

1 **BILL LOCKYER, Attorney General**
 of the State of California
 2 **FRED A. SLIMP II, State Bar No. 118693**
 Deputy Attorney General
 3 1515 Clay Street, Suite 2000 ~ P. O. Box 70550
 Oakland, CA 94612-0550
 4 Telephone: (510) 622-2117
 Facsimile: (510) 622-2121

FILED AND ENTERED
 SUPERIOR COURT
 COUNTY OF SAN FRANCISCO
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 DEPUTY CLERK

6 Attorneys for Defendant and Respondent,
 California Board of Chiropractic Examiners

9 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 10 **FOR THE COUNTY OF SAN FRANCISCO**

12 **LAURENCE TAIN, D.C., DONALD NIELSEN, D.C.,**
ROBERT BITTERS, D.C., STEPHANIE
 13 **WATTENBERG, D.C., and LORI PRESCOTT, D.C.,**

14 **Plaintiffs and Petitioners,**

15 **vs.**

16 **STATE BOARD OF CHIROPRACTIC EXAMINERS,**
CALIFORNIA ACUPUNCTURE BOARD,
 17 **COUNCIL ON CHIROPRACTIC EDUCATION,**
 and DOES 1 to 20,

18 **Defendants and Respondents.**

Case No. CGC-03-419378

**DEFENDANT
 AND RESPONDENT
 CALIFORNIA BOARD OF
 CHIROPRACTIC EXAMINERS'
 DEMURRER TO PLAINTIFFS'
 AND PETITIONER'S SECOND
 AMENDED COMPLAINT
 FOR DECLARATORY RELIEF,
 INJUNCTIVE RELIEF, AND
 WRIT OF MANDATE**

Date: October 29, 2003
 Time: 9:30 a.m.
 Department: 502

ORIGINAL

21 **COMES NOW** defendant and respondent, California State Board of Chiropractic
 22 **Examiners,** and makes and files this demurrer to plaintiffs' and petitioners' second amended
 23 **complaint for declaratory relief, injunctive relief, and writ of mandate as follows:**

24 **Defendant and Respondent California State Board of Chiropractic Examiners**
 25 **demurs to the first, second and third causes of action in the said complaint for declaratory relief,**
 26 **injunctive relief, writ of mandate on the following ground:**

27 **///**

28 **1. The first, second and third causes of action contained in the said complaint**

1.

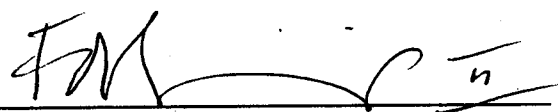
1 for declaratory relief, injunctive relief, writ of mandate, and each of them, fails to state facts
2 sufficient to constitute a cause of action.

3 This demurrer is based on the memorandum of points and authorities
4 filed herewith and in support hereof, the papers, documents, and other things on file in this
5 proceeding, and such argument as may be permitted by the court at the hearing of defendant and
6 respondent Board of Chiropractic Examiners' demurrer, as well as the demurrer and supporting
7 papers and argument filed contemporaneously herewith or later to be presented to the court by
8 defendants California Acupuncture Board and Council on Chiropractic Education.

9 DATED: September 18, 2003

10 Respectfully submitted,

11 BILL LOCKYER, Attorney General
12 of the State of California

13 

14 FRED A. SLIMP II
15 Deputy Attorney General

16 Attorneys for Defendant and Respondent,
17 California Board of Chiropractic Examiners

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PROOF OF SERVICE

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TYPE OF SERVICE**ADDRESSEE**

(A)

David Prescott, Esq.
Veritas Justice & Bioethics Institute
22365 El Toro Road, Suite 109
Lake Forrest, CA 92630

**Attorney for
PLAINTIFFS AND PETITIONERS**

(A)

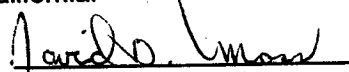
Michael J. Schroeder, Esq.
1851 East First Street, Suite 1160
Santa Ana, CA 92705

**Attorney for
COUNCIL ON CHIROPRACTIC EDUCATION**

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on September 18, 2003, at Oakland, California.

DAVID B. MOSS

(Typed Name)


David B. Moss
(Signature)

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CHIROPRACTIC EXAMINERS'
POINTS AND AUTHORITIES
IN SUPPORT OF DEMURRER TO
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v.

1 BILL LOCKYER, Attorney General
/ of the State of California
2 FRED A. SLIMP II, State Bar No. 118693
Deputy Attorney General
3 1515 Clay Street, Suite 2000 ~ P. O. Box 70550
Oakland, CA 94612-0550
4 Telephone: (510) 622-2117
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19 INTRODUCTION

20 This matter represents another in a long line of cases involving the meritless attempts
21 by a group of dissatisfied chiropractic practitioners to expand the scope of permissible practice
22 under the Chiropractic Initiative Act of 1922 (hereinafter the "Act") and the regulations duly
23 promulgated by defendant and respondent Board of Chiropractic Examiners (hereinafter
24 the "Chiropractic Board") thereunder. As the following arguments demonstrate, the law defining
25 the scope of chiropractic practice is well established in a manner fatal to plaintiffs' and petitioners'
26 ("plaintiffs") claims, and this demurrer must therefore be sustained without leave to amend.

27 ///

28 1.

ARGUMENT

I

TITLE 16, CALIFORNIA CODE OF REGULATIONS SECTION
302 IS A VALID DEFINITION OF THE SCOPE OF CHIROPRACTIC
PRACTICE UNDER THE 1922 INITIATIVE ACT AND IS NOT INVALID
UNDER DUE PROCESS OR EQUAL PROTECTION ANALYSIS

Plaintiffs ask this court to declare the Chiropractic Board's definition of the scope of chiropractic practice set forth at Title 16, California Code of Regulations section 302 ("Rule 302")¹ invalid, void, unconstitutional and of no force and effect, to adopt their particular view of the proper scope of chiropractic practice, and to enjoin the Chiropractic Board from enforcing Rule 302. (Plaintiffs' Second Amended Complaint ["SAC"] at pp. 34-35.) Plaintiffs' request, however, cannot be granted by this court because plaintiffs fail to state facts sufficient to constitute a cause of action for the relief requested.

