CASE NO. 12-17681

UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

DAVID PICKUP, CHRISTOPHER H. ROSIK, PH.D., JOSEPH NICOLOSI, PH.D, ROBERT VAZZO, NATIONAL ASSOCIATION FOR RESEARCH AND THERAPY OF HOMOSEXUALITY (NARTH), AMERICAN ASSOCIATION OF CHRISTIAN COUNSELORS (AACC), JOHN DOE 1, by and through JACK AND JANE DOE 1, JACK DOE 1, individually, and JANE DOE 1, individually, JOHN DOE 2, by and through JACK AND JANE DOE 2, JACK DOE 2, individually, and JANE DOE 2, individually,

Plaintiffs-Appellants,

v.

EDMUND G. BROWN, Jr. Governor of the State of California, in his official capacity; ANNA M. CABALLERO, Secretary of the State and Consumer Services Agency of the State of Motion for Preliminary Injunction California, in her official capacity, KIM MADSEN, Executive Officer of the California Board of Behavioral Sciences, in her official capacity; MICHAEL ERICKSON, PH.D, President of the California Board of Psychology, in his official capacity; SHARON LEVINE, President of the Medical Board of California, in her official capacity,

Defendants-Appellees.

EQUALITY CALIFORNIA,

Intervenor-Defendant-Appellee

PRELIMINARY INJUNCTION APPEAL

(9TH CIRCUIT RULE 3-3)

PLAINTIFFS'/APPELLANTS' REPLY MEMORANDUM IN SUPPORT OF EMERGENCY MOTION (CIRCUIT RULE 27-3) FOR TEMPORARY INJUNCTION PENDING APPEAL

INTRODUCTION

Without immediate action by this Court, in a matter of days all Plaintiffs will face irreparable harm. With their licenses at stake, and not sure where the line is between talking about change of sexual orientation, attractions, behavior, or identity (SOCE), and counseling a cient to reduce or eliminate same-sex (or perhaps opposite sex) sexual attractions, behavior or identity, the Counselors will be forced into silence. Their speech will be chilled. The minors who are benefiting from such counsel will abruptly be prevented from receiving counsel they have chosen. Their parents will be unable to care for their children and will also be prevented from receiving this beneficial counseling. SB1172 should be enjoined pending appeal because it violates the First Amendment rights of the Plaintiffs like the law enjoined by this Court in *Conant v. Walters*, 309 F.3d 629, 639-40 (9th Cir. 2002) (Kozinski, J., concurring).

The District Court admitted that SB 1172 will disrupt Plaintiffs' ongoing counsel, but chose not to "reach" the issue of the irreparable harm. (Exhibit A at 22, n.12). The District Court actually disclaimed any harm, asserting that the minor clients and parents could simply seek out unlicensed counselors to provide the counseling that the state (wrongly) determined to be harmful. *Id.* Neither the Court nor Defendants and Intervenors can explain how receiving counseling (wrongly) deemed harmful when administered by *licensed* professionals is

somehow less harmful when administered by *unlicensed* counselors. The sources they rely upon for the proposition that SOCE is "harmful" say no such thing, *e.g.*, "*there are no scientifically rigorous studies of recent SOCE that would enable us to make a definitive statement about whether recent SOCE is safe or harmful and for whom*" (APA Task Force report Exh. C, p. 83) (emphasis added). Since there is **no** empirical evidence of harm that may be caused by SOCE, and there *is* substantial evidence of immediate harm that *will* befall Plaintiffs if SOCE is suddenly halted in less than two weeks, maintaining the status quo by issuing an injunction pending appeal is necessary to prevent irreparable injury.

LEGAL ARGUMENT

I. AN INJUNCTION WILL PRESERVE THE STATUS QUO.

Defendants and Intervenors argue that the "status quo" is not the state of the law as it presently exists, but the fact that SB 1172 will become law on January 1, 2013. (Intervenors' Brief, p. 1; Defendants' Brief, p. 8). However, it is the implementation of SB 1172 on January 1, not an injunction suspending its implementation, that will be a "shocking disturbance" to the status quo, including to the well-being of the minors undergoing counseling. (Exh. F, p. 3). If no injunction is issued, in less than two weeks approximately 60 percent of the 135 clients that Plaintiff Joseph Nicolosi counsels every week will have the status quo of their ongoing, voluntary, beneficial, therapeutic relationship abruptly halted.

