

FILED
SUPREME COURT
STATE OF WASHINGTON
12/4/2018 1:18 PM
BY SUSAN L. CARLSON
CLERK

COA #53450-9

IN THE WASHINGTON STATE SUPREME COURT

HIRED HANDS LLC.; KENNETH SMITH,
Plaintiffs/Appellants,

v.

WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES,
Defendants/Respondents.

APPEAL FROM THE THURSTON COUNTY SUPERIOR COURT
Honorable Christopher Lanese, Judge

OPENING BRIEF OF APPELLANTS

JACKSON MILLIKAN
WSBA No. 47786
2540 Kaiser Rd. NW
Olympia, WA 98502
(360) 866-3556
Attorney for Appellants

TABLE OF CONTENTS

1.	INTRODUCTION	1
2.	ASSIGNMENTS OF ERROR	1
3.	STATEMENT OF THE CASE	2
4.	ARGUMENTS	5
	4.1 Standard of Review	5
	4.2 Compelled Speech	6
	4.2.1 Summary of Arguments below	6
	4.2.2 Newer Cases	9
	4.2.3 Strict Scrutiny	15
	4.2.4 <u>Becerra</u> Applying <u>Zauderer</u>	22
	4.2.5 <u>Zauderer</u> Test	25
	4.3 Fundamental Rights	26
	4.3.1 Strict Scrutiny	30
	4.4 Vagueness	32
5.	ATTORNEY FEES	35
6.	CONCLUSION	38

TABLE OF AUTHORITIES

Cases

<u>Brown v. Entm't Merchs. Ass'n</u> , 564 U.S. 786 (2011).....	18
<u>Burson v. Freeman</u> , 504 U.S. 191 (1992)	30
<u>Cobra Roofing v. Labor & Indus.</u> , 157 Wash. 2d 90 (2006).....	35, 36
<u>Costanich v. Dep't of Soc. & Health Servs.</u> , 164 Wash. 2d 925 (2008).....	36
<u>Cruzan v. Dir., Mo. Dep't of Health</u> , 497 U.S. 261 (1990)	30
<u>Davis v. Dep't of Licensing</u> , 137 Wash. 2d 957 (1999)	34
<u>Fisher v. Univ. of Tex.</u> , 136 S. Ct. 2198 (2016)	30
<u>Harbor Plumbing v. Dep't of Labor & Indus.</u> , No. 51767-1-II, 2018 Wash. App. LEXIS 1778, at *1 (Ct. App. July 31, 2018).....	18, 31
<u>Hillis v. Dep't of Ecology</u> , 131 Wash. 2d 373, 398 (1997)	5
<u>In re Disciplinary Proceeding Against Deming</u> , 108 Wn.2d 82 (1987).....	37
<u>In re Pers. Restraint of Martinez</u> , 2 Wash. App. 2d 904 (2018).....	17
<u>In re R. M. J.</u> , 455 U.S., 191 (1982).....	14
<u>International Harvester Co. of America v. Kentucky</u> , 234 U.S. 216 (1914).....	32
<u>Janus v. AFSCME, Council 31</u> , 138 S. Ct. 2448 (2018).....	9, 10
<u>Johnson v. United States</u> , 135 S. Ct. 2551 (2015)	32
<u>Kelley v. Johnson</u> , 425 U.S. 238 (1976)	27, 28, 29, 30
<u>Lenander v. Dep't of Ret. Sys.</u> , 186 Wash. 2d 393, 402 (2016).....	5
<u>Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n</u> , 138 S. Ct. 1719 (2018).	7
<u>McIntyre v. Ohio Elections Comm'n</u> , 514 U.S. 334 (1995).....	15
<u>Miller v. Johnson</u> , 515 U.S. 900 (1995).....	30
<u>N.W. Enter. Inc.</u> , 372 F.3d 162 (5 th Cir. 2003)	37

<u>Nat'l Inst. of Family & Life Advocates v. Becerra</u> , 138 S.Ct. 2361 (2018)	10, 11, 12, 13, 14, 15, 18, 19, 20, 22, 23, 25
<u>Northwest Enterprises Inc. v. City of Houston</u> , 27 F. Supp.2d 754 (S.D. Tex. 1998)	29
<u>Pittsburgh Press Co. v. Human Relations Comm'n</u> , 413 U.S. 376 (1973)	9
<u>Planned Parenthood v. Casey</u> , 505 U.S. 833 (1992)	11, 14
<u>Reno v. Flores</u> , 507 U.S. 292 (1993)	30
<u>Riley v. Nat'l Fed'n of Blind</u> , 487 U.S. 781	8, 9, 10, 15, 16, 22
<u>Roberts v. United States Jaycees</u> , 468 U. S. 609 (1984)	9
<u>Shaw v. Hunt</u> , 517 U.S. 899 (1996)	17
<u>Spokane v. Douglass</u> , 115 Wash. 2d 171 (1990)	32, 33
<u>State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.</u> , 135 Wash. 2d 618 (1998)	15
<u>State v. Farmer</u> , 116 Wash. 2d 414 (1991)	30
<u>To-Ro Trade Shows v. Collins</u> , 144 Wash. 2d 403, 410 (2001)	6, 37
<u>United States v. Alvarez</u> , 567 U.S. 709 (2012)	14
<u>Vacco v. Quill</u> , 521 U.S. 793 (1997)	30
<u>Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.</u> , 425 U.S. 748 (1976)	9
<u>Washington v. Glucksberg</u> , 521 U.S. 702 (1997)	26
<u>West Virginia Bd. of Ed. v. Barnette</u> , 319 U. S. 624, 642 (1943)	6, 10, 21
<u>Wolfson v. Concannon</u> , 750 F.3d 1145 (9th Cir. 2014)	17
<u>Wooley v. Maynard</u> , 430 U.S. 705 (1977)	7, 22
<u>Youngberg v. Romeo</u> , 457 U.S. 307 (1982)	30
<u>Zauderer v. Office of Disciplinary Counsel of Supreme Court</u> , 471 U.S. 626 (1985)	13, 14, 15, 20, 22, 23,

Statutes

RCW 18.27.020 21

RCW 19.28.271(1)..... 1, 2

RCW 34.05.375 3

RCW 4.84.340 35

RCW 7.24 4

WAC 296-400A-024..... 18, 31

WAC 296-46B-100..... 38

WAC 296-46B-940..... 1, 2, 3, 5, 32, 33

Other Authorities

PAPERS OF GENERAL INTEREST: Selective Memory: How the Law Affects What We Remember and Forget about the Past - The Case of East Germany, 35 Law & Soc'y Rev. 513, 533 17

William K. Rashbaum, Outspoken Trump Supporter Charged in Attempted Bombing Spree, The New York Times (October 26, 2018)..... 21

1. INTRODUCTION

This is a case of first impression in Washington State and perhaps the United States. The case arose when Ken Smith and employees of his closely held company, Hired Hands LLC (hereinafter collectively denoted “*Hired Hands*”), were forced wear their state-issued electrical contractor licenses or pay a fine. CP at 89.

The Department of Labor and Industries (the “*Department*”) promulgated the worn license requirement in WAC 296-46B-940 under authority of RCW 19.28.271(1). Both the rule and its statutory authority are challenged in this declaratory judgment action (hereinafter collectively denoted “*worn license requirement*”).

2. ASSIGNMENTS OF ERROR

1. The trial court erred in applying rational basis review to the unconstitutional compulsion of speech and association inherent in the worn license requirement. RP 25:14. The trial court should have invalidated the requirement under the First Amendment.

