No. 12-17681

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID PICKUP, et al.,
Plaintiffs-Appellants,
v.
EDMUND G. BROWN, Jr., et al.,
Defendants-Appellees,
and
EQUALITY CALIFORNIA,
Defendant-Intervenor-Appellee

On Appeal From The United States District Court
For The Eastern District Of California
No. 2:12-CV-02497-KJM-EFB (Honorable Kimberly J. Mueller)

RESPONSE OF EQUALITY CALIFORNIA IN OPPOSITION TO PLAINTIFF-APPELLANTS' EMERGENCY MOTION FOR TEMPORARY INJUNCTION PENDING APPEAL

SHANNON P. MINTER (SBN 168907)
CHRISTOPHER F. STOLL (SBN 179046)
NATIONAL CENTER FOR LESBIAN RIGHTS
870 MARKET STREET, SUITE 370
SAN FRANCISCO, CA 94102
TELEPHONE: (415) 392-6257
FACSIMILE: (415) 392-8442

MICHELLE FRIEDLAND (SBN 234124)
MUNGER, TOLLES & OLSON LLP
560 MISSION STREET, 27TH FLOOR
SAN FRANCISCO, CA 94105-2907
TELEPHONE: (415) 512-4000
FACSIMILE: (415) 512-4077

DAVID C. DINIELLI (SBN 177904)
LIKA C. MIYAKE (SBN 231653)
BRAM ALDEN (SBN 272858)
MUNGER, TOLLES & OLSON LLP
355 SOUTH GRAND AVE, 35TH FLOOR
LOS ANGELES, CA 90071-1560
TELEPHONE: (213) 683-9100
FACSIMILE: (213) 687-3702

Counsel for Defendant-Intervenor-Appellee Equality California

DEFENDANT-INTERVENOR-APPELLEE EQUALITY CALIFORNIA'S CORPORATE DISCLOSURE STATEMENT

This Corporate Disclosure Statement is filed on behalf of EQUALITY CALIFORNIA in compliance with the provisions of Rule 26.1, Federal Rules of Appellate Procedure, requiring a nongovernmental party to a proceeding in a court of appeals to file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

Equality California states that it is a nonprofit corporation with no such parent corporation, and no publicly held corporation owns 10% or more of its stock. Additionally, Equality California is unaware of any publicly held entity with a direct financial interest in the outcome of the instant litigation.

A supplemental disclosure statement will be filed upon any change in the information provided herein.

DATED: December 14, 2012

National Center for Lesbian Rights
SHANNON P. MINTER

By: ____/s/ Shannon P. Minter

Attorneys for EQUALITY CALIFORNIA

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 4

I. PLAINTIFFS CANNOT SATISFY THE STANDARD FOR GRANTING THE EXTRAORDINARY REMEDY OF AN INJUNCTION PENDING APPEAL. 4

II. PLAINTIFFS HAVE NOT SHOWN IRREPARABLE INJURY, AND THE SEVERE RISKS OF PHYSICAL AND MENTAL HARM TO YOUTH ADDRESSED BY SB 1172 FAR OUTWEIGH ANY POTENTIAL HARDSHIP TO PLAINTIFFS. 4

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT PLAINTIFFS HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS. 10

A. The State May Reasonably Regulate Medical Practice, Including Aspects of Medical Treatment That Are Carried Out Through Speech 12

B. There Is A Clear Distinction Between Reasonable Medical Regulations and Laws that Improperly Infringe On Professionals' Ability to Express Their Views in the Public Arena. 15

CONCLUSION 20

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Alliance for the Wild Rockies v. Cottrell,
632 F.3d 1127 (9th Cir. 2011) 4, 8

Ass'n of Christian Sch. Int'l v. Stearns,
679 F. Supp. 2d 1083 (C.D. Cal. 2008), aff'd, 362 F. App'x 640 (9th Cir. 2010) 16

Conant v. Walters,
309 F.3d 629 (9th Cir. 2002) ..... passim

Golden Gate Restaurant Ass'n v. City and County of San Francisco,
512 F.3d 1112 (9th Cir. 2008) 1, 5, 10

