13-15023

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD WELCH; et al.,

Plaintiffs and Appellees,

v.

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

Defendants and Appellants.

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

No. CIV. 2:12-2484 WBS LKN
The Honorable William B. Shubb, Judge

APPELLANTS' CORRECTED REPLY BRIEF

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INTRODUCTION

In order to protect the health and safety of California's children and teenagers, the Legislature enacted Senate Bill (SB) 1172, which prohibits licensed mental health providers from subjecting minors to a therapy known as sexual orientation change efforts (SOCE). SB 1172 is an unremarkable exercise of the states' power to regulate professional conduct, and is subject to deferential review.

Plaintiffs concede that the State may regulate mental health treatments, including certain types of SOCE, such as lobotomies and shock and aversion therapy. They contend, however, that the State's power to protect the public health and safety and proscribe harmful practices does not apply to talk therapy. Specifically, plaintiffs insist that their particular brand of SOCE talk therapy is not subject to regulation because it amounts to the inculcation of opinion, values, and ideology, the expression of which the government cannot suppress.

The State agrees that as a general matter, it cannot regulate the expression of opinion, values, and ideology. This case, however, is not about state regulation of the expression of ideas; it is about state regulation of a specific treatment currently being provided pursuant to a professional license issued by the State. SB 1172 bans psychological treatments provided

to children pursuant to a state-issued license that fail to meet professional standards of care. If plaintiffs want to express opinions, ideology and values to their patients, SB 1172 does not prevent them from doing so. What SB 1172 prohibits is the practice of a discredited, ineffective, and unsafe therapy. Mental health treatment, like health care treatment generally, is not expression subject to strict scrutiny under the First Amendment, and state-licensed psychologists are not free to use their license to "treat" children with therapies that the State deems harmful, no matter what subjective value they attach to that "treatment."

Under established law, SB 1172 survives a constitutional challenge so long as it is reasonable and related to a legitimate government interest. However, given the State's compelling interest in protecting minors and that SB 1172 is narrowly tailored to achieve this interest, SB 1172 is constitutional under any standard. Accordingly, plaintiffs have no likelihood of success on the merits of their First Amendment free speech claims and the district court should have denied plaintiffs' motion for a preliminary injunction. Defendants thus respectfully request that this Court reverse the order of the district court.

ARGUMENT

I. SB 1172 DOES NOT VIOLATE PLAINTIFFS' FIRST AMENDMENT RIGHT TO FREE SPEECH

SB 1172 is a valid exercise of the State's power to protect the public health and safety by regulating professional conduct. *See* Appellants' Opening Brief (AOB) 10-11, 23-30. As such, it is presumptively constitutional and need only be rationally related to a legitimate government interest. *See Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1050 (9th Cir. 2000) ("*NAAP*"). Given the State's interest in protecting the physical and psychological well-being of minors and the evidence that SOCE lacks any scientific basis, does not work, is potentially harmful, and has been uniformly rejected by every mainstream professional organization, SB 1172 is constitutional.

Despite the fact that the State routinely regulates discredited and unsafe healthcare practices that involve the use of language, and the well-established law that such regulations are subject to deferential review,[1] plaintiffs insist that SB 1172 is an "unprecedented attempt" to target protected "viewpoint-laden" speech that must survive strict scrutiny under

[1] *See generally* Amicus Curiae Brief of Health Law Professors in Support of Defendants and Appellants 7-29.

the First Amendment. *See* Brief of Appellees (Answering Br.) 11-24, 27-37. Plaintiffs depict SB 1172 as an effort to enforce an "official ideology" by banning the communication of disfavored ideas and messages. *See id.* at 11-14. This argument relies on a mischaracterization of the scope of SB 1172, as well as the nature of SOCE therapy, and of treatment generally. Fairly read, SB 1172 regulates the practice of licensed mental health professionals; not protected speech. Accordingly, plaintiffs' First Amendment claims must fail.