2. The trial court erred in applying rational basis review to the worn license requirement as it unconstitutionally infringes fundamental rights of bodily autonomy and choice of appearance. RP 25:14-26:19. The trial court should have invalidated the requirement under the Due Process clause of the Fifth and Fourteenth Amendments.

3. The trial court erred by holding that WAC 296-46B-940 is not void for unconstitutional vagueness under the Due Process clause of the Fifth and Fourteenth Amendments.

3. STATEMENT OF THE CASE

In 2009, the Legislature added language to several statutes requiring that plumbing, electrical, and conveyance (i.e. elevator) workers have their license and photo identification in their possession while working. See e.g. 2009 c 36 §§ 2(1) and (2), 6(1), 10; SHB 1055.SL; CP at 41, 64, 87-88. The new language also gave the Department the option to “establish by rule a requirement that the person also wear and visibly display his or her certificate or permit.” *Id.*; RCW 19.28.271(1). This worn license requirement is at issue.

The legislative intent was included at Section 1 of the session law and also appears under each new RCW.

The legislature finds that dishonest construction contractors sometimes hire workers without proper licenses, certificates, permits, and endorsements to do electrical, plumbing, and conveyance work. This practice gives these contractors an unfair competitive advantage and leaves workers and customers vulnerable.

The legislature intends that electricians, plumbers, and conveyance workers be required to have their licenses, certificates, permits, and endorsements and photo identification in their possession while working. The legislature further intends that the Department of Labor and Industries be authorized to require electricians, plumbers, and conveyance workers to wear and visibly display their licenses, certificates, permits, and endorsements while working, and to include photo identification on these documents. These requirements will help address the problems of the underground economy in the construction industry, level the playing field for honest contractors, and protect workers and consumers.

See e.g. CP at 41-42.

In 2012, the Department began to promulgate the new section of WAC 296-46B-940, which was finalized in January of 2013. CP at 29, 35.

The operative language is as follows:

(3) To work in the electrical construction trade, an individual must possess, wear, and visibly display on the front of the upper body, a current valid: [certificate of competency (omitted subsections (a) through (e) list the various certificates of competency)] ...The certificate may be worn inside the outer layer of clothing when outer protective clothing (e.g., rain gear when outside in the rain, arc flash, welding gear, etc.) is required. The certificate must be worn inside the protective clothing so that when the protective clothing is removed, the certificate is visible. A cold weather jacket or similar apparel is not protective clothing....The certificate may be worn inside the outer layer of clothing when working in an attic or crawl space or when operating equipment (e.g., drill motor, conduit threading machine, etc.) where wearing the certificate may pose an unsafe condition for the individual.

WAC 296-46B-940(3); CP 64, 89 (full language).

The first regulatory intent espoused by the Department substantially consisted of the following:

Due to the rulemaking moratorium, the program has not adopted rules since 2009 and did not update any of the national electrical safety standards used to regulate the electrical industry. It is critical the program conducts rulemaking to adopt the 2014 national electrical consensus...standards and formalize policy changes that are supported by the industry....

CP at 29 (CR-102 Purpose of the proposal), 35.¹

In 2015, the Department began to loosely relate safety to the market management goals of the worn license requirement.

One of the greatest keys to ensuring safe electrical installations is the requirement for electrical work to be performed by properly

¹ Neither the CR-101 nor CR-102 propose a worn license requirement. However, the two-year statute of limitations for a challenge on this basis expired before this litigation was filed. RCW 34.05.375.

certified electricians.... The requirement...for wearing and visibly displaying [the license] went into effect on March 1, 2013. You must display your original certificate, not a copy. Visibly displaying certification allows the public, customers, and other workers to know that properly certified persons are performing electrical work. The requirement provides a deterrent for contractors who knowingly work trainees unsupervised and will help fight the underground economy and level the playing field for those who comply with the law. ...Certified electricians should display their certificates proudly. Protect your livelihood and help ensure safe electrical installations by reporting electrical workers who are not properly certified. You earned your certificate, wear it with pride and make sure others do too.

CP at 34 (quoting Office of the Chief Electrical Inspector, Wear Your Certificate with Pride, Electrical Currents, Dec. 2015, at 2) (Emphasis in original).

The Department has also stated that the worn license requirement was promulgated because “inspectors witness only a very small fraction of the electrical work being performed in the state.” CP at 88 (quoting the Agency Record). Also, “Oregon has reported that [its version of a worn license] requirement is not burdensome to workers and is routinely complied with.” CP at 89.

Because they are forced to wear their licenses or pay a fine, Hired Hands challenged the operative language from RCW 19.28.271 by seeking a declaration that the worn license requirement violates the constitutional rights of free speech, bodily autonomy, and choice of one’s personal appearance. The statutory basis was the Uniform Declaratory Judgment Act (the “*UDJA*”), RCW 7.24. CP at 116.

Hired Hands challenged the operative language from WAC 296-46B-940 by seeking a declaration that the worn license requirement violates

the same constitutional rights as the statute, additionally alleging unconstitutional vagueness. The statutory basis was the Administrative Procedure Act (the “*APA*”), RCW 34.05 et seq. CP at 117.

On April 13, 2018 the trial court held that, as to vagueness, the rule language does “pass constitutional muster...” RP 25:5-13. As to the free speech and substantive due process challenges, the trial court applied “rational basis...scrutiny,” also finding that the worn license requirement “passes constitutional muster.” RP 25:14-26:19.²

4. ARGUMENTS

4.1 Standard of review.

The challenges to WAC 296-46B-940, all of which are constitutional, are reviewed according to the APA, RCW 34.05.570(2)(c). “The burden is on the challenger asserting invalidity of an administrative rule.” Lenander v. Dep't of Ret. Sys., 186 Wash. 2d 393, 402 (2016). “Constitutional issues are...questions of law...review[ed] de novo.” Id. at 403.

In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary or capricious.

Hillis v. Dep't of Ecology, 131 Wash. 2d 373, 398 (1997).

² The Report of Proceedings was somewhat muddled by the absence of a court reporter from oral argument. RP 3:6-11. Hired Hands does not anticipate this will prejudice the appeal.

The challenges to RCW 19.28.271, all of which are constitutional, were brought under the UDJA, RCW 7.24 et seq. “Because [Hired Hands] has contested no factual findings but seeks reversal of the trial court's legal conclusions, [this Court's] review of the trial court's denial of declaratory relief is de novo.” To-Ro Trade Shows v. Collins, 144 Wash. 2d 403, 410 (2001).

4.2 The worn license requirement is unconstitutional compelled speech under the First Amendment.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens *to confess by word or act their faith therein*.

West Virginia Bd. of Ed. v. Barnette, 319 U. S. 624, 642 (1943)
(Emphasis added).

Since this appeal was filed, the United States Supreme Court has published new cases in the Compelled Speech line. Therefore this section will first summarize the arguments in the trial court, then address those new authorities.

4.2.1 Summary of arguments below

The first case in the compelled speech line is W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Barnette rejected a requirement that school children physically salute and verbally pledge allegiance to the flag. Id. at 627-28, 642-43. The worn license is concededly not as dogmatic as the verbal pledge, though it certainly expresses some degree of state association. CP at 84. The cursory hand gesture incidental to the pledge is

perhaps more theatrically genuflective, though not as cumbersome as the prolonged conversion of the worker's body into a billboard for State messaging. CP at 84-85. The worn license requirement does not survive the Barnette analysis. 319 U. S. 624; CP at 84.

