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

DEFENDANTS-APPELLANTS' RESPONSE TO PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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INTRODUCTION

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 an incompetent and potentially dangerous therapy known as "sexual orientation change efforts" (SOCE). In a well-reasoned opinion, a panel of this Court unanimously reversed the district court's grant of preliminary injunctive relief. Exercising plenary review, the panel held that SB 1172 regulates professional conduct and not protected speech, that the First Amendment does not prevent the State from regulating treatments performed entirely through speaking, that there is no fundamental right to a treatment that the State has deemed harmful, and thus that SB 1172 is subject to, and easily satisfies, deferential review. Although the panel's decision is entirely consistent with governing Supreme Court and Ninth Circuit authority, plaintiffs ask this Court to revisit it. However, plaintiffs do not come close to satisfying the exacting standard for rehearing or en banc review. Instead, they merely repeat arguments that were considered and properly rejected by the panel. Because plaintiffs cannot demonstrate that the panel erred and/or that its opinion is in conflict with any intra- or extra-circuit authority, the petitions for rehearing and rehearing en banc should be denied.

ARGUMENT

I. PLAINTIFFS FAIL TO SATISFY THE REQUIREMENTS FOR REHEARING OR REHEARING EN BANC

Given that the panel's decision is a correct and well-reasoned application of controlling Supreme Court and Ninth Circuit authority, plaintiffs cannot demonstrate that either rehearing or rehearing en banc are warranted. A petition for rehearing "must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition." Fed. R. App. P. 40(a)(2). A petition for rehearing serves a very limited purpose: "to ensure that the panel properly considered all relevant information in rendering its decision." *Armster v. United States Dist. Ct.*, 806 F.2d 1347, 1356 (9th Cir. 1986). Rehearing en banc is "not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). "En banc review is extraordinary, and is generally reserved for conflicting precedent within the circuit which makes application of the law by district courts unduly difficult, and egregious errors in important cases." *United States v. Weitzenhoff*, 35

F.3d 1275, 1293 (9th Cir. 1993) (Kleinfeld, J., dissenting from denial of rehearing en banc).

Plaintiffs have not met these standards. First, plaintiffs have not demonstrated that the panel "overlooked" or "misapprehended" any material facts or law. While the panel rejected plaintiffs' legal and factual propositions, this does not merit rehearing. Although plaintiffs fault the panel for not citing particular cases, the Court, having made the threshold legal determination that SB 1172 regulates professional conduct and is thus subject to deferential review, was not obligated to name and distinguish every case involving protected expression.

Second, plaintiffs cannot establish either that the panel erred in holding that SB 1172 is constitutional, or that its decision is inconsistent with Supreme Court or Ninth Circuit authority. Finally, while SB 1172 is an extremely significant law and the issues presented in this appeal, including the State's ability to regulate the professions and protect children from ineffective and harmful treatments, are critical, plaintiffs have not identified a question of "exceptional importance" within the meaning of Federal Rule of Appellate Procedure 35. Specifically, plaintiffs have not established any conflict between the panel's decision and any other court that "substantially affects a rule of national application in which there is an overriding need for

national uniformity." 9th Cir. R. 35-1; *see also* Fed. R. App. P. 35(b)(1)(B). Indeed, plaintiffs have not identified a single appellate decision that conflicts with the panel's decision. Plaintiffs' suggestion that en banc review is warranted because the panel's decision may bear on future challenges to similar laws passed in other states is insufficient. Appellate opinions always have the potential to influence other circuits, but this alone does not merit en banc review.[1]

II. THE PANEL CONSIDERED ALL RELEVANT FACTS AND LAW AND PROPERLY DETERMINED THAT SB 1172 IS CONSTITUTIONAL

As the panel determined, SB 1172 is a valid exercise of the State's power to protect public health and safety by regulating professional conduct. Accordingly, SB 1172 is presumptively constitutional and subject only to deferential review. *See Pickup v. Brown*, No. 12-17681, Opinion (9th Cir. Aug. 29, 2013) ("Opinion") at 23-25. Given the State's unquestionable interest in protecting the physical and psychological well-being of minors

[1] Moreover, even assuming that plaintiffs had identified a "question of exceptional importance," arguably they must show not just that the question is exceptionally important, but also that the panel answered it incorrectly and thus that it requires reexamination. "The most reasonable construction of [Rule 35] is that this court should rehear a case en banc when it is *both* of exceptional importance *and* the decision *requires correction*." *Newdow v. U.S. Congress*, 328 F.3d 466, 469 (9th Cir. 2003) (Reinhardt, J., concurring in the order denying the rehearing en banc) (emphasis in original).

and the evidence that SOCE is ineffective and unsafe, lacks any scientific basis, and has been uniformly rejected by mainstream professional organizations, SB 1172 is a rational exercise of the State's police power and is thus constitutional. *See id.* at 24-25.