Lowe v. SEC,
472 U.S. 181 (1985).....13

M.R. v. Dreyfus,
697 F.3d 706 (9th Cir. 2011) 7

Nat'l Endowment for the Arts v. Finley,
524 U.S. 569 (1998).....15

National Association for the Advancement of Psychoanalysis v. California Board of Psychology,
228 F.3d 1043 (9th Cir. 2000) 11, 12

Oregon v. Ashcroft,
368 F.3d 1118 (9th Cir. 2004), aff'd sub nom. *Gonzales v. Oregon*, 546 U.S. 243 (2006).....12

Planned Parenthood v. Casey,
505 U.S. 833 (1992).....2, 13

Rodde v. Bonta,
357 F.3d 988 (9th Cir. 2004) 8

United States v. Am. Library Ass'n,
539 U.S. 194 (2003).....16

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,
425 U.S. 748 (1976).....15

TABLE OF AUTHORITIES

Page

Watson v. Maryland,
218 U.S. 173 (1910).....3, 12

Welch v. Brown,
No. Civ. 2:12-2484-WBS-KJN, 2012 WL 6020122 (E.D. Cal. Dec. 3, 2012).....12, 20

Welch v. Brown, et al.,
No. Civ. 2:12-2484-WBS-KJN (E.D. Cal. Dec. 3, 2012).....19

Winter v. Natural Res. Defense Council, Inc.,
555 U.S. 7 (2008).....4, 6, 8

Wollschlaeger v. Farmer,
No. 11-22026-Civ, 2012 WL 3064336 (S.D. Fla. June 29, 2012).....19

STATE CASES

Bd. of Med. Quality Assurance v. Superior Court,
114 Cal. App. 3d 272 (1980) 13

Cobbs v. Grant,
8 Cal. 3d 229 (1972) 13

Meier v. Ross General Hospital,
69 Cal. 2d 420 (1968) 16

Molien v. Kaiser Found. Hosps.,
27 Cal. 3d 916.....17

Moore v. Preventive Medicine Medical Group. Inc.
178 Cal. App. 3d 728 (1986) 16

STATUTES AND RULES

Cal. Bus. & Prof. Code § 651 18

Cal. Bus. & Prof. Code § 2960 17

Cal. Bus. & Prof. Code § 4982 17

Cal. Bus. & Prof. Code § 4989.54 17

Cal. Bus. & Prof. Code § 4992.3 17

TABLE OF AUTHORITIES

Page

Cal. Bus. & Prof. Code § 4999.90 17

Cal. Bus. & Prof. Code § 17500 18

Cal. Stats. 2012, ch. 835, § 1 6

Cal. Stats. 2012, ch. 835, § 1(n) ("SB 1172") ..... passim

OTHER AUTHORITIES

11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.4, at 207 (2d ed. 1995) 10

Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation (2009) 2, 7

Robert Post, Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech, 2007 U. Ill. L. Rev. 939, 951 (2007) 14

INTRODUCTION

Plaintiff-Appellants' Emergency Motion For Temporary Injunction Pending Appeal constitutes an extraordinary attempt to upend the status quo by preventing enforcement of a state law that will protect thousands of vulnerable California youth from risk of severe harm, including suicide, while causing no harm to Plaintiffs or anyone else. The California Legislature overwhelmingly approved SB 1172, with input and strong support from professional mental health organizations, and determined that it should take effect on January 1, 2013. Plaintiffs contend that the requested temporary injunction would preserve the status quo. Mot. at ii. But this Court has held that when a legislative body has duly enacted a law protecting the health and well-being of the general public, it is by allowing the law to take effect as scheduled, not by suspending it, that a court can "in a real sense, preserve rather than change the status quo." *See Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008) (allowing local health care ordinance to take effect pending appeal).

Plaintiffs argue that the statute threatens the "professional livelihood" of therapists and their ability to offer sexual orientation change efforts ("SOCE"). Mot. at 2, 5-7. But this Court has made clear that "financial concerns" such as those asserted by the therapists here cannot outweigh "preventable human suffering." *See Golden Gate*, 512 F.3d at 1126 (denying a stay pending appeal).

