12-17681

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID H. PICKUP; et al.,

Plaintiffs-Appellants,

v.

EDMUND G. BROWN JR., Governor of the State of California, in his official capacity; et al.,

Defendants-Appellees,

EQUALITY CALIFORNIA,

Intervenor-Appellee.

On Appeal from the United States District Court
for the Eastern District of California

No. 2:12-cv-02497-KJM-EFB
The Honorable Kimberly J. Mueller, Judge

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

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 affirmed the district court's denial 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 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. NO EXCEPTIONAL CIRCUMSTANCES WARRANT EN BANC REVIEW

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 cannot meet this exacting standard.

First, plaintiffs have not demonstrated either that the panel erred in holding that SB 1172 is constitutional, or that there is any conflicting precedent or split in opinion within the Ninth Circuit with respect to the issues resolved by the panel's decision.[1] Second, 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

[1] Plaintiffs' request for panel rehearing, for which they offer no additional argument, should be denied for the same reasons.

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 appellate 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 actually conflicts with the panel's decision. Plaintiffs' suggestion that en banc review is warranted because the panel's decision will have a "precedential effect" on 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.[2]

II. SB 1172 DOES NOT VIOLATE THE FIRST AMENDMENT

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, it is presumptively constitutional and subject only to

[2] Even assuming that plaintiffs had identified a "question of exceptional importance," arguably plaintiffs must also show that the panel answered that question incorrectly and thus that it requires reexamination. *Newdow v. U.S. Congress*, 328 F.3d 466, 469 (9th Cir. 2003) (Reinhardt, J., concurring in the order denying the rehearing en banc); *see also id.* at 470.

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 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);[3] *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).

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 at 1054 ("*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'

[3] Plaintiffs attempt to distinguish *Giboney* by limiting it to its facts. *See* Petition at 12-13. However, the principle and reasoning of *Giboney* have been applied broadly, including by this Court in *National Association for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1053 (9th Cir. 2000). *See also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *Lowe v. S.E.C.*, 472 U.S. 181, 228 (1985); *see generally* Brief of Amicus Curiae of First Amendment Scholars, Dkt. No. 44, 7-13 ("[S]ubsequent cases demonstrate that the *Giboney* principle applies to *any* conduct that is within the power of the State to forbid or regulate.").

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).[4]

A. SB 1172 Regulates Unprofessional Conduct, Not Protected Speech.

Plaintiffs contend that the panel erred in concluding that SB 1172 restricts only the provision of SOCE treatment to children and not speech about SOCE. Petition at 4-5. They assert that SB 1172 "necessarily prevents them from discussing the pros and cons of SOCE or otherwise expressing their views regarding SOCE to their patients." Petition at 5.

[4] 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) ("Simply because speech occurs does not exempt those who practice [psychology] from state regulation (including the imposition of disciplinary sanctions).") (citing *NAAP*, 228 F.3d at 1053-55); *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 603-05 (4th Cir. 1988) ("Professional regulation is not invalid, nor is it subject to first amendment strict scrutiny, merely because it restricts some kinds of speech."); *Daly v. Sprague*, 742 F.2d 896, 899 (5th Cir. 1984) ("[R]easonable restraints on the practice of medicine and professional actions cannot be defeated by pointing to the fact that communication is involved.").

However, plaintiffs offer no meaningful explanation of why this would be so and in fact, it is not. 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.

Plaintiffs contend that the panel erred by failing to appreciate "that SOCE *practices* entail *solely speech*," that it is protected expression under the First Amendment, and that any attempt to regulate it must survive

heightened scrutiny. Petition at 4-5 (emphasis in original). The panel acknowledged, and no one disputes, that many SOCE practitioners employ (only) "talk therapy" and that they "speak" to their clients. *See* Opinion at 24 n.5. However, speaking, particularly where speaking 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. Contrary to plaintiffs' view, 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 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]

[5] Plaintiffs' claim that "this is the first time the state has interposed (continued…)

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 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

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itself between counselors and clients" is simply wrong. Petition at 6. In fact, the State routinely regulates and proscribes the conduct of mental health professionals. *See, e.g.*, Cal. Bus. & Prof. Code § 651(b)(7) (unlawful for licensed mental health professional to "make a scientific claim that cannot be substantiated by reliable, peer reviewed, published scientific studies"); § 4999.90(s) (unprofessional conduct for licensed clinical counselor to hold oneself out as being able to perform professional services beyond the scope of one's competence); *see generally* Amicus Curiae Brief of Health Law Professors in Support of Defendants and Appellants, Dkt. No. 48, 7-29.

[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,* 472 U.S. at 230-32 (White, J., concurring); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L. Rev. 939, 949-51 (2007).

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 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.

As the panel properly 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.

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

Plaintiffs argue that Supreme Court and Ninth Circuit precedent require the application of strict or intermediate scrutiny to SB 1172. *See* Petition at 6-12. The cases on which plaintiffs rely, however, are inapt, do not support the application of heightened scrutiny here,[7] and thus do not establish a need for en banc review.

1. *Conant* is inapposite.

Plaintiffs first contend that pursuant to *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, strict scrutiny must apply to a regulation of mental health treatment. However, *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

[7] 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.

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.[8] *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 636-38; Opinion at 18-19, 24 (distinguishing *Conant*).[9] Its ban on

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[8] 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; *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.").