A. SB 1172 Regulates Unprofessional Conduct; It Does Not Restrict Protected Speech.

Plaintiffs begin by overstating the scope of SB 1172. They declare that the statute is "sweeping and striking" and that it precludes mental health professionals from certain "oral communications, intertwined with viewpoints, in the counseling room." Answering Br. 12, 14.[2] Plaintiffs

[2] Plaintiffs also argue that SB 1172 applies to religious practitioners. This is incorrect. Because they are exempt from the regulatory scheme that governs state-licensed mental health professionals, SB 1172 does not apply to ordained members of the clergy, or pastoral or other religious counselors, who do not hold themselves out as licensed mental health professionals. *See* Cal. Bus. & Prof. Code §§ 2063, 2908, 4980.01(b), 4996.13; *see also Nally v. Grace Cmty Church*, 47 Cal.3d 278, 298 (Cal. 1988) ("The Legislature has exempted the clergy from the licensing requirements applicable to marriage, family, child and domestic counselors and from the operation of statutes regulating psychologists.") (citations omitted). Plaintiffs claim that

(continued…)

interpret SB 1172's application to "any practices by mental health providers that seek to change an individual's sexual orientation" to encompass any conceivable action taken by a therapist. However, such a generic reading of the term "practices" completely divorces SB 1172 from its purpose and context. Properly read, as an amendment of code sections regulating the professional practices of mental health providers, SB 1172 only encompasses treatment and therapies, not protected communication. *See Pickup v. Brown*, No. 12-02497, 2012 WL 6021465 at *9 (E.D. Cal. Dec. 4, 2012) ("[W]hat SB 1172 proscribes is actions designed to effect a difference, not recommendations or mere discussions of SOCE.").

As both district judges who analyzed the law understood, SB 1172 does *not* prohibit therapists from communicating, expressing, or advocating any

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(…continued)
because SB 1172 is found in a different chapter from the statutes cited above, the exception for clergy and pastoral counselors does not "reach" it. Answering Br. 49 n.10. This is also incorrect. SB 1172 only applies to "mental health provider" as defined by California law. The definition for each category of mental health provider, found in the above statutes, excepts members of the clergy, or pastoral or other religious counselors. Accordingly, and because SB 1172 is a valid and neutral law of general applicability, plaintiffs' Establishment and Free Exercise Clause claims, not reached by the district court, are without merit. *See Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 879 (1990); *Jacobs v. Clark Cty. School Dist.*, 526 F.3d 419, 439 (9th Cir. 2008); *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1399-1401 (9th Cir. 1994).

viewpoint or message about sexual orientation or SOCE, either generally or to their patients. *See id.* (noting "SB 1172 does not on its face penalize a mental health professional's exercise of judgment in simply informing a minor patient that he or she might benefit from SOCE; it also does not prohibit speech necessary to the therapist's practice"); ER 21, 23 (proceeding to analyze SB 1172 under the assumption that it does not preclude a mental health provider from talking with a minor patient about SOCE or about the changeability or morality of homosexuality, or from recommending or referring a minor to someone else who could legally provide SOCE therapy). Given that SB 1172 only regulates SOCE treatment, and does not restrict the communication of ideas or messages either intrinsic or related to SOCE, plaintiffs' repeated assertions that SB 1172 targets any protected speech, let alone a particular category of protected speech, are baseless.[3]

[3] For this reason, plaintiffs' attempts to distinguish the cases cited by defendants in their Opening Brief, on the basis that unlike these cases, SB 1172 is an ideologically-driven effort to suppress expressive speech, fail. *See* Answering Br. 17-23.

B. SOCE Therapy Is Not Speech Entitled to Heightened First Amendment Protection.

Plaintiffs' notion that delivery of SOCE treatment is "speech" entitled to the highest level of First Amendment protection is similarly unfounded. Plaintiffs contend that SOCE "involves oral communication about a specific idea," that it is thus protected speech, and that any attempt to regulate it must satisfy strict scrutiny. Answering Br. 13. This Court and others, however, have previously considered and rejected this argument. Indeed, although plaintiffs may find the proposition that SOCE counseling is not protected speech for First Amendment purposes to be "remarkable," *id.* at 11, it is in fact a matter of Ninth Circuit law. This Court held in *NAAP* that "the key component of psychoanalysis is the *treatment* of emotional suffering and depression, *not speech*. . . . That psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection." 228 F.3d at 1054 (emphasis added) (citations and quotation marks omitted).

