No. 12-17681

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID PICKUP, et al.,
Plaintiffs-Appellants,
v.
EDMUND G. BROWN, Jr., et al.,
Defendants-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 (Honorable Kimberly J. Mueller)

BRIEF OF DEFENDANT-INTERVENOR-APPELLEE EQUALITY CALIFORNIA

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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: January 30, 2013

/s/ David C. Dinielli

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JURISDICTIONAL STATEMENT

Equality California agrees with Plaintiffs' jurisdictional statement.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Whether the district court correctly ruled that Plaintiffs have no likelihood of prevailing on their claim that SB 1172—a measure enacted by the California Legislature to prevent licensed mental health professionals from engaging in the practice of attempting to change a minor patient's sexual orientation —violates the First Amendment or the Due Process Clause.

B. Whether the remaining elements of this Court's standard for granting a preliminary injunction also support the district court's denial of an injunction.

STATUTORY ADDENDUM

Plaintiffs' Statutory Addendum omitted relevant provisions of SB 1172, including the California Legislature's findings in enacting SB 1172. A complete version of SB 1172 is included in the Addendum hereto.

STATEMENT OF THE CASE

California enacted SB 1172 in response to the problem of state licensed mental health professionals' subjecting minor patients to discredited and unsafe practices that put them at risk of significant harms, including suicide. The law was

written in collaboration with, and supported by, California's leading mental health organizations, and reflects the unanimous consensus of mainstream medical and mental health organizations. The district court found that SB 1172 is a reasonable regulation of mental health care professionals and falls well within the scope of permissible state regulation of medical practice. This Court should affirm that holding.

STATEMENT OF FACTS

As the district court recounted in detail, the modern practice of sexual orientation change efforts dates to at least the mid-twentieth century, at a time when most medical and mental health practitioners assumed homosexuality to be a disease. (ER 4.) Based on that false assumption, many mental health professionals tried to "cure" gay, lesbian, and bisexual people using techniques that included "psychotherapy, hormone treatments, aversive conditioning with nausea-inducing drugs, lobotomy, electroshock, and castration." (ER 204.)

Homosexuality was removed from the Diagnostic and Statistical Manual of Mental Disorders in 1973 (ER 199), and since that time, most practitioners have stopped engaging in efforts to change sexual orientation. "Once homosexuality was no longer classified as an illness, the rationale for trying to 'cure' it by changing an individual's sexual orientation ceased to exist." (ER 205.)

Despite the mental health professions' conclusion nearly 40 years ago that being gay, lesbian, or bisexual is not a condition that requires change or treatment, some practitioners have continued to employ techniques designed to change their patients' sexual orientation based on the premise that homosexuality is an abnormal or undesirable condition that can and should be changed.

In recent years, practitioners of sexual orientation change efforts have more commonly used supposed forms of "talk therapy" rather than surgical, pharmacological, or aversive methods. The nation's leading mental health organizations have found that, although less extreme than some prior methods, these practices also present significant risks of physical and mental harm to patients who undergo them. The American Psychological Association has warned that sexual orientation change efforts "can pose critical health risks" to lesbian, gay, bisexual, and transgender ("LGBT") youth, including "confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, and suicidality," among other negative consequences. (ER 481.) The American Psychiatric Association determined that "the potential risks of reparative therapy are great, including depression, anxiety, and self-destructive behavior." (ER 482.) And the American Academy of Child and Adolescent Psychiatry found that "there is no evidence that sexual orientation can be altered through therapy," and that "there is

no medically valid basis for attempting to prevent homosexuality, which is not an illness." (*Id.*)

In enacting SB 1172, the California Legislature considered and relied upon these conclusions, as well as similar statements from the American School Counselor Association, American Academy of Pediatrics, American Medical Association, National Association of Social Workers, American Counseling Association, American Psychoanalytic Association, and the Pan American Health Organization that sexual orientation change efforts (1) are unnecessary and offer no therapeutic benefit because they attempt to "cure" something that is not an illness and requires not treatment, (2) are contrary to the modern scientific understanding of sexual orientation; (3) are ineffective, and (4) carry a risk of severe harm to patients. (ER 481-83.) The findings of these organizations led the Legislature to determine that "California has a compelling interest in protecting the physical and psychological well-being of minors" and protecting them from "serious harms caused by sexual orientation change efforts." (ER 483.)[1]

[1] Plaintiffs erroneously contend that California has "jumped far afield" (Op. Br. at 41 n.4) in becoming the first state to prohibit licensed mental health providers from attempting to change the sexual orientation of minors. Similar bills have been introduced or are currently under consideration in other states. *See* HD2607, 188th Gen. Ct. (Mass. 2013); A.B. 3371, 2012-13 Legis., 2012 Sess. (N.J. 2012); H.B. 2691, 2011-12 Gen. Asssemb., 2012 Sess. (Pa. 2012); *see also* H.R. Con. Res. 141, 112th Cong. (2012) (urging states "to take action to protect minors" from the harms caused by sexual orientation change efforts). The Pan American Health Organization, a regional office of the World Health Organization, on which the

The Legislature also relied on research demonstrating that the risks of harm are especially great for minors. Gay, lesbian, and bisexual young adults who experienced high levels of family rejection in adolescence based on their sexual orientation were 8.4 times more likely to report having attempted suicide and 5.9 times more likely to report high levels of depression compared with peers from families that reported no or low levels of rejection. (ER 483.)

In addition to the statements cited by the Legislature, the parties submitted to the district court expert testimony that further supported the Legislature's findings that sexual orientation change efforts are both unnecessary and unsafe. The State Defendants submitted a declaration from Dr. Lee Beckstead, a member of an American Psychological Association (APA) Task Force that undertook a comprehensive study of the literature on sexual orientation change efforts and issued a report reflecting its findings in 2009. Dr. Beckstead observed that "the APA, along with all the other major mental-health organizations, remains resolved that SOCE are unnecessary and potentially harmful, and should not be promoted or offered." (ER 186.) Although Plaintiffs attempt to minimize the force of the APA Task Force's conclusions, Dr. Beckstead's testimony underscored and

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California Legislature relied, has also urged legislative action: ""Reparative" or "conversion therapies" have no medical indication and represent a severe threat to the health and human rights of the affected persons." (ER 483.)

supplemented the clear and consistent findings of the Task Force: "Our systematic review of the research on SOCE found that enduring change to an individual's sexual orientation as a result of SOCE was unlikely. Further, some participants were harmed by the interventions." (ER 276.) The reported harms were severe and in some cases life-threatening, including depression, social withdrawal, suicidality, substance abuse, and high-risk sexual behaviors, among other harms. (ER 264-65.)

The State also submitted a declaration from Gregory Herek, Professor of Psychology at the University of California at Davis, who similarly testified that "[i]n light of the many reports of harm, the lack of rigorous studies demonstrating effectiveness, and the fact that homosexuality is not a psychological disorder that requires 'cure,' the major mental health professional associations in the United States have adopted policy statements warning the profession and the public about treatments that purport to change sexual orientation." (ER 210.)[2]

[2] Equality California submitted similar expert declarations in the *Welch* case, and lodged those declarations by means of a request for judicial notice in this case. One of these is the Declaration of Douglas Haldeman, a practicing psychologist and Clinical Instructor in the Department of Psychology at the University of Washington, who has published more than 40 papers in peer-reviewed journals and books, including on the topic of sexual orientation change efforts. He testified that "[t]here is a consensus among mainstream mental health organizations and mainstream mental health providers and academics that [sexual orientation change efforts] [are] not an accepted therapeutic practice. This is because (1) there is no valid evidence that it works; and (2) there is significant and valid evidence that it

SUMMARY OF ARGUMENT

Sexual orientation change efforts historically have included such extreme methods as castration, lobotomy, electroshock therapy, and nausea-inducing drugs. (ER 204.) In recent years, these sexual orientation change efforts have more commonly included supposed forms of talk therapy. The notion of changing a person's sexual orientation through any of these means is contrary to modern science and the consensus of the medical and mental health professions that efforts to change a person's sexual orientation are harmful and unnecessary, because they attempts to alter a normal condition that does not require change or treatment.

No one would seriously question this proposition if sexual orientation change efforts were regularly practiced in attempts to change heterosexual children into gay children. Nevertheless, for several decades, some individuals and organizations have advocated and employed sexual orientation change efforts in attempts to turn gay people straight, including efforts to make gay children heterosexual. All leading medical and mental health professional organizations recognize that sexual orientation change efforts as applied to any person of any sexual orientation, whether heterosexual, homosexual, or bisexual, have no basis in scientific evidence or legitimate therapeutic practice, are contrary to modern

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can cause serious harm, including serious emotional consequences such as depression, suicide attempts, and suicide." (SER 49.)

scientific understanding of sexual orientation, and pose risks of severe harms, particularly to minors.

States regularly and pervasively regulate the provision of medical care by mental health providers, including the provision of such care through talk therapy. Through licensing and professional conduct standards, statutes, regulations, and tort law, states have regulated talk therapy just as they have regulated other forms of medical treatment by licensed professionals. Although SB 1172 is the first statute specifically to address sexual orientation changes efforts, it falls well within the scope of permissible state regulation of the professional speech that takes place during talk therapy sessions.

Plaintiffs' claim that SB 1172 violates their free speech rights must be analyzed under established precedents regarding regulation of the medical profession. As courts including this Circuit have held, laws that regulate the provision of medical care by licensed professionals, even when such laws affect the speech that may occur during doctor-patient visits, are valid if they are reasonably related to protecting health and safety—with an important and understandable exception. Laws that prohibit doctors and patients from sharing truthful information with each other generally warrant greater First Amendment scrutiny. That is because government efforts to prohibit the sharing of truthful

information are among the chief evils against which the First Amendment protects. SB 1172 raises no such concerns.

