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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

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

Plaintiffs,

vs.

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

Defendants.

CASE NO. 2:12-CV-02497-KJM-EFB

AMICUS BRIEF OF EQUALITY CALIFORNIA

Judge: Hon. Kimberly J. Mueller

Courtroom: #3, 15th Floor

Date: November 30, 2012

Time: 10:00 am

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I. INTRODUCTION

Plaintiffs' motion should be denied because they can show neither likelihood of success on the merits nor irreparable harm. SB 1172 narrowly prohibits state-licensed mental health providers from subjecting minors to "sexual orientation change efforts" ("SOCE"). The only speech restrained by SB 1172's regulation of these practices is professional speech that takes place as part of such treatments. Such restrictions on professional conduct in providing treatment to patients are not subject to heightened scrutiny under the First Amendment, but need only be reasonable. In the alternative, SB 1172 is a conduct regulation that at most incidentally affects protected speech and easily passes muster under the well-established test applicable to such laws. Moreover, even were the court to conclude that strict scrutiny applies, the State has a compelling interest in protecting minors from the serious harms caused by SOCE, and SB 1172 is narrowly tailored to achieve that goal. Plaintiffs have also failed to show that SB 1172 is unconstitutionally vague, as the statute sets forth a clear, straightforward prohibition using common terms that are readily understandable to a person of ordinary intelligence. Plaintiffs also have failed to show that enjoining SB 1172 is necessary to prevent irreparable harm, as the alleged harms will not occur if the therapist Plaintiffs fulfill their existing ethical obligations to manage their client relationships in a manner designed to avoid undue disruption or harm to the client.[1]

II. ARGUMENT

A. SB 1172 Is A Valid Regulation Of Mental Health Professionals

1. SB 1172 Was Enacted To Prevent Harmful Conduct By State-Licensed Professionals, Including Conduct Historically Sponsored By The State

Plaintiffs attempt to portray SB 1172 as an impermissible viewpoint-based restriction on protected speech, but the new law was enacted to prevent harmful conduct by state-licensed professionals, not to suppress speech. As such, it is well within the boundaries of the considerable latitude afforded states to reasonably regulate professional conduct. "It is properly within the state's police power to regulate and license professions, especially when public health concerns are affected." *National Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of*

[1] In the interests of judicial efficiency, Equality California incorporates and adopts herein the arguments presented by the State defendants in their Opposition to Plaintiffs' Motion.

Psychology, 228 F.3d 1043, 1054 (9th Cir. 2000) ("*NAAP*"). As the leading organization sponsoring SB 1172 and the leading statewide group representing lesbian, gay, bisexual, and transgender Californians, amicus (and proposed intervenor) Equality California is deeply familiar with the harms that prompted the statute's enactment. Historically, SOCE included highly barbaric practices, such as castration, electroshock, and the use of nausea-inducing drugs to eradicate same-sex desire. Today SOCE includes a variety of behavioral, cognitive, psychoanalytic, and other practices that aim to eliminate a same-sex sexual orientation. *See* A. Lee Beckstead, *Can We Change Sexual Orientation?*, 41 Archives of Sexual Behavior 121, 122-23 (2012). The Legislature was impelled to act by the consensus of mainstream medical and mental health organizations that these practices are ineffective and put patients at risk of serious harm.[2] The Pan American Health Organization, a regional office of the World Health Organization, has also concluded that these practices "lack medical justification and represent a serious threat to the health and well-being of affected people."[3] The Legislature recognized that these practices are especially dangerous for LGBT youth, who are already at high risk of suicide and other serious health issues caused by stress from suffering discrimination and rejection.[4] The American Academy of Child and Adolescent Psychiatry, for example, specifically warned that efforts by a therapist to change a minor's sexual orientation "may encourage family rejection and undermine self-esteem, connectedness and caring, important protective factors against suicidal ideation and attempts."[5] In fact, recent research shows that youth who face high levels of family

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[2] *See* SB 1172 §§ 1(c)-(l) (citing statements). *See also* link to statements by many major medical and mental health organizations at http://www.hrc.org/resources/entry/the-lies-and-dangers-of-reparative-therapy.

[3] Link to full report available at http://new.paho.org/hq/index.php?option=com_content&task=%20%20view&id=6803&Itemid=1926.

[4] Students who identify as lesbian, gay, or bisexual are 2 to 7 times more likely to attempt suicide. *See* Ann P. Haas, PhD, et al., *Suicide and Suicide Risk in Lesbian, Gay, Bisexual and Transgender Populations: Review and Recommendations*, Journal of Homosexuality, 58:1, 10-51 (2010).