A. No Fundamental Right or Suspect Class

Plaintiffs' attack on Rule 302 is premised mainly on the contention that the court can review the effect of Rule 302's definition of the scope of chiropractic practice on plaintiffs' aspirations for an increased scope of practice under something other than the limited review obtaining under the "rational basis" test. (See SAC at pp. 10-17.)² However, plaintiffs set forth no articulation of their interests as chiropractors that rises to the level of a fundamental right. (See Defendant California Acupuncture Board's Memorandum of Points and Authorities in Support of Demurrer to Plaintiffs' Second Amended Complaint [Acupuncture Board's P's & A's] at pp. 6-11, which the Chiropractic Board hereby incorporates by reference as though fully set forth herein.)

Similarly plaintiffs' contention that chiropractors constitute a "suspect class"

1. Title 16, California Code of Regulations section 302, being lengthy, is attached hereto as Exhibit 1 for the Court's examination.

2. Plaintiffs' contention that Rule 302 fails to pass even the limited "rational basis" test is addressed below.

2.

1 sufficient to enable the court to examine the effect of Rule 302 at a heightened level of scrutiny
 2 also fails. (See SAC at pp. 12-17.) As the Acupuncture Board's P's & A's point out, physicians
 3 have been found not to constitute a suspect class (see *id.* at p. 9, citing *Kenneally v. Medical*
 4 *Board* (1994) 27 Cal.App.4th 489, 496); dentists do not constitute a suspect class. (See *ibid.*,
 5 citing *Naismith Dental Corp. v. Board of Dental Examiners* (1977) 68 Cal.App.3d 253, 261.)

6 The *Kenneally* court articulated the proper analysis when it stated:

7 "The determination of whether a suspect class
 8 exists focuses on whether '[t]he system of
 9 alleged discrimination and the class it defines
 10 have [any] of the traditional indicia of suspectness:
 11 [such as a class] saddled with such disabilities,
 12 or subjected to such a history of purposeful
 13 unequal treatment, or relegated to such a position
 14 of political powerlessness as to command extra-
 15 ordinary protection from the majoritarian political
 16 process." (Citations omitted.) Suspect classes
 17 include race and alienage. (Citation omitted.)

13 (*Id.* at p. 496, fn5; see also Tribe, *American Constitutional Law*, 2d ed., 1988, at pp. 1465-1553 ^{check}
 14 [suspect classes may include distinctions based on age, alienage, disability, gender, sexual
 15 preference, illegitimacy, poverty, racial/ancestral status].) Plaintiffs have thus shown no basis
 16 whereby they may be brought within the category of persons found to constitute a suspect class,
 17 and the rational basis test applies to the validity of Rule 302. (See *Griffiths v. Superior Court*
 18 (2002) 96 Cal.App.4th 757, 776 [where no fundamental right or suspect class is shown, rational
 19 basis test applies].)

20 B. Rule 302 Passes Rational Basis Scrutiny

21 Plaintiffs err when they also assert that Rule 302 fails to pass even the rational
 22 basis standard of inquiry³ because other professionals who are authorized to use the hypodermic
 23

24 3. The rational basis test is routinely applied in areas of economic regulation. (*Kenneally v.*
 25 *Medical Board* (1994) 27 Cal.App.4th 489, 496, citing *Rittenband v. Cory* (1984) 159
 26 Cal.App.3d 410, 417). The "standard formulation of the test for minimum rationality" [citation
 27 omitted] is whether the classification is "rationally related to a legitimate government purpose."
 28 (Citation omitted.) Put another way, the classification must bear some fair relationship to
 a legitimate public purpose. (*Ibid.*, citing *Board of Supervisors v. Local Agency Formation*
Commission (1992) 3 Cal.4th 903, 913.) A distinction in legislation is not arbitrary if any set of

3.

1 needles and syringes that plaintiffs want to use, which is presently outside the scope of
 2 chiropractic practice under Rule 302, or who may otherwise sever or penetrate human tissue,
 3 as Rule 302 specifically forbids chiropractors to do, may "have only between 1% and 50% of the
 4 total education and training required to obtain a chiropractic license." (SAC at p. 10.)

5 Rule 302 clearly articulates the scope of practice set forth in *People v. Fowler*
 6 (1938) 32 Cal.App.2d (Supp.) 737 and a long line of additional cases following *Fowler*, as well
 7 as numerous opinions of the California Attorney General, likewise following *Fowler*, that
 8 interpret the scope of practice under the Initiative Act of 1922 as forbidding chiropractors to
 9 sever or penetrate human tissue, and thus to forbid the use of hypodermic needles and syringes
 10 that plaintiffs seek to obtain through this litigation.⁴

11 *Fowler*, interpreting the 1922 Act and relying upon the "well-established"
 12 and "quite definite" meanings of "chiropractic" in common understanding at the time of the
 13 initiative's passage, found the practice of chiropractic permitted by the Act to be:

14 "A drugless method of treating disease chiefly
 15 by manipulation of the spinal column; ... a system
 16 of healing that treats disease by manipulation of
 17 the spinal column; the specific science that removes
 pressure on the nerves by the adjustment of the
 spinal vertebrae. There are no instruments used,
 the treatment being by hand only."

18 (*Id.* at p. 745, citing the Standard Dictionary, 1913 edition, and the 1917 edition of *Corpus*
 19

20
 21 facts reasonably can be conceived that would sustain it. (*Griffiths v. Superior Court* (2002)
 96 Cal.App.4th 757, 776, citing *In re Demergian* (1984) 48 Cal.3d 284, 292; emphasis added.)