The panel's conclusions that "the First Amendment does not prevent a state from regulating treatment even when that treatment is performed through speech alone," *id.* at 25, and that such regulations are not subject to heightened scrutiny, are firmly grounded in Supreme Court and Ninth Circuit authority. Specifically, the Supreme Court has long held state regulation of professional conduct does not have to satisfy a more exacting standard just because services are provided by speaking, writing, or other use of language. "It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949); *see also Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion) (where speech is "part of the practice of medicine," it is "subject to reasonable licensing and regulation by the State."); *Whalen v. Roe,* 429 U.S. 589, 597-98, 600-03 (1977) (applying rational basis and upholding law

requiring physicians to report the identity of persons receiving certain prescription drugs); *see generally* Brief of Amicus Curiae of First Amendment Scholars, Dkt. No. 13, 7-13.

In keeping with these authorities, and of particular significance here, this Court has held that rational basis review applies to regulation of licensed mental health professionals, even those engaged in the "talking cure." In *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 228 F.3d 1043, 1054 (9th Cir. 2000) ("*NAAP*"), this Court held "[t]hat psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection." Despite plaintiffs' repeated attempts to ignore it, and as the panel noted, this holding is controlling here and dictates that SB 1172 "is subject to deferential review just as are other regulations of the practice of medicine." Opinion at 25. "To read *NAAP* otherwise would contradict its holding that talk therapy is not entitled to 'special First Amendment protection,' and it would, in fact, make talk therapy 'virtually immune from regulation.'" *Id.* (citing *NAAP*, 228 F.3d at 1054).[2]

[2] The panel's holding is consistent with opinions from other circuits. *See, e.g.*, *Coggeshall v. Mass. Bd. of Registration of Psychologists*, 604 F.3d 658, 667 (1st Cir. 2010); *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d

(continued…)

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

Plaintiffs contend that the panel "adopted the State's misleading terminology" and thus failed to appreciate that SB 1172's restriction on the provision of SOCE to minors is not limited to mental health practices and/or treatments, but encompasses protected speech. *See* Petition for Rehearing and Rehearing En Banc ("Petition") at 1, 3-7. Plaintiffs overstate the scope of SB 1172 and read its 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.[3] The panel correctly rejected this interpretation. *See* Opinion at 12-13, 24-26.

(…continued)
602, 603-05 (4th Cir. 1988); *Daly v. Sprague*, 742 F.2d 896, 899 (5th Cir. 1984). Although Amicus Institute for Justice suggests that the panel's decision conflicts with *Cooksey v. Futrell*, 721 F.3d 226 (4th Cir. 2013), *see* Brief of Amicus Curiae Institute for Justice ("Amicus Brief"), Dkt. No. 83, at 12-13, that case, which is factually distinguishable and involved the requirements for First Amendment standing, has no bearing here.

[3] Plaintiffs also suggest that SB 1172 regulates religious practice and/or applies to religious practitioners. *See* Petition at 4-5. The panel declined to address this argument as it was not "specifically and distinctly argued" on appeal and directed that the district court consider plaintiffs' religion claims in the first instance. Opinion at 15 n.3. Moreover, because SB 1172 is a valid and neutral law of general applicability that does not apply to members of the clergy, or pastoral or other religious counselors, plaintiffs' contention is incorrect. *See* Appellants' Corrected Reply Brief, Dkt. No. 64, at 4 n.2.

