CA No. 12-17681
DC No. 2:12-cv-02497-KJM-EFB

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID PICKUP, et al.,

Plaintiffs-Appellants,

v.

EDMUND G. BROWN, JR., et al.,

Defendants-Appellees,

and

EQUALITY CALIFORNIA,

Intervenor-Defendant-Appellee.

Appeal From Judgment Of The United States District Court
For The Eastern District Of California
(Hon. Kimberly J. Mueller, Presiding)

BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION FOR MARRIAGE AND FAMILY THERAPY- CALIFORNIA DIVISION, CALIFORNIA PSYCHOLOGICAL ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND NATIONAL ASSOCIATION OF SOCIAL WORKERS, CALIFORNIA CHAPTER SUPPORTING DEFENDANTS-APPELLEES URGING AFFIRMANCE

ARNOLD & PORTER LLP
ROBERT P. TAYLOR (No. 46046)
Robert.Taylor@aporter.com
JOHN S. THROCKMORTON (No. 190604)
John.Throckmorton@aporter.com
JEREMY M. MCLAUGHLIN (No. 258644)
Jeremy.McLaughlin@aporter.com
EMILY WOOD (No. 260832)
Emily.Wood@aporter.com
ROBERT STOLWORTHY (No. 277745)
Robert.Stolworthy@aporter.com
Three Embarcadero Center, Seventh Floor
San Francisco, California 94111-4024
Telephone: 415.471.3100
Facsimile: 415.471.3400

Attorneys for Amici Curiae: American Association for Marriage and Family Therapy-California Division; California Psychological Association; National Association of Social Workers; National Association of Social Workers, California Chapter

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), *Amici curiae* American Association for Marriage and Family Therapy-California Division; California Psychological Association; National Association of Social Workers, and; National Association of Social Workers, California Chapter certify that they are non-profit or not-for-profit corporations, or unincorporated associations, with no parent corporations or publicly traded stock.

DATED: February 6, 2013.

/s/ *Robert P. Taylor*
ROBERT P. TAYLOR

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

IDENTITY AND INTEREST OF *AMICI CURIAE*

The California Division of the American Association for Marriage and Family Therapy ("AAMFT-CA") represents the professional interests of its more than 3,200 members, including marriage and family therapist licensees, interns, students and affiliates of the profession. While the two are separately incorporated, the Division serves as an extension of the American Association for Marriage and Family Therapy ("AAMFT") within the state for purposes of advancing and shaping the MFT profession in California. The AAMFT Code of Ethics is considered the national standard for ethical behavior within the marriage and family therapy profession. AAMFT also produces standards for clinical supervision and the clinical practice of marriage and family therapy.

The California Psychological Association ("CPA"), founded in 1948, is a 501(c)(6) non-profit professional association for licensed psychologists and others affiliated with the delivery of psychological services. CPA represents the interests of approximately 4,000 member psychologists and works on behalf of all psychologists in California as an advocate for the profession of psychology. CPA's members work in a variety of settings, including private practice, hospitals, prisons, academic institutions, and organizations. Its members regularly provide free public service through programs

such as CPA's Public Education Campaign and its well-respected disaster response service. Additionally, CPA works closely with the media to provide timely and accurate information when psychological expertise is requested.

The National Association of Social Workers ("NASW") is the largest association of professional social workers in the world, with 140,000 members and 56 chapters throughout the United States and abroad (including the California chapter, which has 11,000 members). As part of its mission to improve the quality and effectiveness of social work practices, NASW promulgates professional standards and the *NASW Code of Ethics*, conducts research, provides continuing education, and advocates for sound public policies (including by filing *amicus* briefs in appropriate cases, such as this). NASW and its members are particularly committed to improving the lives of the most vulnerable members of the family unit, *i.e.*, children. NASW policies support adolescent health programs that "respect confidentiality and self-determination needs of adolescents and are provided in a culturally appropriate manner" and that "offer specialized training to staff on working with vulnerable populations, including LGBT teenagers." NAT'L ASS'N OF SOCIAL WORKERS, SOCIAL WORK SPEAKS, *Adolescent and Youth Adult Health* 3, 6 (NASW Policy Statement) (9th ed. 2012). NASW's policy statement, *Lesbian, Gay,*

and Bisexual Issues 219, 222 (SOCIAL WORK SPEAKS (9th ed. 2012)), supports "the right of the individual to self-disclose, or to not disclose, sexual orientation and encourages the development of supportive practice environments for lesbian, gay, and bisexual clients and colleagues " and "reaffirms [NASW's] stance against reparative therapies and treatments designed to change sexual orientation or to refer clients to practitioners or programs that claim to do so."

This brief is filed in support of the Defendants-Appellees to provide the Court with the perspective of the foregoing disciplines on the use of sexual orientation change efforts and its potential harm. Our brief also demonstrates that the statute is a proper exercise of California's power to protect the health and safety of its citizens.

This brief was authored in whole by *amici curiae* and their counsel. No party to this litigation or its counsel nor any third party contributed money to fund this brief. The brief is being filed concurrently with a motion seeking leave to file.

