No. 12-17681

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID PICKUP, et al.
Plaintiffs and Appellants,
v.
EDMUND G. BROWN, JR., et al.
Defendants and Appellees,
and
EQUALITY CALIFORNIA
Defendant-Intervenor-Appellee

On Appeal from The United States District Court
for the Eastern District of California
No. 2:12-CV-02497-KJM-EFB (Hon. Kimberly J. Mueller)

DEFENDANT-INTERVENOR-APPELLEE EQUALITY CALIFORNIA'S OPPOSITION TO PETITION FOR PANEL HEARING AND REHEARING *EN BANC*

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I. INTRODUCTION

The panel correctly applied Supreme Court and Ninth Circuit precedent in unanimously holding that SB 1172, which prohibits licensed mental health professionals in California from subjecting minor patients to discredited practices known as "sexual orientation change efforts" (SOCE), "does not violate the free speech rights of SOCE practitioners or minor patients, is neither vague nor overbroad, and does not violate parents' fundamental rights." Panel Decision at 9. Petitions for rehearing e*n banc* are disfavored and should not be granted except to secure or maintain uniformity of decisions among the panels of the Court or to resolve questions of exceptional importance. *See* Fed. R. App. P. 35(a).

Here, the panel decision is firmly grounded in the precedents of this Court and the Supreme Court and does not create a conflict with prior decisions on any issue. Plaintiffs' First Amendment arguments rest on the erroneous notion that because many forms of therapy take place through the vehicle of speech, those therapies cannot be regulated in the same way as medical treatments that do not involve speech, and that any regulation of such therapies must be subject to heightened scrutiny. That notion has no footing in the relevant precedents and, as set forth below, has been expressly rejected by this Court and by the Supreme Court, as well as by every other circuit to consider it. As courts have long held, a state may reasonably regulate the practices of licensed medical providers and other

professionals, including practices that involve speech, in order to protect the public from harm and abuse. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion) (when speech is "part of the practice of medicine, [it is] subject to *reasonable* licensing and regulation by the State") (emphasis added). The panel correctly held that SB 1172 falls well within the scope of this traditional state power. The panel also correctly rejected Plaintiffs' vagueness, overbreadth, and parental rights claims, resting its decision on well settled precedents.

Moreover, no question of extraordinary importance is presented by this case, and Plaintiffs' efforts to show otherwise by pointing to the enactment of a similar law in New Jersey are unavailing. The fact that New Jersey has passed a similar law, and that other states may pass similar laws in the future, is not a proper basis for *en banc* review: that other courts might give consideration to the panel's reasoning in other cases does nothing to distinguish this case from the bulk of cases that panels of this Court decide.

II. ARGUMENT

A. The Panel's Holding That SB 1172 Does Not Violate The First Amendment Is Firmly Grounded In Supreme Court And Circuit Court Precedent And Is Plainly Correct.

SB 1172 is a state regulation of the practices of licensed medical professionals. It prohibits SOCE based on a consensus of professional medical and mental health organizations that these practices are ineffective and pose significant

risks of mental and physical harm to patients, including minors. The fact that SOCE is often administered through spoken words does not alter that conclusion. Under Supreme Court and Ninth Circuit precedent, a state may reasonably regulate the practice of medicine, including treatments that involve speech, to protect public health and safety.

1. SB 1172 Falls Squarely Within A State's Established Power To Reasonably Regulate Medical Treatments To Protect Public Health And Safety.

California enacted SB 1172 pursuant to the long-established power of states to regulate medical practice to enforce professional standards and protect patients from harm, fraud, discrimination, and abuse. *See Watson v. Maryland*, 218 U.S. 173, 176 (1910) ("It is too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health."); *see also Planned Parenthood*, 505 U.S. at 884 (plurality opinion) (when speech is "part of the practice of medicine, [it is] subject to *reasonable* licensing and regulation by the State") (emphasis added).