(*Id.*). Instead of continuing in their relationship with Dr. Nicolosi, *i.e.*, the status quo, these minors will have to be told that they can no longer work toward their therapeutic goals. (*Id.*). Similarly, the status quo for Plaintiff David Pickup will be reversed on January 1, absent an injunction, as he will have to halt work with his clients who have voluntarily sought counseling to eliminate same-sex attractions, behavior or identity (what SB 1172 calls SOCE). (Exh. D at p. 2). As Mr. Pickup testifies:

> Absent an injunction, on January 1, 2013, I will be completely prohibited from continuing the counsel that I have been engaged in with my clients for substantial periods of time, which consists almost entirely of what is known as "talk therapy." On January 1, my speech to my clients, which is everything my practice entails, will be silenced, and I will not be able to assist my clients with the course of counseling they have selected to conform their feelings and behaviors to their religious and moral beliefs.

(*Id.*). Plaintiffs Christopher Rosik and Robert Vazzo similarly testify that SB 1172 will cause significant and irreparable disruption to the status quo of their relationships with their clients who have asked for help with unwanted same-sex attractions, as well as to their and their clients' free speech rights. (Exh. E, pp. 2-3; Exh. G, pp. 2-3).

Defendants and Intervenors point to this Court as authority for their convoluted definition of status quo. (Intervenors' Brief, p. 1; Defendants' Brief, p. 8, citing *Golden Gate Rest. Ass'n v. City & Cnty. Of San Francisco,* 512 F.3d 1112, 1116 (9th Cir. 2008). *Golden Gate* stands for the unremarkable proposition

that when a law is enacted and slated to go into effect on January 1 of the succeeding year, the new law becomes the status quo *after* January 1, not upon enactment in anticipation of January 1. *Id.* "*In the absence of the district court injunction on December 26, 2007, the provisions of the Ordinance* that were scheduled to go into effect on January 1, 2008, *would now be part of the status quo*." *Id.* (emphasis added). Likewise, in this case, *in the absence of an injunction*, SB 1172 *will be* part of the status quo on January 1, 2013. It is not the status quo *until* that time. The correct standard here is the status quo *ante*, not the status quo *post*. *See, e.g.*, *King v. Saddleback Junior Coll. Dist.*, 425 F.2d 426, 427 (9th Cir. 1970) ("It is the function of a preliminary injunction to preserve the status quo pending a determination of the action on the merits."); *G. P. D., Inc. v. N. L. R. B.*, 430 F.2d 963, 964 (6th Cir. 1970) (purpose of act is to preserve "the status quo ante;" petitioner " in effect asks this court" to change it to "the status quo post").

Far from being an "extraordinary attempt to change the status quo," Plaintiffs' request for an emergency injunction pending appeal is an attempt to *maintain* the status quo ante against unwarranted intrusion into the confidential and beneficial therapeutic relationships that Plaintiffs have voluntarily established as an exercise of their right to self-determination. It is Defendants and Intervenor who are trying to disrupt the status quo. Moreover, it makes the most sense to enjoin SB 1172 pending appeal because this Court will have the benefit of full briefing and

oral argument on the merits of the law in early 2013. The briefing schedule for the appeal is already set. When this Court renders its opinion on SB 1172, it may choose to continue the injunction or lift it. It makes less sense to allow the status quo to change on January 1, with the harm it surely will cause, and then reverse the status quo later in 2013. This Court should enjoin SB 1172 pending appeal.