SUMMARY OF ARGUMENT

In 2012, the California Legislature passed Senate Bill 1172 ("SB 1172"), a law prohibiting licensed mental health providers in California from engaging in efforts to change the sexual orientation of minors. The statutory objective of SB 1172 is consistent with a

broad consensus of responsible mental health experts that (1) efforts to change a child's sexual orientation may cause harm to the child, and (2) the use of Sexual Orientation Change Efforts ("SOCE") provides no benefits that derive from SOCE itself and that could not be achieved through competent mental health care that does not attempt to change sexual orientation. Plaintiffs-Appellants challenge the constitutionality of that statute. In the court below, Plaintiffs moved for a preliminary injunction to block the enforcement of SB 1172 and appeal from the denial of that injunction.

We make three points in support of affirmance. First, SB 1172 is based on the most current scientific understanding of sexual orientation within the mental health community. The overwhelming consensus of that community rejects the notion that homosexuality is a mental disorder that can be "cured." To the contrary, there is extensive evidence that SOCE is not effective in changing a person's sexual orientation and may, in fact, result in serious, life-threatening harm. The California Legislature was on solid ground when it prohibited licensed mental health practitioners from subjecting minors to such practices. *See* Part III(A)-(D).

Second, the regulation of mental health care has traditionally been the prerogative of the states, not the Federal government. California acted well within the scope of its police powers when it

banned the provision of SOCE therapies to minors under the imprimatur of a state license. The propriety of California's action is particularly compelling in this Court, given the strong deference the Federal government must show when a State acts to protect its own citizens from harm. *See* Part III(E).

Finally, contrary to Plaintiffs' argument below, SB 1172 clearly defines those acts that the law prohibits. Indeed, numerous mental health care practitioners, through their professional organizations, including *amici*, actively participated in refining the language of SB 1172 to obviate the very concerns raised by Plaintiffs. Those who practice in the field of mental health counseling are not confused by the statute's definition of the term "sexual orientation change efforts." When a law is understood by those the law was intended to regulate, that law is not unconstitutionally vague. *See* Part III(F).

In short, the District Court was correct in concluding that SB 1172 is a valid exercise of California's power to regulate mental health professionals within the state and to protect minor children from injury. This Court, therefore, should affirm the trial court's order denying Plaintiffs' request for a preliminary injunction and allow SB 1172 to be enforced to prevent harm to a new generation of children who would otherwise be subjected to these ineffective and often dangerous treatments.

ARGUMENT

A. The Challenger Must Meet A High Burden Before A Lawfully Enacted Statute Can Be Held Unconstitutional.

Those who challenge the constitutionality of a duly enacted statute bear a heavy burden. *See Parham v. Hughes*, 441 U.S. 347, 351 (1979) ("State laws are generally entitled to a presumption of validity . . ."). The "presumption of validity attaching to state legislative and constitutional provisions weighs heavy." *First Amendment Coal. v. Judicial Inquiry & Review Bd.*, 784 F.2d 467, 475 (3d Cir. 1986) (citing *Clements v. Fashing*, 457 U.S. 957, 963 (1982)). "[The] presumption . . . require[s] that the state's determination be upheld unless it is found to transgress a clear constitutional prohibition." *First Amendment Coal.*, 784 F.2d at 475.

Further, a statute "should be construed whenever possible so as to uphold [its] constitutionality." *United States v. Vuitch*, 402 U.S. 62, 70 (1971). A court "cannot assume that state legislative enactments were adopted arbitrarily or without good reason to further some legitimate policy of the State." *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528 (1959).

In SB 1172, the California Legislature relied on substantial evidence submitted by the professional and scientific communities most familiar with the subject matter of the bill, *i.e.*, the mental

health and well-being of minors with regard to sexual orientation. *See* Section III(B)(1)-(2), *infra*. SB 1172 is entitled to a presumption of constitutionality and should not be overturned "in the absence of egregious circumstances." *First Amendment Coal.*, 784 F.2d at 475.

B. The Legislature Analyzed Numerous Scientific Studies Conducted Over Several Decades Showing That SOCE Is Both Ineffectual And Potentially Harmful.

1. SOCE Is Grounded In Discredited Notions About The Causes Of Same-Sex Sexual Orientations.

In 2007, the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation began a systematic review of peer-reviewed journal literature on SOCE. In 2009, the findings of that Task Force were published as *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* ("Task Force Report" or "Report"). 3 Excerpts of Record ("ER") 215-352. The Report, along with voluminous other materials and the recommendations of numerous medical and mental health organizations focused on the needs of Lesbian, Gay, Bisexual, and Transgendered ("LGBT") youth, provided the California Legislature with a factual basis for understanding the origins and effects of SOCE and for shaping the prohibitions of SB 1172. *See* SB 1172 § 1(b).

The Task Force Report explains the early historical premise for efforts to change sexual orientation and shows that this premise has been thoroughly discredited as the profession of psychology has evolved. Specifically, the Report notes that the practice of SOCE developed more than one hundred years ago, at a time when same-sex relationships were considered to be both immoral and criminal. 3 ER 243; *see also Lawrence v. Texas*, 539 U.S. 558, 568 (2003) (noting laws from colonial times through the 19th century prohibiting "crimes-against-nature" and otherwise criminalizing same-sex relationships).

