CASE NO. 12-17681
UNITED STATES COURT OF APPEALS 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 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.

and

EQUALITY CALIFORNIA, Intervenor-Defendant-Appellee

PRELIMINARY INJUNCTION APPEAL (9TH CIRCUIT RULE 3-3)

On Appeal from the Eastern District of California
Case No. 2:12-cv-02497-KJM-EFB Honorable Kimberly J. Mueller

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT
FRAP 26.1

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant NATIONAL ASSOCIATION FOR RESEARCH AND THERAPY OF HOMOSEXUALITY (NARTH) states that there is no parent corporation or publicly held corporation that owns 10 percent or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant AMERICAN ASSOCIATION OF CHRISTIAN COUNSELORS (AACC) states that there is no parent corporation or publicly held corporation that owns 10 percent or more of its stock.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §1331 because plaintiffs raised questions under the United States Constitution and 42 U.S.C. §1983. The order denying plaintiffs' motion for a preliminary injunction is an appealable interlocutory decision under 28 U.S.C. §1292(a)(1).

The District Court's order was issued and the notice of appeal was filed on December 4, 2012. The appeal is timely under Fed.R.App.P. 4(a)(1)(A).

ISSUES PRESENTED FOR REVIEW

1. California Senate Bill 1172 (SB 1172) bans counseling to reduce or eliminate same-sex sexual attractions, behavior or identity under any circumstances. The District Court erred by ruling that this expressive activity is not entitled to First Amendment protection and thus Plaintiffs were not likely to succeed on the merits.

This issue was raised and ruled on in the District Court's order at pp. 12-19 (Excerpts of Record "ER" 00012-00019). The standard of review for the issue is abuse of discretion, with legal conclusions reviewed *de novo* and its findings of fact for clear error. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir.2011).

2. The District Court erred when it concluded that SB 1172, which allows counseling that affirms same-sex sexual attractions, behavior or identity but bans counseling to reduce or eliminate them is neither a content nor viewpoint restriction on speech and should be reviewed using rational basis.

This issue was raised and ruled on in the District Court's order at pp. 19-21, 42-44 (ER 00019-00021, 00042-00044). The standard of review for the issue is abuse of discretion, with legal conclusions reviewed *de novo* and its findings of fact for clear error. *Cottrell*, 632 F.3d at 1131.

3. The District Court erred when it concluded that SB 1172 is not unconstitutionally vague even though it does not define "sexual orientation" and makes a sweeping prohibition against any counseling aimed at reducing or eliminating same-sex attractions.

This issue was raised and ruled on in the District Court's order at pp. 22-29 (ER 00022-00029). The standard of review for the issue is abuse of discretion, with legal conclusions reviewed *de novo* and its findings of fact for clear error. *Cottrell*, 632 F.3d at 1131.

4. The District Court erred when it determined that Plaintiffs who seek SOCE counseling from licensed mental health counselors for themselves or their children were not likely to succeed on the merits of their Free Speech and parental

rights challenge to SB 1172 because they can seek such counsel from unlicensed counselors.

This issue was raised and ruled on in the District Court's order at pp. 29-42 (ER 00029-00042). The standard of review for the issue is abuse of discretion, with legal conclusions reviewed *de novo* and its findings of fact for clear error. *Cottrell*, 632 F.3d at 1131.

5. The District Court erred when it acknowledged the significant disruption Plaintiffs will face to their ongoing counseling and confidential therapeutic relationships, but failed to even consider the question of the irreparable injury, to balance that injury with allegations of harm on the part of Defendants or examine the public interest to justify injunctive relief under *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105-06 (9th Cir. 2012).

This issue was raised and ruled on in the District Court's order at pp.11-12, 22-23. (ER00011-00012, 00022-00023). The standard of review for the issue is abuse of discretion, with legal conclusions reviewed *de novo* and its findings of fact for clear error. *Cottrell*, 632 F.3d at 1131.

STATUTORY ADDENDUM

The relevant constitutional and statutory provisions are contained in the Addendum attached to this Opening Brief.

STATEMENT OF THE CASE

This Court should reverse the denial of a preliminary injunction against California Senate Bill 1172 ("SB 1172"), which will compel mental health professionals, their minor clients and parents to terminate ongoing beneficial counseling or risk loss of professional licenses. SB 1172 requires that mental health professionals either violate their obligation to do no harm by withdrawing beneficial treatment or violate the law and face disciplinary action that places their livelihoods at risk.

SB 1172 bans any counsel of a minor under any circumstances to reduce or eliminate unwanted same-sex sexual attraction, behavior, or identity (which SB 1172 calls "sexual orientation change efforts" or "SOCE"). Counselors may affirm, but may not offer counsel, and clients may not receive counsel, to reduce or eliminate unwanted same-sex sexual attractions, behavior or identity. Because the law threatened imminent irreparable harm in that the effective date was January 1, 2013, Plaintiffs filed a preliminary injunction with the Complaint on October 4, 2012, seeking relief under the United States and California constitutions and 42 U.S.C. §1983.

On November 30, 2012, the court heard argument on the motion. (ER 00048-00099). On December 4, 2012, the court issued its order denying Plaintiffs' motion. (ER 00001-00044). Plaintiffs filed a notice of appeal under Ninth Circuit

Rule 3-3 on the same day. (ER 00045-00047). On December 6, 2012, Plaintiffs also filed an emergency motion for a preliminary injunction pending appeal. (Dkt. 3). On December 21, 2012, the emergency motion was granted. (Dkt. 10).

Meanwhile, on December 3, 2012, another judge in the same Eastern District of California issued an order *granting* a preliminary injunction against the SB 1172 in favor of three named plaintiffs. (*Welch v. Brown*, ER 00100-00137). The inconsistent decisions create an untenable situation and set up an intra-district conflict. Plaintiffs ask this Court to reverse the District Court's order and issue a preliminary injunction against SB 1172 to maintain the status quo.

STATEMENT OF FACTS

I. THE ENACTMENT AND IMPLEMENTATION OF SB 1172

SB 1172 adds Sections 865-865.2 to the Business and Professions Code. Section 865.1 states: "*Under no circumstances* shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age." (ER 000483) (emphasis added). Section 865(a) defines "mental health provider" as:

> [A] physician and surgeon specializing in the practice of psychiatry, a psychologist, a psychological assistant, intern, or trainee, a licensed marriage and family therapist, a registered marriage and family therapist, intern, or trainee, a licensed educational psychologist, a credentialed school psychologist, a licensed clinical social worker, an associate clinical social worker, a licensed professional clinical counselor, a registered clinical counselor, intern, or trainee, or any

> other person designated as a mental health professional under California law or regulation.

(*Id.*). Section 865(b)(1) defines "Sexual orientation change efforts" ("SOCE") as "*any practices* by mental health providers that *seek to change an individual's sexual orientation*." This includes "*efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals or the same sex*," but excludes psychotherapies that "provide *acceptance, support, and understanding* of clients or the facilitation of clients' coping, social support, and identity exploration or development" or "efforts" that "*do not seek to change sexual orientation*." (*Id.*at (b)(1) and (2)) (emphasis added). SB 1172 creates a *per se* violation, stating that: "*Any sexual orientation change efforts* attempted on a patient under 18 years of age by a mental health provider *shall be unprofessional conduct and shall subject a mental health provider to discipline* by the licensing entity for that mental health provider." (*Id.*) (emphasis added).

The Legislature alleged that SB 1172 was necessary because "California has a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against *exposure to serious harms caused by sexual orientation change efforts*." (*Id.*) (emphasis added). The Legislature relied upon opinions issued by professional associations. (ER 000482-000483). The Legislature most particularly

relied upon the American Psychological Association's (APA) 2009 *Report of the Task Force on Appropriate Therapeutic Responses to Sexual Orientation* convened by the APA ("Task Force Report"). (ER 00215-00352). According to the Legislature, the Task Force "conducted a systematic review of peer-reviewed journal literature on sexual orientation change efforts, and . . . concluded that sexual orientation change efforts can pose critical health risks to lesbian, gay, and bisexual people, …" (ER 00482).

In fact, the Task Force Report does not support the Legislature's conclusion that SOCE is harmful to minors and therefore constitutes unprofessional conduct. (ER 00215-00352). Instead, throughout the report, the Task Force states that there is insufficient evidence to conclude that SOCE is either harmful or beneficial for adults, and no evidence regarding the efficacy of SOCE for children and youth. (ER 00215-00352). "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*. . . . [R]esearch into harm and safety is essential." (ER 00312 (emphasis added)).

> We conclude that 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*.

(ER 00264 (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." (ER 00289). "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." (ER 00292) (emphasis added). The Task Force found "a lack of published research on SOCE among children," and "no empirical research on adolescents who request SOCE." (ER 00294-00295). "Research on sexuality in childhood is limited and seldom includes sexual orientation or sexual orientation identity." (ER 00294).

Furthermore, much of the research that the Task Force cited for its suggestions of harm resulting from SOCE was methodologically flawed or biased. (ER00159). For example, the Task Force Report cited studies by Shidlo and Schroeder in 2002 and 2003 as support for its proposition that SOCE poses potential harm. (ER 00249). However, those studies were conducted in association with the National Gay and Lesbian Task Force, which had mandates to find clients who had allegedly been harmed by SOCE and document ethical violations by practitioners. (ER 00159). The 2002 study's original title was "Homophobic Therapies: Documenting the Damage." (ER 00159). The authors of the study conceded, "The data presented in this study *do not provide information on the incidence and prevalence of failure, success, harm, help, or ethical violations in*

conversion therapy." (ER 00159, citing Shidlo & Schroeder, 2002, p. 250) (emphasis added). Nevertheless, the Task Force Report cited the study as authority for the proposition that SOCE may pose the potential for harm, and, in turn, the Legislature cited the Task Force Report as a primary authority for enacting the SOCE ban. (ER 00249, 00481-00483).

