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8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
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11 FORSALEBYOWNER.COM CORP., -----oo0oo-

12
13 Plaintiff,

NO. CIV. S 03-1019 MCE GGH

14 v.

MEMORANDUM AND ORDER

15 PAULA REDDISH ZINNEMANN, in
16 her official capacity as
17 COMMISSIONER OF THE CALIFORNIA
18 DEPARTMENT OF REAL ESTATE;
19 WILLIAM LOCKYER, in his
20 official capacity as ATTORNEY
21 GENERAL OF THE STATE OF
22 CALIFORNIA,

Defendants.

23 -----oo0oo-----
24 In bringing the present action, Plaintiff ForSaleByOwner.com¹
25 (hereinafter "FSBO") challenges the State of California's real
26 estate licensing requirements, as codified in California Business
27 and Professions Code §§ 10000 et seq., on constitutional grounds.

28 _____
¹Jeffrey C. Chadbourne, d/b/a/ ForSaleByOwner.com magazine,
was initially named as a Plaintiff but has since terminated his
interest in this litigation, leaving ForSaleByOwner.com as the
sole Plaintiff.

1 Specifically, FSBO seeks judicial determination that those
2 licensing requirements, as enforced by Defendants Paula Reddish
3 Zinnemann, Commissioner of the California Department of Real
4 Estate, and Defendant Bill Lockyer, Attorney General of the State
5 of California (hereinafter "Defendants") violates its rights
6 under the First Amendment of the United States Constitution.

7 Presently before the Court are cross-motions for summary
8 judgment filed both on behalf of FSBO and on behalf of the
9 Defendants. For the reasons set forth below, summary judgment in
10 favor of FSBO is granted.

11
12
13 **BACKGROUND**
14

15 FSBO publishes an internet website that advertises
16 properties for sale, including properties for sale in California.
17 The FSBO site charges a flat fee to property owners who wish to
18 advertise and sell their homes without incurring the substantial
19 cost typically incurred by retaining a real estate agent. That
20 fee varies depending on the advertising services chosen and the
21 length of time the advertisement runs.

22 In addition to listing customers' properties on a nationwide
23 database of properties, which can be viewed and searched on the
24 FSBO website at no charge by prospective buyers, FSBO also
25 provides other general information on its website. That
26 information includes, but is not limited to, statistical
27 information about home sales, crime, schools and costs of living
28 in specific geographic locales. The FSBO site further

1 incorporates interactive software for calculating mortgage
2 payments and current data about interest rates.

3 There is no dispute that FSBO also markets itself to
4 providers of various real estate related services (e.g., title
5 insurance agents, escrow companies, inspectors, home improvement
6 contractors and the like). Those providers pay FSBO for listing
7 on a directory accessible through the website. Furthermore, FSBO
8 pays individual real estate service providers, through a
9 partnership and affiliate marketing program, for leads generated
10 by such providers that result in an FSBO service listing.

11 While the FSBO website offers sample real estate forms, the
12 website does not provide specific advice to individuals
13 concerning buying or selling homes. The site contains a
14 disclaimer to the effect that the company is not a real estate
15 agent and is thus "legally prohibited from taking part in the
16 actual sales transaction of any of the properties advertised on
17 our site." (FSBO Undisputed Fact ("UF") 33). The fact that FSBO
18 does not represent property owners or potential purchasers in
19 transactions involving California real estate is undisputed. (UF
20 34). Customers make contact directly with potential purchasers.
21 FSBO does not negotiate or make any contact on behalf of
22 customers, and does not otherwise take part in sales
23 transactions. Moreover, FSBO does not charge or receive any
24 commissions on sales which may result from the contact
25 information it provides to its customers.

26 Although FSBO provides only generalized information
27 concerning real estate and does not participate directly in
28 particular real estate transactions, California law nonetheless

1 contains stringent licensing requirements for anyone involved in
2 the listing or sale of real property. Under California Business
3 and Professions Code § 10130,² it is unlawful for any person or
4 company to act as a real estate broker without first obtaining a
5 California real estate license. Section 10131, in turn, defines
6 a "real estate broker" as follows:

7 A real estate broker...is a person who, for a compensation
8 or in expectation of a compensation, regardless of the form
9 or time of payment, does or negotiates to do one or more of
10 the following acts for another or others:

11 (a) Sells or offers to sell, buys or offers to buy,
12 solicits prospective sellers or purchasers of, solicits
13 or obtains listings of, or negotiates the purchase,
14 sale or exchange of real property or a business
15 opportunity.