22 4. See, e.g., *In Re Hartman* (1935) 10 Cal.App.2d 213, 217 and *Crees v. Board of Medical*
 23 *Examiners* (1963) 213 Cal.App.2d 195, 203-208. See also *People v. Marineau* (1942)
 24 55 Cal.App.2d 893, *People v. Nunn* (1944) 65 Cal.App.2d 188, *People v. Mangiagli* (1950)
 25 97 Cal.App.2d (Supp.) 935, *People v. Augusto* (1961) 193 Cal.App.2d 253, wherein each
 26 and every reported incident of chiropractors' use of hypodermic needles or syringes was found
 27 improper and illegal as outside the scope of practice established by the Initiative Act of 1922.
 The opinions of the Attorney General at 9 Ops.Atty.Gen. 309 (1947), 29 Ops.Atty.Gen. 178
 28 (1957), and 59 Ops.Atty.Gen. 420 (1976) likewise unanimously find the severing and/or
 penetration of human tissue as sought by plaintiffs herein to be illegal as outside the scope
 of chiropractic practice under the 1922 Initiative Act.

4.

1 *Juris.*)⁵ The *Fowler* court also found that chiropractors inherited the practice limitations of
 2 "drugless practitioners" under the former 1913 Medical Practice Act, which included a ban
 3 on severing or penetrating human tissue. (*Id.* at p. 744.)

4 Thus Rule 302 merely replicates the same scope of chiropractic practice found
 5 in *Fowler* and in the consistent interpretation of California courts and law enforcement agencies
 6 thereafter. The Chiropractic Board's interpretation of the scope of chiropractic practice under
 7 the 1922 Act as set forth in Rule 302, being identical with the interpretation of the *Fowler* court
 8 and numerous judicial decisions and opinions of the Attorney General, is entitled to great weight
 9 and deference from the courts. (*Citicorp North America, Inc. v. Franchise Tax Board* (2000)
 X 10 83 Cal.App.4th 1403, 1418, *Jacobs, Malcolm & Burt v. Voss* (1995) 33 Cal.App.4th 1399, 1404.)
 11 Courts will not depart from an agency's construction unless clearly wrong or unauthorized.
 X 12 (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 309.) Courts will uphold
 13 an agency's construction of the statute it administers even if the agency's construction is not the
 14 only permissible one or not the one that the court would have itself adopted. (*RCJ Medical*
 X 15 *Services, Inc. v. Bonta* (2001) 91 Cal.App.4th 986, 1006.)

16 Thus, since the Chiropractic Board could reasonably conclude that a profession
 17 that "treats disease by manipulation of the spinal column" and is heir to the proscription against
 18 penetrating or severing human tissue as set forth in *Fowler, supra*, has no need for, and thus may
 19 not use, hypodermic needles or syringes, unless the court can find the *Fowler* rule itself to be
 20 irrational, Rule 302 meets the rational basis test.⁶

21 C. No Actual Case or Controversy

22 For the reasons set forth in the Acupuncture Board's P's & A's at pp. 3-5,
 23

24 5. Essentially identical definitions are also cited in *Fowler, supra*, from contemporary
 25 editions of Webster's Dictionary, Webster's New Standard Dictionary, Webster's International
 26 Dictionary, Nelson's Encyclopedia, and the International Encyclopedia.

27 6. As plaintiffs, in fact, *concede* that Rule 302 is consistent with the *Fowler* decision,
 28 the rationality of Rule 302 seems without actual challenge in this litigation. (See SAC at p. i6,
 paragraph 47.)

5.

1 which the Chiropractic Board hereby incorporates by reference as though fully set forth herein,
2 no actual case or controversy exists as to the validity of Rule 302 between plaintiffs and the
3 Chiropractic Board.⁷

4 D. No Cause of Action for Injunction

5 Code of Civil Procedure ("CCP") section 526(a)(1) provides in pertinent part that
6 injunctive relief is obtainable "[w]hen it appears *by the complaint* that the plaintiff is entitled to
7 the relief demanded, ..." (*Id.*, emphasis added.) Thus, when a claim fails to state facts sufficient
8 to constitute a cause of action, it likewise fails to state facts sufficient to constitute grounds for
9 issuance of an injunction. (See, e.g., 5 Witkin, *California Procedure*, 4th ed. 1997, section 779,
10 p. 236.) Here, as shown above, plaintiffs have failed to plead facts sufficient to constitute
11 a cause of action for declaratory relief. Therefore, they may not obtain injunctive relief either.
12 (CCP § 526(a)(1), Witkin, *op. cit.*, and cases cited therein.)

13 For all the reasons set forth herein above, plaintiffs' challenge to Rule 302 set forth
14 in the First Cause of Action of the SAC fails to state facts sufficient to constitute a cause of action
15 and the demurrer of the Chiropractic Board thereto should be sustained without leave to amend.

16 II

17 THE 1948 AND SUBSEQUENT AMENDMENTS TO THE
18 CHIROPRACTIC ACT DO NOT CREATE ADDITIONAL PRACTICE RIGHTS,
19 OR THE POTENTIAL FOR ADDITIONAL PRACTICE RIGHTS, AND THE
20 CHIROPRACTIC BOARD IS UNDER NO DUTY TO WRITE REGULATIONS
21 TO EFFECTUATE PLAINTIFFS' CONSTRUCTION OF THOSE AMENDMENTS

22 Plaintiffs' second cause of action maintains that the Chiropractic Board,

23 7. In this regard, plaintiffs assert an *abstract* or *hypothetical* right to perform acts
24 that exceed the scope of chiropractic practice authorized by Rule 302, while conceding that no
25 administrative or other action has been brought against any of them for any violation of the Act
26 or of any rule or regulation of the Chiropractic Board. (SAC at ¶ 19, p. 5.) This is insufficient
27 to constitute an actual controversy. (See *City of Los Angeles v. Standard Oil Co.* (1968)
28 262 Cal.App.2d 118, 127.) The Chiropractic Board also points out that no action for the review
of Rule 302 can be stated pursuant to Gov. C. section 11350 as no allegations of procedural
irregularity required by that section have been made in plaintiffs' SAC. See Gov. C. section
11350: "... The regulation ... may be declared to be invalid *for a substantial failure to comply*
with this chapter, ..." (Emphasis added.) See also Gov. C. sections 11350(b)(1), 11350(b)(2),
and 11350(d)(1)-(4).

