12-17681

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID H. PICKUP; et al. ,

Plaintiffs-Appellants,

v.

EDMUND G. BROWN Jr., Governor of the State of California, in his official capacity; et al.,

Defendants-Appellees,

EQUALITY CALIFORNIA,

Defendant/Intervenor-Appellee.

On Appeal from the United States District Court
for the Eastern District of California

No. 12-02497
The Honorable Kimberly J. Mueller, Judge

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INTRODUCTION

California Senate Bill (SB) 1172 prohibits state-licensed mental health providers from engaging in 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, *Welch v. Brown*, Case No. 13-0523, the defendants appeal the order issued by the Honorable William B. Shubb, which *granted* a preliminary injunction, finding merit to the plaintiffs' First Amendment challenge. In this case, defendants urge affirmance of the order issued by the Honorable Kimberly J. Mueller *denying* a preliminary injunction, in part, on the grounds that the plaintiffs' First Amendment challenge lacks merit, and also ask this Court to vacate its injunction pending appeal.

Plaintiffs reject the scientific and professional consensus on sexual orientation and SOCE. They sued state officials to invalidate SB 1172, contending that SOCE

is "speech" protected by the First Amendment; and that licensed therapists have a constitutional right to provide, and their patients have a constitutional right to obtain, mental health treatments deemed ineffective and unsafe by the State. They also sought a preliminary injunction, which the district court denied. In so doing, the district court correctly determined that SB 1172 regulates professional conduct and not expressive speech, that there is no fundamental right to practice or obtain a particular mental health treatment, and thus, that plaintiffs were unlikely to succeed on the merits of their claims.

The district court's comprehensive and well-reasoned order denying plaintiffs' motion for a preliminary injunction is rooted in established Supreme Court and Ninth Circuit law. SB 1172 is an ordinary exercise of the State's police power to regulate professional conduct in the interest of the public health and safety. The district court correctly concluded that the law is reasonably related to the State's interest in protecting the physical and psychological well being of California's children and teenagers. Accordingly, the order of the district court should be affirmed.

JURISDICTIONAL STATEMENT

Defendants agree with plaintiffs' Jurisdictional Statement.

STATEMENT OF ISSUES

1. Did the district court properly determine that plaintiffs have no likelihood of success on the merits of their claim that SB 1172 infringes their First Amendment right to free speech?

2. Did the district court properly determine that plaintiffs have no likelihood of success on the merits of their claim that SB 1172 is facially vague or overbroad in violation of their due process rights?

3. Did the district court properly determine that plaintiff-parents and their minor children have no likelihood of success on the merits of their claim that SB 1172 infringes their fundamental right to care for their children?

4. Did the district court properly determine that because plaintiffs had not established any likelihood of success on the merits of their claims, their motion for preliminary injunction must be denied?

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 has persisted despite 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 include four therapists who practice SOCE, four parents on behalf of their two children who receive SOCE, the National Association for Research and Therapy of Homosexuality, and the American Association of Christian Counselors. On October 12, 2012, plaintiffs sued defendant state officials to invalidate SB 1172.[1] The complaint alleged that the law violates: (1) the plaintiff-therapists' right to free speech, and the plaintiff-minors' right to receive information, *see* U.S. Const. amend. I; Cal. Const. art. I, § 2; (2) the plaintiff-parents' and plaintiff-minors' right to free exercise of religion, *see* U.S. Const. amend. I; Cal. Const. art. I, § 4; and (3) the plaintiff-parents' rights to guide and care for their children, *see* U.S. Const. amends. I & XIV; Cal. Const. art. I, § 7. ER 429-480.

[1] Defendants in this action include Governor Edmund G. Brown Jr., in his official capacity; Anna M. Caballero, Secretary of the California State and Consumer Services Agency, in her official capacity; Kim Madsen, Executive Officer of the California Board of Behavioral Sciences, in her official capacity; Michael Erickson, President of the California Board of Psychology, in his official capacity; and Sharon Levine, President of the California Medical Board, in her official capacity.

On October 23, 2012, plaintiffs moved the district court to preliminarily enjoin the enforcement of SB 1172. By Order dated December 4, 2012, the district court denied the injunction. ER 1-44. The court held that the motion failed because the complaint did not "meet the threshold test of likelihood of prevailing on the merits of any claim." ER 12.

The court rejected plaintiffs' argument that SB 1172 unconstitutionally discriminates against protected speech on the basis of content and viewpoint. ER 12-16. The court concluded that "the SOCE therapy regulated by SB 1172 is conduct" and not speech. ER 16. The court then determined that cases such as *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), were inapplicable as they pertain only to protected communications between doctors and patients and not to the regulation of treatment itself. ER 14-16.

The district court next considered plaintiffs' claim that the restriction on practicing SOCE violates the First Amendment. ER 16-21. The court noted that the Ninth Circuit had rejected the argument, made by plaintiffs, that "psychoanalysis is 'pure speech,'" and therefore deserving of special First Amendment protection. ER 16-17. The district court also ruled that the provision of SOCE therapy is not expressive conduct. ER 15-18. Thus, the court concluded that SOCE treatment is not entitled to First Amendment protection. ER 19.

The district court also considered and rejected plaintiffs' claim that SB 1172 is facially vague. The court determined that that the term "sexual orientation" is well understood in the mental health profession, that the plaintiff-therapists understand the meaning of "sexual orientation change efforts" well enough to specialize in it, and that it is clear what SB 1172 "proscribes in the vast majority of its intended applications, namely therapy intended to alter a patient's sexual orientation." ER 28 (quoting *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001)).

Finally, the district court rejected the plaintiff-parents' claim that SB 1172 violates their parental and privacy rights. The district court acknowledged the parents' right to direct the care and upbringing of their children, but followed established law in holding that a parent's fundamental right does not encompass the right to any particular treatment. ER 29-42.

The district court determined that the practice of SOCE "is subject to the state's legitimate control over the professions," and that SB 1172 is subject to rational basis review. ER at 21. Applying this standard, the district court held that SB 1172 is rationally related to the State's interest in protecting the physical and psychological well being of minors. ER 42-44.