SB 1172 does not prohibit doctors and patients from sharing truthful information with each other. It does not prohibit therapists from recommending sexual orientation change efforts. Nor does SB 1172 regulate the speech of providers outside the context of patient-therapist relationships. SB 1172 simply prohibits therapists, in the course of their licensed professional work, from engaging in the practice of attempting to change a minor's sexual orientation—a practice that every leading medical and mental health organization has determined is contrary to modern science.

Plaintffs' free speech claim therefore fails. So too does their claim that SB 1172 is unconstitutionally vague or infringes parental rights. Finally, Plaintiffs' association claim was waived below and, in any event, also lacks merit.

STANDARD OF REVIEW

Equality California agrees that "[t]his Court reviews a decision to grant or deny a preliminary injunction for abuse of discretion." (Op. Br. at 19.) The determination lies "within the discretion of the district court," and may be overturned only "where it relied on an erroneous legal premise or abused its discretion." *DISH Network Corp. v. FCC*, 653 F.3d 771, 776 (9th Cir. 2011).

Legal conclusions are reviewed *de novo* and findings of fact for clear error. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (*Cottrell*).

ARGUMENT

I. PLAINTIFFS' CHALLENGE IS UNLIKELY TO SUCCEED ON THE MERITS AND THUS INJUNCTIVE RELIEF WAS PROPERLY DENIED.

The district court correctly determined that Plaintiffs had no likelihood of success on the merits.

Plaintiffs argue that the district court erred when it failed to "follow[] the balancing test this Court has established for preliminary injunctions," and that it should have applied the "'serious questions' test." (Op. Br. at 21-22.) The "serious questions" test, however, merely describes one way that a district court can assess whether to grant an injunction, particularly in cases where the likelihood of success might be a close call. *See, e.g., Cottrell*, 632 F.3d at 1133 ("The 'serious questions' standard *permits* a district court to grant a preliminary injunction in situations where it cannot determine with certainty that the moving party is more likely than not to prevail on the merits of the underlying claims . . . .") (emphasis added). The serious questions standard is thus "a means of assessing a movant's likelihood of success on the merits." *Id.* at 1134.

The district court correctly determined that Plaintiffs had *no likelihood* of success on the merits—"[P]laintiffs do not meet the threshold test of likelihood of prevailing on the merits on any claim." (ER 12.) Under these circumstances, where the determination of success on the merits was not a close call, the district court was not required to reach any other prongs of the *Winter* test. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1111 (9th Cir. 2012) (a court need not reach the other prongs of the *Winter* test if the moving party cannot as a threshold matter demonstrate "a fair chance of success on the merits.") (quoting *Guzman v. Shewry*, 552 F.3d 941, 948 (9th Cir. 2008) (internal quotation marks omitted)).[3]

[3] Plaintiffs cite extensively to the concurrence in *Cottrell* for the proposition that courts, in many circumstances, should apply the "serious questions" test. (Op. Br. at 22-23.) The concurrence makes clear, however, that it does not apply in "obvious cases" where there is no chance of success. *Cottrell*, 632 F.3d at 1140 (Mosmon, J., concurring). Plaintiffs also suggest that this Court somehow is bound to conclude that there are at least "serious questions" on the merits, given that Judge Shubb in the *Welch* case concluded that plaintiffs there *had* demonstrated a likelihood of success. (Op. Br. at 20-21.) That suggestion is inaccurate. This Court must make its own determination whether plaintiffs have shown either (1) a likelihood of success; (2) "serious questions"; or (3) no likelihood of success. It is not bound or constrained by a district court decision, in this case or any other case. Otherwise, this Court never would be able to reverse a district court on this point. This Court independently assesses the degree of likelihood of success, and will reverse a district court decision that applies an incorrect legal standard. *See, e.g.*, *Pimental v. Dreyfus*, 670 F.3d 1096, 1105, 1106 (9th Cir. 2012) (per curiam) (district court granted injunction, finding likelihood of success; this Court reversed, finding no likelihood of success). Here, Judge Shubb

A. SB 1172 Does Not Violate Plaintiffs' Right To Free Speech.

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); *England v. State Bd. of Medical Examiners*, 263 F.2d 661, 673 n.17 (5th Cir. 1959) (collecting cases) ("the Supreme Court has never changed its policy of reviewing with reluctance and self-restraint state regulations in the medical field"). The fact that psychotherapy involves speech does not render such mental health treatment immune from this traditional state power to ensure safe and competent care. *See Nat'l Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1054 (9th Cir. 2000) (*NAAP*). Relying on this Court's holding in *NAAP*, the district court properly declined to apply a heightened First Amendment standard merely because SB 1172 regulates mental health practitioners who practice talk therapy. (ER 16-19.) The district court correctly held that the provision of mental health services by licensed therapists "is subject to the state's legitimate control over the professions," and that "SB 1172's restrictions on therapy do not implicate fundamental rights and are not properly evaluated under strict scrutiny review." (ER 21.)

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found likelihood of success because he applied the wrong standard. Judge Shubb's conclusion on likelihood of success does not constrain this Court in this case at all.

Courts have long recognized that states may enact reasonable professional regulations even when the profession at issue entails—or entirely consists of—speech. *See, e.g.*, *Lowe v. SEC*, 472 U.S. 181, 228 (1985) (White, J., concurring in result) ("The power of government to regulate the professions is not lost whenever the practice of a profession entails speech."); *NAAP*, 228 F.3d at 1054; *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. 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."). Such regulations are constitutional so long as they "'have a rational connection with the applicant's fitness or capacity to practice' the profession." *Lowe*, 472 U.S. at 228 (quoting *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957)).

1. It Is Well Established That States May Regulate Health Care Treatment To Enforce Professional Standards, Even When Such Regulations Affect What Health Professionals Say In Treating Patents.

States routinely regulate medical practice in ways that require what health care providers say to be consistent with professional standards of competence and to avoid causing harm to patients. Such regulations do not generally warrant heightened First Amendment scrutiny because of the unique features of the provider-patient relationship and the state's paramount role in licensing and

regulating health care professionals. The very purpose of licensing and regulating medical professionals is to protect patients from harm and to ensure, as far as possible, that they receive competent and ethical care. Such regulation is required, in part, because medical professionals are in a "unique position of influence" because they have expert knowledge beyond the ability of most laypersons to understand or evaluate—an imbalance of information that creates a corresponding dependency and vulnerability on the part of even the best-informed and most diligent patients. *Board of Med. Quality Assurance v. Superior Court*, 114 Cal. App. 3d 272, 278 (1980) (citations and internal quotation marks omitted); *see also Cobbs v. Grant*, 8 Cal. 3d 229, 242 (1972) (the imbalance of knowledge between patient and doctor creates "an obligation in the physician that transcends arm's-length transactions"). State regulation is therefore necessary to ensure that patients receive competent treatment consistent with generally accepted medical standards.

As a result, the law permits a wide range of restrictions on doctors' and therapists' speech that would be impermissible in other contexts. For example, under ordinary circumstances, a person has no duty to take measures to prevent a suicidal person from committing suicide, but a therapist may be required to do so. *See, e.g.*, *Meier v. Ross General Hospital*, 69 Cal. 2d 420, 424 (1968). Similarly, while the First Amendment would bar a law that penalized ordinary laypeople for failing to recommend a particular type of expert to a friend or neighbor, state

courts routinely hold doctors liable for professional negligence if they fail to do so. *Cf. Moore v. Preventive Medicine Medical Group. Inc.*, 178 Cal. App. 3d 728, 738-39 (1986). Similarly, a doctor or therapist is free to advance any position or theory on television or in an internet posting, no matter how dangerous, misleading, or lacking in scientific credibility, but when a doctor or therapist is providing treatment to patients, the law justifiably penalizes the provision of false, incompetent, or incomplete information and advice, both through discipline by licensing authorities and through imposition of tort liability.

For example, courts regularly enforce professional standards of knowledge and competence in medical malpractice cases, where individual practitioners are judged by whether they adhere to pertinent professional standards. "Doctors commit malpractice for failing to inform patients in a timely way of an accurate diagnosis, for failing to give patients proper instructions, for failing to ask patients necessary questions, or for failing to refer a patient to an appropriate specialist." Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L. Rev. 939, 950-51 (2007). While doctors have some leeway to exercise their professional judgment, they must do so within the boundary separating competent and incompetent care, and doctors who breach that boundary cannot invoke the First Amendment as a defense by asserting that their noncompliance with professional standards was an expression of their

personal "viewpoint." *See, e.g., In re Factor VIII or IX Concentrate Blood Products Litigation*, 25 F. Supp. 2d 837, 845 (N.D. Ill. 1998) (holding that First Amendment did not bar negligence claims against organization alleged to have made false, incorrect, and misleading statements and omissions regarding blood products); *Shultz v. Wells*, No. 2:09cv646, 2010 WL 1141452, at *9 (M.D. Ala. Mar. 3, 2010) ("Clearly the state may reasonably regulate speech in the doctor-patient relationship which unprofessionally, and perhaps illegally, falls outside the scope of the practitioner's licensed field of practice"), *adopted by* 2010 WL 1141444 (M.D. Ala. Mar. 22, 2010); *Myers v. Quesenberry*, 144 Cal. App. 3d 888, 894 (1983) (holding that physicians could be held liable for injuries resulting from their unreasonable failure to warn patient against driving in an uncontrolled diabetic condition); ; *Tarasoff v. Regents of the Univ. of California*, 17 Cal. 425, 438, 446-47 (1976) (holding that therapists could be held liable for failure to warn third party about risk of serious danger from patient).