Here, as the district court found, the Legislature concluded that SB 1172 is necessary to prevent serious harm to minors, including a significantly heightened risk of depression and suicide, based "on mental health professional organizations' research into the safety and efficacy of SOCE" as well a variety of other sources. *See* Cal. Stats. 2012, ch. 835, § 1(n).

Plaintiffs' argument that minor patients will suffer if they cannot obtain SOCE during the pendency of this appeal is also erroneous. Leading medical and mental health organization agree that SOCE is not effective in changing sexual orientation and that any perceived benefits from SOCE practices can be achieved through therapy that is not dangerous and does not aim to change orientation. (*See* Dkt #54, Declaration of Paul Stein Exh. A, Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation (2009) ("APA Report") at 53 ("[T]he factors that are identified as benefits are not unique to SOCE . . . .").)

Independently, the Court should deny the motion because Plaintiffs cannot demonstrate a likelihood of success on the merits. The Supreme Court and this Court long have recognized States' broad authority to regulate professions, including the medical and mental health professions, to ensure that patients receive competent care. This is the law even though these professionals utilize "speech" in the course of providing medical or mental health treatment. *See*, *e.g.*, *Planned*

Parenthood v. Casey, 505 U.S. 833, 884 (1992) (plurality opinion) (speech that is "part of the practice of medicine, [is] subject to reasonable licensing and regulation"). The proposed rule that Plaintiffs advance—subjecting professional regulations to strict scrutiny whenever they affect professional speech—would overturn a century of settled law confirming States' power and duty to regulate these professions. *See, e.g, Watson v. Maryland*, 218 U.S. 173, 176 (1910) ("There is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine."). Indeed, the rule would call into question a central premise of regulation of the medical profession (including through medical malpractice law), which is that States can enforce accepted professional standards about how medical professionals treat their patients, including aspects of what they can and cannot say to their patients during the course of treatment.

Courts have invalidated regulations of medical practice because the regulations impermissibly implicated what medical providers could say to their patients only when, in contrast to the situation here, the challenged regulations would have interfered with the provision of competent medical services. *E.g.*, *Conant v. Walters*, 309 F.3d 629, 644 (9th Cir. 2002) (Kozinksi, J., concurring) (law could harm patients "[as they will be] cut . . . off from *competent* medical advice") (emphasis added). SB 1172, by contrast, reflects the consensus judgment of leading mainstream medical and mental health organizations, including the

American Psychological Association, the American Psychiatric Association, and the American Academy of Pediatrics, which have unanimously concluded that SOCE is ineffective and dangerous. SB 1172 is a straightforward exercise of the State's police power to ensure that licensed therapists in California provide competent care to their patients. There is no basis to enjoin it pending appeal.

ARGUMENT

I. PLAINTIFFS CANNOT SATISFY THE STANDARD FOR GRANTING THE EXTRAORDINARY REMEDY OF AN INJUNCTION PENDING APPEAL.

An injunction is "an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 24 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. A party seeking temporary injunctive relief must always satisfy all four elements of the *Winter* test and must, in every case, show that irreparable harm is not merely possible, but *likely to occur*. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Plaintiffs' request to enjoin SB 1172 fails to satisfy *any* of the *Winter* factors.

II. PLAINTIFFS HAVE NOT SHOWN IRREPARABLE INJURY, AND THE SEVERE RISKS OF PHYSICAL AND MENTAL HARM TO YOUTH ADDRESSED BY SB 1172 FAR OUTWEIGH ANY POTENTIAL HARDSHIP TO PLAINTIFFS.

Plaintiffs have not shown that they will be irreparably injured if SB 1172 goes into effect while this appeal is pending. (Briefing is to be completed within two months, or on a shorter schedule, if this Court so orders). In addition, the balance of hardships and the public interest strongly favor allowing California youth to benefit now from the crucial protections established by SB 1172.

