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

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

Plaintiffs-Appellants,

v.

EDMUND G. BROWN, Jr. Governor of the State of California, in his official capacity; ANNA M. CABALLERO, Secretary of the State and Consumer Services Agency of the State of California, in her official capacity, KIM MADSEN, Executive Officer of the California Board of Behavioral Sciences, in her official capacity; MICHAEL ERICKSON, PH.D, President of the California Board of Psychology, in his official capacity; SHARON LEVINE, President of the Medical Board of California, in her official capacity,

Defendants-Appellees,

and

EQUALITY CALIFORNIA, Intervenor-Defendant-Appellee.

PRELIMINARY INJUNCTION APPEAL (9TH CIRCUIT RULE 3-3)

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

PLAINTIFFS-APPELLANTS' MOTION TO STAY THE MANDATE PENDING RESOLUTION OF PETITION FOR CERTIORARI

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INTRODUCTION

Appellants, David Pickup, Christopher H. Rosik, Joseph Nicolosi, Robert Vazzo, National Association for Research and Therapy of Homosexuality, American Association of Christian Counselors, Jack Doe 1, Jane Doe 1, John Doe 1, Jack Doe 2, Jane Doe 2, and John Doe 2 (collectively "Appellants"), move this Court for an Order Staying the Mandate pending determination of Appellants' Petition for Certiorari to the United States Supreme Court. Appellants make this motion pursuant to Fed. R. App. P. 41(d) and 9th Cir. R. 41-1.

FACTUAL BACKGROUND

In September 2012, California Governor Jerry Brown signed into law an unprecedented regulation of mental health professionals, making California the first state in history to ban licensed mental health counselors from providing and minor clients from receiving a specific viewpoint regarding same-sex sexual attractions, behavior, or identity. Never before has a state banned counselors from providing or clients from receiving "talk therapy" on any subject matter, let alone only one viewpoint on an otherwise permissible subject matter. Regardless of its constitutionality, California Senate Bill 1172 ("SB1172") represents an unprecedented intrusion into the counseling relationship and therapeutic alliance between a counselor and client.

Absent a stay of this Court's mandate pending Appellants' petition for certiorari, Appellants John Doe 1 and 2 and their parents, Jack and Jane Doe 1 and 2, face immediate and irreparable injuries to their physical, mental, and emotional health because they will be forced to discontinue beneficial professional counseling which expresses a viewpoint with which the state disagrees but for which there is no concrete evidence of harm. Similarly, absent a stay, Appellants David Pickup, Christopher H. Rosik, Ph.D., Joseph Nicolosi, Ph.D, Robert Vazzo, and members of NARTH and AACC (collectively "Appellant-Counselors") will be forced to choose between professional discipline from SB1172 for continuing consensual, beneficial counsel that expresses a viewpoint that the State has deemed unacceptable or discipline based on established ethical codes for discontinuing beneficial counsel and/or abandoning their clients.

California lawmakers have placed Appellants in this untenable situation by declaring that counseling expressing the viewpoint that same-sex attractions, behaviors, or identity ("SSA") can be reduced or eliminated is banned, while mandating counseling that expresses the viewpoint that unwanted SSA should be affirmed notwithstanding the client's express wishes and objectives.

Appellants filed a Complaint and Motion for Preliminary Injunction in the Eastern District of California on October 4, 2012, seeking relief under the United States and California Constitutions and 42 U.S.C. §1983. On December 4, 2012,

the court issued its order denying Plaintiffs' motion for a Preliminary Injunction. (ER 00001-00044). Another district court reached the opposite conclusion in *Welch v. Brown*, 907 F. Supp. 2d 1102 (E.D. Cal. 2012), and enjoined the Act as viewpoint discriminatory. Plaintiffs here filed a notice of preliminary injunction appeal under Ninth Circuit Rule 3-3 on the same day. (ER 00045-00047). On December 6, 2012, Plaintiffs also filed an emergency motion for a preliminary injunction pending appeal. (Dkt. 3). On December 21, 2012, the emergency motion was granted by a panel of this Court. (Dkt. 10).

On August 29, 2013, a different three-judge panel of the Ninth Circuit affirmed the district court's denial of a preliminary injunction and reversed the district court's entry of an injunction in *Welch*. (Dkt. 118-1). The panel concluded that SB1172 regulates only "medical treatment," and that any effect it may have on free speech interests is merely incidental. (*Id.* at 9, 26). The panel went on to conclude that SB1172 only needed to satisfy "rational basis review and must be upheld if it 'bear[s] . . . a rational relationship to a legitimate state interest.'" (*Id.* at 27). Appellants subsequently filed for a Motion for a Rehearing or Rehearing En Banc. (Dkt. 119-1). On January 29, 2014, this Court issued an amended opinion affirming its denial of Appellants' request for an injunction. (Dkt. 128). Three judges of this Court filed a written dissent to the denial of a rehearing and/or rehearing en banc and dissented to the panel decision.