Similarly, state legislatures and regulatory agencies can—and regularly do—require professionals to adhere to those professional standards, and may discipline providers for violations of those standards without running afoul of the First Amendment. *See, e.g.*, *Shea v. Bd. of Medical Examiners*, 81 Cal. App. 3d 564, 577 (1978) (rejecting First Amendment defense of licensed physician subjected to professional discipline for inappropriately administering verbal sex therapy, and

stating that "the First Amendment is not an umbrella shielding . . . verbal conduct" of medical professionals). Laws that require health care professionals to treat patients in conformity with accepted professional standards of competence and knowledge are not subject to strict scrutiny merely because they limit a professional's ability to express a contrary viewpoint by departing from those standards in treating their patients.

SB 1172 is one of many statutes and regulations that define unprofessional conduct for licensed mental health professionals in California, including statutes that directly restrict what a licensed therapist can and cannot say to a patient in the course of treatment. A therapist may be subject to professional discipline for advising a patient to pursue a course of action that will result in physical harm. *See* Cal. Bus. & Prof. Code §§ 4982(i), 4989.54(m), 4992.3(j), 4999.90(i). Likewise, a therapist could be disciplined for telling a patient that he or she has a particular disorder when the patient does not have that disorder. *See* Cal. Bus. & Prof. Code §§ 2960(j), 4982(d), 4989.54(k), 4992.3(d), 4999.90(d); *cf. Molien v. Kaiser Foundation Hospitals*, 27 Cal. 3d 916, 919-20 (1980) (permitting negligent infliction of emotional distress cause of action by patient and her husband against doctor who erroneously told patient that she had syphilis).

California law also defines many other activities involving speech as unlawful or unprofessional conduct for licensed therapists. For example:

- Telling a patient that the therapist is able to treat a particular condition, when the therapist does not have the competence or is not licensed to provide such treatment. Cal. Bus. & Prof. Code §§ 2960(p), 4982(*l*), 4989.54(r), 4992.3(m), 4999.90(*l*).
- Disclosing confidential information received from a patient. Cal. Bus. & Prof. Code §§ 2960(h), 4982(m), 4989.54(q), 4992.3(n), 4999.90(m).
- Failing to comply with child, elder, and dependent adult abuse-reporting requirements. Cal. Bus. & Prof. Code §§ 4982(v), (w), 4989.54(w), (x), 4992.3(u), (v), 4999.90(w), (x).
- Promising success in curing the patient's mental health condition in the course of advertising, or making a "scientific claim that cannot be substantiated by reliable, peer reviewed, published scientific studies." Cal. Bus. & Prof. Code §§ 651(b)(3)(A), 651(b)(7), 2960(g), 4982(p), 4989.54(e), 4992.3(q), 4999.90(p), 17500.
- Discriminating against patients based on their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation. Cal. Civ. Code § 51; *see also North Coast Women's Care Med. Group, Inc. v. San Diego County Superior Court*, 44 Cal. 4th 1145, 1157 (2008)

(rejecting physicians' claim that state law prohibition on discrimination against patients violated their right to free speech).

California imposes such regulations on psychologists and other mental health professionals in part because it recognizes "the actual and potential consumer harm that can result from the . . . incompetent practice of psychology," *NAAP*, 228 F.3d at 1052 (citation and internal quotation marks omitted), and because the "practice of psychology in California affects the public health, safety, and welfare and is to be subject to regulation and control in the public interest to protect the public . . . from unprofessional conduct by persons licensed to practice psychology." Cal. Bus. & Prof. Code § 2900.

As with the many other statutes defining unprofessional conduct, the Legislature enacted SB 1172 to protect the health and safety of the public, not to suppress speech. First Amendment doctrine has long recognized that the health care treatment setting is a highly regulated arena in which states can require that professional conduct—including speech that is "part of the practice of medicine," *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion) (*Casey*)—comply with professional standards of safety and competence, and can protect patients from harm, fraud, abuse, and discrimination. SB 1172 falls well within this well-established power of the state to regulate licensed health care professionals.

2. Because SB 1172 Regulates Mental Health Treatment To Ensure Compliance With Professional Standards And Prevent Harm To Patients, It Is Subject Only To Rational Basis Review Under The First Amendment.

The law has long recognized that regulating the practice of medicine often involves regulating speech and that such regulations—which are pervasive—generally do not raise First Amendment concerns. When speech is "part of the practice of medicine, [it is] subject to *reasonable* licensing and regulation by the State." *Casey*, 505 U.S. at 884 (emphasis added).[4] Thus, when a licensed professional speaks in the course of providing medical services to a patient under a state-issued license, the professional is subject to "the State's *reasonable* regulation as the licensing authority." *Shultz*, 2010 WL 1141452, at *9-*11 (emphasis added) (holding that First Amendment did not protect licensed chiropractor who advised patient to stop taking medications prescribed by a physician); *Shea*, 81 Cal. App. 3d at 57; *see also Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (recognizing the state's "significant role . . . in regulating the medical profession").

This Court has applied these same standards to regulation of licensed therapists, even though the practice of therapy consists largely of speech. "[T]he

[4] While the plurality opinion was joined by only three justices, an additional four justices agreed that the applicable standard for evaluating a regulation of speech in the context of the practice of medicine was a reasonableness standard. 505 U.S. at 967-68 (Rehnquist, C.J., White, J., Scalia, J., Thomas, J., concurring in part and dissenting in part).

key component of psychoanalysis is the treatment of emotional suffering and depression, *not* speech. . . . That psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection." *NAAP*, 228 F.3d at 1054 (emphasis in original); *see also Coggeshall*, 604 F.3d at 667 (finding no "cognizable First Amendment injury" based on a state's disciplinary action against a psychologist for exceeding the scope of her competence).

In *NAAP*, this Court squarely rejected the argument—which Plaintiffs now seek to resurrect—that the speech involved in providing psychotherapy is inherently expressive and therefore entitled to heightened First Amendment protection. The Court held that the purpose of therapy is not to provide a therapist with a venue to express personal views, but rather to benefit the patient by providing treatment. *NAAP*, 228 F.3d at 1054. The Court rejected the view that because psychotherapy is "the talking cure," a different constitutional standard should apply to regulation of therapy than to regulation of other types of medical treatment. *Id*. The Court explained that the Supreme Court has long recognized that regulations forbidding harmful conduct do not trigger heightened First Amendment scrutiny simply because the unlawful conduct may involve or consist of speech. *Id*. at 1053-54. "[I]t 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." *Id*. (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). Because psychotherapy is a form of medical treatment, a state can regulate the conduct of licensed therapists and require them to adhere to professional standards of competence and safety, just as it does for other licensed health care providers.[5]

3. *Conant* Is Inapposite Because SB 1172 Regulates Only The Provision Of Treatment To Protect Health And Safety Of Patients; It Does Not Prevent Therapists from Communicating Information To Their Patients.

In *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), this Court invalidated a federal policy—adopted after California voters enacted an initiative permitting patients to use medical marijuana—that prevented doctors even from recommending medical marijuana to their patients, on the ground that doing so might encourage violation of federal laws criminalizing marijuana use. This Court held that the challenged regulation violated the First Amendment because it

[5] Plaintiffs erroneously argue that the holding in *NAAP* applies only to a state's ability to impose licensing requirements, but not to regulations that affect how therapists provide treatment once they are licensed. It is well settled, however, that a state has broad power not only to license, but to regulate the provision of medical and mental health care. *See, e.g.*, *Barsky v. Board of Regents of University of State of New York*, 347 U.S. 442, 451 (1954) ("It is . . . clear that a state's legitimate concern for maintaining high standards of professional conduct extends beyond initial licensing. Without continuing supervision, initial examinations afford little protection.").

prevented doctors from conveying truthful information to their patients. *Id*. at 635 (the policy prevented doctors from communicating "sound medical information" to their patients); *see also id*. at 644 (Kozinski, J., concurring) (the policy prevented doctors from conveying "competent medical advice"). The Court found that the policy "alter[ed] the traditional role of medical professionals by prohibiting speech necessary to the proper functioning of those systems." *Id*. at 638 (citations and internal quotation marks omitted).[6]

Conant held that there is a constitutionally significant distinction between laws that restrict the practice of particular "therapies" and laws that restrict medical

[6] Similarly, in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), the Supreme Court held that the challenged restriction (barring legal services attorneys from challenging federal welfare laws) was impermissible because it prevented attorneys from informing their clients about the full range of lawful options open to them and from making "all reasonable and well-grounded arguments." *Id.* at 545 (holding that the regulation "prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power"). As a result, the Court found that the law "threaten[ed] severe impairment of the judicial function." *Id*. at 546. In contrast, SB 1172 does not prevent therapists from communicating any accurate information or from engaging in any legitimate, non-harmful treatments, and it is consistent with professional standards of competence and ethics. *Cf. Milavetz Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 130 S.Ct. 1324, 1337-38 (2010) (regulation restricting what lawyers can advise clients in bankruptcy cases did not implicate the First Amendment because the provision was consistent with professional standards and did not prevent the provision of any accurate, ethical advice).

professionals from providing "sound medical information." 309 F.3d at 634-35.[7] A state has considerable discretion to ban or limit access to treatments to protect public health and safety when it has a reasonable basis for doing so. But a state may not, consistent with the First Amendment, bar doctors from sharing truthful information with their patients. *Id*. at 634-35.[8]

Unlike the policy in *Conant*, SB 1172 does not prohibit therapists from recommending sexual orientation change efforts to patients. Rather, as the district court observed, the statute is clear that its effect is to prohibit therapists from embarking on a course of purported "treatment" to change a minor's sexual

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[7] Neither this Court nor any of the parties in *Conant* disputed that the government could prohibit doctors from actually *prescribing* or *dispensing* marijuana without implicating speech concerns. 309 F.3d at 634.

