No. 13-15023

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD WELCH, et al.,
Plaintiffs-Appellants,
v.
EDMUND G. BROWN, Jr., et al.,
Defendants-Appellees

On Appeal From The United States District Court
For The Eastern District Of California
No. 2:12-CV-02484-WBS-KJN (Honorable William B. Shubb)

BRIEF OF AMICUS CURIAE EQUALITY CALIFORNIA IN SUPPORT OF DEFENDANT-APPELLANTS

SHANNON P. MINTER (SBN 168907)
CHRISTOPHER F. STOLL (SBN 179046)
NATIONAL CENTER FOR LESBIAN RIGHTS
870 MARKET STREET, SUITE 370
SAN FRANCISCO, CA 94102
TELEPHONE: (415) 392-6257
FACSIMILE: (415) 392-8442

MICHELLE FRIEDLAND (SBN 234124)
MUNGER, TOLLES & OLSON LLP
560 MISSION STREET, 27TH FLOOR
SAN FRANCISCO, CA 94105-2907
TELEPHONE: (415) 512-4000
FACSIMILE: (415) 512-4077

DAVID C. DINIELLI (SBN 177904)
LIKA C. MIYAKE (SBN 231653)
BRAM ALDEN (SBN 272858)
MUNGER, TOLLES & OLSON LLP
355 SOUTH GRAND AVE, 35TH FLOOR
LOS ANGELES, CA 90071-1560
TELEPHONE: (213) 683-9100
FACSIMILE: (213) 687-3702

Counsel for Amicus Curiae Equality California

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

TABLE OF CONTENTS
(continued)

Page

STATE STATUTES

FEDERAL RULES

OTHER AUTHORITIES

CORPORATE DISCLOSURE STATEMENT

This Corporate Disclosure Statement is filed on behalf of Equality California in compliance with the provisions of Federal Rule of Appellate Procedure 26.1 requiring a nongovernmental party to a proceeding in a court of appeals to file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or state that there is no such corporation.

Equality California states that it is a nonprofit corporation with no such parent corporation, and no publicly held corporation owns 10% or more of its stock. Additionally, Equality California is unaware of any publicly held entity with a direct financial interest in the outcome of the instant litigation. A supplemental disclosure statement will be filed upon any change in the information provided herein.

Dated: February 4, 2013

/s/ David C. Dinielli

DAVID C. DINIELLI
MUNGER, TOLLES & OLSON LLP
NATIONAL CENTER FOR LESBIAN RIGHTS
Attorneys for EQUALITY CALIFORNIA

IDENTITY AND INTEREST OF AMICUS CURIAE AND SOURCE OF AUTHORITY TO FILE

Amicus Equality California is a state-wide civil rights advocacy group protecting the needs and interests of lesbian, gay, bisexual, and transgender Californians and their families. Equality California was the lead organizational sponsor of SB 1172 in the California Legislature and has been actively involved in defending SB 1172 against both of the challenges that are now before this Court. Equality California moved to intervene in both cases, and was granted party status in the case assigned to the Honorable Kimberly J. Mueller, District Judge of the U.S. District Court for the Eastern District of California (the "*Pickup* case"). In the appeal related to that case, No. 12-17681, Equality California filed an Answering Brief explaining why SB 1172 falls well within the California Legislature's power to regulate medical practice to protect the health and safety of patients, and therefore does not violate the First Amendment. In the present case, the Honorable William B. Shubb denied Equality California's motion to intervene without prejudice but permitted Equality California to participate as an *amicus* and to offer briefing, argument, and evidence in conjunction with the preliminary injunction hearing.

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 *amicus curiae* and its counsel contributed money to fund the preparation or submission of this brief.

ARGUMENT

I. INTRODUCTION

Equality California will not repeat here the arguments it made in its Answering Brief in the *Pickup* case. Equality California submits this brief solely to address three discrete points:

First, the district court in this case erred in holding that SB 1172 is a viewpoint-based speech restriction simply because the Legislature has enacted a medical regulation with which Plaintiffs disagree. Where the leading medical and mental health professional organizations agree that a practice offers no therapeutic benefit and carries a risk of serious harm, the First Amendment does not preclude the State from prohibiting that practice simply because the "viewpoint" of certain licensed practitioners departs from the mainstream consensus.

Second, the only reputable mental health professional ever to assert in recent years that sexual change orientation efforts can work—Dr. Robert Spitzer—recently recanted the 2003 study which led him to that assertion. (ER 118-23.) Dr.

