CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

DAVID PICKUP, CHRISTOPHER H. ROSIK, PH.D., et. al.

Petitioners,

v.

GAVIN NEWSOM, Governor of the State of California, in his official capacity, et. al.

Respondents

and

EQUALITY CALIFORNIA,

Intervenor-Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When this Court ruled that California's Reproductive FACT Act violates the First Amendment, *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2371-74 (2018) ("NIFLA"), it also abrogated **by name** the panel decision at bar, rendering it demonstrably wrong. Other circuits when confronted with supervening decisions by this Court that do not mention a lower court opinion by name but place its core holdings in question have recalled the mandate. *See e.g., Am. Iron & Steel Inst. v. E.P.A.*, 560 F.2d 589, 596–97 (3d Cir. 1977). However, here, the Ninth Circuit refused to recall the mandate, leaving in place a blatant content-based violation of the First Amendment that creates irreparable harm each day the mandate is not recalled. *See Reed v. Town of Gilbert,* 135 S. Ct. 2218 (2015).

The questions presented are:

1. Whether the Court of Appeals erred when it refused to recall its mandate after this Court explicitly abrogated its opinion by name.

2. Whether a lower court mandate should be recalled when this Court expressly abrogates the ruling by name and when the

lower court's abrogated opinion continues to cause irreparable harm to free speech.

3. Whether a lower court opinion should be vacated and the mandate recalled when this Court expressly overrules the opinion by name and when the lower court opinion continues to cause irreparable harm to free speech.

4. Whether this Court's explicit abrogation of the lower court's opinion by name which departed from this Court's free speech precedents is an extraordinary circumstance justifying recall of the mandate when the lower court opinion continues to cause irreparable harm to free speech.

PARTIES

Petitioners are David Pickup, Christopher Rosik, Robert Vazzo, The Alliance For Therapeutic Choice and Integrity ("the Alliance"), formerly known as the National Association for Research and Therapy of Homosexuality ("NARTH"), American Association of Christian Counselors ("AACC"), minor John Doe 1, appearing by and through his parents Jack Doe 1 and Jane Doe 1, who are also suing individually, and minor John Doe 2, who is appearing by and through his parents Jack

Doe 2 and Jane Doe 2, who are also suing individually.

Respondents are Gavin Newsom, the Governor of the State of California in his official capacity; Alexis Podesta, Secretary of the State and Consumer Services Agency of the State of California, in her official capacity, Kim Madsen, Executive Officer of the California Board of Behavioral Sciences, in her official capacity; Stephen Phillips, J.D. Psy.D., President of the California Board of Psychology, in his official capacity and Denise Pines, President of the Medical Board of California, in her official capacity.

Equality California was an Intervenor-Defendant/Respondent in the lower court case.

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly owned corporation owning ten (10) percent or more of either the Alliance's or AACC's stock.

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STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit denying the petition for rehearing en banc was filed on December 21, 2018. The decision of the United States Court of Appeals for the Ninth Circuit denying the Motion to Recall the Mandate was filed on November 6, 2018. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1). The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The California statute that is the subject of the constitutional challenge is reproduced in its entirety in the Appendix to this Petition. App. 105a.

The relevant constitutional provisions are reproduced in their entirety in the Appendix to this Petition. App. 120a.

STATEMENT OF THE CASE

In *NIFLA v. Becerra*, 138 S.Ct. 2361 (2018), this Court reversed the Ninth Circuit's validation of California's Reproductive FACT Act and rejected as contrary to precedent the Ninth Circuit's reliance on a free speech "continuum" analysis adopted by the Ninth Circuit in this case, *Pickup v. Brown*, 740 F.3d 1208, 1227–29 (9th Cir. 2014) and used by the Third Circuit in *King v. Governor of New Jersey*, 767 F.3d 216, 232 (3rd Cir. 2014). Both lower courts created a new category of "professional" speech (and in the Ninth Circuit case, conduct) providing a lower level of constitutional protection, which *NIFLA* expressly rejected. 138 S.Ct. at 2371-74; *See Pickup,* 740 F.3d at 1228; *King*, 767 F.3d at 233-34. The Ninth Circuit also used the "continuum" concept to find that the content-based Reproductive FACT Act need only satisfy and did satisfy intermediate scrutiny. *NIFLA*, 138 S.Ct. at 2371 (citing *NIFLA v. Harris*, 839 F.3d 823, 839 (9th Cir. 2016)).

This Court rejected the Ninth Circuit's newly minted "professional" speech category, and *by name,* abrogated *Pickup*, the case at bar. *NIFLA*, 138 S.Ct. at 2371-72.