[5] SB 1172 § 1(k) (citing Jennifer Medicus, *Practice Parameter on Gay, Lesbian, or Bisexual Sexual Orientation, Gender Nonconformity, and Gender Discordance in Children and Adolescents*, 51 Journal of the American Academy of Child & Adolescent Psychiatry Issue 9, 957-74 (2012)).

rejection are more than 8 times more likely to report having attempted suicide.[6] The Legislature also heard testimony from Equality California members including Ryan Kendall, who testified that as a teenager, he was driven to the brink of suicide after undergoing these practices. *See* Declaration of Clarissa Filgioun, Ex. 1 (Dkt # 24-03).

The enactment of SB 1172 was also necessary to correct the past harms caused by the State of California's history of *promoting* sexual orientation change efforts, thereby contributing to the very problem it now seeks to address. In 1950, Governor Earl Warren signed a law that ordered the Department of Mental Hygiene to study the "causes and cures of homosexuality." *See* Bonnie Lowenthal, *'Cure' Gays? No, Fix the Law*, L.A. Times, Apr. 4, 2010. That law remained on the books until 2010. Cal. A.B. 2199 (2010); *see generally* Ashley Porter, *Ending the "Gay Cure": Chapter 379 Deletes Discriminatory Language from the Law*, 42 McGeorge L. Rev. 725 (2011). In the middle of the twentieth century, the State was regularly sending so-called "inverts" convicted of consensual same-sex activities to mental hospitals where they were subjected to sexual orientation change efforts that included lobotomies, electrical and pharmacological shocks, and experimental drugs. William N. Eskridge, *Foreword: The Marriage Cases--Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*, 97 Calif. L. Rev. 1785, 1792-1795 (2009) (describing history of state-sponsored efforts to "cure" gay people in California). When such "cures" did not work, the Legislature provided that a "sexual psychopath" found not amenable to "treatment" could still be held indefinitely by the State. Cal. Stats. 1955, ch. 757.

2. SB 1172 Is A Reasonable Regulation Of Professional Conduct And Does Not Infringe Upon Any Protected Speech

As an initial matter, Plaintiffs drastically overstate the scope of SB 1172's prohibition. SB 1172 is focused solely on preventing state-licensed therapists from engaging in certain discredited and unsafe practices when providing therapy to minors. It does not prohibit therapists from holding, expressing, or advocating for any viewpoint—scientific, religious, or otherwise—

[6] SB 1172 § 1(m) (citing Caitlin Ryan, et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 Pediatrics 346 (2009)).

about sexual orientation or SOCE. The gravamen of a violation of SB 1172 is a licensed therapist's conduct in attempting to "treat" or change a client's sexual orientation in therapy, not the therapist's speaking or writing about his or her personal or professional views on these subjects. Indeed, nothing in the statute prevents a therapist from discussing SOCE with clients or sharing his or her views about it. The only thing prohibited by the statute is to actually perform SOCE on a minor client, and this conduct is proscribed regardless of whether it involves talk therapy or non-verbal methods such as aversion therapy.

Contrary to Plaintiffs' argument that SOCE is entitled to heightened protection because it involves speech, the Supreme Court has long recognized that regulations forbidding harmful conduct do not trigger heightened First Amendment simply because the unlawful conduct may involve speech: "[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." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498-502 (1949); *see also Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 53, 66 (2006).[7] In particular, the courts have held that states have considerable leeway to protect the public by regulating the conduct of state-licensed professionals, even when the regulations affect professional 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."); *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[.]").

[7] In a wide variety of contexts, courts have upheld laws prohibiting harmful conduct against First Amendment challenge, even though the conduct constituting a violation may involve 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 & Spaulding*, 467 U.S. 69, 78 (1984) (upholding Title VII); *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."); *Jarman v. City of Northlake*, 950 F. Supp. 1375, 1379 (N.D. Ill. 1997) ("verbal acts of sexual harassment are not protected speech"); *see also 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," since the purpose of such laws is to prevent the harm caused by discriminatory conduct, not to "target speech").