The six Plaintiffs who are licensed therapists or professional associations claim that permitting SB 1172 to take effect will threaten their or their members' licenses and "professional livelihoods." Mot. at 2, 5. That claim has no merit. SB 1172 will not deprive Plaintiffs of their livelihoods or ability to continue to practice as licensed therapists in California; rather, it simply requires them to adhere to professional standards of competence and therefore to refrain from engaging in the practices prohibited by SB 1172. To the extent Plaintiffs argue that they will suffer harm based on the pecuniary impact of being unable to perform SOCE on minor patients while this appeal is pending, the law is clear that any such harm is outweighed by the serious risks to youth—including depression and suicide—that SB 1172 addresses. "'Faced with ... a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly' in favor of the latter." *Golden Gate*, 512 F.3d at 1126 (citation omitted) (permitting ordinance extending health care coverage to approximately 20,000 uninsured individuals to take effect pending appeal, where

the alleged irreparable harm to plaintiffs was a requirement to fund health care for covered employees while appeal was pending).

Plaintiffs' fears that their professional licenses will be in jeopardy pending appeal are wholly unfounded. Plaintiffs can readily avoid such a consequence by simply complying with the law. *See Winter*, 555 U.S. at 22.

Nor have Plaintiffs established a likelihood of irreparable injury arising from the fact that the therapist Plaintiffs will be unable to perform SOCE, and the minor-patient Plaintiffs will be unable to receive it, pending resolution of this appeal. Nothing in SB 1172 prevents the two minor Plaintiffs from continuing to receive and benefit from psychotherapy, including from their current therapist, Plaintiff Nicolosi. SB 1172 prohibits only one specific set of practices—those that seek to change sexual orientation. And, contrary to the claim that stopping SOCE would be harmful, *every mainstream mental health organization to consider the issue* agrees that SOCE is ineffective and puts youth at risk of serious harms—as is reflected in the Legislature's findings supporting SB 1172. *See* Cal. Stats. 2012, ch. 835, § 1. Plaintiffs have no credible claim to harm from not being able to receive a discredited and dangerous "treatment."[1] SOCE is unnecessary for

[1] That SOCE is ineffective and dangerous makes this case far different from *Conant*. In *Conant*, this Court found that the challenged law altered "the traditional role of medical professionals" by preventing them from recommending a particular treatment. 309 F.3d at 638 (internal quotation marks and citation

patients to receive the many benefits of competent, professional mental health care. (*See* Dkt #53, Declaration of Lee Beckstead ¶ 18 (benefits reported by some participants in SOCE "can be found in other [therapeutic] approaches that do not have the intrinsically harmful aspects of SOCE."); *see also* APA Report at 53.)

Finally, Plaintiffs have no argument that they will suffer irreparable harm because of any alleged violation of their free speech rights; as explained below, SB 1172 does not implicate, much less violate the First Amendment.[2]

In sum, when examined carefully, Plaintiffs' generalized predictions of harm have no basis in fact and fail to provide the specific evidence of injury that this Court has found sufficient to warrant an injunction. *See, e.g., M.R. v. Dreyfus,* 697 F.3d 706, 732-33 (9th Cir. 2011) (disabled plaintiffs presented "detailed evidence"

---

omitted). Judge Kozinski, in concurrence, explained that a prohibition against a doctor's being able to "recommend" a course of treatment would "cut [patients] off from competent medical advice." 309 F.3d at 644 (Kozinski, J., concurring). But the practice of SOCE is not "competent medical advice"—the professional consensus is that SOCE is an ineffective attempt to treat, with potentially damaging effects, a condition that is not an illness and needs no "cure."

[2] To the extent Plaintiffs claim irreparable injury arising out of the sudden cessation of therapy or the disruption of existing therapist-patient relationships, there is no evidence or reason to think that SB 1172 will lead therapists to cut off their relationships with their patients, and, indeed, ethical guidelines preclude mental health providers from abruptly terminating their therapeutic relationships. *E.g.*, APA Code of Ethics Standard 10.10 ("prior to termination psychologists provide pretermination counseling and suggest alternative service providers as appropriate").

of "specific ways" in which reduced personal care services would place them at "serious risk of institutionalization"); *Rodde v. Bonta,* 357 F.3d 988, 999 & n.14 (9th Cir. 2004) (Medi-Cal patients offered evidence that hospital closure would deprive them of necessary medical treatments that could not be obtained at other facilities). Here, Plaintiffs have not only failed to make the required showing that irreparable harm is *likely,* as opposed to merely *possible, Winter,* 555 U.S. at 22; they have failed even to show any specific ways in which permitting SB 1172 would cause any harm that they cannot easily avoid simply by following the law and complying with their existing professional obligations to provide competent, ethical care.

