No. 12-17681

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID PICKUP *et al.*

Plaintiffs and Appellants,

v.

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

Defendants and Appellees.

On Appeal From the Order of the Eastern District of California
(Case No. 2:12:cv-02497-KJM-EDB)

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF HEALTH LAW SCHOLARS IN SUPPORT OF DEFENDANTS AND APPELLEES

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INTRODUCTION

Pursuant to Federal Rules of Appellate Procedure 29(b), *amici curiae* are health law scholars (the "Health Law Scholars") who move for leave to appear as *amici curiae* and to file their proposed *amius curiae* brief (submitted concurrently with this motion) in support of Defendants and Appellees, Edmund G. Brown Jr., Governor of the State of California, in his official capacity, *et al*., and Defendants and Appellees/Intervenors, Equality California (the "Motion").

Defendants and Appellees have consented to the filing of a brief by the Health Law Scholars. Liberty Counsel, on behalf of Plaintiffs and Appellants, denied the Health Law Scholars their consent, thereby necessitating this Motion.

STATEMENT

Amici curiae Health Law Scholars have an interest in this proceeding because they specialize in healthcare law and related regulations, have an interest in maintaining consistency in California's regulatory framework within the healthcare industry, and are able to provide particular expertise to this Court concerning the scope of the State's regulatory authority regarding healthcare practices. Specifically, the Health Law Scholars seek to

assist the Court in evaluating the propriety of SB 1172 by providing a historical overview with regard to the State's regulation of healthcare professionals and practices in light of the State's strong interest in the health and welfare of its citizens. The Health Law Scholars believe that SB 1172 is well within the State's regulatory powers regarding healthcare and that the failure to implement SB 1172 would be inconsistent with relevant historical precedent. The Health Law Scholars have an abiding interest in ensuring that this Court decide the present case in accord with California's long-standing principles concerning healthcare regulation which support the competent practice of the healing arts such that the health and welfare of Californians are protected. Thus, the Health Law Scholars urge this Court to remove any injunction hindering the implementation of SB 1172.

Amicus curiae Brietta Clark is a law professor from Loyola Law School in Los Angeles. Her expertise includes healthcare regulatory compliance. She is a member of the LACMA-LACBA Joint Committee on Biomedical Ethics, a past chair of the Health Law Section Executive Committee of the Los Angeles County Bar Association, and a past member of the institutional review boards for Children's Hospital Los Angeles and California Hospital Medical Center.

Amicus curiae Jan Costello is a law professor also from Loyola Law School in Los Angeles. She teaches, lectures, writes and consults in the areas of children and the law, mental disability law, and family law. She is former Chair of the State Bar of California Committee on Legal Rights of Disabled Persons, and Chair of the Law & Mental Disability Section of the American Association of Law Schools (AALS). She served as a board member of Mental Health Advocacy Services, Inc. (MHAS), and the Disability Rights Legal Center (formerly Western Law Center for Disability Rights) associated with Loyola Law School, and as a faculty member of the UCLA Forensic Psychiatry Fellowship Program.

Amicus curiae Judith Daar is a law professor at Whittier Law School and Clinical Professor of Medicine at the University of California, Irvine School of Medicine. Her expertise is on the intersection of law, medicine and ethics. In 2005, she became Chair of the AALS's Section on Law, Medicine and Health Care, and in 2006 she was named to the Board of Directors of the American Society of Law, Medicine & Ethics (ASLME). She was elected President of ASLME in 2009 and re-elected for a second term in 2010. She is a member of the UCI Medical Center Medical Ethics Committee, where she serves on the Bioethics Consultation Team. She has

also served as a member of the Harbor-UCLA Hospital Institutional Review Board, and the ABA Coordinating Group on Bioethics.

Amicus curiae Susan Stefan is a visiting law professor at the University of Miami Law School. She has worked previously for the Mental Health Law Project, which is now the Bazelon Center for Mental Health Law. More recently, she was an attorney with the Center for Public Representation in Massachusetts where she directed the Center's National Emergency Department. This department provides consultation and technical support on issues relating to the treatment of people with psychiatric disabilities in emergency department settings and community psychiatric crisis alternatives. She also taught Disability Law and Mental Health Law at the University of Miami School of Law.

Amicus curiae Katrina Karkazis, PhD, MPH is a Senior Research Scholar at the Center for Biomedical Ethics at Stanford University. Her expertise is in clinical and research ethics and pediatric ethics. Internationally recognized for her work in critical medical and science studies and on gender, sexuality, and intersexuality, Dr. Karkazis has lectured at more than 40 universities and her research is widely cited and taught in fields that include psychology, gender and sexuality studies, and history and philosophy of

science. In addition to her research activities in these areas, she has lectured on a wide range of issues at the interface between medicine, ethics, and society having taught at the undergraduate and graduate level in schools of social sciences, public health, and medicine at Stanford and Columbia Universities, as well as Mills College.