The plaintiffs timely appealed. ER 45-47. On December 6, 2012, plaintiffs moved this Court to temporarily enjoin SB 1172 pending appeal. Dkt. No. 3. This Court granted the motion on December 21, 2012. Dkt. No. 10.

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 204. Historically, SOCE included practices such as castration, lobotomy, hormone treatments, aversive conditioning with nausea-inducing drugs, and electroshock. ER 204. These therapies take as their premise the (then accepted) view that homosexuality is a mental illness or disorder. ER 205. That understanding of homosexuality, however, was abandoned more than forty years ago. [2]

[2] 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 198-199. Two years later, in 1975, the American Psychological Association (APA) affirmed that homosexuality is not a mental illness and urged its membership to work towards dispelling the stigma of mental illness associated with homosexuality. ER 199.

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 250.

Some practitioners, however, reject that scientific and professional consensus and continue to practice SOCE on their patients, including children. ER 255. 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 252. 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 252. SOCE practitioners may use some or all of these techniques.

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 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." Cal. Stats. 2012, ch. 835, § 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, 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." Cal. Stats. 2012, ch. 835, § 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. ER 215-352. Overall, the APA task force determined that "the peer-refereed empirical research provides little evidence of efficacy . . . ." ER 257.

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 265; *see also* ER 186, 189, 193; 205-209, 211-212.

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 259. 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 259-263.

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 184-186, 193; 205-209, 211-212.

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. Cal. Stats. 2012, ch. 835, § 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 264.

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." 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." Cal. Stats. 2012, ch. 835, § 1(d) & (j); *see also* ER 185-186, 188-193; 209-211.

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." Cal. Stats. 2012, ch. 835, § 1(k).

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

The Legislature also recognized that the mental health profession has condemned the persistence 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." Cal. Stats. 2012, ch. 835, § 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).

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).[3] In addition, the law makes explicit that failure to observe the restriction on SOCE will result in professional discipline: "Any sexual

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

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.* at § 865.2.

SB 1172 defines SOCE as "any practices by mental health providers that seek to change an individual's sexual orientation. This includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex." Cal. Bus. & Prof. Code § 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.* at § 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 themselves out as licensed mental health professionals. *See id.* §§ 2063, 2908, 4980.01(b) & 4996.13.

SUMMARY OF ARGUMENT

SB 1172 prevents state-licensed mental health providers from using SOCE, a discredited, inefficacious, and potentially harmful therapy, to treat children and teenagers. The law is an ordinary exercise of the State's police power to protect the public health and safety by regulating professional conduct. It has no effect on protected speech nor does it implicate any other constitutional right. As such, to survive a constitutional challenge, the State need only demonstrate that the regulation is reasonably related to a legitimate governmental purpose.

Plaintiffs urge this Court to hold that because their practice of SOCE involves talking, that it is speech, entitled to heightened First Amendment protection, and that any attempt to regulate it must satisfy strict scrutiny. This Court and others, however, have previously considered and rejected this argument. 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 although the regulation of professional practice may incidentally restrict speech in the broadest sense of the word, such regulations generally do not raise First Amendment concerns. Pursuant to Ninth Circuit law, SB 1172 does not regulate protected speech, but conduct, and is reviewed under a deferential standard.

Plaintiffs' facial vagueness claims are similarly meritless. Plaintiffs admit that they practice and/or have received SOCE, and SB 1172's prohibition on SOCE is clear, straightforward, and articulated through terms of common understanding that are readily comprehensible to a person of ordinary intelligence.

Finally, plaintiffs' fundamental rights claims fail under settled law that individuals have no fundamental right to select a particular mental health treatment or provider.

Because plaintiffs have no likelihood of success on the merits of any of their claims, the district court properly denied the motion for a preliminary injunction. The order of the district court should thus be affirmed, and the emergency injunction pending appeal should be vacated.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the grant or denial of a preliminary injunction for abuse of discretion. *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). On review, it must be determined, "whether the court employed the appropriate legal standards governing the issuance of a preliminary injunction and whether the district court correctly apprehended the law with respect to the underlying issues in the case." *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001). "As long as the district court got the law right, it will not be

reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *Sports Form, Inc. v. United Press, Int'l*, 686 F.2d 750, 752 (9th Cir. 1982). The district court's findings of fact are reviewed for clear error. *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002). A district court's conclusions of law are reviewed de novo. *Freeman v. Allstate Life Ins. Co.*, 253 F.3d 533, 536 (9th Cir. 2001).

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

The district court correctly analyzed and found meritless the plaintiffs' arguments that SB 1172 regulates constitutionally protected interests and must therefore survive strict scrutiny. The court's conclusion is sound: 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.

A. SB 1172 Is a Valid Regulation of Professional Conduct Because It Is Reasonably Related to the State's Interest in Protecting the Mental Health and Well-Being of Children and Teenagers.

SB 1172 is a valid exercise of the State's broad power to protect the public health and safety. Under established law, such regulation survives a challenge so long as it is reasonable and related to a legitimate government interest. Plaintiffs, however, contend that because the forms of SOCE they wish to continue practicing involve speaking, that these practices merit the highest level of First Amendment protection. Plaintiffs also posit that because it "chills" their speech, SB 1172 is

subject to strict scrutiny and is presumptively invalid. Opening Br. 28-29. The district court appropriately rejected these arguments. Under prevailing Supreme Court and Ninth Circuit authority, the practice of SOCE is conduct that is subject to reasonable regulation by the State. ER 16-21.

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

"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); *Dent v. West Virginia*, 129 U.S. 114, 122 (1889).

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; *see also Vacco v. Quill*, 521 U.S. 793, 806-09 (1997); *Whalen v. Roe*, 429 U.S. 589, 597-98, 600-03 (1977). This Court and others repeatedly have 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); *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 713-14 (D.C. 2007) (collecting cases).

2. The State's power to regulate professional conduct is not subject to more exacting scrutiny merely because professional services involve 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)).

