Docket No. 15-17517

In the

United States Court of Appeals

For the

Ninth Circuit

A WOMAN'S FRIEND PREGNANCY RESOURCE CLINIC,
a California Religious Nonprofit Corporation,
CRISIS PREGNANCY CENTER OF NORTHERN CALIFORNIA,
a California Religious Nonprofit Corporation
and ALTERNATIVE WOMEN'S CENTER,

Plaintiffs-Appellants,

v.

KAMALA HARRIS,
Attorney General, State of California,

Defendant-Appellee.

Appeal from a Decision of the United States District Court for the Eastern District of California, No. 2:15-cv-02122-KJM · Honorable Kimberly J. Mueller

REPLY TO OPPOSITION TO MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

The motion under consideration is narrowly focused on pages 56-59 of the lower court's Order. Those pages discuss *balance of hardships* and *public interest*. The Attorney General's, Kamala Harris ("Harris"), opposition addresses matters not before this Court. Those points raised by Harris will be addressed only briefly.

ARGUMENT

I. THE DISTRICT COURT COMMITTED CLEAR ERROR BY NOT APPLYING THE UNDISPUTED FACTS ESTABLISHED IN THE RECORD TO THE LAW.

When reviewing the balance of hardships and public interest, it remains important to remember that the District Court found the harm to these three Plaintiff-Clinics irreparable. Order, p. 54-56. In describing the operation of the Plaintiff-Clinics the District Court had a record provided by these Plaintiffs which included a 22-page verified complaint, three declarations by the executive directors consisting of 35 pages, and the legislative history comprising eight exhibits. *See*, Order, p. 9-15. This evidence was introduced all without objection. The lower court sifted through these uncontroverted facts to come to the conclusion that the content-based notice requirement of the Reproductive FACT Act ("Act") inflicts irreparable harm on these Plaintiffs. That was proper. "The cases best suited to preliminary relief are those in which the important facts are undisputed, and the parties simply disagree about what the legal consequences are of those facts."

GMC v. Let's Make a Deal, 223 F. Supp. 2d 1183, 1190 (D. Nev. 2002). The court in such a case can take the undisputed facts and apply the law to them.

The error occurred when the undisputed facts were ignored during the analysis of both the *balancing the hardships* and *public interest* tests. In the section on balancing the hardships, the District Court did not cite to a single fact in the undisputed record presented by the Plaintiff-Clinics. Order, p. 56-57. The District Court only cited to Harris's Opposition Brief which merely references the text of the bill (AB 775). Id. What is worse, in analyzing the public interest, the District Court did not cite to a solitary fact in the record by either party. Though the decision to deny the motion for preliminary injunction turned on those two fact-based tests, the lower court did not take into consideration the facts of this case. This is clear error.

In defending the District Court's conclusion that there was no error regarding review of the *balance of hardships* and *public interest* tests, Harris recites the Order. Harris asserts that "the State has [] also shown a strong interest in providing public health – the health of the California women who seek services from plaintiffs." Opp. p. 17 (quoting Order, p. 57:21-22). In fact, the Order does not cite to anything but Harris's Brief which references the preamble to the statute, i.e., AB 775 § 1 (Order, p. 56). The lower court simply uncritically embraced the generalized interest in providing public health to the women of California. Yet the

District Court did not look at *any* of the uncontroverted evidence provided by the Plaintiff-Clinics which bore on whether women visiting **their clinics** are directed to health care.

Here the Plaintiff-Clinics advise pregnant women to obtain health insurance for prenatal care and refer women to physicians and local hospitals. Order, p. 11, 14. Though these facts were recited in the factual background of the Order, the District Court turned a blind eye to them for purposes of its discussion on the balance of hardships and public interest. If the State's interest is to provide women access to medical care, the evidence in this case is that the women visiting these Plaintiff-Clinics are not being deprived of such. Although the undisputed record shows that the Plaintiff-Clinics actively connect women with both insurance and appropriate medical professionals and facilities,[1] the District Court did not apply the facts of **this case** to the law. That is clear error.

Besides committing clear error with regards to the facts, the District Court also erred regarding the law. The District Court found, as it must, that the content-based compelled speech comprising the notice causes irreparable harm. Order p. 56:4-6. But when it comes to the public interest, both Harris and the District Court counter by cobbling together two quotes from unrelated cases to construct a legal premise lacking a foundation based in law. They write,

[1] These referrals include Medi-Cal and County Public Health. Gibbs decl. ¶13.

> Though the "public interest favors the exercise of First Amendment rights," *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014), "where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may [then] in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312–13 (1982).

Order, p. 58:4-5 and Harris Opp. p. 19.