Plaintiffs ignore this Court's holding in *NAAP*. Instead, they start with the premise that they provide SOCE by means of talk therapy, and then leap to the conclusion that talk therapy must be protected speech, and that any attempt to regulate their practice is presumptively invalid under the First

Amendment. Plaintiffs' analysis fails to address the critical distinction between the regulation of expressive speech by a professional on the one hand, and the regulation of professional conduct delivered by means of speaking on the other. *See* AOB 41-45. While plaintiffs claim that "SOCE is inseparable from speech," Answering Br. 31, this is technically true of any form of professional conduct carried out through speaking. The mere fact that SOCE may involve talking, however, does not transform it from a discredited and unsafe professional practice subject to reasonable regulation by the State into expressive or otherwise protected speech. *See Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 66 (2006); *United States v. O'Brien*, 391 U.S. 367, 376 (1978); *NAAP*, 228 F.3d at 1053-54. Rather, courts recognize that although the regulation of professional practice may incidentally restrict speech in the broadest sense of the word, such regulations generally do not raise First Amendment concerns. *See* AOB 25-30; *see generally* Brief of Amicus Curiae of First Amendment Scholars 7-13 (noting that speech as a component of regulated conduct does not in itself invoke First Amendment protection; "[p]lainly, 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").

Plaintiffs also suggest that the State's power to regulate professional conduct is limited to controlling entry to a profession through licensing requirements, to regulating the use of terminology in a profession, and to sanctioning practices that lead to "physical, tangible effects on patients." *See* Answering Br. 17-22. This cramped understanding of state regulatory authority has been firmly rejected. "[I]t is properly within the state's police power to *regulate and license* professions, especially when public health concerns are affected." *NAAP*, 228 F.3d at 1054 (emphasis added) (citing *Watson v. Maryland*, 218 U.S. 173, 176 (1910)). The State's legitimate interest in regulating a profession necessarily extends to assuring the competent practice of its licensees. *See Barsky v. Bd. of Regents of Univ. of State of N.Y.*, 347 U.S. 442, 451 (1954) ("It is . . . clear that a state's legitimate concern for maintaining high standards of professional conduct extends beyond initial licensing. Without continuing supervision, initial examinations afford little protection."); *see also Coggeshall v. Mass. Bd. of Registration of Psychologists*, 604 F.3d 658, 667 (1st Cir. 2010). Moreover, because the practice of SOCE does lead to "physical, tangible effects on patients," including depression, suicidality, and sexual dysfunction, even under plaintiffs' theory, SB 1172 would be a valid exercise of state regulatory authority. ER 200-201.

Plaintiffs assert that "even if [SOCE] counseling is deemed conduct, it does not follow that it is not also speech." Answering Br. 8. Insofar as plaintiffs are suggesting that SOCE is expressive conduct, this argument fails. *See O'Brien*, 391 U.S. at 376; *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989); *see also Rumsfeld*, 547 U.S. at 66. SOCE, like medical and mental health treatments generally, is not inherently expressive. Unlike burning a draft card, distributing handbills, and other forms of conduct that amount to "symbolic speech," SOCE therapy does not evince the requisite "intent to convey a particularized message" of the healthcare provider's choosing, nor would they likely be understood by the patient as attempting to communicate such an expressive message. *See Pickup*, 2012 WL 6021465, at *10 (quoting *Anderson v. City of Hermosa Beach,* 621 F.3d 1051, 1058 (9th Cir. 2010)); *O'Brien v. U.S. Dep't of Health and Human Servs.*, No. 4:12-CV-476, 2012 WL 4481208, at *12 (E.D. Mo. Sept. 28, 2012).

Although plaintiffs maintain that SOCE involves "solely the communication of opinions and ideology," Answering Br. 31,[4] the purpose

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

of providing mental health services is not expression, but treatment.[5] *See NAAP*, 228 F.3d at 1054; *Conant v. McCaffrey*, No. C 97-0139, 1998 WL 164946, *3 (N.D. Cal. Mar. 16, 1998) ("The patients and doctors are not meeting in order to advance particular beliefs or points of view; they are seeking and dispensing medical treatment."); *Behar v. Pa. Dep't. of Transp.*, 791 F. Supp. 2d 383, 396-97 (M.D. Pa. 2011) (holding that the mere fact that doctor considered his mental health practice to be advancing societal acceptance of individuals with disabilities or illnesses "does not transform his professional efforts into the group advocacy" protected by First Amendment); *see also* Cal. Bus. & Prof. Code §§ 2903, 4996.9. Arguably, almost every form of treatment, including making a diagnosis or prescribing a drug, might convey, perhaps intentionally, some kind of message, but the Supreme Court has admonished that it "cannot accept the view that an