In Wooley v. Maynard, Maynard lawfully covered up the motto, "Live Free or Die" on his vehicle license plate. 430 U.S. 705, 707 (1977). The Court held that the right to cover the motto was "concomitant to" the right to "proselytize religious, political, and ideological causes...." Id. at 714. Wooley acknowledged that "carrying the state motto on a license plate" was more "passive" than the unconstitutional flag salute gesture requirement, but dismissed the difference as "one of degree" -each a "state measure which forces an individual...to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." Id. at 715.

That Hired Hands has taken exception to wearing a 'mere electrical license' is inapposite because "it is not...the role of the State or its officials to prescribe what shall be offensive." Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1731 (2018). The worn license is concededly not as proselytizing as the motto, though certainly a state document tacked onto the worker's chest is thereby imbued with some message strongly felt by the wearer and many who might encounter her. CP at 84. Though perhaps offensive to many, offensiveness to Hired Hands is alone sufficient to trigger strict scrutiny.

In Riley v. Nat'l Fed'n of Blind, a law compelled “professional fundraisers to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations....” and the fundraiser’s name, as well as the “name and address of his or her employer....” 487 U.S. at 784-86 (1988). The Court reemphasized that deferential scrutiny of commercial speech regulation is not appropriate when it is “intertwined with otherwise fully protected speech.” Id. at 796; see also CP at 67, 101-02, 113-14. Most importantly, Riley completely severed the subject matter (opinion vs. fact) of non-commercial speech from the right of non-compulsion. Id. at 797-98.

A fundraiser’s speech may range from expressive and advocative to merely informative or solicitous of funds, and the Riley Court did not tether its analysis to either extreme. A private electrician’s speech should not be presumed any less dynamic or sacrosanct. Entwining either’s speech with compelled statements of fact is just as offensive to the First Amendment as any motto or pledge.

[C]ases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of "fact": either form of compulsion burdens protected speech. Thus, we would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech.

Riley v. Nat'l Fed'n of Blind, 487 U.S. 781, 797-98 (1988).

Commercial speech – “speech which does no more than propose a commercial transaction” - is the only relevant exception to Riley and clearly inapplicable to the worn license requirement. Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973)); CP 113-14. The recent U.S. Supreme Court cases have elaborated on the protection of speech that does not emanate from a fundraiser or advocate, does not facially resemble any motto or pledge of allegiance, and is not purely commercial.

4.2.2 Newer Supreme Court cases.

In Janus v. AFSCME, Council 31, the Court held that non-union workers represented by public bargaining units (‘free riders’ in the common parlance) cannot be compelled to pay even the apolitical “agency fee” portion of dues. 138 S. Ct. 2448, 2461 (2018). The Court recognized that American citizens enjoy the “right to eschew association for expressive purposes....” Id. at 2463 (citing Roberts v. United States Jaycees, 468 U. S. 609, 623 (1984)).

The Janus Court noted that compelled speech is even more egregious than abridged speech because “additional damage is done. In th[e former] situation, individuals are coerced into betraying their convictions.” Id. at 2464. Hired Hands raised this challenge to avoid unwillingly expressing association with or subservience to state government, and with

the entrepreneurial courage of conviction that wagers greater financial security against a life of greater personal freedom. See e.g. CP 83-86, 114.

As with Riley’s hypersensitivity about compulsion of income-disclosure burdening speech, Janus’ non-expressive dollars might wind up subsidizing some unspecified, incidental “public policy [or] position...in...bargaining” with which he disagrees, despite agency fees having already been definitionally sequestered from political funds. *Id.* at 2461. Less hyperbolic is the scenario of Hired Hands’ owner or employees disagreeing with a policy of Washington State or the Department while required to wear its official document, thusly forced “to confess by word or act their faith therein.” *Barnette*, 319 U.S. at 642.

In *Nat’l Inst. of Family & Life Advocates v. Becerra*, the Supreme Court portended the unconstitutionality of compelled statements of pure fact – and of licensure status specifically (though nothing so invasive as a worn licensure notification). 138 S. Ct. 2361 (2018) (5-4 decision). *Becerra* reversed the denial of a preliminary injunction against a California law designed to alleviate potential deception. *Id.* at 2368-71 (Pursuant to RAP 10.8, Hired Hands will supplement the record with any additional authorities generated on remand of *Becerra*). The potential deception arose because religiously motivated anti-abortion advocacy centers were masquerading as neutral prenatal medical clinics. *Id.* at 2368-2378.

The *Becerra* majority evaded “undue burden” abortion analysis, which has permitted states to compel doctor-to-patient warnings about the

negative consequences of abortion as incidental to “the practice of medicine....” Id. at 2373, 2385 (Breyer J., dissenting) (quoting Planned Parenthood v. Casey, 505 U.S. 833, 884 (1992)). Instead, Becerra forecast the invalidation of two purely informational California disclosure requirements as unconstitutionally compelled speech (the opinion reads like dispositive adjudication, although the procedural posture is preliminary). Id. at 2376-78.

The first presumably invalidated section required state-licensed clinics to “disseminate a government-drafted notice on site” containing information about “free or low-cost” alternative services provided by the state. Becerra, 138 S.Ct. at 2369. The Court held the appellants likely to prevail on the merits in their challenge to this requirement because it was a “government-drafted script” pointing to alternative services of which one was “abortion -the very practice that petitioners are devoted to opposing.” Id. at 2371.³

Although the procedural posture of Becerra does not seem to invite a broad ruling on the merits, that Court emphatically held, “California cannot co-opt the licensed facilities to deliver its message for it.” Id. at 2376. If true, it is difficult to imagine how Washington would be

³ The Becerra majority seemed willfully ignorant of the underhand nature of such clinics’ advocacy. See e.g. Sarah Lipton-Lubet, Four Ways Fake Clinics Harm Women and Undermine Abortion Access, The Hill (February 1, 2018), <https://thehill.com/opinion/healthcare/371888-four-ways-fake-clinics-harm-women-and-undermine-abortion-access>.

constitutionally justified in co-opting the worker’s body to the same end.⁴ If the First Amendment shields anti-abortion activists lurking within a clinical Trojan Horse, surely it protects the person who has earned the privilege to perform electrical work and chooses entrepreneurship over employment by the state or any other paternalistic boss.

The second California law section merely required unlicensed clinics to divulge the fact of their unlicensed status in advertising and by posting a notice on site. *Id.* at 2376-78. In other words, Washington has enacted a worn license requirement, while California enacted a posted ‘unlicense’ requirement. The facts are almost perfectly analogous, but the law is admittedly an awkward fit (though supportive of Hired Hands’ claims).

Having spent pages on why the Zauderer case is inapplicable⁵ to such non-advertisement speech as is implicated by the first section, the Becerra Court then applied a Zauderer Commercial Speech analysis to the second without “decid[ing] whether [it] applies...” or remarking as to whether its application is limited only to the advertising portion of the second section. *Id.* at 2377, 2372-78 (discussing, discounting, then applying Zauderer v. Office of Disciplinary Counsel of Supreme Court, 471

⁴ The irony of basing a ‘keep your law off my body’ argument on a flagrantly anti-abortion opinion is not lost on undersigned counsel.

⁵ The Becerra Court also preempted a 9th Circuit trend of extending deferential, commercial speech analysis to speech “merely because it is uttered by ‘professionals.’” *Id.* at 2371-72. The Department has repeatedly attempted a similar argument. CP at 67, 101-02, 113-14.

