No. 12-17681

IN THE 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,
Defendant-Intervenor-Appellee.

On Appeal From The United States District Court
For The Eastern District Of California
No. 2:12-CV-02497-KJM-EFB (Honorable Kimberly J. Mueller)

SUPPLEMENTAL BRIEF OF DEFENDANT-INTERVENOR-APPELLEE EQUALITY CALIFORNIA

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I. INTRODUCTION

Pursuant to the Court's Order, Defendant-Intervenor-Appellee Equality California submits this supplemental brief to address (1) whether the Court should undertake plenary review; and (2) whether the evidence relevant to assessing the constitutionality of SB 1172 is limited to the legislative record. (*See* Order dated May 14, 2013 ("Order").)

As to the Court's first question, plenary review of the issues on appeal is appropriate because they can be resolved by this Court's articulation of the applicable legal standard and based on facts established in the legislative record—particularly evidence that the leading mental health organizations agree that the practices prohibited by SB 1172 provide no documented benefits and pose a risk of serious harms.

As to the Court's second question, in assessing the constitutionality of SB 1172, although the legislative record here is sufficient to uphold SB 1172, the Court may consider additional evidence that was submitted to the district court or that is publicly available. Such evidence further supports the professional consensus advising against the practices that SB 1172 bans. Moreover, even if some evidence could be viewed as contested, that does not preclude plenary review because the Supreme Court has made clear that contested evidence can constitute "substantial evidence" in support of a statute.

II. FACTUAL BACKGROUND

In enacting SB 1172, the Legislature considered and followed the consensus of the nation's leading mental health organizations that being lesbian, gay, or bisexual is not a disorder and that attempts to change someone's sexual orientation lack evidence of efficacy and are potentially very dangerous. SB 1172, Cal. Stats. 2012, ch. 835, § 1(a)-(m) (quoting the conclusions of ten major professional health organizations).

The Legislature also relied on a 2009 report of an American Psychological Association (APA) Task Force that, having conducted a "systematic review of peer-reviewed journal literature," concluded that there was no reliable evidence that sexual orientation change efforts work and that such efforts "can pose critical health risks" to patients. Cal. Stats. 2012, ch. 835, § 1(b); *see* APA Task Force Report, Stein Decl. Ex. 1 (Pickup ER 215-352). Further, the Legislature cited a study showing that minors who face family rejection, of which sexual orientation change efforts are a central example, "face especially serious health risks." *Id.* § 1(m) (citing Caitlin Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 Pediatrics 346 (2009)). The Legislature also heard testimony from survivors of sexual orientation change efforts (Welch ER 203-209) and received letters in support of SB 1172 from professional organizations (Welch ER 59-68).

The State Defendants and Equality California provided further evidence in the district court here and in *Welch*. The State submitted the

expert declaration of Dr. Gregory M. Herek, a professor of psychology, who described (1) the serious methodological flaws of the few studies that purport to show that sexual orientation change efforts work, and (2) the substantial evidence that such change efforts cause harm. (Pickup ER 194-212.) The State's other expert, Dr. A. Lee Beckstead, a licensed psychologist and a member of the APA Task Force, explained that sexual orientation change efforts have no scientific basis, why reports of their efficacy by some study participants are unreliable, and that sexual orientation change efforts carry a "significant risk of harm," especially for minors. (Welch ER 420-454; Pickup ER 181-193.) Equality California's expert Douglas C. Haldeman offered testimony similar to Dr. Beckstead's and also explained that Dr. Robert Spitzer, author of an often-cited study purporting to show that sexual orientation change efforts may work, had recanted the study. (Haldeman Decl. ¶ 19, Exs. B & C (Welch ER 93-94, 118-132).) Equality California's other expert, Dr. Caitlin Ryan, testified that youth are particularly susceptible to the harms posed by rejecting behaviors, including sexual orientation change efforts.[1] (*Id.* 69-87.)

III. ARGUMENT

A. Plenary Review Is Permissible And Appropriate Here.

Plenary review at the preliminary injunction stage is appropriate if the

[1] Objections to these declarations were filed, but neither court ruled on those objections. (*See* Welch order at 31 n.11 (Welch ER 31); Pickup order at 3 n.2 (Pickup ER 3).)

"district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance." *Gorbach v. Reno*, 219 F.3d 1087, 1091 (9th Cir. 2000) (en banc) (citation omitted); *see also Isaacson v. Horne*, No. 12-16670, --- F.3d ---, 2013 WL 2160171, at *4 (9th Cir. May 21, 2013) (reversing denial of motion for preliminary injunction where there were no relevant facts in dispute and the merits of the constitutional question were controlled by binding precedent). When exercising plenary review, this Court reviews *de novo* not only legal questions but also application of the law to the undisputed material facts. *United States v. Johnson*, 256 F.3d 895, 911-14 (9th Cir. 2001).