Spitzer recognized the flaws in his own study, disavowed it, and apologized to the lesbian, gay, bisexual, and transgender ("LGBT") community.

Third, California has a compelling interest in protecting consumers from deceptive practices. California's prerogative to protect consumers is particularly strong here because sexual orientation change efforts are marketed to parents and youth under the false premise that homosexuality is an abnormality and a disorder that can and should be cured.

In short, sexual orientation change efforts not only falsely promise parents and young people that people can be "cured" of being gay, lesbian, or bisexual, they also present a serious risk of lasting harm to California's youth—including depression, anxiety and suicidal behavior. The Legislature acted well within its established powers by enacting SB 1172 to prevent these harms.

II. DISCUSSION

A. The Regulation Of Medical Treatments Is Not A "Viewpoint-Based" Speech Restriction Merely Because Some Doctors May Disagree With The Professional Standards Reflected In Those Regulations.

In briefs filed both in this case and in the related *Pickup* appeal, Equality California, the state officials defending SB 1172, and amici already have demonstrated that the State has the authority to regulate health care professions to protect the safety and well-being of patients and shield them from incompetent, deceptive, or harmful practices. (*E.g.*, Brief of Defendant-Intervenor-Appellee

Equality California, *Pickup, et al. v. Brown, et al.*, No. 12-17681, Dkt. #25-01, at 13-23 (citing, *inter alia*, *Watson v. Maryland*, 218 U.S. 173, 176 (1910) ("There is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine."); *Collins v. Texas*, 223 U.S. 288, 296 (1912) (where an individual "practises [*sic*] what at least purports to be the healing art[,] [t]he state constitutionally may prescribe conditions to such practice, considered by it to be necessary or useful to secure competence in those who follow it.")); Appellants' Opening Brief, Dkt. #10, at 23-30.) The State may properly regulate health professionals even when those regulations implicate the speech such professionals use in carrying out their professional duties. *E.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion) (when speech is "part of the practice of medicine, [it is] subject to reasonable licensing and regulation by the State").

The district court therefore erred in finding that SB 1172 creates an impermissible viewpoint-based speech restriction because the Legislature:

- "[E]nacted SB 1172 at least in part because it found that SOCE was harmful to minors and disagreed with the practice." (ER 23);
- Made "findings and declarations [that] convey a consistent and unequivocal message that the Legislature found that SOCE is ineffective and harmful." (ER 24); and

- Made a finding "'that being lesbian, gay or bisexual is not a disease, disorder, illness, deficiency, or shortcoming.'" (ER 26 (quoting SB 1172 § 1(a)).)

The legislative findings to which the district court referred were the basis for the Legislature's determination that California's youth should be protected from sexual orientation change efforts. They were based on the consensus of all responsible mental health organizations in the United States, and reflect precisely the sort of information a state legislature can and should weigh in considering regulations of a purported medical treatment. *See, e.g.*, *Jacobson v. Massachusetts*, 197 U.S. 11, 30-31 (1905) (upholding compulsory smallpox vaccination law as consistent with "high medical authority," notwithstanding the "theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox, or who think that vaccination causes other diseases of the body").

The fact that Plaintiffs, or anyone else, may *disagree* with the Legislature's implementation of that medical consensus does not make SB 1172 an act of impermissible viewpoint-based speech restriction. Medical regulation to enforce professional standards of care will always constrain doctors whose ideas about medical practice are inconsistent with professional norms. *That is precisely the purpose of the regulation of medicine.* States regulate medicine to ensure that

licensed medical professionals comply with professional norms of competence, do not subject patients to ineffective or harmful treatments, and do not mislead or defraud patients by making false claims about the efficacy and safety of such treatments, *regardless of the personal "views" those professionals may hold*.

Medical professionals cannot refuse to comply with professional standards by calling their non-conforming medical practices "viewpoints," and then claiming viewpoint discrimination under the First Amendment. *E.g.*, *Coggeshall v. Mass. Bd. of Registration of Psychologists*, 604 F.3d 658, 667 (1st Cir. 2010) (finding no "cognizable First Amendment injury" based on a state's disciplinary action against a psychologist for exceeding the scope of her competence). A doctor who believes that snake oil cures cancer would have no viable viewpoint discrimination claim against a law prohibiting the prescription of snake oil as a cancer treatment. Nor could he defend against a malpractice claim arising out of his prescription of snake oil by asserting that he had a First Amendment right to act on his "viewpoint" that snake oil is effective by making such a prescription. *See, e.g.*, 17 Cal. Code of Regs. § 10400 (prohibiting "Hoxsey method" of treating cancer with, *inter alia*, red clover blossoms, licorice, burdock root, and prickly ash bark).