II. AN EMERGENCY INJUNCTION WILL PREVENT IRREPARABLE INJURY.

At the heart of Defendants' and Intervenor's opposition to emergency relief, and of their defense of SB 1172, is their misrepresentation that SOCE has been shown to be "harmful" to minors. In fact, the very sources upon which they rely explicitly state that they cannot conclude that SOCE harms minors. (*See e.g.*, Exh. C, pp. ix, 6, 42, 67, 70, 83, 90). Their primary source is the 2009 APA Task Force report (Exh. C), which itself contradicts the conclusions Defendants, Intervenor and the District Court attribute to it. The report states that "**recent SOCE research cannot provide conclusions regarding efficacy or effectiveness**." (Exh. C, p. ix) (emphasis added). "The research on SOCE has not adequately assessed efficacy and safety." (Exh. C, p. 6).

> There is a dearth of scientifically sound research on the safety of SOCE. Early and recent research studies provide no clear indication of the prevalence of harmful outcomes among people who have undergone efforts to change their sexual orientation or the frequency of occurrence of harm because *no study to date of adequate scientific rigor has been explicitly designed to do so. Thus, we cannot conclude how likely it is that harm will occur from SOCE.*

(Exh. C., p. 42 (emphasis added)). "Research on harm from SOCE is limited, and some of the research that exists suffers from methodological limitations that make broad and definitive conclusions difficult." (Exh. C., p. 67). "The key scientific findings relevant to the ethical concerns that are important in the area of SOCE are *the limited evidence* of efficacy or benefit and the *potential* for harm." (Exh. C, p. 70) (emphasis added). "We concluded that research on SOCE (psychotherapy, mutual self-help groups, religious techniques) has not answered basic questions of whether it is safe or effective and for whom. Any future research should conform to best-practice standards for the design of efficacy research. Additionally, research into harm and safety is essential." (Exh. C p. 90).

Nor is there sufficient research regarding the effect of SOCE on minors. "[S]exual minority *adolescents are underrepresented* in research on evidence-based approaches, and *sexual orientation issues in children are virtually unexamined*." (Exh. C, p. 91 (emphasis added)). "To date, *the research has not fully addressed age, gender, gender identity, race, ethnicity, culture, national origin, disability, language, and socioeconomic status* in the population of distressed individuals." (Exh. C, p. 120 (emphasis added)).

These conclusions from their primary source demolish the foundation of their argument, *i.e.*, that SOCE has been "proven" to be harmful, ineffective and

incompetent care.[1] (Intervenor's Brief at pp. 3-5, 7-8; Defendants' Brief at p. 17). As that foundation crumbles, so does the argument that Plaintiffs cannot establish irreparable injury because there cannot be an injury from discontinuing a harmful practice. (Defendants' Brief, pp. 2, 18-19). Without evidence of harm, there is no justification for the state's intrusion into ongoing effective and beneficial therapeutic relationships. Plaintiff John Doe 1 testifies how he is benefitting from SOCE and will be harmed by *discontinuing* it, *not continuing* it:

> I have been receiving SOCE counseling from Dr. Nicolosi for a year and a half now. At first I was a little hesitant during the counseling sessions, but now I really look forward to them and enjoy the time I get to spend with Dr. Nicolosi during our SOCE counseling sessions. Because of Dr. Nicolosi's counseling sessions, I have experienced a number of significant, positive changes.

(Exh. Q, p. 4). "I am very concerned that if Dr. Nicolosi is not allowed to continue to provide my SOCE counseling, then I might lose much of the progress that I have made so far in treatment." (*Id.).* Similarly, Plaintiff Jack Doe 2, the father of a child receiving SOCE counseling, testifies that the counseling has resulted in significant positive changes in his son's mental and emotional health and in their relationship as a family. (Exh. R, p. 6). Mr. Doe 2 testifies that if the SOCE counseling with Dr. Nicolosi cannot continue then his son and their family will be harmed. (*Id.*). Dr. Nicolosi

[1] The utter lack of scientific evidence to support SB1172 may also explain the District Court's error, as the court simply assumed the existence of such evidence.

testifies that if SB 1172 goes into effect on January 1 and he is forced to terminate SOCE counseling with minor patients, "many of them will regress and will suffer adverse health consequences," and the relationship of trust and the therapeutic alliance that has developed between he and his clients will be severed, "which will be detrimental to the well-being of the clients." (Exh. M, p. 6). Neither Defendants nor Intervenor offer evidence to dispute this testimony, but merely point back to their discredited hypothesis that SOCE is "harmful."