Pursuant to Circuit Rule 29-3, the Health Law Scholars have endeavored to obtain the consent of all parties to the filing of the proposed *amicus curae* brief prior to bringing the present motion. However, Plaintiffs in the instant case, *Pickup v. Brown*, Case No. 12-17681, have declined to consent to the Health Law Scholars appearing as *amici curiae* and filing the proposed *amicus curiae* brief. The Court should note that all parties in the related case, *Welch v. Brown*, Case No. 13-15023, have provided consent for the Health Law Scholars to appear as *amici curiae* and accordingly, the Health Law Scholars filed their *amicus curiae* brief on February 4, 2013 in the *Welch* appeal [Dkt. No. 14.][1]

Therefore, to inform the Court about matters that directly pertain to the issues to be decided by this Court and pursuant to their interest in

supporting the consistent application of law regarding the regulation of medical practices, the Health Law Scholars respectfully move this Court to grant this Motion for leave to appear as *amici curae* and to file the accompanying proposed *amicus curae* brief.

Respectfully submitted,

DATED: February 6, 2013

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By: s/ Eileen R. Ridley
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HEALTH LAW SCHOLARS

[1] *Amicus Curiae* Susan Stefan was not part of the *amicus curiae* brief submitted in the *Welch* appeal, but joins in the proposed *amicus curiae* brief in this appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th of February, 2013, I filed the foregoing with the Clerk of the Court for the United States Court of Appeal for the Ninth Circuit electronically through the CM/ECF system. I certify that service as to all participants in the case that are registered CM/ECF users will be accomplished by the appellate CM/ECF system.

DATED: February 6, 2013 By: s/ Lorri Nicolini
Lorri Nicolini

No. 12-17681

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The issues presented to the Court on this appeal concern the scope of the State's regulatory authority regarding healthcare practices. *Amici curiae* are health law scholars who submit this brief to assist the Court in considering the well-established and long history of the State's regulation of healthcare professionals stemming from the State's strong interest in the health and welfare of its citizens. Indeed, the State has historically placed practice limitations on a variety of treatments – including those that involve speech. Thus, SB 1172 is well within the State's authority to enact laws designed to protect the health and welfare of Californians and is not a departure from the State's regulatory framework.

Amicus curiae Brietta Clark is a law professor from Loyola Law School in Los Angeles. Her expertise includes healthcare regulatory compliance. She is a member of the LACMA-LACBA Joint Committee on Biomedical Ethics, a past chair of the Health Law Section Executive Committee of the Los Angeles County Bar Association, and a past member of the institutional review boards for Children's Hospital Los Angeles and California Hospital Medical Center.

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science. In addition to her research activities in these areas, she has lectured on a wide range of issues at the interface between medicine, ethics, and society having taught at the undergraduate and graduate level in schools of social sciences, public health, and medicine at Stanford and Columbia Universities, as well as Mills College.

Plaintiffs and Appellants denied the request by the *amici curiae* for consent to file an *amicus curiae* brief. Pursuant to Federal Rule of Appellate Procedure 29(b), *amici curiae* have filed an accompanying Motion For Leave To File An *Amicus Curiae* Brief.

STATEMENT IN COMPLIANCE OF RULE 29(c)(5)

No party's counsel authorized this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than *amici curiae* or their counsel contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

Through its general police powers, the State has the utmost obligation to ensure that the health, safety, and welfare of its citizens are not jeopardized. This strong interest underpins the State's long history of

regulation regarding the medical field – including mental health professionals. Laws and regulations that limit what mental health professionals can or cannot do during the treatment of their patients are common.

Furthermore, almost all medical treatment entails some form of speech (*e.g.*, a physician's discussion of his or her patient's symptoms and treatment options). This fact does not, however, thwart the State's ability to regulate the provision of healthcare – including the administration of mental health treatments where communication through speech is involved.

Viewed holistically, mental health practices are conduct-related treatments that include a communication (*i.e.*, talking) component. Similarly, sexual orientation change efforts (or "SOCE") is a discredited practice that utilizes various methods such as physical aversion and non-aversion techniques, including psychoanalysis, aversion conditioning with nausea-inducing drugs, hormone treatments, lobotomy, shock therapy, electroshock, castration, behavioral therapy, and verbal communication components.[1] There is, therefore, nothing unique about SOCE that should hinder the State's ability to regulate the practice in an effort to protect the health and welfare of

[1] *See Pickup et al. v. Brown et al.*, 2:12-cv-02497-KJM-EFB, 2012 U.S. Dist. LEXIS 172034, *7-*9 (E.D. Cal. Dec. 4, 2012)

Californians. Indeed, given that there is unanimity among all the respected and mainstream medical organizations (such as the American Academy of Pediatrics, American Psychological Association, American Psychiatric Association, and World Health Organization) that SOCE has no medical efficacy and is harmful to the individuals receiving it,[2] the State has a greater duty to regulate the use of such a discredited practice – especially when it concerns minors.

Given the above, SB 1172 appropriately prohibits mental health providers from administering the discredited practice of SOCE to minors because SB 1172 falls well within the State's regulatory history of the medical field and its interest in promoting the health and welfare of

[2] The American Psychoanalytic Association stated that SOCE is "against fundamental principles of psychoanalytic treatment and often result in substantial psychological pain by reinforcing damaging internalized attitudes." The Pan American Health Organization, a regional office of the WHO, said that SOCE "constitute(s) a violation of the ethical principles of health care and violate human rights that are protected by international and regional agreements" and "lack(s) medical justification and represent a serious threat to the health and well-being of affected people." *See* Cal. Stats. 2012, ch. 835, §§ 1(j), 1(l). Moreover, at a recent United Nations panel discussion on SOCE it was noted that "there is no longer any real debate about this [SOCE] therapy among mental health professionals. *The debate now… is not clinical, but cultural*." www.huffingtonpost.com/2103/02/01/un-conversion-therapy_n_2600742.html (last visited Feb. 1, 2013). (Emphasis added.)