[5] Moreover, a licensed professional, whatever his personal views may be, may not engage in practices deemed incompetent, unsafe, or unprofessional by the State. *See Lambert v. Yellowley*, 272 U.S. 581, 596-97 (1926); *United States v. Feingold*, 454 F.3d 1001, 1005-06 (9th Cir. 2006); *see also* Randall P. Bezanson, *Speaking Through Others' Voices: Authorship, Originality, and Free Speech*, 38 Wake Forest L. Rev. 983, 1053-54 (2003) ("Patients do not ordinarily expect (or even want) a physician's professional speech to reflect nothing more than his or her own personal views; instead, patients expect the physician's advice to reflect the physician's best professional judgment about the ideas embodied in the standard of reasonable medical opinion. We expect an exercise of judgment – human agency – but not an exercise of personal intellectual free will.").

apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *O'Brien*, 391 U.S. at 376.[6]

Ultimately, plaintiffs cannot have it both ways: either SOCE is a mental health treatment, in which case it is subject to reasonable regulation whether delivered by talk therapy or by electroshock therapy; or it is simply the expression of an idea, in which case it is not regulated by SB 1172. If SOCE is treatment, it is not, as plaintiffs would have it, "sacrosanct," Answering Br. 31, rather it is precisely what the State has the authority to regulate in the service of public health. If plaintiffs are not acting as licensed mental health

[6] *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2011), is not to the contrary. In *Holder*, "the conduct triggering coverage under the statute consist[ed] of communicating a message" regarding how to resolve disputes peacefully. 130 S. Ct. at 2724. Here, the regulated conduct is mental health treatment. Accordingly, no heightened First Amendment scrutiny applies. *See Arcara v. Cloud Books*, 478 U.S. 697, 706-07 (1986) ("First Amendment is not implicated by the enforcement of a public health regulation of general application" and heightened scrutiny does not apply to statute directed to nonexpressive activity); *cf. NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (distinguishing between conduct intended to express an idea and that which produces harm distinct from communicative impact).

providers and are merely expressing their personal values and viewpoints, then SB 1172 does not apply.[7]

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

Because this case involves the regulation of a treatment, not speech, plaintiffs' arguments that SB 1172 discriminates on the basis of content and viewpoint are misplaced.[8] *See Pickup*, 2012 WL 6021465 at *9 (holding

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[7] However, the State can forbid a licensed mental health provider from providing a patient with the expression of the therapist's opinion, ideology, and values under the guise of treating minors. *See*, *e.g*. Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L. Rev. 939, 949-51 (2007); *cf. Conant v. McCaffrey*, No. 97-00139, 2000 WL 1281174, at *13 (N.D. Cal. Sept. 7, 2000).

[8] Plaintiffs' reliance on *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) is therefore inapt. As discussed in Appellants' Opening Brief, *Conant* does not control because it addressed a federal "gag order" on doctors' speech about a treatment and not the regulation of professional conduct, practice, or treatment itself. *See* AOB 36-41. Moreover, even with respect to doctor-patient communication, the holding in *Conant* is not as broad as plaintiffs suggest. A government may not restrict truthful, competent communication that is necessary to the practice of medicine. However, the First Amendment does not protect communication that falls outside the boundaries of generally recognized and accepted professional standards of care. *Conant v. McCaffrey*, 2000 WL 1281174 at *13 (A doctor "may not counsel a patient to rely on quack medicine. The First Amendment would not prohibit the doctor's loss of license for doing so."); *see also In re Factor VIII or IX Concentrate Blood Products Litigation*, 25 F. Supp. 2d 837, 845 (N.D. Ill. 1998) (The First Amendment has never been thought to bar an action for medical malpractice based on written or spoken expression in a medical context.")

that SB 1172 does not unconstitutionally discriminate on the basis of content or viewpoint because the statute "bars treatment only"); AOB 45-49; Brief of Amicus Curiae of First Amendment Scholars, 13-16.