[8] *Conant* did not involve a recommendation based on misleading, inaccurate, or incompetent advice. Under existing law, as explained above, the First Amendment would not immunize a doctor providing such faulty advice from malpractice liability or professional discipline. In this case, SB 1172 does not *itself* prevent therapists from recommending sexual orientation change efforts—only from engaging in them. However, such a recommendation might well subject a therapist to malpractice liability or other professional discipline for recommending a discredited and unsafe practice for which—unlike medical marijuana—there is no "legitimate and growing division of informed opinion." *Conant*, 309 F.3d at 640-41 (Kozinski, J., concurring). *See*, *e.g.*, American Counseling Association Press Release, "Ethical issues related to conversion or reparative therapy," *available at* http://www.counseling.org/pressroom/newsreleases.aspx?AGuid=b68aba97-2f08-40c2-a400-0630765f72f4 ("[T]he ACA Ethics Committee strongly suggests that ethical professional counselors do not refer clients to someone who engages in conversion therapy or, if they do so, to proceed cautiously only when they are certain that the referral counselor fully informs clients of the unproven nature of the treatment and the potential risks and takes steps to minimize harm to clients").

orientation. (ER 15-16, 27-28.) That the purported "treatment" may be administered through speech does not alter this analysis. *See NAAP*, 228 F.3d at 1054 (psychotherapy is treatment even though it takes place through speech).[9]

Plaintiffs also erroneously seek to rely on *Conant*'s discussion of *Casey*, noting that this Court distinguished the Supreme Court's plurality opinion by observing that the regulation upheld in *Casey* included an exception permitting a doctor to decline to give certain required information to patients seeking an abortion if the doctor held a reasonable belief that such information would "have a severely adverse effect on the physical or mental health of the patient." *Conant*, 309 F.3d at 638. Plaintiffs contend that SB 1172 must be struck down because it

[9] Plaintiffs are also incorrect in suggesting that *NAAP* stands for the sweeping proposition that any regulation affecting "what can be said" in therapy must be subject to heightened First Amendment scrutiny. (Op. Br. at 26-27.) While dicta in *NAAP* hypothesized about a law that would prohibit the use of psychoanalytic methods, indicating that such a law would raise First Amendment concerns, *NAAP*, 228 F.3d at 1055-56, the Court did not suggest that harmful methods of treatment are insulated from state regulation or professional discipline. In fact, the American Psychoanalytic Association has instructed its members that engaging in SOCE is misconduct: "Psychoanalytic technique does not encompass purposeful attempts to 'convert, 'repair,' change or shift an individual's sexual orientation, gender identity or gender expression. Such directed efforts are against fundamental principles of psychoanalytic treatment and often result in substantial psychological pain by reinforcing damaging internalized attitudes." *See* American Psychoanalytic Association, Position Statement, "Attempts to Change Sexual Orientation, Gender Identity, or Gender Expression," *available at* http://www.apsa.org/About_APsaA/Position_Statements/Attempts_to_Change_Sexual_Orientation.aspx.

lacks such an exception permitting therapists to attempt to change a minor's sexual orientation when their professional judgment deems it necessary. But this argument misses a critical point: the regulation upheld in *Casey* required a doctor to have a *reasonable* belief that the required disclosures would harm a patient. Such an exception is not warranted, however, for a discredited practice that no therapist reasonably could believe is necessary or beneficial. Indeed, sexual orientation change efforts often include techniques (such as blaming minors for their inability to change their sexual orientation or encouraging parents to punish children for being gender nonconforming) that in themselves constitute serious emotional abuse, and that puts minors at risk of significant harms, including depression, suicide attempts, and suicide.

The district court also correctly distinguished SB 1172 from the Florida statute at issue in *Wollschlaeger v. Farmer*, No. 11-22026-Civ, 2012 WL 3064336 (S.D. Fla. June 29, 2012), which prohibited doctors from asking patients about gun ownership. Like the regulation in *Conant*, the Florida law interfered with doctors' ability to provide advice consonant with accepted medical standards. The court found that unlike "so many other laws involving practitioners' speech," the law "restrict[ed] a practitioner's ability to provide truthful, non-misleading information to a patient." *Id*. at *9. By contrast, SB 1172 does not limit the provision of truthful, non-misleading information; it instead bars the provision of incompetent

and harmful treatment. As the district court observed, "what SB 1172 proscribes is actions designed to effect a difference" in a minor's sexual orientation. (ER 16.)

4. SB 1172 Is Not An Impermissible Content-Based Or Viewpoint-Based Restriction On Protected Speech.

In *NAAP*, this Court recognized that First Amendment doctrine has long distinguished between a state's authority to reasonably regulate what doctors and other health care providers may say and do in the context of treating individual patients, and a state's inability to restrict what professionals may say in the public arena. 228 F.3d at 1055 (citing Justice Jackson's concurring opinion in *Thomas v. Collins*, 323 U.S. 516, 545 (1945)); *see also Lowe*, 472 U.S. at 232 (White, J., concurring) (describing "the point where regulation of a profession leaves off and prohibitions on speech begin" as hinging on the provision of individualized professional services). When a state is regulating the provision of medical services to consumers, as SB 1172 does, such regulations do not generally warrant the exacting scrutiny applicable to content- or viewpoint-based restrictions on speech that occurs outside the highly regulated treatment setting.

It is well established that courts applying the First Amendment must carefully consider the context in which speech takes place, and that not all regulations that in any way relate to, or affect, the content of speech trigger heightened scrutiny. For example, a state generally cannot restrict speech simply because it is false or misleading, nor can it generally compel speech even when it

is truthful. *See United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012); *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 797-98 (1988). But the Supreme Court has held that states *can* prohibit *commercial* speech that is false or misleading. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980) ("there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity"). States can also compel commercial speakers to include accurate information in their advertising "as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

Similarly, the Supreme Court has held that courts applying the First Amendment in settings other than a public forum must consider an institution's specific features and role, and must take into account the reality that the government may be required to make some content-based distinctions in order to fulfill its mission. *United States v. Am. Library Ass'n*, 539 U.S. 194, 203-204 (2003) (*Am. Library Ass'n*). When the government is providing a function that requires making distinctions based on the content of speech, the Supreme Court has "repeatedly rejected a heightened standard" of review. *Association of Christian Schools Int'l v. Stearns*, 679 F. Supp. 2d 1083, 1095 (C.D. Cal. 2008),

aff'd, 362 F. App'x 640 (9th Cir. 2010). For example, the Supreme Court has held that "it is entirely reasonable for public libraries to . . . exclude certain categories of content," *Am. Library Ass'n*, 539 U.S. at 208; for the government to "make esthetic judgments" in providing arts funding even though they are "inherently content-based," *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 586 (1998) (*Finley*); and for public television stations to make content-based judgments in selecting programming, *Ark. Educ. Television Comm'n v. Forbe*s, 523 U.S. 666, 673-75 (1998). In all of these cases, the Supreme Court has held that "regulations are constitutional if they are reasonably related to the government's goal of providing the public service and are not the product of government animus." *Association of Christian Schools*, 679 F. Supp. 2d at 1095 (applying this standard to public university admission policies).

The licensing and regulation of health care providers' conduct in treating patients is another context in which the nature of the government's function necessarily requires some inquiry into content. For example, any malpractice claim or disciplinary action based on a professional's verbal conduct in misdiagnosing a patient, unlawfully harassing or discriminating against patients, or engaging in talk therapy that violates established professional or ethical standards necessarily is premised in part on the content of a health care professional's speech. Licensed professionals do not have a defense to such professional

misconduct claims based on alleged discrimination against their "viewpoint." Licensing and regulation of medical providers would be impossible without the ability to inquire in this way into the content of treatment, including speech that is part of treatment.[10]

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[10] Indeed, Plaintiffs' claim that every state regulation that touches on the content of speech is barred by the First Amendment is inconsistent with well-settled precedents in many areas of the law. *See, e.g. Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8*, 55 Cal. 4th 1083, 150 Cal. Rptr. 3d 501, 524-25 (2012) (Liu, J., concurring) ("[M]any laws that regulate speech based on its content have never been thought to trigger First Amendment concern."). *See also NAAP*, 228 F.3d at 1054 (noting that there are "'numerous' examples of communications 'that are regulated without offending the First Amendment.'") (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *Illinois, ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 624 (2003) (First Amendment does not prevent State from maintaining fraud action against fundraisers accused of making false or misleading representations designed to deceive donors about how their donations would be used); *United States v. Alvarez*, 617 F.3d 1198, 1213 (9th Cir. 2010), *aff'd*, 132 S. Ct. 2537 (2012) ("[L]aws focused on criminal conduct—like perjury or tax or administrative fraud or impersonating an officer—raise no constitutional concerns even though they can be violated by means of speech."); *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985) (First Amendment does not protect counseling violation of tax laws); *United States v. Kim*, 808 F. Supp. 2d 44, 56 (D.D.C. 2011) (First Amendment does not protect oral disclosures of national security information); *Jarman v. City of Northlake*, 950 F. Supp. 1375, 1379 (N.D. Ill. 1997) ("verbal acts of sexual harassment are not protected speech"); *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (holding that a statute imposing enhanced penalties for certain bias-related crimes regulated "conduct" rather than "expression"); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (upholding Title VII); *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 572 (1995) (anti-discrimination laws "do not, as a general matter, violate the First or Fourteenth Amendments," because the purpose of such laws is to prevent the harm caused by discriminatory conduct, not to "target speech"); *Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 53, 66 (2006) (same).

In sum, SB 1172 is an exercise of California's well-established police power to regulate medical treatment to ensure adherence to professional standards of competence and prevent harm to patients. Such regulations are valid provided they have a rational footing in the relevant scientific or professional standards. SB 1172 easily meets that test, as it is based on the consensus of mainstream mental health organizations that SOCE is not a competent treatment, provides no therapeutic benefit, and puts patients at risk of severe harm. Plaintiffs' position that any state regulation that affects what therapists may say in the treatment room is presumptively unconstitutional has no basis in this Court's or the Supreme Court's precedents and would upend California's entire system of regulation of mental health professionals to ensure competence, ethical practice, and patient safety.