In the 19th century, social scientists began to view same-sex erotic attractions and gender non-conformity as medical conditions that sprang from "psychological immaturity" or "pathology" caused by physical factors (genetic defects or hormonal imbalances) or environmental factors (parent-child relationships, sexual abuse or moral decadence). 3 ER 243. "The first [SOCE] treatments attempted to correct or repair the damage done by pathogenic factors or to facilitate maturity." *Id.* These Victorian-era theories about the causes and pathological nature of homosexuality informed early psychotherapeutic efforts to develop "cures."[1]

[1] Some psychiatrists viewed homosexuality as "developmental arrest" but were skeptical of efforts to force changes in a person's (continued . . .)

During the 20th century, SOCE therapists posited additional theories as to the "causes" of same-sex erotic attraction—for example, that homosexuals suffered from phobias that prevented them from assuming the "normal" attributes of their gender. One influential therapist theorized that sex with a member of the opposite gender could cure a gay man or lesbian from such phobias. 3 ER 244. Other "cures" relied on aversion treatments, including induced nausea and vomiting, movement restrictions and paralysis, electric shock and other painful treatments, and hypnosis. Common non-aversive treatments included educating patients on how to date and be affectionate with members of the opposite sex, reframing erotic desires and thoughts, and physical and social reinforcement to increase heterosexual behaviors. *Id.*

By the 1960s, the scientific community began to reject these notions about the causes of non-conforming sexual orientation and the need for "cures." Theories that classified same-sex attractions as pathological were shown to be invalid through rigorous scientific study, and the scientific community moved away from the notion

---

(. . . continued)
sexual orientation. Dr. Sigmund Freud, for example, at the end of his only, and ultimately failed, attempt to change a patient's homosexual orientation, concluded that such efforts were not likely to be successful. 3 ER 243.

that homosexuality is a problem to be solved. 3 ER 244-45. Exemplary is a 1969 report by the National Institute for Mental Health concluding that homosexuality was neither a mental defect nor a disease. *See* NAT'L INST. OF MENTAL HEALTH, TASK FORCE ON HOMOSEXUALITY, FINAL REPORT (1969).

In 1973, the American Psychiatric Association removed homosexuality from the *Diagnostic and Statistical Manual of Mental Disorders* ("DSM") and adopted the position that homosexuality is not a mental illness. 3 ER 245. This event was important, because the "DSM . . . provides clinicians and research investigators with a common language with which to communicate about the disorders for which they have professional responsibility." *Sandgathe v. Maass*, 314 F.3d 371, 382 (9th Cir. 2002) (citation and internal quotation marks omitted); *cf. S.M. v. J.K.*, 262 F.3d 914, 920-22 (9th Cir. 2001) (relying on the DSM as reflecting the current state of psychiatric knowledge), *amended on other grounds*, 315 F.3d 1058 (9th Cir. 2003).

2. Responsible Mental Health Organizations Have Concluded That SOCE Is Both Unnecessary And Puts Patients At Risk Of Significant Harm.

Since homosexuality was removed from the DSM, nearly every mainstream mental health organization that has examined the

practice of SOCE has advised its members to discontinue the use of such treatments.

In passing SB 1172, the Legislature relied on this uniform, long-standing condemnation of SOCE among the "major professional associations of mental health practitioners and researchers" to conclude that "[b]eing lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming." SB 1172 § 1(a). The Legislature then catalogued, as part of the bill, the findings of over ten mainstream mental health professional organizations that have concluded the significant harms reported by patients who have undergone SOCE clearly outweigh any purported benefits. *See id.* §§ 1(b)-(m).

In addition to the findings relied on in the bill, organizations, including *amici*, have continued to disavow the use of SOCE. For example, while SB 1172 quoted a 1997 policy statement by *amicus* NASW (*see id.* § 1(h)), the organization recently approved a more emphatic policy statement that it "[stands] against reparative therapies and treatments designed to change sexual orientation or to refer clients to practitioners or programs that claim to do so." NAT'L ASS'N OF SOCIAL WORKERS, SOCIAL WORK SPEAKS, *Lesbian, Gay, and Bisexual Issues* 219, 222 (9th ed. 2012) (policy statement approved by NASW Delegate Assembly, August 2005). Likewise, in its letter supporting SB 1172, NASW explained that it had "a long-standing

policy of opposing therapeutic attempts to change sexual orientation" and that "[s]uch efforts are not considered 'therapy' or social work practice . . .". Excerpts of Record in *Welch, et al. v. Brown, et al.*, Ninth Circuit Case No. 13-15023 ("*Welch* ER") 63.[2] Moreover, AAMFT, represented here by *amicus* AAMFT-CA, has disclaimed the use of SOCE, stating that it "does not consider homosexuality a disorder that requires treatment, and as such, [it] see[s] no basis for such therapy." AAMFT Position on Couples and Families, adopted March 25, 2009, http://www.aamft.org/iMIS15/AAMFT/MFT_Resources/MFT_Resources/Content/Resources/Position_On_Couples.aspx. Finally, *amicus* CPA has noted that "SOCE, where the therapist's intent is to direct, redirect, or influence an individual's sexual orientation, are potentially harmful and have no place as a part of legitimate psychological practice." *Welch* ER 66.

The uniform position of so many responsible mental health experts provided the California Legislature with overwhelming evidence of the need to protect minors against the potential harms caused by SOCE.

