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

DAVID PICKUP, CHRISTOPHER H. ROSIK, PH.D., JOSEPH NICOLOSI, PH.D,ROBERT VAZZO, NATIONAL ASSOCIATION FOR RESEARCH AND THERAPY OF HOMOSEXUALITY (NARTH), AMERICAN ASSOCIATION OF CHRISTIAN COUNSELORS (AACC), JOHN DOE 1, by and through JACK AND JANE DOE 1, JACK DOE 1, individually, and JANE DOE 1, individually, JOHN DOE 2, by and through JACK AND JANE DOE 2, JACK DOE 2, individually, and JANE DOE 2, individually,

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.

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

PETITION FOR PANEL REHEARING AND REHEARING EN BANC FRAP 35, 40

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REASONS FOR GRANTING PANEL REHEARING OR REHEARING EN BANC

1. The panel's determination that SB1172 is subject to and satisfies rational basis conflicts with United States Supreme Court and Ninth Circuit precedents, which require that content and viewpoint-based governmental restrictions on expressive conduct be subject to and satisfy strict scrutiny. *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002); *DiLoreto v. Downey Unified School Dist. Bd. of Educ*., 196 F.3d 958 (9th Cir. 1999).

2. The panel's determination that SB1172 is subject to and satisfies rational basis conflicts with United States Supreme Court and Ninth Circuit precedents, which require that governmental restrictions on conduct that have incidental restrictions on speech be subject to and satisfy heightened scrutiny. *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367 (1968); *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180 (1997); *Doe v. Reed*, 586 F.3d 671 (9th Cir. 2009) *aff'd sub nom. John Doe No. 1 v. Reed*, 130 S. Ct. 2811 (2010); *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419 (9th Cir. 2008); *Porter v. Bowen*, 496 F.3d 1009 (9th Cir. 2007).

3. The panel's decision that SB1172 does not abridge the fundamental right of parents to direct the upbringing of their children conflicts with Supreme Court and Ninth Circuit precedents, which reject "the statist notion that governmental power should supersede parental authority," *Parham v. J.R.*, 442 U.S. 584, 603 (1979), and affirm that "the right to family association includes the right of parents to make important medical decisions for their children, and of children to have those decisions made by their parents rather than the state." *Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000); *see also Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 962-63 (9th Cir. 2009).

4. The panel's decision presents an issue of exceptional importance in that failing to enjoin SB1172, the first law in the country to ban Sexual Orientation Change Efforts ("SOCE") (ER 0007), adversely, immediately, and irreparably affects the rights of thousands of mental health professionals, parents, and minor patients to undertake or engage in ongoing consensual, beneficial counsel. The panel's decision also has effects beyond the State of California, as SB1172 has spawned similar legislation in New Jersey, where Assembly Bill Number 3371, "An Act concerning the protection of minors from attempts to change sexual orientation," ("A3371") was signed by Governor Chris Christie and went into

effect immediately on August 19, 2013.[1,2] Other states, including Massachusetts, Pennsylvania and Washington, are considering similar legislation.[3] Because of the unprecedented nature of SB1172 and the precedential effect that its passage will have on the rest of the country, this Court's analysis of its constitutionality is of exceptional public importance, and the panel's decision should be addressed by this Court en banc so that errors in the panel's analysis can be corrected.

ARGUMENT

I. THE PANEL'S DETERMINATION THAT SB1172 IS CONTENT AND VIEWPOINT-NEUTRAL AND SUBJECT TO ONLY RATIONAL BASIS CONFLICTS WITH SUPREME COURT AND NINTH CIRCUIT PRECEDENTS.

The panel's conclusion that the First Amendment does not require that SB1172 be subject to heightened scrutiny is based upon at least three flawed premises: (1) that SB1172 does not prohibit speech about SOCE, including discussing it or recommending it, but merely prohibits "treatment"; (2) that

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[1] New Jersey Legislature, Bills 2012/2013, http://www.njleg.state.nj.us/bills/BillView.asp?BillNumber=A3371 (last visited September 4, 2013).

