

ORIGINAL

1 **BILL LOCKYER, Attorney General**
of the State of California
2 **VIVIEN H. HARA**
Supervising Deputy Attorney General
3 **JOSÉ R. GUERRERO**
State Bar No. 97276
4 Deputy Attorney General
1515 Clay Street, 20th Floor
5 P.O. Box 70550
Oakland, CA 94612-0550
6 Telephone: (510) 622-2219
Fax: (510) 622-2121
7
Attorneys for California Acupuncture Board

FILED AND ENTERED
SUPERIOR COURT
COUNTY OF SAN FRANCISCO

03 SEP 19 PM 2:29

CONCOURSE - LI. CLERK

Gina Gonzales
DEPUTY CLERK

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

12 **Laurence Tain, et al.,**

Plaintiff,

v.

14 **State Board of Chiropractic Examiners, et al.,**

Defendant.

Case No. CGC-419378

**DEFENDANT CALIFORNIA
ACUPUNCTURE BOARD'S
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF DEMURRER
TO PLAINTIFFS' SECOND
AMENDED COMPLAINT**

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

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

| | Page |
|---|------|
| 1 | |
| 2 | |
| 3 INTRODUCTION | 1 |
| 4 ARGUMENT | 2 |
| 5 I. A Demurrer Is Appropriate to Test the Sufficiency of a Complaint | 2 |
| 6 II. Defendant Acupuncture Board Should Be Dismissed with Prejudice | |
| 7 Because No Case or Controversy Exists Within the Meaning of Code of | |
| 8 Civil Procedure Section 1060 | 3 |
| 9 III. Plaintiffs Have Failed to State a Cause of Action to Invalidate Business | |
| 10 and Professions Code Section 4935 | 5 |
| 11 A. Plaintiffs Have Failed To Identify Any Legally Sufficient | |
| 12 Fundamental Rights | 6 |
| 13 B. Plaintiffs Have Failed To Identify A Suspect Class | 9 |
| 14 C. The Appropriate Standard Of Review Is The Rational Basis Standard | 10 |
| 15 IV. The Court Can Not Reform a State Statute Without Invading the Doctrine | |
| 16 of Separation Powers and Without Violating Supreme Court Precedent | |
| 17 Prohibiting Such an Incursion into a Solely Legislative Core Function | 12 |
| 18 A. The Legislative Intent Of Business And Professions Code Section | |
| 19 4935(b) Is Clear. Consequently Reformation Is Inappropriate. | 13 |
| 20 V. Business and Professions Code Section 4935 Read in Conjunction with | |
| 21 Section 18 of the Chiropractic Act and California Constitution Article 2, | |
| 22 Section 10(c) Does Not Impliedly Exempt Chiropractors from Being | |
| 23 Licensed as Acupuncturists in Order to Use Needles | 14 |
| 24 CONCLUSION | 15 |
| 25 | |
| 26 | |
| 27 | |
| 28 | |

TABLE OF AUTHORITIES

| | Page |
|---|-------|
| Federal Cases | |
| <i>Board of Regents v. Roth</i> (1972) 408 U.S. 564 | 8 |
| <i>NAAP v. California Board of Psychology</i> (2000) 228 F.3d 1043 | 8, 10 |
| <i>Walsh v. Louisiana High School Athletic Assn.</i> (5 th Cir. 1980), 616 F.2d 152 | 9 |
| <i>Mitchell v. Clayton</i> (7 th Cir. 1993), 995 F.2d 772 | 8 |
| <i>Russell v. Hug</i> (9 th Cir. 2002) 275 F.3d 812 | 10 |
| State Cases | |
| <i>Adamson v. Department of Social Services</i> (1988) 207 Cal.App.3d 14 | 7 |
| <i>Arp. v. Worker's Comp. Appeals Bd.</i> (1997) 19 Cal.3d 395 | 13 |
| <i>Bame v. City of Del Mar</i> (2001) 86 Cal.App.4th 1346 | 4 |
| <i>Bowens v. Superior Court</i> (1991) 1 Cal. 4 th 36 | 6 |
| <i>Cantu v. Resolution Trust Corp.</i> (1992) 4 Cal.App.4th 857 | 3 |
| <i>City of Cotati v. Cashman</i> (2002) 29 Cal.4th 69 | 5 |
| <i>City of Ontario v. Superior Court</i> (1993) 12 Cal.App.4th 894 | 12 |
| <i>Dribin v. Superior Court</i> (1951) 37 Cal.2d 345 | 11 |
| <i>Duncan v. Department of Personnel Administration</i> (2000) 77 Cal.App.4th 1166 | 8 |
| <i>D'Amico v. Board of Medical Examiners</i> (1974) 11 Cal.3d 1 | 7, 9 |