---

[2] On January 17, 2013, the Clerk of the Court granted the State's request to calendar together this case and the related case of *Welch, et al. v. Brown, et al.*, Ninth Circuit Case No. 13-15023. Accordingly, where necessary, *amici* cite to the record in *Welch*.

3. Apart From The Conclusions Of Professional Organizations, The Legislature Had Additional Evidence Showing That SOCE Provides No Demonstrable Therapeutic Benefit And Puts Patients At Risk Of Significant Harms.

Much of the evidence regarding the potential for harm that the Legislature considered was outlined in the APA's Task Force Report, which has often been mischaracterized by those who wish to continue using SOCE techniques. The Task Force Report lists, for example, a wide range of negative effects that some patients have suffered as a result of SOCE, including treatment-related anxiety, suicidal ideation, anger, self-hatred, depression, impotence, relationship dysfunction, sexual dysfunction and alcohol abuse. 3 ER 263-64. The Report notes that studies "indicate that attempts to change sexual orientation may cause or exacerbate distress and poor mental health in some individuals, including depression and suicidal thoughts." *Id.* As the District Court noted, the Legislature explicitly recognized the Task Force Report's conclusion that "'sexual orientation change efforts can pose critical health risks to lesbian, gay, and bisexual people,'" including among many other effects "'confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, suicidality, substance abuse, stress, disappointment, self-blame, decreased self-esteem and authenticity to others . . . .'" 1 ER 10.

The Task Force Report also concluded that "enduring change to

an individual's sexual orientation is uncommon." 3 ER 265. Further, it noted that "[c]ompelling evidence of decreased same-sex sexual behavior and of engagement in sexual behavior with the other sex was rare" and the "results of scientifically valid research indicate that it is unlikely that individuals will be able to reduce same-sex attractions or increase other-sex attractions through SOCE." 3 ER 224-25.

The Legislature also considered an article summarizing the conclusions of a peer-reviewed study published in 2009 in the journal *Pediatrics*, which supported the conclusion that "[m]inors who experience family rejection based on their sexual orientation face especially serious health risks." 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) (*cited in* SB 1172 § 1(m)). That study showed that 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. The researchers found "a clear link" between parental

rejection of a child's sexual orientation and health problems in young adults. *Id.*[3]

The Legislature further considered an article published in 2012 in the American Academy of Child and Adolescent Psychiatry, which advised clinicians to 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. 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." (SB 1172 § 1(k) (citing Stewart A. Adelson, *Practice Parameter on Gay, Lesbian, or Bisexual Sexual Orientation, Gender Nonconformity, and Gender Discordance in Children and Adolescents*, JOURNAL OF THE

[3] A later study, published in 2010, showed that there is also a correlation between family reactions to a child's disclosure of nonconforming sexual orientation and participation in SOCE. Elaine M. Maccio, *Influence of Family, Religion, and Social Conformity on Client Participation in Sexual Reorientation Therapy*, 57 JOURNAL OF HOMOSEXUALITY 441, 454 (2010). "The likelihood of an individual participating in [SOCE] increased as his or her family's actual or expected reactions to his or her disclosure of same-sex sexual orientation became more negative . . . that is, the more negative the family reactions, the more likely the participation in [SOCE]." *Id.* at 451. As a result, one of the most vulnerable populations of sexual minorities (children who have been rejected by their parents or guardians) are also the most at risk of suffering the harms resulting from participating in SOCE.

AMERICAN ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY 957 (2012)))

C. In Addition To The Overwhelming Body Of Evidence Supporting The Legislative Objectives Of SB 1172, The Trial Court, In Denying The Preliminary Injunction Sought By Plaintiffs, Had Additional Evidence Supplied By Expert Witnesses.

In denying Plaintiffs' motion for preliminary injunction, the trial court had the added benefit of declarations by experts retained by the State that detailed some of the evidence showing that SOCE can be harmful to those "treated," and particularly to minors.

Dr. Lee Beckstead, a licensed psychologist in full-time practice who served on the APA Task Force, described the kinds of harm reported by patients who had undergone SOCE. Those harms included increasing despair; self-hatred; confusion; anxiety; depression; guilt; shame; hopelessness; resentment; loneliness; intimacy difficulties; addictions; risk for HIV; suicidality; and loss of time, money, resources and trust. 2 ER 188. These problems were the direct result of "inherently harmful" practices endemic to SOCE, including misinforming patients about realistic outcomes, misleading patients with unsubstantiated theories and treatments, restricting patients from accurate information, and preventing them from exploring options other than SOCE that would better address their mental health issues. 2 ER 188-89. Dr. Beckstead noted that

patients often blame themselves for failing to change their sexual orientation, and feel pressure to reject or suppress core aspects of themselves. 2 ER 189.

Dr. Beckstead also noted that minors are particularly vulnerable to harm from SOCE. 2 ER 191-92. "[A]ttempts to mask or deny sexual identity put sexual and gender minority youth at risk for unwanted pregnancy, unsafe sex, interpersonal violence, substance abuse, and suicide attempts." 2 ER 192. Some parental behavior directed toward LGB children, including "trying to change their child's sexual orientation and blocking access to positive LGB influences," actually places minors at high risk for suicide, depression and other major health problems. 2 ER 192-93. Children face a risk of continued harm from the lingering effects of SOCE as they mature and try to navigate adulthood without having had the chance to come to terms with their own sexuality. 2 ER 189.