The district court's contrary ruling in this case conflicts with settled law. *See, e.g.*, *National Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1054 (9th Cir. 2000) ("It is properly within the state's

police power to regulate and license professions, especially when public health concerns are affected."). If the district court's view of the law were correct, the State's authority to regulate medical professionals would be significantly undermined.

B. The Only Reputable Scholar To Conclude That Sexual Orientation Change Efforts Can Work Has Retracted His Study Because It Had No Scientific Validity, And Has Apologized To The Gay Community For His "Flawed Study"

The modern scientific understanding of sexual orientation has rejected the discredited notion that homosexuality is a disorder that can or should be "cured." All mainstream mental health organizations accept this scientific consensus. In the forty years since the American Psychiatric Association removed homosexuality from its list of mental disorders, there has been only *one* study by a reputable mental health care professional that purported to conclude that sexual orientation change efforts can actually change sexual orientation. That study was published in the Archives of Sexual Behavior in 2003 by Dr. Robert Spitzer, "considered by some to be the father of modern psychiatry." (ER 118 [Declaration of Douglas C. Haldeman ("Haldeman Decl.") Ex. B], 382 [Declaration of Gregory M. Herek ("Herek Decl.") ¶ 34].)

Dr. Spitzer has long had a prominent place in the mental health profession concerning issues relating to sexual orientation. In the early 1970s, Dr. Spitzer led the movement that ultimately caused the American Psychiatric Association to

remove homosexuality as a listed "mental disorder" from the DSM. (ER 119-20 [Haldeman Decl. Ex. B].) This leadership gave Dr. Spitzer professional credibility on issues relating to sexual orientation and lent authority to his publication in 2003 of a study reporting that some sexual orientation change participants reported some change in their sexual orientation after undergoing change efforts. (*See* ER 93-94 [Haldeman Decl. ¶ 19], 118-23 [Haldeman Decl. Ex. B], 125-32 [Haldeman Decl. Ex. C].)

The study was widely criticized by scholars and other members of the mental health professional community from the time it was issued. (*See* ER 120-22 [Haldeman Decl. Ex. B].)[1] Nonetheless, it was "considered to be the most well-

[1] The decision to publish this study was so controversial that the Archives of Sexual Behavior took the unusual step of publishing multiple critiques of Dr. Spitzer's study in the very same issue in which it published the Spitzer study. One of those published critiques was authored by Gregory Herek, who is a State expert in this case and a Professor of Psychology at the University of California, Davis. Professor Herek made the following prediction:

> Although [Dr. Spitzer] notes in passing that sexual orientation change "may be a rare or uncommon outcome of reparative therapy," it seems inevitable that activists from NARTH, Focus on the Family, and similar groups will attempt to use the [Dr. Spitzer] study to support their political agenda.

Herek, G.M. Evaluating interventions to alter sexual orientation: Methodological and ethical considerations (Comment on Spitzer, 2003). *Archives of Sexual Behavior*, 32(5), 439, *available at* http://psychology.ucdavis.edu/rainbow/html/Herek_2003_SpitzerComment.pdf. The prediction proved accurate. Indeed, NARTH (a *plaintiff* in the *Pickup* case) continues to rely heavily on Dr. Spitzer's now-retracted paper in its public efforts

known and authoritative study purporting to demonstrate that SOCE therapies may work for some individuals under some circumstances." (ER 93-94 [Haldeman Decl. ¶ 19].)

In 2012, however, after meeting with a participant in his study who described the harms he suffered as a result of undergoing sexual orientation change efforts, Dr. Spitzer reevaluated the published critiques of the methodology of his study, and decided that professional integrity required that he recant it. (ER 93-94 [Haldeman Decl. ¶ 19]; 121-22 [Haldeman Decl. Ex. B], 128-30 [Haldeman Decl. Ex. C].) Dr. Spitzer publicly acknowledged that his study was based upon self-reported information from subjects whose credibility could not be determined. (ER 129-30 [Haldeman Decl. Ex. C]; ER 382 [Herek Decl. ¶ 35].) Moreover, he acknowledged that "there was considerable evidence from the study that some participants in this kind of therapy actually are harmed." (ER 130 [Haldeman Decl. Ex. C].) Based on these realizations, Dr. Spitzer felt compelled to apologize to the LGBT community for a "flawed study." (ER 131 [Haldeman Decl. Ex. C]; ER 382 [Herek Decl. ¶ 35].)