TABLE OF AUTHORITIES (continued)

| | Page |
|---|----------|
| 1 | |
| 2 State Cases cont. | |
| 3 <i>Fallen Leaf Protection Assn. v. State of California</i> | |
| 4 (1975) 46 Cal.App.3d 816 | 3 |
| 5 <i>Four Star Electric, Inc. v. F & H Construction</i> | |
| (1992) 7 Cal.App.4th 1375 | 13 |
| 6 <i>Guevara v. Superior Court</i> | |
| 7 (1998) 62, Cal.App.4th 864 | 10 |
| 8 <i>Hayter Trucking, Inc. v. Shell Western E & P, Inc.</i> | |
| (1993) 18 Cal.App.4th 1 | 2 |
| 9 <i>In Re Eric J.</i> | |
| 10 (1979) 25 Cal.3d 522 | 10 |
| 11 <i>Johnson v. Civil Service Com.</i> | |
| (1984) 153 Cal.App.3d 585 | 7 |
| 12 <i>Kenneally v. Medical Board</i> | |
| 13 (1994) 27 Cal.App.4th 489 | 6, 7, 10 |
| 14 <i>Kopp v. Fair Political Practices Committee</i> | |
| (1995) 11 Cal.4th 607 | 13 |
| 15 <i>Landau v. Superior Court</i> | |
| 16 (1998) 81 Cal.App.4th 191 | 6, 7, 9 |
| 17 <i>Manufacturer's Life Ins. Company v. Superior Court</i> | |
| (1995) 10 Cal.4th 257 | 12 |
| 18 <i>Mission Housing Development Co. v. City and County of San Francisco</i> | |
| 19 (1997) 59 Cal.App.4th 55 | 5 |
| 20 <i>Naismith Dental Corp. v. Board of Dental Examiners</i> | |
| (1977) 68 Cal.App.3d 253 | 10 |
| 21 <i>Napa Valley Wine Train, Inc. v. Public Utilities Com.</i> | |
| 22 (1990) 50 Cal.3d 370 | 12 |
| 23 <i>National Organization for Reform of Marijuana Laws v. Gain</i> | |
| (1979) 100 Cal.App.3d 586 | 11 |
| 24 <i>People v. Fowler</i> | |
| 25 (1938) 32 Cal.App.2d Supp. 737 | 1 |
| 26 <i>People v. Mangiagli</i> | |
| (1950) 97 Cal.App.2d Supp. 935 | 2 |
| 27 <i>People v. Nguyen</i> | |
| 28 (1997) 54 Cal.App.4th 705 | 10 |

TABLE OF AUTHORITIES (continued)

