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 COUNTY OF SAN FRANCISCO

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8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 FOR THE COUNTY OF SAN FRANCISCO

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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
 17 BOARD, COUNCIL ON CHIROPRACTIC
 EDUCATION, and DOES 1 to 20,

18 Defendants and Respondents,

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Case No. CGC-03-419378

**DEFENDANT CALIFORNIA
 ACUPUNCTURE BOARD'S
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 MOTION FOR SUMMARY
 JUDGMENT AND/OR FOR
 SUMMARY ADJUDICATION
 OF ISSUES**

Date: January 28, 2004
 Time: 2:00 p.m.
 Dept.: 502

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20 **INTRODUCTION**

21 Plaintiff and petitioners (hereinafter referred to as "plaintiffs") are chiropractors wishing,
22 primarily, to possess and use hypodermic and acupuncture needles. They seek *legislative* relief
23 in this Court, in the form of an expansion of the scope of permissible chiropractic practice by
24 judicial decree, beyond that given by long-settled statutes and administrative regulations
25 governing chiropractors. These prior cases have uniformly held that chiropractors do *not* have
26 the right to sever or penetrate human tissue, or to possess or use needles.

27 Only the Fourth Cause of Action is asserted against the Acupuncture Board. Section
28 4935(b) of the Business and Professions Code makes it unlawful for any person other than a

1 physician, dentist, or podiatrist to practice acupuncture involving the application of a needle to
 2 the human body. Violation of this statute may be punishable as a misdemeanor. Plaintiffs seek a
 3 judicial declaration that this provision is invalid and no force and effect as to chiropractors,
 4 and/or a reformation of the list of persons permitted to use needles to include chiropractors.
 5 (SAC. ¶¶ 92, 93, 94, 116, 118).

6 As a matter of law, plaintiffs are not entitled to the relief they seek. Moreover, there are
 7 several additional grounds which support granting the Acupuncture Board's motion for summary
 8 judgment and/or summary adjudication. These include the prohibition against judicial
 9 intervention into purely legislative functions; and the fact that as a matter of law none of the
 10 asserted claims of plaintiff involve either a suspect class or any fundamental rights, consequently
 11 Business and Professions Code section 4935 comes before this court with a presumption of
 12 constitutionality.

13 I.

14 THE SCOPE OF CHIROPRACTIC PRACTICE IS CLEARLY DEFINED WITHIN 15 THE 1922 CHIROPRACTIC ACT AND FORBIDS THE PRACTICE OF 16 MEDICINE AND SURGERY

16 The construction of statutes and the ascertainment of legislative intent are purely
 17 questions of law. *Burnsed v. State Board of Control* (1987) 189 Cal.App.3d 213, 218, fn.3.
 18 Moreover, plaintiffs' have conceded that "the issue as to plaintiffs' practice rights under the 1922
 19 Chiropractic Act is clearly a question of law". (Statement of Undisputed Facts, No. 6, p.3). *

20 Section 7 of the 1922 Act states in relevant part that, the scope of Chiropractic is:

21 "...[T]o use all necessary mechanical and hygienic and
 22 sanitary measures incident to the care of the body, but shall
 23 not authorize the practice of medicine, surgery, ..."

23 Nothing within the Act permits chiropractors to sever or penetrate human tissues for the
 24 purpose of treatment.

25 Likewise nothing within the plain language of the 1922 Act modified the term 'surgery'
 26 as meaning 'operative surgery'.

27 In *People v. Chong* (1915) 28 Cal.App. 121, 122-123, a case decided before the passage
 28 of the 1922 Chiropractic Act, a defendant was charged with violations of the practice of medicine

1 without a license under the 1913 Medical Act. Defendant appealed his conviction alleging that
 2 section 8 of the 1913 Act was unconstitutional and void because it restricted chiropractors
 3 amongst other licensees of practicing their profession "without in any manner severing or
 4 penetrating any of the tissues of the human being". The Court interpreted the word "sever" to
 5 mean severance by cutting, however the Court also stated in regards to drugless practitioners that
 6 they may "not operate with a knife or in any way sever or penetrate the tissues of human beings".
 7 Obviously, the 1913 Act was meant to prohibit both severing (or cutting with a knife) and any
 8 other form of penetration of a human being.^{1/}

9 The 1922 Chiropractic Act in sec. 18 specifically stated that "Nothing herein shall be
 10 construed as repealing the 'Medical Practice Act' of June 2, 1913, or any subsequent
 11 amendments thereof..."

12 Consequently, the word 'surgery' in the 1922 Chiropractic Act was meant to convey the
 13 broadest sense of the word because the 1913 Medical Act did not use the word surgery but
 14 instead the phrase "to sever or penetrate the tissues of human beings and to use any and all other
 15 methods in the treatment of diseases". (Sec.8, 1913 Act, supra).

