Docket No. 15-17517

In the

United States Court of Appeals

for the

Ninth Circuit

A WOMAN'S FRIEND PREGNANCY RESOURCE CLINIC
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-AC · Honorable Kimberly J. Mueller

APPELLANTS' COMBINED PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC

KEVIN T. SNIDER, ESQ.
Counsel of Record
MATTHEW B. MCREYNOLDS, ESQ.
PACIFIC JUSTICE INSTITUTE
P.O Box 276600
Sacramento, California 95827-6600
(916) 857-6900 Telephone
(916) 857-6902 Facsimile
ksnider@pji.org

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES AND RULES

PETITION FOR PANEL REHEARING

I. INTRODUCTION AND STANDARD FOR GRANTING PANEL REHEARING.

On October 14, 2016, this Court issued its decisions affirming the District Court's denials of preliminary injunctions against the enforcement of the Reproductive FACT Act numbered as Assembly Bill (AB) 775. The panel's decision as to the plaintiffs in this appeal, A Woman's Friend, et al. (AWF) was terse and incorporated by reference its lengthier, simultaneous opinion in *National Inst. of Family and Life Advocates v. Harris*, 2016 U.S. App. LEXIS 18515 (9th Cir. Oct. 14, 2016). Since it was incorporated by reference and provides most of the rationale for the decisions, the *NIFLA* opinion will be referenced here as the "panel opinion."

Unfortunately, the Panel overlooked significant differences between the plaintiffs in the three separate cases challenging the legislation, as well as differences in the District Court opinions below.[1] Most significantly, though, the panel failed to meaningfully distinguish controlling Supreme Court precedent and the two other appellate decisions that reached opposite conclusions on nearly identical legislation. As a result, the panel opinion precipitates a Circuit split.

[1] Of note, the Attorney General brought a motion to consolidate the three cases challenging AB 775. (DktEntry 10-1). This Court denied the motion.

Pursuant to Federal Rule of Appellate Procedure 40 and 9th Cir. 40-1, rehearing should be granted to address material misapprehension of both law and fact which greatly undermine the persuasive power of the panel's opinion.

II. THE PANEL OPINION MISAPPREHENDED MATERIAL FACTS, STATUTORY TEXT, AND LEGISLATIVE HISTORY.

a. The panel overlooked significant factual distinctions among the three separate cases on appeal and failed to recognize the strong factual basis for AWF's as-applied challenge.

First, the panel conflates AWF with the other litigants and consequently misses AWF's strong and unique factual support in the record. Importantly, AWF sought injunctive relief pursuant to its as-applied challenge to the statute.[2] The panel approached the claims as though they presented only a facial challenge.

Unlike the other litigants, the AWF plaintiffs submitted extensive Declarations that informed the District Court's analysis. Rather than ruling on this record, the panel treats the facts as though they were irrelevant. Instead, the panel repeats uncritically the highly controversial legislative findings that sound more in the language of advocacy than accuracy. On rehearing, the panel should consider the considerable record examined by the District Court and not assume it is the same as that developed by the other plaintiffs. This includes the detailed and

[2] The District Court noted that the complaint brings both a facial and as-applied challenge to the Reproductive FACT Act. *A Woman's Friend Pregnancy Res. Clinic v. Harris*, 153 F. Supp. 3d 1168, 1179 (E.D. Cal. 2015).

uncontroverted evidence regarding the religious activities of AWF and that AWF does not engage in any activities that deceive, mislead, misinform, confuse or intimidate women who come to the clinics.

One implication of the panel's mistake is that the relied-upon legislative findings, used to justify its extraordinary reach, are inapplicable to these plaintiffs. AWF's uncontroverted evidence is that it cannot be tagged with the "intentionally deceptive advertising" label that the Legislature casually lobbed at crisis pregnancy centers (CPC's) generally. Op. at 6. The alleged nefarious goal of interfering with women's ability to be fully informed and exercise their reproductive rights, *id.* at 5, is nowhere to be found among the documents actually submitted by AWF. The actual evidence submitted refutes the legislative accusations.[3] Nor do the thousands, let alone millions, of women supposedly unaware of their taxpayer-funded abortion options, *id.* at 5, find their way to AWF's doors. As a justification for applying and then enlarging its professional speech doctrine, the panel claims that Appellants have positioned themselves in the marketplace. Op. at 34. No support from the record is offered for this mischaracterization of the Appellants' religious ministries, but the opinion builds upon it anyway.