Because of the State's strong interest in regulating the safety and effectiveness of medical and professional services, courts assess the regulation of professional speech under the deferential test of "reasonableness," a standard which has been described as "the antithesis of strict scrutiny." *Texas Medical Providers Performing Abortion Services v. Lakey*, 667 F.3d 570, 575 (5th Cir. 2012); *see also Wilson v. State Bar*, 132 F.3d 1422, 1429-30 (11th Cir. 1998) (rejecting First Amendment challenge to rules prohibiting disbarred attorneys from having client contact because the rules "govern occupational conduct, and not a substantial amount of protected speech"). In particular, when speech is "part of the practice of medicine, [it is] subject to *reasonable* licensing and regulation by the State." *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion) (emphasis added) (upholding against First Amendment challenge a statute requiring physicians to inform women seeking abortion of the availability of printed materials describing the fetus and providing information about medical assistance for childbirth and adoption services); *see also Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (recognizing the state's "significant role . . . in regulating the medical profession"). 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 v. Wells*, 2010 WL 1141452, at *9-*11 (M.D. Ala. Mar. 3, 2010) (holding that First Amendment did not protect licensed chiropractor who advised patient to ignore doctor) (emphasis added), *adopted by* 2010 WL 1141444 (M.D. Ala. Mar. 22, 2010); *Shea v. Bd. of Medical Examiners*, 81 Cal. App. 3d 564, 577 (1978) (rejecting First Amendment defense of licensed doctor 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").

Accordingly, Plaintiffs are wrong to contend that simply because the conduct proscribed by SB 1172 includes some speech, SB 1172 regulates constitutionally protected expression and triggers strict scrutiny. As the Ninth Circuit has held "the 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 (upholding California's licensing scheme against challenge

by psychoanalysts who claimed that regulations forbidding them from using the title "psychoanalyst" without completing requirements to become licensed psychologists infringed their right to speak); *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). Indeed, many valid regulations *expressly* control therapists' speech by forbidding them to speak, or requiring them to speak, about particular subjects. *See*, *e.g.*, Cal. Bus. & Prof. Code § 4982(m) (designating as "unprofessional conduct" a licensed marriage and family therapist's failure to maintain confidentiality of client information); §§ 4982(w), (x) (defining as "unprofessional conduct" a marriage and family therapist's failure to comply with child, elder, and dependent adult abuse-reporting requirements).

In this case, the reasonableness and validity of SB 1172 are particularly clear because SB 1172 reaches only speech that *constitutes* mental health treatment--i.e., therapy that seeks to change a minor's sexual orientation. Such practices, although accomplished through speech, directly implicate the state's compelling interest in ensuring the safety and effectiveness of mental health care in California.

Conant v. Walters, 309 F.3d 629 (9th Cir. 2002), upon which Plaintiffs heavily rely, underscores this conclusion. *Conant* involved a challenge to a policy under which the federal government threatened to revoke physicians' licenses to prescribe controlled substances if they "recommend[ed]" the use of medical marijuana. *Id.* at 634. Crucially, none of the parties in *Conant* disputed that the government could prohibit doctors from actually prescribing or dispensing marijuana. *Id.* Thus, the policy enjoined in *Conant* regulated only speech by doctors advocating, describing, or offering opinions about medical treatment. By contrast, SB 1172 regulates speech only when it *constitutes* treatment and does not impact therapists' right to discuss, recommend, or advocate for particular treatments.[8] Under SB 1172, mental health

[8] Plaintiffs cite a sentence from *Conant* stating that "professional speech may be entitled to 'the strongest protection our Constitution has to offer.'" 309 F.3d at 637 (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995)). However, *Florida Bar* noted that professional speech by attorneys may merit heightened protection when it concerns "public issues and matters of legal representation." 515 U.S. at 634. SB 1172 does not regulate speech or advocacy by professionals on issues of public concern, but prohibits certain health care treatments or practices.

professionals remain free to discuss SOCE and all other forms of treatment with their patients. What they cannot do is to *perform* SOCE as a licensed California professional.

3. SB 1172 Does Not Restrict Speech Based On Its Viewpoint

In order to support their claim that SB 1172 discriminates based on viewpoint, Plaintiffs argue that SB 1172 prohibits efforts to change only a minor patient's same-sex attractions, not different-sex attractions. This is not accurate, as the plain language of the statute makes clear. SB 1172 prohibits all SOCE on minor patients, defining SOCE as "*any* practices by mental health providers that seek to change an individual's sexual orientation." SB 1172 § 2 (emphasis added). SB 1172 specifies that such efforts "include[]" "efforts to change behaviors or gender expressions" and efforts to "eliminate or reduce sexual or romantic attractions or feelings towards individuals of the same sex." *Id.* § 2(b)(1). It is well settled that the use of the word "includes" in a statute indicates that what follows is a non-exhaustive list of examples and does not limit the general language that precedes the examples. *See In re Mark Anthony Const., Inc.,* 886 F.2d 1101, 1106 (9th Cir. 1989) ("In construing a statute, the use of a form of the word "include" is significant, and generally thought to imply that terms listed immediately afterwards are an inexhaustive list of examples, rather than a bounded set of applicable items."). Read as a whole, SB 1172 proscribes *all* SOCE, including efforts to change same-sex and different-sex attractions.