1 as a result of certain amendments to the Initiative Act passed by the voters in 1948, 1970
 2 and 1976 relevant to, *inter alia*, "electives" in the chiropractic curriculum, is duty bound to enact
 3 regulations defining the content of elective courses made possible by the above amendments and,
 4 additionally, defining the scope of expanded "practice rights" that plaintiffs assert they may
 5 acquire through completion of the "elective" courses. Plaintiffs' second cause of action also fails
 6 to state facts sufficient to constitute a cause of action.

7 A. No Additional Practice Rights Created by Amendments to the Act

8 It is true that the amendments to the Chiropractic Initiative Act of 1922 that were
 9 approved by the voters in 1948 and 1976 *do* provide for the permissive incorporation of elective
 10 courses in chiropractic curricula. But the said amendments *do not* provide for, require, or even
 11 *mention* increased or expanded "practice rights," i.e., an expanded scope of chiropractic practice
 12 consistent with plaintiffs' desire to utilize hypodermic needles and syringes, purportedly
 13 obtainable by completion of "elective" courses.⁸

14
 15 8. Section 5 of the original Act prescribed a *minimum* of 2400 hours of required subjects
 16 as follows: "The schedule of minimum educational requirements to enable any person to
 17 practice chiropractic in this state is as follows ... anatomy (600 hours), histology (100 hours),
 18 elementary chemistry and toxicology (100 hours), physiology (200 hours), bacteriology (100
 19 hours), hygiene and sanitation (100 hours), pathology (200 hours), diagnosis or analysis (400
 20 hours), chiropractic theory and practice (500 hours), obstetrics and gynecology (100 hours).
 Total 2400 hours." The Chiropractic Board, by regulation, expanded that required minimum
 21 from 2400 hours to 4000 hours in 1944. (See *Hunt v. Board of Chiropractic Examiners* (1948)
 22 87 Cal.App.2d 98 [Board fully empowered by Section 4(b) and (e) of the Act to increase
 23 minimum required subject hours].) The amendments of 1948, as to which the Board issued no
 24 new regulation, maintained the required subject hours at 4000 and added an unspecified
 25 electives component ranging from 0% to 17% of the required courses. The amendments of
 26 1970, in pertinent part, (merely specified) that the Board was to exercise its power under Sections
 27 4 and 10 pursuant to the provisions of Administrative Procedure Act. The amendments of 1976
 28 further modified the course requirements percentages of Section 5 of the Act to (permit) 15% of
 course work to be done in chiropractic electives as follows: "The schedule of minimum
 educational requirements to enable any person to practice chiropractic in this state is as follows,
 except as herein otherwise provided: Group 1 Anatomy, including embryology and histology
 (14%), Group 2 Physiology (6%), Group 3 Biochemistry and clinical nutrition (6%), Group 4
 Pathology and bacteriology (10%), Group 5 Public health, hygiene and sanitation (3%), Group
 6 Diagnosis, dermatology, syphilology and geriatrics, and radiological technology, safety, and
 interpretation (18%), Group 7 Obstetrics and gynecology and pediatrics (3%), Group 8
 Principles and practice of chiropractic, physical therapy, psychiatry, and office procedure (25%)

7.

1 In order to cover this gaping hole in their analysis of the effect of the relevant
 2 amendments, plaintiffs argue that, since the *opponents* of the amendments speculated in their
 3 voter pamphlet statements that such elective courses *could* be used to expand the course
 4 of chiropractic practice and the *supporters* of the amendments failed to specifically refute this
 5 argument *of the opponents*, the amendments must have been intended to have this effect.
 6 (SAC, ¶ 56 at pp. 19-20, citing *Legislature v. Eu* (1991) 54 Cal.3d 492, 504-505.)

7 The *Eu* case, however, is not on point with respect to the effect to be given
 8 the voters' authorization of elective courses in chiropractic curricula. In *Eu* the Supreme Court
 9 construed the language in Proposition 140, the term limitation amendment passed by the voters
 10 in 1990, providing that "No Senator may serve more than 2 terms" and "No member of the
 11 Assembly may serve more than 3 terms." The question addressed was whether the said language
 12 imposed a lifetime ban on affected persons, or whether the language merely banned consecutive
 13 terms in the numbers indicated. (*Id.* at p. 504.)

14 The Supreme Court, having first found the language of the amendment ambiguous
 15 on the question of an intent to impose thereby a lifetime ban, considered available indicia of voter
 16 intent, including the analysis and arguments contained in the official ballot pamphlet. (*Id.*, citing
 17 *Kennedy Wholesale, Inc. v. Board of Equalization* (1991) 53 Cal.3d 245 and *Amador Valley Joint*
 18 *Union High School District v. Board of Equalization* (1978) 22 Cal.3d 208.) While acknowledging
 19 that language taken from the expressed fears and doubts of a proposition's opponents was "not
 20 highly authoritative in construing" the intent of such propositions due to the likelihood that the
 21 opponents' statements "overstate the adverse effects of the challenged measure" (*id.* at p. 505),
 22 the Court nevertheless utilized the opponents' characterizations of the effect of the proposal,
 23 uncontradicted by its proponents, because, in addition to agreeing with the characterization of the
 24 effect of the proposal given by the Legislative Analyst, the proponents' statements on the same
 25 question were *consistent* with those of the opponents and *supported* them. (*Ibid.*)

26 Here, in contrast, there is no ambiguity as there is no expression whatsoever in the

27 Total.....85% Electives.....15%".

28 8.

