13-15023

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD WELCH, et al.,

Plaintiffs-Appellees,

v.

EDMUND G. BROWN JR., Governor of the State of California, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the
Eastern District of California
No. CIV. 2:12-2484 WBS KJN
The Honorable William B. Shubb, Judge

APPELLANTS' OPENING BRIEF (PRELIMINARY INJUNCTION APPEAL – NINTH CIRCUIT RULE 3-3)

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INTRODUCTION

California Senate Bill (SB) 1172 prohibits state-licensed mental health providers from using a type of therapy known as "sexual orientation change efforts" with clients who are under 18 years old. The statute is based on a scientific and professional consensus reached decades ago that homosexuality is a normal expression of human sexuality and not a disease, condition, or disorder in need of a "cure." It is also based on the conclusions of every mainstream professional mental health organization that sexual orientation change efforts (SOCE) are both ineffective and harmful.

This is one of a pair of cases pending before this Court concerning the constitutionality of SB 1172. The cases appeal conflicting rulings from the Eastern District of California. In the other case, *Pickup v. Brown*, Case No. 12-17681, defendants urge affirmance of the order issued by the Honorable Kimberly J. Mueller, which *denied* a preliminary injunction on the grounds that there was no merit to the plaintiffs' First Amendment challenge. In this case, defendants appeal the order issued by the Honorable William B. Shubb *granting* a preliminary injunction on the grounds that the plaintiffs' First Amendment challenge was likely to succeed on the merits. The order granting a preliminary injunction should be reversed for legal error.

The Legislature enacted SB 1172 to protect the health and safety of California's children and teenagers. This prohibition of a discredited and unsafe practice is an ordinary exercise of the states' power to regulate professional conduct. Under established law, such regulation survives a constitutional challenge so long as it is reasonable and related to a legitimate government interest. Applying this standard, plaintiffs have no likelihood of success on the merits of their First Amendment free speech claims and the district court should have denied the plaintiffs' motion for a preliminary injunction.

Instead, the district court reasoned that because the law restricts a form of "talk therapy," it regulates speech protected by the First Amendment, is subject to strict scrutiny, and is unlikely to survive that exacting review. This analysis misapplied governing law. This Court and others uniformly have held that state regulation of professional conduct does not have to satisfy a more exacting standard just because professional services are provided by speaking, writing, or other use of language. At is core, the First Amendment protects against government regulation of speech that aims to suppress thoughts, ideas and the free exchange of truthful information. The First Amendment is not a shield for incompetent or harmful professional conduct and practices.

SB 1172 does not restrict expressive speech or otherwise protected communications between therapists and their patients; it only restricts therapists

from using SOCE treatment on minors. The law leaves mental health professionals free to share with a child or his parent, information, opinions, and advice about SOCE, about the morality of homosexuality, about religious proscriptions, and about the changeability of same-sex attractions. Licensed mental health professionals also remain free to refer children to pastoral or other counselors, whose practice lies outside California's licensing scheme, for SOCE therapy.

Because SB 1172 is a reasonable regulation of professional conduct and not a restriction of protected speech, the district court erred in holding that the plaintiffs were likely to succeed on the merits of their claims. The preliminary injunction should be reversed.

JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction of this case pursuant to 28 U.S.C. § 1331.

This appeal is from an order granting a preliminary injunction, and therefore this Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). The district court's order granting the preliminary injunction was entered on December 3, 2012. Excerpts of Record (ER) 38, 366. Defendants filed the notice of appeal on January 2, 2013. ER 39, 366. The appeal is thus timely under Rule 4(a)(1) of the Federal Rules of Appellate Procedure.

STATEMENT OF ISSUES

1. Did the district court err when it failed to analyze SB 1172 as a regulation of professional conduct that is subject to deferential, rational basis review and instead characterized SB 1172 as a restriction on speech subject to exacting, strict scrutiny, and based thereon, enjoined enforcement of SB 1172 as to plaintiffs?

STATEMENT OF THE CASE

SB 1172 prohibits licensed mental health professionals from treating children and teenagers with a discredited, ineffective, and unsafe therapy in a misguided effort to change their sexual orientation. For more than forty years, every mainstream mental health organization has agreed that same-sex attraction is not a disease in need of a cure. Nonetheless, the practice of SOCE persisted in the face of the evidence that SOCE does not work and may cause minors to suffer a range of harms, including suicidality, depression, and numerous other physical and psychological problems. Alarmed, the Legislature in 2012 made explicit that SOCE falls below the standard of care demanded of California's licensed mental health professionals by forbidding them to provide this therapy to minors.

Plaintiffs, two therapists who practice SOCE and a therapist-in-training who plans to practice SOCE, reject this scientific consensus and challenged SB 1172, claiming that they have a constitutional right to practice in a manner deemed

ineffective and unsafe by the State. Plaintiffs alleged that SB 1172 violates: (1) the right to freedom of speech, association, and religion under the First and Fourteenth Amendments; and (2) the right to privacy and substantive due process under the Fifth and Fourteenth Amendments.[1] ER 335-357.

On, October 29, 2012, plaintiffs moved the district court to preliminarily enjoin the enforcement of SB 1172. By Order dated December 3, 2012, the district court granted the motion for a preliminary injunction as to the three named plaintiffs in this action. ER 1-38.

The district court concluded that plaintiffs were likely to succeed on the merits of their claim under the Free Speech Clause of the First Amendment. ER 34. First, the district court reasoned that while many SOCE treatments do not involve speech (and can therefore be regulated or banned by the State without triggering heightened scrutiny under the First Amendment), other forms, such as talk therapy, do involve speech, which is entitled to the highest level of First Amendment

[1] Defendants in this action include Governor Edmund G. Brown Jr.,in his official capacity; Anna M. Caballero, in her official capacity as Secretary of the California State and Consumer Services Agency; Denise Brown, in her official capacity as Director of Consumer Affairs; Christine Wietlisbach, Patricia Dawson, Samara Ashley, Harry Douglas, Julia Johnson, Sarita Kohli, Renee Lonner, Karen Pines, and Christina Wong, in their official capacities as members of the California Board of Behavioral Sciences; and Sharon Levine, Michael Bishop, Silvia Diego, Dev Gnanadev, Reginald Low, Denise Pines, Janet Salomonson, Gerrie Schipske, David Serrano Sewell, and Barbara Yaroslavsky, in their official capacities as members of the California Medical Board.

protection. ER 16-17. The district court then posited that because SB 1172 regulates speech, or at least has an "incidental effect on speech," that strict scrutiny would apply, unless SB 1172 was determined to be content- and viewpoint-neutral. ER 14-19.

The district court then concluded that the law is likely both an impermissible content and viewpoint-based regulation of speech. ER 19-26. The court did note that SB 1172 does not preclude a mental health provider from talking with a minor patient about SOCE or about the changeability or morality of homosexuality, or from recommending or referring a minor to someone else who could legally provide SOCE therapy. ER 21. Nevertheless, the court decided that SB 1172 is a content-based regulation of speech because the Legislature "disagreed with the practice of SOCE," as evidenced by the Legislature's findings that SOCE is harmful and ineffective. ER 23-24. The court also ruled that SB 1172 discriminates on the basis of viewpoint because "messages about homosexuality can be inextricably linked with SOCE," and SB 1172 therefore "bans a mental health provider from expressing his or her viewpoints about homosexuality as part of SOCE treatment." ER 26.

Consequently, the district court concluded that "it is likely that SB 1172 must ultimately be assessed under strict scrutiny." ER 26. Applying strict scrutiny, the court found that the State has a compelling interest in regulating to protect the

physical and psychological well-being of minors and also to protect all of society from harmful, risky, or unproven mental health treatments. ER 29. Yet, the court reasoned that the evidence that SOCE causes harm to minors was "unlikely" to satisfy strict scrutiny. ER 30-33. The court therefore concluded that plaintiffs were likely to succeed on the merits of their free speech claims. ER 2.[2]

The district court further found that two of the plaintiffs, Welch and Duk, had established irreparable injury. The court held that SB 1172 would "likely infringe their First Amendment rights because it will restrict them from engaging in SOCE with their minor patients." ER 34-35. The court opined that any harm to plaintiff Bitzer "is more remote and less significant" because he is not currently a mental health provider and could still engage in SOCE with the various religious groups of which he is a part. ER 35. With respect to the balance of equities and the public interest, the district court acknowledged that any time the State is enjoined from enforcing a duly enacted statute, irreparable injury is presumed and stated that it "does not take lightly the possible harm SOCE may cause minors, especially when forced on minors who did not choose to undergo SOCE." ER 35, 37. However, the court concluded that these harms were outweighed by the interest in preserving the three plaintiffs' right to freedom of speech. ER 35-36. The court granted

[2] The district court did not reach plaintiffs' remaining claims that SB 1172 violates the right to privacy, violates the Free Exercise and Establishment Clauses, and is unconstitutionally vague and overbroad. ER 2.

plaintiffs' motion, enjoining the state defendants from enforcing SB 1172 against the three plaintiffs. ER 37-38.

Defendants timely filed a notice of appeal from the district court's order on January 2, 2013. ER 39, 366.