16 Therefore, the clear meaning of the 1922 Chiropractic Act was to prohibit chiropractors
 17 from the practice of medicine and surgery as defined by the 1913 'Medical Act' and any
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- 19 1. See CAB's separately filed Motion for Judicial Notice of the 1913 Act, Exhibit A
 20 , p.725. The 1913 Act in sec. 8 allowed two forms of licenses. Sec. 8 provided
 21 that: Sec. 8. Two forms of certificates shall be issued by said board
 22 under the seal thereof and signed by the president and secretary;
 23 first, a certificate authorizing the holder thereof to use drugs or
 24 what are known as medicinal preparations in or upon human
 25 beings and to sever or penetrate the tissues of human beings and
 26 to use any and all other methods in the treatment of diseases,
 27 injuries, deformities, or other physical or mental conditions, which
 28 certificate shall be designated "physician and surgeon certificate";
 second, a certificate authorizing the holder thereof to treat diseases,
 injuries, deformities, or other physical or mental conditions
 without the use of drugs or what are known as medicinal preparations
 and without in any manner severing or penetrating any of the
tissues of human beings except the severing of the umbilical cord,
 which certificate shall be designated "drugless practitioner certificate."

1 subsequent amendments thereto.

2 It is appropriate for a court to take judicial notice upon proper request of a party to
3 disclose limited extrinsic evidence as an aid to interpretation of a statute or initiative that is found
4 to be ambiguous. For example, printed arguments to the voters submitted with the initiative are
5 judicially noticeable. (*White v. Davis* (1975) 13 Cal3d 757, 775, fn. 11); Prior judicial
6 construction of a statute is judicially noticeable. (*Palos Verdes Faculty Assn. v. Palos Verdes*
7 *Unified School District* (1978) 21 Cal.3d 650, 659.); opinions of the Attorney General are
8 entitled to judicial notice and to great weight as an administrative construction of a statute.
9 (*Cristmat v. Los Angeles* (1971) 15 Cal.App.3d 590, 595)

10 **A. To the Extent the 1922 Chiropractic Act Is Found to Be Ambiguous, Subsequent**
11 **Published Court Decisions and Attorney General Opinions Have Interpreted the**
12 **Scope of Chiropractic Practice as Forbidding the Severing and Penetration of**
13 **Human Tissues**

14 In *People v. Fowler* (1938) 32 Cal.App.2d (Supp.) 737, 749-750, the Appellate Dept. of
15 the Superior Court stated that, "...[W]e conclude that the words 'medicine', and 'surgery', as
16 used in section 7 of the Chiropractic Act, were intended to continue as to chiropractors the
17 limitations imposed on drugless practitioners by the Medical Practice Act, that is, to deny them
18 the use of drugs and medical preparations and the severing or penetrating of the tissues of human
19 beings."

20 Likewise, the Fowler Court declared that the scope of practice of chiropractic can not be
21 expanded merely because other courses may from time to time be taught in chiropractic schools.
22 The Court stated at p. 748 that, "In other words, the chiropractor is limited to the practice of
23 chiropractic and the use of mechanical, hygiene and sanitary measures incident to the care of the
24 body, which do not invade the field of medicine and surgery, irrespective of whether or not
25 additional phases of the healing art, including medicine and surgery or the use of drugs, may have
26 been taught in chiropractic schools or colleges."

27 In *People v. Marineau* (1942) 55 Cal.App.2d 893, 907, the Court of Appeal held that "A
28 chiropractor was not authorized to use surgical instruments or hypodermic needles".

In *People v. Nunn* (1944) 65 Cal.App.2d 188, 194-195, A defendant chiropractor

1 appealed his conviction of practicing medicine without a license. His conviction was based in
2 part on his use of hypodermic needles to administer various types of injections. In upholding the
3 conviction the Court of Appeal stated:

4 "[A chiropractor] may not invade the field of medicine or
5 surgery, or administer drugs or medicines included within
6 *materia medica*. He is limited to use of mechanical hygienic
7 measures incident to the care of the body which do not invade
8 the field of medicine and surgery. (*People v. Fowler, supra.*)
9 The practice of medicine becomes unlawful when done or
10 attempted by one not legally licensed."

11 In Attorney General opinion no. 47-134 (9 Ops. Cal. Atty. Gen. 309, 310-311 (1947)); The
12 Attorney General concluded that the "Chiropractic Act, enacted by the initiative process, did not
13 repeal the Medical Practice Act and acts amendatory thereof, including the Business and
14 Professions Code, [and that] the laws of this state relating to public health and the practice of the
15 several healing arts are in *pari materia* and are to be read and construed together."

16 In *People v. Mangiali* (1950) 97 CalApp.2d (Supp.) 935, 939-940, a chiropractor was
17 prosecuted for practicing medicine without a license in part because the court found that, the
18 administration of blood plasma and use of hypodermic injections, "[W]hen done for the
19 treatment of ailment, disease, or other physical conditions are not such mechanical, hygienic or
20 sanitary measures incident to the care of the body, as may be used by chiropractic licensees."

21 In Attorney General Opinion 56-243 (29 Ops. Cal. Atty. Gen. 178-179 (1957)), the
22 Attorney General opined that chiropractors may not use hypodermic needles that penetrate
23 human tissues nor practice electrical surgery.

24 In *Crees v. California State Board of Medical Examiners* (1963) 213 Cal.App.2d 195,
25 211-212, the Court of Appeal clearly held that a holder of a chiropractic license is not authorized
26 to perform surgery not to sever the tissue of the human body. Moreover, *Crees* Adopted the
27 *Fowler* position that chiropractors inherited the practice limitations of "drugless practitioners"
28 under the 1913 Medical Practice Act, which included a ban on severing or penetrating human
tissue. (*Fowler, supra*, at 744; *Cress, supra*, at p. 211-214.)