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, 834-50 (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 (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).

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").

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).

3. State regulation of SOCE need only be reasonable.

Plaintiffs insist that psychotherapy and SOCE are "entirely speech," and thus, entitled to heightened First Amendment protection. But, as the district court recognized, this Court rejected precisely that argument in *NAAP*. ER 16-17. In *NAAP*, a group of psychoanalysts challenged California's licensing scheme for psychologists. The regulations required anyone who practiced psychoanalysis for a fee to be a licensed psychologist. The psychoanalysts objected that these requirements violated their due process and free speech rights. They 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 that a different constitutional standard should apply to regulation of talk therapy than to regulation of other types of medical treatment. *Id*. 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).

The Court explained 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.* After acknowledging that the First

Amendment does not impede government regulation simply because speech is a component of professional conduct, the Court cited a number of examples of communications that are regulated "in furtherance of important state interests" and thus "without offending the First Amendment." *Id.* (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 456). 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." 228 F.3d at 1056.

Plaintiffs argue that *NAAP* only governs a state's ability to control entry to a profession through licensing requirements, not to regulations regarding the conduct of licensed professionals. This argument fails for several reasons. Plaintiffs correctly point out that the challenge in *NAAP* was to professional licensing requirements for psychologists. The holding, however, is not so limited: "[I]t is properly within the state's police power to *regulate and license* professions, especially when public health concerns are affected." 228 F.3d at 1054 (citing *Watson v. Maryland*, 218 U.S. 173, 176 (1910)) (emphasis added). The State's legitimate interest in regulating a profession does not end with granting a license, but also extends to assuring the competent practice of its licensees. *See Barsky v. Board of Regents of University of State of New York*, 347 U.S. 442, 451 (1954) ("It is . . . clear that a state's legitimate concern for maintaining high standards of

professional conduct extends beyond initial licensing. Without continuing supervision, initial examinations afford little 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).

In order to safeguard against "incompetent practice," the State can and does regulate and proscribe the conduct of mental health professionals, much of which is carried out through 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 "make 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).

Like the laws discussed above, SB 1172 sets the applicable standard of practice in California, and declares that violating that standard will subject a 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." Cal. Bus. & Prof. Code § 856(b)(1)) (emphasis added). As the district court determined, 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.

B. Plaintiffs' First Amendment Claims Lack Merit.

The district court correctly found that plaintiffs' First Amendment claims lack merit. As the district court noted, SB 1172 regulates conduct; it does not restrict a therapist's communications with patients or any other protected speech. ER 15-16. Accordingly, SB 1172 does not implicate, let alone violate, the First Amendment.

1. SB 1172 Does Not Discriminate Based on the Content of Protected Speech, or Based on Viewpoint.

The district court properly rejected plaintiffs' contention that SB 1172 unconstitutionally discriminates on the basis of content or viewpoint. ER 12-16. On appeal, plaintiffs repeat their arguments that SB 1172 is content and viewpoint-discriminatory because it only applies to "conversations about" and prohibits a particular viewpoint regarding sexual orientation and SOCE. Opening Br. 34-39. These arguments are contradicted by the statute's plain text. On its face, SB 1172

leaves licensed mental health professionals free to discuss and express their theories and opinions about sexual orientation and SOCE, including the views that same-sex attractions can be reduced or eliminated, that homosexuality is morally wrong, and/or that a minor could seek SOCE from a religious counselor or provider not covered by the challenged law.[4] SB 1172 just prohibits the practice of SOCE on minors by licensed mental health providers. Accordingly, as the district court held, because this case involves the regulation of a mental health treatment, not speech, content and viewpoint discrimination analysis does not apply. ER 15-16.

a. *Conant* does not control because SB 1172 regulates therapy, not therapist-patient communication or otherwise protected speech.

In support of their argument that SB 1172 unconstitutionally discriminates on the basis of content and viewpoint, plaintiffs rely 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*, however, is factually distinguishable and inapposite.

[4] 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. Such speech would not, however, violate SB 1172.

At issue in *Conant* was a federal policy that expressly prohibited doctors from "recommending" the use of medical marijuana to their patients. *Id.* at 634. Because there was a great deal of confusion as to what qualified as a prohibited "recommendation," physicians feared that they would be prosecuted if they even discussed medical marijuana with their patients. 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. However, the Court determined 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 an

impermissible attempt to control speech. *Conant*, 309 F.3d at 636-38. [5] The Court 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 particular patient." *Conant*, 309 F.3d at 637.

The decision in *Conant*, as the district court found, does not control this case because it did not address regulation of professional conduct, practice, or treatment itself. ER 14-16. 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. 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.[6]

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[5] Plaintiffs seize upon *Conant*'s discussion of *Casey*, noting that this Court distinguished *Casey* on the basis that the regulation upheld in that case included an exception permitting a doctor to decline to give certain required information to patients seeking an abortion. *See* Opening Br. at 30-31. Plaintiffs reason that because SB 1172 does not provide an exception for practitioners who want to practice SOCE, it is an unconstitutional restriction on the exercise of professional judgment. However, there is a fundamental difference between the government compelling a practitioner to communicate information that he reasonably believes could harm a patient, at issue in *Casey*, and the prohibition here of a discredited and harmful treatment.

[6] Not all speech or communication between doctors and patients is subject to heightened First Amendment protection. While doctors have a protected right to

(continued…)

In marked contrast to the policy at issue in *Conant*, SB 1172 does not "punish" or regulate communications between therapists and minors about SOCE treatment. As the district court determined, "what SB 1172 proscribes is actions designed to effect a difference, not recommendations or mere discussions of SOCE." ER 16. Contrary to plaintiffs' understanding, 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 637-38 (rejecting government's argument that a doctor's recommendation of marijuana would cause patients to engage in illegal activity).