Dr. Beckstead also noted that the purported benefits of SOCE "are inherently suspect." *Id.* (noting studies showing that patients commonly lie to their therapists and others about changing their sexual orientation "because they anticipated disapproval, wanted to please them, felt embarrassed, and believed their psychotherapist and others could not handle the disclosure").

This evidence is further supported by the Declaration of Dr. Gregory M. Herek, Professor of Psychology at the University of California at Davis, who noted that Dr. Robert L. Spitzer, the author of the most well-known questionnaire and study purporting to demonstrate SOCE can change sexual orientation, has recanted his conclusions with apologies to the gay community. 2 ER 208.

D. Under Well Established Principles Of Federalism, States Are Permitted To Exercise Their Police Power To Regulate The Health Professions.

As a sovereign power, California has broad authority to regulate health care professionals practicing within the state. *Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002). "It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power." *Barsky v. Bd. of Regents*, 347 U.S. 442, 449 (1954).

In *Conant*, a case relied on heavily by plaintiffs, this Court distinguished between the power of the Federal government to regulate health care professionals and that of the States, noting that such regulatory powers are given to the States in the interest of Federalism and that the States have "broad police powers to regulate the administration of drugs by health professionals." 309 F.3d

at 639. As a result, this Court must "'show respect for the sovereign States that comprise our Federal Union. That respect imposes a duty on federal courts, whenever possible, to avoid or minimize conflict between federal and state law . . . .'" *Id.* (quoting *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 501 (2001)).

The "usual constitutional balance between the states and the federal government" calls for Federal deference to California's "authority to regulate medical care within its borders." *Oregon v. Ashcroft*, 368 F.3d 1118, 1124, 1125 (9th Cir. 2004). Here, such deference is particularly justified, because California adopted SB 1172 after its Legislature reviewed substantial scientific information raising concerns regarding the potential health and safety implications of SOCE. *See* Part III(B), *supra*; *see also Bryant v. New York State Educ. Dep't*, 692 F.3d 202, 216, 219 (2d Cir. 2012) (upholding State law prohibiting schools from engaging in aversive treatments when reports showed such therapies raised a risk that patients would develop "negative attitudes toward [themselves]"). Interference in California's proper exercise of its police powers here would cross the outer limits of Federal power "by encroaching on state authority to regulate medical practice." *Ashcroft*, 368 F.3d at 1125.

E. The Legislature Established Clear Boundaries Between Conduct That Is Prohibited And Conduct That Is Not.

1. SB 1172 Is Not Vague.

SB 1172 is sufficiently clear to withstand Plaintiffs' facial vagueness challenge. Contrary to Plaintiffs' allegations, this is not a situation in which "no [individual subject to the law] can know just where the line is drawn." Plaintiffs' Opening Brief 40 (citing *Keyishian v. Bd. of Regents*, 385 U.S. 589, 599 (1967)).

This Court has repeatedly held that a successful facial vagueness challenge is rare. *See, e.g.*, *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1155 (9th Cir. 2001) (invalidation for vagueness "is, manifestly, strong medicine that has been employed by the [Supreme] Court sparingly and only as a last resort") (citation and internal quotation marks omitted); *Humanitarian Law Project v. U.S. Treasury Dep't*, 578 F.3d 1133, 1146 (9th Cir. 2009) (rejecting facial vagueness challenge to a statute). That is because a facial vagueness challenge should succeed only if "the enactment is impermissibly vague in *all of its applications*." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982) (emphasis added).

The language of SB 1172 is short and simple: it subjects to disciplinary procedures a mental health provider who practices under a

license granted from the State of California if he or she attempts sexual orientation change efforts on a patient under 18 years of age. SB 1172 defines "sexual orientation change efforts" as "any practices by mental health providers that seek to change an individual's sexual orientation," and the law provides examples of what is and is not prohibited as part of this definition. SB 1172 § 2. Consequently, "it is clear what the statute proscribes in the vast majority of its intended applications." *California Teachers Ass'n*, 271 F.3d at 1151 (citation and internal quotation marks omitted).

Moreover, Plaintiffs ignore that SB 1172 regulates a specific profession in which the term "sexual orientation change efforts" has a specialized and well-understood meaning. Where the statutory prohibition is addressed to "a select group of persons having specialized knowledge . . . the standard is lowered and a court may uphold a statute which 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) (citation and internal quotation marks omitted).

Applying that principle, courts have uniformly required a heightened showing of vagueness when dealing with the regulated conduct of professions. For example, in *Doyle v. Secretary of Health & Human Services*, 848 F.2d 296 (1st Cir. 1988), a medical

professional challenged on vagueness grounds a statute requiring "those who provide Medicare-reimbursed services to perform work 'of a quality which meets professionally recognized standards of health care.'" *Id.* at 298 (citing 42 U.S.C. §§ 1320c-1 to 13 (1982 & Supp. IV 1986)). The First Circuit concluded that, even though "[t]he definition of adequate medical care cannot be boiled down to a precise mathematical formula," the term had a "reasonably clear meaning" to those medical professionals the statute regulated, and thus the challenged failed. *Doyle*, 848 F.2d at 301 (citation and internal quotation marks omitted); *see also Sierra Club v. MasTec N. Am.*, Nos. 03-1697-HO, 06-6071-HO, 2007 WL 4387428, at *2 (D. Or. Dec. 12, 2007) ("if the permit refers to conduct of a select group of persons having specialized knowledge, and the challenged phraseology is indigenous to the parlance of that class, the standard is lowered and a court may uphold a permit which uses words or phrases having a technical or other special meaning, well enough known to enable those within its reach to correctly apply them").