U.S. 626 (1985) which, by its own terms, limits its analysis to regulation of “commercial advertising....” Id. at 651).

The relevant issue in Zauderer was “whether a State may seek to prevent potential deception of the public by requiring attorneys to disclose in their advertising certain information regarding fee arrangements.” 471 U.S. at 629. The Zauderer Court affirmed application of a state ethics rule requiring “that an attorney advertising his availability on a contingent-fee basis disclose that clients will have to pay costs even if their lawsuits are unsuccessful....” Id. at 652. In applying Zauderer, the Becerra Court strongly hinted that a stricter scrutiny is probably appropriate, noting that “*even under Zauderer,*” the requirement fails. Becerra, 138 S.Ct. at 2377 (Emphasis added).

Application of Zauderer to the worn license rule (and the posted ‘unlicense’ rule, for that matter) appears unworkable from the start, given that Hired Hands is alleging a burden on the body, the tongue, and the mind -not advertisement. Because it is unclear whether Becerra extended the reach of Zauderer, the latter is included in the arguments on appropriate scrutiny, *infra* at sections 4.2.4 and 4.2.5.

Becerra’s strained application of compulsory speech jurisprudence seems designed to protect countenanced pre-natal clinics from being forced to reveal alternatives to the fruits of their surreptitious motives. 138 S.Ct.

2361, 2372-73.⁶ Controlling and helpful though Becerra may be, Hired Hands' rights would appear to prevail even under the logic of the dissent.

The Becerra dissent recognizes that the unlicensed disclosure requirement served to dispel the “self-evident” confusion of patients who, “might think they are receiving qualified medical care when they enter [unlicensed] facilities that” appear to provide comprehensive prenatal care. Id. at 2390.⁷ Hired Hands does not countenance some ideological motive or perform acts that could lead to any conclusion other than licensed electrical services are to be rendered. Nor is there any reason why a rational consumer or inspector might believe otherwise. The worn license rule presumes an inherent duplicity of workers, vacuity of consumers, or perhaps both.

Because the worn license rule entails compulsion of an ideological message ranging somewhere between State association and fealty, and because it contains private information, and especially because it uses the private worker's body as a conduit for State-scripted messaging, Hired Hands firmly believes that the strictest scrutiny applies. However, because

⁶Citing United States v. Alvarez, 567 U.S. 709 (2012) for the apparent proposition that the countenanced activists are constitutionally inoculated by analogy to Xavier—“Lying was his habit”—Alvarez Id. at 713; e.g. citing Casey, 505 U.S. at 881 for the proposition that the lawfulness of compelling abortion doctors to provide information about the “unborn child” (not the procedure) somehow logically illustrates the unlawfulness of compelling anti-abortion care clinics to provide information about how to get an abortion.

⁷ Notably, this logic can also be seen in Zauderer, which the majority seemed to approve by its application: “because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, “[warnings] or [disclaimers] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.” Zauderer, 471 U.S. 626, 651 (1985) (quoting In re R. M. J., 455 U.S., 191, 201 (1982)).

the relevant case universe is replete with other standards of review, several will be discussed. See also CP at 48-59.

4.2.3 Strict Scrutiny applies.

Compelled speech is “constitutional[ly] equivalen[t to] compelled silence....” Riley v. Nat'l Fed'n of Blind, 487 U.S. 781, 797.⁸ According to Becerra, it may be even worse, though both are subjected to “strict scrutiny.” Becerra, 138 S. Ct. 2361, 2374 (2018) (the Riley Court called it “exacting...scrutiny,” a phrase that would later come to denote a lesser standard not relevant here).⁹ To survive, the State must show that a requirement is “narrowly tailored to serve [a] compelling state interest....” Id. at 2371 (citation omitted).

Unlike rational basis review, courts applying strict scrutiny do not take the government’s proffered interest at face value. Here, the government “bears the ‘well-nigh insurmountable’ burden to prove a compelling interest....” State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm., 135 Wash. 2d 618, 628 (1998) (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995)). In 119 Vote No!, this Court held “the State's claimed compelling interest to shield the public from falsehoods during a political campaign [was] patronizing and paternalistic”

⁸ “Disclosure requirements,” though technically a form of compelled speech, are addressed infra at 4.2.5 under the Zauderer, “reasonably related,” standard. 471 U.S. 626, 651.

⁹ Beeman v. Anthem Prescription Mgmt., LLC, while factually unhelpful, contains an excellent synthesis of the compelled speech cases and standards of review. 652 F.3d 1085, 1098-1100 (9th Cir. 2011).

as well as a pretext for the deeper desire to usurp the People’s role and “determine the truth and falsity of political speech.” Id. at 631-32.

The Department’s proffered state interest in the worn license requirement is that it will “enable consumers to better identify their electrical workers’ credentialing [and thereby] enable them to confirm...the worker is qualified,” which supposedly implicates safety. CP at 88. A similar proposition failed in Riley, with the Court unpersuaded by the putative interest of “informing donors how the money they contribute is spent in order to dispel the alleged misperception” about how much goes to the fundraiser. Riley. 487 U.S. at 799-99 (holding the interest “not as weighty as the State asserts”). Notably, a donor may never glean such proprietary information from a private donee, whereas the Department seeks only to “better” the delivery of publicly-available information.

The Department’s proffered interest also appears pretextual in light of its portrayal in Electrical Currents. The Department’s newsletter invites workers to participate in and collaborate with the Department to surveil and “report... electrical workers” (i.e. inform on one another) to authorities. CP at 34 (Emphasis in original). The worker is to embrace this dystopian voyeurism by wearing the license “with pride and mak[ing] sure others do too.” CP at 34. This tactic is strikingly similar to those employed by authoritarian regimes interested in vicariously magnifying their wrested authority through the populace. See e.g. PAPERS OF GENERAL INTEREST: Selective Memory: How the Law Affects What We Remember

and Forget about the Past - The Case of East Germany, 35 Law & Soc'y Rev. 513, 533 (discussing the Stasi Files).

The Legislature's proffered state interest in the worn license requirement is that it will thwart

dishonest...contractors [who] sometimes hire workers without proper licenses...[giving them] an unfair competitive advantage and leav[ing] workers and consumers vulnerable...[and thereby] help address the problems of the underground economy in the construction industry, level the playing field for honest contractors, and protect workers and consumers.

CP at 41-42.

Some interests held to be compelling under strict scrutiny are: remedying specific and evidentially supported discrimination,¹⁰ protecting a victim of violence from a true threat of future harm by the same assailant,¹¹ interests arising from "constitutional obligation" like judicial recusal "in the name of due process,"¹² and generally "public health, peace, and welfare." Robinson v. City of Seattle, 102 Wash. App. 795, 823 (2000); CP at 51-52 (discussing more examples of compelling state interest).¹³ No case finds compelling a state concern about economic misfeasance "sometimes" happening.

When a law is clumsily tailored to a proffered interest, courts occasionally skip the first prong. See e.g. Boos v. Berry, 485 U.S. 312, 324-

¹⁰ See e.g. Shaw v. Hunt, 517 U.S. 899, 909 (1996).

¹¹ See e.g. In re Pers. Restraint of Martinez, 2 Wash. App. 2d 904, 915 (2018)

¹² Wolfson v. Concannon, 750 F.3d 1145, 1163 (9th Cir. 2014).