ARGUMENT

This case has resulted in many different opinions. At the District Court level, one judge granted an injunction based on free speech and one judge in the same district denied an injunction, finding speech was not implicated. At the Ninth Circuit Court of Appeals, a three-judge panel granted an injunction pending appeal. A three-judge panel denied an injunction, finding free speech was not implicated, and three judges dissented from the denial of rehearing or rehearing en banc, stating the some level First Amendment protection should be recognized. Appellants are now preparing their petition for writ of certiorari to the United States Supreme Court and request this Court to stay the Mandate until the petition can be acted upon by the High Court.

"As part of its traditional equipment for the traditional administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal." *Nken v. Holder*, 556 U.S. 418, 421 (2009) (quoting *Scripps-Howard Radio, Inv. v. FCC*, 316 U.S. 4, 9 (1942)). That also includes the authority to stay enforcement of the mandate issued after an appeal while a party seeks review of its petition for a writ of certiorari. *See* Fed. R. App. P. 41. "Ordinarily, a party seeking a stay of the mandate following this court's judgment need not demonstrate that exceptional circumstances justify a stay." *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528 (9th Cir. 1989); *see also Campbell v. Wood*, 20

F.3d 1050, 1051 (9th Cir. 1994) (same). Nevertheless, "[d]elay of the mandate, like any other judicial act, must be supported by a legally sufficient reason." *United States v. Burdeau*, 180 F.3d 1091, 1093 (9th Cir. 1999) (Kozinski, C.J., dissenting from opinion staying mandate *sua sponte*).

Under Fed. R. App. P. 41, a motion to stay the mandate pending a petition for a writ of certiorari "must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for the stay." Fed. R. App. P. 41(d)(2)(A). Such a stay is merited unless the "petition for certiorari would be frivolous or filed merely for delay." 9th Cir. R. 41-1. Appellants' petition for a writ of certiorari is neither.

Appellants' petition will present a substantial question concerning an unprecedented regulation of speech by counselors which clients voluntarily seek, and there is good cause for granting the stay. In fact, given the constitutional significance of the questions presented in Appellants' challenge to SB1172 and the divergent opinions among the District Court and the members of this Court that have considered it, Appellants' petition for a writ of certiorari has significant implications both for the right of free speech and for the regulation of all licensed professionals subject to state licensure and regulation. There is little question that such constitutionally significant questions are far from frivolous and are certainly not submitted for mere delay. Appellants' will file their petition for a writ of

certiorari quickly and substantially before the deadline, which further reveals that Appellants' motion here is not submitted for delay. As such, this Court should stay its mandate pending resolution of Appellants' petition for a writ of certiorari.

I. Appellants' Petition Presents Substantial Questions of Grave Importance.

There are substantial questions presented by Appellants' petition for a writ of certiorari, which will argue that the panel's decision departs from substantial Supreme Court precedent on professional speech and parental rights and from this Circuit's previous decisions in similar cases. As Judge O'Scannlain noted in his dissent from the motion for rehearing en banc, Appellants' petition presents the critical threshold issue of whether a state may "remove from the First Amendment's ambit the speech of certain professionals when the State disfavors its content or its purpose." (Dkt. 128, Order at 22) (O'Scannlain, J., dissenting from denial of rehearing en banc). Indeed, the answer to Appellants' question will control whether professional speech is entitled to any protection whatsoever when the state engages in legislative legerdemain to label a restriction or prohibition of such speech merely a "professional regulation" and thereby remove it from First Amendment scrutiny.

SB1172 set the state's power to regulate licensed professionals on a collision course with fundamental constitutional rights, and Appellants' petition will ask the Supreme Court to decide the critical question of whether a state is permitted to

prohibit an entire category or viewpoint of counselors' speech on an otherwise permissible subject matter simply by calling it conduct instead of speech. This question is one that the Court has demonstrated tremendous hostility against in other contexts, and, which the petition will argue, places the panel's decision at odds with significant First Amendment jurisprudence. *See Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2723-24 (2010); *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). It is axiomatic that questions concerning the First Amendment right to free speech are substantial, as the Supreme Court has stated that such a right "lies at the foundation of free government." *Schneider v. New Jersey*, 308 U.S. 147, 165 (1939). Indeed, the three-judge panel that granted the injunction pending appeal had to conclude that the Appellants (1) will likely succeed on the merits or that (2) the appeal raised substantial constitutional questions. *See Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 512 F..3d 1112, 1115-16 (9th Cir. 2008).