Californians. *Contrary to Plaintiffs' assertions, SB 1172 does not prohibit any mental health provider from talking about SOCE or discussing the availability of SOCE*. Instead, SB 1172 prohibits administering the *technique* of SOCE as a purported form of psychotherapy. SB 1172 does not abridge Plaintiffs' First Amendment rights because SB 1172 does not implicate speech that falls under the First Amendment. SOCE is a conduct-related discredited practice that sometimes involves talking. If Plaintiffs' position is taken to its logical conclusion, any treatment or conduct that involves "talking" would always implicate the First Amendment, and rarely, if at all, would any healthcare regulation pass constitutional muster. Courts have uniformly rejected similar arguments. Plaintiffs' position is not only untenable and wrong, it is also inconsistent with historical and practical precedents in California healthcare law.

ARGUMENT

I. THE STATE ROUTINELY REGULATES HEALTHCARE PRACTICES.

A. State Regulations Of Healthcare Providers Are Aimed At Protecting The Health, Safety, And Welfare Of Its Citizens.

The propriety of the government's power to regulate the medical profession (including mental health professionals) is unquestioned. The

utmost goal of regulations that affect healthcare providers is to protect the health, safety, and welfare of individuals who receive treatment from providers. States are the primary regulators of healthcare, and they enact laws and regulations affecting healthcare professionals through the State's police powers. *Arnett v. Dal Cielo*, 14 Cal.4th 4, 6 (1996) ("The state has long regulated the practice of medicine as an exercise of the police power."); *Gregory v. Hecke*, 73 Cal. App. 268, 277 (1925) ("It is not disputed that the public health, public morals, and general public welfare may be preserved under the police powers vested in the state."); *see also, Kenneally et al. v. Medical Board of California et al.*, 27 Cal. App. 4th 489, 499 (1994); *Fuller v. Board of Medical Examiners of the State of California*, 14 Cal. App. 2d 734, 741 (1936).

Numerous governmental regulations state expressly that the goal of the regulation is to ensure the public's health, safety, and welfare under the States' general police powers. Courts have made clear that states' broad police power includes the right to regulate healthcare professionals and practices for the protection of patients. Indeed, healthcare is one of the most regulated industries in the State and the country as a whole given that "the work of physicians [and other medical and mental health providers] has life

and death consequences for their patients." *Kenneally*, 27 Cal. App. 4th at 500-01 ("There is no profession in which it is more critical that errant practitioners be swiftly and expeditiously identified and disciplined."); *see Board of Medical Quality Assurance v. Superior Court (Willis)*, 114 Cal. App. 3d 272, 278 (1980) ("[t]he courts have had opportunity to describe the "unique position" of influence of those who are licensed to practice the healing arts."); *Fuller*, 14 Cal. App. 2d at 741-42 ("[t]here is no profession where the patient passes so completely within the power and control of the operator as does the medical patient."); *see also*, *Hecke*, 78 Cal. App. at 277-78.

One way that states use their regulatory power to protect the public is through laws that establish the qualifications to obtain and maintain a license to provide healthcare. *See Kenneally*, 27 Cal. App. 4th at 497 ("No person can acquire a vested right to continue, when once licensed, in a business, trade or occupation which is subject to legislative control under the police powers….") (citations omitted). States also pass laws to create and empower state boards to oversee and carry out licensure and disciplinary process of professionals – such as the Medical Board, which regulates the practice of medicine or the Board of Psychology, which regulates the practice

of psychology, in accordance with laws defining unprofessional conduct and otherwise regulating the practice of medicine and psychology. California has enacted a number of statutes that govern medical and mental health professionals based upon the State's interest of protecting its citizens. The California statutes governing the "healing arts" are codified generally in Business & Professions Code sections 500 to 4999.129. Additionally, California has empowered the Division of Public Health of the Department of Health Services to "adopt and enforce regulations for the execution" of regulations "relating to public health." Cal. Health & Safety Code § 100275.

For example, the California regulations on physicians, psychiatrists, and psychoanalysts, among others, are codified in the Medical Practice Act, Business and Professions Code Sections 2000 *et seq*. The Medical Practice Act states that the "[p]rotection of the public shall be the highest priority for the Medical Board of California in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount." Cal. Bus. & Prof. Code § 2001.1. Similarly, the California regulations on psychologists, among others, are codified in the Psychology Licensing Law, Business and Professions Code Sections 2900

et seq. The Psychology Licensing Law states that the "[p]rotection of public shall be the highest priority for the Board of Psychology in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount." *Id*. § 2920.1. The Psychology Licensing Law notes in its legislative history that "[t]he Legislature finds and declares that 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 the unauthorized and unqualified practice of psychology." *Id.* § 2900; *see National Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology (NAAP)*, 228 F.3d 1043, 1047 (9th Cir. 2000). Indeed, this Court in *NAAP* noted, "the Legislature recognized the actual and *potential consumer harm* that can result from the unlicensed, unqualified or incompetent practice of psychology." *NAAP*, 228 F.3d at 1047 (emphasis added).