Therefore, Chiropractic Rule 302 is a valid interpretation of the chiropractic scope of
practice as defined by both the *Fowler* and *Crees* decisions.

1 Clearly, no factual or legal question exists as to the chiropractic scope of practice and the
 2 CAB is entitled to summary judgment and/or summary adjudication that chiropractors can not
 3 use hypodermic needles and/or acupuncture needles as part of their scope of practice.

4 **II.**

5 **NO "ADDITIONAL PRACTICE RIGHTS" ARE CREATED BY ANY AMENDMENTS**
 6 **TO THE CHIROPRACTIC INITIATIVE ACT AND AS A MATTER OF LAW NO**
 7 **CAUSE OF ACTION IS STATED AGAINST THE ACUPUNCTURE BOARD**

8 Plaintiffs' second cause of action maintains that the Chiropractic Board, as a result of
 9 certain amendments to the Initiative Act passed by the voters in 1948, 1970 and 1976 relevant to
 10 "electives" in the chiropractic curriculum, is duty bound to, *inter alia*, enact regulations defining
 11 the content of elective courses made possible by the above amendments and, additionally,
 12 defining the scope of expanded "practice rights" that plaintiffs assert they may acquire through
 13 completion of the "elective" courses. However, there is no dispute as to any material fact and the
 14 Acupuncture Board is without jurisdiction to promulgate the regulations that plaintiffs desire.
 15 Plaintiffs' have incorporated by reference the Second Cause of Action within the Fourth Cause of
 16 Action against the CAB(SAC ¶91,p.28.) As a matter of law no cause of action can be maintained
 17 against the CAB to promulgate regulations not within the scope of the acupuncture licensing
 18 statutes.

19 The Acupuncture Board is an executive agency created by statute and has only as much
 20 rule making power as is invested in it by statute (Business and Professions Code sections 4925,
 21 4926, 4927, 4933.) In *Association for Retarded Citizens v. Department of Developmental*
 22 *Services* (1985) 38 Cal. 3d 384, at 391 our Supreme Court stated, " ... administrative action that
 23 is not authorized by , or is inconsistent with acts of the legislature is void." Courts have also held
 24 that there is no agency discretion to promulgate regulations which are inconsistent with the
 25 agency's governing statute. *State Board of Education v. Honig* (1993) 13 Cal.App.4th 720 at
 26 750-752; *Physicians & Surgeons Laboratories, Inc. v. Department of Health Services* (1992) 6
 27 Cal.App.4th 968 at 982.

28 The Legislature passed the Acupuncture Licensing Act which established the
 Acupuncture Board of California, with responsibilities enumerated by specific statutes therein.

1 The Acupuncture Board is authorized amongst other things to administer the Acupuncture
2 Licensing Act, and to administer the Acupuncture licensing exam. (Business and Professions
3 Code sections 4933, 4938.)

4 A declaratory relief action against a state agency that is not responsible for the
5 administration and enforcement of the Chiropractic Act, or for the promulgation of State Board
6 of Chiropractic regulations and educational elective criteria, is inappropriate (Gov't Code §
7 11350.) This is precisely what plaintiffs have done in their SAC naming the CAB as somehow
8 responsible for the Chiropractic Board's failure to promulgate regulations and establish
9 educational elective criteria. Clearly, there is no justiciable controversy between plaintiffs and
10 the Acupuncture Board over these issues. In *Zetterberg v. State Department of Health* (1974) 43
11 Cal.App.3d 657, 661 at 662, the court of appeal stated, "A citizen's mere dissatisfaction with the
12 performance of either the legislative or executive branches, or disagreement with their policies
13 does not constitute a justiciable controversy"; "A difference of opinion as to the interpretation of
14 a statute between a citizen and a governmental agency does not give rise to a justiciable
15 controversy..." (*Zetterberg* at p. 663.) Obviously, plaintiffs have failed to state an actual
16 controversy pursuant to Code of Civil Procedure § 1060 because the CAB has no duty to
17 promulgate the regulations and/or establish the elective courses that plaintiffs desire.
18 Consequently no legal rights have been or could be breached by the CAB.

19 Secondly although it is true that the amendments to the Act that were approved by the
20 voters in 1948 and 1976 *do* provide for the permissive incorporation of elective courses in
21 chiropractic curricula, it is clear from the plaint text of those amendments that they *do not*
22 provide for, require, or even *mention* increased or expanded "practice rights," i.e., an expanded
23 scope of chiropractic practice consistent with plaintiffs' desire to utilize hypodermic needles and
24 syringes, purportedly obtainable by completion of "elective" courses.

25 Turning to the amendments there is no ambiguity in the amendments themselves as there
26 is no expression whatsoever in the text of the amendment providing for, authorizing, or even
27 mentioning "increased practice rights" to be gained from the provision of elective courses, and
28 there are no corresponding statements, either from the Legislative Analyst or the amendments'

1 proponents, that can be read to be in agreement with the unsupported speculations of the
2 opponents. There is therefore no reason to allow plaintiffs' citation of the opponents' "fears and
3 doubts" to substitute for the total absence of any *positive* expression of legislative intent
4 consistent with their preferred interpretation.