| | Page |
|---|------|
| 1 | |
| 2 State Cases cont. | |
| 3 <i>People v. Nunn</i> | |
| 4 (1944) 65 Cal.App.2d 188 | 2 |
| 5 <i>People v. One 1940 Ford V-8 Coupe</i> | |
| (1950) 36 Cal.2d 471 | 12 |
| 6 <i>People v. Privitera</i> | |
| 7 (1979) 23 Cal.3d 697 | 7 |
| 8 <i>People v. Younghanz</i> | |
| (1984) 156 Cal.App.3d 811 | 7 |
| 9 <i>Personal Watercraft Coalition v. Board of Supervisors</i> | |
| 10 (2002) 100 Cal.App.4th 129 | 5 |
| 11 <i>Picton v. Anderson Union High School District</i> | |
| (1996) 50 Cal.App.4th 726 | 2 |
| 12 <i>Rittenband v. Cory</i> | |
| 13 (1984) 159 Cal.App.3d, 410 | 6 |
| 14 <i>Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.</i> | |
| (1968) 263 Cal.App.2d 41 | 14 |
| 15 <i>Schultz v. Regents of the University of California</i> | |
| 16 (1984) 160 Cal.App.3d 768 | 9 |
| 17 <i>Selby Realty Co. v. City of Buena Ventura</i> | |
| (1973) 10 Cal.3d 110 | 4 |
| 18 <i>Warden v. State Bar</i> | |
| 19 (1999) 21 Cal.4th 628 | 12 |
| 20 <i>Watson v. Los Altos School District</i> | |
| (1957) 149 Cal.App.2d 768 | 3 |
| 21 <i>Zetterberg v. State Department of Public Health</i> | |
| 22 (1974) 43 Cal.App.3d 657 | 4 |
| 23 | |
| 24 | |
| 25 Constitutional Provisions | |
| 26 California Constitution, Article II | |
| § 10(c) | 14 |
| 27 | |
| 28 | |

TABLE OF AUTHORITIES (continued)

| | Page |
|--|------------|
| 1 | |
| 2 Statutes | |
| 3 Business and Professions Code § 1625 | 11 |
| 4 § 2051 | 11 |
| § 2155 | 13 |
| 5 § 2159 | 13 |
| § 2472 | 11 |
| 6 § 4935(b) | 2-5, 11-14 |
| 7 California Code of Regulations, Title 16 | |
| § 302 | 11 |
| 8 §§ 331.11-331.13 | 11 |
| 9 Code of Civil Procedure | |
| § 25 | 3 |
| 10 § 1060 | 3, 4 |
| § 1858 | 12 |
| 11 Statutes of 1975, Chapter 267 | |
| 12 § 6 | 14 |
| 13 | |
| 14 Other Authorities | |
| 15 Chiropractic Act | |
| § 18 | 14 |
| 16 Chiropractic Board Rule | |
| 17 302 | 8 |
| 18 Senate Bill 86 | |
| § 2159 | 13 |
| 19 | |
| 20 | |
| 21 | |
| 22 | |
| 23 | |
| 24 | |
| 25 | |
| 26 | |
| 27 | |
| 28 | |

1 BILL LOCKYER, Attorney General
of the State of California
2 VIVIEN H. HARA
Supervising Deputy Attorney General
3 JOSÉ R. GUERRERO
State Bar No. 97276
4 Deputy Attorney General
1515 Clay Street, 20th Floor
5 P.O. Box 70550
Oakland, CA 94612-0550
6 Telephone: (510) 622-2219
Fax: (510) 622-2121
7 Attorneys for California Acupuncture Board

8
9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF SAN FRANCISCO

11
12 Laurence Tain, et al.,

Plaintiff,

v.

13
14 State Board of Chiropractic Examiners, et al.,

Defendant.

Case No. CGC-03-419378

**DEFENDANT CALIFORNIA
ACUPUNCTURE BOARD'S
MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF DEMURRER
TO PLAINTIFFS' SECOND
AMENDED COMPLAINT**

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

15
16
17
18
19 **INTRODUCTION**

20 Plaintiffs and petitioners (hereinafter referred to as "plaintiffs") are chiropractors
21 wishing, primarily, to possess and use hypodermic and acupuncture needles. They seek *legislative*
22 relief in this Court, in the form of an expansion of the scope of permissible chiropractic practice by
23 judicial decree, beyond that given by long-settled statutes and administrative regulations governing
24 chiropractors. These prior cases have uniformly held that chiropractors do *not* have the right to sever
25 or penetrate human tissue, or to possess or use needles.^{1/}

26
27 1. See, e.g., *People v. Fowler* (1938) 32 Cal.App.2d Supp. 737, 749-50 ("[T]he words
28 'medicine' and 'surgery', as used in section 7 of the Chiropractic Act, were intended to continue as
to chiropractors the limitations imposed on drugless practitioners by the Medical Practice Act, that
is, to deny them the use of drugs and medical preparations and the severing or penetrating of the

