

**IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 2008**

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DARCY MILLER AND )  
SUSAN IBARRA, )  
 )  
Petitioners, )  
 )  
v. )  
 )  
GO-STORES, INC., )  
SAMUEL PURDY, )  
JORDAN CRUZ, )  
AVIS GOLDMAN, AND )  
JOHN DOE, )  
 )  
Respondents. )

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**ORDER GRANTING CERTIORARI**

**PER CURIAM:**

The Petition herein for the writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit is hereby GRANTED, limited to the following issues:

- (1) Whether a state anti-discrimination statute that requires medical professionals to provide services regardless of a patient's sexual orientation, even where those services violate the provider's religious beliefs, abridges the First Amendment.
- (2) Whether plaintiffs may compel the identity of an anonymous non-party witness in discovery without first demonstrating that their underlying claim could withstand summary judgment.

Briefs of the parties are to be submitted no later than February 9, 2009.

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Clerk of the Court

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTEENTH CIRCUIT**

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No. 08-9761

DARCY MILLER AND SUSAN IBARRA,

*Plaintiffs-Appellees,*

v.

GO-STORES, INC., SAMUEL PURDY, JORDAN CRUZ, AND AVIS GOLDMAN,

*Defendants-Appellants,*

*and*

JOHN DOE,

*Third-Party-Appellant.*

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Appeal from the United States District Court  
for the Southern District of Arcadia  
Civ. No. 08-SBT-6322  
Stella Tan, District Judge

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ARGUED NOVEMBER 8, 2008—DECIDED JANUARY 5, 2009

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Before ISSEL, PEDERSEN, and QADDAMI, *Circuit Judges.*

ISSEL, *Chief Judge:*

This appeal raises two important First Amendment questions: (a) the right of medical providers to refuse, based on religious objections, to abide by an anti-discrimination statute, and (b) the right of a third-party witness to anonymous Internet speech when that anonymity stands in the way of evidence potentially critical to litigation.

This Court now holds that the State of Arcadia’s Anti-Discrimination Act did not violate the Defendants’ right to free exercise of religion when it required them to dispense medical care to an unmarried same-sex couple. The Court further holds that a plaintiff in pursuit of a claim

must satisfy a summary-judgment-type standard before it may use the discovery process to abridge a non-party's anonymity.

### **BACKGROUND**

The facts and procedural history are fully described by the district court, *see* Dist. Ct. Mem. & J. at 2-19, and we reproduce only the essential points here. Defendants-Appellants Go-Stores, Inc., and Samuel Purdy, Jordan Cruz, and Avis Goldman, all pharmacists employed by Go-Stores, refused to fill Plaintiff Susan Ibarra's prescription for a fertility drug. The pharmacists allege that their religion, Mancalla, forbade them from assisting any unmarried person in becoming pregnant. Ibarra is unmarried, but she and her partner, Darcy Miller, assert that the true reason they were denied fertility services is that they are a same-sex couple. In a posting on a local internet message board, an anonymous poster (known in the present litigation as "John Doe") claimed to have first-hand evidence to support this allegation.

Ibarra and Miller filed suit against the pharmacists and Go-Stores under a state statute, known as the "Monroe Act," 17 Arcadia Stat. Ann. § 641, that prohibits businesses from discriminating against customers on the basis of sexual orientation, but, notably, does not prohibit discrimination against customers on the basis of marital status. In order to obtain proof of their allegations, Miller and Ibarra served a third-party subpoena on John Doe's internet service provider seeking his identity. Doe moved to quash the subpoena on the grounds that it violated his right to anonymous speech. Defendants joined in Doe's motion, which also argued that Plaintiffs' underlying claim lacked merit because the Monroe Act allegedly violated the free exercise of religion. Defendants raised this same Free Exercise argument in an affirmative defense, which Plaintiffs moved to strike via Fed. R. Civ. P. 12(f) at the same time they opposed John Doe's motion to quash.

The district court consolidated its consideration of these two issues, striking the Defendants' affirmative defense and denying John Doe's motion to quash. John Doe, Go-Stores, and the individual pharmacists have jointly appealed both of the district court's rulings.

## **DISCUSSION**

### **Preliminary Jurisdictional Issues**

As a threshold matter, the Court finds that it does have appellate jurisdiction over the appeals from both rulings.

The Court has jurisdiction under 28 U.S.C. § 1291 over John Doe's appeal from the denial of his motion to quash in light of the Supreme Court's "practical application" of the final judgment rule in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), which permits appeal of a non-final order that (1) resolves an important issue completely separate from the merits; (2) conclusively determines the disputed question; (3) is effectively unreviewable on appeal from a final judgment; and (4) involves a loss of rights deeply rooted in public policy, such as those constitutionally based. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 884 (1994).