Further, nothing in the legislative history of SB 1172 suggests that it was aimed at suppressing speech or penalizing individuals for holding a particular viewpoint about sexual orientation or SOCE. To the contrary, as described above, it is plain that the Legislature's overriding concern was to protect youth from the serious potential harms of being exposed to these practices by state-licensed therapists. Plaintiffs' attempted reliance on *NAAP* to bolster their claim of viewpoint discrimination is misplaced. While the court in *NAAP* suggested in dicta that California's licensing scheme could be subject to strict scrutiny if it was not viewpoint neutral, 228 F.3d at 1054-55, SB 1172 does not discriminate based on viewpoint any more than did the licensing law in *NAAP*, which required the completion of state-selected educational and licensing requirements that conflicted with the views of the plaintiffs about what constituted

necessary and appropriate professional training for psychoanalysts.[9]

4. The State Has Not Created An Expressive Forum For Therapists

The State licenses and regulates therapists to protect the public, not to create an expressive forum for therapists. *See NAAP*, 228 F.3d at 1054 (the state's power to regulate and license professions is justified by public health concerns). These licensing and other regulations presume that the purpose of state-licensed therapy is the professional treatment of patients, not to enable therapists to express their personal views. *See id.*[10] Therefore, Plaintiffs' attempted reliance on forum cases such as *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) is inapt. The relevant framework for analyzing SB 1172's validity is not forum analysis, but the established legal framework that has long been applied to laws that regulate professional conduct. Like many other laws that regulate health care professionals who are licensed by the state, SB 1172 defines specific behaviors that constitute unprofessional conduct, and the relevant test is whether the law is reasonable.

For this reason, *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), is also inapposite. *Velazquez* involved a federal statute that prohibited federally funded legal aid attorneys from challenging the validity of federal welfare laws. The Second Circuit held that the statute was impermissible viewpoint discrimination "because it clearly seeks to discourage

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[9] Plaintiffs' assertion that the law discriminates on the basis of viewpoint because it disfavors the view of therapists who believe in SOCE's effectiveness is facile. It is akin to asserting that the licensing requirements in the *NAAP* case discriminate on the basis of viewpoint because they disfavored the view of psychoanalysts who believed they should be permitted to practice without complying with those licensing requirements, an assertion the Ninth Circuit squarely rejected. *See NAAP,* 228 F.3d at 1054.

[10] Indeed, ethical guidelines caution therapists to refrain from imposing their personal views on patients in the course of treatment. *See*, *e.g.*, American Psychological Ass'n, Ethical Principles of Psychologists and Code of Conduct, Principle E (2010) ("Psychologists are aware of and respect cultural, individual, and role differences, including those based on … gender identity … [and] sexual orientation . . . . Psychologists try to eliminate the effect on their work of biases based on those factors . . . .") (available at http://www.apa.org/ethics/code/principles.pdf); American Counseling Ass'n, ACA Code of Ethics, § A.4.b (2005) ("Counselors are aware of their own values, attitudes, beliefs, and behaviors and avoid imposing values that are inconsistent with counseling goals.") (available at http://www.counseling.org/ethics/feedback/aca2005code.pdf); *see also Keeton v. Anderson-Wiley,* 664 F.3d 865, 868 (11th Cir. 2011) (affirming denial of preliminary injunction to graduate student enrolled in school counseling program who was required to complete remediation plan for violating ACA Code of Ethics after stating that "she intended [in counseling sessions] to attempt to convert students from being homosexual to heterosexual" and would tell students under her care that "it was not okay to be gay").