1 considered. (*Fallen Leaf Protection Assn. v. State of California* (1975) 46 Cal.App.3d 816, 831).
 2 In addition, in the interests of justice, on demurrer, a court will also consider judicially noticeable
 3 facts, even if such facts are not set forth in the complaint." (*Cantu v. Resolution Trust Corp.* (1992) X
 4 4 Cal.App.4th 857, 877).²

5 In *Cantu, supra* at 877, the Court of Appeal stated that, "In addition, in the interest
 6 of justice, on demurrer, a court will also consider judicially noticeable facts, even if such facts are
 7 not set forth in the complaint. (*Watson v. Los Altos School District* (1957) 149 Cal.App.2d 768)."

8 Unfortunately for plaintiffs, their SAC is devoid of any facts that state a cause of
 9 action against the Acupuncture Board, Business and Professions Code section 4935 is constitutional,
 10 and the court is without jurisdiction to grant any relief based solely upon hypothetical events and
 11 conclusions of law. *NOT HYPOTHETICAL - UNPREJUDICIAL*

12 II

13 **DEFENDANT ACUPUNCTURE BOARD SHOULD BE**
 14 **DISMISSED WITH PREJUDICE BECAUSE NO CASE OR**
 15 **CONTROVERSY EXISTS WITHIN THE MEANING OF**
 16 **CODE OF CIVIL PROCEDURE SECTION 1060.**

17 It is a fundamental principle that a claim or cause of action must be founded upon
 18 either a cognizable legal obligation or a cognizable legal injury. (Code of Civ. Proc. § 25). There
 19 can be no claim, in other words, where no duty is owed (and breached), and/or no injury suffered.

20 Plaintiffs fail to articulate any facts that allege any obligation owed or injury caused
 21 to them by the Acupuncture Board. Indeed, the main complaint voiced by plaintiffs, that the scope
 22 of chiropractic practice has been given a narrower definition than they claim it ought to be given, is
 23 based purely upon hypothetical facts and the unilateral desire of chiropractor plaintiffs' to expand
 24 their scope of practice.

25 For example, plaintiffs do not allege that any action has been taken or threatened by
 26 the Acupuncture Board upon which a claim might be based. To the contrary, plaintiffs concede there
 27 is no pending action taken against any of the plaintiffs (SAC ¶19). Plaintiffs therefore fail to state

28 2. The Acupuncture Board has filed a separate motion requesting judicial notice of the
 legislative history of Business and Professions Code section 4935 to be heard contemporaneously
 with the Board's demurrer to plaintiffs' SAC.

1 a basis for an existing actual controversy as required by Code of Civ. Proc. § 1060:

2 "Any person interested...or who desires a declaration of his rights or
3 duties with respect to another...may, in cases of actual controversy
4 relating to the legal rights and duties of the respective parties, bring
an original action in the superior court...for a declaration of his rights
and duties..." (*Emphasis added.*)

5 In *Selby Realty Co. v. City of Buena Ventura* (1973) 10 Cal.3d 110 at 117, our Supreme Court stated
6 that, "[A]ctual controversy" referred to in this statute [the declaratory relief statute] is one which
7 admits of definitive and conclusive relief by judgment within the field of judicial administration; as
8 distinguished from an advisory opinion upon a particular or hypothetical state of facts. The
9 judgment must decree, not suggest what the parties may or may not do." (*Bame v. City of Del Mar* X
10 (2001) 86 Cal.App.4th 1346, 1355 (*emphasis added.*))

11 Clearly, there is no justiciable controversy between the plaintiffs and the Acupuncture
12 Board, and any opinion the trial court might render would be advisory in nature which is explicitly
13 forbidden by law in an action brought for declaratory relief. (*Selby Realty Co. v. City of Buena*
14 *Ventura* (1973) 10 Cal.3d at p. 117; *Zetterberg v. State Department of Public Health* (1974) 43
15 Cal.App.3d 657, 661 at 662: "A citizen's mere dissatisfaction with the performance of either the
16 legislative or executive branches, or disagreement with their policies does not constitute a justiciable
17 controversy"; "A difference of opinion as to the interpretation of a statute between a citizen and a
18 governmental agency does not give rise to a justiciable controversy...", *Zetterberg* at p. 663.