California has also empowered the Board of Behavioral Sciences (BBS) with administering licensing and disciplinary laws governing marriage and family therapists, clinical social workers, education psychologists, and clinical counselors. The stated goal of BBS is to "protect the public from

incompetent, unethical, or unprofessional practitioners." Cal. Bus. & Prof. Code § 4990.02.

California also regulates other professionals who fall under the "healing arts" practice, such as dentists, optometrists, respiratory therapists, pharmacists, psychiatric technicians, acupuncturists, and many others. *See id.* §§ 500-4999.129.

Under this regulatory scheme, healthcare providers may be disciplined or have their licenses restricted, suspended, or revoked for incompetence, unprofessional conduct, violating other applicable laws, or otherwise failing to adhere to professional standards of competence. The California Supreme Court has construed license discipline laws broadly to effect their public protection purpose. *Arnett*, 14 Cal.4th at 6 ("[s]ince the earliest days of regulation the [Medical] Board has been charged with the duty to protect the public against incompetent, impaired, or negligent physicians, and, to that end, has been vested with the power to revoke medical licenses on grounds of unprofessional conduct"); *see also*, *e.g.*, Cal. Bus. & Prof. Code § 2234 (empowering the medical board to take action against "any licensee who is charged with unprofessional conduct" stemming from a variety of offenses, including negligence, incompetence, and violation of

regulations that govern the licensee); *id*. § 2960 (same as to psychologists); *id*. at § 4980 (same as to marriage and family therapists); *id*. at § 4989.54 (same as to licensed educational psychologists); *id*. at § 4992.3 (same as to licensed clinical social workers); *id*. at 4999.90 (same as to licensed professional clinical counselors).

Courts have warned against second-guessing the State when it comes to areas that are traditionally within the State's police powers, stating that the "appellate court does not sit as a super-legislature" and that "[g]reat deference to legislative judgment should be accorded." *Kenneally*, 27 Cal. App. 4th at 499. To this end, California courts have held that the rational basis test should be employed where "the decision of the Legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous…. A distinction in legislation is not arbitrary if any set of facts reasonably can be conceived that would sustain it." *Id*. at 499-500 (citations omitted); *Board of Medical Quality Assurance (Willis)*, 114 Cal. App. 3d at 277 ("The conventional 'rational relationship' test is traditionally applied in cases involving occupational licensing, including those concerning the practice of the healing arts.") (citing to *D'Amico v. Board of Medical*

Examiners, 11 Cal.3d 1, 17 (1974)). This Court in *Brandwein v. The California Board of Osteopathic Examiners et al.*, 708 F.2d 1466 (9th Cir. 1982) summarized,

> Because the use of a degree is in effect a representation to the public concerning the holders [sic] academic training and qualifications, one which the public may rely on in selecting a physician, it is closer to a form of commercial speech than a philosophical statement…. And in dealing with commercial speech, the Supreme Court has emphasized that "restrictions on false, deceptive, and misleading commercial speech" are permissible…. In general, the Court has been especially deferential to legislative classifications in cases of challenges to the state regulation of licensed professions.

Id. at 1469-70 (internal citations omitted). This Court also said in *NAAP*,

> Based on the health and welfare of its citizens, California certainly has a "conceivable rational basis" for regulating the licensing of psychologists, and therefore, psychoanalysts…. Regulating psychology, and through it psychoanalysis, is rational because it is within the state's police power to regulate mental health treatment.

NAAP, 228 F.3d at 1051-52 (citation omitted).

B. Regulations That Limit Or Ban Specific Healthcare Practices Are Common.

Although every leading and mainstream medical association has rejected the medical efficacy of SOCE, Plaintiffs argue that SB 1172 is an

unprecedented and overly broad regulation of medical speech. Plaintiffs are wrong.

To the contrary, healthcare providers are routinely subject to various state and federal laws that regulate certain healthcare practices, devices or drugs that are deemed to be medically ineffective, pose a significant risk of harm that outweighs any possible or speculative benefit, or involve the failure to adhere to professional standards of competence. In passing regulations to protect the public, states are mindful of which patient populations may be particularly susceptible to harmful practices and abuse by others, such as incompetent patients, patients with serious mental health concerns, patients belonging to groups suffering discrimination by government/providers in the past, and minors.

The following are but a few examples of such regulations:

1. California Regulations On Certain Mental Health And Medical Procedures.

The State regulates how medical and mental health professionals conduct their treatment of patients who have been involuntarily committed. For example, the Lanterman-Petris Short Act provides special protection for people suffering from mental health conditions who have been involuntarily detained, and regulates what their treating medical or mental health

professional can or cannot do, and can or cannot say. Cal. Wel. & Inst. Code §§ 5000 *et seq.* The intents of the regulation include: (a) "[t]o end the inappropriate, indefinite, and involuntary commitment of mentally disordered persons, developmentally disabled persons, and persons impaired by chronic alcoholism, and to eliminate legal disabilities;" (b) "[t]o guarantee and protect public safety;" and (c) "[t]o protect mentally disordered persons and developmentally disabled persons from criminal acts." *Id*. § 5001.