STATEMENT OF FACTS

I. SEXUAL ORIENTATION CHANGE EFFORTS HAVE BEEN WIDELY DISCREDITED

SOCE, also commonly referred to as reparative or conversion therapy, encompasses a variety of mental health treatments, including techniques derived from psychoanalysis, behavioral therapy, and religious and spiritual counseling. "These techniques share the common goal of changing an individual's sexual orientation from homosexual to heterosexual." ER 378. Historically, SOCE included practices such as castration, lobotomy, hormone treatments, aversive conditioning with nausea-inducing drugs, and electroshock. ER 379. These therapies take as their premise the (then accepted) view that homosexuality is a mental illness or disorder. ER 380. That understanding of homosexuality, however, was abandoned more than forty years ago. [3]

[3] Homosexuality was listed as a mental disorder in the first edition of what came to be called the Diagnostic and Statistical Manual of Mental Disorders ("the DSM"), published in 1952, but was removed from the DSM in 1973. ER 372-73. Two years later, in 1975, the American Psychological Association (APA) affirmed that homosexuality is not a mental illness and urged its membership to work

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In light of the longstanding and widespread consensus among mental health professionals that homosexuality is not a disorder, but a normal variant of human sexuality, "most practitioners [have] stopped attempting to change sexual orientation and some [have taken] strong public stands against such efforts." ER 178.

Some practitioners, however, reject that scientific and professional consensus and continue to practice SOCE on their patients, including children. ER 183. These therapists utilize a variety of practices that can generally be categorized as either "aversion" or "nonaversion" treatments. Aversion therapies include inducing nausea, vomiting, or paralysis; providing electric shocks; or having the individual snap an elastic band around the wrist upon arousal by same-sex erotic images or thoughts. Nonaversive SOCE treatments focus on "chang[ing] gay men's and lesbians' thought patterns by reframing desires, redirecting thoughts, or using hypnosis, with the goal of changing sexual arousal, behavior, and orientation." ER 180. Such efforts often are accomplished by an accompanying "educational process of dating skills, assertiveness, and affection training with physical and social reinforcement to increase other-sex sexual behaviors." ER 180. SOCE practitioners may use some or all of these techniques.

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towards dispelling the stigma of mental illness associated with homosexuality. ER 373.

II. SB 1172 IS PART OF A COMPREHENSIVE SCHEME REGULATING THE MENTAL HEALTH PROFESSIONS TO PROTECT PUBLIC HEALTH AND SAFETY

SB 1172 amends a comprehensive regulatory scheme that governs the professional conduct of state-licensed psychologists and other licensed mental health providers, including psychiatrists, clinical social workers, marriage and family therapists, and educational psychologists. California has long regulated the mental health professions based on legislative recognition of the "'actual and potential consumer harm that can result from the unlicensed or incompetent practice.'" *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1047 (9th Cir. 2000) ("*NAAP*") (quoting California Bd. of Psychology, *Sunset Review Report* at 1 (October 1, 1997)). State licensure and regulation of mental health professionals rests on a legislative determination that their practice "in California affects the public health, safety, and welfare." *Id.* (citing Cal. Bus. & Prof. Code § 2900). The Legislature has declared that "[p]rotection of the public shall be the highest priority" for the governing Boards "in exercising [their] licensing, regulatory, and disciplinary functions." Cal. Bus. & Prof. Code §§ 2001.1; 2920.1; 4990.16.

To protect the public, the Legislature prescribes minimum educational and training requirements for licensure, *id.* §§ 25, 2903, 2914, 2941-2948, 2915.5; continuing education requirements, *id.* §§ 2914.1, 2914.2, 2915-2915.7; and

detailed rules and procedures governing denial, revocation, and suspension of licenses, *id*. §§ 2960-2960.1, 2960.5, 2960.5, 2961-2965; *see also NAAP*, 228 F.3d at 1047. The Legislature also prescribes professional standards for licensed mental health providers. *See, e.g.*, Cal. Bus. & Prof. Code § 2936.

The Legislature has also explicitly banned certain practices that, in its judgment, constitute unprofessional or criminal conduct. These banned practices include sexual abuse, misconduct or relations with a client; failure to discuss with a client in a manner provided by law the client's admission of sexual contact with a previous therapist; and sexual exploitation of a client. *See* Cal. Bus. & Prof. Code §§ 726, 728, 729. Similarly, SB 1172 makes it unprofessional conduct *per se* for a mental health provider to engage in SOCE with a patient who is under 18. *Id.* § 865.2.

III. SB 1172 PROHIBITS LICENSED MENTAL HEALTH PROFESSIONALS FROM PROVIDING A WIDELY DISCREDITED THERAPY TO MINORS

A. The Legislature Enacted SB 1172 Based on the Professional Consensus That SOCE Has No Scientific Basis, Is Ineffective, and Is Potentially Harmful.

The Legislature included in SB 1172 a list of findings that explain the reasons for its adoption. In short, the mental health professions agree that: (1) SOCE has been obsolete since the 1970s, when the profession concluded that same-sex attractions are a normal variant of human sexuality, not a disorder in need of treatment; (2) no one has produced any reliable evidence that it is possible to

change a person's sexual orientation; (3) there is evidence that SOCE causes psychological harm to patients because it reinforces feelings of societal rejection; and (4) some practitioners persist in treating children with SOCE despite wide-spread professional condemnation. Cal. Stats. 2012, ch. 835, § 1(a)-(m).

1. SOCE has been obsolete for more than forty years.

The Legislature found that "[b]eing lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming. The major professional associations of mental health practitioners and researchers in the United States have recognized this fact for nearly 40 years." *Id.* § 1(a).

2. Despite decades of practice, there is no reliable evidence that SOCE can reduce or eliminate same-sex attractions, or produce opposite-sex attractions.

The Legislature further determined, based on extensive research and study by the American Psychological Association, the American Psychiatric Association, and eight other respected professional psychological and counseling associations, that there is little or no empirical evidence that SOCE works. Cal. Stats. 2012, ch. 835, § 1(a)-(m).

The Legislature relied on the report of a task force convened by the American Psychological Association (APA), which concluded that there is little evidence that SOCE is an effective therapy, that is, that it can succeed in changing anyone's sexual orientation.

The APA task force conducted a "systematic review of peer-reviewed journal literature on SOCE." *Id.* § 1(b). It reviewed studies of SOCE aimed at: (1) decreasing interest in, sexual attraction to, and sexual behavior with same-sex partners; (2) increasing interest in, sexual attraction to, and sexual behavior with other-sex sexual partners; (3) increasing healthy relationships and marriages with other-sex partners; and (4) improving quality of life and mental health. Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation (2009) ("APA Task Force Report") ER 143-280. Overall, the APA task force determined that "the peer-refereed empirical research provides little evidence of efficacy . . . ." ER 185.

The only rigorous studies of SOCE -- those evaluating aversion techniques such as electric shock -- show that "enduring change to an individual's sexual orientation is uncommon"; that a "very small minority of people in these studies showed any credible evidence of reduced same-sex sexual attraction"; and there is a dearth of "strong evidence that any changes produced in laboratory conditions translated to daily life." ER 193; *see also* ER 379-386; 425, 428, 432.

More recent studies examined by the APA task force, including studies about the benefits of so-called reparative therapy, "have investigated whether people who have participated in efforts to change their sexual orientation report decreased same-sex sexual attractions . . . or how people evaluate their overall experiences of

SOCE." ER 187 (citations omitted). The APA found these studies used designs that do not permit cause-and-effect attributions to be made, and were incapable of addressing either the efficacy of SOCE or its promise as an intervention. ER 187, 189-191.

These findings – that there is no reliable scientific evidence that SOCE can change sexual orientation – are consistent with the assessments of every other mainstream association of mental health providers in the country. These include the American Psychiatric Association, which has determined that "'reparative' therapists have not produced any rigorous scientific research to substantiate their claims of cure." Cal. Stats. 2012, ch. 835§ 1(d). It also includes the National Association of Social Workers, which found that "[n]o data demonstrates that reparative or conversion therapies are effective."*Id*. § 1(h). *See also* ER 379-383, 385-386; 423-425, 432.

3. There is significant evidence that SOCE is harmful, and harmful to children who are already at risk.

In addition to the absence of any reliable evidence of efficacy, the Legislature noted that SOCE is particularly harmful to children who are already at high risk of suicide and other serious health problems. *Id.* § 1(m) (citing Caitlin Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 Pediatrics 346 (2009)). The evidence is that SOCE poses potentially severe risks of harm, including but not

limited to depression; anxiety; problems in sexual and emotional intimacy; loss of faith; self-destructive behavior; alienation from family; and suicidality. *Id.* § 1(b)-(m).

The APA task force concluded that "attempts to change sexual orientation may cause or exacerbate distress and poor mental health in some individuals, including depression and suicidal thoughts. The lack of rigorous research on the safety of SOCE represents a serious concern, as do studies that report perceptions of harm." ER 192.

The APA's serious concern about the risk that SOCE causes harm reflects a widespread consensus in the mental health field. The American Psychiatric Association agrees that "the potential risks of reparative therapy are great." Cal. Stats. 2012, ch. 835, § 1(d). The American Psychoanalytic Association concurs that "purposeful attempts to 'convert,' 'repair,' 'change,' or shift an individual's sexual orientation . . . often result in substantial psychological pain by reinforcing damaging internalized attitudes." *Id.* § 1(j).

