of the particular plaintiffs' plight, it did so to reinforce its conclusion that their fundamental rights could not be abridged in the manner sought by the government. *Gorbach* does not support the use of plenary review to *deny* a preliminary injunction in a manner that would jeopardize the plaintiffs' constitutional liberties.

In addition to the factual support for likelihood of success on the merits, the evidence supported the District Court's analysis of the other *Winter* elements. Welch demonstrated that he would suffer irreparable injury. And in balancing the hardships between the parties, the facts showed that this tipped sharply in favor of Welch. Evidence is reviewed for clear error. *Thalheimer*, 645 F.3d at 1115. None has been shown. Indeed, the State produced no evidence as to how or why the granting a preliminary injunction as to these three Plaintiffs would harm the Defendants. Instead, they relied on conclusory assertions applicable to virtually any legislative enactment, but not to the facts of this case. Judge Shubb found that it "would be a stretch of reason to conclude that [the State] would suffer significant harm having to wait a few more months to know whether the law is enforceable as against the three plaintiffs in this case." ER 36. That determination is primarily factual in nature. As such, it is not a proper candidate for plenary review.

SB 1172 cannot be evaluated solely in terms of its ambiguous text and limited legislative history. Even at this early stage of the litigation, the

declarations and exhibits have provided crucial context for the statutory analysis. Indeed, the evidence introduced thus far has caused the State to offer interpretations of the statute that were nowhere to be found in either the text of the statute or its legislative history. Welch submits that these realities necessitate the factual context it was given by the District Court.

The limited legislative history of SB 1172 stands in stark contrast to the congressional record given substantial deference by the Supreme Court in *Turner Broad. Sys. v. FCC*, 520 U.S. 180 (1997) (herein *TBS II*). In that case, Congress engaged in three years of pre-enactment hearings (*Id.*, at 187), evaluating vast amounts of data. *Id.* at 195. In contrast, the complete legislative record, filed by Welch, consisted of only seventy-three (73) pages. SER 349-322. Indeed, there is no evidence that the APA Report filed by the State in the District Court was evaluated by, or even made available to, lawmakers. All that was included in the legislative record were a few cherry picked or paraphrased statements from the Report. SER 253, 303. Finally, it was the State and amicus which submitted declarations in an attempt to bolster the sparse legislative record. The Welch declarations zeroed in on evidence as to how SB 1172 would violate fundamental rights of the Plaintiffs if not preliminarily enjoined. The lower court did not abuse its discretion by considering that evidence. Even in the *TBS* cases, which were resolved on summary judgment, the Supreme Court initially determined the

extensive 3-year congressional record did not answer all of its questions for purposes of intermediate scrutiny, and it remanded the case to the District Court for 18 months and tens of thousands of pages of additional fact-finding before it reached its second decision as to the application of intermediate First Amendment scrutiny. *See TBS II,* 520 U.S. 180; *cf. Turner Broad. Sys. v. FCC,* 512 U.S. 622 (1994) (herein *TBS I*). It must also be noted that both *TBS* cases deferred to Congress as to predictive *economic* judgments and did not involve the targeting of specific messages and *ideas* on a controversial issue, nor did they involve predictive judgments about harms such as the "loss of faith" (SER 253) the State seeks to prevent through SB 1172.

IV. The Lower Court Did Not Fully Address All Legal Issues, Nor Were They Fully Briefed In This Court.

Finally, plenary review is not proper under *Thornburgh* because major legal arguments involving privacy, vagueness, free exercise and the dangers of excessive entanglement in violation of the Establishment Clause have not been fully discussed in this Court. These claims were briefed in the lower court but were not reached in the preliminary injunction ruling. Nor can the claims be entirely separated. For instance, while Welch believes his speech claims were sufficient to support the preliminary injunction, those claims are bolstered by the free exercise of religion and vagueness claims that were considered by the District Court. For

that matter, it is entirely conceivable that, even were the injunction to be vacated by this Court, it could be reinstated by the District Court on the basis of the remaining claims. These arguments taken into account by the District Court but not presently before this Court render plenary review inappropriate.

CONCLUSION

For the foregoing reasons, the Court should not deviate from the well-established standard of review that involves asking whether the District Court abused its discretion in issuing a preliminary injunction as to the Welch Plaintiffs. A holding that the District Court misapprehended the proper approach when it applied the Supreme Court's extensive First Amendment jurisprudence to free speech claims would leave district courts at a loss to know when an expressive claim should be evaluated as something else. Moreover, the conflicting, highly relevant facts and remaining claims further render plenary review unwarranted and inadvisable.

Date: May 28, 2013

/s/ Kevin T. Snider

/s/ Matthew B. McReynolds
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, contains 2,270 words and, per the Court's Order of May 14, 2013, this brief does not exceed ten pages, excluding Table of Contents, Table of Authorities and required certificates.

Date: May 28, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen Moore