5 There is no ambiguity in the Chiropractic Act itself concerning the phrase "as taught in
6 chiropractic schools or colleges" since that phrase has been thoroughly construed and explained
7 by the *Fowler* decision. Plaintiffs' claim of increased "practice rights" in their Second Cause of
8 Action based on amendments to the Act must, therefore, fall.

9 Plaintiffs, however, also maintain in the Second Cause of Action that the Chiropractic
10 Board is under a variety of duties to effectuate their vision of the scope of chiropractic practice.
11 (See SAC at pp. 35-36 [duty to prescribe and define requirements for electives made available
12 under the relevant amendments to the Act; duty to define additional practice rights available on
13 completion of electives; duty to administer examinations on elective courses; duty to certify
14 chiropractic specialists; duty to promulgate regulations effectuating the preceding duties].) This
15 contention is entirely without legal basis, however, as plaintiffs point to no ministerial duty owed
16 them by either the Chiropractic Board or the Acupuncture Board.

17 CCP section 1085 provides in pertinent part that "A writ of mandate may be issued ...
18 to compel the performance of an act which the law specially enjoins, ..." This provision has
19 been repeatedly interpreted to mean that the writ will only issue to compel the performance of
20 a *ministerial* duty owed to petitioner; it does not lie to compel the performance of a *discretionary*
21 agency action. (See, e.g., *California State Psychological Assn. v. County of San Diego* (1983)
22 148 Cal.App.3d 849, 858 [writ does not lie to control discretion within area lawfully entrusted to
23 agency].) The writing of regulations has been specifically committed to the Chiropractic Board's
24 discretion by Section 4(b) of the Act of 1922 (see *Hunt v. Board of Chiropractic Examiners*
25 (1948) 87 Cal.App.2d 98, 101), and such discretionary authority has continued unbroken under
26 the present codified Act as well.²

27
28 2. "Sec. 4. The board shall have power: ... (b) To adopt from time to time such rules and
regulations as the board may deem proper and necessary for the performance of its work, ..."

III.

**PLAINTIFFS HAVE FAILED TO STATE A CAUSE OF ACTION TO INVALIDATE
BUSINESS AND PROFESSIONS CODE SECTION 4935**

Plaintiffs challenge the constitutionality of Business and Professions Code section 4935 on equal protection grounds. (SAC ¶¶107, 112, 115).

It is well-established that duly-enacted public statutes are entitled to a strong presumption of validity and constitutionality. "We start with the well-settled proposition that '[i]n considering the constitutionality of a legislative act we presume its validity, resolving all doubts in favor of the Act. Unless conflict with a provision of the state of federal Constitution is clear and unquestionable, we must uphold the Act." (*Mission Housing Development Co. v. City and County of San Francisco* (1997) 59 Cal.App.4th 55, 78-79 (citation omitted)). "[A]ll presumptions and intendments favor the validity of [the] statute and mere doubt does not afford sufficient reason for a judicial declaration of invalidity. As a result, "[t]he first hurdle to overcome is the bedrock principle that courts are exceedingly reluctant to declare legislation unconstitutional." (*Personal Watercraft Coalition v. Board of Supervisors* (2002) 100 Cal.App.4th 129, 137).

The Fourteenth Amendment's guarantee of equal protection and the California Constitution's protection of the same right are substantially equivalent and are analyzed in a similar fashion. (*Kenneally v. Medical Board* (1994) 27 Cal.App.4th 489, 495). "In considering an equal protection challenge we must first determine the appropriate standard of review; as developed by the high court, depends upon the classification involved in, and interests affected by, the challenged law. (*Bowens v. Superior Court* (1991) 1 Cal.4th 36, 42.) The traditional approach involves two tiers. The challenged law will be subject to strict scrutiny only if it operates to the peculiar disadvantage of a suspect class or impinges on a fundamental right

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

1 (*Landau v. Superior Court* (1998) 81 Cal.App.4th 191, 207-208. Recognizing it is the
2 Legislature's responsibility to draw distinctions between groups, and the lines can rarely be
3 precisely drawn, courts generally apply the rational basis test to most legislation. The rational
4 basis test is routinely applied in areas of economic regulation. (*Rittenband v. Cory* (1984) 159
5 Cal.App.3d, 410, 417.) The standard formulation of the test for minimum rationality is whether
6 the classification is rationally related to a legitimate governmental purpose (citations omitted).

7 Likewise plaintiffs challenge the constitutionality of section 4935 on due process
8 grounds. (SAC ¶108, ¶112, pp.32-33). The analysis and law applicable to a due process challenge
9 is substantially similar to an equal protection challenge. (*Ameri-Medical Corp. v. Workers*
10 *Comp. Appeals Bd.* (1996) 42 Cal.App.4th 1260, 1283 (burden on party challenging statute that
11 legislature acted in an arbitrary or irrational way); *Grupe v. California Coastal Commission*
12 (1985) 166 Cal.App.3d 148, 168-169 (A statute is valid if it reasonably relates to a legitimate
13 governmental purpose.) Therefore, the following analysis is applicable to both challenges
14 brought by plaintiffs.