Among the provisions of the Lanterman-Petris Short Act are specific limitations on the conduct of the medical provider in the course of the treatment of their patients. For example, although a physician may urge the patient to follow through a specific course of treatment, the physician may not "use, in an effort to gain consent, any reward or threat, express or implied…" *Id*. § 5326.5.

2. California Regulation On Psychosurgery And Ban On Psychosurgery and Convulsive Therapies On Minors.

As part of the Lanterman-Petris Short Act, California has also placed strict regulations on the use of psychosurgery. As defined, psychosurgery includes "lobotomy, psychiatric surgery, and behavioral surgery, and all other forms of brain surgery" done for the purpose of, among

others, "[m]odification or control of thoughts, feelings, actions, or behavior." *Id*. § 5325(g). California has created special requirements that must be met before psychosurgery may be performed, such as a waiting period and an agreement by three other physicians. *Id*. § 5326.6. Additionally, California has banned psychosurgeries on minors. *Id*.

Similarly, California has enacted strict regulations on convulsive therapy by requiring rigorous levels of consent before the therapy may be performed on an adult. *Id*. § 5326.85. Furthermore, California has enacted even stricter regulations on convulsive therapy concerning minors, and such therapy may be performed on minors only under certain specifically-defined situations. *Id*. § 5326.8.

3. California And Federal Regulations Involving Controlled Substances.

One of the most regulated areas for medical practitioners involves their prescription of controlled substances. *See* 21 U.S.C. §§ 801 *et seq*. (Controlled Substances Act). Medical professionals must adhere to strict limitations imposed by both the California and federal governments regarding the manner by which they treat their patients with controlled substances. California has deemed as unprofessional conduct any violation "of any federal statute or federal regulation or any of the statutes or

regulations of this state regulating dangerous drugs or controlled substances." Cal. Bus. & Prof. Code § 2238. California courts have held that the regulation's sanction for discipline for "unprofessional conduct" need not involve moral turpitude. Rather, it is sufficient that the legislature determine that a certain act is deemed to be unprofessional conduct to uphold a medical professional's discipline, such as suspension or revocation of license. *Collins v. Board of Medical Examiners*, 29 Cal. App. 3d 439, 444 (1972).

Similarly, California has also placed specific restrictions and regulations concerning a medical professional's treatment of an "addict." For example, Business and Professions Code Section 2241 creates very specific limits on providers who treat addiction, including imposing a maximum limitation on the administration of a controlled substance based on the type of drug used, and the number of days prescribed. Cal. Bus. & Prof. Code § 2241.

4. California Ban on Hoxsey Method for Treatment of Cancer.

Having deemed it to be both ineffective and harmful, California has banned the Hoxsey Method to treat cancer. 17 Cal. Code Regs. § 10400. As defined, the Hoxsey Method is a purported "cancer treatment system which employs the use of the substances potassium iodide, lactated pepsin,

red clover blossoms, cascara sagrada, licorice, burdock root, stillingia root, berberis root, poke root, echinacea root, prickly ash bark, and buckthorn bark, either singly or in combination with each other." *Id*. § 10400(a). Indeed, not only is the Hoxsey Method banned, "any misrepresentation that said Hoxsey method for the treatment of cancer…, has any value in arresting or curing cancer" is also banned." *Id*. § 10400(c); Cal. Health & Safety Code § 109270(d) (authorizing regulation that prohibits any practice "found to be harmful of or no value in the diagnosis, prevention, or treatment of cancer"); *see also* 17 Cal. Code Regs. §§ 10400.1-10400.6.

5. California Oversight Of Emerging And Innovative Medical Practices For Licensed Physicians.

The State also authorizes the appropriate boards to establish disciplinary policies and procedures relating to certain "emerging and innovative medical practices for licensed physicians and surgeons." Cal. Bus. & Prof. Code § 2501. The stated intent of the regulation is to ensure that the "quality of medicine practiced in this state is the most advanced and innovative it can be both in terms of preserving the health of, as well as providing effective diagnosis and treatment of illness for, the residents of this state." *Id*. § 2500. To fulfill the State's intent, the regulation requires the

appropriate boards to assess the standards for investigations for competence involving alternative medicine, as well as the need for specific informed consent standards. *Id*. §§ 2501(a) & (b).

6. California Ban On Female Genital Mutilation.

California bans the practice of female genital mutilation (FGM) outright, and exposes anyone who practices FGM to criminal prosecution. Cal. Penal Code § 273.4. The California Legislature has noted that while FGM is known to be practiced in at least 28 nations and communities in the world (including in Europe, Australia, and North America), and has existed for thousands of years among some cultures, the Legislature has taken the position that such practice is "an extreme form of child abuse and a violation of women's basic human rights." Cal. Stats. 1996, ch. 790, §§ 2(a) & 2(b). The Legislature also determined that any individual who undergoes such practice or technique is subject to potential physical, psychological, and emotional harm. *Id*. § 2(d). The Legislature noted that the World Health Organization, and other "major health care and human rights organizations" have urged to "condemn this harmful and outdated procedure" and pronounced that California wishes to "send a strong message that California

abhors this practice and views its abolition as paramount to the health and welfare of these young girls." *Id*. § 2(g).