B. Mental Health Treatments, Including The Practices Barred By SB 1172, Are Not Expressive Conduct For Purposes of *O'Brien*.

Plaintiffs' argument that efforts by a therapist to change a person's sexual orientation are inherently expressive and therefore entitled to heightened protection has no merit and conflicts with this Court's holding in *NAAP* that the provision of mental health treatment is not inherently expressive. 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).

In this case, the district court reviewed the relevant precedents and concluded that, unlike activities such as flag burning, tattooing, and distributing handbills, medical and mental health treatments generally, and the practices barred by SB 1172 in particular, do 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. (ER 18 (quoting *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058 (9th Cir. 2010)). *See also O'Brien v. United States Dep't of Health & Human Servs.*, No. 4:12-CV-476, 2012 WL 4481208, at *12 (E.D. Mo. Sept. 28, 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). The district court's conclusion was correct; "the key component of psychoanalysis is the treatment of emotional suffering and depression, *not* speech." *NAAP*, 228 F.3d at 1054.

Contrary to Plaintiffs' argument, this case has no similarity to *Anderson* v. *City of Hermosa Beach*. In *Anderson*, this Court held that tattooing is not only expressive conduct, but "pure expression" akin to a painting, drawing, or any other artistic expression. 621 F.3d at 1061. Accordingly, the Court held that the process of creating a tattoo is also a "purely expressive activity," just as the process of

painting or drawing would be. *Id*. Unlike creating a tattoo, however, providing mental health services is not an expressive performance, but rather a form of medical treatment intended to help patients; its purpose is treatment, not expression. *NAAP*, 228 F.3d at 1054. Plaintiffs attempt to argue that the purpose of sexual orientation change efforts is "to convey messages regarding how to address unwanted same-sex attractions, behavior or identity." (Op. Br. at 25.) But the same circular argument could be made for any form of medical treatment that involves communication—claiming that its purpose is to convey messages about how to address a particular problem or issue. If that were the test, then every act of making a diagnosis, prescribing a drug, or referring a patient for tests would be expressive conduct. In fact, however, the Supreme Court has rejected such attempts to bootstrap heightened First Amendment protection by claiming that "the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

Moreover, even if efforts by a licensed therapist to change a minor's sexual orientation could legitimately be characterized as a form of expressive conduct (which they cannot), SB 1172 would easily pass muster under *O'Brien*. 391 U.S. at 377 (a conduct regulation that incidentally burdens expression is valid "if it . . . furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental

restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest"). As the Legislature recognized when it enacted the law, California has not only a substantial but "a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by sexual orientation change efforts." *See* SB 1172 § 1(n). California enacted SB 1172 to alleviate the harms caused by these practices to minors and their families—not to restrict access to information or to silence those who hold particular views. And any incidental impact on protected expression (which Plaintiffs have not shown) is also no greater than necessary to achieve the state's goal, as the law is focused only on prohibiting harmful "practices," not speech.

C. SB 1172 Survives Any Level Of Scrutiny.

Even if Plaintiffs could establish that SB 1172 significantly restricts constitutionally protected speech—which they cannot—SB 1172 is constitutional. The law "is justified by a compelling government interest and is narrowly drawn to serve that interest," so would satisfy even strict scrutiny, if it applied. *See Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011).

1. California Has A Compelling Interest In Protecting The Public Health, Including The Mental Health And Safety Of Youth.

Plaintiffs erroneously argue that there is insufficient evidence of the harms the Legislature identified. (Op. Br. at 48-49.) Plaintiffs also argue that the identified harms are insufficient to justify a ban on sexual orientation change efforts for minors. Plaintiffs' argument ignores the significant harms that the Legislature sought to prevent.

The Legislature relied on the conclusions of every leading mental health association in the United States that sexual orientation change efforts provide no documented benefits, conflict with the modern scientific understanding of sexual orientation, and present a risk of serious harm. (*See* ER 478-80 [SB 1172 § 1(b)-(w)].) These organizations have strongly cautioned professionals and patients against the use of sexual orientation change efforts because they attempt to treat something that is not an illness, because they do not benefit patients, because they conflict with the professional standards of competent care, because and because they carry a risk of serious harms, including harms to lesbian, gay, bisexual, and transgender youth, who already are at risk of serious harms due to stigma and discrimination, and who frequently experience sexual orientation change efforts a type of family rejection, which is associated with a dramatically heightened risk of significant negative health impacts. (*Id.*) The Legislature relied on peer-reviewed

research finding that adolescents who experience high levels of family rejection of their sexual orientation—of which sexual orientation change efforts is one variety—were 8.4 times more likely to report having attempted suicide, 5.9 times more likely to report high levels of depression, 3.4 times more likely to use illegal drugs, and 3.4 times more likely to report having engaged in unprotected sexual intercourse. (*See* ER 480 [SB 1172 § 1(m)].)

The State amplified these findings by submitting the expert declarations of Drs. Lee Beckstead and Gregory Herek; Equality California provided further support with the declarations of Drs. Haldeman and Caitlin Ryan. (SER 47-64.) As the district court concluded, "no small quantum of information" supported the Legislature's action. (ER 44.) Together, the evidence presented to the district court and the materials reflected in the Legislature's findings were more than sufficient to support the conclusion that SOCE offers no benefit to patients and creates a risk of grave harm to minors. (*See* ER 191-93 [Beckstead Decl. ¶¶ 34-37]; SER 51-52 [Haldeman Decl. ¶¶ 13-15]; SER 61 [Ryan Decl. ¶¶ 12-13].)

The consensus of mainstream mental health organizations and the cumulative and widely accepted evidence of harm here entirely differentiate this case from *Brown v. Entertainment Merchants*, on which Plaintiffs erroneously seek to rely. In *Brown*, the studies cited in support of the violent video game law had "been rejected by every court to consider them" and at most showed "minuscule

real-world effects, such as children's feeling more aggressive or making louder noises in the few minutes after playing a violent game." 131 S. Ct. at 2739. The harms reported by survivors of sexual orientation change efforts, by contrast, are long-term, severe, and widely accepted within the mental health professions based on more than 40 years of research, investigation, and clinical reports, and as noted above, the potential harms are particularly great for youth. (*See, e.g.*, ER 272-73 [APA Report at 50-51]; ER 191-93 [Beckstead Decl. ¶¶ 34-37]; SER 51-52 [Haldeman Decl. ¶¶ 13-15]; SER at 61 [Ryan Decl. ¶¶ 12-13].)

2. SB 1172 Is Narrowly Drawn.

The restriction imposed by SB 1172 is narrowly drawn to advance these compelling interests. SB 1172 bars only the provision of sexual orientation change efforts to minors by licensed professionals in a professional setting, and does not otherwise affect therapists' or others' ability to express opinions about those practices. In addition, in recognition that minors have unique vulnerabilities to the harms that may be caused by these practices, including the severe health risks associated with parental rejection, the Legislature has barred these practices only for minors.[11]

[11] Plaintiffs also suggest that SB 1172 increases the risk to minors intent on changing their sexual orientation, because they will seek out unlicensed practitioners, rather than licensed ones. (Opp. Br. at 49.) This is pure speculation. In any event, the State reasonably focused its prohibition narrowly at licensed mental health practitioners because a State license signifies to the public that the

D. SB 1172 Is Not Vague.

When a statute does not significantly implicate constitutionally protected expression—which, as explained above, SB 1172 does not—a facial challenge such as Plaintiffs assert here can succeed "only if the enactment is impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982). Moreover, even a statute that "clearly implicates free speech rights" will survive a facial challenge so long as "it is clear what the statute proscribes in the vast majority of its intended applications." *Humanitarian Law Project v. U.S. Treasury Dept.*, 578 F.3d 1133, 1146 (9th Cir. 2009) (citations and internal quotation marks omitted).

Plaintiffs themselves use the term "sexual orientation change efforts" to describe the services they either offer patients or have sought. (*See, e.g.*, ER 367 [Pickup Decl. ¶ 3] ("I specialize in providing minor children with sexual orientation change efforts ('SOCE') counseling to help them reduce unwanted same-sex attractions.").) "If a reasonable person of ordinary intelligence would understand that his or her conduct is prohibited by the law in question," then the statute is not unconstitutionally vague. *United States v. Fitzgerald*, 882 F.2d 397,

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licensed therapist has necessary education, has passed exams, is subject to discipline by state licensing boards for negligence or ethical violations, and will provide safe and competent care. The State makes none of those guarantees for religious counselors or others who might attempt to change a gay child straight.

398 (9th Cir. 1989). Even if Plaintiffs' declarations were disregarded, however, Plaintiffs' vagueness argument still would fail, because the terms "sexual orientation" and "sexual orientation change efforts" are easily understood.

1. The Term "Sexual Orientation" Is Not Vague.

Courts have repeatedly rejected the notion that inclusion of the term "sexual orientation" renders a statute unconstitutionally vague. *See, e.g., Hyman v. City of Louisville*, 132 F. Supp. 2d 528, 530, 546 (W.D. Ky. 2001) (citing cases), *vacated on other grounds*, 53 F. App'x 740 (6th Cir. 2002) (stating that "[s]everal courts have been faced with, and discussed, 'sexual orientation' as it is used in various statutes and regulations" and "[n]one have found either the term, or a phrase which uses the term, vague in the face of a Due Process Clause challenge"); *see also Greer v. Amesqua*, 212 F.3d 358, 369 (7th Cir. 2000) (holding that the rule that public employee firefighters must "not harass co-employees because of their sexual orientation" was not vague); *United States v. Jenkins*, --- F. Supp. 2d ---, 2012 WL 4887389, at *15 (E.D. Ky. Oct. 15, 2012) (dictionary provides a "succinct[]" and clear definition of sexual orientation). In addition, California law includes a clear, readily understood definition of "sexual orientation": it simply means "heterosexuality, homosexuality, and bisexuality." Cal. Gov't Code § 12926(r). As the district court properly concluded, this term is "neither linguistically nor semantically vague." (ER 25.)