The American Academy of Child and Adolescent Psychiatry, which has a particular expertise and influence in evaluating mental health treatments for children, agreed and firmly discouraged practitioners against using SOCE. The Academy has stated that efforts by a therapist to change a minor's sexual orientation "may encourage family rejection and undermine self-esteem,

connectedness and caring, important protective factors against suicidal ideation and attempts. Given that there is no evidence that efforts to alter sexual orientation are effective, beneficial or necessary, and the possibility that they carry the risk of significant harm, such interventions are contraindicated." *Id.* § 1(k).

4. Mainstream professional organizations widely condemn SOCE, especially for children.

The Legislature also recognized that the mental health profession has condemned the practice of SOCE treatment, especially for children.

As set forth above, the American Academy of Child and Adolescent Psychiatry specifically found that SOCE treatment for children is contraindicated.

The APA agrees that children and their families should avoid SOCE. It advises "parents, guardians, young people, and their families to avoid sexual orientation change efforts that portray homosexuality as a mental illness or developmental disorder." *Id.* § 1(c).

The American Psychiatric Association goes further, recommending that "ethical practitioners refrain from attempts to change individuals' sexual orientation." *Id.* § 1(d).

The American Psychoanalytic Association has declared that SOCE goes "against fundamental principles of psychoanalytic treatment." *Id.* § 1(j). In addition, the American School Counselor Association, American Academy of Pediatrics, American Medical Association Council on Scientific Affairs, National

Association of Social Workers, American Counseling Association Governing Council, American Psychoanalytic Association and Pan American Health Organization of the World Health Organization all have issued statements opposing SOCE. *See id.* §§ 1(c)-(l) (citing statements).[4]

In light of this broad professional consensus against the use of SOCE, the Legislature declared that "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.* § 1(n).

B. The Statute.

SB 1172 defines SOCE and prohibits any licensed mental health provider from engaging in SOCE with patients under 18 years of age. Cal. Bus. & Prof. Code §§ 865.1, 865(a).[5] In addition, the law makes explicit that failure to observe

[4] *See generally* Human Rights Campaign, The Lies and Dangers of Reparative Therapy (providing link to statements by major medical and mental health organizations on SOCE) *available at* http://www.hrc.org/resources/entry/the-lies-and-dangers-of-reparative-therapy (last accessed January 25, 2013).

[5] The term "mental health provider" is defined to include 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, trainee, or any other person designated as a

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the restriction on SOCE will result in professional discipline: "[a]ny 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." *Id*. § 865.2.

SB 1172 defines SOCE as "[a]ny 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." *Id.* § 865(b)(1). SOCE 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." *Id*. § 856(b)(2)).

Because they are exempt from the entire regulatory scheme that governs state-licensed mental health professionals, SB 1172 does not apply to duly ordained members of the clergy, or pastoral or other religious counselors who do not hold

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mental health professional under California law or regulation." Cal. Bus. & Prof. Code § 865(a).

themselves out as licensed mental health professionals. *See* Cal. Bus. & Prof. Code §§ 2063, 2908, 4980.01(b), 4996.13.

SUMMARY OF ARGUMENT

SB 1172 prevents state-licensed mental health providers from administering SOCE, a discredited, inefficacious, and potentially harmful therapy, to children. SB 1172 is an ordinary exercise of the state's police power to protect the public health and safety by regulating professional conduct. As such, to survive a constitutional challenge, the State need only demonstrate that the regulation is a rational exercise of that police power. Given the State's unquestionable interest in protecting the physical and psychological well-being of minors and the evidence that SOCE lacks any scientific basis, cannot change anyone's sexual orientation, is unsafe, and is uniformly rejected by mainstream professional organizations, SB 1172 is constitutional.

The district court, however, did not apply the correct analytical framework. Instead, it misconstrued governing law and assumed that simply because some forms of SOCE involve talking, that this transformed SB 1172 from a regulation of professional conduct to be evaluated under a deferential standard into a restriction on speech protected by the First Amendment and subject to strict scrutiny. In so doing, the district court failed to recognize that all not all regulations that in any way relate to, or affect speech implicate the First Amendment. In particular, the

district court missed the critical distinction between a regulation of professional practice conducted through speech and an impermissible restriction on expressive or otherwise protected speech.

Apart from prohibiting SOCE treatment for minors, SB 1172 does not regulate the speech of licensed mental health professionals in any way. Thus, unlike in the cases relied upon by the district court, SB 1172 does not restrict protected speech. SB 1172 does not ban or compel the communication of particular messages or ideas, nor does it unreasonably interfere with the therapist-patient relationship, or arbitrarily restrict the exercise of professional judgment. SB 1172 enforces professional standards of competence to prevent minors from being harmed by a discredited and unsafe practice.

Contrary to the district court's understanding, the mere fact that a professional practice involves the use of language does not immunize it from the State's near plenary power to regulate for the public health and safety. Rather, courts recognize that regulating professional practice often involves an effect on speech and that such regulations generally do not raise First Amendment concerns so long as they are reasonable. This Court has held specifically that "talk therapy" is not speech entitled to special First Amendment protection, but treatment, and that regulations of licensed mental health professionals, even those engaged in the "talking cure,"

are subject only to rational basis review. Under this standard, SB 1172 is constitutional.

Accordingly, plaintiffs have no likelihood of success on the merits of their First Amendment free speech claims and the district court should have denied the plaintiffs' motion for a preliminary injunction. The order of the district court should thus be reversed.

ARGUMENT

I. STANDARD OF REVIEW

The district court's order granting the preliminary injunction is found at ER 1-38. An order granting a preliminary injunction is generally reviewed for abuse of discretion. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). However, the district court "should be reversed if [it] based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009) (citation and quotation marks omitted); *see also Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010) ("[A]n error of law *is* an abuse of discretion"). The court's conclusions of law are reviewed de novo and its findings of fact for clear error. *Alliance for the Wild Rockies*, 632 F.3d at 1131. "The inquiry into the protected status of speech is one of law, not fact." *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983). Thus, where, as here, the appeal turns on a pure question of law, this Court

undertakes "plenary" review of the case without any deference to the district court's decision. *Gorbach v. Reno*, 219 F.3d 1087, 1091 (9th Cir. 2000) (en banc) (citation and quotation marks omitted).

II. THE DISTRICT COURT ERRED IN FINDING THAT PLAINTIFFS ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS

The district court's First Amendment analysis ignores the distinction between state regulation of professional conduct (here, delivery of an ineffective and harmful type of "talk therapy") and state regulation of expressive or otherwise protected speech. This distinction is critical to preserve the state's authority to regulate any profession that provides services by means of speech, writing, or language. Without it, mundane regulations we currently take for granted, including rules of evidence for lawyers, restrictions on writing prescriptions for doctors, and malpractice judgments – all of which may impose restrictions on the use of speech – would have to survive strict scrutiny. But this is not the law.

The district court's apparent view that speech by a member of a regulated profession, regardless of type or context, is entitled to the highest level of First Amendment protection contradicts Supreme Court and Ninth Circuit authority. The court further erred by finding that the State's prohibition of a treatment was content- or viewpoint-based discrimination within the meaning of the First Amendment. Properly analyzed, SB 1172 is a regulation of professional conduct

that is rationally related to the State's interest in protecting the physical and psychological well being of minors.

A. California Has Near Plenary Power to Regulate the Conduct of Licensed Professionals, and Such Laws Are Subject to Deferential, Rational Basis Review.

1. The State's authority to regulate the professions is both broad and well-established.

SB 1172, which narrowly proscribes state-licensed therapists from engaging in unsafe and discredited practices when providing therapy to minors, is a valid exercise of the State's broad power to protect the public health and safety. "The States have a compelling interest in the practice of professions within their boundaries, and … as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Va. State Bank*, 421 U.S. 773, 792 (1975); *see also Washington v. Glucksberg*, 521 U.S. 702, 731 (1997) (states may act to safeguard "the integrity and ethics of the medical profession" and to protect "vulnerable groups . . . from abuse, neglect, and mistakes" at the hands of medical practitioners); *Dent v. West Virginia*, 129 U.S. 114, 122 (1889) ("The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud").

Given the breadth of the State's police power over the professions and the strength of its interest in protecting the public health and safety, courts review regulation of professional conduct under a deferential standard. *See, e.g.*, *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 491 (1955). It is thus well settled that a state can regulate or prohibit a professional practice, such as SOCE, so long as it has a rational basis for doing so. *NAAP*, 228 F.3d at 1050. For example, the Supreme Court applied a rational basis test in rejecting a challenge to a law prohibiting physician-assisted suicide, *Vacco v. Quill*, 521 U.S. 793, 806-09 (1997); and in upholding a law requiring physicians to report the identity of persons receiving certain prescription drugs, *Whalen v. Roe*, 429 U.S. 589, 597-98, 600-03 (1977). This Court and others have similarly upheld, on rational basis review, government regulation of health care treatments and practices. *See*, *e.g.*, *Carnohan v. United States*, 616 F.2d 1120, 1122 (9th Cir. 1980) (upholding ban on laetrile where plaintiff "has failed to show that government regulation of laetrile traffic bears no reasonable relation to the legitimate state purpose of protecting public health"); *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 713-14 (D.C. 2007) (collecting cases); *People v. Privatera*, 23 Cal.3d 697, 708-09 (1979) (upholding ban on laetrile: "It is not our function to render scientific or legislative judgments. Rather, we must resolve a narrow question: Does the challenged legislation bear a reasonable relationship to

the achievement of the legitimate state interest in the health and safety of its citizens?").[6]

2. The State's power to regulate professional conduct is not subject to more exacting scrutiny merely because professional services are rendered by means of speaking, writing, or other use of language.