"Sexual orientation change efforts" is a well-known phrase in the mental health community, including the members of *amici*. As discussed above in Section III(B), numerous professional organizations have taken express positions on SOCE and whether its members may ethically employ such techniques. In fact, plaintiffs

themselves use terms contained within SB 1172, such as "sexual orientation," to describe the very sexual orientation change therapy they practice. 3 ER 381-83 (noting that Dr. Nicolosi outlines the nature of SOCE treatment to potential patients). To now claim that they do not know what practices fall under SOCE is disingenuous at best.

2. SB 1172 Reflects A Concerted Effort By The Legislature And Professional Organizations To Find Statutory Language That Practitioners Would Understand.

Legislative history can provide insight as to the clarity of a statute and legislative intent. *See United States v. Davidson*, 246 F.3d 1240, 1246 (9th Cir. 2001). The legislative history of SB 1172 shows a significant effort by the California Legislature to understand the relevant issues and to use precision in the bill's language.

Shortly after SB 1172 was introduced by Senator Lieu, various mental health professional associations, including *amici*, met with Senator Lieu regarding the scope and language of the measure. On April 9, 2012, an amended bill was introduced that would have prohibited SOCE for minors and required informed consent for adults.

Notwithstanding their agreement that SOCE lacked efficacious value, some professional organizations disagreed with certain language used in the bill. A variety of organizations submitted a joint

letter to the Legislature opposing the bill unless, among other things, the definition of SOCE was clarified. *See* S. COMM. ON BUSINESS, PROFESSIONS AND ECONOMIC DEV., REP. ON SB 1172, 2011-2012 Sess., as amended Apr. 16, 2012, at 13 (Cal. Apr. 23, 2012).

On April 30, 2012, Senator Lieu responded to these concerns by amending the bill to add statements from several leading mental health associations about the lack of efficacy of SOCE and the harm such therapies can cause, thus further assisting legislators in understanding the scientific and professional context of the proposed law. *See* SB 1172, 2011-2012 Reg. Sess., as amended Apr. 30, 2012, at 2-4 (Cal. Apr. 30, 2012); *see* Part III(C)*, supra*.

On May 2, 2012, various professional organizations, including *amicus* CPA, again submitted an "oppose unless amended" letter, which noted that "[a]s written, the current definition of SOCE is ambiguous and vague as to what kinds of therapy conceptually fall under the definition of SOCE. . . . [I]t is essential that the definition of such a restriction be narrowly tailored and not overly broad." Letter from J. Epstein to T. Lieu at 1, dated May 2, 2012 (attached as Exhibit A).

The Senate Judiciary Committee analysis, dated May 8, 2012, acknowledged this concern, stating that the professional associations' involvement "indicates a high level of commitment to the general

intent of the bill that minors should be protected from the potentially harmful effects of SOCE. However, agreement over specifics of the bill regarding . . . key definitions have yet to be reached." S. JUDICIARY COMM., REP. ON SB 1172, 2011-2012 Reg. Sess., as amended Apr. 20, 2012 at 8 (Cal. May 8, 2012).

During May 2012, while SB 1172 was awaiting a Senate floor vote, *amicus* AAMFT-CA and other professional associations worked with the bill's sponsors on amendments to define more precisely what is meant by "sexual orientation change efforts" as that term is used in the bill to "avoid[] the perception among therapists that any discussion of sexual orientation raised by a patient during psychotherapy may be considered a sexual orientation change effort, therefore opening up the therapist to liability." Letter from K. Madsen to T. Lieu, dated May 17, 2012 (attached as Exhibit B). The professional associations wanted language sufficiently broad to prevent evasion of the law by therapists who persisted in using discredited and unsafe practices to try to change a child's sexual orientation—*i.e.*, by calling their practice by something other than SOCE—but also narrow enough that the definition would not inadvertently capture appropriate and useful forms of therapy—*i.e.*, discussing an adolescents' sexual development. *Id.* Shortly after revisions were made to address these definitional concerns, *amici*

AAMFT-CA and NASW-CA became the first professional groups to support the bill. *Welch* ER 62, 63.

On July 5, 2012, the Assembly amended the bill to clarify further its intent and its language. The change made clear that the statute would apply only to *licensed* mental health practitioners and that any disciplinary action arising from a violation would come from the licensing authority:

> "[a]ny sexual orientation change efforts attempted on a patient under 18 years of age by a mental health provider shall be considered unprofessional conduct and shall subject a mental health provider to discipline by the licensing entity for that mental health provider." (SB 1172, 2011-2012 Reg. Sess., as amended July 5, 2012))

This change alleviated concerns that the statute might apply to persons other than licensed health care practitioners and might interfere with effort by priests or ministers to counsel children as to the dictates of their religion. Under California law, licensing statutes, such as SB 1172, have a pastoral exemption that nullifies their application to those who counsel members of their religious organization as part of their religious duties. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 2908, 4980.01(b), 4996.13(f), 4999.22(c).