SB 1172 simply 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 638;

(…continued)
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.

see also ER 15-16. SB 1172 also does not compromise "a patient's meaningful participation in public discourse." *Conant*, 309 F.3d at 634.[7] Mental health professionals are not in danger of violating SB 1172 if they share with patients their "sincere judgment" that SB 1172 is not "sound policy," and both therapist and patient can "urge their view" to the public and the Legislature. *Id.*[8] SB 1172 prohibits the practice of SOCE on minors, something that is equivalent to prohibiting the prescription of medical marijuana and thus does not offend the First Amendment. Plaintiffs' reliance on *Conant* is thus inapt.[9]

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[7] For these same reasons, as the district court determined, SB 1172 does not violate the First Amendment rights of minors and their parents to receive information about SOCE. ER 21-22. *See* Conant, 228 F.3d at 643 (Kozinski, J., concurring).

[8] 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.

[9] Plaintiffs also rely on dicta in *NAAP* for the proposition that because SB 1172 dictates what can be said in therapy, it is not content-neutral. Opening Br. 28. However, as discussed above, SB 1172 does not "dictate the content of what is said in therapy," except to the extent it prohibits *treatments* deemed ineffective and harmful, which *NAAP* makes clear is constitutionally permissible. *See NAAP*, 228 F.3d at 1050, 1055-56. Because SB 1172 does not suppress protected speech based on its message or viewpoint, but regulates professional practices for the important purpose of protecting public health, safety, and welfare, it is not a content- or viewpoint-based regulation of speech. *See NAAP*, 228 F.3d at 1055-56; *see also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986); *Jacobs v. Clark Cty. School District*, 526 F.3d 419, 433 (9th Cir. 2008).

2. The over-broad application of the First Amendment urged by plaintiffs runs counter to well-established law.

Plaintiffs' notion that any restriction on speech by licensed therapists, including that used to deliver treatment, is subject to strict scrutiny and presumptively invalid under the First Amendment ignores a century of case law.

Indeed, the Supreme Court has cautioned against the kind of rigid and reflexive application of the First Amendment that plaintiffs urge here. 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." *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). Thus, courts routinely distinguish between the regulation of expressive speech

under the First Amendment (which must survive strict scrutiny) and the 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. Entertainment 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 898.

Plaintiffs attempt to portray SOCE treatment itself as expressive speech (and/or conduct), and profess that the "*raison d'etre* for SOCE is to convey messages regarding how to address unwanted same-sex attractions, behavior and identity." Opening Br. 25.[10] However, this argument fails. The Supreme Court has rejected the idea 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); *see also Rumsfield v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 66 (2006).

[10] Plaintiffs' description of SOCE is quite similar to the characterization of psychoanalysis made by plaintiffs and rejected by this Court in *NAAP*. *See* 228 F.3d at 1046 n.1

As the district court noted, unlike flag burning, tattooing, and distributing handbills, medical and mental health treatments generally, and SOCE in particular, do not evince the requisite "intent to convey a particularized message" of the healthcare provider's choosing, nor would they likely be understood by the patient as attempting to communicate such an expressive message. *See* ER 18 (quoting *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058 (9th Cir. 2010)).

Health care treatment generally, and mental health therapy in particular, is not a public forum opened for licensed professionals to engage in free expression, nor do licensed professionals have a constitutional right to provide treatment (especially to children) based on personal beliefs, no matter how deeply felt. *See*, *e.g.*, *Conant v. McCaffrey*, No. C 97–0139, 1998 WL 164946, at *3 (N.D. Cal. 1998) ("the patients and doctors are not meeting in order to advance particular beliefs or points of view; they are seeking and dispensing medical treatment"). 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 (1889). 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); *United States v. Feingold*, 454 F.3d 1001, 1005-06 (9th Cir. 2006).

SB 1172 does not regulate the expression of any idea, but instead regulates professional practice, and while the "First Amendment recognizes no such thing as a 'false idea,'" *Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988), there are false 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. at 449; *NAAP*, 228 F.3d at 1054. Thus, while being a member of a regulated profession does not "result in the 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.[11]

C. SB 1172 Is Not Facially Vague or Overbroad.

SB 1172 adequately describes the conduct it proscribes. The district court rightly determined that SB 1172 is not facially vague. ER 22-29. Indeed, SB 1172 expressly prohibits "a specific form of therapy, [SOCE], known to the community

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11 Plaintiffs make a related argument for the first time on appeal that therapists and patients who practice SOCE engage in "expressive activity conducted in intimate human relationships." Opening Br. 24. To the extent that plaintiffs contend that SB 1172 violates their right to freedom of association, this argument is waived. *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1321 (9th Cir. 1998). Moreover, it is groundless. Therapist-patient relationships do not constitute expressive associations under the First Amendment. *See Behar v. Pennsylvania Dept. of Transp.*, 791 F. Supp. 2d 383, 416 (M.D. Pa. 2011); *cf. NAAP*, 228 F.3d at 1050.

in which it is practiced." ER 25. Thus, as the district court concluded, "it is 'clear what the statute proscribes in the vast majority of its intended applications,' namely therapy intended to alter a patient's sexual orientation." ER 28 (quoting *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d at 1151).

To survive a facial vagueness challenge, a statute ordinarily need only "provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Plaintiffs argue that SB 1172 does not have the "precision of regulation" that is necessary when the government regulates expressive activity. However, as discussed above, SOCE is not an expressive activity. Moreover, even assuming, arguendo, that a heightened standard applies here, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794, (1989); *see also Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language"). "Even when a law implicates First Amendment rights, the constitution must tolerate a certain amount of vagueness." *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d at 1151. As a result, "uncertainty at a statute's margins will not warrant facial invalidation if it is clear what the statute proscribes 'in the vast majority of its intended applications.'" *Id.* (quoting *Hill*, 530 U.S. at 733). Statutory terms will be invalidated on vagueness

grounds only if they require application of "wholly subjective judgments," such as, a statute that "tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent.'" *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2720 (2010).