This Court's rejection of both lower court decisions could not be more clear:

> Although the licensed notice [at issue in *NIFLA*] is content based, the Ninth Circuit did not apply strict scrutiny because it concluded that the notice regulates "professional speech." [*NIFLA v. Harris,*] 839 F.3d at 839. Some Courts of Appeals have recognized "professional speech" as a separate category of speech that is subject to different rules. *See, e.g., King v. Governor of New Jersey*, 767 F.3d 216, 232 (C.A.3 2014); ***Pickup v. Brown*, 740 F.3d 1208, 1227–1229 (C.A.9 2014)**; *Moore–King v. County of Chesterfield,* 708 F.3d 560, 568–570 (C.A.4 2013). These courts define "professionals" as individuals who provide personalized services to clients and who are subject to "a generally applicable licensing and regulatory regime." *Id.*, at 569; *see also*, *King, supra*, at 232; ***Pickup, supra*, at 1230**. "Professional speech" is then defined as any speech by these individuals that is based on "[their] expert knowledge and judgment," *King, supra*, at 232**,**

or that is "within the confines of [the] professional relationship," ***Pickup, supra*, at 1228**. So defined, these courts except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny. *See King, supra*, at 232; ***Pickup*, *supra*, at 1253–1256;** *Moore–King, supra*, at 569.

But this Court has not recognized "professional speech" as a separate category of speech. Speech is not unprotected merely because it is uttered by "professionals." This Court has "been reluctant to mark off new categories of speech for diminished constitutional protection." *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 804, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996) (KENNEDY, J., concurring in part, concurring in judgment in part, and dissenting in part). And it has been especially reluctant to "exemp[t] a category of speech from the normal prohibition on content-based restrictions." *United States v. Alvarez*, 567 U.S. 709, 722, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012)

> (plurality opinion). This Court's precedents do not permit governments to impose content-based restrictions on speech without "'persuasive evidence ... of a long (if heretofore unrecognized) tradition'" to that effect. *Ibid.* (quoting *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 792, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011)).
> *This Court's precedents do not recognize such a tradition for a category called "professional speech."*

Id. at 2372. (emphases added).

When, as is true here in *Pickup,* and was true in *NIFLA* and *King*, the speech restriction affects health care professionals, then content-based restrictions pose as great or greater risks of harm as are posed by content-based restrictions in other contexts. *Id.* at 2374. This Court found that increased risk a further reason to reject the intermediate scrutiny analysis adopted by the Ninth Circuit in *NIFLA* and the case at bar and the Third Circuit in *King*.

> The dangers associated with content-based regulations of speech are also present in the context of

professional speech. As with other kinds of speech, regulating the content of professionals' speech "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Turner Broadcasting [v. FCC]*, 512 U.S.[622], at 641, 114 S.Ct. 2445 [(1994)]. Take medicine, for example. "Doctors help patients make deeply personal decisions, and their candor is crucial." *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1328 (C.A.11 2017) (en banc) (W. Pryor, J. concurring). Throughout history, governments have "manipulat[ed] the content of doctor-patient discourse" to increase state power and suppress minorities:

For example, during the Cultural Revolution, Chinese physicians were dispatched to the countryside to convince peasants to use contraception. In the 1930s, the Soviet government expedited completion of a construction project on the Siberian railroad by ordering doctors to both reject requests for medical leave from work and

conceal this government order from their patients. In Nazi Germany, the Third Reich systematically violated the separation between state ideology and medical discourse. German physicians were taught that they owed a higher duty to the 'health of the Volk' than to the health of individual patients. Recently, Nicolae Ceausescu's strategy to increase the Romanian birth rate included prohibitions against giving advice to patients about the use of birth control devices and disseminating information about the use of condoms as a means of preventing the transmission of AIDS. Berg, *Toward a First Amendment Theory of Doctor–Patient Discourse and the Right To Receive Unbiased Medical Advice*, 74 B.U.L. REV. 201, 201–202 (1994) (footnotes omitted).

Further, when the government polices the content of professional speech, it can fail to "'preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'" *McCullen v. Coakley*, 573 U.S. ——, —— – ——, 134 S.Ct.

> 2518, 2529, 189 L.Ed.2d 502 (2014). Professionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields. Doctors and nurses might disagree about the ethics of assisted suicide or the benefits of medical marijuana; lawyers and marriage counselors might disagree about the prudence of prenuptial agreements or the wisdom of divorce; bankers and accountants might disagree about the amount of money that should be devoted to savings or the benefits of tax reform. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting), and the people lose when the government is the one deciding which ideas should prevail.