16 ...

17 (d) Solicits borrowers or lenders for or negotiates
18 loans or collects payments or performs services for
19 borrowers or lenders or note owners in connection with
20 loans secured directly or collaterally by liens on real
21 property or on a business opportunity.

22 Section 10131.2 expands the definition of real estate broker
23 contained in Section 10131 by specifying that anyone charging an
24 advance fee in connection with the sale, listing, or
25 advertisement of real property is also considered a broker under
26 California law:

27 A real estate broker...is also a person who engages in
28 the business of claiming, demanding, charging, receiving,
collecting or contracting for the collection of an advance
fee in connection with any employment undertaken to promote
the sale or lease of real property or of a business
opportunity by advance fee listing, advertisement or other
offering to sell, lease, exchange or rent property or a
business opportunity, or to obtain a loan or loans thereon.

²Unless otherwise noted, all further references to "Section"
or "Sections" are to the California Business and Professions
Code.

1 Finally, Section 10026 defines "advance fee" as including
2 any fee charged for listing, advertising, or offering to sell or
3 lease real property, except that a "newspaper of general
4 circulation" is expressly exempted from that definition:

5 The term "advance fee,"... means a "fee claimed,
6 demanded, charged, received, collected or contracted from a
7 principal for a listing, advertisement or offer to sell or
8 lease property, other than in a newspaper of general
9 circulation, issued primarily for the purpose of promoting
the sale or lease of business opportunities or real estate
or for referral to real estate brokers or salesmen, or
soliciting borrowers or lenders for, or to negotiate loans
on, business opportunities or real estate.

10 FSBO falls squarely within the definition of "real estate
11 broker," as that term is defined by Sections 10131 and 10131.2
12 It unquestionably engages in the business of soliciting or
13 obtaining listings of residential real property listing, and does
14 so for compensation or profit in the form of an "advance fee."
15 Moreover, because FSBO is undisputedly not a "newspaper of
16 general circulation, it is not exempted under Section 10026
17 from California's licensing requirements.

18 In 2001 and 2002, the California Department of Real Estate
19 ("DRE") sent letters to a number of internet companies, including
20 FSBO, whose websites advertise and list properties for sale in
21 California. The DRE noted that FSBO's website contained no real
22 estate licensing disclosure and requested that FSBO identify the
23 broker's license under which the company was operating. In fact,
24 neither FSBO, or any of its officers or employees, holds a
25 California real estate broker's license.

26 FSBO contends that any distinction between the treatment
27 accorded its website and the exemption for newspapers is
28 nonsensical given the current state of cybertechnology. It is

1 undisputed, for example, that many newspapers now maintain
2 websites operating in much the manner as the site generated by
3 FSBO. Two examples are the Sacramento Bee and the Los Angeles
4 Times, which operate websites that allow property owners in
5 California to advertise their homes for sale for a flat fee.
6 Customers can place ads over the Internet through these websites,
7 and both papers charge customers in advance for publishing their
8 ads on the website. Users of the newspaper websites can search
9 properties for sale based on essentially the same search criteria
10 available on FSBO's website. (FSBO UF 53). Significantly, the
11 newspaper sites also include additional information of interest
12 to property buyers and sellers, which, like the FSBO site,
13 includes searchable information on schools, home prices, interest
14 rates, and real estate news. Users of the Los Angeles Times
15 website can even search for real estate brokers and apply for
16 mortgages on line. (FSBO UF 55). Moreover, both the Sacramento
17 Bee and the Los Angeles Times feature information and advice on
18 their websites on how to buy and sell homes. (FSBO 56).
19 According to FSBO, all this makes the service they offer
20 virtually indistinguishable from that provided by newspapers,
21 despite the fact that newspapers are exempted from the licensing
22 requirements.