As the district court concluded, SB 1172's plain terms make clear what conduct is prohibited: "mental health providers, as defined by the statute, may not implement practices designed for the specific purpose of changing an individual's sexual orientation." ER 27. Although plaintiff-therapists "testify" that they cannot determine what conduct is prohibited by SB 1172, these claims are disingenuous.[12] The plaintiff-therapists are licensed mental health providers who specialize in the practice of SOCE, including on minors. *See* ER 25; 447, 451-454, 457. Plainly, they know what SOCE is, and thus what SB 1172 prohibits. Indeed, these plaintiffs have written extensively about SOCE and what it entails, ER 450, 453, 455; claim they provide detailed informed consent documents to patients which describe SOCE in detail, ER 447, 452, 453, 457-458; and routinely use the terms "sexual orientation change efforts" and "SOCE," to refer to the treatments they offer, ER 446-447, 451-458. For example, plaintiff Pickup states: "In my

[12] The plaintiffs' testimony is also irrelevant to their facial challenge to SB 1172. The issue is not their subjective comprehension of the statute, but whether "a reasonable person of ordinary intelligence would understand that his or her conduct is prohibited by the law in question." *United States v. Fitzgerald*, 882 F.2d 397, 398 (9th Cir. 1989).

professional practice, I specialize in providing minor children with sexual orientation change efforts ('SOCE') counseling to help them reduce unwanted same-sex attractions and help them maximize their heterosexual potential." ER 367 at ¶ 3; *see also* ER 373 at ¶ 7 (Pruden states, "[t]he majority of children that come to my office dealing with same-sex attractions are not interested in sexual orientation change efforts ('SOCE')); ER 373-374 at ¶ 9 ("When both the minor clients and the parents want SOCE counseling . . ."); ER 385 at ¶ 17 (Nicolosi declares, "[b]ecause my clinic focuses on SOCE counseling …"); ER 396-397 at ¶ 5 (Vazzo states, "[i]n my current practice, I specialize in sexual orientation change efforts ('SOCE') counseling"). Plaintiff Pickup also says that "I participated in this treatment for many years." ER 368 at ¶ 6. Thus, even if plaintiff-therapists could identify situations at the margins where SB 1172's application might be unclear, they cannot establish that SB 1172 is unconstitutionally vague. *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973) ("even if the outermost boundaries of [the statute] may be imprecise, any such uncertainty has little relevance here, where appellants' conduct falls squarely within the 'hard core' of the statute's proscriptions and appellants concede as much"); *see also Holder v. Humanitarian Law Project*, 130 S. Ct. at 2719-20.

Plaintiff-therapists' practice involves changing their patients' sexual orientation, yet they contend that in the absence of a specific definition, they do not

understand what the term "sexual orientation" means, and thus what they are prohibited from changing. Opening Br. 43-44. Notwithstanding plaintiffs' purported confusion, the term "sexual orientation" is well understood within the mental health field. ER 181-212; 246-264. To practicing therapists, it is a term of "common understanding . . . to which no [practitioner] is a stranger." *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d at 1151. Moreover, the meaning of "sexual orientation" can also be determined by reference to other readily available sources. As the district court noted, the ordinary meaning of the term "sexual orientation" concerns a "person's sexual identity in relation to the gender to whom he or she is usually attracted; [] the fact of being heterosexual, bisexual, or homosexual." ER 25 (quoting *Concise Oxford English Dictionary* 1321 (12th ed. 2011)). Numerous California statutes reinforce this understanding. *See* Cal. Educ. Code § 212.6 (defining sexual orientation as "heterosexuality, homosexuality, or bisexuality"); Cal. Civ. Code § 51(e)(6) (same); Cal. Penal Code § 422.56(h) (same); *see also, e.g., Hyman v. City of Louisville*, 132 F. Supp. 2d 529, 545-46 (W.D. Ky. 2001) (rejecting vagueness challenge to the term "sexual orientation," finding that it has a common meaning, and canvassing cases rejecting similar challenges), *rev'd on other grounds*, 53 Fed.Appx. 750 (6th Cir. 2002). While plaintiffs posit that "for some," sexual orientation identity may be "fluid" and that the cause of homosexuality is unknown, Opening Br. 44, neither of these facts

alters the meaning of the term "sexual orientation" nor do they render SB 1172 unconstitutionally vague.

The terms "sexual orientation," "sexual orientation change efforts" and "SOCE" are widely used in the mental health field and in the academic literature on human sexuality. *See* ER 246-264; *see generally* ER 181-212. Where, as here, a statutory prohibition "involves conduct of a select group of persons having specialized knowledge, and the challenged phraseology is indigenous to the idiom of that class," it must be upheld so long as it uses "words or phrases having a technical or other special meaning, well enough known to enable those within its reach to correctly apply them." *United States v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1993). Thus, because the terms "sexual orientation" and "sexual orientation change efforts" have an established and accepted meaning within the professional community regulated by SB 1172, the statue is not unconstitutionally vague. *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d at 1151.[13]

[13] Plaintiffs claim that the lack of a "consistent, concrete" definition of sexual orientation among mental health professionals renders SB 1172 unconstitutionally vague. Opening Br. 46. However, whatever trivial variations there may be in the way professionals describe sexual orientation, the term is sufficiently precise to be constitutional. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. at 608 (recognizing that there "may be disputes over the meaning of such terms . . . as 'partisan,' or 'take part in,' or 'affairs of' political parties," but nonetheless rejecting facial vagueness challenge).

1. Plaintiffs' hypothetical applications of SB 1172 do not support their facial vagueness claim.

Unable to identify any genuine ambiguity in the core prohibition against engaging in SOCE with a minor, plaintiffs pose several hypotheticals in an attempt to create uncertainty at the statute's margins. However, SB 1172 readily provides answers to all of these supposed areas of confusion. On its face, a therapist does not violate SB 1172 by simply "disseminating educational information regarding same-sex attractions" or about SOCE, Opening Br. 40, because simply mentioning SOCE's existence is not "a practice[] … that seek[s] to change the individual's sexual orientation." Cal. Bus. & Prof. Code § 865 (b)(1). Nor would a reasonable person question whether recommending a book or handing out educational materials to a patient or parent, without more, constitutes an attempt to change someone's sexual orientation through the application of psychological treatments and techniques.