In addition, the definition of SOCE was amended to differentiate SOCE from psychotherapies dealing with sexual orientation in an appropriate and safe manner:

> (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. (SB 1172 § 2(b)(1), (b)(2))

In light of these clarifications to the statutory language, *amicus* CPA withdrew its opposition to SB 1172, emphasizing that its prior opposition was "based on a vague definition in the bill . . . . Our SUPPORT position is a result of the amendments in the bill that clearly state what is allowed and what is not allowed, *which will provide the utmost clarity for the practitioner*." Supplemental Excerpts of Record 13 (emphasis added).

Other groups also dropped their opposition and supported the bill as finally amended, including the Board of Behavioral Sciences, which licenses several categories of mental health professionals and would be charged with enforcing the provisions of the law. *Welch* ER 67. In the end, all of the major mental health associations that

weighed in on the bill either moved to support SB 1172 or adopted a neutral stance.[4]

CONCLUSION

The vast majority of mental health professional organizations agree that homosexuality is not a mental disorder and have advised against practices that attempt to change an individual's sexual orientation. The vast majority of these organizations have advised that such attempts can cause long-term harm. There is no reliable evidence that SOCE therapies are effective. Because there is potential harm from such therapies, the California Legislature sought to balance dubious benefits against potential harm, particularly with a vulnerable population of minors. In passing SB 1172, the Legislature acted well within its constitutional powers to protect the health and safety of California citizens by prohibiting the use of SOCE by licensed mental health professionals. The statute is precisely worded and narrowly tailored to avoid harm, while still allowing mental health practitioners to provide a safe therapeutic

[4] Throughout these months of negotiation, several groups opposed SB 1172 on the sole basis that it prohibited the use of SOCE by licensed therapists. *See* ASSEMBLY COMM. ON BUSINESS, PROFESSIONS & CONSUMER PROTECTION, REP. ON SB 1172, 2011-2012 Reg. Sess., as amended May 25, 2012, at 6 (Cal. June 26, 2012). Notably, none of these entities raised concerns about the clarity of the language used in SB 1172.

environment in which minors can explore their sexuality as part of a normal developmental process. This Court should defer to California's considered judgment and uphold the trial court's denial of plaintiffs' motion for preliminary injunction.

Dated: February 6, 2013.

Respectfully submitted,

ARNOLD & PORTER LLP
ROBERT P. TAYLOR

By /s/ *Robert P. Taylor*
ROBERT P. TAYLOR

Attorneys for Amici Curiae: American Association for Marriage and Family Therapy-California Division; California Psychological Association; National Association of Social Workers; National Association of Social Workers, California Chapter

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, *Amici Curiae*: American Association for Marriage and Family Therapy-California Division; California Psychological Association; National Association of Social Workers; National Association of Social Workers, California Division states that the following case raises the same or closely related issues and/or arises out of the same transaction or event as this appeal: *Welch, et al. v. Brown, et al.*, No. 13-15023.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32 (a)(7)(C) AND CIRCUIT RULE 321 FOR CASE NUMBER12-17681.

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached **Brief Of *Amici Curiae* American Association For Marriage And Family Therapy- California Division, California Psychological Association, National Association Of Social Workers, And National Association Of Social Workers, California Chapter Supporting *Defendants-Appellees* Urging Affirmance** is proportionally spaced, in a typeface of 14 points or more and contains 6,019 words, exclusive of those materials not required to be counted under Rule 32(a)(7)(B)(iii).

DATED: February 6, 2013.

/s/ *Robert P. Taylor*
ROBERT P. TAYLOR

CERTIFICATE OF SERVICE
FOR DOCUMENTS FILED USING CM/ECF

I hereby certify that on February 6, 2013, 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.

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

/s/ *Robert P. Taylor*
ROBERT P. TAYLOR

33257828

EXHIBIT A

May 2, 2012

The Honorable Ted Lieu
Senator, 28th Senate District
State Capitol, Room 4090
Sacramento, CA 95814

RE: SB 1172 (Lieu) - Sexual Orientation Change Efforts
Oppose Unless Amended
Set for hearing: May 8, 2012

Dear Senator Lieu:

On behalf of the California Association of Marriage and Family Therapists, the California Psychological Association, the California Psychiatric Association, and the California Association for Licensed Professional Clinical Counselors, we wish to convey our continued joint position of Opposed Unless Amended on SB 1172. We believe the bill as drafted, would inhibit and prevent attempts by, and perhaps create liability for, therapists who legitimately explore sexual identity and gender concerns.

We'd like to thank you and the sponsors of the measure for reaching out and having several stakeholders meetings aimed at crafting a consensus measure. At this time, we continue to have the following concerns about the bill:

Definition of Sexual Orientation Change Efforts ("SOCE"):

As written, the current definition of SOCE is ambiguous and vague as to what kinds of therapy conceptually fall under the definition of SOCE. This definition can and will be interpreted by providers, consumers and legal minds in vastly different manners, as evidenced by the communications of all the various stakeholders to date. To the extent that this legislation is attempting to undertake an unprecedented restriction of psychotherapy, it is essential that the definition of such a restriction be narrowly tailored and not overly broad. Without such limits on the definition, there cannot be a restriction for any population, including minors, due to the unintended consequences of banning legitimate and helpful therapies.