7. Other California Regulations Affecting The Practice Of Various Medical And Mental Health Providers.

There are various other regulations that place limits (or bans) on health professionals' practices, such as:

- Ban on human reproductive cloning. Cal. Health & Safety Code § 24185; Cal. Bus. & Prof. Code § 2260.5 (determining the practice to be unprofessional conduct);
- Ban on sexual relations, abuse, exploitation; and/or misconduct between patient and provider, with limited exemptions. Cal. Bus. & Prof. Code §§ 726, 729 (deeming such conduct as unprofessional conduct); *id*. § 728 (describing disclosure requirements to psychotherapists who becomes aware of sexual conduct or relations by a patient with the previous psychotherapist);
- In the context of permitting individuals to control healthcare decisions, California has expressly stated that it does not "authorize or require a health care provider to

provide health care contrary to generally accepted health care standards applicable to the health care provider or health care institution." Cal. Probate Code § 4654;

- Regulations that require disclosures to patients by non-licensed practitioners providing alternative/complementary care not licensed by state. *Id.* §§ 2053.5, 2053.6, 2501(a);
- Ban on the use of certain mercury-containing vaccines to pregnant women or young children. Cal. Health & Safety Code § 124172;
- Limitations on the use of tanning devices, and ban on persons under age eighteen from using ultraviolet tanning devices. Cal. Bus. & Prof. Code § 22706;
- Designating as unprofessional conduct the use of direct injection liquid silicone into breast tissue. *Id.* § 2251;
- Designating as unprofessional conduct acts of excessive prescription or administration of drugs, treatments, or procedures. *Id.* § 725;
- Criminalizing assisted suicide. Cal. Penal Code § 401; and

- Prohibiting certain behavior modification interventions absent specified peer review. 17 Cal. Code Regs. § 50802.

The laws referenced above provide but a small sample of various regulations that govern "healing arts" in California. Many of these regulations not only impose certain requirements regarding what practitioners must do or say, they also prohibit what practitioners can do or say. SB 1172 falls well within this regulatory history of the healthcare field and is properly within the State's police power to protect its citizens.

C. Many Governmental Regulations Of Medical Practice, Including The Practice Of Mental Health, Apply To Speech That Is Part Of Treatment.

Communication between patient and provider is often a critical part of treatment in a variety of medical contexts – yet, governmental regulation is still permitted in these areas. That is, the fact that a treatment may involve speech does not, in and of itself, exempt a provider from regulation. To the contrary, treatments with a speech component are, and have been found to be, appropriately subject to governmental regulation.

1. California Regulation Of Psychotherapy.

One example of treatment that has a speech component is psychotherapy, which relies heavily on provider communication as the means

for helping to treat a patient's illness. As this Court has made clear, the mere fact that speech is involved does not exempt psychotherapists from regulation nor does it necessarily mean that such regulations should be subject to greater scrutiny under the First Amendment. *NAAP*, 228 F.3d at 1054. In *NAAP*, the plaintiffs contended that because psychoanalysis is the 'talking cure,' it deserved special First Amendment protection because it was 'pure speech.' However, in upholding the district court's dismissal of plaintiff's claims that challenged the state's mental health licensing laws, this Court concurred with the district court's assessment in stating that:

> [T]he 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.

Id. Thus, even though psychotherapy employs speech in its treatment, it has been found by this Court to be a proper subject of the state's power to regulate. *Id*. at 1056.

2. California Regulations Imposing Mandatory Reporting Duties As Part Of Treatment.

In other instances, California has promulgated regulations that impose a mandatory reporting duty, which is speech, upon covered healthcare providers. For example, California law designates "any person who has

assumed full or intermittent responsibility for care or custody of an elder or dependent adult," including "any licensed staff of a public or private facility that provides care or services for elder or dependent adults" as a "mandated reporter" for purposes of reporting known or suspected incidents of abuse. Cal. Wel. & Inst. Code § 15630; *see also id*. § 15632 (clarifying that the patient-provider privilege is inapplicable in cases of suspected abuse). Similarly, the Child Abuse and Neglect Reporting Act, Cal. Penal Code §§ 11164 *et seq*., designates the following individuals as a "mandated reporter" for purposes of reporting cases of child abuse and neglect: "[a] physician and surgeon, psychiatrist, psychologist, dentist, resident, intern, podiatrist, chiropractor, licensed nurse, dental hygienist, optometrist, marriage and family therapist, clinical social worker, professional clinical counselor, or any other person who is currently licensed under Division 2 (commencing with Section 500) of the Business and Professions Code." Cal. Penal Code § 11165.7(21). Specifically, the statute provides, "[r]eports of suspected child abuse or neglect shall be made by mandated reporters…to any police department or sheriff's department." *Id*. § 11165.9.

3. California Regulates Public Communications By Healthcare Providers.

California also regulates certain communications to the public by licensed professionals, including physicians, surgeons and mental health professionals. For example, California prohibits:

> [P]ublic communication containing a false, fraudulent, misleading, or deceptive statement, claim, or image for the purpose of or likely to induce, directly or indirectly, the rendering of professional services or furnishing of products in connection with the professional practice or business for which he or she is licensed.