The fact that SOCE is administered through spoken words does not render such treatment immune from this traditional state power to ensure safe and competent care. *See Lowe v. SEC*, 472 U.S. 181, 228 (1985) (White, J., concurring in judgment) ("The power of government to regulate the professions is not lost

whenever the practice of a profession entails speech.") In fact, this Court has considered that argument before in the context of mental health care, and expressly rejected the notion that professional mental health care is subject to "special First Amendment protection" simply because the *vehicle* of that conduct is spoken words. *Nat'l Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1054 (9th Cir. 2000) (*NAAP*). As the panel observed, "[w]ere it otherwise, then any prohibition of a particular medical treatment would raise First Amendment concerns because of its incidental effect on speech," given that "[m]ost, if not all, medical treatment requires speech." Panel Decision at 23. Sister courts have reached the same conclusion. *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 a profession from state regulation[.]"); *Accountant's Soc'y of Virginia v. Bowman*, 860 F.2d 602, 604 (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, 898 (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.").

Plaintiffs urge that the panel should have analyzed SB 1172 in terms of content and viewpoint discrimination. *See* Petition at 7-8. But as the panel

correctly recognized, while *NAAP* noted in *dicta* that the statute there did not regulate protected speech based on content or viewpoint, *NAAP* did not hold that regulations of medical treatment must be evaluated in terms of content and viewpoint neutrality. Such a rule would be remarkable and unworkable given that "doctors are routinely held liable for giving negligent medical advice to their patients, without serious suggestion that the First Amendment protects their right to give advice that is not consistent with the accepted standard of care." Panel Decision at 22.

Moreover, SB 1172 does not prohibit the expression of any content or viewpoint about SOCE. By its plain terms, it prohibits only the "practice" of SOCE on minor patients. SB 1172 has no application outside the realm of state-licensed medical practice. It does not interfere with any individual's right to express his or her views regarding SOCE, sexual orientation, or any other topic. Plaintiffs and all other individuals in California remain free to express their views about SOCE or its goals in any forum, even including recommending SOCE to their clients. Panel Decision at 13 ("SB 1172 regulates the provision of medical treatment, but leaves mental health providers free to discuss or recommend treatment and to express their views on any topic.").

Contrary to Plaintiffs' argument, *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), also supports the panel's holding here. *See* Panel Decision at 18-19. In

Conant, there was no dispute that the government had the authority to prohibit doctors from *treating* patients with medical marijuana. *Conant*, 309 F.3d at 634-35. The challenged policy triggered First Amendment concerns because it not only prohibited prescribing or distributing marijuana, but also penalized doctors for merely recommending medical marijuana to patients. *Conant*, 309 F.3d at 633-34; Panel Decision at 18-19. Thus, in *Conant*, "the government's policy prohibited speech *wholly apart* from the actual provision of treatment." Panel Decision at 24. In contrast, SB 1172 applies solely to the provision of SOCE as a purported treatment for minors; it does not prohibit mental health providers from discussing or recommending SOCE, or expressing their views on any topic. Panel Decision at 13.

The other cases Plaintiffs cite are inapposite and do not support their argument that SB 1172 must be subjected to strict scrutiny. *See* Petition 8-9, citing *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001); *Thomas v. Collins*, 323 U.S. 516, 545 (1945); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995). In *Velazquez*, the Supreme Court held that a restriction barring legal services attorneys from challenging federal welfare laws was impermissible because it prevented attorneys from making "all the reasonable and well-grounded arguments" and was based simply on a governmental desire to discourage suits challenging certain laws. 531 U.S. at 545-46. Unlike the restriction in *Velazquez*,

SB 1172 does not seek to limit the expression of certain ideas or prevent providers from complying with professional standards of competence and responsibility.

Likewise, Justice Jackson's concurring opinion in *Thomas*, which Plaintiffs cite, strongly supports the panel's decision rather than Plaintiffs' arguments. As this Court noted in *NAAP*, Justice Jackson contrasted laws that reasonably regulate the practice of professions such as medicine and law, which are permissible, with impermissible attempts to restrict the expression of particular views privately or in the public arena. *NAAP*, 228 F.3d at 1055 (citing *Thomas*, 323 U.S. at 545 (Jackson, J., concurring)). Because SB 1172 regulates only professional conduct and does not limit what anyone may say *about* SOCE in any forum, Justice Jackson's analysis supports the panel's decision. Similarly, the *dicta* cited by Plaintiffs from *Florida Bar*—noting that some professional speech is entitled to the "strongest protection our Constitution has to offer"—expressly *limited* that protection to "speech by attorneys on public issues" and distinguished such speech from other circumstances in which regulation is permitted. 515 U.S. at 634. Indeed, the Supreme Court upheld the challenged restriction (on certain types of direct mail solicitations) in *Florida Bar*. *Id*. at 635.