[2] New Jersey's A3371 has been challenged on the same basis as has SB1172, *King v. Christie*, 3:13-cv-05038-FLW-LHG (D.N.J.). This case has been cited in *King v. Christie*. Supplemental Brief In Support of Converted Motion for Summary Judgment, 3:13-cv-05038-FLW-LHG, Dkt #18, page 3, n.1.

[3] Massachusetts' bill, H.154, was introduced on January 22, 2013. https://malegislature.gov/Bills/188/House/H154 (last visited September 9, 2013); Pennsylvania's SB 872 was introduced on April 25, 2013. http://www.legis.state.pa.us/cfdocs/legis/home/history (last visited September 9, 2013); Washington's HB 1882 was given a first reading on February 14, 2013. http://apps.leg.wa.gov/documents/billdocs/2013-14/Htm/Bills/ House%20Bills /1882.htm (last visited September 9, 2013).

SB1172 is not content or viewpoint-based; and (3) that, even if SB1172 were content-neutral, it would only need to satisfy rational basis analysis. These underlying premises are based upon factual errors and conflict with established Supreme Court and Ninth Circuit authority. Because of these factual and legal errors, this Court should order a panel rehearing or grant rehearing en banc.

A. The Panel's Conclusion That SB1172 Does Not Prohibit Speech About SOCE Conflicts With The Explicit Language Of The Statute And The Evidentiary Record.

Statutory language and testimony from Petitioners establish that SB1172 prohibits mental health professionals from providing minors with counsel that unwanted same-sex attractions, behaviors or identity (collectively "SSA") can be reduced or eliminated but permits counseling that SSA is to be accepted and supported. SB1172, codified at Cal. Bus. & Prof. Code §§865-865.2. Section 865.1 states: "*Under no circumstances* shall a mental health provider engage in 'sexual orientation change efforts' with a patient under 18 years of age." (emphasis added). "Sexual orientation change efforts" ("SOCE") are defined as "*any practices* by mental health providers that *seek to change an individual's sexual orientation*." *Id.* 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*," but excludes psychotherapies that "provide *acceptance, support, and understanding* of clients or the facilitation of clients' coping, social support, and

identity exploration or development" or "efforts" that "*do not seek to change sexual orientation*." *Id.*at (b)(1) and (2) (emphasis added). Plaintiffs who engage in SOCE testified that SOCE *practices* entail *solely speech*, the only tool they have to engage a client and the predominant method used in psychotherapy since at least 1900. (Dkt. 3-5, p. 6; Dkt. 3-6, p.7; Dkt. 3-7, p. 7; Dkt. 3-8, pp. 5-6). Plaintiffs testified that, as licensed counselors who are not medical doctors, they can only help their clients through speech. (Dkt. 3-8, pp. 5-6). Consequently, the "*practices* by mental health providers that *seek to change an individual's sexual orientation*" that SB1172 prohibits are speech.

The panel never cited the undisputed testimony. Since the modern understanding of psychotherapy, including SOCE, consists of speaking to clients, prohibiting licensed mental health providers from engaging in SOCE necessarily prevents them from discussing the pros and cons of SOCE or otherwise expressing their views regarding SOCE to their patients. The panel's attempt to differentiate between medical "treatment" and "speech" in the context of SOCE is a false dichotomy. In the only reference to the record testimony of the Plaintiffs, the panel acknowledges that "[t]he record shows that Plaintiffs who are licensed mental health providers practice SOCE only through talk therapy." Decision, 24, n.5.[4]

[4] The panel's internally contradictory discussion of whether SB1172 covers speech or "treatment" establishes that its conclusion that SB1172 is not void for

Since this is the first time the state has interposed itself between counselors and clients and directed that only one viewpoint be discussed, the matter should be reheard or this Court should grant en banc review.