19 Therefore, plaintiffs may not merely seek a clarification of their practice rights under
20 Business and Professions Code section 4935, and/or seek declaratory relief based on their
21 disagreement with the fact that the Legislature did not exempt chiropractors from having to have an
22 Acupuncture license in order to possess and use needles. Yet this is exactly what they do. Paragraph
23 105 of the SAC states that "plaintiffs request a judicial determination as to the application of
24 Business and Professions Code section 4935 to chiropractors and a judicial declaration that Business
25 and Professions Code section 4935 is no force or effect as to chiropractors and does not limit their
26 practice rights." Paragraphs 116 and 118 similarly seek invalidation or reformation of section 4935
27 based upon plaintiffs' disagreement therewith, and not on any "actual controversy" arising from or
28 related to this statute.

1 Nor may plaintiffs manufacture an "actual controversy" out of the fact that they have
2 named the Acupuncture Board *in this lawsuit*. The California Supreme Court has recently addressed
3 such attempts to "bootstrap" an "actual controversy." "The requirement that plaintiffs seeking
4 declaratory relief allege the 'existence of an *actual, present controversy*' [citation] would be illusory
5 if a plaintiff could meet it simply by pointing to the very lawsuit in which he or she seeks that relief.
6 Obviously, the requirement cannot be met in such a bootstrapping manner; 'a request for declaratory
7 relief will not create a cause of action that otherwise does not exist.'" (*City of Cotati v. Cashman* x
8 (2002) 29 Cal.4th 69, 80 (citations omitted) (emphasis original)). A basis for a claim or cause of
9 action must exist *independent of the claim(s) for declaratory relief*. Where no independent basis
10 exists, as here, there is no possible entitlement to declaratory relief.

11 Consequently, the court should sustain the Acupuncture Board's demurrer without
12 leave to amend.

13 III

14 **PLAINTIFFS HAVE FAILED TO STATE A CAUSE OF ACTION TO** 15 **INVALIDATE BUSINESS AND PROFESSIONS CODE SECTION 4935.**

16 Plaintiffs challenge the constitutionality of Business and Professions Code section
17 4935 on equal protection grounds. (SAC ¶¶107, 112, 115).

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

28 ///

1 The Fourteenth Amendment's guarantee of equal protection and the California
2 Constitution's protection of the same right are substantially equivalent and are analyzed in a similar
3 fashion. (*Kenneally v. Medical Board* (1994) 27 Cal.App.4th 489, 495). "In considering an equal
4 protection challenge we must first determine the appropriate standard of review; as developed by the
5 high court, depends upon the classification involved in, and interests affected by, the challenged law.
6 (*Bowens v. Superior Court* (1991) 1 Cal. 4th 36, 42.) The traditional approach involves two tiers.
7 The challenged law will be subject to strict scrutiny only if it operates to the peculiar disadvantage
8 of a suspect class or impinges on a fundamental right (*Landau v. Superior Court* (1998) 81
9 Cal.App.4th 191, 207-208. Recognizing it is the Legislature's responsibility to draw distinctions
10 between groups, and the lines can rarely be precisely drawn, courts generally apply the rational basis
11 test to most legislation. The rational basis test is routinely applied in areas of economic regulation.
12 (*Rittenband v. Cory* (1984) 159 Cal.App.3d, 410, 417.) The standard formulation of the test for
13 minimum rationality is whether the classification is rationally related to a legitimate governmental
14 purpose (citations omitted).