While SB 1172 defines "sexual orientation change efforts," it does not define "sexual orientation," which is differentially defined within the Task Force Report and among mental health professionals. (ER 00481-00483, 00224, 00252, 00197). The Task Force Report stated that "[s]ame-sex sexual attractions and behavior occur in the context of a variety of sexual orientations and sexual orientation identities, and *for some, sexual orientation identity* (i.e., individual or group membership and affiliation, self-labeling) *is fluid or has an indefinite outcome*." (ER 00224) (emphasis added). At another point, the Task Force Report defined sexual orientation as "an individual's patterns of sexual, romantic, and affectional arousal and desire for other persons based on those persons' gender and sexual characteristics." (ER 00252). Defendants' expert Gregory Herek defined "sexual orientation" as referring to "an enduring pattern of or disposition to experience sexual, affectional, or romantic desires for and attractions to men,

women, or both sexes." (ER 00197).[1] "The term is also used to refer to an individual's sense of identity based on those desires and attractions, behaviors expressing them, and membership in a community of others who share them." (ER 00197). "Most social and behavioral research has assessed sexual orientation in terms of attraction, behavior, identity, or some combination of these constructs, depending on the specific goals of the study." (ER 00197). Dr. Herek indicated that his definition of "sexual orientation" was commonly used in the mental health community, but the definition utilized in the Task Force Report did not include the term "enduring." (ER 00197, 00252). In 2008, the APA stated that:

> There is no consensus among scientists about the exact reasons that an individual develops a heterosexual, bisexual, gay or lesbian orientation. Although much research has examined the possible genetic, hormonal, developmental, social, and cultural influences on sexual orientation, no findings have emerged that permit scientists to conclude that sexual orientation is determined by any particular factor or factors. Many think that nature and nurture both play complex roles.

(ER 00147). SB 1172 does not state whether professionals are to adhere to the Task Force Report's definition of "sexual orientation," Dr. Herek's definition, or some other definition.

[1] Plaintiffs filed objections to Defendants' proffer of expert testimony, but the District Court failed to rule on the objections, saying that the court's decision would be the same regardless of whether all or none of the evidence is admissible. (ER 00003).

Leaving "sexual orientation" undefined and setting aside the acknowledged absence of evidence that SOCE is harmful, the Legislature determined that "any sexual orientation change efforts attempted on a patient under 18 years of age by a mental health provider shall be considered unprofessional conduct and shall subject the provider to discipline by the provider's licensing entity." (ER 00481) The Legislature emphasized that licensed mental health professionals are prohibited from engaging in SOCE "under any circumstances." (ER 00481). SB 1172's sponsor, Sen. Lieu, publicly stated that its purpose was to limit parental rights: "The attack on parental rights is exactly the whole point of the bill because we don't want to let parents harm their children." (ER 00442).[2]

II. PLAINTIFFS

Plaintiffs include parents whose parental rights are being attacked, as Sen. Lieu intended, their minor children who are receiving SOCE counseling, and licensed professional counselors and professional counseling associations, including the National Association for Research and Therapy of Homosexuality (NARTH) and the American Association of Christian Counselors (AACC)) (ER

[2] Citing Kim Reyes, *Controversy Follows Efforts to Ban Gay Conversion Therapy*, Orange County Register (July 27, 2012), cited in Jim Crogan, *California Law Barring Parents from "Curing" Gay Children Moves through Legislature*, FoxNews.com (Aug. 18, 2012, www.foxnews.com/politics/2012/08/18/California-law-barring-parents-from-curing-gay-children-moves-through/).

00430-00431). All of the Plaintiffs will be directly and immediately affected by the ban on SOCE counseling imposed by SB 1172.[3]

A. COUNSELORS AND PROFESSIONAL ASSOCIATIONS

The Counselors are licensed professionals and two professional associations whose members' licenses and livelihoods are placed at risk and whose First Amendment rights are jeopardized by SB 1172. David Pickup is a licensed Marriage and Family Therapist who specializes in providing minor children with SOCE counseling to help them reduce unwanted same-sex attractions. (ER 00367). Mr. Pickup was a victim of sexual abuse as a child, and that trauma resulted in unwanted same-sex attractions from which he received relief as a result of SOCE counseling. (ER 00367-00368). Having experienced the benefits of SOCE counseling, Mr. Pickup now provides that counseling to his clients, many of whom have suffered trauma similar to that Mr. Pickup suffered and have experienced similar unwanted same-sex sexual attractions. (ER 00368). Mr. Pickup's counseling consists solely of speech, which "is the only tool he has to engage a client, and it is the main tool that has been employed in psychotherapy since at least 1900 when Sigmund Freud introduced this practice." (Dkt. 3-5, p. 6). "There is no other conduct that takes place in my counseling sessions." (*Id.*).

Christopher Rosik, Ph.D., is a licensed clinical psychologist who sees approximately 25 to 30 clients per week, approximately five to ten percent of

whom are dealing with same-sex attraction issues, half of them being minors. (ER 00377). Dr. Rosik offers SOCE counseling to minors only when both the minors and their parents indicate that they want SOCE counseling and receive advanced informed consent. (ER 00378). Dr. Rosik helps clients with their unwanted same-sex sexual attractions by talking to them about root causes of their unwanted feelings, talking to them about general roles and identities, and talking to them about their anxiety and confusion concerning these unwanted same-sex sexual attractions. (Dkt. 3-6, p.7). Speech is the only tool he has to engage his clients.(*Id.*). Dr. Rosik testified that SB 1172 requires that he not recommend SOCE counseling or refer a client to a licensed mental health counselor who would provide such counseling, because he could be subject to professional discipline if the client believes that he is advocating for changing the client's sexual orientation from homosexual to heterosexual, or whatever. (ER 00378).

Joseph Nicolosi, Ph.D. is a California licensed clinical psychologist whose practice is devoted to counseling clients who experience conflict between unwanted same-sex attractions and their values. (ER 00139). About 60 percent of his 135 active clients are minors seeking SOCE counseling. (ER 00139). Prior to engaging in SOCE counseling Dr. Nicolosi provides an extensive consent form that outlines the nature of the treatment, the potential benefits and risks, including the fact that some psychotherapists believe that sexual orientation cannot or should

not be changed, and informs the client that success in any method of psychotherapy is not guaranteed. (ER 00381-00382). Once a client consents to SOCE counseling, Dr. Nicolosi engages in discussions (*i.e.* talks) with the client concerning the nature and cause of their unwanted same-sex sexual attractions; the extent of these attractions; and assistance in understanding and development of traditional, gender-appropriate behaviors and characteristics. (ER 00382). As Dr. Nicolosi explained, "Psychotherapy is speech. The therapeutic relationship is talking and communication; verbal and non-verbal communication is the essential element of the therapeutic process." (Dkt. 3-7, p. 7). Dr. Nicolosi has been providing SOCE counseling to Plaintiffs John Doe 1 and John Doe 2 after receiving their informed consent and the consent of their parents, Jack and Jane Doe 1 and Jack and Jane Doe 2. (ER 00385-00386). In the course of the SOCE counseling with the Doe families, Dr. Nicolosi and the families have developed a therapeutic alliance that is necessary for all psychotherapy to be successful. (ER 00383-00384). The therapeutic alliance is the relationship that is developed between psychotherapist and client or patient, *i.e.*, the collaborative relationship, which incorporates the client's goals and the psychotherapist's methods for accomplishing those goals. (ER 00383-00384). Through that therapeutic alliance, Dr. Nicolosi and the Doe families have been able to successfully progress in the

SOCE counseling and have moved closer to the minors' therapeutic goals of reducing same-sex sexual attractions. (ER 00383-00384).

Robert Vazzo is a California Licensed Marriage and Family Therapist who specializes in SOCE counseling. (ER 00396). He sees 15 to 20 clients each week and ten percent of those clients are minors seeking SOCE counseling. (ER 00396). Mr. Vazzo does not base his SOCE counseling on the idea that homosexuality or any other issue is a "mental illness," but from the standpoint that his clients want to deal with unwanted feelings and issues in their lives. (ER 00397). Mr. Vazzo testified that "[a] therapists' speech is the only tool he has to engage a client, and it is the main tool I utilize in my practice." (Dkt. 3-8, pp. 5-6). He said that "the only psychotherapists that have additional tools other than speech are psychiatrists who can prescribe medicine, but for me, I can only help my clients through speech." (*Id.*)

NARTH is a professional, scientific organization that disseminates educational information, conducts and collects scientific research, promotes effective therapeutic treatment, and provides referrals to those who seek its assistance. (ER 00372). NARTH is engaged in extensive research concerning individuals who have successfully reduced or eliminated their unwanted same-sex attractions and the psychological factors that are typically associated with a homosexual lifestyle. (ER 00372). NARTH advocates for an open discussion of all

viewpoints concerning SOCE counseling and its potential benefits or harms to patients, and supports the rights of individuals with unwanted same-sex attractions to receive effective psychological care and the rights of professionals to offer that care. (ER 00372).

AACC is a professional organization with 50,000 members throughout the world, including California, some of whom engage in SOCE counseling and some who do not. (ER 00390-00391). AACC members adhere to the policy that every client seeking mental health services has the inherent right to participate in treatment that is in alignment with his/her religious beliefs and faith-based values, and furthermore, to have this right vigorously protected. (ER 00392).