Since the introduction of this legislation, we have agreed that any psychotherapy based on the assumption that homosexuality is a mental disorder or pathology and that a patient must therefore change her/his sexual orientation demonstrates unprofessional conduct. And while we

have suggested amendments to restrict the current broad and sweeping definition as currently written, those amendments have not been accepted to date.

Minors Ability to Consent to SOCE:

While we agree with and support the Author's concern about coercion or forced treatment upon minors, we are troubled by the sudden removal of a minor's ability to consent to their own un-coerced psychotherapy just recently granted to them by this Legislature in 2010. In 2010, SB 543 (Chapter 503, Statutes of 2010) was signed into law, which allowed minors (12 years and older) to consent to their own mental health treatment if the minor was "mature enough to participate intelligently in the mental health treatment." Moreover, as mentioned above, because of the vague and unclear definition of SOCE, we are concerned about what implications the definition may have on a minor's ability to generally explore their sexuality.

Definition of Therapeutic Deception:

This language and definition is troubling. It implies that the act of SOCE in itself is an act of deception, which is vague and misleading. Further, because of the ambiguity of this wording, it could likely create liability for a psychotherapist who is practicing SOCE, even if practicing under a lawful informed consent as spelled out in this legislation. We would suggest rewording this definition to: "Therapeutic deception" means a representation by a psychotherapist that sexual orientation change efforts are endorsed by leading medical and mental health associations or that they ~~can or~~ will reduce or eliminate a person's sexual or romantic desires, attractions, or conduct toward another person of the same sex."

Informed Consent:

We have general concerns about what is proposed in the current proposed Informed Consent language and have forwarded to the Author a proposed Informed Consent jointly agreed upon by the California Association of Marriage and Family Therapists, California Psychological Association, California Psychiatric Association, and California Association for Licensed Professional Clinical Counselors. Included within our proposed Informed Consent are the requirements that: provider describe his/her experience that qualifies them to provide such services, a description of the potential risks and consequences of SOCE, a statement that homosexuality is not a mental disorder, reference to the most recent psychotherapeutic association's positions and/or resolutions on SOCE, and a statement that failure to comply is unprofessional conduct. Included with this letter is a sample of our Informed Consent proposal.

For the reasons stated above, we must take the position of Opposed Unless Amended at this time. We look forward to working with the Author, the Sponsors, and any other interested parties on this bill.

Sincerely,

Jill Epstein, J.D.
Executive Director
California Association of Marriage and Family Therapists

Randall Hagar
Director of Government Affairs
California Psychiatric Association

Amanda Levy
Director, Government Affairs
California Psychological Association

Dean Porter
Executive Director
California Association for Licensed Professional Clinical Counselors

cc: Members, Senate Judiciary Committee

Proposed Informed Consent Provision

(a) Prior to the commencement of sexual orientation change efforts by a psychotherapist, the psychotherapist shall obtain the verbal and written informed consent from the patient. The informed consent procedure shall ensure that at a minimum all of the following information is given to the patient verbally and in writing:

1) a description of the education, training, or experience of the psychotherapist that qualifies him or her to provide the services to be rendered;
2) a description of the potential risks, and consequences of such treatment;
3) a statement that indicates that homosexuality is not a mental disorder according to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders(DSM IV) and that it was removed as a mental disorder in 1973;
4) a statement that the psychotherapist will not impose his or her personal values or religious views upon the patient;
5) reference to the most recent position statement, resolutions, research or findings of the leading state or national psychotherapeutic associations as defined in this Section.

(b) The written informed consent signed by the patient shall become part of the patient's mental health treatment record.

(c) The failure of a psychotherapist to comply with this section shall constitute unprofessional conduct.

EXHIBIT B

BBS

Board of
Behavioral
Sciences

1625 North Market Blvd., Suite S-200, Sacramento, CA 95834
(916) 574-7830, (916) 322-1700 TDD, (916) 574-8625 Fax
www.bbs.ca.gov

Governor Edmund G. Brown Jr.
State of California
State and Consumer Services Agency
Department of Consumer Affairs

MAY 24 2012

May 17, 2012

Senator Ted Lieu
State Capitol, Room 4090
Sacramento, CA 95814

RE: SB 1172 - Oppose Unless Amended

Dear Senator Lieu,

At its May 16, 2012 meeting, the Board of Behavioral Sciences (Board) discussed and took a position of "oppose unless amended" on SB 1172 (Lieu) (As Amended April 30, 2012).

The Board shares the author's concerns about the use of sexual orientation change efforts in psychotherapy. However, the Board respectfully requests that the term "sexual orientation change efforts" be more precisely defined. A more precise definition will assist with avoiding the perception among therapists that any discussion of sexual orientation raised by a patient during psychotherapy may be considered a sexual orientation change effort, therefore opening the therapist up to liability.

Please feel free to contact my Legislative Analyst, Rosanne Helms, at (916) 574-7897 if you have any questions.

Sincerely,

Kim Madsen
Executive Officer

CC: Assembly Business, Professions and Consumer Protection Committee
Tracy Rhine, Deputy Director, Legislative and Policy Review, Department of Consumer Affairs