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

17 Plaintiffs have alleged in conclusory fashion that the following desires of
18 chiropractors rise to the level of constitutionally protected fundamental rights: (1) "The right of
19 chiropractors to work within said variants of the holistic paradigm, to fully develop their diagnostic
20 and treatment perspective and to realize their own individual identity within their chosen profession
21 is a fundamental right protected by the First, Fifth, Ninth and Fourteenth Amendment to the United
22 States Constitution, Article 1, section 1 and Art. 1, sec. 7" (SAC ¶34, p. 12); (2) "To fully develop
23 the holistic paradigm and their respective treatment agendas" (SAC ¶111, p. 32); (3) "To fully realize
24 their own individual identity within their chosen vocation" (SAC ¶111, p. 32); (4) "To fully enjoy
25 the economic benefits and property rights of their chosen profession" (SAC ¶111, p. 32); (5) "[T]hat
26 patients have a right to choose a mode of healing more consonant with their personal beliefs and
27 philosophical convictions than allopathic medicine; and that patients have a right to reasonable
28 access to lawful medical treatment of their own choosing..." (SAC ¶¶37, 38, 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 1, X
 3 17, made a contention similar to the current chiropractor plaintiffs that the right to be licensed in a
 4 profession was a fundamental interest, therefore requiring a heightened level of scrutiny. This
 5 contention was dismissed by the Supreme Court in *D'Amico*. The Supreme Court stated, "Nor can
 6 it be said that the instant case touches upon 'fundamental issues' as that term has been lately defined
 7 by the United States Supreme Court. . . (*D'Amico, supra*, at p. 18; see also *Landau v. Superior Court* X
 8 (2000) 81 Cal.App.4th 191, 210). A physician's right to continue to practice her licensed profession
 9 is not a fundamental right for equal protection purposes. (*Kenneally v. Medical Board* (1994) 27 X
 10 Cal.App.4th 489, 496; "There is no fundamental right to pursue an occupation that has an intimate
 11 relationship to the public interest." (*Adamson v. Department of Social Services* (1988) 207 X
 12 Cal.App.3d 14, 23). "An individual does not possess a fundamental right to pursue an occupation
 13 wherein technical complexity and intimate relationship to the public interest and welfare counsel.
 14 . . . deference to legislative judgment. . . [A] constitutional right to pursue an occupation presupposes
 15 an ability to perform the job. Neither the federal nor state Constitution suggests a person be
 16 employed absent the ability to satisfy job requirements. No prohibitive classification occurs when
 17 a statute categorizes those who can and cannot meet job requirements." (*Johnson v. Civil Service* X
 18 *Com.* (1984) 153 Cal.App.3d 585, 588-589.)

19 Consequently, plaintiffs' desires to "develop their diagnostic and treatment
 20 perspective and to develop the holistic paradigm and their respective treatment agendas", are not
 21 fundamental rights. w
1

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

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

5 Likewise the Ninth Circuit in *NAAP v. California Board of Psychology* (2000) 228 ~~X~~
6 F.3d 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
13 of 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
16 of 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 practice
18 as defined in Chiropractic Board Rule 302. Consequently they have no property rights to use
19 syringes and needles. In *Duncan v. Department of Personnel Administration* (2000) 77 Cal.App.4th
20 1166, 1175, the Court of Appeal quoted from *Board of Regents v. Roth* (1972) 408 U.S. 564, 577,
21 for the following proposition: "To have a property interest in a benefit, a person clearly must have
22 more than an abstract need or desire for it. He must have more than a unilateral expectation of it.
23 He must, instead, have a legitimate claim of entitlement to it. It is the purpose of the ancient
24 institution of property to protect those claims upon which people rely in their daily lives, reliance
25 that must not be arbitrarily undermined . . . Property interests, of course, are not created by the
26 Constitution. Rather they are created and their dimensions are defined by existing rules or
27 understandings that stem from an independent source such as state law. . ."

28 ///

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

3 In *Schultz v. Regents of the University of California* (1984) 160 Cal.App.3d 768, 786,
4 the 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
9 expectations. *Walsh v. Louisiana High School Athletic Assn.* (5th Cir. 1980), 616 F.2d 152, 159.
10 "The due 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 with
15 syringes or needles. Therefore, their unilateral desire to use syringes and needles is not a right or
16 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
19 contrary, professional status alone is not considered a suspect classification. This assertion was
20 clearly addressed by our Supreme Court in *D'Amico v. Board of Medical Examiners* (1974) 11
21 Cal.3d 1, 18, when the high court stated that a "cognizable 'fundamental interest in the right to
22 pursue employment . . . is clearly limited in scope to 'the common occupations of the community
23 and 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 *Landau*
25 *v. Superior Court* (1998) 81 Cal.App.4th 191, 209-210; for purposes of equal protection analysis,
26 the right to a professional license or to continue practice pursuant to that license does not constitute
27 a fundamental interest).

