No. 13-15023

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD WELCH, et al.
Plaintiffs and Appellants,
v.
EDMUND G. BROWN, JR., et al.
Defendants and Appellees,

On Appeal From The United States District Court
For the Eastern District Of California
No. 2:12-CV-02484-WBS-KJN (Hon. William B. Shubb)

BRIEF OF AMICUS CURIAE EQUALITY CALIFORNIA IN OPPOSITION TO PETITION FOR PANEL HEARING AND REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

This Corporate Disclosure Statement is filed on behalf of Equality California in compliance with the provisions of Federal Rule of Appellate Procedure 26.1 requiring a nongovernmental party to a proceeding in a court of appeals to file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or state that there is no such corporation.

Equality California states that it is a nonprofit corporation with no such parent corporation, and no publicly held corporation owns 10% or more of its stock. Additionally, Equality California is unaware of any publicly held entity with a direct financial interest in the outcome of the instant litigation. A supplemental disclosure statement will be filed upon any change in the information provided herein.

Dated: October 24, 2013

/s/ Bram Alden

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae Equality California is a state-wide civil rights advocacy group protecting the needs and interests of lesbian, gay, bisexual, and transgender Californians and their families. Equality California was the lead organizational sponsor of SB 1172 in the California Legislature and has been actively involved in defending SB 1172 against both of the challenges that are before this Court. Equality California moved to intervene in both cases, and was granted party status in *Pickup v. Brown*, No. 12-17681. In the present case, the Honorable William B. Shubb permitted Equality California to participate as an amicus and to offer briefing, argument, and evidence in the proceedings below.

This brief is submitted with the consent of all parties. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except *amicus curiae* and its counsel contributed money to fund the preparation or submission of this brief.

ARGUMENT

I. INTRODUCTION

Equality California will not repeat here the arguments it made in its Opposition to the Petition for Rehearing in the *Pickup* case, or in the Oppositions to the Petition for Rehearing filed by the State Defendants. Equality California

submits this brief solely to respond to three assertions made by the *Welch* Plaintiffs and *amicus curiae* Institute for Justice.

II. DISCUSSION

A. Lee Beckstead's Declaration Demonstrates That SB 1172 Is *Not* A Form Of Viewpoint Suppression.

First, Plaintiffs mischaracterize Dr. Lee Beckstead's declaration. Dr. Beckstead, a psychologist who served on the American Psychological Association's Task Force to evaluate the practice of sexual orientation change efforts (SOCE), states that SB 1172 reflects the professional consensus that SOCE carries a significant risk of harm and should not be attempted. ER 421 ¶¶ 2, 5; ER 425 ¶ 18; ER 427 ¶¶ 23-24. Dr. Beckstead points out that harms experienced by those who have undergone SOCE include despair, self-hatred, distress, guilt, shame, and suicidality. ER 427 ¶¶ 23-24. Contrary to Plaintiffs' claim, Dr. Beckstead never "urged that SOCE was dangerous precisely because it did not challenge assumptions and beliefs." (Petition for Rehearing and Rehearing En Banc ("Petition") at 7.) Rather, Dr. Beckstead explains that therapeutic treatment consistent with professional norms advances client autonomy by facilitating the client's ability to explore beliefs and options (without any preconceived result), develop self-acceptance, and enhance active coping skills. ER 425-426 ¶¶ 19-21.

There is no merit to the contention that Dr. Beckstead's declaration supports Plaintiffs' claim that SB 1172 is a form of viewpoint suppression. *See* Petition for

Rehearing and Rehearing En Banc ("Petition") at 6-7. Precisely the opposite is true. Dr. Beckstead's observation that SB 1172 prohibits a practice that has been rejected by every major mental-health organization and may cause serious harms demonstrates that SB 1172 is doing exactly what States should do in regulating licensed professionals: enforcing the mainstream consensus regarding professional standards.

B. The Panel's Decision Is Consistent With *Holder v. Humanitarian Law Project* Because Therapeutic Treatment Is *Not* A Means Of Communicating A Message.