The State's power to protect the public health and safety and proscribe harmful practices is in no way diminished where professional conduct takes place through speaking. "Limitations on professional conduct necessarily affect the use of language and association; accordingly, reasonable restraints on the practice of medicine and professional actions cannot be defeated by pointing to the fact that communication is involved." *Daly v. Sprague*, 742 F.2d 896, 899 (5th Cir. 1984). This Court has stated unequivocally that "[i]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *NAAP*, 228 F.3d at 1053 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

[6] In light of State's broad police power to protect the public health and safety, federal courts generally will not invalidate state regulations of medical practice unless they clearly infringe upon a protected constitutional right. *See*, *e.g.*, *England v. State Bd. of Medical Examiners*, 263 F.2d 661, 673 & n.2 (5th Cir. 1959) (collecting cases) ("[T]he Supreme Court has never changed its policy of reviewing with reluctance and self-restraint state regulations in the medical field"). No protected constitutional right is implicated by SB 1172.

Thus, government regulation of professional practice, including that of the "speaking professions" need only be reasonable. *See, e.g.*, *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 603-05 (4th Cir. 1988) ("Professional regulation is not invalid, nor is it subject to first amendment strict scrutiny, merely because it restricts some kinds of speech"); *see generally* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. Pa. L. Rev. 771, 834-850 (1999).

Most legal practice, for example, involves speech in the broadest sense, but state bar regulations are permissible so long as they "have a rational connection with the applicant's fitness or capacity to practice [the profession]." *Schware v. Bd. of Bar Examiners*, 353 U.S. 232, 239 (1957). States regulate lawyers in a number of ways that restrict speech, including rules of evidence and procedure, bans on revealing grand jury testimony, prohibitions on counseling a client to commit perjury, restrictions on in person solicitation, and sanctions for frivolous pleadings. When a lawyer counsels her client to violate the law – including a law she believes to be unconstitutional or grossly unfair – she may be subject to professional discipline, notwithstanding that her advice was based on her personal views. *See generally* Kathleen Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 Fordham L. Rev. 569, 569 (1998) ("Lawyers' freedom of speech is constrained in many

ways that no one would challenge seriously under the First Amendment"); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 459 (1978) (holding that an attorney's in-person solicitation of clients is "entitled to some constitutional protection," but "is subject to regulation in furtherance of important state interests" and "special responsibility for maintaining standards among members of licensed professions);[7] *Giannini* v. *Real*, 911 F.2d 354, 358 (9th Cir. 1990).

Similarly, where speech is "part of the practice of medicine," it is "subject to reasonable licensing and regulation by the State." *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion); *see also Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (recognizing the state's "significant role . . . in regulating the medical profession"); *Shea v. Bd. of Med. Exam'r*, 81 Cal. App. 3d 564, 577 (1978) (the First Amendment "does not insulate the verbal charlatan from responsibility for his conduct; nor does it impede the State in the proper exercise of its regulatory functions").

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[7] In *Ohralik*, the Supreme Court cited numerous examples of "communications that are regulated without offending the First Amendment," including the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees. "Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 456 (internal citations omitted).

Indeed, "without so much as a nod to the First Amendment, doctors are routinely held liable for malpractice for speaking or for failing to speak. Doctors commit malpractice for failing to inform patients in a timely way of an accurate diagnosis, for failing to give patients proper instructions, for failing to ask patients necessary questions, or for failing to refer a patient to an appropriate specialist. In all these contexts, the regulation of professional speech is theoretically and practically inseparable from the regulation of medicine." Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L. Rev. 939, 949 (2007). As one court cogently explained, a recommendation by a medical practitioner "is a form of expression, since it can be conveyed only orally or in writing, but the First Amendment has never been thought to bar an action for medical malpractice based on such written or spoken expression in a medical context." *In re Factor VIII or IX Concentrate Blood Products Litigation*, 25 F. Supp. 2d 837, 845 (N.D. Ill. 1998).

In keeping with these authorities, the Ninth Circuit has long held that the same reasonableness standard applies to regulations of licensed mental health professionals, even those engaged in the "talking cure." As this Court held in *NAAP*, 228 F.3d at 1054, "[t]hat psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection." *See also Coggeshall v. Mass. Bd. of Registration of Psychologists*, 604 F.3d 658,

667 (1st Cir. 2010) ("Simply because speech occurs does not exempt those who practice [psychology] from state regulation (including the imposition of disciplinary sanctions).") (citing *NAAP*, 228 F.3d at 1053-55). Thus, many valid regulations of mental health professionals restrict speech. *See, e.g.*, Cal. Bus. & Prof. Code § 2960(h) (unprofessional conduct for psychologist to disclose confidential information received from a patient); § 4982(w), (x) (unprofessional conduct for marriage and family therapist to fail to comply with child, elder, and dependent adult abuse reporting requirements); § 651(b)(7) (unlawful for licensed mental health professional to "[m]ake[] a scientific claim that cannot be substantiated by reliable, peer reviewed, published scientific studies"); § 4999.90(s) (unprofessional conduct for licensed clinical counselor to hold oneself out as being able to perform professional services beyond the scope of one's competence); *see also Ewing v. Goldstein*, 120 Cal.App.4th 807, 820 (2004) (therapist has a duty to warn a potential victim if information communicated to the therapist leads the therapist to believe his or her patient poses a serious risk of grave bodily injury to another).[8]

Like the laws discussed above, SB 1172 sets the applicable standard of practice in California, and declares that violating that standard will subject a

[8] All of these regulations would be subject to strict scrutiny, rather than rational basis review, if the district court's analysis in this matter were adopted.

licensee to discipline. Cal. Bus. & Prof. Code §§ 865.1, 865(a). SB 1172 restricts "any *practices* that seek to change an individual's sexual orientation." *Id.* § 856(b)(1)) (emphasis added). As such, it falls squarely within the State's near plenary power to regulate professional conduct to protect the public health and safety and is subject only to rational basis review. *See NAAP*, 228 F.3d at 1050-54. As the district court held in *Pickup v. Brown*, because "SOCE therapy is subject to the state's legitimate control over the professions, SB 1172's restrictions on therapy do not implicate fundamental rights and are not properly evaluated under strict scrutiny review, but rather under the rational basis test." No. 12-02497, 2012 WL 6021465 at *12 (E.D. Cal. Dec. 4, 2012).

B. SB 1172 Satisfies Rational Basis Review Because the State Has a Strong Interest in Protecting the Physical and Psychological Health of Minors, and Prohibition of Practices Discredited and Renounced by Every Mainstream Organization of Mental Health Professionals Is Rationally Related to That Interest.

California's prohibition on treating children with SOCE is rationally related to its important interest in protecting the health and well-being of minors. Legislation subject to challenge survives rational basis review as long as the legislature is acting in pursuit of a permissible government interest that bears a rational relationship to the means chosen to achieve that interest. *Heller v. Doe*, 509 U.S. 312, 319 (1993). This review is deferential; courts do not sit in review of the wisdom of legislative policy judgments. Indeed, duly enacted laws are

presumed to be constitutional. *NAAP*, 228 F.3d at 1050. "We do not require that the government's action actually advance its stated purposes, but merely look to see whether the government could have had a legitimate reason for acting as it did." *NAAP*, 228 F.3d at 1050 (quoting *Dittman v. California*, 191 F.3d 1020, 1031 (9th Cir. 2005)). Put another way, a legislative determination that a particular law or regulation is necessary will not be overturned provided it has a conceivable rational basis. *Id*. Measured against this deferential standard, SB 1172 is constitutional.

As the district court found, the State of California has a legitimate, indeed compelling, interest in protecting the physical and psychological well-being of minors. ER 29 (citing *Nunez by Nunez v. City of San Diego*, 114 F.3d at 946); *see also Sable Comm's of Cal. v. FCC*, 492 U.S. 115, 126 (1989). The State also has an interest in protecting all of society from harmful, risky, or unproven mental health treatments. *NAAP*, 228 F.3d at 1052, 1055 (California's interest in regulating mental health is compelling); *Watson v. Maryland*, 218 U.S. 173, 176 (1910) ("It is too well settled to require discussion at this day that the police power of the States extends to the regulation of certain trades and callings, particularly those which closely concern the public health").

The Legislature reasonably determined that SB 1172 would promote the State's interest in protecting the health and safety of California's children.

SB 1172 recounts the findings, recommended practices, and opinions of every major psychological association in the country that: (1) SOCE is obsolete because homosexuality is not a disease or condition that warrants treatment; (2) there is no reliable evidence that SOCE can reduce or eliminate same-sex attraction; and (3) there is evidence that SOCE is harmful and that minors are particularly vulnerable. Cal. Stats. 2012, ch. 835, §§ 1(a)-(m); *see also Perry v. Schwarzenegger*, 704 F.Supp. 2d 921, 966 (N.D. Cal. 2010) ("No credible evidence supports a finding that an individual may, through conscious decision, therapeutic intervention or any other method, change his or her sexual orientation."); ER 379-386; 423, 425, 430-432; *Pickup*, 2012 WL 6021465 at *25 (holding that SB 1172 is a "valid legislative enactment" that is rationally related to legitimate state interest in protecting the physical and psychological well being of minors "because it prohibits a therapeutic practice deemed unproven and potentially harmful to minors by ten professional associations of mental health experts").

Under the proper governing standard, SB 1172 is thus constitutional.