Plaintiffs apparently do not dispute that content and viewpoint analysis does not apply to the reasonable regulation of a professional practice. Instead, they argue that SOCE is speech and that SB 1172 is an "undisguised assault" by the Legislature on "particular, disfavored messages inherent in SOCE." Answering Br. 32. However, even assuming that content and viewpoint discrimination analysis has any applicability here, and it does not, plaintiffs have not established that the government's purpose in adopting the regulation was discriminatory. *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

All the evidence demonstrates that in enacting SB 1172 the Legislature had no motive or purpose other than to protect children from harm. On appeal, plaintiffs posit that SB 1172 is not neutral because: (1) it only prohibits the practice of SOCE; (2) it does not prohibit affirmative therapies; and (3) it is based on the Legislature's findings that SOCE does not work

and is harmful. *See* Answering Br. 27-36.[9] These are complaints about the Legislature's judgment, not evidence of discriminatory purpose.

SB 1172 prohibits practicing SOCE rather than other mental health treatments because, unlike treatments that are effective and safe, SOCE does not work and is potentially dangerous, especially for minors. Although plaintiffs and amicus Foundation for Moral Law suggest that by excepting "affirmative therapies" from the definition of SOCE, SB 1172 licenses one side of the debate over change efforts, this is incorrect. SB 1172 does not require therapists to provide affirmative therapies or any therapy at all. Moreover, "affirmative therapy" does not refer to therapy that espouses a particular world-view or encourages same-sex attractions or behaviors. It simply means assisting and affirming the client's own experience without any *a priori* treatment goal concerning how clients identify or express their sexual orientation. ER 164.

Finally, there is no evidence that SB 1172 regulates based on favoritism or hostility toward any particular viewpoint or idea. Instead the evidence

[9] Plaintiffs also rely on dicta in *NAAP* for the proposition that because SB 1172 dictates what can be said in therapy, it is not content-neutral. Answering Br. 29. However, SB 1172 does not "dictate the content of what is said in therapy," except to the extent it prohibits *treatments* deemed ineffective and harmful, which *NAAP* makes clear is constitutionally permissible. *See NAAP*, 228 F.3d at 1050, 1055-56.

shows a broad consensus in the mental health field as to: (1) the fact that homosexuality is "not a disease, disorder, illness, deficiency, or shortcoming" that warrants treatment, Cal. Stats. § 2012, ch. 835, § 1(a); (2) SOCE's lack of proven efficacy; and (3) SOCE's risk of harm. *Id*. § 1(b)-(m). In enacting reasonable regulations of professional practice, the Legislature may rely on the data available to it, and notwithstanding plaintiffs' disagreement, it may do so without offending, or even implicating, the First Amendment. *See Lambert v. Yellowley*, 272 U.S. at 590-91, 596-97; *Jacobson v. Massachusetts*, 197 U.S. 11, 30-31 (1905); *cf.* Robert Post, *Understanding the First Amendment*, 87 Wash L. Rev. 549, 552 (2012). Because SB 1172 advances "legitimate regulatory goals," it is content and viewpoint neutral. *See Jacobs v.Clark Cty. School District*, 526 F.3d at 433 (citation and quotations omitted).

D. SB 1172 Satisfies Any Level of Scrutiny

Plaintiffs seize upon the statement of the Legislature that "California has a compelling interest in protecting the physical and psychological well-being of minors" as proof that SB 1172 must be assessed under strict scrutiny. Answering Br. 38-39 (quoting Cal. Stats. § 2012, ch. 835 § 1(n)). The State certainly has a compelling interest in protecting its youth. However, it is not the significance of the State's interest that determines the

appropriate level of judicial review; it is whether First Amendment rights are implicated. Because they are not, rational basis review applies. *NAAP*, 228 F.3d at 1050. However, even if plaintiffs could establish that SB 1172 significantly restricts constitutionally protected speech warranting strict scrutiny, SB 1172 would be constitutional. The law is "justified by a compelling interest and is narrowly drawn to serve that interest." *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011).[10]

1. The State has a compelling interest in protecting the physical and psychological health of minors.

As the district court noted, the State of California has a compelling interest in protecting the psychological well-being of minors and in protecting the public from harmful, risky, or unproven, mental health treatments. ER 29 (citing *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 946 (9th Cir. 1997) and *NAAP*, 228 F.3d at 1054); *see also Sable Commc'n of Cal. v. FCC*, 492 U.S. 115, 126 (1989). Although plaintiffs and

[10] Plaintiffs claim that defendants have "waived" the argument that SB 1172 passes strict scrutiny. However, while SB 1172 is only subject to rational basis review, defendants are responding to arguments raised by plaintiffs in their answering brief. Moreover, defendants argued before the district court that the statute would survive any level of review including strict scrutiny. *See* Supplemental Excerpts of Record 29-31.

the district court dismiss the evidence of the harm caused by SOCE, it is more than sufficient to justify SB 1172.