1 text of the amendment providing for, authorizing, or even mentioning "increased practice rights"
 2 to be gained from the provision of elective courses. In further contrast to the *Eu* case, moreover,
 3 which was litigated immediately following the election of 1990 and decided in 1991, the
 4 Chiropractic Board has consistently construed these amendments in a manner contradictory to the
 5 interpretation now advocated by plaintiffs. Such consistent administrative interpretation is,
 6 as noted above, entitled to great weight and will not be overturned unless clearly wrong or
 7 unauthorized. (See *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, *supra*.)
 8 Finally, on the effect of the inclusion of permissive electives in chiropractic curricula, there are
 9 no corresponding statements, either from the Legislative Analyst or the amendments' proponents,
 10 that can be read to be in agreement with the unsupported speculations of the opponents.

11 Under these circumstances, so different from the situation facing the *Eu* court,
 12 there is no reason to allow plaintiffs' citation of the opponents' "fears and doubts" to substitute
 13 for the total absence of any *positive* expression of legislative intent consistent with their preferred
 14 interpretation.⁹

15 B. No Duty to Write Regulations as Plaintiffs Desire

16 Plaintiffs argue that the Chiropractic Board has a duty to write regulations that
 17 effectuate their interpretation of the amendments at issue herein (see SAC at ¶¶ 64(b), 70) and
 18 pray for relief in mandate to effectuate this purported duty. (Prayer for Relief, SAC at ¶6, pp.
 19 35-36.) Plaintiffs are in error.

20 CCP section 1085 provides in pertinent part that "A writ of mandate may be
 21 issued ... to compel the performance of an act which the law specially enjoins, ..." This provision
 22 has been repeatedly interpreted to mean that the writ will only issue to compel the performance
 23 of a *ministerial* duty owed to petitioner; it does not lie to compel the performance of a *discretionary*

24
 25 9. For the same reasons, it is most unlikely that an average voter, having read the language
 26 of the proposed amendments and the official ballot pamphlets, would have concluded that the
 27 measures provided for "increased practice rights" for chiropractors merely by the addition of
 28 permissive elective courses. The intent of the enacting body being the paramount concern in
 construing statutory and constitutional provisions, this conclusion weighs dispositively against
 plaintiffs' interpretation. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 505.)

1 agency action. (See, e.g., *California State Psychological Assn. v. County of San Diego* (1983)
 2 148 Cal.App.3d 849, 858 [writ does not lie to control discretion within area lawfully entrusted to
 3 agency].) The writing of regulations has been committed to the Chiropractic Board's discretion
 4 by Section 4(b) of the Act of 1922 (see *Hunt v. Board of Chiropractic Examiners* (1948)
 5 87 Cal.App.2d 98, 101), and such discretionary authority has continued unbroken under the
 6 present codified Act as well.¹⁰

7 Moreover, courts that have considered the issue have found the decision to engage
 8 in agency rule making a discretionary, legislative act, not a ministerial function, and thus not
 9 subject to mandate. (See, e.g., *Tailfeather v. Board of Supervisors* (1996) 48 Cal.App.4th 1223,
 10 1244 [court cannot command or prohibit legislation (citations omitted); unless statute specifically
 11 calls for formal regulation in particular area, decision to promulgate regulations is discretionary
 12 (citations omitted)].)

13 Plaintiffs' second cause of action seeking relief in mandate ordering the
 14 Chiropractic Board to write regulations of any kind therefore fails to state facts sufficient to
 15 constitute a cause of action.

16 C. No Case or Controversy

17 For the reasons set forth in the Acupuncture Board's P's & A's at pp. 3-5,
 18 which the Chiropractic Board hereby incorporates by reference as though fully set forth herein,
 19 no actual case or controversy exists as to any putative increase in practice rights pursuant to the
 20 amendments to the Act of 1922;¹¹ plaintiffs' claims represent a mere difference of opinion

22 10. "Sec. 4. The board shall have power: ... (b) To adopt from time to time such rules and
 23 regulations *as the board may deem proper and necessary* for the performance of its work, ..." (Emphasis added.) Code section 1000-4 provides: "The board shall have power: ... (b) To
 24 adopt from time to time such rules and regulations *as the board may deem proper and*
 25 *necessary* for the performance of its work, the effective enforcement and administration of this
 26 act, the establishment of educational requirements for license renewal, and the protection of the
 27 public. (Emphasis added.)

28 11. The Chiropractic Board again points out that no action for declaratory relief can be
 stated pursuant to Gov. C. section 11350 as no allegations of procedural irregularity required by
 that section have been made in plaintiffs' SAC. See footnote 7, above.

1 between a group of citizens and a governmental agency regarding the interpretation of a legal
 2 enactment and, as such, fail to constitute a justiciable case or controversy. (See *Winter v.*
 3 *Gnaizda* (1979) 90 Cal.App.3d 750, 756.)

4 For all the reasons set forth herein above, plaintiffs' assertions of the possibility to
 5 acquire increased practice rights, further graduate study, and/or professional specialization
 6 pursuant to elective courses made permissible by amendments to the Act of 1922, and a claimed
 7 duty in the Chiropractic Board to write regulations effectuating such putative rights and other
 8 putative educational requirements as set forth in the Second Cause of Action of the SAC fail to
 9 state facts sufficient to constitute a cause of action, and the demurrer of the Chiropractic Board
 10 thereto should be sustained without leave to amend.