C. The District Court Failed To Apply the Correct Legal Framework and Misapplied Ninth Circuit Law.

The district court, however, did not apply settled law regarding regulation of professional conduct. It held instead that rational basis review does not apply when "a law imposes restrictions on a professional's speech." ER 11. Although it noted that many forms of SOCE, such as electric shock treatment, emetics,

"affection training," visualization, and sedative drugs, do not involve speech at all, ER 15-16, the district court reasoned that because "some forms of SOCE, such as 'talk therapy,' employ speech," this "communication" must receive a high level of protection under the First Amendment. ER 17.

The district court's error was in failing to distinguish between government regulation of speech, and government regulation of professional conduct that is carried out through speech. In so doing, the district court relied heavily on *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), in which this Court invalidated a federal gag order on physician-patient communications regarding the potential benefits of medical marijuana. *Conant*, while instructive, is inapposite: it addressed a direct restriction of protected speech by a professional, not professional conduct. Rather, it is this Court's decision in *NAAP*, 228 F.3d 1043, that provides the legal framework for assessing the validity of SB 1172.

1. *NAAP* provides the governing standard to review regulation of professional conduct.

In *NAAP*, a group of psychoanalysts challenged California's licensing scheme for psychologists. The regulations required anyone who practices psychoanalysis for a fee to be a licensed psychologist. The psychoanalysts objected that these requirements violated their due process and free speech rights. Plaintiffs argued that "because psychoanalysis is the 'talking cure,' it deserves special First Amendment protection because it is 'pure speech.'" 228 F.3d at 1054.

This Court rejected the argument, also made here, that regulation of "talk therapy" is subject to strict scrutiny, rather than rational basis review. It held that "the key component of psychoanalysis is the *treatment* of emotional suffering and depression, *not speech*. . . . That psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection." *Id.* (emphasis added, citations and quotation marks omitted).

This Court stated that "[t]he communication that occurs during psychoanalysis is entitled to constitutional protection, but it is not immune from regulation." Rather, states retain the prerogative to control professional conduct in the realm of the health professions. *Id.* It then cited a number of examples of communications that are regulated "in furtherance of important state interests" and thus "without offending the First Amendment." *Id.* (citations and quotation marks omitted). Next it stated that "[i]t is properly within the state's police power to regulate and license professions, especially when public health concerns are affected." *Id.* (citing *Watson v. Maryland*, 218 U.S. at 176). Finally, applying a deferential standard of review, this Court held that California's psychologist licensing scheme "is a valid exercise of its police power to protect the health and safety of its citizens and does not offend the First Amendment." *Id.* at 1056.

NAAP thus forecloses the distinction implicit in the district court's order, between regulation of forms of SOCE that involve cognitive or behavioral

methods, such as the use of emetics or electric shock, and regulation of SOCE talk therapy. *See id.* at 1053-54. Both are subject to ordinary rational basis review because they are both "treatments" that seek to "cure" homosexuality and change a patient's sexual orientation. *See* ER 171-92; *NAAP*, 228 F.3d at 1052 ("Regulating psychology and through it psychoanalysis, is rational because it is within the state's police power to regulate mental health treatment."); *see also id.* at 1051-54; *Pickup*, 2012 WL 6021465 (holding that SB 1172 is a neutral regulation of professional conduct that is rationally related to the State's interest in protecting the physical and psychological well being of minors).[9]

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[9] Justice White's concurring opinion in *Lowe v. SEC*, 472 U.S. 181 (1985), upon which the district court relies, supports this conclusion. As the court noted, Justice White wrote that at "some point, a measure is no longer a regulation of a profession but a regulation of speech or of the press; beyond that point, the statute must survive the level of scrutiny demanded by the First Amendment." ER 11 (quoting *Lowe*, 472 U.S. at 230). However, Justice White acknowledged that a law does not regulate speech protected by the First Amendment whenever and simply because a professional is speaking. Rather, Justice White set forth specific guidelines for determining the point at which a regulation of conduct, practice, or treatment becomes an unconstitutional restriction on speech:

> One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession. Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession. . . . Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose

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2. *Conant* is inapposite because SB 1172 regulates SOCE therapy, not communications with children or their parents about SOCE therapy or otherwise protected speech.

The district court acknowledged the holding in *NAAP* that talk therapy is a course of treatment that is subject to reasonable state regulation, but did not apply it in this case. Instead, the court found that all types of communication between therapists and their patients, including talk therapy, are subject to exacting First Amendment protection. ER 17 (citing *NAAP*, 228 F.3d at 1054 and *Conant v. Walters*, 309 F.3d 629). The district court erred by failing to distinguish regulation of a therapist's communication with a client *about* a treatment from regulation of a mental health *treatment* itself. *See NAAP*, 228 F.3d at 1054; *see also People v. Jeffers*, 690 P.2d 194, 198 (Colo. 1984) ("The practice of medicine itself is not protected by the first amendment. Therefore, reasonable regulation of medical practice does not conflict with first amendment protections").

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> circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

Lowe, 472 U.S. at 232. SB 1172 does not regulate any speech outside of the "personal nexus" between therapist and patient, and is confined to speech that is "incidental to the conduct of the profession." Accordingly, Justice White's concurrence does not support the district court's analysis.

The decision in *Conant*, on which the district court relied, is illustrative. At issue in *Conant* was a federal policy that expressly prohibited doctors from "recommending" the use of medical marijuana to their patients. *Conant*, 309 F.3d at 634. Because there was a great deal of confusion as to what qualified as a "recommendation," physicians feared that they would be prosecuted if they even discussed medical marijuana with their patients.[10] As a result, many physicians began to "self-censor" their conversations with patients, withholding information, recommendations, and advice about medical marijuana even though it was their professional judgment that their patients would benefit from such information. *See Conant v. McCaffrey*, No. C 97-00139, 2000 WL 1281174, *5 (N.D. Cal. Sept. 7, 2000). The district court found that the government's policy impermissibly abridged speech and permanently enjoined its enforcement. *Conant v. McCaffrey*, 172 F.R.D. 681, 698, 701 (N.D. Cal. 1997).

This Court affirmed the injunction. In so doing, this Court distinguished between regulation of the practice of medicine and regulation of speech. Pursuant to *Planned Parenthood v. Casey*, 505 U.S. at 884, a physician's speech when "part of the practice of medicine" is subject to reasonable regulation by the State.

[10] Apparently, the policy restricting physicians' ability to "recommend" medical marijuana to their patients was so ambiguous that even the government's own attorneys were unable to clearly articulate its meaning. *See Conant v. McCaffrey*, 172 F.R.D. 681, 690 (N.D. Cal. 1997)

However, the Court found that the federal policy regulating physician "recommendations" about marijuana, unlike regulations at issue in *Casey* and *Rust v. Sullivan*, 500 U.S. 173 (1991), interfered with doctors' exercise of their professional judgment and with the doctor-patient relationship, and thus, was not reasonable. *Conant*, 309 F.3d at 636-38. The Court also held that the government policy sought to "punish physicians on the basis of the content of doctor-patient communications," and went so far as to condemn "expression of a particular viewpoint, i.e., that medical marijuana would likely help a specific patient." *Conant*, 309 F.3d at 637. Thus, the Court determined that the government's policy did not have the "requisite narrow specificity" to survive First Amendment scrutiny. *Id.* at 639 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

Conant does not provide the rule of decision in this case because it did not address regulation of professional conduct, practice, or treatment itself. None of the parties in *Conant* argued that the First Amendment prevented the government from prohibiting doctors from prescribing or dispensing marijuana. Indeed, it was undisputed that the government could regulate such conduct. *See Conant v. McCaffrey*, 172 F.R.D. at 694; *Conant*, 309 F.3d at 633. What the government

could not do, under the First Amendment, was "quash protected speech" between doctor and patient *about* the treatment. *Conant v. McCaffrey*, 172 F.R.D. at 694.[11]

In marked contrast to the policy at issue in *Conant*, SB 1172 does not "gag" or regulate communications between therapists and minors *about* SOCE treatment. SB 1172 does not bar therapists from "recommending," discussing, referring, or providing their clients with information about SOCE; it prohibits them from providing SOCE therapy to minors.[12] *Pickup v. Brown*, 2012 WL 6021465 at *9 ("what SB 1172 proscribes is actions designed to effect a difference, not recommendations or mere discussions of SOCE"). SB 1172 bans these practices by licensed mental health professionals not because the State is concerned that information about SOCE will cause minors to engage in harmful conduct, but because SOCE treatment is *itself* harmful to minors. *See Conant*, 309 F.3d at 638 (rejecting government's argument that a doctor's recommendation of marijuana would cause patients to engage in illegal activity).

[11] To be clear, not all speech or communication between doctors and patients is subject to heightened First Amendment protection. While doctors have a protected right to exercise their professional judgment, they must do so within the confines of generally recognized and accepted professional standards of care. Doctors whose recommendations fall below that standard are subject to discipline without regard to the First Amendment. As the district court in *Conant* explicitly recognized, a doctor "may not counsel a patient to rely on quack medicine. The First Amendment would not prohibit the doctor's loss of license for doing so." *Conant v. McCaffrey*, No. 97-00139, 2000 WL 1281174 at *13 (N.D. Cal. Sept. 7, 2000).