Properly read, both on its face and as an amendment of code sections regulating the professional practices of mental health providers, SB 1172 only regulates treatment and therapies, not protected communication. In enacting SB 1172, the Legislature sought to protect children from a well-documented set of practices that comprise SOCE. *See* Cal. Stats. § 2012, ch. 835, §§ 1(a)-(m); (2). There is no indication that the Legislature intended to prohibit either the dissemination of ideas about and/or any practice that could conceivably relate to SOCE. Accordingly, and as the panel and both district courts to consider the constitutionality of SB 1172 determined, SB 1172 does not prevent therapists from discussing, recommending, or providing a referral for SOCE. *See* Opinion at 12, 24; *see also Pickup v. Brown*, No. 12-02497, 2012 WL 6021465 , *9 (E.D. Cal. Dec. 4, 2012); *Welch v. Brown*, 907 F. Supp. 2d 1102, 1114-15 (E.D. Cal. 2012). Rather, it "does just one thing": it prohibits licensed health providers from engaging in SOCE with minors. Opinion at 12.

B. SOCE Therapy Is Not Protected Speech.

As the panel concluded, SB 1172 does not regulate protected expression. SB 1172 does not ban or compel the communication of particular messages or ideas, nor does it unreasonably interfere with the therapist-patient relationship, nor arbitrarily restrict the exercise of

professional judgment. All SB 1172 does is enforce professional standards of competence and prevent harm to minors by eliminating a discredited and unsafe practice. Accordingly, it is "subject to deferential review just as are other regulations of the practice of medicine." Opinion at 25.

Plaintiffs continue to assert that SOCE is not mental health treatment[4] and that SB 1172 targets "ideas and ideologies disfavored by the government" and impermissibly seeks to censor certain opinions, "advocacy," and "philosophical viewpoints" regarding sexual orientation. Petition at 6, 11, 18. Amicus Institute for Justice similarly argues that insofar therapists are "talking with minors in an effort to change their sexual orientation," SOCE is speech, and thus that SB 1172 must satisfy heightened scrutiny. Amicus Brief at 2-4, 7-11. However, plaintiffs and amicus overlook the fact that talking with minors, particularly where such talking is the means of providing a health treatment within a highly regulated fiduciary relationship, is not the same as protected speech under the First Amendment. *See* Opinion at 21-24. The mere fact that SOCE involves the use of language does not transform it from a discredited and unsafe professional practice subject to reasonable regulation by the State into expressive or

[4] Plaintiffs' continued suggestion that SOCE is not a mental health treatment is curious and belied by the record. *See, e.g.*, Opinion at 9-10.

otherwise protected speech that would be subject to heightened scrutiny. *See* Opinion at 28-29 ("Most, if not all medical treatment requires speech, but that fact does not give rise to a First Amendment claim when the state bans a particular treatment."). Indeed, in holding that psychotherapists are not entitled to heightened First Amendment protection, the Court in *NAAP* rejected the precise argument that plaintiffs advance here: "the key component of psychoanalysis is the *treatment* of emotional suffering and depression, *not speech*." *See* 228 F.3d at 1054 (emphasis added) (citations and quotation marks omitted).[5]

Plaintiffs ignore the critical distinction between the regulation of expressive speech by a professional and the regulation of professional conduct delivered by means of speaking, and continue to insist that that all speech, regardless of type or context, is entitled to the full complement of First Amendment protection. However, not all speech is treated the same for

[5] Plaintiffs suggest that under *NAAP*, the State's power to regulate professional conduct is limited to controlling entry to a profession through licensing requirements. *See* Petition at 11. However, while the challenge in *NAAP* was to professional licensing requirements for psychologists, its holding is not so limited: "[I]t is properly within the state's police power to *regulate and license* professions, especially when public health concerns are affected." 228 F.3d at 1054 (citing *Watson v. Maryland*, 218 U.S. 173, 176 (1910)) (emphasis added).

First Amendment purposes, and some does not implicate the First Amendment at all. As the panel correctly articulated, First Amendment protection of professional speech exists along a "continuum." Opinion at 19-24.[6] At one end of that continuum, professionals are engaged in public dialogue and are functioning like "soapbox orators," and in this context their "speech receives robust protection under the First Amendment." *Id.* at 21. This is because expressions of opinion and/or "discourse on public matters" implicate the core values protected by the First Amendment. *See Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2733 (2011); *see also* Opinion at 20-21. At the other end of the continuum, professionals are providing mental health treatment pursuant to a State license, and in this context the State has "great" power to regulate or ban ineffective treatments and practices, in order to protect the public from harm, even where "that treatment is performed through speech alone." Opinion at 23-25. Such regulations are reviewed under a deferential standard because the First

[6] Contrary to plaintiffs' understanding, the panel did not construct the "continuum" of First Amendment protection for speech and conduct by professionals; rather, the panel derived the continuum from well-established jurisprudence. *See* Opinion at 20-25; *see, e.g.*, *Lowe v. S.E.C.*, 472 U.S. 181, 230-32 (1985) (White, J., concurring).