15 **A. Plaintiffs Have Failed To Identify Any Legally Sufficient Fundamental Rights.**

16 Plaintiffs have alleged in conclusory fashion that the following desires of chiropractors
17 rise to the level of constitutionally protected fundamental rights: (1) "The right of chiropractors
18 to work within said variants of the holistic paradigm, to fully develop their diagnostic and
19 treatment perspective and to realize their own individual identity within their chosen profession
20 is a fundamental right protected by the First, Fifth, Ninth and Fourteenth Amendment to the
21 United States Constitution, Article 1, section 1 and Art. 1, sec. 7" (SAC ¶34, p. 12); (2) "To fully
22 develop the holistic paradigm and their respective treatment agendas" (SAC ¶111, p. 32); (3) "To
23 fully realize their own individual identity within their chosen vocation" (SAC ¶111, p. 32); (4)
24 "To fully enjoy the economic benefits and property rights of their chosen profession" (SAC ¶111,
25 p. 32); (5) "[T]hat patients have a right to choose a mode of healing more consonant with their
26 personal beliefs and philosophical convictions than allopathic medicine; and that patients have a
27 right to reasonable access to lawful medical treatment of their own choosing..." (SAC ¶¶37, 38,
28 p.12; ¶111, p. 32).

1 None of these asserted chiropractic desires constitute legally recognized fundamental
2 rights. For example, the plaintiffs in *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d
3 1, 17, made a contention similar to the current chiropractor plaintiffs that the right to be licensed
4 in a profession was a fundamental interest, therefore requiring a heightened level of scrutiny.
5 This contention was dismissed by the Supreme Court in *D'Amico*. The Supreme Court stated,
6 "Nor can it be said that the instant case touches upon 'fundamental issues' as that term has been
7 lately defined by the United States Supreme Court. . .(*D'Amico, supra*, at p. 18; see also *Landau*
8 *v. Superior Court* (2000) 81 Cal.App.4th 191, 210). A physician's right to continue to practice
9 her licensed profession is not a fundamental right for equal protection purposes. (*Kenneally v.*
10 *Medical Board* (1994) 27 Cal.App.4th 489, 496; "There is no fundamental right to pursue an
11 occupation that has an intimate relationship to the public interest." (*Adamson v. Department of*
12 *Social Services* (1988) 207 Cal.App.3d 14, 23). "An individual does not possess a fundamental
13 right to pursue an occupation wherein technical complexity and intimate relationship to the
14 public interest and welfare counsel. . .deference to legislative judgment. . .[A] constitutional right
15 to pursue an occupation presupposes an ability to perform the job. Neither the federal nor state
16 Constitution suggests a person be employed absent the ability to satisfy job requirements. No
17 prohibitive classification occurs when a statute categorizes those who can and cannot meet job
18 requirements." (*Johnson v. Civil Service Com.* (1984) 153 Cal.App.3d 585, 588-589.)

19 Consequently, plaintiffs' desires to "develop their diagnostic and treatment perspective
20 and to develop the holistic paradigm and their respective treatment agendas", are not fundamental
21 rights.

22 Nor is there a fundamental right to seek a particular cure or form of treatment for one's
23 illness. In *People v. Younghanz* (1984) 156 Cal.App.3d 811, 816, the Court of Appeal stated,
24 "The right to seek a particular form of medical treatment as a cure for one's illness, however, has
25 not been recognized as a fundamental right in California. In fact, the right to make decisions
26 regarding medical treatment has been held not to be a fundamental right within the concept of a
27 right to privacy. (*People v. Privitera* (1979) 23 Cal.3d 697). In *Privitera, supra* at p. 702 our
28 Supreme Court stated as follows regarding whether a fundamental privacy right existed in the

1 area of medical treatment, "[T]he kinds of 'important decisions' recognized by the high court to
2 date as falling within the right of privacy involve "matters relating to marriage, procreation,
3 contraception, family relationships, and child rearing, and education" (citations omitted), but do
4 not include medical treatment."

5 Likewise the Ninth Circuit in *NAAP v. California Board of Psychology* (2000) 228 F.3d
6 1043, 1050 held that "substantive due process rights do not extend to the choice of type of
7 treatment or of a particular health care provider. The Seventh Circuit has noted that most federal
8 courts have held that a patient does not have a constitutional right to obtain a particular type of
9 treatment or to obtain treatment from a particular provider if the government has reasonably
10 prohibited that type of treatment or provider (*Mitchell v. Clayton* (7th Cir. 1993), 995 F.2d 772,
11 775.)"

12 Therefore, plaintiffs' allegations regarding the rights of patients "to choose a mode of
13 treatment more consonant with their personal beliefs and rights to access to medical treatment"
14 do not rise to the level of recognized fundamental interests.

15 Plaintiffs also claim that a right "to enjoy the economic benefits and property rights of
16 their chosen profession" is a fundamental one. (SAC ¶¶35, 111.) However, chiropractors do not
17 have a right to penetrate human tissues by long established case authority and the scope of
18 practice as defined in Chiropractic Board Rule 302. Consequently they have no property rights to
19 use syringes and needles. In *Duncan v. Department of Personnel Administration* (2000) 77
20 Cal.App.4th 1166, 1175, the Court of Appeal quoted from *Board of Regents v. Roth* (1972) 408
21 U.S. 564, 577, for the following proposition: "To have a property interest in a benefit, a person
22 clearly must have more than an abstract need or desire for it. He must have more than a
23 unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is
24 the purpose of the ancient institution of property to protect those claims upon which people rely
25 in their daily lives, reliance that must not be arbitrarily undermined . . . Property interests, of
26 course, are not created by the Constitution. Rather they are created and their dimensions are
27 defined by existing rules or understandings that stem from an independent source such as state
28 law. . ."