B. MINOR AND PARENT PLAINTIFFS

Plaintiff John Doe 1 is 15 years old and currently receiving SOCE counseling with Dr. Nicolosi. (ER 00415). After meeting with Dr. Nicolosi, he said that he wanted to work with Dr. Nicolosi because he did not want to experience the same-sex attractions. (ER 00403 00415). John Doe 1 and his parents, Jack and Jane Doe 1 are very concerned that discontinuing SCOE counseling with Dr. Nicolosi, as required under SB 1172, will be harmful to John Doe 1's health and well-being. (ER 00403, 00415). They are afraid that if the counseling is discontinued, then John Doe 1 will regress from the progress toward his goal of eliminating his same-

sex attractions, and will suffer setbacks and conflicts between his unwanted same-sex attractions and his religious beliefs. (ER 00403, 00415-00416).

Plaintiffs Jack and Jane Doe 2 are likewise very concerned that discontinuing their 14-year-old son John Doe 2's SOCE counseling with Dr. Nicolosi will be harmful to his health and well-being (ER 00410). As a result of the SOCE counseling, John Doe 2 experiences less anxiety and confusion, is engaging in more physical activity, and is relating better to his family. (ER 00410). They and their son are afraid that if the SOCE counseling is discontinued, then the beneficial changes that Doe 1 and his family have experienced will regress and that the unhealthful habits and attitudes will return. (ER 00410)

SUMMARY OF ARGUMENT

The District Court disregarded binding precedents from this Court and the United States Supreme Court when it denied Plaintiffs' motion for a preliminary injunction. Instead of utilizing this Court's standard of balancing the prerequisites for a preliminary injunction as set forth in *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012), the District Court concluded that SB 1172 does not implicate the First Amendment so that Plaintiffs "are not likely to succeed on the merits" of their constitutional claims. Critical to the District Court's conclusion is the false premise that SOCE counseling has been proven to be "harmful" to minors, when

the evidence relied upon by the Legislature shows that there is no scientifically valid proof that SOCE causes harm.

The District Court erred in concluding that SOCE counseling is not speech, but is conduct not sufficiently infused with speech to warrant First Amendment protection, despite this Court's contrary conclusion regarding a substantially similar statute in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002). Furthermore, despite the substantial similarity between the regulation in *Conant* and SB 1172, the District Court incorrectly concluded that *Conant* is inapposite and that SB 1172 is merely a permissible professional regulation similar to the licensing statutes upheld in *National Association for the Advancement of Psychoanalysis v. California Board of Psychology*, ("NAAP") 228 F.3d 1043 (9th Cir. 2000).

The District Court also erred when it concluded that SB 1172 is not unconstitutionally vague or overbroad, disregarding evidence that undefined terms such as "sexual orientation" have no accepted meaning and therefore leave professionals guessing as to what is prohibited. This is all the more serious when a mistake will cost them their license. Furthermore, SB 1172 is unconstitutionally overbroad in that it would prohibit a minor and his parents from seeking help from a licensed professional if the likes of a Jerry Sandusky sexually molested a minor, and, as often happens, the minor, developed anger and identity confusion, began to have urges to act out sexually in the way he was abused, and wanted to reduce or

eliminate that behavior. Under SB 1172, a counselor can only affirm or accept those feelings, even if the client abhors them, but under no circumstances may the counselor assist the client in reaching the goal to reduce or eliminate them.

The District Court improperly determined that SB 1172 does not infringe upon fundamental parental rights because parents who want their children to continue receiving SOCE counseling (which the court wrongly concluded is "harmful") can simply send their children to unlicensed practitioners.

Having reached the improper conclusion that Plaintiffs are not likely to succeed on the merits of their constitutional claims, the District Court then simply chose not to "reach" the remaining prerequisites for a preliminary injunction, *i.e.*, irreparable harm, balancing of hardships and public interest. The District Court noted that its decision would disrupt ongoing therapy, but dismissed that fact as irrelevant since it was choosing not to reach the question of irreparable injury. (ER 00022). Because of the myriad of errors made by the District Court, this Court should reverse the District Court and direct that a preliminary injunction be issued.

STANDARD OF REVIEW

This Court reviews a decision to grant or deny a preliminary injunction for abuse of discretion. *Pimentel*, 670 F.3d at 1105 (citing *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir.2011)). In deciding whether the district court abused its discretion, this Court employs a two-part test: "first, we

'determine de novo whether the trial court identified the correct legal rule to apply to the relief requested'; second, we determine 'if the district court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.'" *Id.* A decision based on an erroneous legal standard or a clearly erroneous finding of fact amounts to an abuse of discretion. *Id.* The District Court's conclusions of law are reviewed *de novo* and its findings of fact for clear error. *Id.*; *Cottrell*, 632 F.3d at 1131.

The District Court erred when it denied Plaintiffs' motion for a preliminary injunction. The District Court concluded that SB 1172 does not implicate the First Amendment, so that it is to be evaluated under the rational basis test, and that it satisfies this test. (ER 00021). The court acknowledged that SB 1172 will disrupt the Minor Plaintiffs' ongoing counseling, but refused to "reach" the question of whether the disruption constituted irreparable injury. (ER 00022). The District Court then determined that the Minor Plaintiffs' and Parent Plaintiffs' rights were not infringed because they could seek SOCE counseling from unlicensed practitioners. (ER 00034). The Court applied the wrong legal standard based upon erroneous findings of fact to reach the erroneous conclusion that Plaintiffs were not entitled to a preliminary injunction.

The error is all the more apparent in light of a ruling made one day earlier in which another Eastern District judge found that SB 1172 is content- and

viewpoint-based and unlikely to withstand strict scrutiny under the First Amendment and thereby cause irreparable injury. *Welch v. Brown*, Case No. 2:12-cv-02484 WBS KJN, Order on Motion for Preliminary Injunction (ER 00133). That contradictory order by a fellow judge in the same court throws the District Court's conclusion here into serious question, and a review of the court's analysis reveals that it failed to correctly apply the law in light of the fundamental constitutional rights that SB 1172 places in serious jeopardy.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT HELD THAT PLAINTIFFS DID NOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS.

A. The Court Utilized The Wrong Legal Standard.

Plaintiffs exceeded this Court's prerequisites for establishing that they are entitled to a preliminary injunction to preserve the status quo and protect them from irreparable harm. The District Court engaged in a preliminary adjudication of the merits without following the balancing test this Court has established for preliminary injunctions. *Pimentel*, 670 F.3d at 1105. In general, a plaintiff seeking a preliminary injunction must establish: (1) likely success on the merits; (2) likely irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the plaintiff's favor; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 20(2008). Under

this Court's "sliding scale" approach to preliminary injunctions (which the District Court refused to consider), the elements of the *Winter* preliminary injunction test "are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Pimental,* 670 F.3d at 1105(citing *Cottrell*, 632 F.3d at 1131). "[A]t an irreducible minimum," though, "the moving party must demonstrate a fair chance of success on the merits, or questions serious enough to require litigation." *Id*. at 1105-1106.

Instead of undertaking the balancing of factors this Court described in *Cottrell* and *Pimental*, the District Court made passing reference to this Court's standard and then undertook an analysis of only the "likelihood of success on the merits" prong from the *Winter* standard. (ER 00012). The court refused to consider irreparable harm or whether Plaintiffs raised a serious question regarding the constitutionality of SB 1172, and then balance that question with the remaining factors. (ER00012, ER 00022). "Because it did not apply the 'serious questions' test, the district court made an error of law in denying the preliminary injunction." *Cottrell*, 632 F.3d at 1135. The importance of utilizing the "serious questions" test instead of the "likelihood of success" test, particularly in cases such as this one in which the risk of irreparable injury is particularly acute, was aptly explained in *Cottrell:* "As between the two, a district court at the preliminary injunction stage is in a much better position to predict the likelihood of harm than the likelihood of

success." *Id.*at 1139 (Mosman, J. concurring). "But predicting the likelihood of success is another matter entirely. As mentioned, the whole question of the merits comes before the court on an accelerated schedule." *Id.* "The parties are often mostly guessing about important factual points…." *Id.* "[I]n many, perhaps most, cases the better question to ask is whether there are serious questions going to the merits. That question has a legitimate answer. Whether plaintiffs are likely to prevail often does not." *Id.* at 1139-1140. The question of whether there are serious questions going to the merits at this stage of the proceedings has a legitimate answer, *i.e.*, "Yes," as is apparent from the extensive analysis of the constitutional claims and the conflicting ruling the day before by a sister court in the same district, finding that SB 1172 likely violates the First Amendment. SB 1172 does indeed violate the First Amendment, but at a minimum the District Court should have gone on to balance the remaining factors, and issued a preliminary injunction.

B. The District Court Erred When It Concluded That Banning SOCE Counseling For Minors Does Not Abridge Plaintiffs' Free Speech Rights Under The First Amendment.

While the state has an interest in regulating professions, including psychotherapy, *NAAP v. California Board of Psychology*, 228 F.3d 1043 (9th Cir. 2000), that interest does not extend to regulating the content, and particularly the viewpoint, of what transpires between the professional counselor and the client. *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002). The District Court erred when it

concluded that SB 1172 is merely an exercise of the state's interest in professional regulation under *NAAP*, instead of an impermissible over-reach into the content or viewpoint of counselor-client communications under *Conant*. That error resulted in two incorrect conclusions: that SB 1172 does not regulate speech so as to implicate the First Amendment, and is content- and viewpoint-neutral.

1. SOCE Counseling is Expressive Activity Conducted in Intimate Human Relationships Protected by the First Amendment.

Plaintiffs' choices to enter into and maintain the intimate human relationships between counselors and clients "must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *City of Dallas v. Stanglin*, 490 U.S. 19, 23-24 (1989) (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984)). Such intimate relationships are protected as a fundamental element of personal liberty encompassed in the phrase "freedom of association." *Id.* at 24. The freedom of association also encompasses "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion," *i.e.*, expressive association. *Id.* It does not encompass every type of human association, which might have some kernel of expression in it, such as meeting together to engage in recreational dancing. *Id.* (overturning an appellate

court ruling granting First Amendment protection to social dancing). Seizing upon this latter statement in *Stranlin* and disregarding the on-point authority in *Roberts*, the District Court categorized SOCE counseling, which is conducted within a confidential, therapeutic setting between a counselor and client in the context of an established, collaborative, therapeutic alliance (*see* ER 00383-00384), as mere social association akin to recreational dancing. (ER 00018). *Roberts* requires the opposite conclusion.

