CASE NO. 12-17681
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Plaintiffs-Appellants,

v.

EDMUND G. BROWN, Jr. Governor of the State of California, in his official capacity; ANNA M. CABALLERO, Secretary of the State and Consumer Services Agency of the State of California, in her official capacity, KIM MADSEN, Executive Officer of the California Board of Behavioral Sciences, in her official capacity; MICHAEL ERICKSON, PH.D, President of the California Board of Psychology, in his official capacity; SHARON LEVINE, President of the Medical Board of California, in her official capacity,

Defendants-Appellees.

and

EQUALITY CALIFORNIA, Intervenor-Defendant-Appellee

PRELIMINARY INJUNCTION APPEAL (9TH CIRCUIT RULE 3-3)

On Appeal from the Eastern District of California
Case No. 2:12-cv-02497-KJM-EFB Honorable Kimberly J. Mueller

PLAINTIFFS-APPELLANTS' SUPPLEMENTAL BRIEF

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I. THIS COURT SHOULD ENGAGE IN A PLENARY REVIEW OF SB 1172 BECAUSE THIS CASE PRESENTS A QUESTION OF LAW.

Ordinarily, this Court reviews the denial of a preliminary injunction for an abuse of discretion. *Gorbach v. Reno*, 219 F.3d 1087, 1091 (9th Cir. 2000) (en banc). When this Court reviews an order from a preliminary injunction resting "solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, the court may undertake 'plenary review of [the] issues' rather than 'limit its review in a case of this kind to abuse of discretion.'" *Id.* (quoting *Thornburgh v. Am. College of Obstetricians & Gynecologists*, 476 U.S. 747, 757 (1986)). The question involved here is a legal one. Plenary review is therefore appropriate.

A. SB 1172 is Viewpoint Discriminatory so Its Constitutionality is a Pure Question of Law.

This Court has found that the constitutionality of a statute normally involves a pure question of law. *See United States v. Bolanos-Hernandez*, 492 F.3d 1140, 1141 (9th Cir. 2007); *see also United States v. Carranza*, 289 F.3d 634, 643 (9th Cir. 2002) (citing *United States v. Jones*, 231 F.3d 508, 513 (9th Cir. 2000)) ("The constitutionality of a statute is a question of law reviewed de novo."). Whether a statute discriminates against speech on the basis of viewpoint is also a pure question of law, which requires for analysis nothing more than the text of the

statute. No court has ever upheld viewpoint discrimination of private speech, thus indicating the facts are not determinative for viewpoint discrimination. If the law is viewpoint discriminatory, as SB 1172 is here, it is unconstitutional.

B. Facts are Not Relevant in a Facial Challenge to a Viewpoint Discriminatory Law.

Viewpoint discrimination of private speech has never been upheld. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'") (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). Indeed, a finding of viewpoint discrimination is dispositive. *See Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2667 (2011).

Because SB 1172 discriminates against speech based solely on the basis of its viewpoint (*see* Dkt. 89, Appellants' Reply Br. at 1-4), *any* factual considerations or assertions posited by the Legislature, the State or the Intervenors are of no controlling relevance. Such discrimination is *per se* unconstitutional and cannot be upheld. A finding that SB 1172 discriminates on the basis of viewpoint would therefore end the inquiry.

II. THIS COURT SHOULD ENGAGE IN PLENARY REVIEW OF SB 1172 EVEN IF IT FINDS THAT SB 1172 IS NOT VIEWPOINT DISCRIMINATORY.

A. This Court's Determination of SB 1172's Constitutionality as a Content-Based Restriction is a Pure Question of Law.

As mentioned above, "[t]he constitutionality of a statute is a question of law reviewed de novo." *United States v. Carranza*, 289 F.3d 634, 643 (9th Cir. 2002) (citing *United States v. Jones*, 231 F.3d 508, 513 (9th Cir. 2000)). A pure question of law exists when "consideration of the issue will not require the parties to develop new facts." *Turner v. McMahon*, 830 F.2d 1003, 1008 (9th Cir. 1987). Whether the content-based restriction imposed by SB 1172 is constitutional does not require the development of additional facts. The only relevant facts are established, and all others that could be reviewed are of no controlling relevance for purposes of determining whether a preliminary injunction should issue.