1 Federal constitutional substantive due process analysis of a claim is triggered only when
2 there exists a legitimate claim of entitlement.

3 In *Schultz v. Regents of the University of California* (1984) 160 Cal.App.3d 768, 786, the
4 Court of Appeal stated that the "requirement of a statutorily conferred benefit limits the universe
5 of potential due process claims: presumably not every citizen adversely affected by governmental
6 action can assert due process rights; identification of a statutory benefit subject to deprivation is a
7 prerequisite."

8 Likewise, the federal Constitution does not protect lesser interests or mere expectations.
9 *Walsh v. Louisiana High School Athletic Assn.* (5th Cir. 1980), 616 F.2d 152, 159. "The due
10 process clause of the Fourteenth Amendment extends constitutional protection to those
11 fundamental aspects of life, liberty, and property that rise to the level of a 'legitimate claim
12 entitlement' but does not protect lesser interests or 'mere expectations'.

13 Consequently, neither the federal or state Constitution, nor California statutory law
14 contains any provision that entitles chiropractors to an absolute right to penetrate human tissues
15 with syringes or needles. Therefore, their unilateral desire to use syringes and needles is not a
16 right or entitlement protected by either the federal or state constitution.

17 **B. Plaintiffs Have Failed To Identify A Suspect Class.**

18 Plaintiffs claim that chiropractors are a suspect class. (SAC ¶93). Quite to the contrary,
19 professional status alone is not considered a suspect classification. This assertion was clearly
20 addressed by our Supreme Court in *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1,
21 18, when the high court stated that a "cognizable 'fundamental interest in the right to pursue
22 employment . . . is clearly limited in scope to 'the common occupations of the community and
23 should not be applied to professions whose technical complexity and intimate relationship to the
24 public interest and welfare counsel greater deference to the legislative judgment.'" (See also
25 *Landau v. Superior Court* (1998) 81 Cal.App.4th 191, 209-210; for purposes of equal protection
26 analysis, the right to a professional license or to continue practice pursuant to that license does
27 not constitute a fundamental interest).

28 In *Kenneally v. Medical Board* (1994) 27 Cal.App.4th 489, 496, the Court of Appeal held

1 that licensed physicians do not belong to a suspect class. In *Naismith Dental Corp. v. Board of*
 2 *Dental Examiners* (1977) 68 Cal.App.3d 253, 261, the Court of Appeal held that dentistry is not
 3 a suspect classification. In *NAAP v. California Board of Psychology* (9th Cir. 2000) 228 F.3d
 4 1043, 1049, the Ninth Circuit held that "psychoanalysts are not a suspect class entitled to
 5 heightened scrutiny." In *Russell v. Hug* (9th Cir. 2002) 275 F.3d 812, 819 f.5 citing *Giannini v.*
 6 *Real* (9th Cir. 1990) 911 F.2d 354, 359, for the proposition that "lawyers are not a suspect class."
 7 Likewise, chiropractors are not a suspect class.

8 **C. The Appropriate Standard Of Review Is The Rational Basis Standard.**

9 In *Kenneally, supra*, at pp. 495-496, 499-500, the Court of Appeal stated the standard of
 10 review in equal protection cases as follows:

11 "Under the rational basis test, the decision of the legislature
 12 as to what is a sufficient distinction to warrant the
 13 classification will not be overturned by the courts unless it is
 14 palpably arbitrary and beyond rational doubt erroneous. A
 15 distinction in legislation is not arbitrary if any state of facts
 16 reasonably can be conceived that would sustain it". (*In Re*
 17 *Demergian* (1989) 48 Cal.3d 284, 292.) 'The burden of
 18 demonstrating the irrationality of the statute rests on [the
 19 party assailing it] and it will not be set aside if any basis
 20 reasonably may be conceived to justify it. (Citations omitted.)
 21 "In general, the [United States Supreme] Court has been
 22 especially deferential to legislative classifications in cases of
 23 challenges to the state regulation of licensed professions."
 24 (*Brandwein v. California Board of Osteopathic Examiners,*
 25 9th Cir. 1983) 708 F.2d 1466, 1470.)" (*Kenneally* at p. 499-
 26 500.)

27 A prerequisite to a meritorious equal protection claim is a showing that the State has
 28 treated two or more similarly situated groups in an unequal manner. (*In Re Eric J.* (1979) 25
 29 Cal.3d 522, 530.) "The 'similarly situated' prerequisite simply means that an equal protection
 30 claim cannot succeed, and does not require further analysis, unless there is some showing that the
 31 two groups are sufficiently similar with respect to the purpose of the law in question that some
 32 level of scrutiny is required in order to determine whether the distinction is justified." (*People v.*
 33 *Nguyen* (1997) 54 Cal.App.4th 705, 714, *emphasis added.*; *Guevara v. Superior Court* (1998) 62,
 34 Cal.App.4th 864, 872.)