Likewise, this Court's decision in *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010), compels the conclusion that SOCE counseling is conduct sufficiently imbued with elements of communication as to fall within the scope of the First and Fourteenth Amendments. The District Court cited this Court's decision for the proposition that SOCE counseling is not intended to convey a particular message. (ER 00018). In fact, however, *Anderson* supports the opposite conclusion, *i.e.*, that SOCE counseling, even more so than the tattooing in *Anderson*, is expressive activity intended to communicate a particular message likely to be understood by the recipient. *Id.* at 1058.The *raison d'etre* for SOCE counseling is to convey messages regarding how to address unwanted same-sex attractions, behavior or identity and meet the therapeutic goals of clients who want to resolve underlying issues and conflicts. (ER 00367-00368, 00377-00378, 00384-00386, 00395-00397). The purpose of the counseling is to communicate a message

that will be understood by the client who wants to hear that message. (ER00400-00428). Therefore, it falls squarely within the protected category of expressive activity identified in *Anderson* as subject to First Amendment protection. *Id.* at 1058.

2. SB 1172 Goes Beyond Regulating the Counseling Profession in General to Infringing upon the Speech Between Counselor and Client.

As was true with the federal law that was struck down prohibiting physicians from discussing the use of medical marijuana to relieve pain struck down in *Conant*, 309 F.3d at 639-40, SB 1172 unconstitutionally reaches beyond merely regulating the counseling professions to dictating what can be said during counseling sessions. Eschewing this binding, on-point precedent, the District Court concluded that SB 1172 is nothing more than a permissible regulation akin to the licensing regulations upheld in *NAAP*, 228 F.3d at 1047. (ER00021). However, the District Court ignored a significant caveat in this Court's decision that the licensing laws in *NAAP* did not violate the First Amendment, *i.e.*, California's mental health licensing laws "do not dictate what can be said between psychologists and patients during treatment." *Id.* at 1055.

> A state may forbid one without its license to practice law as a vocation, but I think it could not stop an unlicensed person making a speech about the rights of man or the rights of labor.... Likewise, the state may prohibit the pursuit of medicine as an occupation without its license, but I do not think it could make it a crime publicly or

> privately to speak urging persons to follow or reject any school of medical thought.

Id. (citing *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring)). In *NAAP*, this Court found the licensing laws constitutional because, "although the California laws and regulations may require certain training, *speech is not being suppressed based on its message*." *Id*. (emphasis added). *NAAP* merely addressed the type and amount of training and education a person mush have to be licensed. It did not address what a licensed counselor may say to a client.

As this Court was careful to point out in *Conant*, the decision in *NAAP* does not mean that being a member of a regulated profession results in surrendering First Amendment rights. *Conant*, 309 F.3d at 637 (citing *Thomas* 323 U.S. at 531). "To the contrary, professional speech may be entitled to 'the strongest protection our Constitution has to offer.'" *Id.* (citing *Florida Bar v. Went For It, Inc*., 515 U.S. 618, 634 (1995)). This Court rejected the government's argument that physician-patient discussions about medical marijuana should be prohibited because they might lead some patients to make bad decisions. *Conant*, 309 F.3d at 637. This Court refused to accept the assumptions that physicians would prescribe unnecessary, harmful treatment and that patients would make harmful decisions if given truthful information about marijuana. *Id.* It should similarly refuse to accept the State's assumptions here that Counselor Plaintiffs will recommend counseling that is harmful to minors and that minors and their parents who are provided with

truthful information about SOCE counseling will make harmful decisions. That is particularly true in light of the fact that *there is no empirical evidence that SOCE causes harm to minors*. (ER 00292-00295, 00312). The main resource relied upon by the Legislature, the APA Task Force Report, concluded that "[r]esearch on SOCE (psychotherapy, mutual self-help groups, religious techniques) *has not answered basic questions of whether it is safe or effective and for whom*. . . . [R]esearch into harm and safety is essential." (ER 00312 (emphasis added)). "We conclude that there is a dearth of scientifically sound research on the safety of SOCE. …Thus, *we cannot conclude how likely it is that harm will occur from SOCE*." (ER 00264) (emphasis added).

The Task Force found "a lack of published research on SOCE among children," and "*no* empirical research on adolescents who request SOCE." (ER 00294-00295) (emphasis added). Absent credible evidence of harm, this Court should reject the District Court's conclusion that the State can prohibit SOCE counseling – which has been in existence for many decades without incident -- to protect minors and their parents from making "harmful" decisions. This is especially so in light of the evidence that SB 1172's prohibition against SOCE counseling will chill Plaintiffs' speech and infringe their right of association. (ER 00366-00428). As the Counselor Plaintiffs testified, SOCE counseling, like other forms of psychotherapy, consists entirely of speech between the client and

professional, and this has been the case for over a century. (Dkt. 3-5to 3-8). SB 1172's blanket prohibition on SOCE counseling that seeks to reduce or eliminate same-sex attractions, behaviors or identity thus chills Counselors' speech by prohibiting the expression of a particular viewpoint. In *Conant*, this Court found that a record similarly "replete with examples of doctors who claim a right to explain the medical benefits of marijuana to patients and whose exercise of that right has been chilled by the threat of federal investigation" defeated the government's contention that prohibiting physician speech about medical marijuana was a permissible regulation to prevent illegal conduct. Plaintiffs' extensive evidence of the chilling effect of SB 1172's prohibition of SOCE counseling (*see* ER 00366-00428) should lead this Court to similarly reject the District Court's conclusion that SB 1172 is a permissible regulation to prevent "harm."

The District Court relied, in part, on *United States v. O'Brien*, 391 U.S. 367, 376 (1968), for the proposition that conduct cannot become speech simply because the person engaging in the conduct intends to express an idea. (ER 00018). In fact, however, *O'Brien*'s analysis of the speech/conduct distinction demonstrates that SB 1172 would fall on the side of speech subject to a heightened scrutiny analysis under the First Amendment. In *O'Brien*, the Supreme Court said that the lower level of scrutiny applied to conduct does not apply when "the government's

interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." *Id.* at 382. The California Legislature has clearly and unequivocally sought to regulate the content of a counselor's speech and therefore falls within the content-based exception for conduct/speech in *O'Brien*.

Conant also illustrates why this Court must reject the District Court's conclusion that SOCE counseling may be banned by the State pursuant to *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). (ER 00020). To the contrary, in *Conant*, this Court cited *Casey* and *Rust v. Sullivan*, 500 U.S. 173 (1991), and recognized that physician speech is entitled to First Amendment protection "because of the significance of the doctor-patient relationship." *Conant*, 309 F.3d at 636. Disregarding the discussion of *Casey* in *Conant*, the District Court pulled a sentence from a portion of the *Casey* opinion that was joined by only three Justices and cited to non-Ninth Circuit precedent to support its assertion that SOCE counseling is not subject to the First Amendment. (ER 00020, citing *Casey* 505 U.S. at 884 (plurality) and *Texas Medical Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012)). However, as this Court said in *Conant*, neither *Casey* nor *Rust* upheld restrictions on speech itself. *Conant*, 309 F.3d at 638.

> *Rust* upheld restrictions on federal funding for certain types of activity, including abortion counseling, referral, or advocacy. *See*

> *Rust*, 500 U.S. at 179–80, 111 S.Ct. 1759. In *Casey*, a plurality of the Court upheld Pennsylvania's requirement that physicians' advice to patients include information about the health risks associated with an abortion and that physicians provide information about alternatives to abortion. 505 U.S. at 883–84, 112 S.Ct. 2791. The plurality noted that physicians did not have to comply if they had a reasonable belief that the information would have a "severely adverse effect on the physical or mental health of the patient," and thus the statute did not "prevent the physician from exercising his or her medical judgment." *Id.* The government's policy in this case does precisely that.

Id. So does SB 1172 in this case—it provides that licensed counselors cannot "engage in" SOCE counseling, which includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions of feelings towards individuals of the same sex, *under any circumstances.* (ER00483). Licensed counselors are prevented from exercising their professional judgment, *i.e.*, speaking, concerning the practices to be used to assist a minor patient deal with their unwanted same-sex attractions. The subject matter of same-sex sexual attractions, behavior or identity is permitted, but only if the counselor affirms them. If the counselor seeks to reduce or eliminate them, then that viewpoint on the otherwise permissible subject matter is banned. SB 1172 restricts content and viewpoint. Therefore, like the statute in *Conant*, and unlike the regulations in *Casey* and *Rust*, SB 1172 interferes with the professionals' judgment and, consequently, their rights under the First Amendment. The District Court's conclusion that Plaintiffs were not likely to prevail on this issue was error.

3. The District Court Erred When It Concluded That SB 1172 Does Not Infringe Upon Minor Plaintiffs' First Amendment Rights To Receive Messages.

SB 1172 deprives minors—such as Plaintiffs John Does 1 and 2—of the right to receive information regarding the reduction or elimination of unwanted same-sex attractions and directs that such clients only receive the state-approved message that same-sex attractions are only to be accepted, understood and supported. (ER 00483). Nevertheless, relying upon the flawed premise that the State had proven that SOCE counseling is "harmful," the District Court found that SB 1172 posed no threat to Minor Plaintiffs' First Amendment rights. (ER 00022). In so doing, the District Court disregarded this Court's precedent in *Conant* as well as Supreme Court precedents that establish the government may not regulate the receipt of information when its purpose is to suppress certain ideas or viewpoints. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 871-72 (1982) (plurality) ("Our Constitution does not permit the official suppression of ideas."); *See also, id.* at 880 (Blackmun, J., concurring) ("[O]ur precedents command the conclusion that the State may not act to deny access to an idea simply because state officials disapprove of that idea. . . .").