[9] For this reason, plaintiffs' reliance on *Legal Services Corp. v Velazquez*, 531 U.S. 533 (2001), is also misplaced. In *Velazquez*, the Supreme Court held that a statute barring legal services attorneys from challenging federal welfare laws prevented lawyers from making "all the reasonable and well-grounded arguments" on behalf of their clients and "prohibits speech and expression upon which courts must depend for the proper exercise of judicial power." *Id.* at 545. Unlike in *Velazquez* and *Conant*, SB 1172 does not alter the role of professionals by prohibiting

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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. 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 by medical professionals).[10] Accordingly, the panel's determination that

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speech necessary to their proper functioning nor does it compel them to promote a government-sanctioned viewpoint. Rather, it forces licensed therapists to comply with professional standards of competence by forbidding a bogus and unsafe practice.

[10] 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

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rational basis review applies to SB 1172, and that the statute easily passes this review, is consistent with *Conant*.

2. Intermediate scrutiny does not apply.

Plaintiffs also argue that because SB 1172 has an "incidental effect" on speech, pursuant to *United States v. O'Brien*, 391 U.S. 367 (1978) and its progeny, this Court must apply intermediate scrutiny to SB 1172. *See* Petition at 10-13. As an initial matter, plaintiffs mischaracterize the panel's decision. The panel did not "explicitly state" that SB 1172 has an incidental effect on speech; it said that SB 1172 "regulates only treatment" and that "any effect it *may* have on free speech interests is merely incidental." Opinion at 26 (emphasis added). Moreover, *O'Brien* applies only to regulation of expressive conduct or speech. 391 U.S. at 376-77. SOCE, like medical and mental health treatments generally, is not inherently expressive. Unlike burning a draft card, distributing handbills, and other forms of

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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).

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).

Further, and perhaps of greater significance, the purpose of providing mental health services is not personal expression, but 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."); *see also O'Brien*, 391 U.S. at 376. 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. Accordingly, intermediate scrutiny is not warranted. *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).

III. SB 1172 IS NEITHER UNCONSTITUTIONALLY VAGUE NOR OVERBROAD

Insofar as plaintiffs' vagueness argument rests on the premise that SB 1172 restricts protected expression and/or that "talk therapy" is protected speech under the First Amendment, it fails for the reasons stated above. *See* Petition at 13-14. As the panel rightly noted, what SB 1172 prohibits, mental health treatments aimed at altering a minor's sexual orientation, "is clear to a reasonable person," and particularly clear to plaintiffs, who are self-identified practitioners of SOCE. Opinion at 31-32; *see also Weitzenhoff*, 35 F.3d at 1289 (lower vagueness standard applies where a statutory prohibition "involves conduct of a select group of persons having specialized knowledge, and the challenged phraseology is indigenous to the idiom of that class"). The panel's conclusion that SB 1172 is not vague is entirely consistent with controlling Supreme Court and Ninth Circuit authority. *See, e.g.*, *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001).

The panel's holding that SB 1172 is not overbroad is similarly well founded. The Supreme Court has admonished that "particularly where

conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *New York v. Ferber*, 458 U.S. 747, 770 (1982). As set forth above, the entire "sweep" of SB 1172 is the "legitimate" regulation of mental health professionals. *See NAAP*, 228 F.3d at 1054. Accordingly, it is not overbroad.

IV. THERE IS NO FUNDAMENTAL RIGHT TO OBTAIN MENTAL HEALTH TREATMENTS THE STATE HAS DEEMED HARMFUL

Plaintiffs argue that "prevailing authority requires a finding that SB 1172 impermissibly infringes upon parents' fundamental rights absent evidence that SOCE poses real harm to the children's well-being." Petition at 15. While there is considerable evidence in the record of the serious harm caused by SOCE, plaintiffs misstate the governing legal framework. There is, as the panel held, no fundamental right to choose a specific mental health treatment that the State has deemed harmful to minors. *See* Opinion at 33-36.[11] Because there is no fundamental right, the State's regulation need only

[11] The panel's holding is consistent with Supreme Court and Ninth Circuit authority. *See, e.g.*, *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1204-06 (9th Cir. 2005) (although parents have the right to choose a specific educational program, this does not "afford parents a right to compel public schools to follow their own idiosyncratic views as to what information the schools may dispense"); *see also Parham v. J.R.*, 442 U.S. 584 (1979).

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survive rational basis review. Accordingly, it is not the State's burden to prove that SOCE is harmful; rather it is plaintiffs' burden to demonstrate that SB 1172 lacks any conceivable rational basis. *Heller v. Doe*, 509 U.S. 312, 319 (1993). Given the State's interest in protecting the health and safety of minors and the evidence of SOCE's inefficacy and risk of harms to minors, plaintiffs cannot meet their burden. Accordingly, plaintiffs have not established that there is any cause for en banc review of the panel's opinion with respect to parental rights.

CONCLUSION

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

(…continued)
Courts have uniformly held that there is no fundamental right or privacy interest, either on one's own behalf or on behalf of one's children, to particular medical treatments reasonably prohibited by the government. *See NAAP*, 228 F.3d at 1050; *Carnohan v. United States,* 616 F.2d 1120, 1122 (9th Cir. 1980); *Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993); *Rutherford v. United States*, 616 F.2d 455, 457 (10th Cir. 1980).

Dated: October 17, 2013

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Defendants-Appellees,

EQUALITY CALIFORNIA,

Intervenor-Appellee.

STATEMENT OF RELATED CASES

The following related case is pending: *Welch, et al. v. Brown, et al.*, Ninth Circuit, Case No. 13-15023.

Dated: October 17, 2013

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 AND 40-1
FOR 12-17681

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 4,066 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: **Pickup, David, et al. v. Brown, et al.** No. **12-17681**

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-APPELLEES' 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
Lambda Legal Defense & Education Fund, Inc.
120 Wall Street
New York, NY 10005-3904

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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