The question presented in Appellants' petition is also substantial because it requires a determination of the crucial constitutional consideration of when a state crosses the line from permissible professional regulations to impermissible speech restrictions. As Judge O'Scannlain noted, "authoritative precedents have established that neither professional regulations generally, nor even a more limited

subclass of such rules, remain categorically outside of the First Amendment's reach." (Order at 15) (O'Scannlain, J., dissenting from denial of rehearing en banc). The authoritative precedents to which he was referring consist entirely of opinions from the High Court, and they are all in direct conflict with the panel's determination here. *See Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011); *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533 (2001); *Florida Bar v. Went for It*, 515 U.S. 618 (1995); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Thomas v. Collins*, 323 U.S. 516 (1948).

"The panel cites no case holding that speech, uttered by professionals to their clients, does not actually constitute 'speech' for purposes of the First Amendment. And that should not surprise us—for the Supreme Court has not recognized such a category." (Order at 21) (O'Scannlain, J. dissenting from denial of rehearing en banc). In the absence of sufficient justification for departing from this precedent, Appellants' petition for a writ of certiorari will present a substantial question worthy of a stay of the mandate.

Additionally, Appellants' petition will raise the significant issue of whether a regulation such as SB1172 must satisfy at least some level of intermediate scrutiny if SOCE counseling is ultimately determined to be conduct rather than

speech. The panel's decision on this issue conflicts directly with substantial precedent from the Supreme Court. *See Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010); *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 66 (2006); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997); *United States v. O'Brien*, 391 U.S. 367, 377 (1968). While Appellants maintain that SB1172 is viewpoint- and content-based, even if it were to be found to be content-neutral, the petition would raise the substantial question of whether the law should be analyzed using intermediate scrutiny under *O'Brien*, not the deferential rational basis standard used by the panel. Because the panel's analysis conflicts with the Supreme Court's and other circuits' precedents on this issue, this question is substantial and likely to merit a writ of certiorari.

Appellants' petition will also raise the question of whether a restriction on the ability of parents to seek counseling for their child consistent with their sincerely held religious beliefs violates the fundamental rights of Appellants to direct the upbringing and education of their children. It is beyond dispute that this raises a substantial question because the Supreme Court has stated that such a right is perhaps the oldest fundamental liberty interest recognized in law. *See Troxel v. Granville*, 530 U.S. 57 (2000); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Regulations implicating such a fundamental right raise substantial

questions, especially since the Supreme Court has recognized that regulations infringing this right are "repugnant to American tradition." *Parham v. J.R.*, 442 U.S. 584, 603 (1979).

Appellants' petition will also have significant implications for state regulations nationwide and potentially control the validity of all such regulations, such as SB1172, which have been passed, introduced, or are currently being considered in Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Virginia, Washington, and Wisconsin.[1] This case is one of first impression and will bring to the forefront the authority of states to enact similar regulations. In short, Appellants' petition for certiorari presents several substantial questions of grave importance, each of which is sufficient to satisfy Rule 41. The motion to stay the mandate should therefore be granted.

[1] Maryland House Bill 91 was introduced on January 8, 2014 and is currently being debated. http://mgaleg.maryland.gov/webmga/frmMain.aspx?id=hb0091&stab=01&pid=billpage&tab=subject3&ys=2014RS (last visited Jan. 30, 2014). Virginia House Bill 1135 was introduced on January 13, 2014 and is currently being considered. http://lis.virginia.gov/cgi-bin/legp604.exe?141+ful+HB1135 (last visited Jan. 30, 2014). New York Senate Bill 4917 was introduced on May 1, 2014. http://assembly.state.ny.us/leg/?sh=printbill&bn=S04917&term=2013 (last visited Jan. 30, 2014). Massachusetts House Bill 154 was introduced on January 22, 2013. https://malegislature.gov/Bills/188/House/H154 (last visited Jan. 30, 2014); Pennsylvania's SB 872 was introduced on April 25, 2013 and referred to committee. http://www.legis.state.pa.us/cfdocs/legis/home/history (last visited September 9, 2013). Washington's HB 1882 was given a first reading on February 14, 2013. http://apps.leg.wa.gov/documents/billdocs/2013-14/Htm/Bills/House%20Bills /1882.htm (last visited September 9, 2013).

II. There Is Good Cause for Staying the Mandate.

Ninth Circuit General Order 4-6 specifically states that "following a decision by this Court, the mandate should not issue forthwith, *but that time should be allowed after entry of judgment for the filing of . . . a petition for a writ of certiorari*." 9th Cir. Gen. Order 4-6(a) (emphasis added). It further states that "[i]t is the policy of this court that only in exceptional circumstances should a panel order the issuance of a mandate forthwith." *Id.* Here, no exceptional circumstances justify preventing a modest delay of the issuance of the mandate while Appellants seek review from the Supreme Court, and compelling reasons militate in favor of staying the mandate.