[3] Each of the AWF plaintiffs submitted evidence about the operations of their respective clinics that refutes the characterizations by the Legislature that CPCs engage in deceptive practices. See the declarations of CPC directors Tamara (ER 277- 278) and Dodds at ER 291-293.

For this as-applied challenge, the court must find more factual support for the compulsion of AWF's speech. The Legislature's conjecture might provide a rational basis for the statute, but the panel did not purport to apply that standard to the speech claims, nor could it have. The panel's understanding that it was presented only with a pre-enforcement challenge, Op. at 13-18, that turned only on a question of law and needed no further factual development, Op. at 17, was mistaken to the extent the panel believed it could overlook the evidence AWF actually submitted.

b. The panel's characterization of the challenged compelled speech as a "disclosure" is missing crucial factual support.

Second, the panel opinion fails to deal with the nature of the mandated speech at the heart of these cases. The Court too quickly categorizes the mandated notice as a disclosure, without explaining why it should be so regarded, when it differs materially from other medical disclosures that have been upheld. Most tellingly, AB 775, in reference to licensed clinics, requires no disclosure of what occurs on their premises – instead it points visitors to other locations for services not offered by the clinics. The panel overlooks this crucial distinction, rendering its reliance on other abortion-related disclosure cases unpersuasive. In each of those cases, the plaintiffs were being required to discuss the procedures performed on site, and in some instances medical information about the pregnancy. Op. at 26-28 (collecting cases). AB 775, at least in the provisions challenged by these

plaintiffs, is not comparable to the other types of disclosures to which the panel points. Indeed, nothing on the face of the text addresses potential deceptive practices. Further, the notice says nothing about what a given clinic does or does not do. Finally, the notice is not a disclaimer.

On rehearing, the panel should identify the factual basis for its determination that the mandated speech is a disclosure.

c. The Panel mistook the speech mandate for a professional regulation.

Third, the panel overlooks the reality that the Legislature does not itself classify the challenged statute as a professional regulation. This invention of the State's attorneys lays a faulty factual and textual foundation on which the entire analysis rests.

This Circuit's professional speech doctrine was very recently enunciated in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). This formulation was criticized by the Third Circuit in a case very similar to *Pickup* (*King v. Gov. of N.J.*, 767 F.3d 216 (3d Cir. 2014)), even as that court reached a similar conclusion. Nor has the Eleventh Circuit followed this Court's lead on professional speech, *Wollschlaeger v. Gov. of Fla.*, 2015 U.S. App. LEXIS 21573 (11th Cir. Dec. 14, 2015). It is therefore prudent for this Court to proceed carefully and not expand the doctrine well beyond the parameters so recently set forth by this Circuit. Unfortunately, this is exactly what has happened in the panel's opinion.

While seeking to break even more new ground, the panel shot past an important definitional barrier – the basic requirement that professional speech regulations actually regulate professionals.

In changing the professional speech doctrine into a professional facility doctrine, Op. at 33-34, the panel may not have realized that the Supreme Court has already occupied this field with its commercial vs. non-commercial speech doctrine. *See*, *e.g.*, *Va. Bd. of Pharmacy v. Va. Consumer Council*, 425 U.S. 748 (1976) (addressing professional regulation of pharmacists and postings in their facilities). The Supreme Court did not leave non-commercial speech in a no-man's-land at the mercy of state regulators. Rather, it accorded non-commercial speech the highest level of protection – not at the intermediate level where the panel parked AB 775.

Because the Legislature did not consider AB 775 to be a professional speech regulation, it did not provide the necessary factual predicate for the panel's far-reaching decision. The panel should therefore rehear and reconsider the crucial threshold issue of whether any other facts exist to support the application of the professional speech doctrine, beyond the speculation offered by the panel.

III. THE OPINION MISSES THE TEXT AND LEGISLATIVE HISTORY THAT SUPPORT THE FREE EXERCISE CLAIM.

In giving short shrift to the Free Exercise claim, Op. at 45-47, the panel brushes past the Legislature's recognition that it was targeting Christian, belief-

based non-profits. This is hardly run-of-the-mill regulation, professional or otherwise. The panel reads the exemptions in the statute such that the restrictions *could* theoretically apply to other clinics regardless of their beliefs. But these are not the facts presented in the record. Rather, the burden of AB 775 is borne – practically, not theoretically – by the litigants before the Court, all of whom are religious.[4] As the Legislature knew, there was no equivocation that the entities it targeted "may be" motivated by their religious beliefs, Op. at 46; they *were* so motivated. Conjecture will not support the panel opinion; this mistake underscores why it is essential to consider AWF's as-applied challenge, and the evidence on which it is based.