Amendment is not a shield for incompetent practices. *See, e.g*, *NAAP*, 228 F.3d at 1053; Opinion at 25; *Daly v. Sprague*, 742 F.2d at 898.

To the extent that plaintiffs posit that SOCE therapy is expressive or and/or "communicates a message," this argument fails.[7] *See United States v. O'Brien*, 391 U.S. 367, 376 (1978); *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). 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 Anderson v. City of Hermosa Beach,* 621 F.3d 1051, 1058 (9th Cir. 2010). Moreover, and perhaps of greater significance, the purpose of providing mental health services is not expression, but

[7] Amicus attempts to characterize the practice of SOCE as the provision of "individualized advice." While is not an accurate description of SOCE, *see* Opinion at 9-10, amicus also fails to grasp that the State has considerable latitude to ensure that professional practices, including advice, are sound and reflect accepted standards of knowledge and competence. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997); *Conant v. McCaffrey*, No. 97-00139, 2000 WL 1281174, *13 (N.D. Cal. Sept. 7, 2000) (noting that 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.").

competent treatment. *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."). 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 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.

C. The Cases Relied Upon by Plaintiffs and Amicus Are Inapposite and Do Not Require the Application of Heightened Scrutiny To SB 1172.

1. *Holder v. Humanitarian Law Project* does not apply.

Plaintiffs assert en banc review is warranted because the Supreme Court's decision in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2011), is controlling here, and the panel erred in failing to cite it.[8] *See* Petition at 1, 14-15. *Holder* addressed a statute making it a federal crime to

[8] As plaintiffs note, the district court relied on *Holder*, and it was discussed in the parties' briefs. However, and as noted above, because SB 1172 does not restrict expressive speech or conduct, the panel had no reason to cite *Holder*.

"knowingly provid[e] material support or resources to a foreign terrorist organization." Although it upheld the challenged statute as constitutional under the First Amendment, the Supreme Court rejected the government's argument that what the law proscribed was pure conduct. 130 S.Ct. at 2723-24. It held that while the statute "may be described as directed at conduct," more rigorous scrutiny applied because "the conduct triggering coverage under the statute consist[ed] of communicating a message." *Id.* at 2724. Plaintiffs and amicus seize upon this language and insist that because the conduct regulated by SB 1172 also involves speaking about particular topics, the State cannot avoid strict scrutiny merely by playing a "labeling game." Amicus Brief at 4-10. However, this misses the critical point that 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 (emphasis added). Here, the regulated conduct is mental health treatment, which as discussed above is not expressive within the meaning of the First Amendment. While the State certainly cannot regulate protected speech merely by relabeling it conduct, it can regulate what is actually professional conduct, such as the provision of mental health services

pursuant to a State license, so long as it has a rational basis for doing so.[9] *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); *NAAP*, 228 F.3d at 1054.[10]

2. *Conant* is inapposite.

In support of their argument that SB 1172 unconstitutionally discriminates on the basis of content and viewpoint, plaintiffs rely heavily

[9] As the absurd hypotheticals provided by amicus, such as stand-up comedians engaging in the conduct of "inducing amusement," illustrate, it is not ultimately the label given to an activity that determines what level of scrutiny applies. Rather, it is whether and how much the activity implicates the concerns of the First Amendment and/or whether it is governed by a different analytic framework. *See* Opinion at 20-25; *see generally,* Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L. Rev. 939, 949 (2007). Performing comedy, which involves the communication of ideas and values, is expressive speech that is protected by the First Amendment. Talk therapy, like performing a lobotomy or administering shock treatment, is not.