B. The Panel's Conclusion That SB1172 Is Not Content And Viewpoint-Based Conflicts With Supreme Court And Ninth Circuit Precedent.

Based upon its flawed premise that SB1172 "regulates only treatment," the panel determined it was not required to apply strict scrutiny. Decision, 26. This conclusion not only contravenes this Court's own precedent and Supreme Court authority, but also the explicit language of the statute and the Legislature's findings. According to Section 2 of SB1172:

> "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*.

Cal. Bus. & Prof. Code § 865(b)(1) (emphasis added). However,

> "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.

Id. § 865(b)(2) (emphasis added). The legislative findings supporting these provisions discuss only effects on "gay, lesbian and bisexual" minors. (ER 00481-

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vagueness because "the text of SB1172 is clear to a reasonable person" is factually and legally flawed. Decision p. 32.

00482). Instead of merely listing the various studies upon which the Legislature based the statute, the Legislature made its own "declaration" that:

> Being lesbian, gay or bisexual is not a disease, disorder, illness, deficiency, or shortcoming. The major professional associations of mental health practitioners and researchers in the United States have recognized this fact for more than 40 years.

(ER 00481). Thus, the Legislature demonstrated that its concern was with protecting only one viewpoint—the viewpoint that SSA should be affirmed, even if they are unwanted. The findings and the language of SB1172 indisputably show that the Legislature seeks to ban only one viewpoint—counseling aimed at reducing or eliminating SSA. Cal. Bus. & Prof. Code § 865(b)(1). Counseling aimed at affirming, accepting, and supporting SSA is an acceptable viewpoint. *Id.* § 865(b)(2). Consequently, counselors who express the state-approved viewpoint that SSA is acceptable and should not be changed will not be subject to liability under SB1172. *Id.* However, if a counselor should stray from the state-approved viewpoint and counsel that SSA can be reduced or eliminated, even if the minor patient and parents request and consent to the counseling, then that counselor will be subject to discipline. *Id.* §§ 865.1, 865.2. As discussed above, while the panel characterized the prohibition as against "treatment," the evidence established and the panel acknowledged that the "treatment" is solely speech. (Dkt. 3-5, p. 6; Dkt. 3-6, p.7; Dkt. 3-7, p. 7; Dkt. 3-8, pp. 5-6). This is exactly why counseling associations called the law "unprecedented." (Dkt. 59-2, Ex. A).

Therefore, contrary to the panel's conclusion, it was required to analyze SB1172 as a content and viewpoint-based regulation of speech. Supreme Court and Ninth Circuit precedent have long established that such speech regulations must be analyzed utilizing strict scrutiny, not rational basis. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002). "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, 515 U.S. at 828. Citing *Rosenberger*, this Court said, "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Conant*, 309 F.3d at 637. This Court and the Supreme Court have repeatedly emphasized that government may not limit expressive activity "if the limitation is . . . based on the speaker's viewpoint" *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 (9th Cir. 1999); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *see also, 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").

The panel's conclusion that regulations of speech in the professional context are accorded deferential treatment (Decision, 21-23) also conflicts with Supreme Court and Ninth Circuit precedents which applied strict scrutiny to laws that were

less intrusive into the professional relationship than is SB 1172. *See e.g., Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001) (striking down a regulation that denied federal funds to attorneys if they advised clients to challenge welfare laws); *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (members of professions do not surrender First Amendment rights); *Florida Bar v. Went For It, Inc*., 515 U.S. 618, 634 (1995) (professional speech may be entitled to "the strongest protection our Constitution has to offer"); *Conant*, 309 F.3d at 637