Accordingly, SB 1172 does not raise any of the core free speech concerns at issue in *Conant*. SB 1172 does not prevent mental health professionals from speaking "frankly and openly to patients" about SOCE, nor does it alter "the traditional role" of mental health professionals by prohibiting truthful, non-misleading speech necessary to the proper practice of their profession. *See Conant*, 309 F.3d at 636, 638; *see also Pickup v. Brown*, 2012 WL 6021465 at *9 ("SB 1172 does not on its face penalize a mental health professional's exercise of judgment in simply informing a minor patient that he or she might benefit from SOCE; it also does not prohibit speech necessary to the therapist's practice."). SB 1172 also does not compromise "a patient's meaningful participation in public discourse." *Conant*, 309 F.3d at 634. Mental health professionals are not in danger of violating SB 1172 if they share with patients their "sincere medical judgment" that SB 1172 is not "sound public policy," and both therapist and patient can "urge their view" to the public and the Legislature.[13] *Id.* SB 1172's ban on SOCE to minors is the equivalent of prohibiting the prescription of medical marijuana and thus does not offend the First Amendment. Accordingly, the district

[13] It is worth noting that, unlike in *Conant*, there is no "legitimate and growing division of informed opinion" regarding the efficacy and risks of SOCE. *Conant*, 309 F.3d at 640-41 (Kozinski, J., concurring). Regardless, SB 1172 does not prevent a mental health professional from telling a child or his parents that the therapist rejects the professional consensus discrediting SOCE treatment and rejects the warning that minors, in particular, should avoid it.

court erred in holding that *Conant* requires application of heightened scrutiny to SB 1172.

3. The distinction drawn between regulation of health practices delivered by speaking, writing, or other use of language and direct regulation of expressive speech is necessary to avoid an over-broad application of the First Amendment that would obstruct the protection of the public health and safety.

As set forth above, *Conant* does not support the district court's conclusion that all speech by a health professional, including that used to deliver treatment, is entitled to First Amendment protection.[14] Indeed, the Supreme Court has cautioned against the kind of rigid and reflexive application of the First Amendment at the heart of the district court's analysis. The "First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems."

[14] The district court relied, in part, on a sentence from *Conant* stating that "professional speech may be entitled to 'the strongest protection our Constitution has to offer.'" 309 F.3d at 637 (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995)). However, in *Florida Bar* the Court stated that "[s]peech by professionals obviously has many dimensions." The Court noted that, for example, professional speech by attorneys may merit heightened protection when it concerns "public issues and matters of legal representation." 515 U.S. at 634. SB 1172 does not regulate speech by professionals on issues of public concern, but rather prohibits ineffective and unsafe practices. Accordingly, the district court's reliance on *Conant* and *Florida Bar* is misplaced.

Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C., 518 U.S. 727, 741 (1996).

Simply put, not all speech is treated the same for First Amendment purposes, and some does not implicate the First Amendment at all. "Because many, perhaps most, activities of human beings living together in communities take place through speech, and because speech-related risks and offsetting justifications differ depending upon context, [the Supreme] Court has distinguished for First Amendment purposes among different contexts in which speech takes place." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2673 (2011) (Breyer, J. dissenting). Therefore, while the First Amendment imposes "tight constraints" upon government efforts to restrict "core" political and expressive speech, the Supreme Court applies a far more "lenient approach to ordinary commercial or regulatory legislation that affects speech in less direct ways." *Id.* at 2673-74.[15]

Indeed, courts routinely distinguish between the regulation of expressive speech under the First Amendment (which must survive strict scrutiny) and the

[15] *See also* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv. L. Rev. 1765, 1769 (2004) ("Though many cases involve the First Amendment, many more do not. . . . It is not that the speech is not protected. Rather, the entire event – an event that often involves 'speech' in the ordinary language sense of the word – does not present a First Amendment issue at all, and the government's action is consequently measured against no First Amendment standard whatsoever. The First Amendment just does not show up.").

regulation of professional conduct carried out through speech (which need only have a rational basis). These distinctions are drawn because regulations that target expressions of opinion and/or "discourse on public matters" implicate the core values protected by the First Amendment. *See Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2733 (2011). In contrast, regulation of professional conduct does not "offend the First Amendment." *See, e.g*, *NAAP*, 228 F.3d at 1053; *Daly v. Sprague*, 742 F.2d at 899. The First Amendment protects speech related to the "intellect and spirit" and the "exposition of ideas" and political, social, and philosophical messages. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Unlike such speech, mental health practices are not expressive and do not, per se, contribute to the "marketplace of ideas." *See Pickup v. Brown*, 2012 WL 6021465 at *10 (recognizing that courts reaching the question have found that "the provision of health care and other forms of treatment is not expressive conduct"); *O'Brien v. United States Dept. of Health & Human Servs.*, No. 12-476, 2012 WL 4481208, at *12 (E.D. Mo. Sept. 28, 2012) ("Giving or receiving health care is not a statement in the same sense as wearing a black armband or burning an American flag.") (internal citations omitted).[16]

[16] Plaintiffs attempt to portray SOCE treatment itself as expressive speech, and profess that it conveys their values and beliefs about the morality and

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SB 1172 does not regulate any idea, but instead regulates professional practice, and while the "First Amendment recognizes no such thing as a 'false idea,'" *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988), there are false

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(…continued)
changeability of homosexuality. However, this argument fails. The Supreme Court has rejected the argument that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968); *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) (rejecting the idea that every activity with "some kernel of expression" is entitled to First Amendment protection). Therapy, and health care treatment generally, is not a forum for licensed professionals to engage in free expression, and licensed professionals do not have a constitutional right to provide treatment (especially to children) based on individually-held beliefs. *See, e.g.*, Cal. Bus. & Prof. Code § 4996.9 (defining psychotherapy as the use of "methods ... to assist the person ... to achieve a better psychosocial adaptation ... to modify internal and external conditions which affect individuals, groups, or communities in respect to behavior, emotions, and thinking); Cal. Bus. & Prof. Code § 2903 (defining psychology, in part, as "the application of [psychological] principles, methods, and procedures of understanding, predicting, and influencing behavior, such as the principles pertaining to learning, perception, motivation, emotions, and interpersonal relationships"). To the contrary, in exercising its authority to protect the public health and safety, the State has considerable latitude to ensure that professional practices are sound and reflect accepted standards of knowledge and competence. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. at 731; *Dent v. West Virginia*, 129 U.S. at 122. Thus, whatever plaintiffs or individual therapists may believe about the "pathology" of homosexuality, the immutability of sexual orientation, and/or the efficacy of SOCE, they cannot practice in a manner that the State has deemed unprofessional conduct. *See Lambert v. Yellowley*, 272 U.S. 581, 596-97 (1926) (rejecting claim of physician who "believes that the use of spirituous liquor as a medicinal agent is at times both advisable and necessary" because "Congress [has] the power to determine that the necessities of the liquor problem require a limitation of permissible prescriptions"); *United States v. Feingold*, 454 F.3d 1001, 1005-06 (9th Cir. 2006) (rejecting doctor's defense that he issued illegal prescriptions of controlled substances "in the genuine belief" that they were necessary).

and dangerous practices and treatments that the State may regulate or ban to protect the public from harm. *See Barsky v. Bd. of Regents*, 347 U.S. 442, 449 (1954) ("It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power."); *NAAP*, 228 F.3d at 1054 ("[i]t is properly within the state's police power to regulate and license professions, especially when public health concerns are affected"). Thus, while being a member of a regulated profession does not "result in [a] surrender of First Amendment rights," *Conant*, 309 F.3d at 637, licensed mental health providers have no First Amendment right to engage in discredited, ineffective, and harmful practices.

D. SB 1172 Does Not Discriminate Based on the Content of Protected Speech, or on the Speaker's Viewpoint.

Having miscategorized SB 1172 as a direct regulation of speech, the district court compounded its error by going on to analyze whether SB 1172 discriminates on the basis of content or viewpoint. As a threshold matter, the framework for analyzing content and viewpoint neutrality has no application here because this case involves the regulation of a mental health treatment, not speech. As set forth above, nothing in SB 1172 prohibits mental health providers from expressing their theories and opinions about sexual orientation, or from discussing or

recommending SOCE.[17] They are only prohibited from practicing SOCE on minors in their capacity as licensed mental health providers.[18] *See Pickup v. Brown*, 2012 WL 6021465 at *9 (holding that SB 1172 does not unconstitutionally discriminate on the basis of content or viewpoint because the statute "bars treatment only").

1. *NAAP* does not suggest either that content and viewpoint discrimination analysis applies to a regulation of conduct, or that SB 1172 discriminates on the basis of content or viewpoint.

The district court relied on dicta in *NAAP* for two propositions upon which it built its analysis. First, the court found that *NAAP* requires state regulation of a mental health practice to be content neutral, or otherwise survive strict scrutiny to

[17] To be clear, telling a client that the therapist believes that being gay is morally wrong or unhealthy and can be changed may well violate applicable ethical standards for mental health providers. Similarly, given the lack of empirical evidence that SOCE works, and the known risks of engaging in SOCE, counseling minors and their families that they should pursue SOCE may violate a mental health provider's basic duty of competency. It would not, however, violate SB 1172.