challenges to the status quo." *Id.* at 539 (citations and internal quotation marks omitted). The Supreme Court agreed, holding that the statute restricted "constitutionally protected expression" and was "aimed at the suppression of ideas thought inimical to the Government's own interests." *Id.* at 548-49. The Court found that the statute discriminated based on viewpoint because "arguments by indigent clients that a welfare statute is unlawful or unconstitutional cannot be expressed." *Id.* at 548. This case bears no resemblance to *Velazquez*. A lawyer's advocacy of arguments challenging an existing law directly "implicat[es] central First Amendment concerns." *Id.* at 547. In contrast, while therapy may include some expressive aspects, providing mental health treatment is not inherently expressive activity. *NAAP*, 228 F.3d at 1054 (treatment is not elevated to the level of protected speech simply because the treatment is conveyed through speech). In addition, unlike the federal funding program in *Velasquez*, the state has not created a limited forum of subsidized speech and then restricted the viewpoints that can be expressed in the forum in order to suppress challenges to the government's own interests or laws. Rather, the state licenses and regulates therapists to protect the public and ensure that patients receive safe and competent care--not to create a forum for speech.

5. Even If SB 1172 Has Some Incidental Impact On Protected Speech, It Easily Satisfies The *O'Brien* Standard

On its face, SB 1172 restricts "practices"; it is not targeted at speech and limits professional speech only insofar as it constitutes treatment. Notably, even if Plaintiffs could show that SB 1172 somehow has some impact on protected speech, the law easily would satisfy the standard applied to regulations of conduct that incidentally affect some protected expression. The Supreme Court "has long recognized the need to differentiate between legislation that targets expression and legislation that targets conduct for legitimate non-speech-related reasons but imposes an incidental burden on expression." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 604 (2001) (Stevens, J., concurring in part). The latter type of law is subject to the test in *United States v. O'Brien*, 391 U.S. 367 (1968): "a government regulation is sufficiently justified 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." *Id*. at 377.

SB 1172 easily meets this test. First, as the Legislature recognized when it enacted the new 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). Second, California's interest in prohibiting SOCE lies in alleviating the harms caused by SOCE to minors and their families—not in suppressing free expression. The statute prohibits SOCE for minors because those efforts are ineffective and unsafe—not because the state wishes to silence those who hold particular views about sexual orientation or SOCE. The prohibition leaves therapists free to express any views on these matters. Under SB 1172, the only thing they may not do is engage in practices that seek to change a minor's sexual orientation while engaged in the provision of therapy under the auspices of a state license. Therefore, any incidental impact on protected expression (which Plaintiffs have not shown) is minimal and no greater than necessary to achieve the state's goal.[11]

6. 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 would survive even strict scrutiny, because the law "is justified by a compelling government interest and is narrowly drawn to serve that interest." *See Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011).

a. **SB 1172 Furthers A Compelling Government Interest**

Plaintiffs *concede* that "there is a compelling interest in protecting the physical and psychological well-being of minors." *See Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989); *see also* SB 1172 § 1(o). But Plaintiffs argue that the sources on which the State

[11] Plaintiffs's contention that SB 1172 violates minors' right to "receive" information has no merit. (*See* Mot. at 22-25.) As explained above, SB 1172 does not limit a patient's right to "receive information" about SOCE or any other topic. In addition, the speech rights of the patient and therapist are co-extensive and analyzed according to the same principles; patient "listeners" have no greater rights than therapist "speakers." *See NAAP*, 228 F.3d at 1054 n.7; *see also Coggeshall,* 604 F.3d at 667 ("A patient . . . does not hold a First Amendment trump card that may be played to rescue a licensed practitioner" from regulation of his professional speech.).

relies do not reflect any such interest here. (*See* Mot. at 11.) In particular, Plaintiffs attempt to discredit a 2009 publication by the American Psychological Association ("APA") that relied upon a comprehensive review of the published literature on SOCE. *See Report of the APA Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (available at http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf) ("APA Report").

Plaintiffs' critique of the APA Report is meritless. The Report cited multiple studies showing that "attempts to change sexual orientation may *cause or exacerbate* distress or poor mental health in some individuals, including depression and suicidal thoughts." *Id.* at 42 (emphasis added). According to the APA Report, subjects of these studies reported 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 resulting from SOCE. *Id.* at 50-51.

The APA is not alone in its conclusion that SOCE can cause serious harm. The overwhelming consensus of major mental health professional associations is that SOCE presents a risk of serious harm. Indeed, the Legislature relied on the conclusions of every leading mental health association in the United States. *See* SB 1172 § 1 (citing health organizations' reports or statements warning against SOCE).