Conant, in particular, should have prompted the panel to analyze SB1172 using strict scrutiny. As is true with SB1172, the regulation at issue in *Conant* imposed a content-based restriction on speech related to health care. *Conant*, 309 F.3d at 637. This Court struck down the regulation that punished physicians who advised their patients about the potential benefits of medical marijuana, finding that it "strike[s] at core First Amendment interests of doctors and patients." *Id.* at 636. Not only did the panel here fail to apply *Conant* to SB1172, it claimed that it was not aware of any cases in which strict scrutiny was applied to regulations of medical or mental health treatment. Decision, 26 n.6. In fact, in *Conant*, this Court did just that—applied strict scrutiny to a regulation of medical treatment, *i.e.*, the use of medical marijuana. *Id.* In addition, the Southern District of Florida cited *Conant* and applied strict scrutiny to strike down a regulation that prohibited physicians from inquiring about firearm ownership during a course of treatment.

Wollschlaeger v. Farmer, 880 F. Supp. 2d 1251, 1265-66 (S.D. Fla. 2012). The panel's failure to apply strict scrutiny in this case should be reviewed via rehearing or rehearing en banc.

C. The Panel's Decision That Rational Basis Should Apply To A Content-Neutral Regulation That Incidentally Affects Speech Conflicts With Supreme Court and Ninth Circuit Precedents.

The panel's conclusion that as a content and viewpoint-neutral regulation that incidentally affects speech,[5] SB1172 is subject to only rational basis review[6] contradicts scores of Ninth Circuit cases and Supreme Court precedent establishing that such regulations must satisfy intermediate or "heightened" scrutiny. *United States v. O'Brien*, 391 U.S. 367 (1968). "A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Id.* at 377. The Supreme Court and this Court have repeatedly recognized that *O'Brien* represents the prevailing heightened scrutiny standard for content-neutral regulations that have an incidental effect on speech. *See, e.g., Turner Broad. Sys., Inc. v. F.C.C.*,

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[5] Petitioners do not agree that SB1172 is content and viewpoint-neutral, but, even if it was, at a minimum, intermediate scrutiny should apply.

[6] The panel cited *National Association for the Advancement of Psychoanalysis v. California Board of Psychology*, 228 F.3d 1043, 1049 (9th Cir. 2000) to support its proposition that rational basis should apply. Decision, 26. However, the reference in *NAAP* is to a Fourteenth Amendment substantive due process and equal protection claim, not a First Amendment challenge.

520 U.S. 180, 189 (1997) (basing its analysis on the standards for intermediate scrutiny "enunciated in *O'Brien*"); *Doe v. Reed*, 586 F.3d 671, 678 (9th Cir. 2009) *aff'd sub nom. John Doe No. 1 v. Reed*, 130 S. Ct. 2811 (2010) (intermediate scrutiny was articulated in *O'Brien*); *see also Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 434 (9th Cir. 2008) ("Outside the school speech context, the Supreme Court has repeatedly held that a law restricting speech on a viewpoint- and content-neutral basis is constitutional as long as it withstands intermediate scrutiny…." "The same is true of a regulation that has an incidental effect on expressive conduct. (citing *O'Brien*)); *Porter v. Bowen*, 496 F.3d 1009, 1021 (9th Cir. 2007) (same).

The panel explicitly stated that SB 1172 has an incidental effect on free speech (Decision, 26), yet does not even cite to, let alone analyze SB1172 under *O'Brien*. In so doing, the panel ignored 45 years of Supreme Court and Ninth Circuit precedent which calls for heightened scrutiny of SB1172. Rather than engaging in the analysis called for by Supreme Court and Ninth Circuit precedent, the panel constructed what it called a "free speech continuum" from which it could conclude that SB1172 regulates only conduct and need only satisfy rational basis. Decision, 23-24. However, even if the "continuum" were constitutionally valid (which it is not), SB 1172 should fall at the mid-point of the continuum calling for intermediate scrutiny under *O'Brien*. The panel states the "mid-point" of its

"continuum" is the point where speech takes place "within the confines of a professional relationship" and protection is "somewhat diminished." Decision, 21. SB 1172 regulates speech within the confines of a professional relationship, so under the Panel's construct it should fall at the mid-point of the "continuum" and be subject to "diminished" or intermediate scrutiny. *Id.* However, the panel somehow concludes that *this* regulation of speech in a professional relationship falls at the lowest point in the continuum and is entitled to only rational basis review. Decision, 23. The panel attempts to bolster its departure from its own construct by returning to its false dichotomy between "treatment" and "speech." Decision, 24. The panel returns to the false premise that SB1172 "*allows* discussions about treatment…" and therefore is distinguishable from *Conant*. Decision, 24 (emphasis in original).