NIFLA, 138 S.Ct. at 2374-75 (emphasis added). "In sum, neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique

category that is exempt from ordinary First Amendment principles." *Id.* at 2375.

After this Court abrogated the panel's decision here by name, Petitioners filed a motion with the Ninth Circuit to recall the mandate. After receiving responses from Respondents and Intervenor-Respondents, the Ninth Circuit panel denied the motion without discussion. App. 1a. Petitioners timely sought rehearing en banc, which the Ninth Circuit denied without discussion. App. 104a.

The Ninth Circuit abused its discretion in refusing to recall the mandate despite this Court's explicit abrogation of its decision and the continuing irreparable injury occurring as a result of the content-based speech restrictions. Petitioners now seek review of the decision below and ask that this Court grant review and vacate the Ninth Circuit's denial of the motion to recall the mandate.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT BETWEEN THE NINTH CIRCUIT'S REFUSAL TO RECALL THE MANDATE AND THIS COURT'S EXPRESS ABROGATION OF ITS OPINION.

As this Court acknowledged in *Calderon v. Thompson*, 523 U.S. 538, 549 (1998), "the courts of appeals are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion." "In light of 'the profound interests in repose' attaching to the mandate of a court of appeals, however, the power can be exercised only in extraordinary circumstances." *Id.* at 550 (citing 16 C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3938, p. 712 (2d ed.1996)).

Courts of appeal have defined such extraordinary circumstances as, *inter alia*, "good cause," to "prevent injustice," or in "special circumstances." *American Iron & Steel Institute v. EPA*, 560 F.2d 589, 593 (3d Cir. 1977). In turn, "special circumstances" have included "(1) where clarification of a mandate and opinion is critical; (2) where misconduct has affected the integrity of the judicial process; (3) where there is a danger of incongruent results in cases pending at the same time; and (4) where it is necessary

to revise an 'unintended' instruction to a trial court that has produced an unjust result." *Id.* at 594 (citing *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 278-79 (D.C. Cir. 1971)).

In particular, courts of appeal have found that subsequent decisions by this Court or supervening changes in law can justify recalling a mandate:

> Where, as here, a decision of the Supreme Court the preeminent tribunal in our judicial system departs in some pivotal aspects from those of lower federal courts, amendatory action may be in order to bring the pronouncements of the latter courts into line with the views of the former. As noted above, recall of a mandate traditionally has been warranted when and to the extent necessary "to protect the integrity" of a court's earlier judgment. Certainly, such integrity may be jeopardized when the solemn declarations of a court are called into question by a later Supreme Court opinion. Recall of a mandate, in such a situation, would appear to be an appropriate response by a court of appeals.

Am. Iron & Steel Inst. 560 F.2d at 596–97. "One circumstance that may justify recall of a mandate is a supervening change in governing law that calls into serious question the correctness of the court's judgment." *Sargent v. Columbia Forest Prod., Inc.,* 75 F.3d 86, 90 (2d Cir. 1996). Here, the court's judgment was not merely questioned, but abrogated by name by this Court, yet the mandate was not recalled.

A. The Ninth Circuit's Refusal To Recall The Mandate Following This Court's Abrogation Of Its Decision Conflicts With Other Circuits Stating That Recall Is Appropriate When A Subsequent Decision by This Court Proves that the Lower Court Decision is Wrong.

The Ninth Circuit's refusal to recall the mandate here cannot be reconciled with actions by other circuits which recalled mandates when subsequent decisions by this Court undercut the legal conclusions reached by the lower court. Circuit courts have recalled their mandates when this Court's later opinions in unrelated cases addressing similar legal issues have shown the appellate court's analysis to be

"demonstrably wrong." However, those cases did not involve this Court's express abrogation of the appellate court decision by name, as is true here. If a subsequent case reaching a different conclusion on similar facts has rendered an earlier unrelated case demonstrably wrong and subject to recall, then this Court's explicit abrogation of the case at bar must trigger recall of the mandate. The Ninth Circuit's refusal to do so is itself demonstrably wrong.

The Fifth Circuit recalled its mandate when a subsequent decision of this Court clarified when a firearm can be considered as having been used in a crime. *United States v. Tolliver*, 116 F.3d 120, 123 (5th Cir. 1997). In *Tolliver*, the defendant had been convicted according to precedent holding that mere possession of a firearm was sufficient. *Id.* at 124. Subsequent to that conviction, this Court issued an opinion in an unrelated case and found that mere possession was not sufficient for a conviction. *Id.* The Fifth Circuit found that the subsequent decision "directly conflicted" with its earlier decision, justifying a recall of the mandate. *Id.* at 123.