These organizations have strongly cautioned professionals and patients concerning the use of SOCE in part because of the risk of serious harms, including harms that follow from an increased likelihood of family rejection. The Legislature also relied on peer reviewed research finding that adolescents who experience high levels of family rejection of their sexual orientation 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* SB 1172 § 1(m). Taken together, these research findings are more than sufficient to support the Legislature's conclusion that prohibiting

SOCE would protect youth from a risk of serious harm while prohibiting practices that have not been shown to be safe, effective, or beneficial to clients in therapy.

The consensus of mainstream mental health organizations and evidence of harm here entirely differentiate this case from *Brown v. Entertainment Merchants*, in which the State conceded that it could not show a "causal link between violent video games and harm to minors." 131 S. Ct. at 2738. 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." *Id.* at 2739. The harms reported by survivors of SOCE, 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. *See, e.g.,* APA Report at 50-51.

Moreover, in *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 962 (9th Cir. 2009), the Ninth Circuit, and later the Supreme Court, concluded that the law prohibiting the sale of violent video games to minors was a restriction on protected expression, subject to the highest level of constitutional scrutiny. *See id.; see also Brown*, 131 S. Ct. at 2738. SB 1172, by contrast, is a reasonable and viewpoint-neutral regulation of mental health care practices, not a restriction on the sale and distribution of literature or other expressive media based on its content. Therefore, while the evidence supporting SB 1172 was plainly sufficient under any level of review, SB 1172 does not trigger strict scrutiny and does not require the State to show more than a rational basis, not the "substantial evidence" required under heightened review.

b. **SB 1172 Is Narrowly Drawn**

The restriction imposed by SOCE is narrowly drawn to protect youth from these harms. Plaintiffs suggest that it was improper to ban SOCE outright for minors, rather than simply require informed consent. But, prior to SB 1172's enactment, ethical requirements already required mental health professionals to seek informed consent.[12] These pre-existing ethical

[12] *See*, *e.g.*, APA Code Of Ethics, Standard 10.01(b) ("When obtaining informed consent for treatment for which generally recognized techniques and procedures have not been established, psychologists inform their clients/patients of the developing nature of the treatment, the potential risks involved, alternative treatments that may be available and the voluntary nature of their participation.").

mandates have not in the past prevented the harms the State now seeks to address, and there is no reason to think they would do so in the future.

B. SB 1172 Is Not Vague

Where 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, 494-495 (1982). Moreover, "perfect clarity" is not required even when a law regulates expression. *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). "[W]e can never expect mathematical certainty from our language." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972); *see also California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001). Thus, 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' own affirmative admissions that they engage in the conduct SB 1172 prohibits defeat their vagueness challenge. A plaintiff who engages in "conduct that is clearly proscribed" by a law cannot challenge the law on vagueness grounds. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010); *see also id.* ("even to the extent a heightened vagueness standard applies, a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim"). Plaintiffs themselves use the term "sexual orientation change efforts" in their declarations to describe the services they either offer patients or have sought. (*See, e.g.*, Declaration of David Pickup ¶ 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, 398 (9th Cir. 1989). Here, Plaintiffs' declarations show that they understand what SOCE is and realize SB 1172 prohibits activity they conduct. This defeats their

vagueness challenge at the threshold.

1. The Term "Sexual Orientation" Is Not Vague

In any event, none of the terms of SB 1172 is vague. For example, courts have repeatedly rejected the notion that inclusion of the term "sexual orientation" renders a statute unconstitutionally vague. For example, one district court, when faced with an argument that the meaning of the term "sexual orientation" is "complex or mysterious," flatly rejected it. *United States. v. Jenkins*, 2012 WL 4887389, at *15 (E.D. Ky. Oct. 15, 2012). The court pointed to Merriam-Webster's Dictionary's "succinct[]" and clear definition—"the inclination of an individual with respect to heterosexual, homosexual, and bisexual behavior"—and held that the term was not vague. *Id.* In considering the validity of ordinances prohibiting discrimination because of "sexual orientation and gender identity," another district court noted 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." *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); *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). As these courts have recognized, "sexual orientation" is a commonly used, understandable term that does not render a statute vague.