Similarly, the law does not prohibit, on its face or otherwise, web videos, radio broadcasts, or electronic transmissions into California about SOCE. *See* Opening Br. 17. To violate SB 1172, a mental health provider must be engaged with a "patient," Cal. Bus. & Prof. Code §§ 865.1, 865.2; *see also id.* § 2903 (defining psychotherapy, in part, as "the use of psychological methods in a professional relationship"). With respect to plaintiffs' elaborate hypothetical regarding the application of SB 1172 to "multijurisdictional professionals" who

may be in California, but engaging in video therapy with a patient in another jurisdiction, (where the professional is also licensed), *see* Opening Br. 42, any uncertainty is not created by SB 1172, but by the divergent regulatory schemes that govern professionals with multiple licenses. Finally, although Plaintiffs suggest that that the statute is impermissibly vague in that it "appears" to require them to provide "affirmative" therapy to homosexual patients, this is incorrect. While SB 1172 does not prohibit such affirmative therapies, it also does not compel them.[14]

Despite plaintiffs' attempts to create vagueness where none exists, ultimately, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Hill*, 530 U.S. at 733. Accordingly, the district court correctly determined that plaintiffs have no likelihood of succeeding on their vagueness claim. *See*, *e.g.*, *id*. (rejecting vagueness challenge to ordinance making it a crime to "approach" another person without that person's "consent," and to engage in "oral protest, education, or counseling" within specified distance of health care facility).

[14] Moreover, "affirming" therapy does not mean encouraging same-sex attractions or behaviors. It simply means assisting and affirming the client without any *a priori* treatment goal concerning how clients identify or express their sexual orientation. ER 236.

2. Plaintiffs have failed to demonstrate overbreadth.

Plaintiffs also argue that SB 1172 is overbroad. Opening Br. 45-46. Plaintiffs did not raise this issue before the district court, nor did the district court rule on it. However, even assuming that this argument is not waived, *see Peterson v. Highland Music, Inc.*, 140 F.3d at 1321, it is without merit.

The Supreme Court has said that First Amendment overbreadth doctrine is "strong medicine" only to be used as a last resort, when a statute implicates a substantial amount of protected expression. *New York v. Ferber*, 458 U.S. 747, 769 (1982) (citing *Broadrick*, 413 U.S. at 613). It has admonished that "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 770; *see also Virginia v. Hicks*, 539 U.S. 113, 124 (2003).

Plaintiffs cannot meet this standard. As set forth above, plaintiffs have not demonstrated that SB 1172 implicates protected expression at all. Moreover, the entire "sweep" of SB 1172 is the "legitimate" regulation of mental health professionals. *See NAAP*, 228 F.3d at 1054. Finally, plaintiffs' characterization of SB 1172 as creating a "prohibition of alarming breadth" is unfounded. SB 1172 prohibits SOCE for minors. SB 1172 does not stop plaintiffs from continuing to counsel their clients using other accepted and beneficial therapies.

D. There Is No Fundamental Right To Obtain Mental Health Treatments the State Has Deemed Ineffective and Potentially Harmful.

Plaintiffs contend that their fundamental right to raise their children as they see fit, which no one disputes that they have, encompasses an unrestricted right to choose mental health treatments for their children without government interference. Based on this premise, plaintiffs posit that SB 1172 is subject to strict scrutiny. Opening Br. 46-49. The district court, after a thorough and comprehensive analysis, rejected this argument. ER 29-42.

Plaintiffs vastly overstate the scope of parental autonomy. Contrary to their assertions of an absolute right to make decisions relating to the "mental health" of the child, "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare . . . ." *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944). Although parents undoubtedly have a right to the "custody, care and nurture of the child," *id.* at 166, the "rights of parenthood are [not] beyond limitation." *Prince*, 321 U.S. at 167. Thus, in *Parham v. J.R.*, 442 U.S. 584 (1979), a case on which plaintiffs rely, the Supreme Court held that "a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." 442 U.S. at 603 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972)). Here, the State has enacted a reasonable regulation to protect minors from mental health practices that are

ineffective and unsafe. Thus, it is well within "the rightful boundary of its power" to protect minors from "harmful possibilities . . . of . . . psychological or physical injury." *Prince*, 321 U.S. at 170.

While parents have a right to seek mental health care for their children, plaintiffs cannot compel the State to permit licensed mental health professions to engage in unsafe practices, and cannot dictate the prevailing standard of care in California based on their own views. *See Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1204-06 (9th Cir. 2005) (although parents have the right to choose a specific educational program, this does not "afford parents a right to compel public schools to follow their own idiosyncratic views as to what information the schools may dispense"). Indeed, the Ninth Circuit and other courts uniformly have held that there is no fundamental right or privacy interest, either on one's own behalf or on behalf of one's children, to particular medical treatments reasonably prohibited by the government. *See, e.g.*, *NAAP*, 228 F.3d at 1050; *Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993).

In *Rutherford v. United States*, 616 F.2d 455, 457 (10th Cir. 1980), the court rejected a suit brought by terminally ill cancer patients to enjoin the federal government from interfering with the shipment and sale of laetrile. The court held that "the decision by the patient whether to have a treatment or not is a protected right, but his selection of a particular treatment, or at least a medication, is within

the area of government interest in protecting public health." *Id*. at 457. The Ninth Circuit followed suit in *Carnohan v. United States*, 616 F.2d 1120, and held that "[c]onstitutional rights of privacy and personal liberty do not give individuals the right to obtain laetrile free of the lawful exercise of government police power." *Id.* at 1122; *see also Duncan v. United States*, 590 F. Supp. 39, 40-41 (W.D. Okla. 1984) (parents of a child with Down's Syndrome could not obtain unapproved drug); *Oklahoma Chapter of the Amer. Acad. of Pediatrics v. Fogarty*, 366 F. Supp. 2d 1050 (N.D. Okla. 2005) (parents have no fundamental right to obtain experimental asthma drug for their children).