11 III

12 THE ROLE OF THE COUNCIL ON CHIROPRACTIC EDUCATION 13 UNDER THE AMENDMENTS IS CONSTITUTIONAL

14 In their Third Cause of Action, plaintiffs also attack, as violative of Article II,
 15 section 12 of the California Constitution, the limited role allotted to the Council on Chiropractic
 16 Education ("CCE") under the 1976 and 1978 amendments to the Act.¹² (SAC at pp. 29, 31.)
 17 The role sought to be overthrown is the CCE's provision of national accreditation standards for
 18 the approval of chiropractic programs in California. Plaintiffs' attack on the participation of
 19 California in the application of *national* standards to a *nationally practiced* profession is contrary
 20 to the law construing Article II, section 12.

21 A. No Violation of Cal. Const. Article II, Section 12

22 Prior to the passage of the 1976 amendments to the Initiative Act of 1922,
 23 Section 5 of the Act read as follows, in pertinent part:

24 "... Except in cases herein otherwise prescribed,

25
 26 12. Calif. Const. Art. II, section 12 provides in pertinent part: "No ... statute proposed to
 27 the electors by the Legislature or by initiative, that ... names or identifies any private
 28 corporation to perform any function or to have any power or duty, may be submitted to the
 electors or have any effect."

1 each applicant shall be a graduate of an approved
2 chiropractic school or college which teaches a
3 course of not less than 4,000 hours extended over
4 a period of four school terms of at least nine
5 months each ..." (*Id.*)

6 The relevant portion of the Act following the 1976 amendments read as follows:

7 "... Except in the cases herein otherwise prescribed,
8 each applicant shall present evidence of having
9 attended, and graduated from, a chiropractic college
10 accredited by the Accrediting Commission of the
11 Council on Chiropractic Education, *or the*
12 *equivalent thereof, ...*" (*Id.*, emphasis added.)

13 The relevant portions of the Act following the 1978 amendments read as follows:

14 "Sec. 4. Powers of the board. The board shall have
15 power: ... (g) To approve chiropractic schools and
16 colleges whose graduates may apply for licenses
17 in this state. The following shall be eligible for
18 approval: (1) Any chiropractic school or college
19 having status with the accrediting agency and
20 meeting the requirements of Section 5 of this act
21 and the rules and regulations adopted by the board.
22 ... (3) ... As used in this section, 'accrediting agency'
23 means (1) the Accrediting Commission of the Council
24 on Chiropractic Education, *other chiropractic school*
25 *and college accrediting agencies as may be recog-*
26 *nized by the United States Commissioner of Education,*
27 *or chiropractic school and college accrediting agencies*
28 *employing equivalent standards for accreditation as*
determined by the board, (2) ... or (3) ..., the board.
(Id., emphasis added.)

Thus at no time following the amendments of 1976 and 1978 did the CCE
enjoy an exclusive role in the provision of national accreditation standards under the Act.
Rather, the participation of the CCE, along with various alternative accrediting agencies, was
well within the rule of the seminal decision construing Article II, section 12, *Calfarm Ins. Co.*
v. Deukmejian (1989) 48 Cal.3d 805.

There, in finding violative of Article II, section 12 an initiative provision that
recognized an unnamed public interest corporation to be established as the exclusive advocate for
the interests of consumers, including the consumer activists who created the initiative provision,
the Supreme Court identified the interests protected by the section as follows:

12.

1 "The evil which the constitutional prohibition seeks
 2 to prevent—the conferring of special privilege upon
 3 *some organization sponsoring the initiative*—is
 4 most easily perpetrated by referring to an existing
 5 entity. But if the prohibition were limited to
 6 existing entities, it could easily be evaded by
 7 conferring a privilege upon some future corporation,
 8 describing its formation and governance so as
 9 to ensure its control by the *proponents of the*
 10 *initiative.*" (*Id.* at p. 833, emphasis added.)

11 Here, in strong contrast, the CCE was not a "sponsor" of the provisions by which
 12 it was selected for its limited role under the Act, within the understanding of that term as used
 13 in *Calfarm, supra*.¹³ Nor was it the recipient of some "special" privilege not enjoyed by other
 14 accrediting organizations identified in the amendment. CCE was not, in the language of
 15 *Calfarm*, a "promoter seeking self-aggrandizement," nor did it seek "some special privilege not
 16 afforded other organizations." (*Id.* at p. 834.) These dispositive distinctions, coupled with the
 17 courts' "extraordinarily broad deference to the electorate's power to enact laws by initiative"
 18 (*Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 Cal.App.4th 565, 574) insure
 19 that plaintiffs' challenge to the electorate's rational choice concerning the allocation of scarce
 20 public resources must fail.¹⁴

21 Finally, since the rules governing the interpretation of legislative enactments apply
 22 to constitutional provisions, even those enacted as voter initiatives, as well as to statutes (see,
 23 e.g., *People v. Bustamante* (1997) 57 Cal.App.4th 693, 699, fn5), the principle that an
 24 interpretation should not be adopted that produces an absurd or unfair result is applicable here.

25 13. The CCE was not even one of the "supporters" of the initiative proposal identified
 26 in the official ballot pamphlet.

27 14. Cf. also the limited role of the CCE, as indicated above, with the comprehensive
 28 direction of the project in *Pala Band, supra*, at pp. 584-585, which was found to run afoul of
 Article II, section 12. The situation of the CCE is much more similar to that of the specifically
 named private corporation found *not violative* of Article II, section 12 in *Citizens for*
Responsible Government v. City of Albany (1997) 56 Cal.App.4th 1199, since there, as here, the
 naming of the corporation in the challenged initiative proposal, although a local and not a state
 initiative, "*did not originate as a proposal from the electors.*" (*Id.* at p. 1229; emphasis added.)
 Rather, it was presented to them for ratification, as were the amendments that included the CCE
 and other accrediting agencies.