¹³ The sort of market protection interest proffered by the Legislature also fails strict scrutiny. See e.g. CP at 66-67, 95, 96-98, 108-111.

25 (1988). The Becerra Court did this as to the ‘licensed notice requirement’:

Assuming that California’s interest in providing low-income women with information about state-sponsored service is substantial, the licensed notice is not sufficiently drawn to promote it. The notice [requirement] is “wildly underinclusive....”

Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2367 (2018) (quoting Brown v. Entm’t Merchs. Ass’n, 564 U.S. 786, 802 (2011)).

In Becerra, the licensed notice requirement only applied to certain clinics serving “low-income women” and did not encumber several other types of clinics serving -i.e capable of educating- the same target group. Id. at 2375-76. The worn license requirement only applies to “electrical workers,” though the target group (consumers putatively in need of education) may encounter many other types of workers who are not forced to wear their credential. This cannot be explained as legislative incrementalism, given that the Department has chosen not to require plumbers wear their license.¹⁴

The Becerra Court then suggested a less restrictive alternative to compelled speech. Id. at 2376. California could create its own “public-information campaign.” Id. The Department could do the same and already employs an intricate website where the consumer may “Verify a Contractor, Tradesperson or Business” by searching for “Name, Contractor/tradeperson license, Workers’ comp account, [or] WA UBI No.” See

¹⁴ See “WAC 296-400A-024(3), which states that plumbers are ‘encouraged’ to wear their certificates....” Harbor Plumbing v. Dep’t of Labor & Indus., No. 51767-1-II, 2018 Wash. App. LEXIS 1778, at *1 (Ct. App. July 31, 2018).

<https://secure.lni.wa.gov/verify/>. Those consumers aware of unlicensed contractors may also click on “Report a Contractor.”

On the Department’s website, a consumer may also select “Hire Smart Step-by-Step,” which enables consumer “tracking...[and] who is tracking a specific firm.” <https://secure.lni.wa.gov/verify/>. ‘Hire Smart’ also contains a tutorial on how to use all the contractor verification services. Finally, it contains an interactive sectional drawing of a house. The consumer may click on various parts of the house and receive a pop-up message on how respectively to “get the job done right.” Clicking the electrical service panel brings up the following message:

Wiring problems? Broken fixture? For your safety and your family’s, you will need to hire an experienced, registered electrical contractor who is licensed to do the work. Any employees doing the work on your home must be licensed electricians. A licensed contractor will ensure work is done to code, permitted and inspected as required. You could jeopardize your insurance coverage if there’s fire after non-permitted/inspected electrical work.

The consumer is then presented the options of printing the “Hire Smart Worksheet,” choosing to “Learn About Electrical Permits,” or link to the above-described “Verify Contractor Registration” page.¹⁵ Or, the consumer may call the “Contractor information” line either toll free or locally.

Becerra even suggested the dramatic idea to “post the information on public property near crisis pregnancy centers.” 138 S.Ct. at 2376. The

¹⁵ Interactive virtual house can be found at <https://lni.wa.gov/TradesLicensing/Contractors/ContractorFraud/ProtectHome.asp>

Department's website, accessible as it is from most homes and smartphones, is similar in a 'virtual' way. In any case, Becerra clearly locates the Constitutional rampart at or outside the private property boundary line, leaving little doubt that the private human body is also thereby protected.

The Becerra Court next addressed California's "unlicensed notice" requirement. 138 S.Ct. at 2377. The Court nominally applied an incarnation of commercial speech analysis (see Zauderer review sections, *infra*) but placed a heavy burden on California to show their stated purpose of "ensuring 'that pregnant women in California know when they are getting medical care from licensed professionals'" was neither pretextual nor "hypothetical." *Id.* at 2377 (quoting 2015 Cal. Legis. Ser., §1(e)). This allocation of burden and skepticism over the state's proffered explanation are hallmarks of heightened scrutiny.

However strained the Becerra analysis, its facts are too analogous to be discounted. Washington has created a worn license requirement. California created a posted 'unlicense' requirement. If a requirement to post the 'unlicense' on private property is unconstitutional, then the requirement to post a license on the private human body must be as well. The Becerra Court held the posted 'unlicense' requirement was underinclusive because it only applied to some types of unlicensed clinic. *Id.* at 2378. The Legislature only empowered the Department to force some types of worker to wear a license, and of those trades only electricians are so encumbered. Just as "California already makes it a crime for individuals without a

medical license to practice medicine,” Washington makes it a gross misdemeanor for contractors to do so. See RCW 18.27.020.

Finally, the worn license requirement is wildly overinclusive. The wearer’s private information is displayed, not just to consumers and inspectors (including fellow workers encouraged to spy on one another), but to all whose gaze happen upon the credential as the electrician works.

The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632-33 (1943).

The worn license uses both the State Seal and the Department’s logo to symbolize the regulatory system, knitting loyalty to it while announcing the rank and function of the worker. CP at 124. The “other man’s jest and scorn” has been cultivated by many of America’s recent leaders and is manifest in characters like the so-called MAGA-Bomber, who view any so-called ‘deep-state’ affiliation with deadly contempt.¹⁶

¹⁶See e.g. William K. Rashbaum, Outspoken Trump Supporter Charged in Attempted Bombing Spree, The New York Times (October 26, 2018) <https://www.nytimes.com/2018/10/26/nyregion/cnn-cory-booker-pipe-bombs-sent.html>;

The Wooley Court answered ‘no’ to the question of “whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property.” Wooley v. Maynard, 430 U.S. 705, 713 (1977), CP at 84. The Riley Court broadened the protection to cases where the state requires the individual to disseminate a purely factual message from her mouth. 487 U.S. 781 (1988). The only logical conclusion is that the state may not require an individual to participate in dissemination of a message by displaying it on his private body. The worn license requirement flatly fails strict scrutiny.

4.2.4 Becerra’s application of Zauderer.

Zauderer v. Office of Disciplinary Counsel of Supreme Court was a case grounded firmly within the doctrinal confines of “purely commercial speech....” U.S. 626, 629, 636-38 (1985) (“advertising pure and simple”). Nonetheless, Becerra obliquely applied the prong of commercial speech doctrine that is typically invoked -after the predicate finding that burdened speech is purely commercial- where the state has implemented a “disclosure requirement.” 185 S.Ct. at 2377.

Disclosure requirements incidental to purely commercial speech were analyzed in Zauderer as follows:

We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.

Zauderer, 471 U.S. 626, 651 (1985).

The Becerra Court apparently ignored the last sentence, which would seem to be the actual *Zauderer*-test, and instead assessed whether the “unlicensed notice” is “unjustified or unduly burdensome.” Becerra, 138 S. Ct. at 2377 (citation omitted). The Court then gauged the burden by asking whether the disclosure requirement would “remedy a harm that is ‘potentially real not purely hypothetical,’” and was “no broader than reasonably necessary....” Id. (citations to Commercial Speech cases omitted for brevity). Most importantly, the Court placed the burden of proof on the state. Id.

In Becerra, California’s argument failed because it “point[ed] to nothing suggesting that pregnant women do not already know” the clinics are “staffed by unlicensed” personnel. Id. Here, the Department has pointed to nothing suggesting a consumer who hires an electrician lacks knowledge of her licensure status. See e.g. CP at 114; RP 23:7-13. The worn license rule is a solution in search of a problem.

Much like the worn license requirement,

[t]he unlicensed notice imposes a government-scripted, speaker-based disclosure requirement that...covered facilities...post [the state]’s precise notice, no matter what the facilities say on site or in their advertisements.

