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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 IN AND FOR THE COUNTY OF ALAMEDA

KATHLEEN R.,	)	CASE NO.: V-015266-4
	)	
Plaintiff,	)	
	)	REPLY TO OPPOSITION TO
v.	)	DEMURRER OF CITY OF LIVERMORE
	)	TO FIRST AMENDED COMPLAINT
CITY OF LIVERMORE, et al.	)	FOR INJUNCTIVE RELIEF
	)	
Defendants.	)	Date: January 13, 1999
	)	Time: 2:00 p.m.
_____	)	Dept.: 50

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**I. INTRODUCTION**

In the Opposition to the Demurrer of the City of Livermore to First Amended Complaint for Injunctive Relief ("Opposition"), Plaintiff appears to make three main arguments: (1) that constitutional review of the Library's Internet Policy should be governed by the "compelling interest" test rather than the "rational relationship" test because ". . . this case involves the fundamental right and liberty interest of personal security and freedom from infliction of pain . . . ." (Opposition, p. 3.); (2) that, because it is easy for a child to access offensive material over the Internet, the City placed Plaintiff in danger (*Id.* at pp. 3-6); and (3) that the executive actions alleged by Plaintiff show a level of culpability sufficient to state a constitutional violation (*Id.* at pp. 6-8).

These arguments reflect a fundamental misunderstanding of the law. The First Amended Complaint should be dismissed without leave to amend.

**II. ARGUMENT**

**A. Judicial Review of the Library's Internet Policy is Governed by the "Rational Relationship" Test, Not the "Strict Scrutiny" Test, Because No Fundamental Rights are Involved.**

Plaintiff suggests that judicial review of the Library's Internet Policy should be governed by the "strict scrutiny" test because ". . . this case involves the fundamental right and liberty interest of personal security and freedom from infliction of pain . . . ." (*Id.* at p. 3.)<sup>1</sup>

Ordinarily, judicial review of legislative action is governed by the "rational relationship" test: "[i]f the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied . . . ." (*Nebbia v. New York* (1934) 291 U.S. 502, 537, 54 S.Ct. 505, 516, 78 L.Ed. 940; see also Memorandum of Points and Authorities in Support of Demurrer of the City of Livermore to First Amended Complaint for Injunctive Relief ("Initial Memorandum"), pp. 9-10.)

However, where the legislative action limits a fundamental constitutional right, the Due Process Clause provides for heightened judicial scrutiny. In such cases, judicial review is governed by the "strict scrutiny" test: ". . . the State may prevail only upon showing a subordinating interest which is compelling,' (citation). The law must be shown 'necessary, and not merely rationally related to, the accomplishment of a permissible state policy.' (Citations.)" (*Griswold v. Connecticut* (1965) 381 U.S. 479, 497, 85 S.Ct. 1678, 1689, 14 L.Ed.2d 519 (conc. opn. of Goldberg, J.).)

In addition to those rights specifically enumerated in the Constitution, the United States Supreme Court has found other rights to be so essential to individual liberty in our society that they are deemed fundamental and worthy of strict judicial scrutiny. The list of rights protected under the Due Process Clause and deemed fundamental by the Supreme Court was recently outlined in *Washington v. Glucksberg* (1997) 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772:

In a long line of cases, we have held that , in addition to the specific freedoms protected by the Bill of Rights, the 'liberty ' specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); to use contraception, *ibid*; *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), and to abortion, *Casey, supra*. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment. *Cruzan*, 497 U.S., at 278-279, 110 S.Ct., at 2851-2852.

(*Id.* at 117 S.Ct. 2258, 2267.) In *Glucksberg*, the Supreme Court refused to expand this list to include the right to assistance in committing suicide. (*Id.* at p. 2271.)

The Library's Internet Policy does not even remotely implicate or interfere with any fundamental rights or liberties protected by the Due Process Clause. Therefore, judicial review of the Policy is governed by the "rational relationship" test. This test is easily satisfied here. (See Initial Memorandum, pp. 9-10.)

**B. The Legal Analysis in This Case Rests on Whether There Was Direct Affirmative Conduct on the Part of the City that Placed the Plaintiff in Danger, Not on Whether it is Easy for a Child to Access Offensive Material Over the Internet.**

In the Opposition, Plaintiff spends several pages focusing on how easy it is for a child to access offensive material over the Internet. (Opposition, pp. 3-6.) While this discussion may form the basis of an interesting public policy debate, it is irrelevant to the legal analysis at issue here.

As was pointed out in the City's Initial Memorandum, this case is governed by the holding in *DeShaney v. Winnebago County Department of Social Services* (1989) 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249. Based on *DeShaney* and its progeny, in order to base a claim on a "danger created duty," there must be direct affirmative conduct on the part of the state in placing the plaintiff in danger. (See Initial Memorandum, pp. 3-8.) Providing Internet access to the general public is not sufficient to trigger a "danger created duty." (See *id.*) It makes no difference in this case how easy it is for a minor to access offensive material over the Internet.

### **C. Plaintiff Has Failed to Show How the Executive Actions Alleged Violate Substantive Due Process.**

Plaintiff claims that the executive actions alleged by her show ". . . that the level of culpability of the library officials is more than sufficient to set forth a claim even under the more stringent 'executive malfeasance' tests." (Opposition, p. 8.)

The test that applies in this case is not the "executive malfeasance" test, whatever that may be. The test that applies here is the "shocks the conscience" test, as discussed by the United States Supreme Court in *County of Sacramento v. Lewis* (1998) \_\_\_ U.S. \_\_\_, 118 S.Ct. 1708, 140 L.Ed.2d 1043. (See Initial Memorandum, pp. 10-13.)

It is not surprising that Plaintiff avoids any discussion of how the conduct she alleges rises to the level of conscience-shocking as described in *Lewis*. The conscience-shocking standard is impossible for Plaintiff to meet with the facts she alleges.

## **III. CONCLUSION**

Plaintiff cannot state a claim based on the Due Process Clause or any other constitutional protection. The First Amended Complaint should be dismissed without leave to amend.

Respectfully submitted,

Date: \_\_\_\_\_

\_\_\_\_\_  
Daniel G. Sodergren  
Assistant City Attorney  
Attorney for Defendants  
City of Livermore

1 In the Opposition, Plaintiff cites to *Wood v. Ostrander* (9th Cir. 1989) 879 F.2d 583, 589, to support her claim that a child has a "liberty interest in personal security and freedom from restraint and infliction of pain." (Opposition, p. 2.) This language, quoted from *Wood*, was being used in that case to describe the holding in *Ingraham v. Wright*

(1977) 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711. In *Ingraham*, the Supreme Court upheld the use of corporal punishment for children by state school teachers so long as the state had some procedure to later determine the propriety of such actions and impose liability for any excessive use of force. The majority opinion in *Ingraham* fully accepted the position that physical restraint constitutes a deprivation of liberty for which some process is due unless it would be of an extremely brief and de minimis nature. *Ingraham* is inapplicable in this case. This case does not involve physical restraint or procedural due process.