No. 13-15023

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD WELCH et al.,
Plaintiffs-Appellees,

v.

EDMUND G. BROWN, JR., Governor of the State of California, in his official capacity, et al.,
Defendants-Appellants.

PRELIMINARY INJUNCTION APPEAL (NINTH CIRCUIT RULE 3-3)
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
WILLIAM B. SHUBB, DISTRICT JUDGE • CASE NO. 2:12-2484 WBS KJN

BRIEF *AMICUS CURIAE* OF FIRST AMENDMENT SCHOLARS IN SUPPORT OF DEFENDANTS-APPELLANTS SUPPORTING REVERSAL

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BRIEF *AMICUS CURIAE* OF FIRST AMENDMENT SCHOLARS IN SUPPORT OF DEFENDANTS-APPELLANTS SUPPORTING REVERSAL

INTEREST OF *AMICI CURIAE*

Amici curiae are First Amendment scholars who share an interest in ensuring that the constitutionality of S.B. 1172, 2011-2012 Reg. Sess. (Cal. 2012) is determined in accordance with settled First Amendment principles. This brief is submitted in two cases before this Court challenging S.B. 1172: *Pickup v. Brown*, No. 12-17681, and *Welch v. Brown*, No. 13-15023.

Vikram Amar teaches Constitutional Law at the University of California, Davis Law School, where he is the Associate Dean for Academic Affairs and Professor of Law. Previously he taught at UC Berkeley, UCLA, and UC Hastings Law Schools. He has authored, co-authored, and edited numerous books and articles in top law reviews. His books include (with Jonathan Varat and William Cohen) *Constitutional Law: Cases and Materials* (13th ed. 2009) and *The First Amendment, Freedom of Speech: Its Constitutional History and the Contemporary Debate* (2009). Professor Amar served as law clerk for United States Supreme Court Justice Harry Blackmun. He authors a bi-weekly column on constitutional matters for justia.com.

Alan E. Brownstein is Professor of Law, Boochever and Bird Chair for the Study and Teaching of Freedom and Equality, at the University of California, Davis Law School. He has written extensively on freedom of speech and other constitutional law subjects, including dozens of law review articles. His books include (with Leslie Jacobs) *Global Issues in Freedom of Speech and Religion* (2008). Professor Brownstein received the UC Davis School of Law's Distinguished Teaching Award in 1995 and the

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Erwin Chemerinsky is the Founding Dean and Distinguished Professor of Law at the University of California, Irvine School of Law. Previously he taught at Duke Law School for four years and at the University of Southern California School of Law for 21 years. Professor Chemerinsky has also taught at UCLA School of Law and DePaul University College of Law. His areas of expertise are constitutional law, federal practice, civil rights and civil liberties, and appellate litigation. He is the author of seven books and nearly 200 law review articles. Among the many courses he has taught are First Amendment Law and Free Speech Rights on College Campuses.

Michael C. Dorf is the Robert S. Stevens Professor of Law at Cornell Law School. He is the co-author (with Laurence Tribe) of *On Reading the Constitution* (1991), the co-author (with Trevor Morrison) of *The Oxford Introductions to U.S. Law: Constitutional Law* (2010), and the editor of *Constitutional Law Stories* (2d. ed. 2009). He served as law clerk for Judge Stephen Reinhardt of the United States Court of Appeals for the Ninth Circuit and then for Justice Anthony M. Kennedy of the Supreme

Court of the United States. Before joining the Cornell faculty, Professor Dorf taught at Rutgers-Camden and Columbia Law Schools.

Pamela S. Karlan is the Kenneth and Harle Montgomery Professor of Public Interest Law and Co-Director of the Supreme Court Litigation Clinic at Stanford Law School. She has served as a commissioner on the California Fair Political Practices Commission and an assistant counsel and cooperating attorney for the NAACP Legal Defense Fund. Professor Karlan is the co-author of three leading casebooks on constitutional law, constitutional litigation, and the law of democracy, as well as more than 60 scholarly articles. Before joining the Stanford faculty, she was a Professor of Law at the University of Virginia School of Law and served as law clerk for United States Supreme Court Justice Harry Blackmun.

Steven H. Shiffrin is the Charles Frank Reavis Sr. Professor of Law at Cornell Law School. He previously taught at UCLA, Boston University, Harvard University, Seattle University, and the University of Michigan. Professor Shiffrin's writings on freedom of speech have appeared in many legal publications. He is the author of *The First Amendment, Democracy, and Romance* (1990) and is the co-author (with Jesse Choper, Richard Fallon and Yale Kamisar) responsible for the freedom of speech materials

in *Constitutional Law: Cases—Comments—Questions* (11th ed. 2011), and the co-author (with Jesse Choper) responsible for the freedom of speech materials in *The First Amendment: Cases—Comments—Questions* (5th ed. 2011).