Becerra, 138 S. Ct. 2361, 2377 (2018).

The worn license requirement does not account for the fact that the consumer has plenary bargaining power at the outset of a transactional relationship with the private electrical contractor and can choose to hire only

licensees. It ignores the dialogue between worker and consumer or inspector, what Hired Hands may say on site or in advertisements, and the vast resources available by calling or visiting the Department or its website.

The worker who has endeavored through thousands of apprenticeship hours to become licensed (who is likely proud of the accomplishment and happy to show off the license when prompted) is additionally burdened by the physical nuisance of always needing to have a placard positioned just so, irrespective of the dynamic realities presented in blue collar work environs. Moreover, the worker is burdened by the distraction of constantly checking whether the license has fallen off or is positioned correctly, though she may be attempting to concentrate on a dangerous task involving, for instance, electricity or power tools.

The Department has taken a paternalistic view of both the electrical worker and consumer. Despite rigorous electrical apprenticeship requirements and continuing education, the electrician's natural state is presumed to be one of bungling duplicity. The consumer is presumed to be so witless as to require immediate visual confirmation and incessant reaffirmation of easily discoverable facts. Finally, to the individual who has chosen not to work for the state, or perhaps for any employer at all, the burden is visceral -the State has coerced such a worker into betraying his convictions (not to mention betraying colleagues, who are supposed to be spied upon and reported for noncompliance).

4.2.5 Intermediate Scrutiny as applied in Zauderer.

Zauderer held, in pertinent part, that the state may require an attorney to disclose the potential that non-prevailing clients may be required to pay costs in a contingency fee arrangement. 471 U.S. 626, 653 (1985). Zauderer's intermediate "disclosure requirement" review was triggered by the fact that the ethics rule "only required them to provide somewhat more information than they might otherwise be inclined to present." Id. at 650.

Because Hired Hands is not subjected to speech compulsion that relates in any way to advertisement, this standard is probably inapplicable. It will, however, be discussed briefly because Becerra applied Zauderer. The Zauderer test is whether "disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." Id. at 651.

In Becerra, the unlicensed operations were literally disguised as medical clinics. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2378 (2018). Though unlicensed, they "primarily provide 'pregnancy-related'" services" like "ultrasounds...[and] pregnancy testing or...diagnosis." Id. at 2370, 2378. A pregnant woman, for whom even a minor delay may have monumental consequences, would presumably be at great risk of deception by such clinics. The displayed 'unlicense' requirement would seem to reasonably relate to preventing this deception.

Licensed electricians are state-approved professionals. The Department's assumption that they are inherently duplicitous is not only

paternalistic but just plain mean. The Department has carried no burden of showing that electricians go about our society scheming to perform unlicensed and unsafe work, or that consumers are so foolish as unknowingly to let them. There is no deception.

4.3 The worn license requirement is an unconstitutional infringement of the fundamental rights of bodily autonomy and choice of appearance under the Substantive Due Process clause of the 5th and 14th Amendments.

The issue is whether the worn license requirement violates the wearer's right to a choice of personal appearance, unlawfully invading bodily autonomy. CP at 74-83, 95-101, 108-13; VR 5:22-8:7. Below, the Department argued the conservative theory that fundamental rights are only those meted out by the Supreme Court in a "short list." CP at 95-96.

Though this is a flawed argument, the Court need not reach it because both personal appearance and bodily autonomy are within the Substantive Due Process "guideposts for responsible decisionmaking." CP at 96 (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)). Because no new binding case has been published since the trial court dismissal, this section will summarize the arguments below and reinforce the impossibility that rational basis review is appropriate.

Substantive due process jurisprudence, for better or worse, has tended to begin with a survey of history. See e.g. Washington v. Glucksberg, 521 U.S. 702, 710 (1997); CP at 74-77. It is said that fundamental rights are those "'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither

liberty nor justice would exist if they were sacrificed.” Am. Legion Post No. 149 v. Dep't of Health, 164 Wash. 2d 570, 600 (2008) (quoting Glucksberg, supra at 720-21 (citations omitted)).

Though it always existed, the fundamental liberty interest in “personal appearance” was first judicially recognized in the “policeman’s hair” case, Kelley v. Johnson, 425 U.S. 238, 244 (1976); CP at 49-50, 76-79, 98-99, 111-12. Though the Constitution did not protect Officer Kelley’s hair as a “paramilitary” state employee, the majority, concurring, and dissenting opinions all agreed that the personal appearance liberty interest exists. Id. at 246.

In his dissent, Justice Marshall provided raw historical context straight from the source of our Bill of Rights, “the 1789 congressional debates....” Id. at 1448 (J. Marshall dissenting). Like the extra-jurisdictional cases cited by Hired Hands, the nonbinding character of a dissenting opinion does not diminish its utility as direct historical evidence. CP at 74-75 n. 4-6, 98-100, 112.

There was considerable debate over whether the right of assembly should be expressly mentioned. Congressman Benson of New York argued that its inclusion was necessary to assure that the right would not be infringed by the government. In response, Congressman Sedgwick of Massachusetts indicated:

"If the committee were governed by that general principle... they might have declared that a man should have a right to wear his hat if he pleased... but [I] would ask the gentleman whether he thought it necessary to enter these trifles in a declaration of rights, in a Government where none of them were intended to be infringed."

Id. at 251-52.

Justice Marshall cited the passage to support the majority and concurring opinions with tangible evidence that American legal history itself consists of the very right at bar (though the majority would not extend it to police officers). Congressman Sedgwick chose this fundamental right of personal appearance as the metaphorical least common denominator of Liberty itself. For as long as fundamental rights jurisprudence continues under the oft maligned ‘deeply rooted in history’ rubric, it is unlikely any proponent will ever unearth an artifact so revelatory. It is therefore no wonder the majority and concurring opinions cautiously avoided any quarrel with the existence of the right as to private citizens, given that it is a literal building block or distillation of Constitutional Liberty.

“If little can be found in past cases of this Court or indeed in the Nation's history on the specific issue of a citizen's right to choose his own personal appearance, it is only because the right has been so clear as to be beyond question.” Kelley v. Johnson, 425 U.S. 238, 251 (1976) (Marshall J. dissenting). It may be difficult to find affirmative examples of Personal Appearance Liberty. This speaks to the audacity of the infringement, not to a dearth of liberty resultant of blank spots on some judge-made list. Assuming circumstantial evidence is even necessary in the wake of Congressman Sedgwick’s decree, it will typically be found in the rarified instances where the Liberty is tolerably infringed.

Liberty-negative examples are usually associated with state employees like Officer Kelley (haircuts, badges, uniforms etc.), prisoners

(jumpsuits, tracking bracelets etc.) soldiers and school children. CP at 75.¹⁷

At risk of triggering the delicate sensibilities of the Department, a survey of American slavery would also yield some examples of items worn by force.

Though examples of such paternalistic laws are difficult to find, courts have rejected worn licenses for signature gatherers, newsboys, and street performers. CP at 74-75. The sole possible exception is an apparent ‘secondary effects doctrine’ case regarding nude dancers in Texas -a favorite of the Department.¹⁸ Outside our shores are the obvious example of badges in Nazi Germany (again, with apologies to the Department’s emotions) and the lesser known Irish ‘bouncer’ rules. CP at 75-76, 98 n. 2, 112 n. 6.