The ruling in this case on Plaintiffs' request for preliminary relief under the First Amendment and the Due Process Clause's protection of parental rights rested on the district court's "premise as to the applicable rule of law," *Gorbach*, 219 F.3d at 1091—namely, application of rational basis review to SB 1172. And as explained in Section C below, there is no need for further development of an evidentiary record under that test or under more heightened scrutiny. (*See Pickup* Order at 42-44 (Pickup ER 42-44).) SB 1172 itself contains extensive legislative findings. In addition, ample evidence supporting both those findings and the statute as a whole were not only before the Legislature, but also before the district court.

Moreover, plenary review is appropriate here for purposes of judicial economy and to avoid the possibility of contrary rulings by the district court here and that in *Welch*. *See Thornburgh v. American College of*

Obstetricians and Gynecologists, 476 U.S. 747, 755–57 (1986) (explaining that plenary review can be appropriate "in certain cases to save the parties the expense of further litigation"); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 701 (9th Cir. 1997) ("Where the issue is whether the district court got the law right in the first place, we do not defer review and thereby allow lawsuits to proceed on potentially erroneous legal premises.").

1. **Plenary Review Is Appropriate If Rational Basis Review Applies.**

As the district court here concluded, because SB 1172 concerns professional conduct subject to "reasonable licensing and regulation by the State," the statute should be reviewed only for reasonableness. *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992); Intervenor-Appellee's Br. ("EQCA Br.") at pp. 21-23. The established facts, detailed in the legislative findings, that the leading mental health professional organizations have advised against sexual orientation change efforts—including for minors—on the grounds that such efforts lack any scientific basis or evidence of efficacy and pose serious risks of harm, are more than sufficient to sustain SB 1172's constitutionality under this standard. *See* Cal. Stats. 2012, ch. 835, § 1.

2. **Plenary Review Is Appropriate If Intermediate Scrutiny Applies.**

This Court's questions to the Parties cited *Turner Broad. Sys. v. F.C.C.* ("*Turner I*"), 315 U.S. 622 (1994), and *Turner Broad. Sys. v. F.C.C.* ("*Turner II*"), 520 U.S. 180, 216 (1997) (*see* Order), which applied the more

heightened *United States v. O'Brien*, 391 US. 367 (1968), standard of First Amendment scrutiny. For the reasons explained in Equality California's opening brief, that standard is inapplicable here. (*See* EQCA Br. at 32-34.) But even if it did apply, the Court could still resolve the issues on appeal on plenary review.

Under *O'Brien*, the State must show that a statute promotes an important or substantial government interest without burdening substantially more speech than necessary to further that interest. *Turner I*, 512 U.S. at 662. The legislative record establishes that SB 1172 satisfies this test. First, the governmental interests that SB 1172 furthers "in protecting the physical and psychological well-being of minors, including protecting . . . minors against exposure to serious harms caused by sexual orientation change efforts," Cal. Stats. 2012, ch. 835, § 1(a)-(m), plainly are important and substantial. The Legislature relied on the conclusions of the country's leading mental health associations that sexual orientation change efforts provide no documented benefits, conflict with the modern scientific understanding of sexual orientation, present a risk of serious harms, and should not be practiced, including on minors. There is no need for further development of a factual record on this issue. *Id.* § 1(b)-(w).

Second, the practices that SB 1172 specifically targets are exactly those that put youth at risk of the serious harms the Legislature was trying to prevent. Indeed, SB 1172 contains a "carve-out" provision to ensure its reach extends only to those types of therapies identified in the legislative

record as potentially harmful, excluding from its reach psychotherapies that (a) assist patients in exploring their identity, "including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices," and (b) "do not seek to change sexual orientation." Cal. Stats. 2012, ch. 835, § 2(A)-(B). Accordingly, *O'Brien's* tailoring requirement is satisfied, and there is no need for further evidence on this point. *Cf. Turner Broadcasting System v. F.C.C.* ("*Turner II*"), 520 U.S. 180, 216 (1997) ("None of [the regulation's] provisions appears unrelated to the ends that it was designed to serve.") (alteration in original) (citation omitted).[2]