SB1172 was originally intended to become effective on January 1, 2013, but it was enjoined pending review by this Court. As such, it has been "stayed" once already by an injunction pending appeal without any evidence of negative consequences or harm, and justice dictates that it should be stayed again. Extending the stay until determination of Appellants' petition for certiorari will cause no harm to the State.

Alternatively, a denial of the stay would cause immediate and irreparable harm to Appellants, which counsels in favor granting the stay of the mandate. The Appellant-Counselors' licenses and very livelihoods, as well as the health of their minor clients, will be immediately harmed if the mandate is issued prematurely.

Such irreparable injury should be prevented pending resolution of Appellants' petition for a writ of certiorari. If the mandate is issued, the Appellant-Counselors must immediately stop providing counseling that their clients and parents have sought, consented to, and are substantially benefitting from. Although all parties have consented to the counseling, Appellant-Counselors will be immediately prohibited from expressing the message their clients desperately seek without jeopardizing their professional licenses. Cal. Bus. & Prof. Code §865.2. If the mandate issues, Appellant-Counselors will be forced to to choose between placing their licenses in jeopardy by violating the statute or placing their licenses in jeopardy by complying with the statute and violating other professional standards.

Moreover, complying with the mandate will not only force Appellant-Counselors into a Hobson's choice, but will also abruptly sever beneficial therapeutic alliances between Appellant-Counselors and their clients. These collaborative relationships are built upon trust developed over a course of treatment that marries the client's goals with the counselors' methods for accomplishing those goals. These are critical components of achieving the clients' therapeutic goals. An abrupt termination will not merely affect the Appellant-Counselors' livelihoods, but will adversely affect the clients' health and well-being. Such grave consequences are unwarranted given the circumstances here.

Prohibiting Appellants from offering and their clients from receiving counseling reduce or eliminate *unwanted* same-sex attractions, behaviors, or identity could lead to depression, anxiety, confusion, hopelessness, and even potential suicide in the young vulnerable clients. In many cases, the clients are victims of sexual abuse or other trauma who have found relief through counseling; issuance of the mandate would disrupt that counseling and likely cause increased trauma to the clients. To deprive these minors of their counseling under a statute subject to substantial disagreement among the judges that have already considered it would be unjust and is unnecessary prior to a final determination of the merits of such an unprecedented law. Nothing will be lost should the mandate be stayed pending resolution of Appellants' petition, but substantial and irreversible harm would likely result from denial of a stay. These exceptional circumstances justify the limited stay of the mandate while Appellants seek review by the Supreme Court.

Additionally, there has been considerable disagreement concerning SB1172's constitutionality, with a number of judges, including several on this Court, finding it to violate long-established and binding precedent concerning the First Amendment, or at least warranting some level of First Amendment protection, while others do not. Indeed, the two judges in the Eastern District of California both reached completely opposite conclusions on this issue. Judge

Mueller stated that SB1172 is subject solely to rational basis review because it does not even implicate the First Amendment whatsoever. *See Pickup v. Brown*, No. 2:12-CV-02497-KJM-EFB, 2012 WL 6021465 *10-12 (E.D. Cal. Dec. 4, 2012). Just one day prior to Judge Mueller's opinion, another Eastern District of California Judge Shubb issued an injunction against SB1172 stating that it was subject to strict scrutiny as a content and viewpoint-based restriction on speech. *Welch v.* Brown, 907 F. Supp. 2d 1102, 1113-14 (E.D. Cal. 2012). Additionally, this Court has also had divergent views on the constitutionality of SB1172. The first panel of this Court to review SB1172, which included Judges Goodwin, Leavy, and M. Smith, found that an injunction pending appeal was warranted and issued that injunction. (Dkt. 10). But this subsequent panel upheld SB1172 as a constitutionally permissible regulation of professional "conduct." (Dkt. 128). However, three additional judges on this Court, Judges O'Scannlain, Bea, and Ikuta, issued a vigorous dissent stating that such determination of whether the panel had the authority to remove an entire category of speech from the First Amendment's protection is foreclosed by *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) and other Supreme Court precedent. (Dkt. 128). Such disagreement represents a significant justification and good cause for staying the mandate pending resolution of Appellants' petition for a writ of certiorari. The stay should issue.

CONCLUSION

Appellants have demonstrated that their petition for a writ of certiorari will present substantial questions of critical constitutional significance. Appellants have shown that there is good cause for issuing a stay of the mandate. Also, Appellants' petition for a writ of certiorari is neither frivolous nor submitted for purposes of delay. Indeed, Appellants are filing their petition for a writ of certiorari quickly. Therefore, Appellants have satisfied the requirements of Fed. R. App. P. 41 and respectfully request that this Court issue a stay of the mandate pending resolution of Appellants petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of January, 2014, I filed the foregoing Motion electronically through the CM/ECF system, which caused the following counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing.

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