The panel further attempts to shore up its faulty conclusion by claiming that "California has authority to prohibit licensed mental health providers from administering therapies that the legislature has deemed harmful and, under *Giboney* [*v. Empire Storage & Ice Co*., 336 U.S. 490 (1949)] at 502, the fact that speech may be used to carry out those therapies does not turn the prohibitions of conduct into prohibitions of speech." *Id.* However, *Giboney* addressed parties inciting people to engage in illegal activities, not professionals engaging in

consensual conversations aimed at treating psychological concerns, so it does not support the panel's conclusion. *Giboney*, 336 U.S. at 502.

The panel's attempt to equate incitement of illegal activity with providing consensual professional counseling further emphasizes the conflict between its conclusion and established precedent. The panel decision should be reviewed through a panel rehearing or through en banc review.

D. The Panel's Conclusion That SB1172 Is Not Vague Or Overbroad Conflicts With Prevailing Precedent.

The panel's internally inconsistent description of the meaning of SB1172 belies its conclusion that the statute is not vague or overbroad. On the same page in which the panel insists that SB1172 does not ban speech, but merely "a form of medical treatment for minors," it acknowledges that "[t]he record shows that Plaintiffs who are licensed mental health providers practice SOCE only through talk therapy." Decision, 24. According to the panel, therefore, SB1172 does not prevent "therapists from discussing the pros and cons of SOCE with their patients," but does prevent them from engaging in "talk therapy." Decision, 24. Consequently, it cannot be true that "SB1172 is not void for vagueness because the text of SB1172 is clear to a reasonable person." Decision, 32. As the panel itself establishes, SB1172 does not have the "precision of regulation" that is necessary when the government seeks to regulate expressive activity. *NAACP v. Button*, 371 U.S. 415, 435 (1963).

The panel's inconsistent language regarding whether the statute regulates "treatment" or "speech" also disproves its conclusion that SB1172 is not overbroad. In fact, the panel cannot clear even the first step in overbreadth analysis, *i.e.*, "to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Stevens*, 559 U.S. 460, 474 (2010). The panel's conclusion that SB1172's language that "*[u]nder no circumstances* shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age" is not overbroad defies logic and conflicts with established precedent finding such broad-based regulation of expressive conduct impermissible. *Id.*; *United States v. Alvarez*, 638 F.3d 666, 672 (9th Cir. 2011). This Court should grant a panel rehearing or rehearing en banc to correct the conflict.

II. THE PANEL'S CONCLUSION THAT SB1172 DOES NOT INFRINGE UPON PARENTAL RIGHTS CONFLICTS WITH SUPREME COURT AND NINTH CIRCUIT PRECEDENT.

The panel abandoned decades of Ninth Circuit and Supreme Court authority in favor of "the statist notion that governmental power should supersede parental authority" that the Supreme Court has found to be "repugnant to American tradition." *Parham v. J.R.*, 442 U.S. 584, 603 (1979). This Court and the Supreme Court have long recognized parents' fundamental right to make important medical decisions for their children, and children's right to have those decisions made by

their parents rather than the state. *Id.* at 602; *Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000). The Supreme Court has long held that there exists a "private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