---

to argue that sexual orientation change efforts work. NARTH has published a "Journal of Human Sexuality," for example, which is available on its website under the heading, "Key NARTH Documents." *See* http://narth.com/2012/12/journal-of-human-sexuality-volume-1-complete-text/. In it, NARTH continues to cite and discuss Dr. Spitzer's study as the principal scientific evidence demonstrating that change efforts work. Indeed, NARTH continues publicly to refer to the 2003 retracted study as a "landmark study." *See id*. at 20 (last viewed February 3, 2013).

Dr. Spitzer's retraction was reported widely by the popular press, including *The New York Times*. (*See* ER 118-23 [Haldeman Decl. Ex. B, Benedict Carey, *Psychiatry Giant Sorry for Backing Gay 'Cure'*, N.Y. Times, May 18, 2012].) Counsel for Equality California met in person with Dr. Spitzer to learn about his reasons for retracting his study, as well his current understanding of the significant harms that sexual orientation change efforts can cause. Dr. Spitzer offered a sworn video statement on these topics for use in this case, which can be viewed at http://www.youtube.com/watch?v=TdOovBb2tqI&feature=youtu.be. (*See* ER 125-32 [Haldeman Decl. Ex. C, Transcript of Spitzer Statement].) In the statement, Dr. Spitzer explained his motivation for his retraction and his desire to contribute to the record in this case:

> [F]inally, after an interview that I did with a former patient of one of the people who is very prominent in giving this therapy [Nicolosi], he described how the therapy really harmed him and led to a lot of depression, which is a common finding. And with that, I began to feel that I really could not justify the study as such, that it was misleading and that -- and finally, I felt not only did I have trouble justifying it, I had to acknowledge that there was considerable evidence from the study that some participants in this kind of therapy actually are harmed.
>
> With those two facts, there's no objective way of measuring homosexuality and the fact that this therapy often leads to harmful psychological state, I had to let my views be known. And I decided the best way to do that was to apologize to the gays and to the patients for presenting really a flawed study.

(ER 130-31.)

C. SB 1172 Furthers The State's Interest In Ensuring That Consumers Are Not Duped

In addition to protecting vulnerable children from an ineffective and harmful practice—as set forth in Equality California's brief in the *Pickup* case—SB 1172 furthers the State's compelling interest in protecting consumers from unproven business practices that masquerade as scientifically-supported professional treatment. *Diamond Multimedia Sys., Inc. v. Superior Court*, 19 Cal. 4th 1036, 1064 (1999) ("California also has a legitimate and compelling interest in preserving a business climate free of fraud and deceptive practices."). When the State protects consumers from fraud by enacting "'restrictions on false, deceptive, and misleading commercial speech,'" the First Amendment is not violated. *Brandwein v. Cal. Bd. of Osteopathic Examiners*, 708 F.2d 1466, 1469-70 (9th Cir. 1983) (quoting *Friedman v. Rogers*, 440 U.S. 1, 9 (1980)).

The violation of SB 1172 constitutes "unprofessional conduct" that subjects licensed therapists to professional discipline by the State's mental health licensing bodies. The function of those licensing bodies is to protect the public health and safeguard the public from deception and fraudulent practices by providers of medical services. *Furnish v. Bd. of Med. Examiners*, 149 Cal. App. 2d 326, 331 (1957) (noting that the Legislature permits the revocation or suspension of medical licenses to "protect the life, health and welfare of the people at large and to set up a

plan whereby those who practice medicine will have the qualifications which will prevent, as far as possible, the evils which could result from . . . a lack of honesty and integrity"); *see also Dent v. West Virginia*, 129 U.S. 114, 122 (1889) ("The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud.").

