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' SUPPLEMENTAL BRIEF

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INTRODUCTION

Defendants submit this supplemental brief pursuant to this Court's Order dated May 14, 2013, to address (1) whether this Court should undertake plenary review of the legal issues in this case; and (2) the evidence relevant to assessing the constitutionality of Senate Bill (SB) 1172.

With respect to the first question, this Court should undertake plenary review because both the district court's grant of a preliminary injunction in this case, and the denial of a preliminary injunction in the related case of *Pickup v. Brown*, Case No. 12-17681, rest solely on legal questions, and the facts are either established or of no controlling relevance. This Court must determine, among other issues, whether or not sexual orientation change efforts (SOCE) is speech within the meaning of the First Amendment, whether there is a fundamental right to practice or receive a treatment reasonably prohibited by the State, and what is the appropriate legal standard for evaluating the constitutionality of SB 1172.

As Defendants have set forth, SB 1172, which restricts treatments to children that fail to meet professional standards of care, is an unremarkable exercise of the State's power to regulate professional conduct, and is subject to deferential review. Given the overwhelming professional consensus that SOCE provides no documented benefits, conflicts with the modern scientific

understanding of sexual orientation, and poses serious risks of harm, no additional facts are required to show that SB 1172 is reasonably related to the State's strong interest in protecting the health and safety of its children. The legislative record establishes the only fact of controlling relevance – that the practice of SOCE (on minors) is ineffective, is unsafe, and falls well below the prevailing standard of care. Even if this Court should decide that a higher level of scrutiny applies, the facts of controlling relevance are still established and plenary review is appropriate. The legislative record shows that the Legislature drew reasonable inferences based on substantial evidence that treating children with SOCE is incompetent and dangerous, that SB 1172 would further the State's interest in protecting minors from SOCE, and that SB 1172 is sufficiently tailored.

As to the Court's second question, the evidence before the Legislature demonstrates that SB 1172 satisfies any level of constitutional scrutiny. Accordingly, and although this Court has discretion to consider the additional evidence submitted to the district court, in assessing the constitutionality of SB 1172, it need not look beyond the legislative record to hold that SB 1172 is constitutional.

ARGUMENT

I. THIS COURT SHOULD EXERCISE PLENARY REVIEW BECAUSE THESE APPEALS INVOLVE QUESTIONS OF LAW AND THE FACTS OF CONTROLLING RELEVANCE ARE ESTABLISHED

This Court should exercise plenary review and hold that SB 1172 is constitutional. Appellate review of decisions to grant or deny a preliminary injunction is generally limited and for abuse of discretion.[1] However, where, as here, an appeal turns on a pure question of law, this Court may undertake "plenary" review. *Gorbach v. Reno*, 219 F.3d 1087, 1091 (9th Cir. 2000) (en banc). In *Rucker v. Davis*, this Court clarified the standard and scope of review for preliminary injunctions, and explained when it is appropriate to reach the merits of the underlying case. 237 F. 3d 1113, 1118 (9th Cir. 2001) (en banc), *rev'd on other grounds*, *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002). As this Court stated:

> If a district court's ruling rests solely on a legal question, and the facts are established or of no

[1] Even if the abuse of discretion standard applied, reversal of the district court's order would be required, as the district court's decision is based upon erroneous conclusions of law. *See Yokoyama v. Midland Nat'l Life Ins. Co.,* 594 F.3d 1087, 1091 (9th Cir. 2010) ("an error of law is an abuse of discretion").

> controlling relevance, then we may undertake a plenary review of the decision to grant a preliminary injunction.