[10] For this reason, cases relied upon by plaintiffs involving restrictions on expressive speech, such as *Brown v. Entertainment Merchants*, 131 S. Ct. 2729 and *United States v. Stevens*, 130 S.Ct. 1577 (2010), are inapt. Plaintiffs' reliance on *Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653 (2011), *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc*., 425 U.S. 748 (1976) and the "commercial speech doctrine" is also misplaced. Plaintiffs have never argued, and it cannot seriously be contended, that the sole point of SOCE is to "propose a commercial transaction." *Virginia State Bd. of Pharmacy*, 425 U.S. at 762.

on *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), in which this Court invalidated a federal "gag order" on physician-patient communications regarding the potential benefits of medical marijuana. *Conant*, however, is factually distinguishable and inapposite. *Conant* did not involve the regulation of professional conduct, practice, or treatment itself. None of the parties in *Conant* argued that the First Amendment prevented the government from prohibiting doctors from prescribing or dispensing marijuana. Indeed, it was undisputed that the government could regulate such conduct. *See* 309 F.3d at 634. What the government could not do was quash protected speech between doctor and patient *about* the treatment.[11] *See id.*at 634-37; Opinion at 18.

As discussed above, and in marked contrast to the policy at issue in *Conant*, SB 1172 does not "punish" or regulate communications between therapists and minors about SOCE treatment and it therefore does not raise any of the same core free speech concerns. *See, e.g.*, *Conant*, 309 F.3d at

[11] 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. Opinion at 21-23.

636-38; Opinion at 18-19, 24 (distinguishing *Conant*). Its ban on performing an incompetent treatment on children is the equivalent of prohibiting the prescription of medical marijuana and thus does not offend the First Amendment.

Conant also does not support plaintiffs' notion that the Court is required to engage in content or viewpoint analysis.[12] As set forth above, nothing in SB 1172 prohibits mental health providers from expressing their theories and opinions about sexual orientation, or from discussing or recommending SOCE. As the panel noted, while *Conant* holds that "content- or viewpoint-based discrimination *about* treatment must be closely scrutinized," where, as here, a regulation is of "only *treatment itself*," content and viewpoint discrimination analysis does not apply. Opinion at 24-25; *see also* Post, *supra*, 2007 U. Ill. L. Rev. at 949-51 (noting the inapplicability of First Amendment viewpoint discrimination to most speech

[12] To the extent that plaintiffs rely on dicta in *NAAP* for the proposition that because SB 1172 dictates what can be said in therapy, it is not content-neutral, *see* Petition at 10-11, this argument is without merit. 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. As the panel noted, "nothing in *NAAP* requires [the Court] to analyze a regulation of treatment in terms of content and viewpoint discrimination." Opinion at 26.

by medical professionals).[13] Accordingly, the panel's determination that rational basis review applies to SB 1172, and that the statute easily passes this review, is consistent with *Conant*.[14]

CONCLUSION

For the foregoing reasons, defendants respectfully request that this Court deny the petitions for rehearing and rehearing en banc.

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[13] Moreover, 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). Rather, all the evidence demonstrates that in enacting SB 1172 the Legislature had no motive or purpose other than to protect children from harm. *See* Cal. Stats. § 2012, ch. 835, §§ 1(b)-(m). 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).

[14] To be clear, 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. However, only rational basis applies, and because it does, plaintiffs' criticism of the evidence of SOCE's harm to minors is irrelevant. Moreover, given the consensus of mainstream mental health organizations and the cumulative and widely accepted evidence of harm caused by SOCE, it is unfounded. *See* Appellants' Corrected Reply Brief, Dkt. No. 64, at 18-21.

Dated: October 17, 2013

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Defendants and Appellants.

STATEMENT OF RELATED CASES

The following related case is pending: *Pickup, et al., v. Brown, et al.,* Ninth Circuit Case No. 12-17681

Dated: October 17, 2013

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 AND 40-1
FOR 13-15023

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing enbanc/answer is: (check (x) applicable option)

[X] Proportionately spaced, has a typeface of 14 points or more and contains 4,167 words (petitions and answers must not exceed 4,200 words).

or

[ ] In compliance with Fed.R.App.P. 32(c) and does not exceed 15 pages.

October 17, 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 October 17, 2013, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANTS-APPELLANTS' RESPONSE TO PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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 October 17, 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
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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 October 17, 2013, at San Francisco, California.

N. Newlin	s/ N. Newlin
Declarant	Signature

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