Plaintiffs assert that the district court wrongly concluded that the State "had met its burden of proving that SOCE counseling is harmful to minors." Opening Br. 47. However, this misstates both the governing legal framework and the district court's decision. The district court found that there is no fundamental right to choose a specific mental health treatment that the State has deemed harmful to minors.[15] ER 31, 41-42. Because there is no fundamental right, the State's

[15] The district court did not hold that SB 1172 does not infringe parents' fundamental rights simply because it only bars parents from obtaining SOCE from state-licensed therapists. Plaintiffs take this statement out of context. Opening Br. 48-49. The district court stated that unlike many of the cases cited by plaintiffs, SB 1172 did not "enact a comprehensive and total ban" and thus any incursion into parental rights was minimal. The district court went on to note that also unlike in cases such as *Meyer v. Nebraska*, 262 U.S. 390 (1923), in enacting SB 1172, the

(continued…)

regulation need only survive rational basis review. Accordingly, it is not the State's burden to prove that SOCE is harmful; rather it is plaintiffs' burden to demonstrate that SB 1172 lacks any conceivable rational basis. *Heller v. Doe*, 509 U.S. 312, 319 (1993). Given the State's interest in protecting the health and safety of minors and the evidence of SOCE's inefficacy and risk of harms to minors, plaintiffs cannot meet their burden.

E. 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 Such Interest.

As the district court held, 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." ER 21. Contrary to plaintiffs' contentions, Opening Br. 49-50, SB 1172 easily passes rational basis review.

(…continued)
Legislature relied on significant evidence indicating that SOCE is ineffective and harmful. ER 34.

Moreover, plaintiffs' notion that it is preferable for minors to receive SOCE from licensed mental health professionals rather than religious and unlicensed practitioners is misguided. Unlike valid medical treatments, there is no benefit to receiving SOCE from a licensed professional, but there is a greater harm from doing so. SOCE does not work, and may be damaging, no matter who performs it, but there is a particular harm in giving the imprimatur of a state license to a scientifically invalidated practice.

State regulation 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*, 509 U.S. at 319. 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. Cal.*, 191 F.3d 1020, 1031 (9th Cir. 2005)).

The district court found that the State of California has a legitimate, indeed compelling, interest in protecting the physical and psychological well-being of minors. ER 43. 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).

Plaintiffs contend that SB 1172 fails rational basis review because the Legislature lacks empirical proof positive that SOCE causes harm to minors. In particular, plaintiffs devote much of their Opening Brief to criticizing the APA Report, which was one of many pieces of evidence upon which the Legislature relied. However, a state need not offer "scientific or epidemiological 'hard data'" to support a law or regulation affecting public health." *New York State Ophthalmological Soc'y v. Bowen*, 854 F.2d 1379, 1391 (D.C. Cir. 1987); *Whalen*, 429 U.S. at 598 n.21. Even the possibility that the Legislature's concern is not universally shared, and may eventually be proven unfounded, does not undermine its authority to adopt laws in protection of public health and safety. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 35 (1905).[16]

In sum, plaintiffs do not, and cannot, meet their burden of demonstrating that SB 1172 lacks any conceivable rational basis. *See Heller v. Doe*, 509 U.S. at 319. Therefore, the district court correctly held that plaintiffs have no likelihood of prevailing on their claims that SB 1172 violates their constitutional rights.

[16] Because SB 1172 is a reasonable regulation of professional conduct and assessed under rational basis review, plaintiffs' reliance on *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (2009), is misplaced, as the district court found. ER 43. In any event, here the consensus of mainstream mental health organizations and the cumulative and widely accepted evidence of harm caused by SOCE are in a different class from the violent video studies the Supreme Court considered to have been "rejected by every court to consider them" and at most to show "minuscule real-world effects." *See Brown v. Entertainment Merchants*, 131 S. Ct. at 2739.

III. BECAUSE PLAINTIFFS FAILED TO DEMONSTRATE ANY LIKELIHOOD OF SUCCESS ON THE MERITS, THE DISTRICT COURT PROPERLY DENIED THE MOTION FOR PRELIMINARY INJUNCTION

Because plaintiffs failed to demonstrate any likelihood of success on the merits of their claims, the district court was not required to consider the remaining preliminary injunction factors. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1111 (9th Cir. 2012); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1131, 1135 (9th Cir. 2011). Moreover, in the absence of any constitutional violation, plaintiffs cannot demonstrate that they will be injured, let alone irreparably so, if SB 1172 goes into effect, or that the balance of hardships and the public interest militate in favor of an injunction.

A. The District Court Employed the Correct Legal Standard.

A "preliminary injunction is an extraordinary remedy never awarded as a matter of right." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008) (internal quotations and citations omitted). To justify a preliminary injunction, the moving party must establish by a "clear showing" "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20, 22. Alternatively, "[a] preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply

in the plaintiff's favor." *Cottrell*, 632 F.3d at 1134-35 (internal quotations omitted). Even under the alternative sliding scale test, however, plaintiffs must satisfy all four *Winter* factors. *Id*. at 1135.

Plaintiffs contend that the district court erred by failing to apply the balancing test set forth in *Cottrell*, and by refusing to consider the remaining preliminary injunction factors. Opening Br. 21-23, 51-55. As an initial matter, plaintiffs have not demonstrated any cognizable injury and/or that the balance of hardships in this case tips so strongly in their favor as to justify use of the *Cottrell* standard. *See Cottrell*, 632 F.3d at 1131-35. Moreover, the district court properly determined that plaintiffs had not satisfied their burden to demonstrate a likelihood of success on the merits under any standard. Regardless of what formulation is applied, to obtain a preliminary injunction, a movant must establish "at an irreducible minimum," a "fair chance of success" and/or a "serious question" on the merits. *Pimentel*, 670 F.3d at 1111 (9th Cir. 2012).[17] Here the district court

[17] A "serious legal question" must present a "substantial case for relief on the merits." *Leiva-Perez v. Holder*, 640 F.3d 962, 967-68 (9th Cir. 2011). Plaintiffs posit that because in *Welch et al. v. Brown et al.*, No. 12-02484 (E.D. Cal. Dec. 3, 2012), the Honorable William B. Shubb enjoined the enforcement of Senate Bill 1172 as against the three named *Welch* plaintiffs, "serious questions" about the constitutionality of SB 1172 necessarily exist. Opening Br. 23. Even assuming that it were appropriate to apply the *Cottrell* balancing test here, the fact that another judge came to a different, and erroneous, conclusion regarding SB 1172 does not establish a "substantial, difficult and doubtful" issue that can not be

(continued…)

determined, after a comprehensive analysis of plaintiffs' claims, that they had demonstrated *no* likelihood of success on the merits. ER 12 ("plaintiffs do not meet the threshold test of likelihood of prevailing on the merits on any claim"); ER 12-44.