1 (See *Stanton v. Parish* (1980) 28 Cal.3d 107, 115 [constitutional provisions construed to avoid
 2 absurd or unfair result].) The role of the CCE under the amendments of 1976 and 1978 is limited
 3 and shared with other similar organizations. That role does not implicate the manipulation of
 4 the initiative process by a proposal's sponsor in order to gain special favor that was condemned
 5 in *Calfarm, supra*. Rather, the CCE's role enables California to participate in the uniform,
 6 national regulation of the profession of chiropractic to insure the public safety in a manner that
 7 recognizes the national character of the profession. It would, therefore, be tragically absurd and
 8 unfair to unnecessarily overturn this rational, effective utilization of uniform program standards,
 9 particularly in this era of severe governmental resource restraints, for the insular and partisan
 10 interest of plaintiffs.¹⁵

11 B. No Duty to Approve Non-CCE Schools or Programs for Chiropractic Specialists

12 Although plaintiffs argue, based on their construction of California Constitution
 13 Article II, Section 12 as set forth above, that the Chiropractic Board has a remedial duty to
 14 "approve schools not accredited by the CCE" and a like duty to "recognize and approve
 15 postgraduate education and training for the purpose of certifying chiropractic specialists"
 16 (SAC at ¶¶ 85(b), (c) at p. 26), plaintiffs again fall prey to the error of forgetting that the
 17 Chiropractic Board is not under a *duty* to exercise its discretionary functions in administering
 18 the Chiropractic Act in the manner desired by plaintiffs, and cannot be ordered to do so.
 19 (See, e.g., *California State Psychological Assn. v. County of San Diego* (1983) 148 Cal.App.3d
 20 849, *supra*, and *Tailfeather v. Board of Supervisors* (1996) 48 Cal.App.4th 1223, *supra*.)¹⁶

21

22
 23 15. The Chiropractic Board notes that on this question as well, the Board's reasonable
 24 interpretation of its constitutional authority and the constitutional provision it implements is
 25 entitled to considerable weight, and courts will not depart from the such an agency construction
 unless clearly erroneous or unauthorized. (See *The Recorder v. Comm. on Judicial*
Performance (1999) 72 Cal.App.4th 258, 269.)

26 16. In addition, plaintiffs have failed to exhaust their administrative remedies by
 27 presenting their proposals to the Chiropractic Board. (*Styne v. Stevens* (2001) 26 Cal.4th 42, 56
 28 [prior resort to administrative forum jurisdictional prerequisite to judicial consideration of
 claim].)

1 C. No Case or Controversy

2 For the reasons set forth in the Acupuncture Board's P's & A's at pp. 3-5,
 3 which the Chiropractic Board hereby incorporates by reference as though fully set forth herein,
 4 no actual case or controversy exists as to a putative violation of California Constitution,
 5 Article II, Section 12 between plaintiffs and the Chiropractic Board. For all the reasons set forth
 6 herein above, plaintiffs' assertions that the limited role of the CCE in furnishing national
 7 curricula standards for California professional chiropractic programs is violative of Article II,
 8 section 12 of the California Constitution and, further, that the Chiropractic Board is under a
 9 ministerial duty to write regulations providing for the approval of non-CCE approved professional
 10 chiropractic curricula and programs for certifying chiropractic specialists, as set forth in the
 11 Third Cause of Action of the SAC, fail to state facts sufficient to constitute a cause of action,
 12 and the demurrer of the Chiropractic Board thereto should be sustained without leave to amend.

13 CONCLUSION

14 For all the reasons set forth herein above, plaintiffs have failed to state facts
 15 sufficient to constitute a cause of action as to their First, Second and Third Causes of Action,
 16 and defendant and respondent Chiropractic Board's demurrer to said causes of action should be
 17 sustained without leave to amend.

18 DATED: September 18, 2003

19 Respectfully submitted,

20 BILL LOCKYER, Attorney General
 21 of the State of California

22 

23 FRED A. SLIMP II
 24 Deputy Attorney General

25 Attorneys for Defendant and Respondent
 26 Board of Chiropractic Examiners

EXHIBIT 1

16 CCR s 302

Cal. Admin. Code tit. 16, s 302

**BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS
TITLE 16. PROFESSIONAL AND VOCATIONAL REGULATIONS
DIVISION 4. STATE BOARD OF CHIROPRACTIC EXAMINERS
ARTICLE 1. GENERAL PROVISIONS**

This database is current through 5/16/2003, Register 2003, No. 20.

s 302. Practice of Chiropractic.

(a) Scope of Practice.

(1) A duly licensed chiropractor may manipulate and adjust the spinal column and other joints of the human body and in the process thereof a chiropractor may manipulate the muscle and connective tissue related thereto.

(2) As part of a course of chiropractic treatment, a duly licensed chiropractor may use all necessary mechanical, hygienic, and sanitary measures incident to the care of the body, including, but not limited to, air, cold, diet, exercise, heat, light, massage, physical culture, rest, ultrasound, water, and physical therapy techniques in the course of chiropractic manipulations and/or adjustments.

(3) Other than as explicitly set forth in section 10(b) of the Act, a duly licensed chiropractor may treat any condition, disease, or injury in any patient, including a pregnant woman, and may diagnose, so long as such treatment or diagnosis is done in a manner consistent with chiropractic methods and techniques and so long as such methods and treatment do not constitute the practice of medicine by exceeding the legal scope of chiropractic practice as set forth in this section.

(4) A chiropractic license issued in the State of California does not authorize the holder thereof:

(A) to practice surgery or to sever or penetrate tissues of human beings, including, but not limited to severing the umbilical cord;

(B) to deliver a human child or practice obstetrics;

(C) to practice dentistry;

(D) to practice optometry;

(E) to use any drug or medicine included in materia medica;

(F) to use a lithotripter;

(G) to use ultrasound on a fetus for either diagnostic or treatment purposes; or

(H) to perform a mammography.