23 FSBO makes three arguments through the instant lawsuit.
24 First, it contends that California's licensing requirements
25 impose an unconstitutional "prior restraint" on speech that
26 violates the First Amendment. Secondly, even if the speech at
27 issue is deemed commercial in nature, FSBO argues that the
28 limitations posed fail to pass constitutional muster. Finally,

1 FSBO maintains that the restrictions imposed by California law
2 are discriminatory, and violate principles of equal protection
3 under both the First and Fourteenth Amendments, because of
4 unwarranted distinctions based on both content, viewpoint and
5 choice of media.

6 Both parties now move for summary judgment as to these
7 claims. They conceded at oral argument on their respective
8 motions that no material issues of disputed fact are present with
9 respect to the claims asserted through FSBO's lawsuit. Hence
10 resolution of this matter on summary judgment is appropriate, and
11 each of the three contentions advanced by FSBO will be addressed
12 in turn.

13
14 **STANDARD**
15

16 The Federal Rules of Civil Procedure provide for summary
17 judgment when "the pleadings, depositions, answers to
18 interrogatories, and admissions on file, together with
19 affidavits, if any, show that there is no genuine issue as to any
20 material fact and that the moving party is entitled to a judgment
21 as a matter of law." Fed. R. Civ. P. 56(c). One of the
22 principal purposes of Rule 56 is to dispose of factually
23 unsupported claims or defenses. Celotex Corp. v. Catrett, 477
24 U.S. 317, 325 (1986). Under summary judgment practice, the
25 moving party

26 "always bears the initial responsibility of informing the
27 district court of the basis for its motion, and identifying
28 those portions of 'the pleadings, depositions, answers to
interrogatories, and admissions on file together with the
affidavits, if any,' which it believes demonstrate the

1 absence of a genuine issue of material fact.”

2 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Rule
3 56(c).

4 If the moving party meets its initial responsibility, the
5 burden then shifts to the opposing party to establish that a
6 genuine issue as to any material fact actually does exist.

7 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
8 585-587 (1986); First Nat'l Bank v. Cities Ser. Co., 391 U.S.
9 253, 288-289 (1968).

10 In attempting to establish the existence of this factual
11 dispute, the opposing party must tender evidence of specific
12 facts in the form of affidavits, and/or admissible discovery
13 material, in support of its contention that the dispute exists.
14 Fed. R. Civ. P. 56(e). The opposing party must demonstrate that
15 the fact in contention is material, i.e., a fact that might
16 affect the outcome of the suit under the governing law, and that
17 the dispute is genuine, i.e., the evidence is such that a
18 reasonable jury could return a verdict for the nonmoving party.

19 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 251-52
20 (1986); Owens v. Local No. 169, Assoc. of Western Pulp and Paper
21 Workers, 971 F.2d 347, 355 (9th Cir. 1987). Stated another way,
22 “before the evidence is left to the jury, there is a preliminary
23 question for the judge, not whether there is literally no
24 evidence, but whether there is any upon which a jury could
25 properly proceed to find a verdict for the party producing it,
26 upon whom the onus of proof is imposed.” Anderson, 477 U.S. at
27 251 (quoting Improvement Co. v. Munson, 14 Wall.442, 448, 20
28

1 L.Ed. 867 (1872)). As the Supreme Court explained, "[w]hen the
2 moving party has carried its burden under Rule 56(c), its
3 opponent must do more than simply show that there is some
4 metaphysical doubt as to the material facts ... Where the record
5 taken as a whole could not lead a rational trier of fact to find
6 for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 586-87

8
9 **ANALYSIS**

10
11 **A. The real estate licensing requirements at issue do not
12 constitute an unconstitutional prior restraint of speech.**

13 FSBO first argues that California's real estate licensing
14 requirements operate as an unconstitutional prior restraint of
15 speech. According to FSBO, Sections 10131 and 10131.2 require
16 the government's permission in the form of a real estate license
17 in order to publish or disseminate real estate information. FSBO
18 contends that this constitutes an impermissible prior restraint
19 by requiring governmental permission as a prerequisite to
20 speaking or publishing. See Baby Tam & Co., Inc. v. City of Las
21 Vegas, 154 F.3d 1097, 1100 (9th Cir. 1998), citing Near v.
22 Minnesota, 283 U.S. 697, 713 (1931).