Specifically, the American Psychological Association (APA) has determined, after an extensive review of the scientific literature, that SOCE can cause:

> critical health risks to lesbian, gay, and bisexual people, including confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, suicidality, substance abuse, stress, disappointment, self-blame, decreased self-esteem and authenticity to others, increased self-hatred, hostility and blame toward parents, feelings of anger and betrayal, loss of friends and potential romantic partners, problems in sexual and emotional intimacy, sexual dysfunction, high-risk sexual behaviors, a feeling of being dehumanized and untrue to self, a loss of faith, and a sense of having wasted time and resources.

Cal. Stats. § 2012, ch. 835, § 1(b); *see also* ER 200-201; Amicus Brief of Dr. Jack Drescher, M.D. 3-10 (detailing the findings of harm in the APA Report).

In addition to the APA Report, the Legislature relied upon the conclusions of every leading mental health organization that SOCE provides no documented benefits, conflicts with the modern scientific understanding of sexual orientation, and poses serious risks of harm. Cal. Stats. § 2012, ch.

835, § 1(b)-(w).[11] Because of its lack of efficacy and risk of harms, these organizations have strongly cautioned professionals that SOCE should not be provided, particularly to children and adolescents. *See* AOB 14-17.[12] For example, the American Academy of Pediatrics announced in 1993 that "[t]herapy directed specifically at changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation." Committee on Adolescence, *Homosexuality and Adolescence*, 92 Pediatrics 631 (1993). The APA similarly concluded that "there is insufficient evidence to support the use of psychological interventions to change sexual orientation" which can cause or exacerbate "distress," "depression," and "negative self-image." ER 270. The Legislature also relied upon peer-reviewed research that SOCE is particularly harmful to children who are already at high risk of suicide and

[11] Notably, even some of the former leading practitioners and advocates of SOCE agree that it does not work and is harmful. *See*, *e.g.*, Brief of Amicus Curiae Equality California 8-11.

[12] Children and adolescents are particularly vulnerable to the harmful effects of SOCE because their identities are still forming, and they lack the psychological protections that come from a stable self-identity. ER 226-227; Caitlin Ryan, David Huebner, Rafael M. Diaz and Jorge Sanchez, *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, Pediatrics (2009). As the APA concluded, "SOCE . . . can pose harm through increasing sexual stigma and providing inaccurate information" to youth about their sexuality. ER 229.

other serious health problems. Cal. Stats. § 2012, ch. 835, §1(m) (citing Caitlin Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 Pediatrics 346 (2009)).

Although the district court, relying on *Brown v. Entertainment Merchants*, 131 S. Ct. 2729, opined that this evidence lacked scientific certainty, ER 30-32, numerous studies have documented the harms caused by SOCE, including the "non-aversive" forms practiced by plaintiffs. ER 42; *see also* A.L Beckstead and S.L. Morrow, *Mormon Clients' Experiences of Conversion Therapy: The Need for a New Treatment Approach*, 32 The Counseling Psychologist 651-690 (2004); Brief of Amicus Curiae Children's Law Center, et. al. 2-19; Brief of Amicus Curiae of Survivors of Sexual Orientation Change Efforts 3-17. The consensus of mainstream mental health organizations and the cumulative and widely accepted evidence of harm caused by SOCE are in no way comparable to the violent video game studies that the Supreme Court in *Brown v. Entertainment Merchants*

described as having been "rejected by every court to consider them" and at most to show "minuscule real-world effects." 131 S. Ct. at 2739.[13]

2. SB 1172 Is Narrowly Drawn.

SB 1172 is narrowly tailored to advance the State's compelling interests. It limits its regulation of SOCE specifically to minors, who are particularly vulnerable, and only regulates professionals practicing pursuant to the authority of a State license. It neither regulates a mental health professional's ability to discuss or recommend SOCE, nor restricts the expression of messages and viewpoints about SOCE or sexual orientation. SB 1172 also does not apply members of the clergy, or pastoral or other religious counselors, so long as they do not hold themselves out as licensed mental health professionals, *see* Cal. Bus. & Prof. Code §§ 2063, 2908, 4980.01(b) & 4996.13, or to unlicensed mental health providers.