(5) A duly licensed chiropractor may employ the use of vitamins, food supplements, foods for special dietary use, or proprietary medicines, if the above substances are also included in section 4057 of the Business and Professions Code, so long as such substances are not included in materia medica as defined in section 13 of the Business and Professions Code.

The use of such substances by a licensed chiropractor in the treatment of illness or injury must be within the scope of the practice of chiropractic as defined in section 7 of the Act.

(6) Except as specifically provided in section 302(a)(4), a duly licensed chiropractor may make use of X-ray and thermography equipment for the purposes of diagnosis but not for the purposes of treatment. A duly licensed chiropractor may make use of diagnostic ultrasound equipment for the purposes of neuromuscular skeletal diagnosis.

(7) A duly licensed chiropractor may only practice or attempt to practice or hold himself or herself out as practicing a system of chiropractic. A duly licensed chiropractor may also advertise the use of the modalities authorized by this section as a part of a course of chiropractic treatment, but is not required to use all of the diagnostic and treatment modalities set forth in this section. A chiropractor may not hold himself or herself out as being licensed as anything other than a chiropractor or as holding any other healing arts license or as practicing physical therapy or use the term "physical therapy" in advertising unless he or she holds another such license.

(b) Definitions.

(1) Board. The term "board" means the State Board of Chiropractic Examiners.

(2) Act. The term "act" means the Chiropractic Initiative Act of California as amended.

(3) Duly licensed chiropractor. The term "duly licensed chiropractor" means any chiropractor in the State of California holding an unrevoked certificate to practice chiropractic, as that term is defined in section 7 of the Act, that has been issued by the board.

<General Materials (GM) - References, Annotations, or Tables>

Note: The Chiropractic Initiative Act of California is listed in West's Annotated California Codes following section 1000 of the Business and Professions Code, and in Deering's California Codes Annotated as an appendix to the Business and Professions Code.

Note: Authority cited: Sections 1000-4(b) and 1000-10(a), Business and Professions Code.
Reference: Sections 1000-5 and 1000-7, Business and Professions Code.

HISTORY

1. Renumbering of subsection (b) to subsection (c) filed 7-7-78; effective thirtieth day thereafter (Register 78, No. 27). For prior history, see Register 65, No. 24.
2. Redesignation of section 318 as subsection 302(b) filed 7-7-78; effective thirtieth day thereafter (Register 78, No. 27).
3. Repealer and new section filed 8-4-87; operative 9-3-87 (Register 87, No. 32).
4. Change without regulatory effect of subsection (b)(2) (Register 88, No. 23).
5. Amendment of subsection (a) filed 4-4-91 as an emergency; operative 4-4-91 (Register 91, No. 17). A Certificate of Compliance must be transmitted to OAL by 8-3-91 or emergency language will be repealed by operation of law on the following day.
6. Amendment of subsection (a) with amendments refiled 6-3-91 as an emergency; operative 6-3-91 (Register 91, No. 34). A Certificate of Compliance must be transmitted to OAL by 10-1-91 or emergency language will be repealed by operation of law on the following day.
7. Certificate of Compliance as to 6-3-91 order transmitted to OAL 9-27-91 and filed 10-23-91 (Register 92, No. 24).
8. Change without regulatory effect amending subsection (a)(5) filed 1-12-2000 pursuant to section 100, title 1, California Code of Regulations (Register 2000, No. 2).

16 CA ADC s 302

END OF DOCUMENT

PROOF OF SERVICE

Page 1 of 2

CASE NAME: Laurence Tain, D.C., et al., v. State Board of Chiropractic Examiners, et al.**CASE NO.: CGC-03-419378**

I am employed in the County of Alameda, California. I am over the age of 18 years and not a party to the within entitled cause; my business address is 1515 Clay Street, 20th Floor, Oakland, California 94612-1413. On September 18, 2003, I served the following document(s):

**CALIFORNIA BOARD OF CHIROPRACTIC EXAMINERS'
POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER
TO SECOND AMENDED COMPLAINT FOR DECLARATORY RELIEF,
INJUNCTIVE RELIEF, AND WRIT OF MANDATE**

on the parties through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

- (A) **By First Class Mail:** I caused each such envelope to be placed in the internal mail collection system at the Office of the Attorney General with first-class postage thereon fully prepaid in a sealed envelope, for deposit in the United States Postal Service that same day in the ordinary course of business.
- (B) **By Certified Mail:** I caused each such envelope to be placed in the internal mail collection system at the Office of the Attorney General with first-class postage thereon fully prepaid in a sealed envelope, for deposit in the United States Postal Service that same day in the ordinary course of business.
- (C) **By Overnight Mail:** I caused each such envelope to be placed in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for.
- (D) **By Messenger Service:** I caused each such envelope to be delivered by a courier, with whom we have a direct billing account, who personally delivered each such envelope to the office of the address on the date last written below.
- (E) **By Facsimile:** I caused each such document to be served via facsimile electronic equipment transmission (fax) on the parties in this action by transmitting a true copy to the following fax numbers listed under each addressee below.
- (F) **By E-mail:** I caused each such document to be served via electronic equipment transmission (E-mail) on the parties in this action by transmitting a true copy to the following E-mail addresses listed under each addressee below.

PROOF OF SERVICE

Page 2 of 2

TYPE OF SERVICE**ADDRESSEE**

(A)

David Prescott, Esq.
Veritas Justice & Bioethics Institute
22365 El Toro Road, Suite 109
Lake Forrest, CA 92630

**Attorney for
PLAINTIFFS AND PETITIONERS**

(A)

Michael J. Schroeder, Esq.
1851 East First Street, Suite 1160
Santa Ana, CA 92705

**Attorney for
COUNCIL ON CHIROPRACTIC EDUCATION**

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on September 18, 2003, at Oakland, California.

DAVID B. MOSS

(Typed Name)


(Signature)