The Kelley Court emphatically tied the application of rational basis review to Kelley’s status as a state employee, reiterating this point at least thirteen times in the majority opinion. 425 U.S.at 244-49. Justice Powell’s concurring opinion is only one paragraph, written solely to “make clear” that the deferential treatment of the police regulation carries “no negative implication...with respect to a liberty interest...as to matters of personal appearance.” Id. at 249 (Powell, J. concurring).

¹⁷ Though it is tempting to include protective gear like a hardhat, safety goggle, or fall-restraint harness in the historical analysis, this would be a distraction because it is inconceivable such requirements would fail even the strictest scrutiny, nor is any expression conveyed by such imposition. See CP at 111 n. 4.

¹⁸ See e.g. CP at 74-75, 102, 112 n. 5; RP 18:24-19:14, 23:14-24:14 (discussing the inapposite case Northwest Enterprises Inc. v. City of Houston, 27 F. Supp.2d 754 (S.D. Tex. 1998), reversed by N.W. Enter. Inc., 372 F.3d 162, 197 (5th Cir. 2003) (nude dancer license upheld under ‘secondary effects’ scrutiny).

4.3.1 Strict scrutiny is appropriate.

Kelley eliminated the possibility that the deferential review of laws burdening “para-military” employees of the State could also apply to those burdening “a member of the citizenry at large....” Id. at 245. Either strict scrutiny or a balancing test will be used to analyze infringement of “bodily integrity and freedom from unwanted touching....” Vacco v. Quill, 521 U.S. 793, 807 (1997) (citing Cruzan v. Dir., Mo. Dep’t of Health, 497 U.S. 261, 279 (1990); see also Reno v. Flores, 507 U.S. 292, 302 (1993)).¹⁹ Privacy, also implicated by the worn license requirement, is subjected to strict scrutiny. See e.g. State v. Farmer, 116 Wash. 2d 414, 429 (1991).²⁰

The various levels of scrutiny having been briefed supra and in the trial court, the burden of proof deserves some attention here. Supra at 4.3; CP at 48-59. Under strict scrutiny “it is the government that bears the burden of proof” of both the compelling nature of the interest and that the infringement is necessary. Fisher v. Univ. of Tex., 136 S. Ct. 2198, 2222 (2016).²¹

The record contains no evidence that the Department’s proffered safety interest is anything but imaginary. The Department has not carried any burden to refute or clarify the tenuous model by which “a worn license

¹⁹ A balancing appears in cases where the aggrieved person is incarcerated or civilly committed. See e.g. Youngberg v. Romeo, 457 U.S. 307, 319 (1982).

²¹ See also eg. Miller v. Johnson, 515 U.S. 900, 920 (1995) (“the State must demonstrate that its...[action] is narrowly tailored to achieve a compelling interest...” (applying strict scrutiny in the Equal Protection context)); Burson v. Freeman, 504 U.S. 191, 199 (1992) (“To survive strict scrutiny...a State must do more than assert a compelling state interest - it must demonstrate that its law is necessary to serve the asserted interest.”);

creates ubiquitous transparency, the illumination of which forces unlicensed electricians out of the trade, making electrical work safer.” CP at 51. All indications are that safety is a pretextual justification for market management.

The Department offers no statistic or publication tending to correlate wearing a license with safety, nor has it adduced any evidence of defective electrical work posing a threat to public safety.²² It is common knowledge that gas piping -the trade of the plumber- occasionally results in entire buildings or city blocks exploding.²³ Yet the plumbers of Washington State are not required to wear their licenses. See CP 64, WAC 296-400A-024 (“encourage[ing]” plumbers to wear licenses); Harbor Plumbing v. Dep’t of Labor & Indus., No. 51767-1-II, 2018 Wash. App. LEXIS 1778 (Ct. App. July 31, 2018).

Even pretending the Department had shown its interest was anything more than market management wrapped in the nominally-compelling ‘public safety’ guise, the Department has also made no effort to foreclose less restrictive alternatives. The enormous list of less restrictive alternatives has been heavily briefed supra at 4.3.3. See also CP at 52-56. The

²² The Department’s own self-serving and conclusory testimony does not carry any burden. CP at 88-89.

²³ See e.g. Kira Millage, Timeline of Bellingham Pipeline Explosion, The Bellingham Herald (June 7, 2009) <https://www.bellinghamherald.com/news/local/article22200432.html>; Denny Westneat, Puget Sound Energy’s Blame Game Misses its Mark in Greenwood Gas Blast, The Seattle Times (March 14, 2018) <https://www.seattletimes.com/seattle-news/puget-sound-energys-blame-game-misses-its-mark-in-greenwood-gas-blast/>; etc.

Department should improve its enforcement function, not punish those who are compliant.

4.4 WAC 296-46B-940 is Void for Vagueness under the Fourteenth Amendment.

The rule is vague because the mandated “standard of conduct...is not possible to know.” Johnson v. United States, 135 S. Ct. 2551, 2570 (2015) (quoting the seminal vagueness case, International Harvester Co. of America v. Kentucky, 234 U.S. 216, 221 (1914)). This is so even when “the language used in the enactment is afforded a sensible, meaningful, and practical interpretation.” Spokane v. Douglass, 115 Wash. 2d 171, 180 (1990).

Hired Hands argued below that the rule (and not the statutory authority for it) is vague as to when the license may be covered up, by what garment it may be covered, and by what instrumentality the license can lawfully and practically be mounted on the human. CP at 68-74. At risk of merely rehashing the record below, this section will summarize the trial court arguments then focus on the vaguest aspects of the rule.

‘When’ the license may be covered is a function of location, activity of the worker, and the weather. The specified locations are “outside in the rain[,]...in an attic or crawl space...[, or] where wearing the certificate may pose an unsafe condition for the individual.” WAC 296-46B-940 (reproduced in pertinent part supra at Section 3, and CP at 64). The ‘vagueness of when’ inheres in the fact that construction work is frequently

performed ‘inside’ in the rain, and that maintaining a consciousness of the license location is itself an “unsafe” distraction. CP at 69-70, 72-73.

‘What’ garment may cover the license is a function of garment purpose. The garment must be purposed as “outer protective clothing (e.g., rain gear when outside in the rain, arc flash, welding gear, etc.)...” WAC 296-46B-940, CP at 64. Hired Hands argued below that vagueness inheres in the paradox created by the “etc,” which suggests inclusion of other garments in the continuum of listed protections, and the decree that “[a] cold weather jacket or *similar* apparel is not protective clothing.” *Id.* (the “etc” and the “similar” depriving the remaining words of meaning). CP at 69-73.

The instrumentality is not detailed in the rule. However, compliance can imaginably be accomplished by dangling a lanyard, or by pinning or clipping the license on the required chest area. See CP at 64 (“on the front of the upper body” WAC 296-46B-940). Hired Hands argued it is not possible to comply without violating WISHA rules (lanyard), inadvertently stabbing one’s self with a pin, or inadvertently losing the license amidst physical rigors of construction work despite good faith effort to comply by clipping it on. CP at 73.

The vaguest aspect of the rule is the contradiction in terms. “Vagueness in the constitutional sense means that persons of ordinary intelligence are obliged to guess as to what conduct the ordinance proscribes.” Spokane v. Douglass, 115 Wash. 2d 171, 179 (1990). “Statutes must be interpreted and construed so that all the language used is

given effect, with no portion rendered meaningless or superfluous.” Davis v. Dep't of Licensing, 137 Wash. 2d 957, 963 (1999).