Cal. Bus. & Prof. Code § 651. Similarly, the state defines as "unprofessional conduct" when an individual "falsely represents the existence or nonexistence of a state of facts" as it relates to the practice of optometry. *Id*. § 3106. Likewise, California limits the use of the words "doctor," "physician," or the initials "M.D." or any other terms or letters implying that he or she is a doctor, in "any sign, business card, or letterhead, or in an advertisement" to individuals who hold certain certificates and credentials. *Id*. §§ 2054(a), 2054(b); *id*. § 4992.10 (prohibiting the use of false, misleading or deceptive business name for licensed clinical social workers); *id*. § 4999.72 (prohibiting a false, misleading, or deceptive business name for licensed professional clinical counselors and requiring disclosure of the name and license

designation of the owner or owners of the practice prior to commencement of treatment).

4. California Regulations Require Practitioners To Provide Certain Information During Treatment.

California has imposed regulations that require healthcare providers to provide information while providing certain treatments to patients. For example, the State requires that a physician of a patient who has been diagnosed with breast cancer "shall provide the patient the written summary" to provide a standardized summary on diagnosis and treatment for breast cancer. Cal. Health & Safety Code § 109275. Likewise, the State mandates "the medical care provider primarily responsible for providing an annual gynecological examination to a patient" to provide "a standardized summary" of symptoms and appropriate methods of diagnoses for gynecological cancers during the examination. *Id*. § 109278. Moreover, the State dictates the manner and language of these disclosures, requiring that such information be provided to the patient "in layperson's language and in a language understood by the patient." *Id*; *see id*. § 109275(b). There are numerous similar instances where the State requires the dissemination of certain information (in the form of written or verbal speech) by healthcare providers to patients in the course of treatment as follows:

- Requiring a standardized written summary of treatment methods for prostate cancer and mandating the physician provide certain information to the patient during a prostate gland examination. Cal. Bus. & Prof. Code § 2248; Cal. Health & Safety Code § 109280(a);
- Mandating healthcare providers performing a sterilization treatment comply with heightened informed consent requirements, including a state-published booklet and verbally providing information concerning alternatives to family planning. Cal. Bus. & Prof. Code § 2250 (defining unprofessional conduct as failure to provide informed consent); Cal. Wel. & Inst. Code § 14191 (conditioning Medi-Cal payment for sterilization upon informed consent requirements); 22 Cal. Code Regs. §§ 51305.3, 51305.4;
- Requiring a written summary be provided to a patient who has a "reasonable possibility" of receiving a blood transfusion "as a result of a medical or surgical procedure." Cal. Health & Safety Code § 1645;

- Requiring that written materials be provided by the treating psychotherapist to a patient alleging sexual intercourse or contact with a previous psychotherapist during course of prior treatment. Cal. Bus & Prof. Code § 728;
- Requiring a written summary be provided to a patient receiving silicone implants. *Id*. § 2259;
- Requiring that certain information be provided and accessible to individuals who are considering egg donation. Cal. Health & Safety Code §§ 125325, 125335, 125340;
- Requiring that a medical care provider inform patients who receive HIV testing of certain information such as treatment options for a positive test. *Id*. § 120990. In addition, "prenatal care providers" must "offer" specific HIV information and counseling "to every pregnant patient." *Id*. § 125107;
- Requiring that certain information and counseling be provided to a patient who has been diagnosed with a

terminal illness by his or her health care provider. *Id*. §§ 442-442.7.

Regulation of these healthcare treatments, like psychotherapy, undoubtedly involve a speech component yet are a proper subject of regulation to protect the health, safety and welfare of patients. Thus, based upon the above examples, the fact that a treatment may have a speech component does not preclude the State from regulating those healthcare treatments. To hold otherwise would bar numerous existing regulations concerning the providing of healthcare treatments that employ speech.

II. SOCE IS A CONDUCT-BASED PRACTICE, NOT SPEECH.

A. SB 1172.

California Governor Edmund G. Brown signed SB 1172 on September 29, 2012, with an effective date of January 1, 2013. SB 1172 (to be codified as Cal. Bus. & Prof. Code §§ 865 *et seq*.) prohibits mental health providers from administering SOCE to any individual under 18 years old. SB 1172 defines SOCE as "any ***practices*** by mental health providers that seek to change an individual's sexual orientation. This includes effort to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex." (Emphasis

added). Furthermore, SB 1172 defines "mental health provider" to include, among others, physicians and surgeons specializing in psychiatry, psychologist, license marriage and family therapists, licensed education psychologists, licensed clinical social worker, and any other health professional under California law or regulation." SB 1172 defines as unprofessional conduct "[a]ny sexual orientation change efforts attempted on a patient under 18 years of age by a mental health provider."

The Legislative findings contained in SB 1172 cite to, and rely upon, the stated position by respected and mainstream medical and psychological associations all of whom overwhelmingly state that SOCE has no known benefit, is ineffective towards its purported aim, and presents a high likelihood of harm and critical health risks to those who undergo such a technique. Cal. Stats 2012, ch. 835, §§ 1(b)-1(l). These associations include the American Psychological Association, American Psychiatric Association, American School Counselor Association, American Academy of Pediatrics, American Medical Association Council on Scientific Affairs, National Association of Social Workers, American Counseling Association, American Psychoanalytic Association, American Academy of Child and Adolescent Psychiatry, and the Pan American Health Organization (the regional office of

the World Health Organization). None of these organizations recognize SOCE as an accepted practice, and indeed, a number of these organizations expressly reject SOCE as not only discredited and inappropriate, but unethical. *See* Cal. Stats. 2012, ch. 835, §§ 1(b)-1(l).