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except *amici curiae* and their counsel contributed money to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. S.B. 1172, which prohibits licensed mental health providers in California from engaging in the practice of sexual orientation change efforts (SOCE) with minors, does not implicate the First Amendment merely because speech is a component of SOCE. The State may regulate the health care professions, unimpeded by the First Amendment, to protect the public from spoken misconduct by doctors. The First

Amendment protects a doctor's right to extol the virtues of snake oil in public discourse, but not to tell a patient to use it.

Indisputably, the California courts may, without constitutional restraint, impose liability for medical malpractice that is committed through speech. Likewise, the California Legislature, having determined that SOCE for minors is medical malpractice, may restrict its use without offending the First Amendment. SOCE enjoys no more First Amendment protection than the hawking of snake oil.

2. Even if SOCE triggers some sort of First Amendment protection, it cannot be at the level of strict scrutiny, because S.B. 1172 does not discriminate on the basis of content or viewpoint. The legislation is content neutral because it does not prohibit mental health providers from discussing SOCE with a patient, and the legislation is viewpoint neutral because it does not prohibit the expression of an opinion that SOCE might help the patient. S.B. 1172 only sanctions the actual *practice* of SOCE by mental health providers.

3. Absent strict scrutiny, this Court should defer to the legislative fact-finding underlying S.B. 1172. Such deference is owed, even in First

Amendment cases, because legislatures are better equipped than courts to amass and evaluate the data bearing on legislative questions.

ARGUMENT

I. SPEECH AS A COMPONENT OF REGULATED CONDUCT DOES NOT IN ITSELF INVOKE FIRST AMENDMENT PROTECTION.

We begin with the settled principle that speech as a component of SOCE does not in itself invoke First Amendment protection. More than 60 years ago, the Supreme Court explained that "it 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." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Thus, in *Giboney*, the State could enjoin unlawful picketing despite the picketers' use of placards, because "placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control." *Id.*

Giboney involved speech as a component of criminal conduct, but subsequent cases demonstrate that the *Giboney* principle applies to *any* conduct that is within the power of the State to forbid or regulate. A

generation after *Giboney*, in a case involving a state bar association's prohibition on lawyer solicitation, the Supreme Court reiterated that "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). The Court commented: "Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and product information among competitors, and employers' threats of retaliation for the labor activities of employees." *Id.* (citations omitted).

As the Dean of Yale Law School explains, "vast stretches of ordinary verbal expression, as for example between dentists and their patients, between corporations and their shareholders, between product manufacturers and their customers, are not considered necessary for the formation of public opinion and are consequently excluded from First Amendment coverage." Robert C. Post, *Democracy, Expertise, Academic Freedom: A First Amendment Jurisprudence for the Modern State* 15 (2012) [hereinafter *First Amendment Jurisprudence*].

In *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043 (9th Cir. 2000) (*NAAP*), this Court applied the *Giboney* principle to speech as a component of psychoanalysis, rejecting the plaintiffs' contention "that, because psychoanalysis is the 'talking cure,' it deserves special First Amendment protection because it is 'pure speech.'" *Id.* at 1054. The Court explained: "As the district court noted, however, '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.*

Plainly, the State may regulate the various professions, unimpeded by the First Amendment, to protect the public from, for example, spoken misconduct by unscrupulous lawyers or charlatan doctors. "[T]he 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." *Shea v. Bd. of Med. Exam'rs*, 81 Cal. App. 3d 564, 577 (1978); *see also Oasis West Realty, LLC v. Goldman*, 51 Cal. 4th 811, 824 (2011) ("'a lawyer's right to freedom of expression is modified by the

lawyer's duties to clients'"). The First Amendment does not provide a constitutional right to hawk snake oil.

A doctor surely could not evade malpractice liability for giving incompetent medical advice—say, advising a patient to take up smoking because the doctor believes it to be healthy, or advising an anorexic to lose weight in order to improve her physical appearance—by claiming it was speech and thus protected by the First Amendment. Yet that is where a judgment for the plaintiffs here would lead.