Through SB1172, the state has entered into that private realm to supersede parental authority when it is exercised to consent to counseling to reduce or eliminate a child's SSA. Prevailing authority requires a finding that SB1172 impermissibly infringes upon parents' fundamental rights absent evidence[7] that SOCE poses real harm to the children's well-being. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 962-63 (9th Cir. 2009). *The record contains no evidence that SOCE harms children*. (ER 00215-00352). In fact, the study upon which the Legislature relied in drafting SB1172 said:

> We conclude that there is a dearth of scientifically sound research on the safety of SOCE. Early and recent research studies provide no clear indication of the prevalence of harmful outcomes among people who have undergone efforts to change their sexual orientation or the frequency of occurrence of harm because no study to date of adequate scientific rigor has been explicitly designed to do so. Thus, *we cannot conclude how likely it is that harm will occur from SOCE*.

(ER 00264 (emphasis added)). What the record does contain is evidence that *discontinuing SOCE counseling* will cause real harm to the children. (ER 00403,

[7] The Supreme Court and this Court have made clear that there must be substantial *evidence*, not "mere anecdote and suspicion" or opinion evidence *United States v. Playboy Entm't Grp*., 529 U.S. 803, 822 (2000); *United States v. Honolulu Plantation Co.*, 182 F.2d 172, 178 (9th Cir. 1950).

ER 00410, 00415-00416). Therefore, under *Parham*, *Wallis*, and *Video Software Dealers*, the state impermissibly superseded parental authority when it banned SOCE. Instead of following this precedent, the panel shifted the burden of proof from the state to the Plaintiffs. Decision, 13-14. Acknowledging that the findings upon which the Legislature relied were methodologically flawed, the panel nonetheless found that *Plaintiffs had failed to meet their burden of proving that SOCE is efficacious. Id.*

The panel not only turned the burden of proof, but also the facts and prevailing authority, on its head to conclude that SB1172 does not infringe parental rights because parents do not have the right to "compel the California legislature, in shaping its regulation of mental health providers, to accept Plaintiffs' personal views of what therapy is safe and effective for minors." Decision, 36. Yet, the record evidence is not in dispute—the minors and parents want this counseling. The panel recast the parent Plaintiffs' right to direct the upbringing of their children by seeking SOCE counseling at the children's request as a purported "right to choose for a child a particular type of provider for a particular treatment that the state has deemed harmful." Decision, 34-35. After redefining the relevant parental right, the panel concluded that there are no cases addressing that redefined right. Decision, 35. The panel then turned to *Fields v. Palmdale Sch. Dist.*, 427

F.3d 1197, 1204 (9th Cir. 2005)[8] to support its conclusion. Decision, 36. The panel equated the parent Plaintiffs' decision to seek SOCE counseling for their children, at their children's request, with private therapists with an attempt to direct the content of curriculum taught to all children in a public school. Decision, 36. The panel here likens the Plaintiffs' wholly private counseling relationships to the *Fields*' plaintiffs' relationship with state-owned public schools and asserts that in both cases the parents did not have the right to impose their viewpoints on the state. Decision, 36 (citing *Fields*, 427 F.3d. at 1206).

The panel's characterization of the facts, including its *sua sponte* redefinition of the parent Plaintiffs' right to direct the upbringing of their children, contradicts the facts and record. As a result, its conclusion that SB1172 does not infringe upon parental rights is contrary to the facts and conflicts with prevailing authority. Consequently, Plaintiffs' request for a panel rehearing or rehearing en banc should be granted.

CONCLUSION

The panel's decision conflicts with established Ninth Circuit and Supreme Court precedent regarding heightened and strict scrutiny for content-based regulations on expressive conduct, vague and overboard regulations and parental rights.

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[8] This Court modified and re-issued the decision at 447 F.3d 1187 (9th Cir. 2006).

For these reasons, Plaintiffs' Petition for a Panel Rehearing or, in the alternative, rehearing en banc, should be granted.

September 10, 2013.

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I hereby certify that this 10th day of September 2013, I filed the foregoing 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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/s/ Mary E. McAlister
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September 10, 2013.