[13] Moreover, absolute certainty, if lacking, is due in large part to the fact that proponents and practitioners of SOCE have failed to subject their work and methodologies to rigorous scientific testing. ER 187, 189-191. Given the risks posed by SOCE, it would be unethical and impracticable to require the State to conduct double-blind studies on children, subjecting them to SOCE, to establish with certainty that SOCE directly causes minors to become suicidal and/or clinically depressed. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1813 (2009) (refusing to require Congress to present studies where minors were intentionally exposed to indecent television broadcasts, isolated from all other indecency, to establish the harmful effects of such broadcasts).

Plaintiffs argue that SB 1172 does not employ the least restrictive means to address the identified harms of SOCE, suggesting that the Legislature could have limited regulation to government employees, required informed consent, or only targeted "aversive" forms of SOCE. They do not explain, however, how a regulation so limited would address the interest the Legislature was trying to protect. These suggested alternatives are not "as effective in achieving the legitimate purpose that the statute was enacted to serve." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997). In order to protect minors from a discredited and unsafe practice, the State has prohibited licensed therapists from providing SOCE to minors. This is sufficiently tailored. There is no evidence that any government employees are practicing SOCE; accordingly limiting a regulation to therapists employed by the government would not adequately protect California's youth. Similarly, informed consent, which was required before the enactment of the statute, does not adequately protect against the harms SB 1172 seeks to address. Finally, "aversive" forms of SOCE were not the only forms of SOCE that needed to be addressed. A law that allowed for "nonaversive" forms of SOCE such as counseling – which just like "aversive" forms are based on a discredited premise, do not work, and are harmful – would be insufficient.

II. PLAINTIFFS CANNOT MEET THEIR BURDEN TO DEMONSTRATE IRREPARABLE HARM, OR DEMONSTRATE THAT THE BALANCE OF HARM TIPS IN THEIR FAVOR

The district court's determination that plaintiffs would suffer irreparable injury in the absence of an injunction was error because it was based entirely on its incorrect conclusion that SB 1172 would "likely infringe their First Amendment rights" to freedom of speech. ER 34-35; *see* AOB 51-52. Aside from the alleged deprivation of their First Amendment rights, plaintiffs do not identify any cognizable injury that they will suffer if SB 1172 goes into effect. Accordingly, in the absence of any constitutional violation, plaintiffs cannot demonstrate that they will be injured, let alone irreparably so, if SB 1172 goes into effect, or that the balance of hardships and the public interest militate in favor of an injunction. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *see also Maryland v. King*, 133 S. Ct. 1, 2 (2012); *Golden Gate Rest. Ass'n v. City of San Francisco*, 512 F.3d 1112, 1126-27 (9th Cir. 2008); *Goldie's Bookstore, Inc. v. Superior Ct.*, 739 F.2d 466, 472 (9th Cir. 1984); *Dex Media West, Inc. v. City of Seattle*, 790 F. Supp. 2d 1276, 1289 (W.D. Wash. 2011).[14]

[14] Plaintiffs rely on *Sammartano v. First Judicial District Court*, 303 F.3d 959, 973 (9th Cir. 2003), but that case has been abrogated. The mere potential of irreparable injury is no longer sufficient to support entry of a (continued…)

CONCLUSION

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

Dated: March 1, 2013

Respectfully submitted,

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(…continued)
preliminary injunction. *Winter* requires that plaintiffs demonstrate that irreparable injury is *likely* in the absence of an injunction. *See* 555 U.S. at 22; *see also Cottrell*, 632 F.3d at 1135; *Dex Media West,* 790 F. Supp. 2d at 1289, n.8 (noting abrogation).

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

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

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

[X] Proportionately spaced, has a typeface of 14 points or more and contains 5,826 words (opening, answering and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words

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

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

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

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This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is

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☐ 4. **Amicus Briefs**.

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

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March 1, 2013
Dated

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

CERTIFICATE OF SERVICE

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

I hereby certify that on March 1, 2013, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

APPELLANTS' REPLY BRIEF

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

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

I further certify that some of the participants in the case are not registered CM/ECF users. On March 1, 2013, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Hayley Gorenberg
Lambda Legal Defense & Education Fund, Inc.
120 Wall Street
New York, NY 10005-3904

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 March 1, 2013, at San Francisco, California.

N. Newlin	s/ N. Newlin
Declarant	Signature

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