The law has always been otherwise. "First Amendment coverage does not typically extend to malpractice litigation." *First Amendment Jurisprudence*, *supra,* at 45. "If an expert chooses to participate in public discourse by speaking about matters within her expertise, her speech will characteristically be classified as fully protected opinion." *Id.* at 43. "Outside of public discourse, by contrast, the First Amendment functions quite differently." *Id.* at 44. "[M]alpractice law outside of public discourse rigorously polices the authority of disciplinary knowledge. It underwrites the competence of experts. Doctors, dentists, lawyers or architects who offer what authoritative professional standards would regard as incompetent advice to their clients face strict legal regulation." *Id.* at 44-

45. The First Amendment protects a doctor's right to extol the virtues of snake oil in public discourse, but not to tell a patient to use it.

Thus, "[i]f your doctor offers you incompetent advice X, you may sue the doctor for malpractice, and the doctor may not invoke the First Amendment as a defense. . . . But if your doctor goes on the Jay Leno show and advises X to the general public, and if in reliance on the doctor some member of the public P decides to follow X and is consequently injured, the doctor will be entitled to a First Amendment defense in a suit by P for malpractice." Robert Post, *Discipline and Freedom in the Academy*, 65 Ark. L. Rev. 203, 212 (2012).

This contrast between public discourse by professionals, which the First Amendment protects, and non-public communication between professionals and their clients, which the First Amendment does not protect, "is the single most salient pattern of entrenched First Amendment doctrine." *First Amendment Jurisprudence*, *supra,* at 23. Outside the realm of public discourse, doctors may be sanctioned by licensing boards or held liable in medical malpractice proceedings for wrongdoing that is committed through speech, such as expressing an inaccurate or false medical opinion or advising a dangerous course of conduct. Administrative

and judicial proceedings for medical malpractice perpetrated via speech have long been permitted without any suggestion that they raise First Amendment issues.

"The practice of medicine, like all human behavior, transpires through the medium of speech. In regulating the practice, therefore, the state must necessarily also regulate professional speech. Without so much as a nod to the First Amendment, doctors are routinely held liable for malpractice for speaking or for failing to speak." Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech* 2007 U. Ill. L. Rev. 939, 950 (2007). "[W]e routinely sanction doctors who deviate from professional standards in the course of their professional speech because we believe that in professional practice the safety and health of patients ought to trump the long-run benefits of debate." *Id.* at 951. And the primacy of such public health concerns is at its zenith where the mental and physical health of minors is at stake.

S.B. 1172, in effect, declares SOCE for minors to be a form of medical malpractice. It makes no difference whether such malpractice is made sanctionable by legislation or by the common law. The First Amendment is not implicated.

Laws and regulations commonly restrict or compel non-public speech by professionals. Courts may hold doctors liable for telling a patient to take a quack remedy; bar associations may sanction lawyers for advising a client to prosecute a frivolous appeal; regulations may require pharmacists to disclose the potential side effects of prescribed drugs. Judges should be leery of constitutionalizing such speech. The consequence would be to reduce the ability of courts, legislatures, and administrative agencies to protect the public from professional misconduct.

II. S.B. 1172 DOES NOT IMPLICATE STRICT SCRUTINY BECAUSE IT IS CONTENT AND VIEWPOINT NEUTRAL.

Even if SOCE triggers some sort of First Amendment protection, it cannot be at the level of strict scrutiny, which would apply only if S.B. 1172 discriminates on the basis of content or viewpoint. *See NAAP*, 228 F.3d at 1055. S.B. 1172 does not so discriminate.

S.B. 1172 limits its prohibition to "any *practices* by *mental health providers* that seek to change an individual's sexual orientation." Cal. Bus. & Prof. Code, § 865(b)(1) (West 2013) (emphasis added). The legislation does *not* prohibit mental health providers from discussing SOCE with a patient or expressing an opinion that it might help the

patient. The legislation only sanctions their actual *practice* of SOCE. To whatever extent speech and nonspeech elements are combined in the practice of SOCE, SB 1172's incidental effect on the speech element is justified by the government interest in regulating professional misconduct. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968).

The distinction between discussing/opining and practicing is pivotal for purposes of First Amendment analysis. This Court addressed the distinction in *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002), where the federal government had promulgated a policy by which physicians could be sanctioned for recommending the medical use of marijuana for their patients. Invalidating the policy as a First Amendment violation, *Conant* explained that to the extent the policy prohibited physicians from discussing the medical use of marijuana with patients it discriminated on the basis of content, and to the extent the policy prohibited physicians from expressing the opinion that medical marijuana would likely help a specific patient it discriminated on the basis of viewpoint. *Id.* at 637. The policy thus triggered strict scrutiny.