B. The Legislative Facts are Established.

This Court's "obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo*, or to replace [the legislature's] factual predictions with our own. Rather, it is to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences *based on substantial evidence*." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) (emphasis added). SB 1172 was enacted on August 30, 2013, and signed into law by Governor Brown on September 29, 2013. The evidence the Legislature considered for this bill was closed at that point. Those findings are

expressed in the text of SB 1172 (ER 00478-80) and are the only facts necessary for this Court's determination. As such, the relevant facts are established.

C. All Other Facts are of No Controlling Relevance to this Decision.

"Facial attacks, by their nature, are not dependent on the facts surrounding any particular [law]." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 n.11 (1988). "A facial challenge to a statute considers only the text of the statute itself, not its application to the particular circumstances of an individual." *Field Day, LLC v. Cnty. of Suffolk*, 463 F.3d 167, 176 (2d Cir. 2006) (citing *City of Lakewood*, 486 U.S. at 770 n.11). Indeed, "facial challenges are to constitutional law what *res ipsa loquitur* is to facts—in a facial challenge, *lex ipsa loquitur:* the law speaks for itself." *See Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011) (quoting Nicolas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209, 1238 (2010)). When the issues presented to the Court are pure questions of law, as is true here, this Court's consideration does not require the developments of facts. *Turner*, 830 F.2d at 1008.

Appellants brought a facial challenge against SB 1172 based on the fact that it was viewpoint and content discriminatory, unconstitutionally vague and overbroad, and that it infringed on the fundamental parental rights of parents. (ER 00464-65, 00473). These are all purely facial challenges, and in order to decide

them this Court need only look at the text of the statute and the legislative findings as expressed in the text. *See Brown v. Gilmore*, 258 F.3d 265, 275 (4th Cir. 2001).

III. THIS COURT'S REVIEW SHOULD BE LIMITED TO THE FACTS IN THE LEGISLATIVE RECORD, WHICH ARE INSUFFICIENT TO UPHOLD THE BREATHTAKING SWEEP OF SB 1172.

A. Deference to the Legislature Does Not Preclude Meaningful Judicial Review of the Legislative Findings.

"That Congress' predictive judgments are entitled to substantial deference does not mean, however, that they are insulated from meaningful judicial review." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994). "To the extent that the federal parties suggest that we should defer to Congress' conclusion about an issue of constitutional law, our answer is that while we do not ignore it, *it is our task in the end to decide whether Congress has violated the Constitution*." *Sable Commc'ns, Inc. v. FCC*, 492 U.S. 115, 129 (1989) (emphasis added). Indeed, "whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law." *Id.*

The importance of critical judicial review is at its zenith when cherished constitutional freedoms are at issue. "Deference to legislative findings cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). This Court's plenary review should pay little deference to the conclusions that the Legislature drew from the scant policy statements in SB 1172. Indeed, the APA Task Force Report of 2009 ("Task Force

Report" or "Report"), relied upon by the Legislature as the primary basis for the law, does not at all support SB 1172. *Brown v. Entm't Merchant Ass'n*, 131 S. Ct. 2729, 2736 (2011). The law is a breathtaking intrusion into the First Amendment speech rights of Appellants, and the Court is required to undertake a critical review of the sufficiency of the Legislature's findings, which are insufficient as a matter of law to merit such a broad intrusion in constitutionally protected liberties.

B. The Legislative Findings are Insufficient as a Matter of Law.

This Court must answer the "question [of] whether the legislative conclusion was reasonable and supported by *substantial evidence* in the record." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 211 (1997) (citing *Turner I*, 512 U.S. at 665-66). "When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'" *Turner*, 512 U.S. at 664 (citing *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)). Indeed, the State "must specifically identify an *actual problem* in need of solving." *Brown*, 131 S. Ct. at 2736 (emphasis added). The Legislature "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* "[T]he government must present more than anecdote and suspicion." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 822 (2000). *"[S]peculative fears alone have never been held*

sufficient to justify trenching on first amendment liberties." *Century Commc'ns Corp. v. FCC*, 835 F.2d 292, 300 (D.C. Cir. 1987) (holding that government claims that are not based on substantial evidence are "more speculative than real") (emphasis added).

When this Court reviews the findings upon which the Legislature made its determination to ban the protected speech of mental health professionals who engage in SOCE with minors, and minors and their parents who seek such counsel, it is evident that the Legislature did not base its conclusions on *substantial evidence*. The only "findings" contained in the text of SB 1172 are position or ideological opinions of some mental health organizations, none of which actually ban the practice of SOCE; the APA Task Force Report on SOCE; and an irrelevant study. (ER 00478-80).