IV. THE PANEL OPINION MISPERCEIVED THE "SERIOUS QUESTIONS" EQUATION.

Lastly, the panel opinion strangely neglects to address all of the preliminary injunction factors. The District Court found that AWF had raised "serious questions" about the constitutionality of AB 775. Op. at 13. The panel calls this harmless error without bothering to explain what the panel believes constitutes

[4] Each of the AWF plaintiffs submitted detailed evidence about the preeminence of faith in the operations of the clinics. See the declarations of CPC directors Tamara and Dodds at ER 271-76, 278-79, 282-84, 286-87, 292-93, 295. In this regard, AWF has no dispute with the legislative history that CPCs are "pro-life (largely Christian belief-based) organizations." AB 775 Bill Analyses, Senate Rules Committee, June 24, 2015 (ER 254, ¶1); Senate Health Committee, June 24, 2015 (ER 261, ¶1); Senate Rules Committee, June 24, 2015 (ER 268, ¶1).

"serious questions." Consequently, the panel opinion leaves the distinct impression that the panel is fundamentally altering the Circuit's approach set forth in *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011) . Op. at 18. If the panel wants to make likelihood of success on the merits the only significant factor in the equation, while greatly diminishing the role of the other three factors, it should say so clearly. The panel's approach ignores what the District Court actually held below, particularly its emphasis on the public interest. The opinion leaves the District Courts mystified as to the Circuit's jurisprudence.

For the foregoing reasons, and the additional reasons discussed in the accompanying Petition for Rehearing En Banc, this Panel should rehear the case.

PETITION FOR REHEARING EN BANC

V. INTRODUCTION AND SUMMARY OF THE ARGUMENT.

Pursuant to FRAP 35, rehearing en banc is necessary to maintain uniformity within this Circuit, to avoid creating a Circuit split, and to avert a direct clash with Supreme Court authority on religious freedom and speech. Appellants, A Woman's Friend, et al. (collectively, AWF), further suggest that this decision, restricting First Amendment rights in realms that are among the most hotly-debated of our time, is exceptionally important.

In the foregoing Petition for Rehearing, material factual and textual discrepancies are detailed that undermine the Opinion. Here, AWF will focus

more on the analytical errors that needlessly draw this Circuit into direct conflict with sister Circuits and the Supreme Court.

VI. REHEARING EN BANC IS NEEDED TO AVOID CREATING A CIRCUIT SPLIT IN WHICH THIS COURT WOULD BE IN THE MINORITY FAVORING LESSER PROTECTIONS FOR ABORTION-RELATED SPEECH.

The panel acknowledges, almost in passing at pp. 39-40 of the *NIFLA* opinion, that it disagrees with the holdings of the Second and Fourth Circuits which struck down nearly identical speech mandates. *Evergreen Ass'n v. City of N.Y.*, 801 F.Supp.2d 197 (S.D.N.Y. 2011), *aff'd in part, vacated in part*, 740 F.3d 233 (2d Cir. 2014), *cert. denied*, 135 S.Ct. 435 (2014); and *O'Brien v. Mayor & City Council of Balt.*, 768 F. Supp. 2d 804, 814 (D. Md. 2011), *aff'd sub nom. Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 683 F.3d 539 (4th Cir. 2012), *aff'd in part, vacated in part en banc*, 721 F.3d 264 (4th Cir. 2013); *cf. Centro Tepeyac v. Montgomery Cty.*, 779 F. Supp. 2d 456, 464 (D. Md. 2011), *aff'd in part, rev'd in part*, 683 F.3d 591 (4th Cir. 2012), *aff'd en banc sub nom. Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184 (4th Cir. 2013).

The panel attempted to distinguish these cases because the invalidated mandates used the word "encourages," which the panel felt could be more indicative of a favored viewpoint, rather than AB 775's imperative verb, "Contact…." This extreme formalism cannot hope to patch the gaping Circuit

split. It behooves this Court to consider the statute en banc before the panel's reasoning is put under a microscope at the Supreme Court.

VII. THE PANEL'S APPLICATION OF INTERMEDIATE SCRUTINY TO CONTENT-BASED, COMPELLED SPEECH INVITES REVIEW AND REVERSAL BY THE SUPREME COURT.