For all of these reasons, the panel correctly held that SB 1172 is a reasonable regulation of licensed mental health care providers. There is no need for this Court *en banc* to reconsider the panel's decision.

2. Public Forum Cases Are Irrelevant To State Regulation Of Medical Treatment.

Plaintiffs' reliance on "public forum" cases such as *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995), is inapt. SB 1172 regulates medical treatments by licensed providers to protect the public's health and safety; it does not regulate protected speech in a public forum. *See NAAP,* 228 F.3d at 1054 (holding that "the key component of psychoanalysis is the treatment of emotional suffering and depression; *not* speech")*; see also Conant v. McCaffrey*, No. C 97-0139, 1998 WL 164946, at *3 (N.D. Cal. Mar. 16, 1998) (holding that "the patients and doctors are not meeting in order to advance particular beliefs or points of view; they are seeking and dispensing medical treatment"). Public forums include traditional locations for public debate on public property, such as town squares, parks, and sidewalks, and also may result from intentional government action creating additional platforms for expression. *See Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988). Regulation of a licensed professional's provision of medical services to patients does not restrict what may be said in any type of public forum—to the contrary, SB 1172 leaves licensed professionals free to say anything they wish about SOCE in any forum.

3. Mental Health Treatments, Including The Practices Barred By SB 1172, Are Not Expressive Conduct Subject To *O'Brien* Scrutiny.

There is no basis for Plaintiffs' argument that SB 1172 should be subjected to heightened scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968) ("*O'Brien*").[1] The First Amendment protects conduct that amounts to "symbolic speech," but only when the conduct is "inherently expressive." *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 65-66 (2006). As both the Supreme Court and this Court have held, "conduct intending to express an idea" is constitutionally protected only if an "intent to convey a particularized message [is] present," and the "likelihood [is] great that the message w[ill] be understood by those who view[] it." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058 (9th Cir. 2010) (alterations in original) (internal quotation marks omitted) (quoting *Spence v. Washington*, 418 U.S. 405, 409-11 (1974)).

Under this standard, SOCE is not expressive conduct. The purpose of therapy is not to convey a particular message, but rather to treat the patient. *NAAP*,

[1] Plaintiffs' claim that "the panel explicitly stated that SB 1172 has an incidental effect on free speech" has no merit. Petition at 11. Rather, the panel merely reiterated the established principle that when medical treatment takes place through speech, the fact that the regulation has an incidental effect on the speech used to facilitate or provide the treatment does not in itself give rise to a First Amendment concern. *See* Panel Decision at 23 ("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. . . . Were it otherwise, then any prohibition of a particular medical treatment would raise First Amendment concerns because of its incidental effect on speech.").

228 F.3d at 1054 (holding that "the key component of psychoanalysis is the treatment of emotional suffering and depression, *not* speech"); *see also O'Brien v. United States Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1166-67 (E.D. Mo. 2012) ("Neither the doctor's conduct in prescribing nor the patient's conduct in receiving contraceptives is inherently expressive. Giving or receiving health care is not a statement in the same sense as wearing a black armband or burning an American flag.") (citations omitted).

Moreover, even if *O'Brien* were applied, SB 1172 would easily pass muster. Under *O'Brien*, a conduct regulation that incidentally burdens protected expression is permissible if it furthers an important governmental interest unrelated to the suppression of free expression, and if the restriction is no greater than necessary to further that interest. 391 U.S. at 377. Here, as the Legislature noted when it passed SB 1172, California has not only a substantial but a compelling interest in protecting minors against the serious risks posed by SOCE to their mental and physical health. SB 1172 § 1(n). Further, as the panel concluded, the law is narrowly tailored to that goal: SB 1172 prohibits only harmful practices, not protected speech; it applies only to minor patients; and it does not prohibit providers from communicating with the public about SOCE, expressing their views about SOCE to patients or others, or recommending SOCE to patients or others. *See* Panel Decision at 12-13.

