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CLERK, U.S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

FORSALEBYOWNER.COM CORP.,

Plaintiff,

v.

NO. CIV. S 03-1019 MCE GGH

MEMORANDUM AND ORDER

PAULA REDDISH ZINNEMANN, in  
her official capacity as  
COMMISSIONER OF THE CALIFORNIA  
DEPARTMENT OF REAL ESTATE;  
WILLIAM LOCKYER, in his  
official capacity as ATTORNEY  
GENERAL OF THE STATE OF  
CALIFORNIA,

Defendants.

In bringing the present action, Plaintiff ForSaleByOwner.com<sup>1</sup>  
(hereinafter "FSBO") challenges the State of California's real  
estate licensing requirements, as codified in California Business  
and Professions Code §§ 10000 et seq., on constitutional grounds.

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<sup>1</sup>Jeffrey 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,<sup>2</sup> 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  
the following acts for another or others:

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

13 ...

14 (d) Solicits borrowers or lenders for or negotiates  
15 loans or collects payments or performs services for  
16 borrowers or lenders or note owners in connection with  
loans secured directly or collaterally by liens on real  
property or on a business opportunity.

17 Section 10131.2 expands the definition of real estate broker  
18 contained in Section 10131 by specifying that anyone charging an  
19 advance fee in connection with the sale, listing, or  
20 advertisement of real property is also considered a broker under  
21 California law:

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

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27 <sup>2</sup>Unless otherwise noted, all further references to "Section"  
28 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 (9<sup>th</sup> 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

### 9 ANALYSIS

#### 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> 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.<sup>3</sup>

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

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24 <sup>3</sup>Although 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 Lowe 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.”<sup>4</sup>

2 It follows that FSBO’s website, and the information it  
3 provides, is not subject to a commercial speech analysis.<sup>5</sup> 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

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19  
20 <sup>4</sup>Moreover, 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 <sup>5</sup>Having 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.<sup>6</sup> 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 (7<sup>th</sup> 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,

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27  
28 <sup>6</sup>See 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.<sup>7</sup>

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

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20  
21 <sup>7</sup>The 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.<sup>8</sup> 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.<sup>9</sup>  
 23 The only other specific activity targeted by Defendants concerns  
 24 referral fees paid by FSBO for customers directed through other  
 25 websites.

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

28 <sup>9</sup>See 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."<sup>10</sup> 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 //

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27 <sup>10</sup>Apparently, 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.

**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 \* \*

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v.

Zinnemann

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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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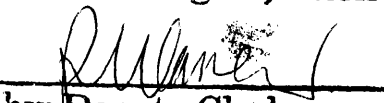
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by: Deputy Clerk