23 FSBO properly points out that prior restraints on speech are
24 permissible only where they serve obviously proper purposes and
25 are narrowly drawn. See Riley v. Nat'l Fed. Of the Blind, 487
26 U.S. 781, 802 (1988). Prior restraints are subject to careful
27 scrutiny to ensure that no threat of censorship exists. See,
28 e.g., City of Lakewood v. Plain Dealer Publishing Co., 486 U.S.

1 750, 755-59 (1988). According to FSBO, the California law at
2 issue cannot withstand such scrutiny and is unconstitutional on
3 its face as a restriction on speech and publication *per se*.

4 A facial challenge like that advocated by FSBO in its First
5 Claim, however, will lie only in prior restraint cases where the
6 law has a "close nexus" with speech or regulates "conduct
7 commonly associated" with speech. Southern Oregon Barter Fair v.
8 Jackson County, 372 F.3d 1128, 1135 (9th Cir. 2004). In Barter
9 Fair, the Ninth Circuit considered Oregon's Mass Gathering Act
10 (Or. Rev. Stat. §§ 433.735-.770), a statutory scheme prohibiting
11 outdoor gathering of large groups of persons without a permit
12 issued by the Department of Health Services. In the face of
13 application fee and insurance requirements as a prerequisite for
14 issuance of the needed permit, the plaintiff argued that the Act
15 on its face violated the First Amendment.

16 In assessing the plaintiff's facial challenge, the Ninth
17 Circuit noted that facial challenges to legislation are generally
18 disfavored, even though such disfavor is generally relaxed
19 somewhat in the First Amendment context. The court nonetheless
20 found that any willingness in this regard diminishes as the
21 conduct targeted becomes less "expressive" in nature, and stated
22 as follows: "[L]aws of general application that are not aimed at
23 conduct commonly associated with expression and do not permit
24 licensing determinations to be made on the basis of ongoing
25 expression or the words about to be spoken, carry with them
26 little danger of censorship." Id., citing City of Lakewood v.
27 Plain Dealer, 486 U.S. at 760-61. The court went on to make it
28 clear that "a facial challenge is proper only if the statute by

1 its terms seeks to regulate spoken words or patently expressive
2 or communicative conduct..." Id., see also Roulette v. City of
3 Seattle, 97 F.3d 300, 303-04 (9th Cir. 1995).

4 Although the Ninth Circuit found, in Barter Fair, that mass
5 gatherings like those targeted by the Act bear a sufficient nexus
6 to conduct commonly associated with expression, and consequently
7 allowed the facial licensing challenge, the same conclusion
8 cannot be made with respect to the real estate licensing laws at
9 issue here. Those laws simply do not target patently expressive
10 or communicative conduct.

11 As recognized by the Supreme Court in City of Lakewood,
12 "[i]t is laws subjecting the exercise of First Amendment freedoms
13 to license requirements that we have found suspect, not merely
14 laws with some amorphous "nexus" to expression." City of
15 Lakewood v. Plain Dealer, 486 U.S. at 777 (internal citation and
16 quotations omitted). At most, the real estate licensing statutes
17 challenged here have only an attenuated and indirect connection
18 with expression that does not rise to the level permitting a
19 facial free speech challenge. Consequently FSBO's facial
20 challenge to California's real estate licensing law as a prior
21 restraint fails.

22
23 **B. Commercial speech is not implicated.**
24

25 FSBO next contends that the licensing law impinges on its
26 commercial speech rights. Commercial speech is "expression
27 related solely to the economic interests of the speaker and its
28 audience." Central Hudson Gas & Elec. Corp. v. Public Service

1 Comm'n of New York, 447 U.S. 557, 561 (1980), emphasis added.

2 The Central Hudson standard is arguably more expansive than the
3 traditional, narrow definition of commercial speech as "speech
4 which does no more than propose a commercial transaction."