28 ///

1 In *Kenneally v. Medical Board* (1994) 27 Cal.App.4th 489, 496, the Court of Appeal
 2 held that licensed physicians do not belong to a suspect class. In *Naismith Dental Corp. v. Board*
 3 *of Dental Examiners* (1977) 68 Cal.App.3d 253, 261, the Court of Appeal held that dentistry is not
 4 a suspect classification. In *NAAP v. California Board of Psychology* (9th Cir. 2000) 228 F.3d 1043,
 5 1049, the Ninth Circuit held that "psychoanalysts are not a suspect class entitled to heightened
 6 scrutiny." In *Russell v. Hug* (9th Cir. 2002) 275 F.3d 812, 819 f.5 citing *Giannini v. Real* (9th Cir.
 7 1990) 911 F.2d 354, 359, for the proposition that "lawyers are not a suspect class." Likewise,
 8 chiropractors are not a suspect class.

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

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

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

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

///

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

13 "[T]he absence of 'legislative facts' explaining the distinction 'on the record' has no
14 significance in rational-basis analysis. In other words, a legislative choice is not subject to
15 courtroom fact-finding and may be based on rational speculation unsupported by evidence or
16 empirical data (citations omitted). A state . . . has no obligation to produce evidence to sustain the
17 rationality of a statutory classification..." (*National Organization for Reform of Marijuana Laws v.*
18 *Gain* (1979) 100 Cal.App.3d 586, 594.)

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

28 ///

1 In *Warden v. State Bar* (1999) 21 Cal.4th 628, 649, fn.13, our Supreme Court held
 2 that "under the rational relationship standard, a court may not strike down a classification simply
 3 because the classification may be imperfect (citation omitted) or because it may be "to some extent
 4 both underinclusive and overinclusive."

5 Consequently, plaintiffs have not and cannot state a legally sufficient cause of action
 6 regarding the constitutionality of Business and Professions Code section 4935(b). Accordingly, the
 7 Court should sustain the Acupuncture Board's demurrer without leave to amend.

8 IV

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

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

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

23 In *Napa Valley Wine Train, Inc. v. Public Utilities Com.* (1990) 50 Cal.3d 370,
 24 381, our Supreme Court quoted from *People v. One 1940 Ford V-8 Coupe* (1950) 36 Cal.2d 471,
 25 475, for the proposition that, "[i]n construing the statutory provisions a court is not authorized to
 26 insert qualifying provisions not included and may not rewrite the statute to conform to an
 27 assumed intention which does not appear from its language."

28 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.)

///

1 **A. The Legislative Intent Of Business And Professions Code Section**
 2 **4935(b) Is Clear. Consequently Reformation Is Inappropriate.**

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

12 Clearly, the Legislature intended to exclude chiropractors from the use of needles
 13 unless they first obtained a license to practice from the Acupuncture Board. This is particularly
 14 apparent when we turn to the legislative history of section 4935(b) and find that the relevant
 15 language of section (b) at issue here was originally part of section 2159 of Senate Bill 86, which
 16 was chaptered as section 267 and approved by the Governor on July 12, 1975. (See Exhibit B, p.
 17 0052 attached to Defendant Acupuncture Board's separately filed Motion for Judicial Notice; "A
 18 complaint may be read as if it included matters judicially noticed. . .such matters may show the
 19 complaint fails to state a cause of action though its bare allegations do not disclose the defect. . . ;
 20 *Four Star Electric, Inc. v. F & H Construction* (1992) 7 Cal.App.4th 1375, 1379.)