B. The Panel's Holding That SB 1172 Is Not Vague Is Firmly Grounded In Supreme Court And Circuit Precedent And Is Plainly Correct.

The panel's holding that SB 1172 is not unconstitutionally vague accords with Supreme Court and Ninth Circuit precedent. A law is not unconstitutionally vague if "a reasonable person of ordinary intelligence would understand that his or her conduct is prohibited by the law in question." *United States v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1994) (citation and internal quotation marks omitted).[2] A vagueness challenge will not be sustained on the basis of "speculation about possible vagueness in hypothetical situations not before the Court" when the statute is "surely valid in the vast majority of its intended applications." *Hill v. Colorado*, 530 U.S. 703, 733 (2000) (citation and internal quotation marks omitted); *see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982) (facial vagueness challenge will succeed only "if the enactment is impermissibly vague in *all* of its applications") (emphasis added).

Tellingly, Plaintiffs do not quote the actual language of SB 1172 in support of their vagueness argument, but instead rely on excerpting words and

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[2] Even if a statute restricts protected expression—which SB 1172 does not—"perfect clarity and precise guidance" would still not be required. *See Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989) ("perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity").

phrases from the panel decision, stripping them of their context, and asserting that they cannot discern the difference between them. *See* Petition at 13-14. But the statute is clear. SB 1172 expressly limits its prohibition of SOCE on minors to "any *practices* by mental health providers that seek to change an individual's sexual orientation." Cal. Bus. & Prof. Code § 865(b)(1) (emphasis added).

Moreover, under this Court's precedent, "if the 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 standard is lowered." *See* Panel Decision at 31-32 (quoting *Weitzenhoff*, 35 F.3d at 1289). Licensed medical professionals would surely understand the scope of SB 1172's prohibition of "practices" that seek to change an individual's sexual orientation; that Plaintiffs hold themselves out as SOCE practitioners calls into doubt their claim that they do not understand what SOCE practices are.

The sole case Plaintiffs rely on for their vagueness argument, *NAACP v. Button*, 371 U.S. 415 (1963), offers no support for their position. There, a state attempted to regulate expressive activity by forbidding legal solicitation practices commonly used by organizations such as the NAACP, and sought to do so in language vague enough to render any "person who advises another that his legal rights have been infringed and refers him to a particular attorney or group of attorneys" a criminal. *Id.* at 434. SB 1172 does not regulate expressive activity,

and its prohibition is precisely defined and intelligible to any reasonable person, but particularly to a licensed medical professional.

C. The Panel Decision That SB 1172 Is Not Overbroad Is Firmly Grounded In Supreme Court And Circuit Precedent And Is Plainly Correct.

The panel correctly rejected Plaintiffs' claim that SB 1172 is unconstitutionally overbroad. Invalidating a law under this doctrine requires showing that the overbreadth is "substantial, not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Virginia v. Hicks*, 539 U.S. 113, 119-20 (2003). Plaintiffs cannot make this showing because SB 1172 prohibits only those purported medical treatments that the Legislature found to be ineffective and potentially dangerous, leaving untouched Plaintiffs' ability to advocate for SOCE in public or even to recommend it to their patients.

Neither of the two cases Plaintiffs cite supports their position. In *United States v. Stevens*, 559 U.S. 460 (2010), the Court considered a ban on "crush videos" that portrayed harmful acts against animals. As the Court noted, the language of the statute did not actually require "that the depicted conduct *be* cruel," *id.* at 474 (emphasis added), and could easily be read to allow prosecution for publishing news reports *about* animal cruelty or other protected speech, *id.* at 477-78. SB 1172, on the other hand, plainly prohibits state-licensed medical professionals from engaging only in *practices* that attempt to change a minor's

sexual orientation. Plaintiffs also cite a concurrence supporting denial of *en banc* review in *United States v. Alvarez*, 638 F.3d 666, 672 (9th Cir. 2011), that did not address overbreadth, but instead addressed whether false speech is unprotected by the First Amendment.