[18] *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2011), does not support the district court's conclusion that content and viewpoint analysis applies to regulation of conduct. ER 18-19. *Holder* addressed a statute making it a federal crime to "knowingly provid[e] material support or resources to a foreign terrorist organization." The speech that the *Holder* plaintiffs wanted to engage in, and thus "the conduct triggering coverage under the statute consist[ed] of communicating a message" and was protected, expressive speech. *Id.* at 2724. Here, the conduct triggering coverage of SB 1172 is not communicating a message, but providing a treatment. The district court's attempt to analogize the two cases in therefore inapt.

be constitutional. ER 14. Second, the court found that *NAAP* compels the conclusion that SB 1172 discriminates on the basis of content. ER 19-26. However, *NAAP* does not support either of these propositions.

In *NAAP*, the plaintiff psychoanalysts made a fairly complex argument that California's mental health licensing scheme impermissibly regulated the content of speech because, among other reasons, the training required to become a licensed psychologist excluded some psychoanalytical approaches. 228 F.3d at 1055-56. This Court rejected that argument and stated that *unlike* laws that distinguish between prohibited and permitted speech on the basis of content, the licensing scheme was not adopted because of a disagreement with the message conveyed by psychoanalytical theories, did not suppress speech based on its message, and "does not dictate the content of what is said in therapy." 228 F.3d at 1055, 1056. Rather, it was "adopted for the important purpose of protecting public health, safety and welfare." *Id.* at 1056 (citation omitted).

This passage from *NAAP* does not, as the district court concluded, signify that regulation of conduct is subject to content and viewpoint discrimination analysis. It simply reflects the well-established proposition that a law that does restrict or promote *speech* on the basis of the ideas or views expressed is not content or viewpoint neutral and must survive strict scrutiny. Nor does this passage from *NAAP* mean that a state cannot disagree with or ban an incompetent

and unsafe practice without running afoul of the First Amendment. Such an expansive reading would undermine *NAAP*'s principal holding, which is that a state can reasonably regulate mental health professionals in order to protect the public from incompetent practice. *NAAP*, 228 F.3d at 1054. Indeed, the district court's reading of *NAAP* would undermine state health and safety regulation entirely. By the district court's reasoning, the government could not disagree with or restrict disproven, harmful, and/or practices that fall well below the standard of acceptable and competent care, such as forms of psychosurgery, analytic "techniques" that involve sexual relations between therapists and clients, and the practice of prescribing psychedelic drugs to treat depression, without risking a First Amendment content discrimination challenge. This is not the law. *See*, *e.g.*, Cal. Wel. & Inst. Code §5326.6 (banning psychosurgery on minors); Cal. Bus. & Prof **.** Code §§ 726-729 (proscribing sexual misconduct with a client); §§ 2237-39, 2241 (regulating controlled substances).

Similarly, *NAAP* does not hold that state regulation must survive viewpoint discrimination analysis whenever a therapist holds a view about those practices different from those of the state. *See* Post, *supra*, 2007 U. Ill. L. Rev. at 949-51 (noting the inapplicability of First Amendment viewpoint discrimination to most speech by medical professionals: "[w]e would be puzzled by a physician who sought to preserve his constitutionally protected 'individual freedom of mind' by

refusing to provide his patients necessary and accurate diagnoses, citing for his justification . . . 'the right of freedom of thought protected by the First Amendment"). The belief that homosexuality is a disease that can and should be cured also animates other discredited and harmful SOCE treatments such as lobotomy and castration, but the State's decision to ban or regulate these practices is not impermissible viewpoint discrimination. There is no principled basis to apply viewpoint discrimination analysis to "talk therapy," but not to any other practice on which a practitioner may have a firmly held but idiosyncratic view. *See NAAP*, 228 F.3d at 1053-54.

2. Even assuming that content or viewpoint discrimination analysis applies to a law regulating conduct, the district court failed to apply it correctly.

Even if it were appropriate to take content and viewpoint neutrality principles from the framework of First Amendment analysis and import them into the analysis of state regulation of conduct – and it is not – the district court applied these principles incorrectly. Content and viewpoint discrimination are established by demonstrating that the government's purpose in adopting the regulation was itself discriminatory. "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . .The government's *purpose* is the controlling consideration." *Ward v. Rock Against Racism*, 491 U.S. 781, 791

(1989) (citations omitted, emphasis added). Even a statute that facially distinguishes a category of speech or speakers is content-neutral if justified by interests that are "unrelated to the suppression of free expression." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). The motive and purposes of the Legislature is also the primary inquiry with respect to viewpoint discrimination. Viewpoint discrimination occurs out of hostility to "particular views taken by speakers on a subject." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

Plaintiffs presented no evidence, and the district court pointed to none, demonstrating that in enacting SB 1172 the Legislature had any motive or purpose other than to protect children from harm. Accordingly, SB 1172 seeks to advance "legitimate regulatory goals" and is content and viewpoint neutral. *See Jacobs v. Clark Cty. School District*, 526 F.3d 419, 433 (9th Cir. 2008) (citation and quotations omitted).[19]

[19] The district court appears to believe that in adopting the findings that homosexuality is not a disease, condition, or disorder in need of a "cure," and that SOCE are both ineffective and harmful, the Legislature has impermissibly "licensed one side of a debate." *See R.A.V. v. City St. Paul*, 505 U.S. 377, 392 (1992). However, in enacting reasonable regulations of professional practice, the Legislature may rely on the data available to it -- here the determination of every mainstream mental health organization that SOCE is ineffective and unsafe -- and it may do so without offending, if even implicating, the First Amendment.

III. IN THE ABSENCE OF ANY CONSTITUTIONAL VIOLATION, PLAINTIFFS CANNOT MEET THEIR BURDEN TO DEMONSTRATE IRREPARABLE HARM, OR DEMONSTRATE THAT THE BALANCE OF HARM AND THE PUBLIC INTEREST WEIGH IN FAVOR OF AN INJUNCTION.

The district court's finding that plaintiffs would suffer irreparable injury in the absence of an injunction was in error because it was based entirely on its conclusion that SB 1172 would "likely infringe their First Amendment rights" to freedom of speech, and fails for the same reason. ER 34-35. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *see also Goldie's Bookstore, Inc. v. Superior Ct.*, 739 F.2d 466, 472 (9th Cir. 1984); *Dex Media West, Inc. v. City of Seattle*, 790 F. Supp. 2d 1276, 1289 (W.D. Wash. 2011) ("Because the court finds that Plaintiffs have failed to establish that they are likely to succeed on the merits of their First Amendment claim …, the court cannot find that Plaintiffs have established that they are likely to suffer irreparable First Amendment injury in the absence of a preliminary injunction"); *Putzer v. Donnelly*, No. 07–00620, 2009 WL 3271315 at *5 (D. Nev. Aug. 17, 2009) ("[P]laintiff has not demonstrated a likelihood of success on his First Amendment claim. Therefore, plaintiff has not presented evidence sufficient to show a likelihood of irreparable injury").

Similarly, in the absence of any constitutional violation, plaintiffs cannot establish harm sufficient to outweigh the injury an injunction inflicts on the State. "Any time a State is enjoined by a court from effectuating statutes enacted by

representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (quotation and citation omitted).

Injury to the State aside, allowing mental health providers to engage in SOCE with minors (pending trial) could cause these minors irreparable harm, up to and including severe depression, alienation from family, and suicidal thoughts. Cal. Stats. 2012, ch. 835, § 1(b)-(m); ER 191-93; ER 73-74; 92-93; 383-383; 427-428, 430-432. None of this damage could be undone if the injunction were subsequently vacated.

These harms to the State and the public interest far outweigh the alleged harm to plaintiffs. *See Golden Gate Rest. Ass'n v. City of San Francisco*, 512 F.3d 1112, 1126-27 (9th Cir. 2008) ("The public interest may be declared in the form of a statute") (citation and quotations omitted); *Fed. Trade Comm'n v. Affordable Media, LLC*, 179 F.3d 1228, 1236 (9th Cir. 1999) ("[W]hen a district court balances the hardships of the public interest against a private interest, the public interest should receive greater weight.") (citation and quotations omitted).

CONCLUSION

For the foregoing reasons, defendants respectfully request that this Court reverse the district court's order granting the motion for preliminary injunction, vacate the preliminary injunction, and grant such other relief as the Court deems just.

Dated: January 28, 2013

Respectfully submitted,

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13-15023

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD WELCH; et al. ,

Plaintiffs and Appellees,

v.

EDMUND G. BROWN, JR., Governor of the State of California; et al.,

Defendants and Appellants.

STATEMENT OF RELATED CASES

The following related case is pending: *Pickup, et al. v. Brown, et al.*, Ninth Circuit, Case No. 12-17681

Dated: January 28, 2013

Respectfully Submitted,

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APPENDIX

BILL NUMBER: SB 1172 CHAPTERED
BILL TEXT

CHAPTER 835
FILED WITH SECRETARY OF STATE SEPTEMBER 30, 2012
APPROVED BY GOVERNOR SEPTEMBER 30, 2012
PASSED THE SENATE AUGUST 30, 2012
PASSED THE ASSEMBLY AUGUST 28, 2012
AMENDED IN ASSEMBLY JULY 5, 2012
AMENDED IN SENATE MAY 25, 2012
AMENDED IN SENATE APRIL 30, 2012
AMENDED IN SENATE APRIL 25, 2012
AMENDED IN SENATE APRIL 16, 2012
AMENDED IN SENATE APRIL 9, 2012

INTRODUCED BY Senator Lieu
(Coauthor: Assembly Member Ma)

FEBRUARY 22, 2012

An act to add Article 15 (commencing with Section 865) to Chapter 1 of Division 2 of the Business and Professions Code, relating to healing arts.