The most remarkable aspect of the panel's opinion is the alacrity with which it waved off the Supreme Court's most recent pronouncement on content-based speech restrictions. In *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015), the Supreme Court could not have been more clear that content-based speech restrictions are presumptively unconstitutional and must be justified by a narrowly tailored compelling interest. *Id.* At 2226; Op. at 24-25.

The panel nevertheless determined that the Justices could not have meant what they said and chose instead to apply this Circuit's precedents, particularly *Pickup* and *U.S. v. Swisher*, 811 F.3d 299 (9th Cir. 2016). Op. at 25. The panel also pointed to decisions from other Circuits applying intermediate scrutiny, but all of those decisions predate *Reed*.

The significance of the panel's holding that *Reed* must give way to the decision of this Circuit is so startling that it calls for en banc review before certiorari is sought. The panel's over-reliance on *Swisher* is baffling and does not come close to justifying departure from *Reed*. In *Swisher* this Circuit considered en banc the constitutionality of Subsection (a) of the federal Stolen Valor Act,

criminalizing the wearing of unearned military medals. The Supreme Court had previously struck down Subsection (b) of the Act in *United States v. Alvarez*, 132 S.Ct. 2537 (2012), concerning the utterance of false statements about military service.

Swisher makes clear that it was dealing with false symbolic speech, which required greater scrutiny than content-neutral restrictions. Swisher, *811 F.3d* at 314. The nexus between the two subsections of the Act impelled this Court to closely follow *Alvarez*, which was made more challenging by the fact that the plurality had applied strict scrutiny but Justice Breyer applied his own unique version of intermediate scrutiny. This Court's task of harmonizing the various opinions in *Alvarez* was simplified by the fact that it held the statute did not survive even Justice Breyer's test, and therefore it could not overcome the plurality's use of strict scrutiny either. Swisher, at 315-17. In fact, *Swisher*, relying on *Alvarez*, held that the Act failed because the government could have employed counter-speech, in the form of a database containing information about recipients of military medals, as a less restrictive alternative. *Id.* at 318. AWF has argued similarly that the State has vast resources with which it can and does promote its own message. The panel neglected to apply this inconvenient holding of *Swisher*.

The panel sets up a false choice between *Swisher* and *Reed*, when *Swisher* began its analysis with *Reed*. *Swisher*, at 311-13. The Court's analysis became more complicated only because *Alvarez*, notwithstanding its splintered opinions, was so factually and textually indistinguishable. No such gyrations are needed here, since *Swisher* bears no factual similarity to the present. It would be imprudent for this Circuit to extend the holding of *Swisher* beyond false symbolic speech into an area of pure speech – a sign, no less – that fits squarely within *Reed*.

Of course, *Reed* did not arise in a vacuum; it was based on a line of Supreme Court precedent to which the panel devoted little discussion. The High Court's strong denunciations of both compelled speech and content-based restrictions, including professional contexts, are memorialized in such landmark decisions as *Riley v. Nat'l Fed. Of the Blind of N.C.*, 487 U.S. 781 (1988); *Hurley v. Irish–American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974); *Wooley v. Maynard*, 430 U.S. 705 (1977); and *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943). *See also*, *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 965-66 (9th Cir. 2012) (compelling Yellow Pages to fund and advertise Seattle's opt-out program was not least restrictive means).

The panel cannot create its own lower standards for compelled, content-based, non-commercial speech.

Nor does the Court's holding in *Pickup* justify the panel's extension of it. *Pickup* broke new ground by identifying a continuum for professional speech, *Id.* at 1227; Op. at 30. Meanwhile, the Supreme Court has had relatively little to say beyond a concurrence in *Lowe* and attorney advertising and other cases with significant commercial speech overlap. The panel now boldly takes *Pickup* one large step further, holding for the first time that lessened professional speech standards can be stretched beyond the professionals themselves. This runs headlong into Justice White's explanation of what constitutes a professional, i.e., "[o]ne who takes the affairs of a client personally in hand." *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring). It also creates a split with the Third and Fourth Circuits that have held that professional speech involves (1) personalized advice, (2) to a paying client, (3) in a private setting. *Moore-King v. County of Chesterfield, Va*, 708 F.3d 560, 569 (4th Cir. 2013); *King v. Governor of N.J.*, 767 F.3d 216, 231 (3d Cir. N.J. 2014).