Id. (internal citations omitted); *see also Sierra Club v. Marsh*, 816 F.2d 1376, 1982 (9th Cir. 1987) (on appeal from a denial of a preliminary injunction that "rested primarily on interpretations of law, not on the resolution of factual disputes . . . we consider the merits of the case and enter a final judgment to the extent appropriate."); *cf. Isaacson v. Horne*, No. 12-16670, 2013 WL 2160171, at *4 (9th Cir. May 21, 2013).[2]

Resolution of this appeal turns on dispositive legal issues, including: whether SOCE is speech within the meaning of the First Amendment, whether there is a fundamental right to practice or obtain a treatment deemed harmful by the State, and the appropriate standard for evaluating the constitutionality of SB 1172. Whether this Court applies the rational basis

[2] Plenary review is particularly appropriate where, as here, the case before the Court is a facial constitutional challenge to a statute. *See Glick v. McKay*, 937 F.2d 434, 436 (9th Cir. 1991) (because "important constitutional issues are at stake," the "customary discretion accorded to a district court's ruling on a preliminary injunction yields to our plenary scope of review as to the applicable law"), *overruled on other grounds*, *Lambert v. Wicklund*, 520 U.S. 292 (1997); *see also Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 701 & n.9 (9th Cir. 1997) (reversing preliminary injunction and exercising plenary review of constitutional challenge to a statute). Judicial economy and avoidance of potentially conflicting rulings by the district courts also militate in favor of plenary review. *See United States v. Johnson*, 256 F.3d 895, 912-14 (9th Cir. 2001).

standard that governs regulation of professional conduct or intermediate scrutiny, all the facts of controlling relevance are established and no further development of the record is needed.[3] Accordingly, plenary review is appropriate. *See Gorbach*, 219 F.3d at 1091.

As discussed in Defendants' various briefs, SB 1172 does not implicate the First Amendment or any other fundamental right, and is thus subject only to rational basis review. *See Welch v. Brown*, Case No. 13-15023, Appellants' Opening Brief at 23-32; Reply Brief at 4-17; *Pickup v. Brown*, Case No. 12-17681, Answering Brief of Defendants-Appellees at 22-28, 32-33. Under this standard, SB 1172 is constitutional so long as it is reasonable and related to a legitimate government interest. *See National Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology* (*NAAP*), 228 F.3d 1043, 1050-51 (9th Cir. 2000). The legislative record, in particular the longstanding and widespread professional consensus that SOCE is

[3] Given the abundant legislative record and other evidence before the district court demonstrating the State's compelling interest in protecting minors and that SB 1172 is narrowly tailored to achieve this interest, this Court arguably could exercise plenary review and hold that SB 1172 survives strict scrutiny. *See, e.g., Welch v. Brown*, Case No. 13-15023, Appellants' Reply Brief at 16-22. However, and as discussed in defendants' briefs, because SB 1172 is a reasonable regulation of professional conduct and does not restrict protected speech, strict scrutiny does not apply. *See NAAP*, 228 F.3d at 1050-54.

ineffective and harmful to children, *see* Cal. Stats. 2012, ch. 835, § 1 (a)-(m), *Welch* ER 62-68**,** is more than sufficient to establish that "the government could have had a legitimate reason for acting as it did." *NAAP*, 228 F.3d at 1050.

Because SOCE, like medical and mental health treatments generally, is not expressive speech or conduct, intermediate scrutiny does not apply here. *See Arcara v. Cloud Books*, 478 U.S. 697, 706-07 (1986); *United States v. O'Brien*, 391 U.S. 367, 376 (1968); *see also Welch* Reply Brief at 10-13. However, even if it were applicable, the Court could still undertake plenary review as all the facts of controlling relevance to this test are established. *See Gorbach*, 219 F.3d at 1091.

In order to survive intermediate scrutiny, the State must show that the statute promotes a substantial government interest that is unrelated to the suppression of free expression without burdening substantially more speech than is necessary to further that interest. *See O'Brien*, 391 U.S. at 377. The legislative record is sufficient to allow the Court to make this determination. In applying intermediate scrutiny, the court's "sole obligation is 'to assure that, in formulating its judgments, [the Legislature] has drawn reasonable inferences based on substantial evidence.'" *Turner Broad. Sys., Inc. v. F.C.C.* (*Turner II*), 520 U.S. 180, 195 (1997) (quoting *Turner Broad. Sys.,*

Inc. v. F.C.C. (*Turner I*), 512 U.S. 622, 666 (1994)). Substantiality is a deferential standard and "complete factual support in the record is not possible or required" to uphold a statute as constitutional. *See Turner II*, 520 U.S. at 196. "Even in the realm of First Amendment questions where [the legislature] must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting [] regulatory policy." *Id.*; *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 299 (2000) (plurality op.).