S.B. 1172, however, is content and viewpoint neutral. Nothing in the legislation prohibits mental health providers from discussing SOCE with a

patient or expressing the opinion that it might help the patient. They are only prohibited from *practicing* SOCE as *mental health providers*. *Cf. Conant,* 309 F.3d at 635-36 (distinguishing between recommending medical marijuana, which is constitutionally protected, and prescribing it, which is not). This is not a case in which mental health professionals are prohibited from communicating truth to a patient or are compelled to communicate a falsehood; this is a case in which mental health professionals are prohibited from engaging in malpractice.

In *Pickup v. Brown*, Judge Mueller properly understood S.B. 1172 to be content and viewpoint neutral, and thus to be distinguished from *Conant*. Order, Dec. 4, 2012, No. 2:12-cv-02497-KJM-EFB, ECF No. 80, at 16. As Judge Mueller explained, "S.B. 1172 does not on its face penalize a mental health professional's exercise of judgment in simply informing a minor patient that he or she might benefit from SOCE," and "the statute does not preclude a minor's taking information from a licensed mental health professional and then locating someone other than a licensed professional to provide SOCE." *Id.*

In contrast, in *Welch v. Brown*, Judge Shubb went astray in concluding that S.B. 1172 is *not* content neutral because it restricts the

content of speech during "talk therapy." Mem. and Order Re: Mo. for Prelim. Inj., Dec. 3, 2012, No. 2:12-cv-02484-WBS-KJN, ECF No. 55, at 23. Judge Shubb's analysis does not take into account the *Giboney* principle that speech as a component of regulated conduct does not in itself invoke First Amendment protection, *Giboney,* 336 U.S. at 502, or the admonition in *NAAP* that speech during "talk therapy" is not accorded special First Amendment status, *NAAP*, 228 F.3d at 1054.

Judge Shubb also erred in interpreting *O'Brien*, 391 U.S. 367, to require strict scrutiny here "because 'the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful.'" *Welch v. Brown*, Mem. and Order Re: Mo. for Prelim. Inj., Dec. 3, 2012, No. 2:12-cv-02484-WBS-KJN, ECF No. 55, at 24 (quoting *O'Brien* at 382). It is not merely the communication inherent in SOCE that the California Legislature has determined to be harmful; rather, it is SOCE itself, by whatever technique it is practiced, that the Legislature has found harmful.

III. ABSENT STRICT SCRUTINY, THIS COURT SHOULD DEFER TO THE LEGISLATIVE FACT-FINDING UNDERLYING S.B. 1172.

In the absence of strict scrutiny, the California Legislature's extensive factual findings in S.B. 1172—citing and quoting multiple studies and reports by various national organizations warning of serious health risks that SOCE poses for minors, *see* S.B. 1172, § 1(a)-(m)—loom very large. These are findings of "legislative facts" to which the courts must accord substantial deference. *See Vance v. Bradley*, 440 U.S. 93, 111 (1979). "[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Id.*

Such deference is owed, even in First Amendment cases, because legislatures are better equipped than courts to amass and evaluate the data bearing on legislative questions. *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 195-96 (1997); *accord, e.g., Lange-Kessler v. Dep't. of Educ. of the State of N.Y.*, 109 F.3d 137, 140 (2d Cir. 1997) ("A statute regulating a profession is presumed to have a rational basis unless the plaintiff shows that 'the legislative facts upon which the [statute] is apparently based

could not reasonably be conceived to be true by the governmental decisionmaker'"); *Gaudiya Vaishnava Soc. v. City of Monterey*, 7 F. Supp. 2d 1034, 1046 (N.D. Cal. 1998) ("courts must give deference to 'legislative' facts and refrain from intruding upon the accumulated common sense judgment of local lawmakers"). This is particularly true for matters of public health, where courts lack the expertise to second-guess a legislature's evaluation of the data it has amassed.

Plaintiffs cannot show that the legislative facts on which S.B. 1172 is based "could not reasonably be conceived to be true." *Vance*, 440 U.S. at 111. Indeed, the California Legislature's findings make a very compelling case that SOCE poses substantial health risks to lesbian, gay, bisexual, and transgender minors. This Court should defer to those findings, lest the Court "infringe on traditional legislative authority to make predictive judgments." *Turner*, 520 U.S. at 196.

CONCLUSION

For the foregoing reasons, this Court should determine that S.B. 1172 does not violate the First Amendment.

February 4, 2013

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FIRST AMENDMENT SCHOLARS

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS [FED R. APP. P. 32(a)(7)(C)]

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February 4, 2013 *s/ Jon B. Eisenberg*

CERTIFICATE OF SERVICE

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

I hereby certify that on February 4, 2013, I electronically filed the following document with the Clerk of the Court using the CM/ECF system:

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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 February 4, 2013, at Encino, California.

Jan Loza	/s/ *Jan Loza*
Declarant	Signature