5 Virginia State Bd. of Pharm. v. Virginia Citizens Consumer
6 Council, Inc., 425 U.S. 748, 762 (1976). Because commercial
7 speech is more readily subject to regulation, it is afforded a
8 lesser degree of protection than other constitutionally
9 guaranteed expression. Central Hudson, 447 U.S. at 562-563.

10 Commercial speech represents an accommodation between the right
11 to speak and hear expression about goods and services and the
12 right of government to regulate the sales of such goods and
13 services. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 499
14 (1996)

15 Our first task is to determine whether a commercial speech
16 analysis is appropriate in this case. In Commodity Trend
17 Service, Inc v. Commodity Futures Trading Comm'n, 149 F.3d 679
18 (3d Cir. 1998), the court examined whether the publisher of
19 impersonal investment advice concerning the commodity futures
20 market could properly attack, on First Amendment grounds, a
21 requirement that it be registered as a commodity trading advisor.
22 Similar to FSBO's position in the present case, the publisher in
23 Commodity Trend Service argued that it did not provide
24 personalized financial planning services or trading advice
25 tailored to the individual needs of any particular subscriber.

26 The Commodity Trend Service court found the publications at
27 issue to not be commercial speech because they "do not appear to
28 propose commercial transactions between CTS and any customers,"

1 and instead "appear to provide information on commodity trading
2 in general and leave any actual trading to other parties." Id.
3 at 685-86. The court concluded that the publications in question
4 were "not commercial speech because they do not propose a
5 commercial transaction between CTS and a *specific customer*." Id.
6 at 686, citing Board of Trustees of State Univ. Of New York v.
7 Fox, 492 U.S. 469, 473 (1989). (Emphasis added)

8 Likewise, in Taucher v. Born, 53 F.Supp.2d 464 (D.D.C.
9 1999), which, like Commodity Trend Service, involves registration
10 requirements under the Commodity Exchange Act, 7 U.S.C. § 1, et
11 seq., the Court found that the provision of impersonal
12 information providing generalized advice did not constitute
13 commercial speech. Id. at 481. The fact that the publications
14 at issue in Taucher included advertising materials did not render
15 them commercial speech, with the Court emphasizing that the
16 substance of the publications was not commercial since they
17 proposed no commercial transaction directly between the
18 publishers and any prospective customers. Id. at 480-81.³

19 Defendants here, in arguing that FSBO's website constitutes
20 commercial speech, go on to contend that the licensing
21 requirements applicable to California real estate brokers, as
22 applied to FSBO, are a permissible regulation of the state's
23

24 ³Although Taucher ultimately found that the Commodity
25 Exchange Act's registration requirement imposed an
26 unconstitutional prior restraint of speech, the requirements in
27 question directly regulated the provision of investment advice on
28 commodity futures trading and in so doing imposed "a drastic
prohibition on speech." Id. at 482. As discussed above, this
Court does not find that the licensing requirements here have a
sufficient "nexus" to expressive conduct that makes a prior
restraint facial challenge appropriate.

1 interest in ensuring professional responsibility and consumer
2 protection as to such brokers. Taucher also rejects that
3 argument. Citing the Supreme Court's decision in Low v.
4 Securities and Exchange Comm'n, 472 U.S. 181, 232 (1985), Taucher
5 states that "[w]here a personal nexus between professional and
6 client does not exist, and a speaker does not purport to be
7 exercising judgment on behalf of any particular individual with
8 whose circumstances he is directly acquainted, government
9 regulation ceases to function as legitimate regulation of
10 professional practice...." Id. at 477-478. Rather, Taucher
11 found that publications it examined qualified as protected speech
12 "[b]ecause the plaintiffs do not profit from their customers'
13 gains or losses in the market and because the plaintiffs do not
14 exercise judgment on behalf of their customers..." Id. at 479.