The position or ideological opinions of mental health organizations do not constitute *substantial evidence*. Even if these organizations based their ideological positions on a *belief* that SOCE is potentially harmful to minors, that is not *evidence* sufficient to justify infringing the First Amendment liberties of other individuals. Indeed, "[o]pinion evidence is not evidence of fact." *United States v. Honolulu Plantation Co.*, 182 F.2d 172, 178 (9th Cir. 1950). Moreover, subjective opinions about a particular practice are not evidence. *See Cheney v. U.S. Oncology, Inc.*, 34 F. App'x 962 (5th Cir. 2002); *Lenzen v. Workers Compensation*

Reinsurance Ass'n, 705 F.3d 816, 821 (8th Cir. 2013). As Judge Christen pointed out during oral argument, the Legislature's findings regarding these position statements were really nothing more than a "bunch of opinions." As a matter of law, those opinions do not constitute substantial evidence upon which this Court may defer to the Legislature and uphold SB 1172 against constitutional scrutiny.

The Legislature also referenced an article by Caitlin Ryan (ER 00479), but this article has nothing to do with SOCE. It merely states some minors may experience mental health problems due to family rejection because of their sexual orientation, but this has nothing whatsoever to do with SOCE. This cannot possibly provide a basis for an unprecedented law that bans any counsel or efforts under any circumstances to change unwanted same-sex sexual attractions, behavior or identity, especially when minors and their parents desperately seek such counsel.

The only *evidence* included in the Legislature's findings is the APA Task Force Report. (ER 00478). This Report, however, is insufficient to justify the significant intrusion into the constitutionally protected liberties of mental health professionals in California. The Report found only *anecdotal evidence* of purported harm from SOCE. (ER 00312). It is beyond question that the Legislature did not base its conclusions on *substantial evidence* when the *only* evidence it relied upon concludes that "there is a dearth of scientifically sound research on the safety of SOCE," and that "[e]arly and recent research studies provide *no clear indication of*

the prevalence of harmful outcomes." (ER 00264) (emphasis added). The Report also found evidence of *benefit* from SOCE. (ER 00271). If the only real evidence that was included in the Legislature's findings is *inconclusive* as to the alleged harms that *might* arise in *some* minors, then certainly the Legislature did not have a substantial basis upon which to impose its breathtakingly expansive intrusion into the First Amendment liberties of mental health professionals and those who seek such counsel. This evidence is insufficient as a matter of law.

In *Turner*, the Court found that Congress's conclusions of harm were justified because "much of the testimony, though offered by interested parties, was supported by verifiable information and citation to independent sources." *Turner*, 520 U.S. at 196. The Court upheld the *content-neutral* regulation being challenged in that case because "Congress had before it substantial evidence to support its conclusions." *Id.* at 208. Here, by contrast, SB 1172 is certainly not content-neutral, but is viewpoint and content discriminatory. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Additionally, the only evidence supporting the Legislature's prohibition on SOCE counseling consists in anecdotal evidence and inconclusive studies. There is evidence of benefit among adults and no research either way on minors. On this record, SB 1172 cannot survive a constitutional challenge under the First Amendment.

IV. IT WOULD BE ERROR FOR THIS COURT TO CONSIDER EXTRANEOUS EVIDENCE OUTSIDE OF THE LEGISLATIVE FINDINGS.

Plenary review is only appropriate when the preliminary injunction decision "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) (citing *Thornburgh v. Am. College of Obstetricians & Gynecologists*, 476 U.S. 747, 757 (1986)) (emphasis added). Courts have engaged in this expanded review only when there is a full record before it, the facts are undisputed by the parties, or the facts are irrelevant. *Thornburgh*, 476 U.S. at 757; *see also Siegel v. Lepore*, 234 F.3d 1163, 1174 n.4 (11th Cir 2000); *Hsu ex rel. Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 852-53 (2d Cir. 1996) (noting that this type of review applies where the case hinges not on the facts but one how the law should be applied). Here, the only facts that were not vigorously contested by the parties at the district court were those contained in the text of SB 1172. Therefore, it would be error to consider extemporaneous fact.

CONCLUSION

This Court should engage in plenary review, reverse the district court, find that SB 1172 is unconstitutional, and continue to enjoin the law.

Respectfully submitted:

Dated: May 28, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 28th day of May, 2013, I filed the foregoing Motion electronically through the CM/ECF system, which caused the following counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing:

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