As both district courts noted, the legislative record contains substantial evidence that the Legislature enacted SB 1172 in order to protect the psychological well-being of minors. *See Welch* ER 29; *Pickup* ER 8-10, 42-44. Indeed, the legislative findings reflect the considerable evidence that SOCE is harmful, unscientific, and spurious. This evidence includes (1) the American Psychological Association Report that concluded that SOCE can cause "critical health risks to lesbian, gay, and bisexual people;" (2) the conclusions and reports of every leading mental health organization that SOCE is ineffective and dangerous, and thus should be "avoided;" and (3) peer-reviewed research that SOCE is particularly harmful to children who

are already at high risk of suicide and other serious health problems. Cal. Stats. § 2012, ch. 835, § 1(b)-(w); *Welch* ER 143-272; *Pickup* ER 215-344. The Legislature could reasonably conclude from this evidence that regulation was required to protect "minors against exposure to serious harms caused by sexual orientation change efforts," and that SB 1172 would further its interest in doing so. *Id.*, § 1(n); *see Turner I*, 512 U.S. at 664;[4] *Turner II*, 520 U.S. at 209-10.

There is also substantial evidence in the legislative record that SB 1172 is sufficiently tailored. *See Turner II*, 520 U.S. at 216-17. SB 1172 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

[4] Although the Court in *Turner I* determined that a remand was required to allow the parties to develop a more thorough record, remand is not warranted here. Unlike in *Turner I*, there is not a "paucity of evidence" or complete lack of findings that would prevent this Court from conducting a meaningful application of intermediate scrutiny. *See, e.g.*, 512 U.S. at 668 (remanding in part because the record contained no findings regarding "the extent to which the [challenged] provisions in fact interfere with protected speech.").

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.

Plaintiffs disagree with the Legislature's findings and conclusions, and have put forth some questionable evidence that SOCE may work for some individuals. However, this evidence does not impede plenary review. As the Court in *Turner II* explained, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." *Turner II*, 520 U.S. at 211 (internal quotation marks, alterations, and citations omitted); *see also id.* at 224-25 ("We cannot displace Congress' judgment respecting content-neutral regulations with our own, so long as its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination. Those requirements were met in this case, and in these circumstances the First Amendment requires nothing more.").

II. ALTHOUGH THE LEGISLATIVE RECORD ESTABLISHES ALL FACTS OF CONTROLLING RELEVANCE NECESSARY TO UPHOLD SB 1172, THE COURT MAY ALSO CONSIDER ADDITIONAL EVIDENCE SUBMITTED BELOW

Although, as discussed above, the evidence contained in the legislative record is more than adequate to establish that SB 1172 satisfies rational basis

review or intermediate scrutiny, this Court has discretion to consider the additional evidence submitted to the district court. In *Turner II*, for example, the Court examined "first the evidence before Congress and then the further evidence presented to the District Court on remand to supplement the congressional determination." *Turner II*, 520 U.S. at 196. The Court engaged in a detailed analysis of the various expert declarations and other supplemental evidence provided on remand and relied upon this evidence in holding that the challenged statute was constitutional. *See, e.g.*, *id.* at 197-202.[5] Accordingly, in assessing the constitutionality of SB 1172, this Court may consider the additional evidence, including the expert declarations and reports in the district court record. *See, e.g.*, *Welch* ER 69-76, 88-96, 143-272, 368-386, 420-434; *Pickup* ER 181-212, 215-344.

CONCLUSION

For the foregoing reasons, defendants respectfully request that this Court exercise plenary review and hold that SB 1172 is constitutional.

[5] Moreover, as this Court recently recognized, legislative facts, which are the only facts relevant here, "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 information presented in briefs by amicus curiae. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 330-32 (2003).

Dated: May 28, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

I hereby certify that on May 28, 2013, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

APPELLANTS' SUPPLEMENTAL 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 May 28, 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:

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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 May 28, 2013, at San Francisco, California.

N. Newlin	s/ N. Newlin
Declarant	Signature

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