The United States Supreme Court rejected a state's similar attempt to protect consumers from harm in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). The law at issue in *Virginia*

Citizens banned pharmacists from advertising the market prices of prescription drugs purportedly to protect against the negative effects of price competition. *Id.* The Supreme Court rejected that rationale because professional codes of conduct already imposed a high standard of care that would address the purported harm. *Id.* at 768-69. The Court said that the First Amendment commands the assumption that "information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Id.* at 770.

That rule is particularly true in the context of medical care, as this Court stated in *Conant,* 309 F.3d at 639. Judge Kozinski's evaluation of the effect of the ban on advising patients about the use of medical marijuana for pain relief reflects the importance of maintain unimpaired channels of communication between practitioners and their clients:

> Enforcement of the federal policy will cut such patients off from competent medical advice and leave them to decide on their own whether to use marijuana to alleviate excruciating pain, nausea, anorexia or similar symptoms. But word-of-mouth and the Internet are poor substitutes for a medical doctor; information obtained from chat rooms and tabloids cannot make up for the loss of individualized advice from a physician with many years of training and experience.

Id. at 644 (Kozinski, J. concurring). Like the laws in *Virginia Citizens* and *Conant*, SB 1172 suppresses information that minor Plaintiffs clients have a right to hear,

i.e., that unwanted same-sex attractions, behavior or identity can be reduced or eliminated.

The state has determined that the only permissible message same-sex attractions, behavior or identity are to be accepted, supported and understood, thus suppressing all other viewpoints to the detriment of licensed professionals and their vulnerable minor clients. On the subject matter of same-sex attractions, behaviors or identity, affirmation is permitted, but counsel to reduce or eliminate one or all of them is banned. Because this contradicts *Pico*, 457 U.S. at 871-72, the District Court erred when it concluded that Plaintiffs have not shown a likelihood of success on the merits. (ER 00022).

4. The District Court Erred When It Concluded That SB 1172 Is Not Content and Viewpoint-Based.

This Court's analysis in *Conant* also demonstrates that SB 1172 unconstitutionally discriminates against Plaintiffs' expressive activities on the basis of content and viewpoint. Nevertheless, the District Court mistakenly claimed that *Conant* is inapposite because it addressed speech while SB 1172 addresses conduct. (ER 00015-00017). The District Court also found that the "medical judgment" referenced in *Conant* does not refer to the physician's medical judgment regarding medical marijuana, but merely "medical judgment" in general. (ER 00014). Most remarkably, the District Court admitted that in *Conant* this Court found that the government's policy infringed the physicians' First

Amendment speech because it prevented the doctors from exercising medical judgment, but that "*Conant* did not consider whether the government's restriction on prescribing medical marijuana or using medical marijuana as a treatment would raise any First Amendment concerns." (ER 00014). Since this Court found that the law at issue in *Conant* "strike[s] at core First Amendment interests of doctors and patients," 309 F.3d at 636, it is difficult to comprehend how the District Court could conclude that this Court did not consider whether the restriction raised any First Amendment concerns.

In fact, in *Conant* the First Amendment was at the center of this Court's discussion of the infirmities in the policy and its effect on medical professionals. The similarities between the policy in *Conant* and SB 1172 make this Court's analysis directly on point.

> The government's policy in this case seeks to punish physicians on the basis of the content of doctor-patient communications. Only doctor-patient conversations that include discussions of the medical use of marijuana trigger the policy. Moreover, the policy does not merely prohibit the discussion of marijuana; it condemns expression of a particular viewpoint, i.e., that medical marijuana would likely help a specific patient.

Conant, 309 F.3d at 637. In the same way, SB 1172 punishes licensed counselors and their clients on the basis of the content and viewpoint of their counselor-client communications. (ER 00483). Only counselor-client conversations that include the viewpoint to reduce or eliminate identity, behaviors, gender expressions, or sexual

attractions towards individuals of the same sex trigger disciplinary action. (ER 00483). (ER 00483). SB 1172 specifically excludes from its prohibition:

> [P]sychotherapies that: (A) provide *acceptance, support, and understanding* of clients or the facilitation of clients' coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and (B) *do not seek to change sexual orientation*.

(ER 00483) (emphasis added). When a client experiencing same-sex attractions seeks advice from a licensed counselor, the counselor may express the viewpoint that the attractions are to be *accepted*, *supported* and *understood* (ER 00483), but cannot *under any circumstances* express the viewpoint that same-sex attractions, behavior or identity can be *reduced* or *eliminated*, even if the client *wants* to reduce or eliminate one or all of them. To avoid violating SB 1172, the counselor must override or ignore the client's right to self-determination to seek such counsel, and in so doing the counselor will violate other ethical provisions. The counselor is damned either way. What was true about the burden the medical marijuana regulation imposed upon physicians in *Conant* is even more true about the burden imposed upon counselors by SB 1172:

> By speaking candidly to their patients about the potential benefits of medical marijuana, they risk losing their license to write prescriptions, which would prevent them from functioning as doctors. In other words, they may destroy their careers and lose their livelihoods.

Conant 309 F.3d at 639-640 (Kozinski, J. concurring). By speaking candidly to their clients about the possibility of reducing or eliminating same-sex attractions, behavior or identity, Counselor Plaintiffs risk losing their licenses. Their careers would be destroyed because they counseled the viewpoint that same-sex attractions can be reduced or eliminated.

"Such condemnation of particular views is especially troubling in the First Amendment context." *Conant*, 309 F.3d at 637. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828 (1995)). "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Conant*, 309 F.3d at 637 (citing *Rosenberger*, 515 U.S. at 829). Viewpoint-based regulations are unconstitutional. *See, e.g.*, *Good News Club v. Milford Central School* 533 U.S. 98 (2001) (invalidating a school access policy that differentially treated a religiously based after-school club); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others"); *DiLoreto v. Downey Unified School Dist. Bd. of Educ.*, 196 F.3d 958, 965 (9th Cir. 1999) (even in a nonpublic forum, the government may not limit expressive activity "if the

limitation is . . . based on the speaker's viewpoint"); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 980 (9th Cir. 1998) ("Viewpoint discrimination is a form of content discrimination in which 'the government targets not subject matter, but particular views taken by speakers on a subject.'") (quoting *Rosenberger*, 515 U.S. at 829).

SB 1172 regulates the substantive content of a counselor's speech in the same way that the government tried to regulate physicians' speech in *Conant* and lawyers' speech in *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001). The regulation at issue in *Velazquez* prevented legal aid attorneys from receiving federal funds if they advised clients to challenged welfare laws. *Id.* at 537-38. In invalidating the measure on its face, the Court said the effect of the funding condition was to "prohibit advice or argumentation that existing welfare laws are unconstitutional or unlawful," and thereby exclude certain "vital theories and ideas" from the lawyers' representation. *Id.* at 547-549. SB 1172 regulates mental health counselors in the same constitutionally-impermissible manner. The law invalidated in *Velazquez* merely removed federal funding from lawyers who expressed the prohibited viewpoint. *Id*. Lawyers who violated the provision could still practice law, but would just be deprived of a portion of their income. *Id.* However, under SB 1172, mental health professionals risk losing their licenses, and thereby, their entire livelihood, if they express the prohibited viewpoint. If

deprivation of one source of income is sufficient to invalidate a regulation on the grounds of impermissible viewpoint discrimination, then deprivation of an entire livelihood is even more so.

Much like the viewpoint-based law invalidated in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), SB 1172 impermissibly favors one side of a subject matter on a very important issue, *i.e.*, therapeutic responses to unwanted same-sex attractions. SB 1172 permits discussion of the subject of sexual orientation or same-sex attractions, but precludes expression of a particular view on that subject, *i.e.* that unwanted same-sex attractions, expressions, or behavior can be reduced or eliminated. The viewpoint of counselors who in their professional judgment determine that same-sex attractions conflict with the religious and moral beliefs of clients and are not desired, is silenced by SB 1172. This raises a serious constitutional question that exceeds the Court's requirement under *Pimentel* 670 F.3d at 1105-06 and meets the stricter standard of substantial likelihood of success under *Winter*, 555 U.S. at 20.

5. The District Court Erred When It Concluded That SB 1172's Ban on SOCE is not Unconstitutionally Vague and Overbroad.

The Counselor Plaintiffs, whose very livelihoods depend upon properly interpreting SB 1172, have established that SB 1172 does not have the "precision of regulation" that is necessary when the government seeks to regulate expressive

activity. *NAACP v. Button*, 371 U.S. 415, 435 (1963). SB 1172 violates the basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Laws like SB 1172 which threaten to inhibit the exercise of constitutionally protected expression must satisfy "a more stringent vagueness test." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). When analyzing a law for vagueness, "the crucial consideration is that no [individual subject to the law] can know just where the line is drawn ...." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 599 (1967).