Plaintiffs also cannot show that an injunction pending appeal is in the public interest, or that the "balance of hardships tips sharply in [their] favor." *See Cotrell*, 632 F.3d at 1135. The Legislature enacted SB 1172 to protect California youth from the many risks of severe harm documented in the APA Report and other studies of SOCE, and reflected in the policy statements of virtually every leading medical and mental health organization in the nation. *See* SB 1172 § 1. Although Plaintiffs attempt to minimize the APA Report's conclusions, the APA Task Force was clear and consistent in its findings: "Our systematic review of the research on SOCE found that enduring change to an individual's sexual orientation as a result of SOCE was unlikely. Further, some participants were harmed by the

interventions." (APA Report at 54.) The reported harms were severe and in some cases life-threatening, including depression, social withdrawal, suicidality, substance abuse, and high-risk sexual behaviors, among other harms. SB 1172 § 1(b). (*See also* APA Report at 42-43.) These findings are based directly upon the conclusions of leading mental health organizations on which the Legislature relied. These included: the American Academy of Pediatrics ("Therapy directed at specifically changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation."); the American Psychiatric Association ("The potential risks of reparative therapy are great, including depression, anxiety and self-destructive behavior …"); and the Pan American Health Organization, a regional office of the World Health Organization (SOCE "lack medical justification and represent a serious threat to the health and well-being of affected people"). *See id.* §§ 1(d), (f), (l). The Legislature also relied on research establishing that youth who face high levels of family rejection, *including through being sent for SOCE*, are more than eight times more likely to report having attempted suicide. SB 1172 § 1(m).

Finally, the public interest strongly favors denial of the Emergency Motion because "California has a compelling interest in protecting the physical and psychological well-being of minors." *See id.* § 1(n). This Court's "consideration of the public interest is constrained in this case" because the California Legislature

and Governor have "already considered that interest" by overwhelmingly approving and enacting SB 1172. *Golden Gate*, 512 F.3d at 1126-27 (citing 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.4, at 207 (2d ed. 1995) ("The public interest may be declared in the form of a statute.")). Here, the Legislature has determined—in reliance on an extraordinarily broad consensus among the nation's most prestigious and respected medical and mental health organizations—that the practices prohibited by SB 1172 are ineffective and unsafe, and pose especially serious risks to minors. The Plaintiffs have presented no evidence or arguments to justify preventing the protections provided by SB 1172 to take effect.

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT PLAINTIFFS HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS.

Plaintiffs ask this Court to enjoin SB 1172 on the novel theory that any regulation that affects what a health care professional may say when providing treatment is subject to strict scrutiny under the First Amendment—a result that would call into question a plethora of common regulations of medical care and prevent States from protecting the public even from practices that grossly depart from standards of professional competence. SB 1172 is one of many statutes that define unprofessional conduct for licensed medical professionals in the State. The Legislature enacted SB 1172 based upon the consensus of mainstream mental

health professionals that SOCE has no scientific validity, is ineffective, and can cause serious harms to youth, including suicide.

Crucial to the analysis is that SB 1172 regulates only the provision of mental health treatment. It imposes no restrictions on the ability of mental health professionals to express their views in the public arena. Psychotherapists can advocate for changes in professional standards in light of their views about homosexuality. They can appear on television or in print, in the popular press or professional journals, advocating for the view that the broad professional consensus that rejects SOCE is misguided. The First Amendment protects their right to do so regardless of how extreme and unconventional their professional views might be. But First Amendment doctrine has long recognized that the health care treatment setting is a not a forum for licensed professionals to engage in their own expression. To the contrary, it is a highly regulated setting in which professional conduct, including speech, can and must be subject to compliance with widely accepted professional standards.