The two quotes constitute the wrong materials for building the premise. First, *Doe v. Harris* stands for precisely the opposite proposition. In that opinion this Court **upheld** an order that preliminarily enjoined a law thought to chill the speech rights of registered sex offenders. As to the second part of the District Court's premise salvaged from *Weinberger*, that case had nothing to do with *free speech* at all. The term does not even appear in the opinion. The litigation involved the Federal Water Pollution Control Act. *Weinberger*, 456 U.S. at 306.

Finally, Harris states that the notice only requires the dissemination of true factual information. Harris Opp., *passim*. Hence in balancing the hardships, the harm to the Plaintiff-Clinics is minimal. Harris Opp. p. 17. This clearly contradicts the District Court's findings of irreparable harm. Further, as a matter of law, the Second Circuit decisively ruled that argument out.

> When evaluating compelled speech, we consider the context in which the speech is made. *Riley*, 487 U.S. at 796-97. 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. "[E]xpression on public issues has always rested on the highest rung on the hierarchy of First Amendment values. *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 913…(1982)…" Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. *Riley*, 487 U.S. at 795. A requirement that pregnancy services 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.

Evergreen Association v. New York City, 740 F.3d 233, 249 (2d Cir. 2014)

II. BECAUSE THE DISTRICT COURT FOUND THE HARM TO THESE CLINICS IRREPARABLE, THE STANDARD OF REVIEW USED IS NOT GERMANE FOR PURPOSES OF THIS PRESENT MOTION.

Harris's Opposition Brief devotes considerable space to whether the statute involves commercial or professional speech. By extension, the standard of review – whether rational basis, intermediate or strict scrutiny – is discussed at length. Such will constitute a primary issue before this Court in the main briefings. But for purposes of this motion it is enough to state that the District Court found that the Plaintiffs are likely to suffer irreparable harm to their speech rights under the Act's content-based notice requirement. Order, at 54-56.

Ignoring this, Harris attempts to repackage her unsuccessful point relating to commercial speech. In sum, Harris proffers that the Plaintiffs provide services that are of a commercial nature. Hence the Act is proper as to them because the notice

is a regulation of commercial speech. Harris is attempting to contradict the factual finding by the lower court.

The Plaintiffs motion for preliminary injunction relied on three detailed declarations by the executive directors consisting of 35 pages, as well as, the 22 page Amended Verified Complaint. Based on these documents, Judge Mueller systematically set forth the facts regarding the activities of the Plaintiff-Clinics (Order, p. 9-15) and came to the conclusion that their speech is non-commercial. Order, p. 29-33. Thus the commercial speech doctrine has no relevance. Tellingly, in her opposition brief to this Court, Harris does not cite to even one page of the record in support of her assertion. To counter the findings of fact in a review of a decision on a preliminary injunction, Harris must show that the lower court made clear errors. *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1311 (9th Cir. 2015).

III. ATTEMPTS AT MERGING THE FACTS AND RULING OF ANOTHER CASE ON APPEAL IS IMPROPER.

Harris's argument integrates an order from *Living Well Medical Clinic v. Harris*, (No. 15-17497). That case on appeal and this case have not been consolidated, nor should they be. The plaintiffs in *Living Well* filed three declarations containing one to two pages of text each. *See* Doc. 14-2 to 14-4. In contrast, the executive directors of the Plaintiff-Clinics in the motion before this

Court filed three detailed declarations amounting to 35 pages. Judge White had a vastly different factual record in front of him. Hence, in applying the facts that he had to the law sent him in a very different direction than Judge Mueller. For example, Plaintiff-Clinics here laid a careful foundation as to why they do not engage in commercial speech. Moreover, the Plaintiff-Clinics provided sufficient evidence to prove irreparable harm. Though Plaintiffs here do not agree with the legal reasoning in the order in *Living Well*, Harris's attempts at merging the two cases in her opposition to this motion is problematic.

CONCLUSION

This case is not a class action. There are three Plaintiff-Clinics. The four pages of the District Court's Order under scrutiny revolve around the notion that the women who visit *these* clinics will be deprived of access to health care. That was clear error for the District Court did not apply the law to the facts in the record regarding these three Plaintiff-Clinics. When not looking at the facts in the record, the harm to women who will not see the notice is speculative at worst. The District Court erred by not considering that the undisputed record shows that women who visit the Plaintiff-Clinics are indeed connected to insurance and medical professionals. That is consistent with the State's stated interest.

AB 775 was not urgency legislation. No notice has hung on the walls of any clinic since Governor Reagan signed the Therapeutic Abortion Act in 1967. These Plaintiff-Clinics are simply requesting that the nearly 48-year status quo be maintained while this case is being considered on the merits in this Court. In balancing the harms, the scales of justice tip sharply in Plaintiffs' favor.

Dated: January 7, 2016.

Respectfully submitted,

s/Kevin T. Snider

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and Ninth Cir. R. 25-5(e) I hereby certify that on January 8, 2016, 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/ Kirstin E. Largent