Under either test, a movant must satisfy all four *Winter* factors. *Cottrell*, 632 F.3d at 1135; *see also Winter v. NRDC, Inc.*, 555 U.S. at 23 (failure to establish any one "of these factors alone requires denial of the requested injunctive relief"). Thus, where, as here, the moving party has failed to establish a showing of likelihood of success on the merits or a "serious question," a court need not consider the remaining factors. *Pimentel*, 670 F.3d at 1111; *DISH Network Corp. v. FCC*, 653 F.3d 771, 776-77 (9th Cir. 2011) ("because we agree with the district court that DISH has failed to satisfy its burden of demonstrating it has met the first element [of likelihood of success on the merits of its First Amendment claim], we need not consider the remaining three"); *see also Winter v. NRDC, Inc.*, 555 U.S. at 23 (declining to address remaining factors where plaintiffs could not overcome the public policy and strong government interests that weighed against granting the

(…continued)
"resolved one way or the other at the hearing on the injunction." *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991).

injunction).[18] Thus, contrary to Plaintiffs' argument, the district court "employed the appropriate legal standards" governing the issuance of a preliminary injunction. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d at 1013.

B. Plaintiffs Cannot Meet Their Burden to Demonstrate Irreparable Harm, or Demonstrate That the Balance of Harms and the Public Interest Weigh in Favor of an Injunction.

In the absence of constitutional injury, plaintiffs cannot meet the standard for injunctive relief; their remaining assertions of injury are unfounded. The six plaintiffs who are licensed therapists or professional associations claim that permitting SB 1172 to take effect will threaten "destruction of their careers and loss of livelihoods." Opening Br. 53. However, SB 1172 does not deprive plaintiffs of their livelihoods or ability to continue to practice as licensed therapists in California. It simply requires them to refrain from engaging in SOCE with

[18] In support of their contention that the district court erred by not reaching their evidence of harm, plaintiffs primarily rely on this Court's opinions in *Pimentel* and *M.R. v. Dreyfus*, 697 F.3d 706 (9th Cir. 2012). These cases, however, do not support plaintiffs' argument. In *Pimentel*, consistent with the discussion above, this Court reversed a preliminary injunction because even though "the other *Winter* factors may tip in [plaintiff's] favor and in fact remain unchallenged," the plaintiffs could not establish the "irreducible minimum" requirement of likelihood of success on the merits, and thus they were not entitled to a preliminary injunction. 670 F.3d at 1111 (citations omitted). In *M.R. v. Dreyfus*, this Court reversed the denial of a preliminary injunction because it determined that plaintiffs had shown at least serious questions going to the merits and irreparable injury. 697 F.3d at 725, 732-36. Neither of these cases holds that where the moving party cannot establish a chance of success on the merits, and thus that an injunction cannot issue, that a court is obligated to consider the other factors.

minors. Plaintiffs can avoid placing their professional licenses in jeopardy by complying with the law. *See Winter*, 555 U.S. at 22.

Although plaintiffs contend that minor clients will suffer harm if they are not able to continue in SOCE therapy, given the complete lack of evidence of SOCE's efficacy and the proof that it is potentially dangerous to minors, this conclusion is baseless. To the extent that plaintiffs claim that SB 1172 will disrupt existing therapist-patient relationships, this also cannot form the basis for injunctive relief. SB 1172 prohibits SOCE for minors. It does not require the sudden cessation of counseling or rupture of the therapeutic alliance. There are many other accepted therapies with which to treat emotional distress caused by sexual abuse, family discord, and conflicts between sexual orientation and religious and moral beliefs. These therapies provide all the "generic" benefits of SOCE without any of the attendant harms. *See* ER 225, 273-276. SB 1172 does not stop plaintiff-therapists from continuing to counsel their clients using these methods.

Plaintiffs' remaining claim that failing to enjoin SB 1172 will cause irreparable harm to therapists by somehow forcing them to violate their ethical obligations fails. Given that SOCE has been disavowed by every mainstream association of mental health experts, plaintiff-therapists, who are obligated to provide competent care, plainly have no professional ethical obligation to offer SOCE to minors.

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 263-265.

Accordingly, the law, the balance of harms, and the public interest all weigh decisively against entry of a preliminary injunction in this matter.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court affirm the decision of the district court and vacate the injunction pending appeal.

Dated: January 30, 2013

Respectfully Submitted,

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12-17681

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID H. PICKUP; et al. ,

Plaintiffs-Appellants,

v.

EDMUND G. BROWN Jr., Governor of the State of California, in his official capacity; et al.,

Defendants-Appellees,

EQUALITY CALIFORNIA,

Intervenor-Appellee.

STATEMENT OF RELATED CASES

The following related case is pending: *Welch, et al. v. Brown, et al.*, Ninth Circuit, Case No. 13-15023.

Dated: January 30, 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 12-17681

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

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

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[ ] 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).

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[ ] 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 30, 2013
Dated

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

CERTIFICATE OF SERVICE

Case Name: **Pickup, David, et al. v. Brown, et al.** No. **12-17681**

I hereby certify that on January 30, 2013, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

ANSWERING BRIEF OF DEFENDANTS-APPELLEES

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

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 30, 2013, at San Francisco, California.

N. Newlin	*s/ N. Newlin*
Declarant	Signature

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