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 Relevant 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 "[s]exual orientation change efforts": "any practices by mental health providers that seek to change an individual's sexual orientation." SB 1172 § 2. 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.* Further, SB 1172 provides that violation of its prohibition will "be considered unprofessional conduct and shall subject a mental health provider to discipline by the licensing entity for that mental health provider." *Id.*

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).[13] Read as a whole and in

[13] *See also* 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); *id.* § 4989.50 (requiring a license to practice educational psychology); *id.* § 4989.14 (defining the practice of educational psychology); *id.* § 4989.13 ("A person engages in the practice of educational psychology 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); *id.* § 4996 (requiring a license to practice clinical social work); *id.* § 4996.9 (defining the practice of clinical social work); *id.* § 4991.1 ("A person engages in the practice of clinical social work 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); *id.* § 4999.30 (requiring a license for the practice of professional clinical counseling); *id.* § 4999.20 (defining the practice of professional clinical counseling); *id.* § 4999.13 ("A person engages in the practice of professional clinical counseling 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

conjunction with the 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.

While SB 1172's terms are 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 the Ninth Circuit 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 Staes v. Elias*, 269 F.3d 1003, 1014 (9th Cir. 2001) (same). That all the leading, mainstream mental health organizations have issued reports or statements condemning SOCE—which are cited in the statute's findings—shows that the professional community understands what practices are banned.

3. SB 1172 Provides Ready Answers To Plaintiffs' Hypotheticals

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. It is thus nothing like the statute in *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967), upon which Plaintiffs rely, which provided for dismissal of university employees who uttered "any treasonable or seditious word or words," without providing any concrete definitions of "treasonable" or "seditious." *Id.* at 597-98.

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added). The practice of medicine requires a license even if not for remuneration, but the definition of practicing medicine focuses on treatment of "another person" by one who "[h]olds out, states, indicates, advertises, or implies to a client or prospective client that he or she is a physician, a surgeon, or a physician and surgeon." *Id.* § 2053.5; *see also id.* § 2052 ("any person who practices or attempts to practice, or who advertises or holds himself or herself out as practicing, any system or mode of treating the sick or afflicted in this state, or who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other physical or mental condition *of any person*") (emphasis added).

Plaintiffs' first hypothetical of a therapist's "rais[ing] the existence of SOCE with a minor client" (Mot. at 16) does not describe prohibited conduct. The mere statement that SOCE exists would not in itself be a "practice[] . . . that seek[s] to change the individual's sexual orientation." SB 1172 § 2(b)(1). A mental health provider could mention the existence of SOCE in expressing his or her opinions about the practice, or could merely state that it is prohibited by law, which certainly would not be engaging in SOCE.

Nor would web videos, radio broadcasts, or instructional pamphlets on websites (Mot. at 17.) 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.[14]

Plaintiffs also ask whether, under SB 1172, "professional counselors unwilling to counsel in a manner affirming homosexual practices have to effectively close their mouths at the mere mention that a minor patient might have experienced some form of same-sex attractions." (Mot. at 16.) Plaintiffs' hypothetical is perplexing. It is not the role of a professional counselor to either approve or disapprove of the behavior of patients based on the counselor's personal beliefs--and indeed, counselors are ethically bound to avoid imposing their own views on clients. *See* note 10, *supra*. What is required under SB 1172 is that a mental health professional provide counseling services in a manner that does not attempt to change the patient's sexual orientation. Providing such therapy does not mean that the therapist is "affirming" any particular behavior, but rather that he or she is assisting the client with legitimate therapies such as those that "provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development." SB 1172 § 2.[15]

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[14] Plaintiffs also pose hypotheticals about video-conferencing with a patient in another state or performing SOCE in another state. (Mot. at 17-18.) These hypotheticals do not 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 does not mean SB 1172 is vague. Plaintiffs' would have the same questions about whether they could engage in any other form of unprofessional conduct that might subject them to professional discipline.

[15] "Affirming" therapy does not mean encouraging same-sex attractions or behaviors. The Report of the American Psychological Association Task Force "Appropriate Therapeutic Responses to Sexual Orientation" explains that a "competent and affirmative approach" to counseling "sexual

Plaintiffs' questions about a hypothetical bisexual patient are also answered by the plain language of SB 1172. SB 1172 prohibits efforts that "seek to change a [minor patient's] sexual orientation," whatever that sexual orientation may be. Bisexuality is a sexual orientation, so a therapist could not engage in efforts to change the fact that a patient experienced both same-sex and different-sex attractions. But a therapist clearly could counsel the patient concerning both same-sex and different-sex attractions and relationships without running afoul of the statute. Even if, however, Plaintiffs might be able to conjure a few hypotheticals that pose interesting questions about SB 1172's outer boundaries, these outlying cases would not make the statute facially invalid. 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*, 578 F.3d at 1146 (citations and internal quotation marks omitted).