The Counselor Plaintiffs, who are the parties subject to the punitive sanctions in SB 1172, have testified that they cannot determine where the line between prohibited and permitted speech will be drawn. (ER 00373, 00378, 00386-00387, 00398-00399). David Pruden, Vice President of Plaintiff NARTH, testified that SB 1172's definition of "engaging" in SOCE counseling would subject NARTH's members to discipline for merely disseminating educational information regarding same-sex attractions and effective therapeutic treatment for those with unwanted same-sex attractions. (ER 00373). Dr. Rosik testified that his interpretation of SB 1172's prohibitions places him in a Catch-22 situation in which he would face professional discipline for violation of professional codes of conduct if he discontinues ongoing beneficial SOCE counseling and would face

disciplinary action under SB 1172 if he continues the counseling. (ER 00378). He testified that SB 1172 leaves him without clear direction on how to comply with its provisions and not violate professional codes of conduct. (ER 00398). Mr. Vazzo similarly testified that SB 1172's prohibition leaves him in the impossible position of having to choose between violating professional codes of conduct, including those requiring that he do no harm (which he would do by discontinuing counseling) and risking his professional license by violating SB 1172. (ER 00398). Mr. Vazzo is also licensed in Florida and Ohio, which do not have prohibitions on SOCE counseling, and he cannot determine whether SB 1172 will subject him to discipline in California if he engages in what is prohibited under SB 1172 under the auspices of his Ohio or Florida licenses. (ER 00396).[4] Dr. Nicolosi provided extensive testimony on the uncertainty created by SB 1172:

> Specifically, I have many YouTube and other videos on my website and on other websites that specifically address the issue of SOCE counseling. These videos have the potential to reach every minor in California. SB 1172's language prohibits all efforts that seek to reduce or eliminate same-sex attractions, and it would seem that having videos on the Internet that advocate for SOCE counseling and provide information about where an individual can receive it might be perceived as an effort that seeks to reduce or eliminate same-sex attractions. I do not know whether SB 1172 requires me to remove all of these videos from my website and request that they be removed from others. Also, it is virtually impossible to ensure that all such videos are removed, so if SB 1172 is found to apply to them, then I

[4] California is the first state to ban SOCE. No other state, professional counseling association or ethical code bans SOCE. California has jumped far afield with the passage of SB 1172.

> could inadvertently be subject to disciplinary proceedings because of the viewing of a video that I thought had been removed from the internet.

(ER 00387).

Nevertheless, the District Court found that the statute was "clear enough." (ER 00027). "[T]here is a general understanding of what SOCE encompasses and the statute surpasses the bar set for minimal clarity." (ER 00029). Dr. Nicolosi testified that SB 1172 could threaten his online educational efforts and video conferencing. The District Court said that SB 1172 would not prohibit those efforts, yet said that if a mental health professional licensed by California is engaging a patient in therapy intended to alter that patient's "sexual orientation" via video conference or other remote medium, then the therapist is subject to discipline. (ER 00028-00029). That statement actually substantiates the uncertainty of how SB 1172 will affect multi-jurisdictional professionals such as Mr. Vazzo. (ER 00396). Although the District Court dismissed that concern, its statement that a counselor licensed in California who is engaging in therapy intended to change "sexual orientation" via video conference would be subject to discipline, suggests that someone like Mr. Vazzo who might be engaging in video conference therapy with a client in Ohio or Florida would, as a licensed California counselor, face discipline. The vastly different interpretations offered by the parties and the District Court themselves demonstrate that SB 1172 does not satisfy the

requirements of *Grayned*, 408 U.S. at 108, *Hoffman Estates*, 455 U.S. at 499 or *Keyishian*, 385 U.S. at 599.

The vagueness inherent in SB 1172 is further borne out by the Legislature's failure to define "sexual orientation" in the statute, which presents a difficult problem for mental health counselors tasked with complying with SB 1172 or risking losing their licenses. (ER 00145). Mental health professionals are prohibited from engaging in therapy to "change sexual orientation," but are not informed how the state defines "sexual orientation." (ER00145). The District Court dismissed Plaintiffs' arguments about the sexual orientation definition, claiming that the meaning was "clear," and then reciting a dictionary definition: "[A] person's sexual identity in relation to the gender to whom he or she is usually attracted; [ ] the fact of being heterosexual, bisexual, or homosexual." (ER 00025, citing Concise Oxford English Dictionary 1321 (12th ed. 2011)). The court also alluded to definitions in various California statutes which define "sexual orientation" as "heterosexuality, homosexuality, or bisexuality." (ER 00025). Citing to this truncated dictionary definition reveals how problematic the undefined term is to professionals. At a minimum, it includes sexual attractions, behavior, and identity, but it is also understood by many professionals that sexual orientation is fluid, and it is undisputed that sexual orientation identity is fluid. As Dr. Nicolosi testified and the evidence presented to the court by both sides

illustrates, there is no consensus regarding the definition of sexual orientation in the mental health profession. (ER 00145).

> Given the mental health professions' inability to provide a concrete definition of sexual orientation, there is potentially no limit to what could fall into its definition. The vagueness in the understanding itself of what is encompassed by "sexual orientation" results in a variety of understandings of its meaning and includes pederasty, which is homosexual relationship between a young man and a pubescent boy outside his immediate family, or pedophilia, or a host of other paraphilias or fetishes.

(ER 00145). The lack of consensus is borne out by the testimony of Defendants' expert, Dr. Herek, who said that sexual orientation refers to "an enduring pattern of or disposition to experience sexual, affectional, or romantic desires for and attractions to men, women, or both sexes." (ER 00197). "The term is also used to refer to an individual's sense of identity based on those desires and attractions, behaviors expressing them, and membership in a community of others who share them." (ER 00197). In addition, Defendants' expert, Dr. A. Lee Beckstead, testified that there is no universal agreement on the cause of homosexuality, but that there remain a number of hypotheses regarding the issue. (ER 00184). Finally, the Task Force Report, the Legislature's primary resource, said that "[s]ame-sex sexual attractions and behavior occur in the context of a variety of sexual orientations and sexual orientation identities, and *for some, sexual orientation identity* (i.e., individual or group membership and affiliation, self-labeling) *is fluid or has an indefinite outcome*." (ER 00224 (emphasis added)). If it is acknowledged

that "sexual orientation identity" is fluid or has an indefinite outcome, then why are licensed counselors being forced to affirm and not allowed to counsel a client who seeks such counsel to reduce or eliminate such identity? SB 1172 is a misguided attempt by the state to intrude into the professional judgment of counselors and their clients.

SB 1172's language prohibiting SOCE counseling "under any circumstances" creates a sweeping prohibition that the Supreme Court has found impermissible in statutes affecting expressive activity. *United States v. Stevens*, 130 S.Ct. 1577, 1588 (2010). As was true with the statute against depictions of animal cruelty in *Stevens*, SB 1172 creates a prohibition of "alarming breadth." *Id.* In fact, SB 1172 violates the overbreadth doctrine even more egregiously than did the regulation in *Stevens*, in that the *Stevens* regulation included exceptions, while SB 1172 explicitly states that SOCE counseling is prohibited "under any circumstances." (ER 00483) *Id.* A licensed mental health professional will face disciplinary action if he provides counseling to a minor who wants to reduce or eliminate same-sex attractions, behaviors, mannerisms, speech or identity, even if the minor pleads for the counseling. SB 1172 would prohibit a minor and his parents from seeking help from a licensed professional if the minor is molested by the likes of a Jerry Sandusky child sex abuser, develops anger and identity confusion, begins to have urges to act out sexually in the way he was abused and

wants to reduce or eliminate that behavior. Under SB 1172, a counselor can only affirm or accept those feelings, even if the client abhors them, but under no circumstances may the counselor assist the client in reaching the goal to reduce or eliminate them. SB 1172 is unconstitutional in more than a substantial number of applications, and therefore, overbroad. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6 (2008).

If mental health professionals have not developed a consistent, concrete definition of "sexual orientation," then the Legislature's failure to define the term cannot be dismissed as meaningless. At the hearing on the preliminary injunction, counsel for Defendants stated that sexual orientation also includes "mannerisms" and "speech." (ER 00074). Apparently, any attempt to change speech or mannerisms to conform to a gender other than the real or perceived one would violate SB 1172. (ER 00074). This absurd admission illustrates the vagueness and overbreadth of SB 1172. The District Court's conclusion that SB 1172 is neither vague nor overbroad is clear error.

C. The District Court Erred When It Concluded That SB 1172 Does Not Infringe Parents' Fundamental Rights.

SB 1172 represents the Legislature's adoption of "the statist notion that governmental power should supersede parental authority" that the Supreme Court has found to be "repugnant to American tradition." *Parham v. J. R.*, 442 U.S. 584, 603 (1979).

> [O]ur constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations. ... The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

*Id.*at 602. The fundamental parental right and presumption that parents act in the best interest of their children extends to decisions about medical procedures, including mental health treatment. *Id.* at 607-608. Citing *Parham*, this Court has confirmed that "the right to family association includes the right of parents to make important medical decisions for their children, and of children to have those decisions made by their parents rather than the state." *Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000). The state cannot supersede these fundamental parental rights unless it proves that the parental decision poses real harm to the well-being of children. *Video Software Dealers Association v. Schwarzenegger*, 556 F.3d 950, 962-963 (9th Cir. 2009).

The District Court erroneously concluded that the state met its burden of proving that SOCE counseling is harmful to minors. (ER 00032). The District Court redefined the fundamental right at issue as "the right to choose a specific mental health treatment the state has deemed harmful to minors." There is no evidence that SOCE causes harm to minors. (ER 00215-00352). Instead, the APA

Task Force Report, which was the Legislature's primary authority for its findings, conceded that there is insufficient evidence to conclude that SOCE is either harmful or beneficial for adults, and no evidence regarding the efficacy of SOCE for children and youth. (ER 00215-00352). "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**. . . . [R]esearch into harm and safety is essential." (ER 00312 (emphasis added)).

The Task Force found "a lack of published research on SOCE among children," and "no empirical research on adolescents who request SOCE." (ER 00294-00295). Regardless of what state legislators might have placed in the statute, there is no evidence that SOCE poses real harm to children, and therefore, no basis for superseding the Parent Plaintiffs' rights to choose SOCE counseling for their children. *Video Software Dealers*, 556 F.3d at 962-963.