2. SB 1172 Both Clearly Defines "Sexual Orientation Change Efforts" In The Text Of The Statute And Also Draws On The Clear Understanding Of That Term Within The Mental Health Professions.

Plaintiffs' assertion that the phrase "sexual orientation change efforts" is vague fails as well. SB 1172 gives a simple, clear definition of SOCE: "any practices by mental health providers that seek to change an individual's sexual orientation." (ER 480 [SB 1172 § 865(b)(1)].) The statute then elaborates that "[t]his includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex." *Id*. It further provides that "'[s]exual orientation change efforts' does *not* include psychotherapies that: (A) provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and (B) do not seek to change sexual orientation." (*Id.* (emphasis added).) The statute prohibits "sexual orientation change efforts" only when engaged in by a mental health provider "with a patient under 18 years of age." (*Id.* [SB 1172 § 865.1].)

By limiting its application to sexual orientation change efforts "with *a patient* under 18 years of age" and by giving enforcement to licensing entities, SB 1172 makes clear that its scope is limited to conduct undertaken as part of the therapist-patient relationship, within the jurisdiction of the state licensing entities

that regulate the specific categories of mental health providers set forth in the statute. Those entities regulate the provision of mental health services in California, and their jurisdiction typically is limited to instances in which the professional offers services for a fee. *See, e.g.*, Cal. Bus. & Prof. Code § 2903 ("No person may engage in the practice of psychology, or represent himself or herself to be a psychologist, without a license granted under this chapter . . . . The practice of psychology is defined as rendering or offering to render *for a fee* . . . any psychological service involving the application of psychological principles, methods, and procedures . . . .") (emphasis added).[12] Read as a whole and in conjunction with the entire statutory licensing scheme for mental health professionals, SB 1172 thus makes clear that what it prohibits is efforts by a mental health provider to change a minor patient's sexual orientation, in the context of providing mental health services for which a license is required. As the district court concluded, the statute's plain terms make clear what is prohibited: "mental health providers, as defined by the statute, may not implement practices designed for the specific purpose of changing an individual's sexual orientation." (ER 27.)

[12] *See, e.g.*, Cal. Bus. & Prof. Code § 4980 (requiring a license to practice marriage and family therapy in California); *id.* § 4980.02 (defining the practice of marriage and family therapy); *id.* § 4980.10 ("A person engages in the practice of marriage and family therapy when he or she performs or offers to perform or holds himself or herself out as able to perform this service *for remuneration* in any form, including donations.") (emphasis added).

While SB 1172's terms are more than clear enough for any "reasonable person of ordinary intelligence" to understand, *Fitzgerald*, 882 F.2d at 398, to survive Plaintiffs' vagueness challenge, SB 1172 merely needs to be understandable to the mental health professionals that it regulates. As this Court has explained:

> [I]f [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 [vagueness] standard is lowered and a court may uphold a statute which uses words or phrases having a technical or other special meaning, well enough known to enable those within its reach to correctly apply them.

United States v. Weitzenhoff, 35 F.3d 1275, 1289 (9th Cir. 1993) (citations and internal quotation marks omitted); *United States v. Elias*, 269 F.3d 1003, 1014 (9th Cir. 2001) (same). That all the leading, mainstream mental health organizations have promulgated policies or statements that reject sexual orientation change efforts as a legitimate practice—which are cited in the statute's findings—shows that the professional community understands what practices are not allowed.

3. None Of Plaintiffs' Hypotheticals Is Sufficient To Establish That SB 1172 Is Vague.

Plaintiffs purport to be confused about whether SB 1172 would prohibit several hypothetical examples of mental health provider conduct. But SB 1172 provides answers to all of Plaintiffs' hypotheticals. Plaintiffs' purported uncertainty about "merely disseminating educational information regarding same-

sex attractions" and sexual orientation change efforts (Op. Br. at 40) does not describe prohibited conduct. Distributing such materials outside of a clinical setting would not be a "practice[] . . . that seek[s] to change the individual's sexual orientation." SB 1172 § 2(b)(1). Nor would web videos, radio broadcasts, or instructional pamphlets on websites (Op. Br. at 41) be prohibited by SB 1172, regardless of their content. Website materials and radio broadcasts are not the sort of personalized mental health services for which a license is required.

Plaintiffs also pose hypotheticals about performing sexual orientation change efforts from California via videoconference, or performing these practices in another state under a license issued in that state. (Op. Br. at 41-42.) These hypotheticals do not call into question what conduct SB 1172 prohibits, but rather ask about the boundaries of the state licensing entities' jurisdiction. Even if Plaintiffs have questions about the outer reaches of the licensing entities' jurisdiction generally, that has nothing to do with whether *SB 1172* is vague. Plaintiffs would have the same interstate jurisdictional questions about any other form of unprofessional conduct that might subject them to professional discipline in one state but not another.[13]

[13] Plaintiffs also argue that SB 1172 is overbroad. (Op. Br. at 45.) This argument was neither raised below nor addressed by the district court, so it is waived. *See, e.g.*, *Baccei*, 632 F.3d at 1149. Even if Plaintiffs had preserved this argument, it is without merit. The Supreme Court has recognized that invalidating a law under the overbreadth doctrine is "strong medicine" that imposes "substantial social

E. SB 1172 Does Not Infringe On Parental Rights.

SB 1172 regulates the practices of state-licensed professionals, not parents. The statute applies exclusively to "mental health providers," *i.e.*, professionals either registered or licensed by the State. (ER 480 [SB 1172 §§ 865, 865.1, 865.2].) Parents' actions are unaffected—they remain free to communicate their values to their children; to bring them up, care for them, nurture them, and control their education; to seek out pastoral or religious counseling for them; and to discuss issues of sexual orientation with them. SB 1172 therefore does not affect parents' constitutional rights.

The district court undertook a painstaking analysis of the relevant precedent and correctly concluded that parental rights do not extend to controlling how the State regulates the practices of state-licensed mental health providers, or to demanding that licensed mental health professionals provide treatments that the Legislature has found to be unsafe or ineffective. As the district court held, "there

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costs," and so has insisted the overbreadth be "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) (citation and internal quotation marks omitted). Here, the statute is legitimate not simply in a *substantial* number of applications; it is legitimate in *all* applications. The nation's leading mental health professional organizations have uniformly concluded that sexual orientation change efforts have no therapeutic benefit to patients, are inconsistent with modern scientific understanding of sexual orientation, and may cause severe harm to their physical and emotional health. Thus, there is no instance in which sexual orientation changes efforts could have an appropriate role in therapy.

is no fundamental or privacy right to chose a specific mental health treatment the state has reasonably deemed harmful to minors." (ER 31 (citing, *inter alia*, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (upholding child labor regulations against claim that they violated parental rights); *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 that includes graphic sexual content).

The district court's analysis was correct.[14] This Court has specifically held that "'a patient does not have a constitutional right to obtain a particular type of treatment or to obtain treatment from a particular provider if the government has

[14] Of course, the government's restriction of access to a particular medical treatment might well raise constitutional concerns if the restriction substantially burdened a constitutionally protected liberty or right, such as the right to reproductive autonomy. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating law barring access to birth control); *Roe v. Wade*, 410 U.S. 113 (1973) (invalidating law barring access to abortion). In this case, however, SB 1172 does not burden any constitutionally protected liberty interest. Moreover, even when medical care implicates a fundamental right, there is no right to a treatment that offers no health benefits and is dangerous. *See, e.g.*, *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975) (no constitutional right to abortion by a nonphysician); *Abigail Alliance for Better Access*, 495 F.3d 695, 711 n.19 (D.C. Cir. 2007) (no constitutionally protected right of "affirmative *access* to a potentially harmful, and even fatal, commercial good"); *cf. United States v. Rutherford*, 442 U.S. 544, 555-56 (1979) (even for terminally ill patients the government may bar access to a drug when the potential to cause injury "is not offset by the possibility of therapeutic benefit").

reasonably prohibited that type of treatment or provider.'" *NAAP*, 228 F.3d at 1050 (quoting *Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993)). *See also Carnohan v. United States*, 616 F.2d 1120, 1122 (9th Cir. 1980) (holding that there is no right to obtain alternative cancer treatment absent showing that government regulation bore "no reasonable relation to the legitimate state purpose of protecting public health"); *Abigail Alliance*, 495 F.3d at 711 (holding that there is no privacy right for terminally ill patients to access treatments whose safety had not yet been tested). As the D.C. Circuit has noted, "[n]o circuit court has acceded to an affirmative access claim." *Abigail Alliance*, 495 F.3d at 710 n.18.

Plaintiffs argue that the district court's straightforward application of these principles was erroneous because they contend there is "*no evidence* that SOCE causes harm to minors." (Op. Br. at 47 (emphasis added).) But the Legislature's reliance on the "expertise of ten different mental heath professional organizations" and "studies indicating minors who face family rejection based on their sexual orientation face especially serious health risks," (ER 34), is more than sufficient to show that its action in prohibiting these long-discredited practices was rational.

In short, because the only effect of SB 1172 is to prohibit professionals from engaging in practices that are reasonably regarded as harmful to the health and safety of minors, Plaintiffs' argument that it infringes parental rights is without merit. "[P]arents may not conscript the state-regulated mental health profession

into treating their children with a potentially harmful therapy before those children have reached the age of majority." (ER 37.)