D. The Panel Decision That SB 1172 Does Not Violate The Rights Of Parents Is Firmly Grounded In Supreme Court And Circuit Precedent And Is Plainly Correct.

The panel correctly held that Supreme Court and Ninth Circuit precedent compel the conclusion that SB 1172 does not violate parents' due process rights. In cases alleging that a law violates a substantive right protected by the Due Process Clause, courts require "a 'careful description' of the asserted fundamental liberty interest." *Washington v. Glucksberg*, 521 U.S. 702, 721(1997) (cited in Panel Decision at 34). SB 1172 regulates only the practices of state-licensed professionals; it does not regulate parents. Accordingly, the panel correctly defined the right at issue to be "whether parents' fundamental rights include the right to choose for their children a particular type of provider for a particular medical or mental health treatment that the state has deemed harmful." Panel Decision at 34.[3]

[3] By contrast, Plaintiffs' broad description of the due process right at issue as the "right to direct the upbringing of their children" contravenes *Glucksberg*'s requirement that the right be described specifically and , would call into question countless reasonable exercises of the state's police power. *E.g. Prince*, 321 U.S. at 166 (upholding child labor regulations against claim they violated parental rights);

Precedent demonstrates that no such right exists. As the panel observed, a long line of cases from across the country holds that the substantive due process rights of patients themselves "do not extend to the choice of type of treatment or of a particular health care provider," much less to a prohibited type of treatment. Panel Decision at 13 (quoting *NAAP*, 228 F.3d at 1050). Logically, and as the panel observed, "it would be odd if parents had a substantive due process right to choose specific treatments for their children—treatments that reasonably have been deemed harmful by the state—but not for themselves." Panel Decision at 35. That inconsistency would be particularly incongruous and untenable given that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

Parham v. J.R., 442 U.S. 584, 603 (1979) and *Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000), which Plaintiffs also cite, do not support Plaintiffs' argument that parents have a protected right to require that the state permit licensed therapists to subject minors to practices that the state has reasonably determined to be ineffective and unsafe. In *Parham*, the Supreme

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Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905) (upholding compulsory inoculation requirement); *Fields v. Palmdale School Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005) (parental rights do not encompass the right to direct public school instruction or alter curriculum).

Court *affirmed* the longstanding principle that "a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." 442 U.S. at 603 (requiring a neutral fact finder to determine whether a child admitted by a parent to a state mental health facility required treatment and would benefit from the treatment to be provided). *Parham* did not hold or suggest that the state, based on deference to a parent's wishes, must permit licensed medical professionals to engage in treatments that put children at risk of serious harms. Rather, to the limited extent *Parham* is relevant, it supports the opposite conclusion.

This Court's holding in *Wallis* is even more inapt. *Wallis* held that, barring exigent circumstances, "the state is required to notify parents and to obtain judicial approval before children are subjected to investigatory physical examinations," and that "parents have a right . . . to be with their children while they are receiving medical attention." *Id.* at 1141-42. Nothing in *Wallis* suggests that parents have a right to compel the state to provide a child with any specific treatment for their children—much less with a treatment that the state has reasonably determined to be ineffective or unsafe.

III. CONCLUSION

For the reasons set forth above, Equality California respectfully requests that this Court deny Plaintiffs' Petition for Panel Rehearing or Rehearing *En Banc*.

Dated: October 17, 2013

Respectfully submitted,

/s/ Bram Alden
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Federal Rule of Appellate Procedure 32(c)(2) and Ninth Circuit Rule 40-1(a). This brief contains 4,144 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief's type size and type face comply with Federal Rule of Appellate Procedure 32(a)(5) and (6).

Dated: October 17, 2013

/s/ Bram Alden

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Equality California states that the following case pending in this Court raises the same or closely related issues and/or arises out of the same transaction or event as this appeal: *Welch, et al. v. Brown, et al.*, No. 13-15023.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 17, 2013.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Executed on October 17, 2013, at Los Angeles, California.

Dated: October 17, 2013

/s/ Bram Alden

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