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

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

26 Moreover, it is clear that the Legislature in 1975 did not want to extend this same
 27 exemption to licensed chiropractors because the same Act provided in section 2155 of the
 28 Business and Professions Code that acupuncture could only be performed upon first receiving a

1 referral from "a licensed physician and surgeon, a licensed dentist, a licensed podiatrist, or a
2 licensed chiropractor . . ." (*Emphasis added; See Stats. 1975, Ch. 267, § 6, p. 0050, Exhibit B*
3 attached to Motion for Judicial Notice.)

4 In addition, section 6 of the Act declared that it was an urgency statute necessary
5 for the immediate protection of the health or safety of the public. The Act specifically stated
6 that, "There is growing interest in acupuncture and a substantial amount of practice of
7 acupuncture and yet there is no statute protecting the public from incompetent practitioners. . . the
8 promising possibilities of acupuncture make it imperative that it be practiced as extensively as
9 possible, as soon as possible, with adequate protection to the public." (Stats. 1975, Ch. 267, § 6,
10 p. 0053, Exhibit B, attached to Motion for Judicial Notice.)

11 Consequently, it is clear that the Legislature did not intend to include
12 chiropractors within current section 4935(b) because of the unstated but implied reason that they
13 were not competent to do so; consequently, it would be inappropriate for this court to reform the
14 statute.

15 V

16 **BUSINESS AND PROFESSIONS CODE SECTION 4935 READ IN**
17 **CONJUNCTION WITH SECTION 18 OF THE CHIROPRACTIC ACT**
18 **AND CALIFORNIA CONSTITUTION ARTICLE 2, SECTION 10(C)**
19 **DOES NOT IMPLIEDLY EXEMPT CHIROPRACTORS FROM BEING**
20 **LICENSED AS ACUPUNCTURISTS IN ORDER TO USE NEEDLES.**

21 Plaintiffs argue that they are impliedly exempt from the provisions of Business
22 and Professions Code section 4935. (SAC ¶¶92, 102-106. They are clearly wrong. A clear
23 reading of the applicable provisions reveals no conflict between the Chiropractic Act, the
24 Constitution, and section 4935(b).

25 The Court of Appeal in *Sacramento Newspaper Guild v. Sacramento County Bd.*
26 *of Suprs.* (1968) 263 Cal.App.2d 41, at p. 54, stated that "the courts assume that in enacting a
27 statute the Legislature was aware of existing, related laws and intended to maintain a consistent
28 body of statutes." Section 4935(b) is consistent with the prohibition in the Chiropractic Act that
chiropractors may not penetrate human tissues in order to treat patients. Therefore, plaintiffs'

1 argument is without merit.


2 CONCLUSION

3 For the foregoing reasons, Defendant Acupuncture Board's demurrer should be
4 sustained without leave to amend.

5 Dated: September 18, 2003

6 Respectfully submitted,

7 BILL LOCKYER
8 Attorney General of the State of California
9 VIVIEN H. HARA
10 Supervising Deputy Attorney General

11 By: 
12 JOSE R. GUERRERO
13 Deputy Attorney General

14 Attorneys for Defendant
15 California Acupuncture Board

16
17
18
19
20
21
22
23
24
25
26
27
28

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):

**DEFENDANT CALIFORNIA ACUPUNCTURE BOARD'S MEMORANDUM
OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO PLAINTIFFS'
SECOND AMENDED COMPLAINT**

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 Personal Delivery:** I caused each such envelope to be personally delivered either by a courier with whom we have a direct billing account, or by interoffice mail, 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

Attorneys for Plaintiffs

D

Fred Slimp
Deputy Attorney General
State of California, Department of Justice
Office of the Attorney General, HQE Section
1515 Clay Street, 20th Floor ~ P. O. Box 70550
Oakland, CA 94612-0550

Attorneys for Def. State Board of Chiropractic Examiners

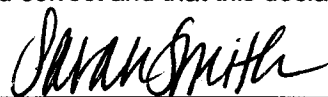
A

Michael Schroeder
Attorney at Law
1851 East First Street, Suite 1160
Santa Ana, CA 92705

Attorneys for Defendant 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.

SARAH SMITH
(Typed Name)


(Signature)