Turning to plaintiffs' SAC, it is clear as a matter of law that chiropractors are not similar

1 to physicians, podiatrists and dentists with regard to education, training, testing requirements,
2 and scope of practice. Physicians, podiatrists and dentists all are allowed by virtue of their
3 education, training, and passage of a licensing exam to perform surgery on the human body albeit
4 within the scope of their respective licenses. (Business and Professions Code sections 1625,
5 2051, 2472.) Chiropractors, on the other hand, are not allowed to perform surgery pursuant to
6 their scope of practice (Calif. Code of Regulations, title 16, §302), and do not have such rigorous
7 and technically complex surgical education, training, and examination requirements. (Calif.
8 Code of Regulations, tit. 16, §§331.11-331.13.) "A distinction in legislation is not arbitrary if
9 any set of facts reasonably can be conceived that would sustain it." (*Dribin v. Superior Court*
10 (1951) 37 Cal.2d 345, 352.) The state need not prove such facts exist; the existence of facts
11 supporting the legislative judgment is presumed.

12 "In performing this [equal protection] analysis, we are not bound by explanations of the
13 statute's rationality that may be offered by the litigants or other courts. Rather, those challenging
14 the legislative judgment must convince us 'that the legislative facts on which the classification is
15 apparently based could not reasonably be conceived to be true by the governmental
16 decisionmaker' ". (*Ameri-Medical Corp. v. Workers' Comp. Appeals Bd.* (1996) 42 Cal.App.4th
17 1260,1285.)

18 Here the goal of the legislature in enacting the Acupuncture Licensing Law was stated in
19 Section 6 of the Statutes of 1975 in pertinent part as follows:

20 " SEC.6. This act is an urgency statute necessary for the immediate preservation of the
21 public...health and safety...The facts constituting such necessity are:

22 There is a growing interest in acupuncture and a substantial amount of practice of
23 acupuncture and yet there is no statute protecting the public from incompetent practitioners...The
24 promising possibilities of acupuncture make it imperative that it be practiced as extensively as
25 possible, as soon as possible, with adequate protection of the public." (Stats. 1975, Ch. 267, § 6,
26 p. 0053, Exhibit B, attached to Motion for Judicial Notice.)

27 The articulated goal of the legislature was to protect the public from incompetent
28 practitioners of acupuncture by regulating and setting standards to allow the practice in this state.

1 One such means of protecting the public was to allow licensees whose licenses already permitted
 2 penetration of human tissues to practice acupuncture without the necessity of obtaining an
 3 acupuncture license, and as to all others, such as chiropractors, permitting them to do so only
 4 after demonstrating competence by obtaining an Acupuncture License.

5 There can be no question that section 4935(b) of the Business and Professions Code
 6 serves a legitimate state interest by protecting the public from persons who are not qualified to
 7 penetrate human tissues by virtue of their training, education, examination and scope of practice.
 8 The medical, podiatry, and dental professions are technically complex and intertwined in an
 9 intimate relationship with the public interest and welfare. The work of physicians, podiatrists,
 10 and dentists by virtue of their respective scope of permitted practices have potentially greater
 11 health and safety consequences for their patients based upon their ability to perform surgery.
 12 Consequently, it is not irrational that the Legislature would exclude chiropractors from the
 13 exemption allowed to these other three licensed professions.

14 Consequently, plaintiffs have not and cannot state a legally sufficient cause of action
 15 regarding the constitutionality of Business and Professions Code section 4935(b). Accordingly,
 16 the Court should grant CAB's motion for summary judgment and/or summary adjudication.

17 **D. Business and Professions Code Section 4935 Is Not Unconstitutional Because It Is
 Under Inclusive.**

18 Plaintiffs challenge the constitutionality of section 4935 on the grounds that it is under
 19 inclusive because it does not grant chiropractors the same exemption from licensure as
 20 physicians, dentists, and podiatrists. (SAC ¶108,p.32). They are wrong. As demonstrated above,
 21 they are not similarly situated as the specifically listed licensees because they are not permitted to
 22 penetrate or sever human tissues. Moreover, as our Supreme Court stated in *Warden v. State Bar*
 23 (1999) 21 Cal.4th 628, at p.649, fn.13, " a court may not strike down a classification simply
 24 because...it may be to some extent under inclusive...".

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IV.

THE COURT CAN NOT REFORM A STATE STATUTE WITHOUT INVADING THE DOCTRINE OF SEPARATION POWERS AND WITHOUT VIOLATING SUPREME COURT PRECEDENT PROHIBITING SUCH AN INCURSION INTO A SOLELY LEGISLATIVE CORE FUNCTION.

A trial court's task is to construe and not to amend a statute. In *Manufacturer's Life Ins. Company v. Superior Court* (1995) 10 Cal.4th 257, 274, our Supreme Court quoted from the language of section 1858 of the Code of Civil Procedure as follows:

"In the construction of a statute...the office of a judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

In *Napa Valley Wine Train, Inc. v. Public Utilities Com.* (1990) 50 Cal.3d 370, 381, our Supreme Court quoted from *People v. One 1940 Ford V-8 Coupe* (1950) 36 Cal.2d 471, 475, for the proposition that, "[i]n construing the statutory provisions a court is not authorized to insert qualifying provisions not included and may not rewrite the statute to conform to an assumed intention which does not appear from its language."