If a statute cannot be interpreted as such by a court, then certainly an electrician of ordinary intelligence cannot determine how to comply. Here, the terms “etc.” and “similar” collide such that one or both must be robbed of meaning. By attaching “etc” to a definition of “protective clothing” that confronts rain, arc flash, and welding embers, ordinary intelligence would assume cold is reached as well.

Ordinary intelligence might even demure just enough to accept the fiction that a “cold weather jacket...is not protective clothing.” However, if apparel *similar* to such a jacket is also not “protective,” then neither can be those associated with rain, arc flash, or welding. There exists no chest-covering garment ‘similar’ to a cold weather jacket that would not afford protection against, at least, rain.

A legal scholar analyzing the language with a rehabilitative eye might conclude that the rain/cold dichotomy is correlated with the protective time-commitment necessitated by each condition. In other words, it may be that the Department wanted to limit covering the license to cursory instances of transition between dynamic environs.

However, the wording leaves Hired Hands to guess at when it is permissible to cover the license. CP at 44-46. To comply, the electrician must guess at the paradigm of bureaucrats sitting in cozy boardrooms,

themselves half-heartedly (or, perhaps, not at all) guessing at the jobsite realities faced by those over whom they impose their will.

5.0 The Court should award appellants' attorney fees and costs.

The Equal Access to Justice Act (“EAJA”), RCW 4.84.340 et seq, permits an award of prevailing plaintiff “attorney fees for certain individuals and qualified groups who otherwise would be deterred from defending against unjust state agency actions.” Cobra Roofing v. Labor & Indus., 157 Wash. 2d 90, 98 (2006) (citing Entm't Indus. Coal. v. Tacoma-Pierce Co. Health Dep't, 153 Wn.2d 657, 667 (2005)). But for a contingency fee agreement, Hired Hands would not have been able to raise this challenge.

Under the EAJA, a fee applicant must be “qualified.” Id.; RCW 4.84.350(1). Kenneth Smith did not have a “net worth exceed[ing] one million dollars,” nor did Hired Hands have a “net worth exceed[ing] five million dollars” as of May 6, 2016, when “the initial petition for judicial review was filed.” RCW 4.84.340(5). Therefore, each is a qualified party and may be entitled to reimbursement for attorney fees up to the combined limit of “twenty-five thousand dollars.” RCW 4.84.350(2).

Additionally EAJA only applies to judicial review “authorized by the APA.” Cobra Roofing, 157 Wash. 2d at 101. RCW 34.05.570(2) authorizes Constitutional challenges to rules. The award and its cap apply “for each level of judicial review” and include “time spent on establishing

entitlement to a court awarded attorney fee.” Costanich v. Dep't of Soc. & Health Servs., 164 Wash. 2d 925, 933-35 (2008).

If this appeal has prevailed on any significant issue, the Court should award fees for any reversal of the trial court and for the appeal, “unless [the Department] was substantially justified” in making the rule. RCW 4.84.350(1). The burden is on the Department to “show that its position has a reasonable basis in law and fact.” Silverstreak, Inc. v. Dep't of Labor & Indus., 159 Wash. 2d 868, 892 (2007) (quoting Cobra Roofing Serv., Inc., 122 Wn. App. 402, 420 (2004)).

The weakness of the government’s legal basis is evident in that neither the legislative nor agency record contain any reference to the Constitutional rights of citizens. No reasonable person would believe, in America, that the state government could start pinning its official documents to private citizens’ chests. The Legislature has its own attorneys and the Department has an entire division of the Attorney General’s Office at its disposal.

Among these herds of lawyers, there should not be one single bar member whose issue-spotting skills are so poor as to not, at the very least, raise a red flag upon seeing this unprecedented and flagrant government encroachment on the individual. Heeding such red flag, a lawyer would find only one case potentially capable of tenuously supporting such requirement, and that from the Fifth Circuit. See N.W. Enter. Inc., 372 F.3d

162 (5th Cir. 2003) (discussed supra at 4.3, CP at 75 and RP 8:14-9:22, 18:24-19:17, 23:14-22.

To the contrary, a reasonable person would expect the government to analyze her rights as an American and Washingtonian prior to foisting a state emblem onto her body. A reasonable person would expect something more than answer to the beckon call of trade associations and blind adherence to whatever is going on in Oregon. CP at 88-89. The Department does not appear to have given any Constitutional consideration to workers' rights during rulemaking. CP 87-89. This was a legally arbitrary choice.

At the very least, a reasonable person would expect one of the many available, tax-funded lawyers to do some research, perhaps draft a legal memorandum for the file. Moreover, imminent codification of such a constitutionally offensive requirement might be one of "those rare occasions where the interest of the public in the resolution of an issue is overwhelming" such that an advisory opinion might be rendered beforehand. To-Ro Trade Shows v. Collins, 144 Wash. 2d 403, 416 (2001) (quoting In re Disciplinary Proceeding Against Deming, 108 Wn.2d 82, 122-23 (1987) (Utter, J., concurring)).

The weakness of the government's factual basis is coterminous with its failure to carry any burden of proof. The government has not demonstrated any real deficiency in electrical safety or spike in electrically induced harm. The Department appears to have reacted to a "previous rulemaking moratorium" by frantically expelling its pent-up rulemaking

urges in a haphazard fashion. CP at 29. Indeed this same messy rulemaking session nearly killed off the entire telecommunications (aka “.06 license”) industry by redefining “telecommunications” to preclude work on anything but analog telephones from circa 1940. See WAC 296-46B-100; WSR 12-21-103.

Neither the Department’s “Preproposal Statement of Inquiry” (a.k.a. CR-101) nor its “Proposed Rule Making” (a.k.a. CR-102) notified stakeholders that a worn license requirement was even being considered. CP at 28-29. If the stakeholders had known about the coming infringement, the Department would certainly have had more than (i) only “one person at a hearing objected” and (ii) the fact that ‘Oregon does it too’ as factual bases. CP at 88-89. The only supportable factual basis is that industry leaders wanted better economic protection. CP at 88.

6. Conclusion

The worn license requirement is unconstitutional in several ways. It violates the First Amendment by compelling speech. It violates substantive due process by invading the body and depriving the wearer of the liberty to choose personal appearance. It violates procedural due process by wording so vague as to leave the worker unable to comply. The Court should invalidate both the rule and its statutory authority.

I, Jackson Millikan, respectfully submit, and swear under penalty of perjury by Washington State law, that I have electronically served, this brief on counsel of record this 4th day of December 2018

/s/Jackson Millikan

Jackson Millikan WSB# 47786
Attorney for Appellants
Law Office of Jackson Millikan
2540 Kaiser Rd. Olympia, WA 98502
360.866.3556

December 04, 2018 - 1:18 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 95901-3
Appellate Court Case Title: Hired Hands, LLC, et al v. Washington State Department of Labor and Industries
Superior Court Case Number: 16-2-01850-2

The following documents have been uploaded:

- 959013_Briefs_20181204131643SC788925_0389.pdf
This File Contains:
Briefs - Appellants
The Original File Name was 95901-3 Appellants Opening Brief Hired Hands.pdf

A copy of the uploaded files will be sent to:

- WillH@atg.wa.gov
- cynthiagl@atg.wa.gov

Comments:

Sender Name: Jackson Millikan - Email: jackson@millikanlawfirm.com
Address:
2540 KAISER RD NW
OLYMPIA, WA, 98502-4040
Phone: 360-866-3556

Note: The Filing Id is 20181204131643SC788925