Plaintiffs may disagree with the medical consensus against sexual orientation change efforts, but that disagreement does *not* mean that the fact of that consensus is not established. Plaintiffs do not dispute that the legislative record reflects the statements of the leading mental health professional organizations advising against sexual orientation change efforts, but still insist that the Court also consider the views of individuals and groups who wish to engage in such efforts despite their lack of demonstrated efficacy and their risks, *and then conclude that the Legislature was wrong.*

The Supreme Court rejected this type of argument in *Turner II*. The relevant question, even under the *O'Brien* heightened standard , is not "whether [the legislature], as an objective matter, was correct," but rather "whether the legislative conclusion was reasonable and supported by

[2] For the reasons Equality California previously has explained (EQCA Br. at 35-38), SB 1172 also would survive strict scrutiny on the existing record

substantial evidence." *Turner II*, 520 U.S. at 211. Even under heightened scrutiny, legislative decisions based upon "substantial evidence" are afforded deference, "lest we infringe on traditional legislative authority to make predictive judgments" inherent in policy-making. *Id.* at 196; *see also id.* at 208 ("The issue . . . is whether, given conflicting views . . . , Congress had substantial evidence for making the judgment that it did.").

B. Although The Legislative Record Contains Ample Evidence Sufficient To Uphold SB 1172, The Court May Also Consider Additional Evidence.

In response to this Court's second question, Equality California submits that, although the legislative record provides ample evidence to uphold SB 1172, this Court has discretion to consider additional evidence offered in the district court as well. This is illustrated by the Supreme Court's application of *O'Brien* in *Turner II*, which was decided after the Supreme Court remanded the *Turner I* case for factual development concerning issues about which there was no evidence in the record. *Turner II* evaluated the "substantial basis to support Congress' conclusion" by "first examin[ing] the evidence before Congress and then the further evidence presented to the District Court on remand to supplement the congressional determination." 520 U.S. at 196. The Court engaged in a detailed analysis of the expert declarations submitted on remand, citing those declarations dozens of times in explaining why the statute at issue should be upheld.

Turner II also makes clear that, even if some of the evidence submitted in the district court was contested, that evidence can contribute to the "substantial evidence" necessary for an appellate court to uphold a statute under *O'Brien*. *Id.* at 211. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent . . . [a] finding from being supported by substantial evidence." *Id.*

C. Unlike In *Turner I*, Remand Is Unnecessary Here.

That there was a remand between *Turner I* and *Turner II* does not mean that there would need to be a remand here for this Court to consider evidence outside the legislative record in reviewing the issues presented on appeal. *Turner I* explained that there were relevant questions on which there was no evidence at all in the record. *See, e.g.*, 512 U.S. at 667-68 ("The parties have not presented *any evidence* [that various types of harm have befallen local broadcast stations] as a result of their being dropped from . . . cable systems.") (emphasis added).

There are no such evidentiary gaps here. The Legislature considered a fulsome body of evidence, including policies from all of the leading mental health organizations, as well as the APA Task Force report and other scientific articles and studies detailing the lack of evidence of efficacy and the serious harms associated with sexual orientation change efforts. The State Defendants' and Equality California's expert declarations submitted in the district courts here and in *Welch* elaborate on and reinforce the Legislature's conclusions. And Plaintiffs have already had an opportunity to

submit lengthy declarations to present their views disagreeing with the professional consensus about sexual orientation change efforts.[3]

Even assuming that Plaintiffs could succeed on remand in demonstrating that some of the evidence that the Legislature relied on is contested, this would not change the constitutional analysis. As explained above, *Turner II* explicitly holds that a court applying *O'Brien* can consider evidence that is contested as part of the substantial evidence supporting the law in question. *Turner II*, 520 U.S. at 211. Indeed, in *Turner II*, even where there was not a consensus among the leading experts, the Court held that there was "substantial evidence" to support Congress's judgment. *Id.* at 208-11. Here, the overwhelming scientific consensus regarding the practices barred by SB 1172 plainly constitutes substantial evidence.

IV. CONCLUSION

This Court may undertake plenary review in this matter, and has no need to but may consider evidence that was not in the legislative record.

[3] Further, the only facts necessary for this Court's review are "legislative facts." As this Court recently explained, legislative facts "are often considered by appellate courts from publicly available primary sources even if not developed in the record." *Isaacson*, 2013 WL 2160171, at *4 n.7. This Court may also consider relevant information presented in *amicus* briefs such as that submitted by Dr. Jack Drescher, M.D. (ECF 30-1); the City of San Francisco (ECF 55); a group of survivors of sexual orientation change efforts (ECF 46-2), and other *amicus* briefs. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 330-32 (2003) (quoting *amicus* brief of military leaders); *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2004).

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Respectfully submitted,

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