John Doe's appeal satisfies this "collateral order" test. Where a third party is ordered to produce discovery that implicates the rights of an additional party, the additional party cannot refuse to comply with an order not directed at it, and thus cannot expect the third party to adequately vindicate its rights by risking sanction. *Perlman v. United States*, 247 U.S. 7 (1918). When a third party does not object but the privilege-holder does, a district court's refusal to quash is immediately appealable by the objecting party. *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 575 (2d Cir. 2005). John Doe cannot expect WooHoo to risk sanction by failing to

comply with the subpoena, and if he waits until after final judgment in this case to appeal, he will have effectively lost his right to preserve his right to anonymity.

Given that jurisdiction over the motion to quash exists, this Court also has jurisdiction over the Defendants' appeal of the order striking their affirmative defense. Courts may exercise pendant appellate jurisdiction over a non-final order when that order is inextricably intertwined with an appealable final order. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 50-51 (1995).

In this case, the questions raised on the motion to strike are in part the same Free-Exercise issues as those raised by the motion to quash. The issues presented in these two appeals are inextricably intertwined (which is why the district court elected to hear the motions to quash and to strike in a consolidated fashion, *see* Dist. Ct. Mem. & J. at 2), and therefore pendant appellate jurisdiction exists. We thus turn to the merits of the two issues appealed.

#### **I. The District Court's Grant of Plaintiffs' Motion to Strike the Affirmative Defense**

Because the district court's grant of the Plaintiffs' Motion to Strike effectively disposed of Defendants' legal argument against the statute in its entirety, and because an analysis of the motion does not require a reweighing of the evidence but rather merely an analysis of a legal claim, we apply a de novo standard of review to the appeal of this ruling. *See Koon v. United States*, 518 U.S. 81, 100 (1996); *Yamaguchi v. U.S. Dep't of the Air Force*, 109 F.3d 1475, 1481-82 (9th Cir. 1997). Under this standard, this Court agrees with the district court decision that the Monroe Act is a neutral law of general applicability that does not violate Defendants' First Amendment rights. Moreover, a contrary holding would violate the Establishment Clause of the First Amendment by fostering an endorsement of religion over non-religion.

Balancing the rights of citizens to receive medical care with the religious and ethical concerns of medical-care providers has proved a vexing problem in several settings of late. *See*,

*e.g., No. Coast Women's Care Medical Group, Inc., v. San Diego Co. Sup. Ct.*, 189 P.3d 959 (Cal. 2008); Matthew Barakat, [\*Va. Pharmacy Follows Faith, No Birth Control Sales\*](#), Associated Press, October 21, 2008. In the instant case, the Defendants argue that the Arcadia state statute that compels them to offer fertility services to same-sex couples violates their rights to free exercise of religion.

The district court correctly noted that the Free Exercise Clause requires only that laws be neutral and generally applicable. *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 878-80 (1990). So long as a law meets these requirements, it is subject to rational basis review, and will be upheld even when it significantly impedes the practice of a religion. *See, e.g., Lyng v. Northwest Indiana Cemetery Protective Association*, 485 U.S. 439 (1988). For example, in *Lyng*, the Supreme Court held that allowing lumber harvesting and road development through an area of a forest traditionally used for Native American religious purposes did not violate the Native American's rights to free exercise of their religion because the destruction of their site did not impair their religious decision-making. *Id.* at 451-52.

The district court was also correct that the Monroe Act is neutral and generally applicable. It is possible to read more animus into the statute than is acknowledged in the district court opinion, but we find nothing sufficient to hold that this statute constitutes a direct infringement on the right to free exercise. The statute was subject to debate from both sides during legislative debate, and has been implemented fairly. Moreover, it is unclear whether the Supreme Court would even consider arguments about the legislative history of the Act in this context. *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 558-59 (1993).

The district court also noted that the exemptions in the Act are generally applicable to all businesses, and that there is no evidence to suggest that any religious groups have been singled

out for discriminatory treatment. Free exercise exemptions are not frequently granted, and typically are only warranted in cases where the departure from neutrality amounts to legislative gerrymandering that targets the religious practice in some way. *See id.* at 535-36. The Monroe Act simply does not rise to the level of animus seen in *Lukumi* or similar cases.

Furthermore, it is hard to imagine how the immensely lesser burden placed on the pharmacists in the case at hand (being required to fill a prescription that they do not want to fill) would be constitutionally sufficient to raise a free exercise issue if the destruction of a worship site (as in *Lyng*) is not. In both instances, the religious adherents were still able to practice what they believed even after the government action.

The Establishment Clause is also implicated here, because the government's accommodation of particular religious beliefs can reach the level of tacit endorsement or support for that religious practice over other religions or irreligion generally. *See generally Texas Monthly Inc., v. Bullock*, 489 U.S. 1 (1989). In *Texas Monthly*, the Supreme Court struck down a Texas law that conveyed a tax exemption only to periodicals that promulgated religious faiths because this law conveyed a benefit to religious groups that was not generally available to all. *Id.* at 906-07 (Blackmun, J., concurring).