LEGISLATIVE COUNSEL'S DIGEST

SB 1172, Lieu. Sexual orientation change efforts.

Existing law provides for licensing and regulation of various professions in the healing arts, including physicians and surgeons, psychologists, marriage and family therapists, educational psychologists, clinical social workers, and licensed professional clinical counselors.

This bill would prohibit a mental health provider, as defined, from engaging in sexual orientation change efforts, as defined, with a patient under 18 years of age. The bill would provide 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.

The bill would also declare the intent of the Legislature in this regard.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares all of the following:

(a) Being lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming. The major professional associations of mental health practitioners and researchers in the United States have recognized this fact for nearly 40 years.

(b) The American Psychological Association convened a Task Force on Appropriate Therapeutic Responses to Sexual Orientation. The task force conducted a systematic review of peer-reviewed journal literature on sexual orientation change efforts, and issued a report in 2009. The task force concluded that sexual orientation change efforts can pose critical health risks to lesbian, gay, and bisexual people, including confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, suicidality, substance abuse, stress, disappointment, self-blame, decreased self-esteem and authenticity to others, increased self-hatred, hostility and blame toward parents, feelings of anger and betrayal, loss of friends and potential romantic partners, problems in sexual and emotional intimacy, sexual dysfunction, high-risk sexual behaviors, a feeling of being dehumanized and untrue to self, a loss of faith, and a sense of having wasted time and resources.

(c) The American Psychological Association issued a resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts in 2009, which states: "T]he American Psychological Association] advises parents, guardians, young people, and their families to avoid sexual orientation change efforts that portray homosexuality as a mental illness or developmental disorder and to seek psychotherapy, social support, and educational services that provide accurate information on sexual orientation and sexuality, increase family and school support, and reduce rejection of sexual minority youth."

(d) The American Psychiatric Association published a position statement in March of 2000 in which it stated:

"Psychotherapeutic modalities to convert or 'repair' homosexuality are based on developmental theories whose scientific validity is

questionable. Furthermore, anecdotal reports of 'cures' are counterbalanced by anecdotal claims of psychological harm. In the last four decades, 'reparative' therapists have not produced any rigorous scientific research to substantiate their claims of cure. Until there is such research available, the American Psychiatric Association] recommends that ethical practitioners refrain from attempts to change individuals' sexual orientation, keeping in mind the medical dictum to first, do no harm.

The potential risks of reparative therapy are great, including depression, anxiety and self-destructive behavior, since therapist alignment with societal prejudices against homosexuality may reinforce self-hatred already experienced by the patient. Many patients who have undergone reparative therapy relate that they were inaccurately told that homosexuals are lonely, unhappy individuals who never achieve acceptance or satisfaction. The possibility that the person might achieve happiness and satisfying interpersonal relationships as a gay man or lesbian is not presented, nor are alternative approaches to dealing with the effects of societal stigmatization discussed.

Therefore, the American Psychiatric Association opposes any psychiatric treatment such as reparative or conversion therapy which is based upon the assumption that homosexuality per se is a mental disorder or based upon the a priori assumption that a patient should change his/her sexual homosexual orientation."

(e) The American School Counselor Association's position statement on professional school counselors and lesbian, gay, bisexual, transgendered, and questioning (LGBTQ) youth states: "It is not the role of the professional school counselor to attempt to change a student's sexual orientation/gender identity but instead to provide support to LGBTQ students to promote student achievement and personal well-being. Recognizing that sexual orientation is not an illness and does not require treatment, professional school counselors may provide individual student planning or responsive services to LGBTQ students to promote self-acceptance, deal with social acceptance, understand issues related to coming out, including issues that families may face when a student goes through this process and identify appropriate community resources."

(f) The American Academy of Pediatrics in 1993 published an article in its journal, Pediatrics, stating: "Therapy directed at specifically changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential

for achieving changes in orientation."

(g) The American Medical Association Council on Scientific Affairs prepared a report in 1994 in which it stated: "Aversion therapy (a behavioral or medical intervention which pairs unwanted behavior, in this case, homosexual behavior, with unpleasant sensations or aversive consequences) is no longer recommended for gay men and lesbians. Through psychotherapy, gay men and lesbians can become comfortable with their sexual orientation and understand the societal response to it."

(h) The National Association of Social Workers prepared a 1997 policy statement in which it stated: "Social stigmatization of lesbian, gay and bisexual people is widespread and is a primary motivating factor in leading some people to seek sexual orientation changes. Sexual orientation conversion therapies assume that homosexual orientation is both pathological and freely chosen. No data demonstrates that reparative or conversion therapies are effective, and, in fact, they may be harmful."

(i) The American Counseling Association Governing Council issued a position statement in April of 1999, and in it the council states: "We oppose 'the promotion of "reparative therapy" as a "cure" for individuals who are homosexual.'"

(j) The American Psychoanalytic Association issued a position statement in June 2012 on attempts to change sexual orientation, gender, identity, or gender expression, and in it the association states: "As with any societal prejudice, bias against individuals based on actual or perceived sexual orientation, gender identity or gender expression negatively affects mental health, contributing to an enduring sense of stigma and pervasive self-criticism through the internalization of such prejudice.

Psychoanalytic technique does not encompass purposeful attempts to 'convert,' 'repair,' change or shift an individual's sexual orientation, gender identity or gender expression. Such directed efforts are against fundamental principles of psychoanalytic treatment and often result in substantial psychological pain by reinforcing damaging internalized attitudes."

(k) The American Academy of Child and Adolescent Psychiatry in 2012 published an article in its journal, Journal of the American Academy of Child and Adolescent Psychiatry, stating: "Clinicians should be aware that there is no evidence that sexual orientation can be altered through therapy, and that attempts to do so may be harmful. There is no empirical evidence adult homosexuality can be

prevented if gender nonconforming children are influenced to be more gender conforming. Indeed, there is no medically valid basis for attempting to prevent homosexuality, which is not an illness. On the contrary, such efforts may encourage family rejection and undermine self-esteem, connectedness and caring, important protective factors against suicidal ideation and attempts. Given that there is no evidence that efforts to alter sexual orientation are effective, beneficial or necessary, and the possibility that they carry the risk of significant harm, such interventions are contraindicated."

(l) The Pan American Health Organization, a regional office of the World Health Organization, issued a statement in May of 2012 and in it the organization states: "These supposed conversion therapies constitute a violation of the ethical principles of health care and violate human rights that are protected by international and regional agreements." The organization also noted that reparative therapies "lack medical justification and represent a serious threat to the health and well-being of affected people."

(m) Minors who experience family rejection based on their sexual orientation face especially serious health risks. In one study, lesbian, gay, and bisexual young adults who reported higher levels of family rejection during adolescence were 8.4 times more likely to report having attempted suicide, 5.9 times more likely to report high levels of depression, 3.4 times more likely to use illegal drugs, and 3.4 times more likely to report having engaged in unprotected sexual intercourse compared with peers from families that reported no or low levels of family rejection. This is documented by Caitlin Ryan et al. in their article entitled Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults (2009) 123 Pediatrics 346.

(n) 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.

(o) Nothing in this act is intended to prevent a minor who is 12 years of age or older from consenting to any mental health treatment or counseling services, consistent with Section 124260 of the Health and Safety Code, other than sexual orientation change efforts as defined in this act.

SEC. 2. Article 15 (commencing with Section 865) is added to Chapter 1 of Division 2 of the Business and Professions Code, to

read:

Article 15. Sexual Orientation Change Efforts

865. 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.

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

865.2. 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.

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED.R.APP.P 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR 13-15023

I certify that: (check (x) appropriate option(s))

[ ] 1. Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached **opening/answering/reply/cross-appeal** brief is

[X] Proportionately spaced, has a typeface of 14 points or more and contains 12,568 words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains ____ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

[ ] 2. The attached brief is **not** subject to the type-volume limitations of Fed.R.App.P. 32(a(7)(B) because

[ ] This brief complies with Fed.R.App.P 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

or

[ ] This brief complies with a page or size-volume limitation established by separate court order dated _____ and is

[ ] Proportionately spaced, has a typeface of 14 points or more and contains _____ words,

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains __ pages or __ words or __ lines of text.

[ ] 3. Briefs in **Capital Cases**.
This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is

[ ] Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words).

or is

[ ] Monospaced, has 10.5 or fewer characters per inch and contains __ words or __ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 75 pages or 1,950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

☐ 4. **Amicus Briefs**.

☐ Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

or is

☐ Monospaced, has 10.5 or few characters per inch and contains not more than either 7,000 words or 650 lines of text,

or is

☐ Not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed.R.App.P. 32 (a)(1)(5).

January 28, 2013
Dated

/s/ Alexandra Robert Gordon
Alexandra Robert Gordon
Deputy Attorney General

CERTIFICATE OF SERVICE

Case Name: **Donald Welch, et al. v. Edmund G. Brown Jr., et al.** No. **13-15023**

I hereby certify that on January 28, 2013, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

APPELLANTS' OPENING BRIEF (PRELIMINARY INJUNCTION APPEAL – NINTH CIRCUIT RULE 3-3)

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

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On January 28, 2013, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Michael Peffer
Attorney at Law
Pacific Justice Institute
P.O. Box 11630
Santa Ana, CA 92711

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 28, 2013, at San Francisco, California.

N. Newlin	/s/ N. Newlin
Declarant	Signature

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