The district court held that, under established law, states may reasonably regulate medical professionals, and it found that SB 1172 easily passes muster under that standard. In declining to apply a heightened First Amendment standard, the district court relied on this Court's prior holding in *National Association for the Advancement of Psychoanalysis v. California Board of Psychology*, 228 F.3d 1043,

1054 (9th Cir. 2000) ("*NAAP*"), that the treatment of patients' mental health through psychotherapy is not entitled to heightened First Amendment protection merely because the treatment takes place through speech. Order at 18-19; *NAPP*, 228 F.3d at 1054. Plaintiffs now urge this Court to reverse course and hold, contrary to *NAAP*, that because therapy consists of speech, any regulation that affects the content of what a therapist may say to a patient is subject to strict scrutiny. (Mot. at 18 (citing Order Granting Prelim. Inj., *Welch v. Brown,* No. Civ. 2:12-2484-WBS-KJN, 2012 WL 6020122 (E.D. Cal. Dec. 3, 2012) ("*Welch* Order")).) That argument has no footing in the law, and, if adopted, would work a radical transformation in the constitutional analysis currently applied to regulations of medical practice. Indeed, Plaintiffs' theory would require the invalidation of countless state and federal laws and regulations. Plaintiffs have no likelihood of succeeding on this argument.

A. The State May Reasonably Regulate Medical Practice, Including Aspects of Medical Treatment That Are Carried Out Through Speech

The courts have long recognized that States have a strong interest in regulating the practice of medicine and possess clear legal authority to do so. *See, e.g.*, *Watson*, 218 U.S. at 176 ("There is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine."); *Oregon v. Ashcroft*, 368 F.3d 1118, 1128 (9th Cir. 2004) (State has "traditional

authority to regulate medical practices."), *aff'd sub nom. Gonzales v. Oregon*, 546 U.S. 243 (2006). Courts have recognized that medical professionals are in a "unique position of influence" because they have expert knowledge beyond the ability of most laypersons to understand or evaluate, which creates a corresponding dependency and vulnerability on the part of patients. *Bd. of Med. Quality Assurance v. Superior Court*, 114 Cal. App. 3d 272, 278 (1980) (internal citations omitted); *see also Cobbs v. Grant*, 8 Cal. 3d 229 (1972). State regulation is therefore necessary to ensure that patients receive competent information and care.

The law also has long recognized that regulating the practice of medicine necessarily does involve regulating speech and that such regulation—which is pervasive—generally does not raise First Amendment concerns. When speech is "part of the practice of medicine, [it is] subject to reasonable licensing and regulation by the State." *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion).[3]

Indeed, states routinely restrict doctors' professional speech through statutes, regulations, and common-law causes of action that enforce professional standards

[3] It has long been accepted within our constitutional system that states may enact reasonable professional regulations even when the profession at issue entails—or even largely consists of—speech. *See, e.g., Lowe v. SEC*, 472 U.S. 181, 228 (1985) (White, J., concurring in result) ("The power of government to regulate the professions is not lost whenever the practice of a profession entails speech.").

of competence and integrity. In addition, malpractice law routinely requires courts to enforce extensive restrictions on doctors' speech. These sorts of regulations may subject a professional to discipline or liability "for failing to inform patients in a timely way of an accurate diagnosis, for failing to give patients proper instructions, for failing to ask patients necessary questions, or for failing to refer a patient to an appropriate specialist." Robert Post, Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech, 2007 U. Ill. L. Rev. 939, 951 (2007). Such regulations are not accurately viewed as content- or viewpoint-based for constitutional purposes because such regulations only prohibit doctors from providing medical diagnoses and advice that depart from professional standards of care; they do not to prohibit discussion by health care professionals of topics or viewpoints (which professionals remain free to discuss or to express outside of the therapeutic context). A doctor who believes that snake oil is the best cure for all ills and who administers or recommends snake oil to his patients is not immune from regulation or malpractice liability simply because his treatment expresses his viewpoint that the use of snake oil is a good idea. By the same token, laws that require doctors to treat patients in conformity with accepted professional standards are not subject to strict scrutiny merely because they limit a doctor's ability to express a contrary viewpoint by departing from those standards in the course of treating their patients.