Incredibly, the District Court further held that SB 1172 does not infringe upon parents' fundamental rights because it does not totally bar SOCE counseling, but only counseling offered by licensed counselors. (ER 00034). "Parents can still seek SOCE or its equivalent through religious institutions or other unlicensed providers." (ER 00034). The reasoning of the District Court goes like this: (A) SOCE is harmful to minors, (B) Parents cannot seek harmful counsel from *licensed* mental health professionals, and (C) Parental rights are not infringed because they

can seek SOCE from *unlicensed* lay counselors. According to the District Court, parents will act in their children's best interest if they seek out unlicensed counselors to provide the counseling that the state (wrongly) determined to be harmful if provided by licensed professionals. Advocating that vulnerable minor clients and their parents be cut off from competent professional advice and left to decide on their own how to deal with unwanted same-sex attractions, behavior or identity including whether to "roll the dice" with an unlicensed practitioner, is precisely the kind of situation that this Court has said cannot be permitted. *Conant*, 309 F.3d at 644 (Kozinski, J., concurring).

D. SB 1172 Cannot Satisfy Even Rational Basis Analysis

Since the District Court erroneously concluded that SB 1172 does not implicate fundamental rights, it improperly applied only the rational basis test instead of the more stringent strict scrutiny required for laws that infringe upon constitutional rights. *See United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000). (ER 00043). Notwithstanding the state's abstract compelling interest in the well-being and protection of children, when the government seeks to restrict speech "'[i]t must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.'" *Video Software Dealers*, 556 F.3d at 962. (citation omitted). The District Court was obligated to "assure that, in formulating its judgments, [the

legislature] has drawn reasonable inferences based on substantial evidence." *Id.* Even "the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative." *Playboy*, 529 U.S. at 813. The District Court did not meet its burden here, as the Legislature's *own* sources demonstrate. The APA Task Force concluded that "there is a dearth of scientifically sound research on the safety of SOCE." (ER 00264). "[W]e cannot conclude how likely it is that harm will occur from SOCE." (ER 00264).

The absence of any credible proof of harm means not only that the District Court did not meet its burden under *Video Software*, but also that SB 1172 cannot satisfy the rational basis test, which requires that the legislation be "rationally related to a legitimate state interest." *Fields v. Palmdale School Dist.*, 427 F.3d 1197, 1208 (9th Cir. 2005), *aff'd,* 447 F. 3d 1187 (9th Cir. 2006) (per curiam), *cert. denied*, 549 U.S. 1089 (2006). Here, SB 1172's prohibition on SOCE counseling is not rationally related to the state's purported goal of protecting minors from an alleged "harmful" procedure since the state's evidence shows that there is no scientifically credible proof of harm arising from SOCE counseling. In fact, SB 1172 will actually increase harm to minors as it will send them away from licensed providers to unlicensed practitioners, a result the District Court acknowledged and viewed as acceptable. (ER 00034).

Plaintiffs established, at a minimum, that serious questions exist as to the constitutionality of SB 1172. Plaintiffs also established a substantial likelihood of success on the merits of its constitutional challenges. Either way, they satisfied the first prerequisite for obtaining a preliminary injunction. *Pimentel*, 670 F.3d at 1105-06.

II. THE DISTRICT COURT ERRED WHEN IT REFUSED TO "REACH" THE IRREPARABLE INJURY THAT SB 1172'S CENSORSHIP IMPOSES UPON PLAINTIFFS.

Plaintiffs' extensive evidence of irreparable injury that will occur if SB 1172 is implemented, Defendants' ineffective responses, and the District Court's rejection of injunctive relief mirror the decision that this Court reversed in *M.R. v. Dreyfus*, 697 F.3d 706, 726 (9th Cir. 2011). The District Court's error is even more egregious here than it was in *Dreyfus*, since the district court in *Dreyfus* actually addressed the issue of irreparable injury, albeit incorrectly, while the District Court here chose not even to "reach" the issue. (ER 00022). In *Dreyfus*, the plaintiffs provided the court with declarations and other evidence which showed that if certain regulations were implemented, they would face irreparable harm in the form of being unable to continue receiving in-home care. *Dreyfus*, 697 F.3d at 726-732. The defendants submitted declarations from state health care workers who were not familiar with the plaintiffs' personal circumstances but concluded that the regulation would not pose harm. *Id.* The district court found that the plaintiffs had

not shown a likelihood of irreparable harm. *Id.* In overturning that order, this Court said that the failure to address the individualized evidence of harm presented by the plaintiffs was error. *Id.*

In this case, Plaintiffs similarly provided detailed evidence of the adverse effect that SB 1172 will have on their therapeutic relationships and personal well-being (ER 00366-00428), and Defendants presented only generalized declarations from people unfamiliar with Plaintiffs' circumstances who merely tried to shore up Defendants' unsubstantiated argument that SOCE counseling causes harm. (ER 00181-00212). As was true in *Dreyfus,* the District Court here embraced the Defendants' argument and denied injunctive relief. (ER 00044). However, unlike the court in *Dreyfus,* the District Court did not consider Plaintiffs' evidence in the context of irreparable injury. (ER 00022). Instead, the District Court acknowledged that SB 1172 will disrupt Plaintiffs' ongoing therapeutic relationships, but said that the disruption was irrelevant to the court's analysis because it was not going to "reach" the issue of irreparable harm. (ER 00022 n.12).

This Court's precedents do not grant the District Court the discretion to simply ignore evidence of irreparable injury. Instead, under *Cottrell*, the strong showing of irreparable harm should have been balanced against the question of whether there was at least a serious question of constitutional infirmity, as well as

the issues of balances of harm and public interest, and an injunction should have issued. *Dreyfus*, 697 F.3d at 725.

As was true in *Conant*, the Counselor Plaintiffs here face destruction of their careers and loss of livelihoods by speaking candidly to their clients about the possibility that SOCE counseling might reduce or eliminate same-sex attractions, even when the client is begging for such help. *Conant*, 309 F.3d at 639-40 (Kozinski, J., concurring). Also, as was true in *Conant*, the Minor and Parent Plaintiffs will face the loss of professional counsel regarding their unwanted same-sex attractions, leaving them to fend for themselves when dealing with traumatic personal issues, including perhaps seeking help from unlicensed practitioners. *See id*. Actually, both Defendants and the District Court suggested that seeking help from unlicensed practitioners should be considered (ER 00034), even though that would violate the State's declaration that licensing laws are necessary to protect consumers from harm "that can result from the unlicensed, unqualified or incompetent practice of psychology."[5] *NAAP*, 228 F.3d at 1047.

Defendants and the District Court are also depriving minors of the rights given to them by the Legislature in 2009 when it passed what has been codified as Ca. Health & Safety Code § 124260(b): "a minor who is 12 years of age or older

[5] It would also violate the professional codes of conduct, further exacerbating the Catch-22 into which SB1172 places Plaintiffs. *See*, Dkt Nos. 3-5, p. 5; 3-8, pp. 7-8.

may consent to mental health treatment or counseling services if, in the opinion of the attending professional person, the minor is mature enough to participate . . . ." Minors such as John Doe 1 and John Doe 2 who are over the age of 12 have the right to consent to mental health counseling, and have exercised that right by consenting to SOCE counseling. (ER 00408-00409, 00415). They are now going to be deprived of that right because they want to reduce or eliminate same-sex attractions, behaviors or identity. The Legislature determined in 2009 that minors over the age of 12 can consent to mental health counseling (which included SOCE), but now SB 1172 bans minors and parents from receiving any counsel regarding SOCE *under any circumstances*. Minors who espouse the viewpoint that same-sex attractions, behaviors or identity are to be affirmed and accepted can exercise their right to consent to counseling, but if they seek counsel to reduce or eliminate these attractions, behaviors or identity, then they lose their right. Such a suppression of speech "unquestionably 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 Minors and their parents provided the District Court with substantial, individualized evidence that it is the discontinuation, not the continuation, of SOCE counseling, that will harm their health and well-being. (ER 000403, 00410, 00415). John, Jack and Jane Doe 1 testified that discontinuing the SOCE

counseling for John Doe 1 will harm his health and well-being in that he will regress in his progress toward his mental health goal and will suffer increased anxiety and conflict between his same-sex attractions and his religious beliefs. (ER 00415, 00410). Likewise, Jack and Jane Doe 2 testified that discontinuing SOCE counseling will harm their son, John Doe 2's health in that he would regress from his healthy habits such as increased physical activity and return to unhealthful habits, anxiety and relational issues. (ER 00410). These significant and irreparable harms were wholly ignored by the District Court, which claimed to be acting to protect the health and well-being of children.

The District Court should not only have "reached the issue" of irreparable injury, but should have balanced the extensive evidence of irreparable injury with the serious constitutional issues Plaintiffs raised and issued a preliminary injunction. *Dreyfus*, 697 F.3d at 725. The error of the District Court should be reversed.

III. THE IRREPARABLE INJURY IMPOSED UPON PLAINTFFS FAR OUTWEIGHS ANY HARDSHIP THAT MIGHT BEFALL DEFENDANTS.

Granting an injunction will preserve the status quo *ante* and protect the very rights that the Supreme Court has characterized as "lying at the foundation of free government of free men." *Schneider v. New Jersey*, 308 U.S. 147, 151 (1939). The loss of such fundamental freedoms outweighs any purported harm that Defendants

might argue could occur to them if SB 1172 is not implemented immediately. The Supreme Court has found that a state can suffer irreparable harm if a duly enacted statute is enjoined so that the state is prevented from exercising its duties to protect public health and safety. *Maryland v. King*, 133 S.Ct. 1, 3 (2012). However, that is not the case here. Defendants claim that SB 1172 is necessary to protect minors from "harmful" SOCE counseling, but failed to provide evidence to prove such harm. In fact, the sources upon which Defendants rely state that "there is a dearth of scientifically sound research on the safety of SOCE. … Thus, *we cannot conclude how likely it is that harm will occur from SOCE*." (ER 00264) (emphasis added). The APA Task Force found that "[r]esearch on SOCE (psychotherapy, mutual self-help groups, religious techniques) *has not answered basic questions of whether it is safe or effective and for whom*. ..." (ER 00312) (emphasis added). The only "evidence" of harm is anecdotal at best, and consists primarily of the opinions of organizations critical of SOCE counseling. (ER 00483). Without proof that SB 1172 will prevent harm, Defendants cannot establish that the state's interest will be adversely affected if an injunction issues.