B. SOCE Is Conduct.

As pertinent to SB 1172, SOCE refers to the "practice" (*i.e.*, conduct) undertaken by certain mental health providers that seek to change an individual's sexual orientation and "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." The medically discredited and unproven practice employs a variety of aversive and non-aversive methods, including psychoanalysis, aversion conditioning with nausea-inducing drugs, hormone treatments, lobotomy, shock therapy, electroshock, castration, behavioral therapy, and counseling, all for the purported goal of "curing" same-sex attraction. *See Pickup et al. v. Brown et al.*, 2:12-cv-02497-KJM-EFB, 2012 U.S. Dist. LEXIS 172034, *7-*9 (E.D. Cal. Dec. 4, 2012). Thus, SOCE is a practice that entails conduct (*e.g.*, aversion therapy and the administration of drugs) with a communication component – it is not "pure speech."

C. The Speech Component Of SOCE Does Not Transform The Practice Into Expressive Speech Or Expressive Conduct.

This Court made it clear that "it 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, evidence, or carried out by means of language, either spoken, written, or printed." *NAAP*, 228 F.3d at 1053-54s (citing to *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). In *NAAP*, certain unlicensed psychoanalysts challenged California's licensing requirements, in part, under the First Amendment arguing that "because psychoanalysis is the 'talking cure,' it deserves special *First Amendment* protection because it is 'pure speech.'" *Id*. at 1054 (emphasis included). This Court rejected that argument holding that while the practice of psychoanalysis employs speech, "'the key component of psychoanalysis is the treatment of emotional suffering and depression, *not* speech," and therefore, it does not make it immune from regulation, "especially when public health concerns are affected." *Id*. (citing to *Watson v. Maryland*, 218 U.S. 173, 176 (1910)) (emphasis included).

There are very few instances where a regulation concerning the medical profession has been challenged successfully on constitutional

grounds. Moreover, in the rare instance where the challenge has been successful, the regulation at issue was not tethered necessarily to standards of professional competence. Rather, the regulation prevented the practitioner from sharing information that was *consistent* with generally accepted standards (as opposed to a practice that was at odds with generally accepted standards such as SOCE), or that may provide medical benefit. *See, e.g.*, *Conant v. Walters*, 309 F.3d 629, 638 (9th Cir. 2002) (striking down policy that prevented physicians from even sharing information about the availability of the potential benefit of marijuana, as opposed to prohibiting a physician from actually prescribing marijuana); *Wollschlaeger v. Farmer*, No. 11-22026-Civ, 2012 WL 3064336 (S.D. Fla. June 29, 2012) (finding that a Florida law that prohibited a doctor from inquiring about their patients' gun-ownership ran afoul of the First Amendment because it prevented doctors from communicating with their patients in a manner that was "truthful [and] non-misleading.")

There are two fatal infirmities to the First Amendment challenge against SB 1172. First, it is indisputable that all respected and mainstream medical, psychological, psychiatric, and counseling organizations, as well as by the World Health Organization, have concluded that SOCE confers no

medical benefit, and, in fact, poses a risk of serious harm to those subjected to the technique. *See* Cal. Stats. 2012, ch. 835, §§ 1(b)-1(l). Indeed, it appears that apart from those who advocate the use of SOCE, no other organization supports the use of SOCE. Thus, not only did California pass SB 1172 rightfully within its police powers to protect the health, safety, and welfare of one of the most vulnerable group of its citizens (minors), SB 1172 also passes muster insofar as the First Amendment is concerned because SOCE is not consistent with the standard of professional competence. Second, unlike in *Conant*, SB 1172 does not prevent a mental health practitioner from espousing his or her view on SOCE, but rather, prohibits a mental health practitioner from acting upon their favorable view of SOCE by actually administering SOCE to their patients as a purported treatment. A mental health practitioner who believes in SOCE is not prohibited by SB 1172 from expressing his or her views on SOCE, nor from mentioning the existence or availability of SOCE. SB 1172 does not, therefore, abridge Plaintiffs' First Amendment rights.

CONCLUSION

California has a lengthy history of regulating healthcare for the health and welfare of its citizens. Such regulations have routinely addressed

the communication component of treatments and have sought to enforce the applicable standard of care regarding those treatments. SB 1172 is just the most recent example of the State's exercise of such police power for the health and welfare of one of the most vulnerable segments of its citizenry – minors. Consequently, SB 1172 falls well within California's regulatory history of healthcare and appropriately protects the health and welfare of Californians.

Respectfully submitted,

DATED: February 6, 2013

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, *amici curiae* state that the following case is related: *Welch et al. v. Brown et al.*, Ninth Circuit, Case No. 13-15023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(d), 32(a)(7)(B), 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionally spaced, has a typeface of 14 points, and contains 6,843 words, including footnotes, as counted by the Microsoft Word 2003 word-processing software used to generate this brief.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th of February, 2013, I filed the foregoing with the Clerk of the Court for the United States Court of Appeal for the Ninth Circuit electronically through the CM/ECF system. I certify that service as to all participants in the case that are registered CM/ECF users will be accomplished by the appellate CM/ECF system.

DATED: February 6, 2013 By: s/ Lorri Nicolini
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