B. There Is A Clear Distinction Between Reasonable Medical Regulations and Laws that Improperly Infringe On Professionals' Ability to Express Their Views in the Public Arena.

Without question, doctors and other professionals have a clear First Amendment right to voice their opinions on any topic in the public arena, including in books, professional journals, television and radio shows, and other expressive venues. Attempts on the part of the State to regulate the content of doctors' public speech in such settings clearly would trigger appropriate levels of First Amendment scrutiny. SB 1172 does not impact such speech, writing, or advocacy on matters of public concern.

There is nothing troubling or unusual about the application of divergent First Amendment standards in different settings. To the contrary, it is well settled that First Amendment law must be sensitive to the context in which speech occurs. For example, states generally cannot restrict speech in the public arena because it is false; however, because the constitutional value of commercial speech lies in the information it carries, the Supreme Court has held that states can regulate the content of commercial speech that is false or misleading. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). Similarly, the government may make content-based judgments when providing a function that requires making such distinctions, such as "esthetic judgments" made in providing arts funding, *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569,

586 (1998) and public libraries' judgments in selecting what materials to provide, *United States v. Am. Library Ass'n*, 539 U.S. 194, 208 (2003). *See also Ass'n of Christian Sch. Int'l v. Stearns*, 679 F. Supp. 2d 1083, 1095 (C.D. Cal. 2008), aff'd, 362 F. App'x 640 (9th Cir. 2010) (applying reasonableness standard to public university admission policies that evaluated contents of courses).

Likewise, courts have recognized that States generally can regulate the content of professional speech to require adherence to professional standards of care without implicating or undermining the First Amendment even if similar restrictions would be impermissible outside the treatment context. For example, under ordinary circumstances, a person has no duty to suggest that a suicidal person see a therapist or seek medical attention, but a therapist treating the individual may be required to do so. *See, e.g., Meier v. Ross General Hospital*, 69 Cal. 2d 420 (1968). Similarly, while the First Amendment would bar a law that penalized ordinary laypeople for failing to recommend a particular type of expert to a friend or neighbor, state courts routinely hold doctors liable for failing to do so to a patient. *See Moore v. Preventive Medicine Medical Group. Inc.* 178 Cal. App. 3d 728 (1986). Consistent with these principles, a vast number of regulations *expressly* control therapists' speech by forbidding therapists to speak, or requiring them to speak, about particular subjects. Current California law defines as "unprofessional conduct" to include a wide range of practices by therapists,

including many involving prohibitions on what the therapist may say, or compelling particular speech, during treatment sessions. For example, a therapist plainly would be subject to professional discipline for advising a suicidal patient to kill himself or telling an anorexic patient that she needs to lose weight. *See* Cal. Bus. & Prof. Code §§ 4982(i), 4989.54(m), 4992.3(j), 4999.90(i). Likewise, a therapist could be disciplined for telling a patient that he or she has schizophrenia, bipolar disorder, or some other disorder when the patient does not. *See* Cal. Bus. & Prof. Code §§ 2960(j), 4982(d), 4989.54(k), 4992.3(d), 4999.90(d); *cf. Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 919-20 (permitting negligent infliction of emotional distress cause of action by patient and her husband against doctor who erroneously diagnosed patient with syphilis). Similarly, a therapist could be restricted from telling a patient that a condition that is not a disease is a disease, or that a condition can be cured by a form of treatment that, according to established medical standards, cannot cure such a condition.

Other forms of regulated unprofessional conduct include the following:

- Telling a patient that the therapist is able to treat a particular condition, when the therapist does not have the competence or is not licensed to provide such treatment. Cal. Bus. & Prof. Code §§ 2960(p), 4982(l), 4989.54(r), 4992.3(m), 4999.90(l).
- Disclosing confidential information received from a patient. Cal. Bus. & Prof. Code §§ 2960(h), 4982(m), 4989.54(q), 4992.3(n), 4999.90(m).
- Promising success in curing the patient's mental health condition in the course of advertising, or making a "scientific claim that cannot be substantiated by reliable, peer reviewed, published scientific studies."