15 In the present case, like the circumstances confronted in
16 both Commodity Trend Service and Taucher, FSBO does not propose a
17 commercial transaction between FSBO and its customers. While
18 FSBO does provide information in the form of real estate
19 listings, and does supply other non-specific informational
20 materials, it does not propose or encourage a direct sales
21 transaction between itself and a prospective real estate
22 purchaser. FSBO confirms this in its Opposition to Defendants'
23 Motion for Summary Judgment, when it states at p. 18: "[T]he home
24 advertisements on the website are not simply commercial speech,
25 because they do not propose a commercial transaction between

26 //
27 //
28 //

1 ForSaleByOwner.com and anyone else.”⁴

2 It follows that FSBO’s website, and the information it
3 provides, is not subject to a commercial speech analysis.⁵ Given
4 the fact that FSBO’s services are informational in nature and not
5 tailored to the needs of any specific buyer, categorizing its
6 speech as commercial would mean that any for-profit book,
7 newspaper or periodical in the “do-it-yourself” arena would also
8 constitute commercial speech. That runs counter not only to
9 common sense but also to the holdings in both Commodity Trend
10 Service and Taucher that the provision of generalized information
11 does not implicate commercial speech.

12 That the speech interests implicated by FSBO’s website are
13 not commercial does not end the First Amendment analysis
14 applicable to this case. As the Commodity Trend Service court
15 recognized, “the Supreme Court has commented specifically that
16 the First Amendment affords full protection to impersonal
17 investment advice.” Commodity Trend Service, 149 F.3d at 686,
18 citing Lowe, 472 U.S. at 210. As discussed above, in this

19
20 ⁴Moreover, FSBO seems to concede the inapplicability of a
21 commercial speech analysis in its own Motion for Summary
22 Judgment. At pp. 26-27 of its Opening Points and Authorities,
23 FSBO states that California’s “licensing scheme does not simply
24 regulate commercial speech, and...must be justified under First
25 Amendment doctrines that apply to fully-protected speech.”

26 ⁵Having determined that FSBO’s web-based real estate
27 listings are not subject to scrutiny under a commercial speech
28 analysis, the Court need not apply the four part analysis set
forth by Central Hudson in analyzing the scope of permissible
regulation on commercial speech. Those criteria include
assessment of whether commercial speech is lawful and not
misleading, and whether any proposed regulation “directly
advances the governmental interest asserted” and is “not more
extensive than is necessary to serve that interest.” Central
Hudson, 447 U.S. at 566. At oral argument, the parties agreed
that the Central Hudson factors apply only to commercial speech.

1 Court's view there is no analytical difference between the
2 impersonal investment advice provided in Commodity Trend Service
3 and the facilitation of real estate listings provided by FSBO
4 here. In both instances there is no economic transaction
5 directly between the party asserting its speech rights and
6 potential customers. Hence, even apart from whether California
7 law imposes an unconstitutional prior restraint or whether FSBO's
8 activities are subject to regulation as commercial speech, to the
9 extent the information disseminated by FSBO qualifies as non-
10 commercial or "pure" speech it may still be entitled to
11 protection on that basis.

12
13 **C. As applied to FSBO, California's real estate licensing laws**
14 **constitute unconstitutional content and media-based regulation.**

15 FSBO argues that California's real estate licensing laws
16 amount to content-based regulation because they "single out"
17 publishers of real estate advertising and information, like FSBO,
18 "for a burden the state places on no other [speech] and is
19 directed only at works with a specified content." Simon &
20 Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105,
21 115 (1991). FSBO contends that publishers of other sales
22 magazines or websites for different products (like automobiles,
23 jewelry or boats, for instance) are not required to be licensed,
24 and even more significantly argues that newspapers of general
25 circulation are exempt from real estate licensing requirements
26 despite the fact that they offer services virtually identical to
27 those provided by FSBO. According to FSBO, this differential
28 treatment is unconstitutional unless the State's regulation "is

1 necessary to serve a compelling state interest and is narrowly
2 drawn to achieve that end.” Id. at 118.

3 FSBO’s argument that Section 10026 unconstitutionally
4 discriminates based on media type is persuasive. The Court
5 agrees that California’s real estate licensing scheme
6 impermissibly differentiates between certain types of
7 publications carrying the same basic content. As indicated
8 above, while Section 10026 exempts “newspapers of general
9 circulation” from the advance fee provisions that trigger
10 licensing requirement, websites like FSBO’s are not so exempted.
11 Given the uncontroverted fact that FSBO’s activities are
12 virtually identical to those pursued online by California
13 newspapers, the distinction drawn between the two publishing
14 mediums appears wholly arbitrary.