Second, contrary to Plaintiffs' and Amicus's assertions, the panel's decision is fully consistent with *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010). *Holder* applied a more rigorous standard of review because "as applied to [the] plaintiffs the conduct triggering coverage under the statute consist[ed] of *communicating a message*." *Id.* at 2724 (emphasis added). This Court has already held that mental health therapy, even when conducted by talking, is treatment, *not* a means of communicating a message. *National Association for the Advancement of Psychoanalysis v. California Board of Psychology*, 228 F.3d 1043, 1054 (9th Cir. 2000) ("the key component of psychoanalysis is the treatment of emotional suffering and depression; *not* speech"); *cf. 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").

Plaintiffs' own declarations make clear that SOCE is treatment, not communication of a message. For example, Plaintiff Duk explains that he frequently prescribes medication as part of SOCE. ER 295 ¶ 3 ("As a psychiatrist I frequently use a combination of counseling and prescription medications to assist the patients in achieving their objectives in the therapeutic treatment.); ER 301 ¶ 21("In the event a teenage patient seeks to gain a stronger level of control over sexual behaviors, desires, and addictions, treatment can include, in addition to counseling, prescription drugs to help control sexual drive, sometimes referred to as libido."). Plaintiff Welch himself complains that SB 1172 interferes with his "providing *treatment* to minors." ER 319 ¶ 11 (emphasis added).

The Supreme Court has specifically held that when speech is "part of the practice of medicine, [it is] subject to reasonable licensing and regulation by the State." *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion) (emphasis added). Nothing in *Holder*, which addressed speech that did not take place in the context of state-licensed professional services but rather speech that purely communicated a message in a political context, changes that holding.

C. ***Cooksey v. Futrell* Is Inapposite Because It Is A Case About Standing To Pursue Claims Related To The Regulation Of Advice And Opinions.**

Third, *Cooksey v. Futrell*, 721 F.3d 226, 229–30 (4th Cir. 2013), discussed by *amicus curiae* Institute for Justice, also has no bearing here. The plaintiff in *Cooksey* is an unlicensed individual who alleges that a state licensing board caused him to self-censor certain dietary "advice" and "opinions" offered through his website. *Id.* at 229, 230, 232, 236. The Fourth Circuit remanded the case, holding only that the plaintiff has *standing* to pursue his First Amendment claim. *Id.* at 238. The Fourth Circuit expressly did *not* address the merits of the case, which are "irrelevant to the standing analysis." *Id.* at 239 (citation omitted). Here, of course, no question of standing has been raised, and the Panel decision goes directly to the merits of Plaintiffs' constitutional claims. *See* Panel Decision at 36 ("Senate Bill 1172 survives the constitutional challenges presented here.").

Cooksey is also substantively inapposite. The plaintiff in that case communicated dietary "advice" and "opinions" through his website, which "contained a disclaimer that [he] was not a licensed medical professional and did not have any formal medical education or special dietary qualifications." *Id.* at 229-30, 236. The state licensing board criticized his communications "to the public." *Id.* at 232. By contrast, SB 1172 regulates licensed mental health providers when operating under their license in providing services to a patient and

does not restrict what any individual, licensed or unlicensed, may publish or communicate to the public about SOCE. Indeed, the Panel explicitly emphasized that, outside the therapist-patient treatment relationship, "a doctor who publicly advocates a treatment that the medical establishment considers outside the mainstream, or even dangerous, is entitled to robust protection under the First Amendment—just as any person is—even though the state has the power to regulate medicine." Panel Decision at 20.

III. CONCLUSION

For the reasons set forth above, in the State Defendants' briefs, and in Equality California's brief in *Pickup*, Equality California respectfully requests that this Court deny Plaintiffs' Petition for Rehearing and Rehearing *En Banc*.

Dated: October 24, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Federal Rule of Appellate Procedure 29. This brief's type size and type face comply with Federal Rule of Appellate Procedure 32(a)(5) and (6). This brief contains 1,219 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated: October 24, 2013

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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 24, 2013.

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

Executed on October 24, 2013, at Los Angeles, California.

Dated: October 24, 2013

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