This Court's binding precedents further support the proposition that Plaintiffs have established irreparable injury sufficient to support an emergency injunction. "An alleged constitutional infringement will often alone constitute irreparable injury." *Goldie's Bookstore, Inc. v. Superior Court,* 739 F.2d 466, 472 (9th Cir. 1984).[2] Plaintiffs have alleged the same constitutional infringement that this Court found to constitute irreparable injury in *Conant v. Walters*, 309 F.3d 629, 639-40 (9th Cir. 2002) (Kozinski, J., concurring). As Plaintiffs have established, SB 1172, like the law at issue in *Conant*, regulates speech, not conduct. (Defendants' Brief, pp. 14-16; Intervenors' Brief, pp. 2-3). Just as the "activity" regulated in *Conant* involved speaking to patients about using medical

[2] This contradicts Defendants' assertion that *Goldie's Bookstore* stands for the proposition that merely alleging constitutional injury is insufficient to establish irreparable injury. (Defendants' Brief at 17).

marijuana for pain relief, the "activity" regulated by SB 1172involves speaking to clients. (Exh. E, p. 7; Exh. D, p. 6, Exh. F., p. 7). As Plaintiff Rosik testifies: "Speech is the only tool I have to engage my clients." (Exh. E, p. 7). "The only thing that happens in my counseling sessions is speech…." (*Id.*). Dr. Nicolosi testifies that "[i]n actual practice of psychotherapy, it is impossible to distinguish 'practice of SOCE' from 'speech.' Psychotherapy is speech." (Exh. F, p. 7). Consequently, as was true in *Conant*, SB 1172 seeks to suppress *speech* about a particular viewpoint, which constitutes irreparable injury. *Conant*, 309 F.3d at 639-40.[3] As this Court found in *Conant*, "[t]he Supreme Court has recognized that physician speech is entitled to First Amendment protection because of the significance of the doctor-patient relationship." *Id.* at 636 (citing *Planned Parenthood of SE Penn. v. Casey*, 505 U.S. 833, 884 (1992) (plurality).[4] Therefore, the hardship posed by SB 1172's suppression of speech "unquestionably

[3] As was true in *Conant*, this case is unlike *NAAP v. California Board of Psychology*, 228 F.3d 1043, 1055-56 (9th Cir. 2000), which *did not* dictate what could be said during treatment or in therapy.

[4] Defendants and Intervenor, as well as the District Court, also disregarded this Court's interpretation of *Casey* in *Conant*, choosing instead to cite to non-Ninth Circuit authority that asserted that physician speech is regulable. (Defendants' Brief at pp. 2-3; Intervenor's Brief at pp. 2-3, 12, 13). The sentence pulled from *Casey* was the opinion of only three Justices. The District Court, Defendants and Intervenor fail to acknowledge that *Conant* cites *Casey* for the proposition that speech interfering with what a doctor recommends to a patient violates the First Amendment. This is precisely what SB 1172 does here.

constitutes irreparable injury." *Ebel v. City of Corona*, 698 F.2d 390, 393 (9th Cir.1983) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

The fact that SOCE is speech protected under *Conant* also substantiates Plaintiffs' assertions that they will have to halt discussing SOCE or risk losing their licenses. SB 1172's directive that counselors cannot engage in SOCE counseling "under any circumstances" means that they will have to immediately discontinue speaking to existing and potential clients about SOCE out of fear of losing their professional licenses. (Exh. D, p. 4). This will also place their licenses at risk in that they will be knowingly halting therapy that is beneficial for their clients. (*Id.*). This is precisely the kind of irreparable injury that this Court has found sufficient to support an injunction. *Conant*, 309 F.3d at 639-40.

CONCLUSION

For the foregoing reasons, this Court should grant Appellants' emergency motion for an injunction pending appeal.

Dated December 18, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of December, 2012, I filed the foregoing Reply Brief In Support of Emergency Motion electronically through the CM/ECF system, which caused the following counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing:

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