15 California cannot make arbitrary distinctions based on the
16 manner of speech or the media used for publication. See City of
17 Lakewood v. Plain Dealer, 486 U.S. at 763 (“a law or policy
18 permitting communication in a certain manner for some but not for
19 other raises the specter of content and viewpoint censorship”);
20 Greater New Orleans Broadcasting Ass’n, Inc. v. U.S., 527 U.S.
21 173, 195 (1999) (“decisions that select among speakers conveying
22 virtually identical messages are in serious tension with the
23 principles undergirding the First Amendment”); City of Ladue v.
24 Gilleo, 512 U.S. 43, 48 (1994) (“regulation of a medium inevit
25 ably affects communication itself”).

26 Defendants’ only response is to categorize FSBO’s claim in
27 this regard as sounding solely on basic equal protection
28 principles. According to Defendants, because FSBO has no

1 "fundamental interest" in pursuing its internet real estate
2 business, California's real estate licensing scheme only has to
3 be examined on the basis of the relatively lenient "rational
4 basis" test.⁶ Under that test, Defendants maintain that
5 California needs only to demonstrate that its regulation "is
6 rationally related to a legitimate state interest." Lawline v.
7 American Bar Assoc., 956 F.2d 1378, 1385 (7th Cir. 1992).

8 Because Section 10026 discriminates between particular
9 segments of the media (online publications on one hand and
10 newspapers of general circulation on the other), the rational
11 basis test does not apply. In Pitt News v. Pappert, 379 F.3d 96
12 (3d Cir. 2004), the Third Circuit held that a state statute
13 preventing alcoholic beverage advertisers from running paid ads
14 in media affiliated with educational institutions, but permitting
15 such ads in magazines, newspapers or other periodicals with no
16 such connection, was an unconstitutional content-based
17 restriction on a student newspaper's First Amendment rights. In
18 order to avoid the potential threat to free speech posed by laws
19 targeting a particular sector of the media, Pitt News reasoned
20 that such laws must be carefully examined. The court held that
21 because the law in question targeted a narrow segment of the
22 media, it was presumptively unconstitutional. Id. at 110-11.
23 According to Pitt News, that presumption of unconstitutionality
24 can be overcome "only by a showing that the challenged law is
25 needed to serve a compelling interest." Id. at 111, see also
26 Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,

27
28 ⁶See Defendants' Opening Memorandum in Support of Summary
Judgment, pp. 18-19; Opposition to FSBO Motion, fn. 1.

1 460 U.S. 575, 582, 585 (1983) (presumption can be overcome only
2 by "an overriding government interest" of "compelling
3 importance"); Police Dep't of Chicago v. Mosley, 408 U.S. 92
4 (1972) ("[W]e have frequently condemned... discrimination among
5 different users of the same medium for expression).

6 Defendants cannot show a compelling state interest for
7 Section 10026's differentiation between newspapers of general
8 circulation and other outlets of media expression like FSBO's
9 website. Indeed, given the fact that the online newspaper
10 services and the FSBO website are virtually identical, there
11 appears to be no justification whatsoever for any distinction
12 between the two mediums. Even if a distinction was warranted in
13 1959, when the statute was amended to include the newspaper
14 exemption, that does not mean that the same rationale for
15 exempting newspapers remains viable in 2004, given the vast
16 advances in technology that have occurred in the meantime.⁷

17 As FSBO points out, if use of the internet itself justifies
18 state regulation, that would logically suggest that both online
19 newspaper services and websites like FSBO's should be equally

20
21 ⁷The Court is aware of the legislative history generated
22 when Section 10026 was amended in 1959. According to that
23 history, consumers were then at the mercy of unscrupulous
24 promoters who made false and fraudulent misrepresentations to
25 property owners in order to exact payment for services rendered
26 in connection with real property transactions. In deciding to
27 restrict the use of advance fees in order to prohibit such
28 behavior, the California Legislature noted that newspapers of
general circulation had not been found to engage in the offending
practices in question. See Cal. Stats. 1959, ch. 2117, at § 14,
pp. 4942-43. Accordingly newspapers were given more credibility
and an exemption from the advance fee restrictions was provided
to them. It goes without saying that the technology of today was
never contemplated by the California Legislature when the 1959
amendments to Section 10026 were made.