Clearly, the Legislature did not intend to exempt chiropractors from the licensure requirements as it did for physicians, dentists, and podiatrists. The Legislature obviously knew how to create an exemption for chiropractors if it wished to do so. Obviously, it did not. (*City of Ontario v. Superior Court* (1993) 12 Cal.App.4th 894, 902.)

A. The Legislative Intent Of Business And Professions Code Section 4935(b) Is Clear. Consequently Reformation Is Inappropriate.

In *Kopp v. Fair Political Practices Committee* (1995) 11 Cal.4th 607, 642, our Supreme Court held that it is appropriate in some situations for courts to reform - i.e., "rewrite" - enactments in order to avoid constitutional infirmity, when doing so "is more consistent with legislative intent than the result that would attend outright invalidation." *Arp. v. Worker's Comp. Appeals Bd.* (1997) 19 Cal.3d 395, 407-408. "Although courts do not lack the power to remedy a constitutional defect by literally rewriting statutory language, it is a comparatively drastic

1 alternative to be invoked sparingly, and only when the result achieved by such a course is more
2 consistent with legislative intent than the result that would attend outright invalidation (*Arp.*,
3 *supra*, 19 Cal.3d at pp. 407-408)." *Emphasis added.*

4 Clearly, the Legislature intended to exclude chiropractors from the use of needles unless
5 they first obtained a license to practice from the Acupuncture Board. This is particularly
6 apparent when we turn to the legislative history of section 4935(b) and find that the relevant
7 language of section (b) at issue here was originally part of section 2159 of Senate Bill 86, which
8 was chaptered as section 267 and approved by the Governor on July 12, 1975. (See Exhibit B, p.
9 0052 attached to Defendant Acupuncture Board's separately filed Motion for Judicial Notice; "A
10 complaint may be read as if it included matters judicially noticed. . .such matters may show the
11 complaint fails to state a cause of action though its bare allegations do not disclose the defect. . .;
12 *Four Star Electric, Inc. v. F & H Construction* (1992) 7 Cal.App.4th 1375, 1379.)

13 The 1975 Act which first permitted the practice of acupuncture provided in section 2159
14 of the Business and Professions Code that:

15 "Nothing in the Article shall be construed to prevent the
16 practice of acupuncture by a holder of a physicians' and
17 surgeons' certificate, by a licensed dentist, or by a licensed
podiatrist, within the scope of their respective licenses".

18 Moreover, it is clear that the Legislature in 1975 did not want to extend this same
19 exemption to licensed chiropractors because the same Act provided in section 2155 of the
20 Business and Professions Code that acupuncture could only be performed upon first receiving a
21 referral from "a licensed physician and surgeon, a licensed dentist, a licensed podiatrist, or a
22 licensed chiropractor . . ." (*Emphasis added*; See Stats. 1975, Ch. 267, § 6, p. 0050, Exhibit B1
23 attached to Motion for Judicial Notice.)

24 In addition, section 6 of the Act declared that it was an urgency statute necessary for the
25 immediate protection of the health or safety of the public. (Stats. 1975, Ch. 267, § 6, p. 0053,
26 Exhibit B1, attached to Motion for Judicial Notice.)

27 Consequently, it is clear that the Legislature did not intend to include chiropractors within
28 current section 4935(b) because of the unstated but implied reason that they were not competent

1 to do so; consequently, it would be inappropriate for this court to reform the statute.

2 V.

3 BUSINESS AND PROFESSIONS CODE SECTION 4935 READ IN
4 CONJUNCTION WITH SECTION 18 OF THE CHIROPRACTIC ACT AND
5 CALIFORNIA CONSTITUTION ARTICLE 2, SECTION 10(C) DOES NOT
6 IMPLIEDLY EXEMPT CHIROPRACTORS FROM BEING LICENSED AS
7 ACUPUNCTURISTS IN ORDER TO USE NEEDLES

6 Plaintiffs argue that they are impliedly exempt from the provisions of Business and
7 Professions Code section 4935. (SAC ¶¶92, 102-106) They are clearly wrong. A clear reading
8 of the applicable provisions reveals no conflict between the Chiropractic Act, the Constitution,
9 and section 4935(b). Section 4935 does not repeal any section of the Chiropractic Act. It does
10 not limit the services a chiropractor may legally render under his professional license. A similar
11 argument was made by Chiropractors under former section 24 of Article IV ,now section 10(c)),
12 and rejected by the court of appeal in *California Chiropractic Assn. v. Board of Administration*
13 (1974) 40 Cal.App.3d 701, 704.

14 The Court of Appeal in *Sacramento Newspaper Guild v. Sacramento County Bd. of*
15 *Suprs.* (1968) 263 Cal.App.2d 41, at p. 54, stated that "the courts assume that in enacting a
16 statute the Legislature was aware of existing, related laws and intended to maintain a consistent
17 body of statutes." Section 4935(b) is consistent with the prohibition in the Chiropractic Act that
18 chiropractors may not penetrate human tissues in order to treat patients. Therefore, plaintiffs'
19 argument is without merit.

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CONCLUSION

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For the foregoing reasons, Defendant Acupuncture Board's Motion for Summary Judgment or alternatively for Summary Adjudication should be granted.

Dated: November 10, 2003

Respectfully submitted,

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