C. SB 1172 Does Not Infringe Upon The Rights Of Parents

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. SB 1172 § 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. And 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. Parents also do not have a constitutionally protected right to choose a particular type of treatment or a particular provider.

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minorities is based on the scientific knowledge in key areas: (a) homosexuality and bisexuality are stigmatized, and this stigma can have a variety of negative consequences throughout the life span; (b) same-sex sexual attractions, behavior, and orientations per se are normal and positive variants of human sexuality and are not indicators of either mental or developmental disorders; (c) same-sex sexual attractions and behavior can occur in the context of a variety of sexual orientation identities; and (d) lesbians, gay men, and bisexual people can live satisfying lives and form stable, committed relationships and families that are equivalent to heterosexuals' relationships and families in essential respects." *See* APA Report at 14 (citations omitted).

In fact, the Ninth Circuit 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 reasonably prohibited that type of treatment or provider." *NAAP*, 228 F.3d at 1050 (citations and internal quotation marks omitted). Because SB 1172 merely prohibits professionals from engaging in practices that are reasonably regarded as harmful to the health of minors, Plaintiffs' argument that it infringes parental rights are without merit.

D. Plaintiffs Have Not Shown They Would Suffer Irreparable Harm

Plaintiffs argue that they will suffer irreparable harm if SB 1172 takes effect, but none of their arguments withstands scrutiny. The *therapist*-Plaintiffs assert they risk losing their licenses and livelihoods once SB 1172 takes effect. (*See* Mot. at 25 (citing *Conant*, 309 F.3d at 639-40 (Kozinski, J. concurring)).) But if therapists *comply* with the law and stop performing SOCE on minors, which the Court should presume they would, they will *not* lose their licenses. *Cf. Pasadena Research Laboratories v. United States*, 169 F.2d 375, 382 (9th Cir. 1948) (recognizing legal presumption that private citizens generally comply with their legal duties). The therapist-Plaintiffs also assert that the law requires them to violate the ethical mandate to respect client autonomy. But the State's expert, Dr. Lee Beckstead, demonstrates that SOCE—because it imposes a pre-selected sexual orientation outcome—*undermines* client autonomy. SB 1172's prohibition therefore *advances* client autonomy and minimizes the risk that these therapists will violate the autonomy mandate.

The *parent*-Plaintiffs allege harm in that they want their sons to continue in therapy "so that their sons can achieve their full, God-given heterosexual potential." (Mot. at 27.) The parents' argument—that SB 1172 limits the ability for them to force the State to authorize medical treatments that have been found to be ineffective and harmful—is simply a restatement of their contention that SB 1172 infringes their parental rights. As explained above, it does not.

The *patient*-Plaintiffs argue that they will be harmed by the loss of their "right to receive medical information." (Mot. at 28.) As noted above, SB 1172 does nothing to prevent patients' learning about SOCE; it only prevents licensed mental health providers from *performing* it on their minor patients.

Plaintiffs also assert that patients receive benefits from SOCE, and that "[a]bruptly stopping the therapy will result in immediate and irreparable harm." (Mot. at 28.) In the first place, nothing about SB 1172 requires an "abrupt" cessation of therapy generally. Indeed, patients may choose to continue therapy *with their current therapists*, who remain free to employ any therapeutic technique that may be beneficial to the health and well-being of their clients, but not SOCE. Ethical guidelines preclude mental health providers from "abruptly" terminating their therapeutic relationships. *E.g.*, APA Code of Ethics Standard 10.10 ("prior to termination psychologists provide pretermination counseling and suggest alternative service providers as appropriate"). Moreover, to the extent the therapist-Plaintiffs are offering the professional opinion that patients benefit from SOCE rather than the non-SOCE aspects of therapy, this opinion is contrary to the conclusions of leading mainstream mental health organizations and so should not be credited. *See, e.g.,* APA Report at 53 ("[T]he factors that are identified as benefits are not unique to SOCE and can be provided within an affirmative and multiculturally competent framework that can mitigate the harmful aspects of SOCE by addressing sexual stigma while understanding the importance of religion and social needs.").

III. CONCLUSION

For all the foregoing reasons, the Court should deny the motion for preliminary injunction.

DATED: November 9, 2012	Munger, Tolles & Olson LLP DAVID C. DINIELLI MICHELLE FRIEDLAND LIKA C. MIYAKE BRAM ALDEN By: */s/ David C. Dinielli* Attorneys for EQUALITY CALIFORNIA Proposed Intervenor