> Cal. Bus. & Prof. Code §§ 651(b)(3)(A), 651(b)(7), 2960(g), 4982(p), 4989.54(e), 4992.3(p), 4999.90(q), 17500.

SB 1172 falls squarely within this long tradition of State regulation of medical professionals and professional speech. It is part of a well-established legal scheme defining and enforcing professional standards of competence for California's licensed mental health professionals.

The few cases in which courts have invalidated laws regulating professional speech have done so because the laws at issue interfered with the normal functioning of a professional discipline, rather than enforcing professional standards of competence and good practice. In *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), for example, the challenged policy prevented doctors from following normal standards of competence by prohibiting them even from sharing information about a treatment option supported by substantial scientific evidence, *id.* at 641 (Kozinski, J., concurring), based on the possibility that doing so might lead the patient to violate federal law by procuring medical marijuana. *Id.* at 636-37; *see also id.* at 638 ("[T]he government's policy here 'alter[s] the traditional role' of medical professionals by 'prohibit[ing] speech necessary to the proper functioning of those systems.'") (citations omitted). By contrast, SB 1172 simply requires providers to conform to the "traditional [professional] role" of providing

competent, non-harmful care that is consistent with accepted medical standards.[4] Put simply, whereas the regulation in *Conant* sought to *override* accepted medical standards in order to further a different set of (criminal law) goals, SB 1172 seeks to *support and enforce* accepted medical standards in order to protect patients from harm. Similarly, in *Wollschlaeger v. Farmer*, No. 11-22026-Civ, 2012 WL 3064336 (S.D. Fla. June 29, 2012), a district court held that a Florida law prohibiting doctors from asking patients about gun ownership raised First Amendment concerns because, like the regulation in *Conant*, the law interfered with doctors' ability to provide advice consonant with accepted medical standards. The court found that unlike "so many other laws involving practitioners' speech," the law "restrict[ed] a practitioner's ability to provide truthful, non-misleading information to a patient." *Id*. at *9. By contrast, SB 1172 does not limit the provision of truthful, non-misleading information; it instead bars the provision of ineffective, harmful treatment.

The district court decision in *Welch v. Brown, et al.*, No. Civ. 2:12-2484-WBS-KJN (E.D. Cal. Dec. 3, 2012) not only fails to adhere to this long-standing

[4] SB 1172 also differs from the regulation in *Conant* in that it does not prohibit therapists from discussing or providing information about SOCE; rather, it prohibits them from engaging in SOCE on minors, based on a long-standing consensus of every leading medical and mental health association that it is ineffective and poses a risk of severe harm. *See* Order at 43.

framework governing State regulation of professions, but also adopts reasoning fundamentally inconsistent with the framework. The decision in *Welch* concluded that SB 1172 constitutes impermissible viewpoint discrimination because, for example, it prevents licensed therapists from engaging in SOCE practices that conflict with the Legislature's finding that being lesbian gay or bisexual "is not a disease, disorder, illness, deficiency, or shortcoming." *Welch* Order at 26. It is perfectly appropriate and fully constitutional, however, for the State to bar mental health professionals from engaging in treatments that are premised on the "belief" that homosexuality is a disorder. For nearly 40 years, the mental health profession itself has rejected this view. By codifying this professional standard, SB 1172 does not discriminate against mental health professionals who disagree with it any more than would a regulation that forbade physicians from advising heart disease patients based on a personal belief that heart disease actually is caused by evil spirits and should be treated solely with exorcism. A professional who holds a belief that is contrary to professional standards cannot invoke the First Amendment as a grounds to act or speak in a way that violates those standards. The rule adopted in the *Welch* opinion essentially would allow any professional to do so.

CONCLUSION

For the foregoing reasons, Equality California requests that the Court deny Plaintiffs' emergency motion for a temporary injunction pending appeal.

Dated: December 14, 2011

Respectfully submitted,

s/ Shannon P. Minter
SHANNON P. MINTER
NATIONAL CENTER FOR LESBIAN RIGHTS

Attorneys for EQUALITY CALIFORNIA

9th Circuit Case Number(s) 12-17681

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) December 14, 2012 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) /s/ Lika Miyake

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)