1 restricted. Instead, however, online newspaper advertising for
2 real property is not subject to licensing, whereas the very same
3 information disseminated by FSBO requires a real estate broker's
4 license. That license entails substantial coursework
5 requirements as well as passage of a rigorous broker's exam.
6 Defendants have simply shown no compelling need why such
7 requirements must be satisfied in the case of FSBO but need not
8 be adhered to by newspapers.

9 While Defendants do offer several purported distinctions
10 between FSBO's website and newspapers that they claim do justify
11 differential treatment, those distinctions are totally
12 unpersuasive and certainly do not rise, as they must, to the
13 level of a compelling state interest. For example, Defendants
14 point to FSBO's alleged "synergistic" effort to cultivate "market
15 relationships" with other retailers, as opposed to a newspaper's
16 provision of "more traditional advertising services" as a reason
17 to exempt newspapers but not websites like FSBO's from real
18 estate licensing requirements.⁸ As factual support for this
19 proposition, Defendants suggest that FSBO accepts fees from
20 mortgage brokers for business generated through a website
21 referral process, despite the fact that no such referral service
22 is even available on the FSBO website for users in California.⁹
23 The only other specific activity targeted by Defendants concerns
24 referral fees paid by FSBO for customers directed through other
25 websites.

26
27 ⁸See Defendants' Memorandum of Points and Authorities in
Support of Summary Judgment, p. 20, n. 16.

28 ⁹See Second Declaration of Colby Sambrotto at ¶ 9;
Declaration of Jonathan Holbrook Jr. at ¶ 5.

1 Defendants have not demonstrated that these arrangements are
2 improper, or that licensing will do anything to prevent or
3 regulate any resulting improprieties. Defendants make no effort
4 to show how regulating such activities constitutes a compelling
5 state interest, not to mention whether requiring FSBO to obtain a
6 broker's license is a remedy narrowly tailored to address such an
7 interest. Otherwise, while Defendants vaguely attempt to paint
8 newspapers as geographically situated and relatively more stable
9 than internet companies, they have not established why this
10 should require websites like FSBO's to obtain a California
11 broker's license as a prerequisite to listing properties for
12 sale, when online services doing exactly the same thing are not
13 subject to any licensing requirement so long as they are operated
14 by a "newspaper."¹⁰ Defendants provide no reasonable explanation
15 whatsoever for this differential treatment, let alone a
16 compelling interest to justify it.

17 Because FSBO unquestionably has a speech interest in
18 disseminating real estate information through its website, and
19 because Defendants have not shown any compelling state interest
20 in requiring a real estate broker's license for FSBO's website
21 but not for virtually identical newspaper websites, the
22 presumption of unconstitutionality triggered by this disparity of
23 treatment has not been overcome. Section 10026 accordingly fails
24 constitutional muster on that basis.

25 //

27 ¹⁰Apparently, Defendants argue that newspapers of general
28 circulation, as opposed to magazines or website publications, are
cloaked with some form of trustworthiness simply because they are
newspapers.

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CONCLUSION

Based on the foregoing, summary judgment in favor of Plaintiff FSBO is hereby GRANTED on grounds that Section 10026, as applied to FSBO, is unconstitutional. Defendants' motion for summary judgment is DENIED. The Clerk of the Court is accordingly directed to enter judgment in favor of FSBO.

IT IS SO ORDERED.

DATED: 11/18/2004



MORRISON C. ENGLAND, Jr.
UNITED STATES DISTRICT JUDGE

United States District Court
for the
Eastern District of California
November 18, 2004

* * CERTIFICATE OF SERVICE * *

2:03-cv-01019

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v.

Zinnemann

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on November 18, 2004, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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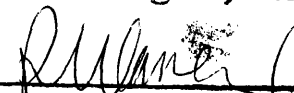
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