F. The Professional Relationship Between A Licensed Therapist And A Patient Is Not An Intimate Or Expressive Association.

Plaintiffs argue for the first time on appeal that the relationship between a licensed therapist and a patient constitutes an intimate association protected by the Due Process Clause and an expressive association protected by the First Amendment. (Op. Br. at 24-25.) Plaintiffs waived these arguments by failing to assert them before the district court. *See, e.g., Baccei v. United States*, 632 F.3d 1140, 1149 (9th Cir. 2011). But even if Plaintiffs had preserved these arguments, they have no legal support.

This Court has previously held that therapist-patient relationships are not intimate associations. *See NAAP*, 228 F.3d at 1050 (a patient-therapist relationship "lasts only as long as the client is willing to pay the fee" and otherwise lacks the attributes that give rise to a protected intimate association) (citation and internal quotation marks omitted). Courts have recognized that patient-therapist relationships may be regulated in ways that would be invalid if applied to spouses, family members, close friends, or other intimate associations—such as by laws barring therapists from engaging in sexual relationships with their patients.[15] *See*,

[15] *See*, *e.g.*, Cal. Bus. & Prof. Code §§ 729, 2960(o), 4982.26, 4989.58, 4992.33, 4999.90(k).

e.g, *Ferguson v. People*, 824 P.2d 803, 810 (Colo. 1992) ("[N]either the treating psychotherapist nor the psychotherapy client has a fundamental constitutional right to engage in sexual intercourse with each other during the existence of the psychotherapist-client relationship."); *Shapiro v. State*, 696 So. 2d 1321, 1325 (Fla. Dist. Ct. App. 1997) (same); *see also Serrano v. Multnomah County*, No. Civ. 00-1592, 2001 WL 34043441, at *6 (D. Or. Aug 14, 2001), *aff'd*, 64 Fed. Appx. 21 (9th Cir. 2003) (county policy restricting personal relationships between juvenile detention staff and their current or former clients did not violate the right to intimate association).

Nor do therapist-patient relationships constitute expressive associations. The First Amendment protects a "right to associate for expressive purposes." *Roberts v. Jaycees*, 468 U.S. 609, 623 (1984).[16] In contrast, the purpose of therapy is to provide treatment for the patient. "[T]he key component of psychoanalysis is

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[16] As an initial matter, SB 1172 does not interfere with anyone's ability to associate or not to associate with anyone else. In this way, it differs from *Roberts* and *City of Dallas v. Stanglin*, 490 U.S. 19, 23-24 (1989) (*Stanglin*). *Roberts* reviewed—and upheld—a law that required clubs offering certain public accommodations to admit female members. 468 U.S. at 615-16, 631. *Stanglin* considered and upheld an ordinance providing that certain dance halls could restrict admission to minors. 490 U.S. at 22. SB 1172, in contrast, does not prevent any patient or any licensed therapists from entering into a doctor-patient relationship with anyone they choose, or from refraining from entering into any such relationship. It only prevents licensed therapists from engaging in certain unsafe practices on any minor patients with whom they choose to associate.

the treatment of emotional suffering and depression, not speech." *NAAP*, 228 F.3d at 1054; *see also Conant v. McCoffey*, No. C 97–0139, 1998 WL 164946, at *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"); *Behar v. Pennsylvania Dept. of Transp.*, 791 F. Supp. 2d 383, 416 (M.D. Pa. 2011) ("The physician-patient association fails to share sufficiently similar characteristics with those groups to whom First Amendment protection to freely associate has been afforded."). In *Conant*, the district court held: "The fact that the treatment discussions [between doctors and patients in that case] may involve the politically-charged topic of medical marijuana does not transform their relationship into" an expressive association. 1998 WL 164946, at *3. Similarly, in this case, the topic of sexual orientation change efforts may be politically charged; however, that does not transform the relationship between the Plaintiff therapists and the Plaintiff patients into an expressive association.

II. ALL OF THE OTHER *WINTER* FACTORS ALSO SUPPORT THE DISTRICT COURT'S DENIAL OF A PRELIMINARY INJUNCTION.

An injunction is "an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 24 (2008). Here, even if Plaintiffs had satisfied their threshold burden of demonstrating a "fair chance of success on the merits," *Pimentel*, 670 F.3d at 1111, and even if the "serious

questions" test were applicable in this case, the district court did not abuse its discretion in denying a preliminary injunction because Plaintiffs failed to satisfy any of the remaining *Winter* factors. *See Cottrell*, 632 F.3d at 1135 (explaining that under the "serious questions" test, plaintiffs "must also satisfy the other *Winter* factors").

The six Plaintiffs who are licensed therapists or professional associations claim that permitting SB 1172 to take effect will threaten "destruction of their careers and loss of livelihoods." (Op. Br. at 53.) That claim has no merit. SB 1172 will not deprive Plaintiffs of their livelihoods or ability to continue to practice as licensed therapists in California. It simply requires them to adhere to professional standards of competence and therefore to refrain from engaging in the practices prohibited by SB 1172. To the extent Plaintiffs argue that they will suffer harm based on the pecuniary impact of being unable to perform the practices on minor patients, the law is clear that any such harm is outweighed by the serious risks to youth—including depression and suicide—that SB 1172 addresses. "'Faced with ... a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly' in favor of the latter." *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008) (citation omitted) (permitting ordinance extending health care coverage to approximately 20,000

uninsured individuals to take effect pending appeal, where the alleged irreparable harm to plaintiffs was a requirement to fund health care for covered employees while appeal was pending). Moreover, Plaintiffs' fears that their professional licenses will be in jeopardy are wholly unfounded. Plaintiffs can readily avoid such a consequence by simply complying with the law. *See Winter*, 555 U.S. at 22.

Nor have Plaintiffs established a likelihood of irreparable injury arising from disruption to ongoing therapy. Nothing in SB 1172 prevents the two minor Plaintiffs from continuing to receive and benefit from competent psychotherapy, including from their current therapist, Plaintiff Nicolosi. SB 1172 prohibits only one specific set of practices—those that seek to change sexual orientation.[17] And, contrary to the claim that stopping sexual orientation change efforts would be harmful, *every mainstream mental health organization to consider the issue* agrees that SOCE is ineffective and puts youth at risk of serious harms. (*See* ER 478-80 [SB 1172 § 1].) Plaintiffs have no credible claim to harm from not being able to receive a discredited and dangerous "treatment." Plaintiffs can continue to receive the many benefits of competent, professional mental health care, without

[17] Plaintiffs also argue that SB 1172 will inflict harm on minors by depriving them of the protections codified in Cal. Health & Safety Code § 124260(b), which permits a minor 12 years of age or older to consent to some mental health treatments without parental approval. As the district court noted, however, the Legislature considered this issue and determined that no conflict existed between the two provisions because § 124260 permits consent only to helpful treatments. (ER 8.)

undergoing efforts to change their orientation. (*See* ER 186 [Beckstead Decl. ¶ 18] (benefits reported by some participants in SOCE "can be found in other [therapeutic] approaches that do not have the intrinsically harmful aspects of SOCE"); *see also* ER 275 [APA Task Force Report] (same).)

Nor will Plaintiffs suffer any significant harm as a result of what the district court acknowledged could cause some "disruption" to Plaintiffs ongoing therapy. (ER 22.) Plaintiffs have no basis to suspect that therapists will suddenly cease providing therapy to current clients, or abruptly terminate their current therapeutic relationships. Indeed, ethical guidelines *preclude* mental health providers from abruptly terminating their therapeutic relationships. *See, e.g.*, American Psychological Ass'n Code of Ethics, Standard 10.10 ("prior to termination psychologists provide pretermination counseling and suggest alternative service providers as appropriate"). Plaintiffs' dire predictions of irreparable harm from the minor "disruptions" the district court acknowledged are therefore unfounded.

Plaintiffs also fail to show that an injunction is in the public interest, or that the "balance of hardships tips sharply in [their] favor." *See Cotrell*, 632 F.3d at 1135. The Legislature enacted SB 1172 to protect California youth from the many risks of severe harm documented in the APA Task Force Report and other studies of SOCE, and reflected in the policy statements of every leading medical and mental health organization in the nation. (ER 478-80 [SB 1172 § 1].) Although

Plaintiffs attempt to minimize the APA Task Force's conclusions, the Task Force was clear and consistent in its findings: "Our systematic review of the research on SOCE found that enduring change to an individual's sexual orientation as a result of SOCE was unlikely. Further, some participants were harmed by the interventions." (ER 276.) The reported harms were severe and in some cases life-threatening, including depression, social withdrawal, suicidality, substance abuse, and high-risk sexual behaviors, among other harms. (*See* ER 478 [SB 1172 § 1(b)]; *see also* ER 264-65.) These findings are based directly upon the conclusions of the mental health professional organizations on which the Legislature relied. The Legislature also relied on research establishing that youth who face high levels of family rejection, *including through being sent for SOCE*, are more than eight times more likely to report having attempted suicide. (*See id.* 480 [SB 1172 § 1(m)].)

Finally, the public interest strongly favors denial of a preliminary injunction because "California has a compelling interest in protecting the physical and psychological well-being of minors." (*See* ER 478 [SB 1172 § 1(n)].) This Court's "consideration of the public interest is constrained in this case" because the California Legislature and Governor have "already considered that interest" by overwhelmingly approving and enacting SB 1172. *Golden Gate,* 512 F.3d at 1126-27 (citing 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal*

Practice and Procedure § 2948.4, at 207 (2d ed. 1995) ("The public interest may be declared in the form of a statute.")).[18] Here, the Legislature has determined—in reliance on an extraordinarily broad consensus among the nation's most prestigious and respected medical and mental health organizations—that the practices prohibited by SB 1172 are ineffective and unsafe, and pose especially serious risks to minors. The Plaintiffs have presented no evidence or arguments to justify the extraordinary remedy of a preliminary injunction preventing the protections provided by SB 1172 to take effect while they litigate their challenge to the statute.