As Dr. Lee Beckstead, expert witness for the State Defendants, testified in the district court, "[i]t is not the responsibility of the public or client to know which interventions work and which do not, or to understand the current state of the scientific literature." (ER 430 [Declaration of A. Lee Beckstead ("Beckstead Decl.") ¶ 32].) Rather, it is the State's responsibility to protect the public from deceptive and incompetent health services. *Garcia v. Tex. State Bd. of Med. Examiners*, 384 F. Supp. 434, 437 (W.D. Tex. 1974), *aff'd* 421 U.S. 995 (1975) ("This right of a State to regulate under its police powers all aspects of the practice of medicine and thereby help provide for the general health and welfare of its citizens is of such vast importance as to approach the status of a duty."); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) ("In addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members

of the licensed professions."). As part of its licensing and regulatory functions, the State has a duty to protect consumers from deceptive and dangerous "treatments."

This consumer-protection function is especially important in connection with sexual orientation change efforts. These efforts are premised upon the false notion that having a same-sex sexual orientation is a mental disorder that can be treated. (*E.g.*, SB 1172 § 1(d), (h), (k).) As the California Legislature found, "[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." (SB 1172 § 1(a).) Sexual orientation change efforts therefore are intrinsically deceptive. If the State permits licensed therapists to engage in such deceptive practices on minors, the State gives parents and patients the false impression that these practices are an accepted and safe method of treatment, when, in fact, they are not.[2]

Finally, the State has significant basis for concern that, in addition to the deception inherent in sexual orientation change efforts, licensed therapists who engage in these practices misrepresent their efficacy and fail to disclose their

[2] A significant proportion of people who undergo sexual orientation change efforts with a licensed mental health professional are minors. Joseph Nicolosi, plaintiff in the *Pickup* case, recently stated that about one-half of the patients at his clinic in Southern California are "teenagers." *See* http://www.truthwinsout.org/blog/2012/10/30459/ (video of Joseph Nicolosi) (seven full-time therapists working on "homosexuality"; 135 patients per week; one-half of whom are teenagers).

substantial risks of harm. In describing their practices, neither of the therapist-Plaintiffs in this case states that he informs parents or minors of the risks of harm posed by sexual orientation change efforts. (*See* ER 293-302 [Declaration of Anthony Duk], 315-22 [Declaration of Donald Welch].) Nor do the therapist-Plaintiffs state that they inform patients of the APA's conclusion that any perceived benefits of sexual orientation change efforts may be obtained through legitimate therapies that do not pose the dangers attendant to sexual orientation change efforts. (*See id*.) Social worker Caitlin Ryan has testified about the poignant experience of meeting parents who have subjected their children to sexual orientation change efforts believing them to be safe, only ultimately to experience the devastation that results from the damage sexual orientation change practices inflict. (*See* ER 76 [Declaration of Caitlin Ryan ¶ 21].)

In sum, SB 1172 is necessary to protect children from harm by prohibiting California mental health professionals from offering deceptive "therapies" to minors and their parents. Parents and youth may be duped into participating in therapy that not only fails to offer the benefits they are promised, but may expose young people to severe and even life-threatening harms, including increased rates of attempted suicide, depression, and drug use. (ER 383-84 [Herek Decl. ¶¶ 39-40]; ER 427 [Beckstead Decl. ¶ 22-23].) The consequences of sexual orientation change efforts therefore are not limited to a waste of time and resources, but also

may include severe and lasting physical and emotional harm to the very young people whom parents are deceived into believing they are helping by sending their children to practitioners of these discredited techniques.

III. CONCLUSION

For the reasons set forth above, as well as the reasons set forth in Equality California's brief in the *Pickup* case, Equality California respectfully urges that this Court reverse the district court's order.

Dated: February 4, 2013

Respectfully submitted,

/s/ David C. Dinielli
DAVID C. DINIELLI
MUNGER, TOLLES & OLSON

NATIONAL CENTER FOR LESBIAN RIGHTS

Attorneys for EQUALITY CALIFORNIA

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Federal Rule of Appellate Procedure 29. This brief's type size and type face comply with Federal Rule of Appellate Procedure 32(a)(5) and (6). This brief contains 3,421 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated: February 4, 2013

/s/ David C. Dinielli

DAVID C. DINIELLI
MUNGER, TOLLES & OLSON

NATIONAL CENTER FOR LESBIAN RIGHTS

Attorneys for EQUALITY CALIFORNIA

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 4, 2013.

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

Executed on February 4, 2013, at Los Angeles, California.

Dated: February 4, 2013

/s/ David C. Dinielli

DAVID C. DINIELLI
MUNGER, TOLLES & OLSON

NATIONAL CENTER FOR LESBIAN RIGHTS

Attorneys for EQUALITY CALIFORNIA