Lacking precedential support, the panel engaged in extended speculation as to the expectations of those coming into the clinics as the basis for applying professional speech standards even in areas with no professionals present. Op. at 33-34. The panel failed to consider, though, that the Supreme Court actually has spoken to regulation of facilities in the professional, healthcare context – and it has approached them under commercial speech doctrine. This was the case in *Va. Bd.*

of Pharmacy v. Ba. Consumer Council, 425 U.S. 7478 (1976), where the Supreme Court invalidated restrictions on drug price posting, promulgated as a professional regulation of pharmacists. The Supreme Court's exclusion of non-commercial speech from its doctrine did not leave any room for this or other Circuits to create lower standards of review in the same type of professional facility. *See also, Board of Trustees v. Fox*, 492 U.S. 469 (1989).

For these reasons, the panel's analysis was woefully inadequate to support the Circuit split it has created. En banc review is needed to keep the Circuit on course and keep the nascent professional speech doctrine from straying into the Supreme Court's carefully marked commercial vs. non-commercial speech boundaries.

VIII. THIS CASE IS OF EXCEPTIONAL IMPORTANCE.

Abortion, free speech, and religious freedom are among the most hotly debated national issues of our time. Into this arena, the California Legislature leapt with unabashed preference for expansive abortion availability over the objections of religious non-profits who do not want to be mouthpieces for the government.

In recognition of the importance and interest level in these cases, they have been designated as "high profile" on this Court's website. Moreover, FRAP 35 highlights conflict with other appellate courts as one indication of exceptional importance. As detailed in the foregoing sections, and without belaboring the

point, the panel decision clashes most directly with decisions of the Second and Fourth Circuits, creating a split of authority. All parties and the nation would therefore benefit from en banc review.

CONCLUSION

It is not especially surprising that the panel found a way to uphold a statute purporting to advance abortion rights. What is surprising is the degree to which the panel was willing to enter into open conflict with other Circuits and expand a fledgling test for professional speech that is impossible to square with Supreme Court precedent on compelled, content-based speech.

The serious issues raised in these Petitions call for the measured judgment of the en banc panel.

Date: October 26, 2016

/s/ Kevin T. Snider

/s/ Matthew B. McReynolds

Kevin T. Snider
Matthew B. McReynolds

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 35(b)(2) and Fed. R. App. P. 32(a), the attached Petition is proportionately spaced, has a typeface of 14 points or more and is within the fifteen-page limit.

Date: October 26, 2016

/s/ Kevin Snider
Kevin T. Snider

MEMORANDUM

Filed October 14, 2016
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION

FILED

OCT 14 2016

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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; ALTERNATIVE WOMEN'S CENTER,

Plaintiffs - Appellants,

v.

KAMALA HARRIS, Attorney General, State of California,

Defendant - Appellee.

No. 15-17517

D.C. No. 2:15-cv-02122-KJM-AC

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, District Judge, Presiding

Argued and Submitted June 14, 2016
San Francisco, California

Before: D.W. NELSON, TASHIMA, and OWENS, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

A Woman's Friend Pregnancy Resource Clinic, et al. (collectively A Woman's Friend) appeals from the district court's denial of their motion for a preliminary injunction to prevent the enforcement of the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (the FACT Act or the Act). We have jurisdiction under 28 U.S.C. § 1292(a)(1), and we affirm.

1. The district court properly found that A Woman's Friend cannot demonstrate a likelihood of success on their First Amendment free speech or free exercise claims. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). With respect to the free speech claim, the Act regulates licensed clinics' professional speech, and is subject to intermediate scrutiny, which it survives. *See Nat'l Inst. of Family & Life Advocates (NIFLA) v. Harris*, No. 16-55249, Slip op. at 26–34 (9th. Cir. 2016). The Act's notice that applies to unlicensed clinics survives any level of review. *See id.* at 34–37. With respect to the free exercise claim, the Act is a neutral law of general applicability, which survives rational basis review. *See id.* at 37–39.

2. Because we affirm the district court's finding that A Woman's Friend cannot demonstrate a likelihood of success on their First Amendment claims, thus failing to meet the first, most important *Winter* factor, *see Garcia v. Google, Inc.*,

786 F.3d 733, 740 (9th Cir. 2015) (en banc), we need not parse their showing under the remaining *Winter* factors.[1]

AFFIRMED.

[1] We also conclude that A Woman's Friend have not raised "serious questions" going to the merits of their claims; thus, the alternate test set forth in *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011), does not apply. The district court's conclusion that there were serious questions going to the merits was harmless error because the district court appropriately denied the motion for a preliminary injunction.

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 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/ Stephen Moore
Senior Appellate Paralegal
COUNSEL PRESS, INC.