Plaintiffs also contend that the requested temporary injunction would protect the public's interest by preserving the status quo. (Op. Br. at 57-58.) This Court has held, however, that when a legislative body has enacted a law protecting the health and well-being of the general public, it is by allowing the law to take effect, not by suspending it, that a court can "in a real sense, preserve rather than change the status quo." *See Golden Gate*, 512 F.3d at 1116. Moreover, it is the *Winter* factors, not the preservation of the status quo, that determines whether the grant or denial of a preliminary injunction is appropriate. *See id.* Because Plaintiffs have

[18] Put another way, "it is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Golden Gate*, 512 F.3d at 1127 (quoting *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943) (internal quotation marks omitted)).

no likelihood of succeeding on the merits of their claims, and because the other factors also weigh against a preliminary injunction, the district court did not abuse its discretion.

CONCLUSION

For the foregoing reasons, Equality California respectfully requests that the Court affirm the decision of the district court denying a preliminary injunction preventing enforcement of SB 1172.

Dated: January 30, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Federal Rule of Appellate Procedure 28(b) and Ninth Circuit Rule 28-4. This brief's type size and type face comply with Federal Rule of Appellate Procedure 32(a)(5) and (6). This brief contains 13,449 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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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.

STATUTORY ADDENDUM

Senate Bill No. 1172, CHAPTER 835

An act to add Article 15 (commencing with Section 865) to Chapter 1 of Division 2 of the Business and Professions Code, relating to healing arts.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares all of the following:

(a) Being lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming. The major professional associations of mental health practitioners and researchers in the United States have recognized this fact for nearly 40 years.

(b) The American Psychological Association convened a Task Force on Appropriate Therapeutic Responses to Sexual Orientation. The task force conducted a systematic review of peer-reviewed journal literature on sexual orientation change efforts, and issued a report in 2009. The task force concluded that sexual orientation change efforts can pose critical health risks to lesbian, gay, and bisexual people, including confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, suicidality, substance abuse, stress, disappointment, self-blame, decreased self-esteem and authenticity to others, increased self-hatred, hostility and blame toward parents, feelings of anger and betrayal, loss of friends and potential romantic partners, problems in sexual and emotional intimacy, sexual dysfunction, high-risk sexual behaviors, a feeling of being dehumanized and untrue to self, a loss of faith, and a sense of having wasted time and resources.

(c) The American Psychological Association issued a resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts in 2009, which states: “[T]he [American Psychological Association] advises parents, guardians, young people, and their families to avoid sexual orientation change efforts that portray homosexuality as a mental illness or developmental disorder and to seek psychotherapy, social support, and educational services that provide accurate information on sexual orientation and sexuality, increase family and school support, and reduce rejection of sexual minority youth.”

(d) The American Psychiatric Association published a position statement in March of 2000 in which it stated:

"Psychotherapeutic modalities to convert or 'repair' homosexuality are based on developmental theories whose scientific validity is questionable. Furthermore, anecdotal reports of 'cures' are counterbalanced by anecdotal claims of psychological harm. In the last four decades, 'reparative' therapists have not produced any rigorous scientific research to substantiate their claims of cure. Until there is such research available, [the American Psychiatric Association] recommends that ethical practitioners refrain from attempts to change individuals' sexual orientation, keeping in mind the medical dictum to first, do no harm.

The potential risks of reparative therapy are great, including depression, anxiety and self-destructive behavior, since therapist alignment with societal prejudices against homosexuality may reinforce self-hatred already experienced by the patient. Many patients who have undergone reparative therapy relate that they were inaccurately told that homosexuals are lonely, unhappy individuals who never achieve acceptance or satisfaction. The possibility that the person might achieve happiness and satisfying interpersonal relationships as a gay man or lesbian is not presented, nor are alternative approaches to dealing with the effects of societal stigmatization discussed.

Therefore, the American Psychiatric Association opposes any psychiatric treatment such as reparative or conversion therapy which is based upon the assumption that homosexuality per se is a mental disorder or based upon the a priori assumption that a patient should change his/her sexual homosexual orientation."

(e) The American School Counselor Association's position statement on professional school counselors and lesbian, gay, bisexual, transgendered, and questioning (LGBTQ) youth states: "It is not the role of the professional school counselor to attempt to change a student's sexual orientation/gender identity but instead to provide support to LGBTQ students to promote student achievement and personal well-being. Recognizing that sexual orientation is not an illness and does not require treatment, professional school counselors may provide individual student planning or responsive services to LGBTQ students to promote self-acceptance, deal with social acceptance, understand issues related to coming out, including issues that families may face when a student goes through this process and identify appropriate community resources."

(f) The American Academy of Pediatrics in 1993 published an article in its journal, Pediatrics, stating: “Therapy directed at specifically changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation.”

(g) The American Medical Association Council on Scientific Affairs prepared a report in 1994 in which it stated: “Aversion therapy (a behavioral or medical intervention which pairs unwanted behavior, in this case, homosexual behavior, with unpleasant sensations or aversive consequences) is no longer recommended for gay men and lesbians. Through psychotherapy, gay men and lesbians can become comfortable with their sexual orientation and understand the societal response to it.”

(h) The National Association of Social Workers prepared a 1997 policy statement in which it stated: “Social stigmatization of lesbian, gay and bisexual people is widespread and is a primary motivating factor in leading some people to seek sexual orientation changes. Sexual orientation conversion therapies assume that homosexual orientation is both pathological and freely chosen. No data demonstrates that reparative or conversion therapies are effective, and, in fact, they may be harmful.”

(i) The American Counseling Association Governing Council issued a position statement in April of 1999, and in it the council states: “We oppose ‘the promotion of “reparative therapy” as a “cure” for individuals who are homosexual.’”

(j) The American Psychoanalytic Association issued a position statement in June 2012 on attempts to change sexual orientation, gender, identity, or gender expression, and in it the association states: “As with any societal prejudice, bias against individuals based on actual or perceived sexual orientation, gender identity or gender expression negatively affects mental health, contributing to an enduring sense of stigma and pervasive self-criticism through the internalization of such prejudice.

Psychoanalytic technique does not encompass purposeful attempts to ‘convert,’ ‘repair,’ change or shift an individual’s sexual orientation, gender identity or gender expression. Such directed efforts are against fundamental principles of psychoanalytic treatment and often result in substantial psychological pain by reinforcing damaging internalized attitudes.”

(k) The American Academy of Child and Adolescent Psychiatry in 2012 published an article in its journal, Journal of the American Academy of Child and Adolescent Psychiatry, stating: “Clinicians should be aware that there is no evidence that sexual orientation can be altered through therapy, and that attempts to do so may be harmful. There is no empirical evidence adult homosexuality can be prevented if gender nonconforming children are influenced to be more gender conforming. Indeed, there is no medically valid basis for attempting to prevent homosexuality, which is not an illness. On the contrary, such efforts may encourage family rejection and undermine self-esteem, connectedness and caring, important protective factors against suicidal ideation and attempts. Given that there is no evidence that efforts to alter sexual orientation are effective, beneficial or necessary, and the possibility that they carry the risk of significant harm, such interventions are contraindicated.”

(l) The Pan American Health Organization, a regional office of the World Health Organization, issued a statement in May of 2012 and in it the organization states: “These supposed conversion therapies constitute a violation of the ethical principles of health care and violate human rights that are protected by international and regional agreements.” The organization also noted that reparative therapies “lack medical justification and represent a serious threat to the health and well-being of affected people.”

(m) Minors who experience family rejection based on their sexual orientation face especially serious health risks. In one study, lesbian, gay, and bisexual young adults who reported higher levels of family rejection during adolescence were 8.4 times more likely to report having attempted suicide, 5.9 times more likely to report high levels of depression, 3.4 times more likely to use illegal drugs, and 3.4 times more likely to report having engaged in unprotected sexual intercourse compared with peers from families that reported no or low levels of family rejection. This is documented by Caitlin Ryan et al. in their article entitled Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults (2009) 123 Pediatrics 346.

(n) California has a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by sexual orientation change efforts.

(o) Nothing in this act is intended to prevent a minor who is 12 years of age or older from consenting to any mental health treatment or counseling services,

consistent with Section 124260 of the Health and Safety Code, other than sexual orientation change efforts as defined in this act.

SECTION 2. Article 15 (commencing with Section 865) is added to Chapter 1 of Division 2 of the Business and Professions Code, to read:

Article 15. Sexual Orientation Change Efforts

865. For the purposes of this article, the following terms shall have the following meanings:

(a) "Mental health provider" means a physician and surgeon specializing in the practice of psychiatry, a psychologist, a psychological assistant, intern, or trainee, a licensed marriage and family therapist, a registered marriage and family therapist, intern, or trainee, a licensed educational psychologist, a credentialed school psychologist, a licensed clinical social worker, an associate clinical social worker, a licensed professional clinical counselor, a registered clinical counselor, intern, or trainee, or any other person designated as a mental health professional under California law or regulation.

(b) (1) "Sexual orientation change efforts" means any practices by mental health providers that seek to change an individual's sexual orientation. This includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex.

(2) "Sexual orientation change efforts" does not include psychotherapies that: (A) provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and (B) do not seek to change sexual orientation.

865.1. Under no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age.

865.2. Any sexual orientation change efforts attempted on a patient under 18 years of age by a mental health provider shall be considered unprofessional conduct and shall subject a mental health provider to discipline by the licensing entity for that mental health provider.

Available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB1172.