While *Texas Monthly* involves different factors than the case at hand, strong parallels can be drawn. If this Court were to grant the pharmacists an exemption from the Monroe Act, it would risk favoring Mancallists -- or religious objectors generally -- over the irreligious, in violation of the Establishment Clause. If religious objectors such as the Mancallists were exempted from the Monroe Act on the grounds sought here, then the non-religious would be deprived of similar latitude simply on the grounds of their "religious" orientation. The Establishment Clause prohibits such a result.

For these reasons, we affirm the district court's order striking the Defendants' affirmative defense.

## **II. The District Court's Denial of the Motion to Quash**

Ordinarily the discovery rulings of the district courts are reviewed on an abuse-of-discretion basis. *See, e.g., Koch v. Cox*, 489 F.3d 384, 388 (D.C. Cir. 2007). However, since a "district court by definition abuses its discretion when it makes an error of law," the "abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." *Koon v. United States*, 518 U.S. 81, 100 (1996). Here, the district court's decision to deny John Doe's motion to quash was based on an incorrect standard for compelling the disclosure of the identity of an anonymous speaker.

As the district court correctly recognized, there is a First Amendment right to speak anonymously, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). This right to anonymity applies to speech on the Internet, *Reno v. ACLU*, 521 U.S. 844, 870-81 (1997). But as the Internet, with its unprecedented capacity both to foster and disseminate anonymous speech, has played a larger and larger role in public discourse, the dilemmas posed by anonymous speech have often been presented. *See, e.g., Doe I v. Individuals*, 561 F. Supp. 2d 249 (D. Conn. 2008); Henri E. Cauvin, [Md. Court Weighs Internet Anonymity](#), Washington Post, December 9, 2008, at B1 (referencing *Indep. Newspapers v. Brodie*, 405 954 A.2d 467 (Md. 2008)).

Balancing this interest in the right to anonymity with the practical needs inherent in civil litigation, the district court reviewed precedents from around the country and applied a four-part test for determining when the identity of a speaker wishing to remain anonymous could be compelled.

The test used by the district court here required that: (1) the anonymous party must be given notice that he is the target of a subpoena, giving that party an opportunity to be heard; (2) the plaintiff must identify the exact statements made by the anonymous party that are central to its claim; (3) the plaintiff must establish that the discovery request targeting the anonymous party's identity is the sole method of obtaining the information sought; and (4) the court must consider the relative strength of the plaintiff's case and find that it would be able to withstand a Fed. R. Civ. P. 12(b)(6) motion, before enforcing a subpoena compelling the identity of an anonymous speaker. Dist. Ct. Mem. & J. at 21-22.

Appellants here challenge most directly the fourth element of this test, arguing that its low threshold insufficiently protects the rights of anonymous speakers. We agree.

The standard used by the district court here would permit a party to abridge a non-party's right to anonymous speech simply by meeting the very low standard of articulating a claim on which relief can be granted. First Amendment rights are of course not absolute, but more should be required before basic constitutional rights can be overridden. As the court held in *Doe v. 2themart.com*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001), the "standard for disclosing the identity of a non-party *witness* must be higher" than the one used where only the anonymity of a defendant is at stake. *Id.* at 1095. The court below should have imposed a higher burden on the Plaintiffs' case before overriding John Doe's free speech rights.

The district court noted the thresholds that other courts have imposed on the cases of plaintiffs before allowing the identities of anonymous speakers to be compelled. Among the higher standards are: (1) requiring the plaintiff's case to survive the standard used in a Fed. R. Civ. P. 56 summary judgment motion, see *Best Western Intern., Inc. v. Doe*, No. CV-06-1537, 2006 WL 2091695 at \*4 (D. Ariz. 2006); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); or (2)

requiring plaintiff to make concrete showings as to each element of a prima facie case, establishing a factual and legal basis for the truth of the allegations made in the complaint, *see Highfields Capital Mgmt. v. Doe*, 385 F. Supp. 2d 969, 976 (N.D. Cal. 2005); *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 245-46 (Cal. Ct. App. 2008).

We find that the appropriate balance is achieved by the first approach, in which a plaintiff who seeks to compel a non-party's identity is first required to show that its claim could survive a Rule 56 motion for summary judgment. This standard permits those plaintiffs who have legitimate claims to proceed while protecting anonymous speakers from having to yield their identities – with all the attendant potential harms – in the service of a dubious or flimsy claim. In the instant case, it appears that Plaintiffs would be unable to meet this standard, and thus that the district court's ruling denying the motion to quash was in error.

The ruling denying the motion to quash is reversed and the motion is remanded to the district court for a ruling consistent with this opinion.

### **CONCLUSION**

The district court's order granting Plaintiffs'-Appellees' motion to strike is hereby **AFFIRMED**. The district court's order denying John Doe's motion to quash the subpoena is hereby **REVERSED** and remanded for further proceedings consistent with this opinion.

*So ordered:*

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Anton Issel, Chief Judge