By contrast, Plaintiffs have established that they will suffer harm in the form of substantial disruptions in ongoing beneficial, consensual counseling relationships if SB 1172 is permitted to go into effect. Counselors will have to face a Hobson's choice of violating professional codes of conduct or violating SB 1172,

violating ethical standards by discontinuing effective and consensual treatment and the loss of First Amendment rights as their expressive activities are silenced. (ER 00369-00370, 00373-00374, 00378-00379, 00385-00387, 00398-00399). The Minor Plaintiffs and Parent Plaintiffs will face the loss of beneficial, consensual therapeutic relationships, increased emotional distress and diminished relational effectiveness. (ER 00403-00404, 00409-00411, 00415-00416, 00420-00421, 00426-00428). When balanced against Defendants' unproven allegations that SOCE counseling might harm some children, it is apparent that Plaintiffs' detailed evidence of irreparable injury far outweighs any harm that could possibly arise if SB 1172 is enjoined.

The District Court failed to even engage in the balancing of harms and therefore wrongly concluded that Plaintiffs were not entitled to a preliminary injunction. This Court should overrule the District Court.

IV. ENJOINING SB 1172 IS IN THE PUBLIC INTEREST.

Enjoining SB 1172's unprecedented intrusion into Plaintiffs' ongoing, beneficial and consensual therapeutic relationships protects the public interest in maintaining the status quo *ante*. The District Court also failed to "reach" this question and therefore wrongly denied a preliminary injunction. The public interest inquiry primarily addresses the effect that a challenged law will have on non-parties rather than parties. *Sammartano v. First Judicial Dist. Court, in & for*

County of Carson City, 303 F.3d 959, 974 (9th Cir. 2002). Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles. *Id.* As was true in *Sammartano,* "the potential for impact on nonparties is plainly present here." *Id.*

If SB 1172 is not enjoined, then licensed "mental health providers" throughout the State of California will face suppression of their First Amendment rights in that they will be prohibited from expressing the viewpoint that same–sex attractions, behaviors or identity can be reduced or eliminated. The scope of the effect of SB 1172 is exemplified by its broad definition of "mental health providers" who are subject to the prohibition. (ER 00483). Absent an injunction, virtually every professional who has any connection with the mental health care field will be prohibited, under any circumstances, from espousing to minor clients the viewpoint that same-sex attractions, behaviors or identity can be reduced or eliminated. (ER 00483). This will affect tens of thousands of licensed professionals. Likewise, thousands of minors and their parents will face the disruption of ongoing, beneficial, consensual SOCE counseling if they adhere to the viewpoint confirmed by their sincerely held religious beliefs that same-sex attractions, behaviors or identity can be reduced or eliminated. Others will be deprived of the opportunity to even consent to such counseling despite having the statutory right to do so on every other subject matter, including sexual orientation

(but only if they seek affirmation). Minors and families in crisis will be left to fend for themselves when faced with unwanted same-sex attractions, behaviors or identity issues.

Issuing a preliminary injunction will serve the public interest by preserving the status quo *ante* until there can be a determination of the merits of Plaintiffs' claims. *King v. Saddleback Junior Coll. Dist.*, 425 F.2d 426, 427 (9th Cir. 1970). A preliminary injunction will prevent unwarranted intrusion into confidential and beneficial therapeutic relationships, which will continue uninterrupted while the courts determine whether SB 1172 can be fully implemented.

The District Court failed to even "reach" this issue. This Court should determine that the public interest will be served by an injunction, and direct that a preliminary injunction issue.

CONCLUSION

The District Court erred when it determined that Plaintiffs could not establish a likelihood of success on the merits and then failed to address the other criteria for a preliminary injunction.

For these reasons, Plaintiffs request that this Court reverse the District Court's order denying a preliminary injunction and order the District Court to grant Plaintiffs' motion.

Dated: January 2, 2013.

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STATEMENT OF RELATED CASE

Plaintiffs-Appellants state that there is a related case on file in this Court, to wit, *Pickup et. al. v. Brown et. al.*, Docket No. 12-17744, which arises out of the same District Court case and addresses the question of whether the district court erred in granting Equality California's Motion to Intervene.

CERTIFICATE OF SERVICE

I hereby certify that I have this 2nd day of January, 2013, I filed the foregoing 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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/s/ Mary E. McAlister
Attorney for Plaintiffs-Appellants

January 2, 2013.

STATUTORY ADDENDUM

West's Ann.Cal.Bus. & Prof.Code § 865

§ 865. Definitions

For the purposes of this article, the following terms shall have the following meanings:

(a) "Mental health provider" means a physician and surgeon specializing in the practice of psychiatry, a psychologist, a psychological assistant, intern, or trainee, a licensed marriage and family therapist, a registered marriage and family therapist, intern, or trainee, a licensed educational psychologist, a credentialed school psychologist, a licensed clinical social worker, an associate clinical social worker, a licensed professional clinical counselor, a registered clinical counselor, intern, or trainee, or any other person designated as a mental health professional under California law or regulation.

(b)(1) "Sexual orientation change efforts" means any practices by mental health providers that seek to change an individual's sexual orientation. This includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex.

(2) "Sexual orientation change efforts" does not include psychotherapies that: (A) provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and (B) do not seek to change sexual orientation.

Credits

(Added by Stats.2012, c. 835 (S.B.1172), § 2.)

West's Ann.Cal.Bus. & Prof.Code § 865.1

§ 865.1. Prohibited actions

Currentness

Under no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age.

Credits

(Added by Stats.2012, c. 835 (S.B.1172), § 2.)

West's Ann.Cal.Bus. & Prof.Code § 865.2

§ 865.2. Unprofessional conduct of mental health provider; disciplinary action

Currentness

Any sexual orientation change efforts attempted on a patient under 18 years of age by a mental health provider shall be considered unprofessional conduct and shall subject a mental health provider to discipline by the licensing entity for that mental health provider.

Credits

(Added by Stats.2012, c. 835 (S.B.1172), § 2.)

West's Ann.Cal.Health & Safety Code § 124260

§ 124260. Consent to mental health treatment or counseling services by minors age 12 or older determined to meet maturity requirements; involvement of parents or guardians; liability of parents or guardians for payment; consent of parents or guardians required for convulsive therapy, psychosurgery, or psychotropic drugs

Currentness

(a) As used in this section:

(1) "Mental health treatment or counseling services" means the provision of outpatient mental health treatment or counseling by a professional person, as defined in paragraph (2).

(2) "Professional person" means any of the following:

(A) A person designated as a mental health professional in Sections 622 to 626, inclusive, of Title 9 of the California Code of Regulations.

(B) A marriage and family therapist, as defined in Chapter 13 (commencing with Section 4980) of Division 2 of the Business and Professions Code.

(C) A licensed educational psychologist, as defined in Chapter 13.5 (commencing with Section 4989.10) of Division 2 of the Business and Professions Code.

(D) A credentialed school psychologist, as described in Section 49424 of the Education Code.

(E) A clinical psychologist, as defined in Section 1316.5 of the Health and Safety Code.

(F) A licensed clinical social worker, as defined in Chapter 14 (commencing with Section 4991) of Division 2 of the Business and Professions Code.

(G) A person registered as a marriage and family therapist intern, as defined in Chapter 13 (commencing with Section 4980) of Division 2 of the Business and Professions Code, while working under the supervision of a licensed professional specified in subdivision (g) of Section 4980.03 of the Business and Professions Code.

(H) A board certified, or board eligible, psychiatrist.

(I) A licensed professional clinical counselor, as defined in Chapter 16 (commencing with Section 4999.10) of Division 2 of the Business and Professions Code.

(J) A person registered as a clinical counselor intern, as defined in Chapter 16 (commencing with Section 4999.10) of Division 2 of the Business and Professions Code, while working under the supervision of a licensed professional specified in subdivision (h) of Section 4999.12 of the Business and Professions Code.

(b) Notwithstanding any provision of law to the contrary, a minor who is 12 years of age or older may consent to mental health treatment or counseling services if, in the opinion of the attending professional person, the minor is mature enough to participate intelligently in the mental health treatment or counseling services.

(c) Notwithstanding any provision of law to the contrary, the mental health treatment or counseling of a minor authorized by this section shall include involvement of the minor's parent or guardian, unless the professional person who is treating or counseling the minor, after consulting with the minor, determines that the involvement would be inappropriate. The professional person who is treating or counseling the minor shall state in the client record whether and when the person attempted to contact the minor's parent or guardian, and whether the attempt to contact was successful or unsuccessful, or the reason why, in the professional person's opinion, it would be inappropriate to contact the minor's parent or guardian.

(d) The minor's parent or guardian is not liable for payment for mental health treatment or counseling services provided pursuant to this section unless the parent or guardian participates in the mental health treatment or counseling, and then only for services rendered with the participation of the parent or guardian.

(e) This section does not authorize a minor to receive convulsive therapy or psychosurgery, as defined in subdivisions (f) and (g) of Section 5325 of the Welfare and Institutions Code, or psychotropic drugs without the consent of the minor's parent or guardian.

Credits

(Added by Stats.2010, c. 503 (S.B.543), § 1. Amended by Stats.2011, c. 381 (S.B.146), § 35.)

Constitution of the United States

Amendment I. Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.