> Our authority to recall our own mandate is clear. Under Rule 41.2 of the Fifth Circuit Rules, we may recall our mandate if necessary in order to prevent injustice. An

> example of such an injustice is when a subsequent decision by the Supreme Court renders a previous appellate decision demonstrably wrong.

Id. Unlike the situation here, in *Tolliver* the subsequent decision did not reference the Fifth Circuit's decision by name as being wrongly decided, yet the court found that recall was necessary to prevent injustice. By contrast, the Ninth Circuit refused to recall the mandate when this Court explicitly said that the *Pickup* decision was demonstrably wrong. *NIFLA*, 138 S.Ct. at 2372.

The Third Circuit also recalled its mandate when a subsequent decision by this Court in an unrelated case resolved an issue differentially from the way it was resolved in the decision at issue. *Am. Iron & Steel Inst. v. E.P.A.*, 560 F.2d 589, 596–97 (3d Cir. 1977). In *American Iron*, the Third Circuit acknowledged that this Court's decision in another case involving environmental regulations had the effect of overruling the Third Circuit's resolution of a similar environmental question. *Id.*

> Where, as here, a decision of the Supreme Court the preeminent tribunal in our judicial system departs in some pivotal aspects from

> those of lower federal courts, amendatory action may be in order to bring the pronouncements of the latter courts into line with the views of the former. As noted above, recall of a mandate traditionally has been warranted when and to the extent necessary "to protect the integrity" of a court's earlier judgment. Certainly, such integrity may be jeopardized when the solemn declarations of a court are called into question by a later Supreme Court opinion. Recall of a mandate, in such a situation, would appear to be an appropriate response by a court of appeals.

Id. Notably this Court did not expressly discuss and abrogate the *American Iron* decision as the *NIFLA* court did with the Ninth Circuit's decision here. If the mere similarity of facts is an exceptional circumstance justifying recall of a mandate to prevent injustice, then the explicit abrogation, by name, of a lower court decision is even more so. The Ninth Circuit's contrary decision creates an irreconcilable conflict.

The Sixth Circuit also recalled its mandate when a subsequent decision by this Court in an unrelated case issued a new rule

regarding criminal sentencing that affected the defendant in the Sixth Circuit case. *U.S. v. Murray*, 2 Fed. Appx. 398, 400 (6th Cir. 2001). "[W]hen an intervening Supreme Court case calls into question the 'integrity' of a separate judgment, the circumstance is extraordinary enough to warrant such an extreme remedy." *Id.* In *Murray,* as in *Tolliver*, this Court's subsequent decision did not mention the case at issue, let alone, as is true here, explicitly abrogate it. Still, the new rule announced in the case was sufficient to render the Sixth Circuit's decision demonstrably wrong and subject to recall.

The Ninth Circuit's refusal to recall the mandate conflicts with decisions in other circuits which found that a subsequent decision of this Court which merely departed from but did not explicitly abrogate the lower court case showed that the appellate decision was demonstrably wrong and subject to recall. This Court should grant the Petition to reconcile the conflict.

B. The Ninth Circuit's Refusal To Recall The Mandate Following This Court's Express Abrogation Of Its Decision Conflicts With Other Circuits' Decisions Recalling Mandates For Far Less Consequential Supervening Changes in the Law.

The Ninth Circuit's refusal to recall the mandate following this Court's explicit abrogation of its decision also conflicts with decisions in the Eleventh, Second and Third circuits that have recalled mandates when supervening changes in the law, including decisions by this Court, have called the appellate court's decision into question. In none of these cases did the supervening change in law involve the circumstances here, *i.e.,* abrogation of the appellate court opinion by name, by this Court, making the Ninth Circuit's action here all the more egregious.

The Eleventh Circuit recalled its mandate when a subsequent decision by this Court effectively, but not explicitly, abrogated the earlier decision. *Judkins v. Beech Aircraft Corp*., 745 F.2d 1330, 1331–32 (11th Cir. 1984). In *Beech*, the Eleventh Circuit originally held in

the context of a Title VII case that the filing of an EEOC right-to-sue letter and a request for appointment of counsel satisfied the statutory requirement that a lawsuit be brought within 90 days from the issuance of the right-to-sue letter. *Id.* at 1331. In a subsequent unrelated decision, *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 149-50 (1984), this Court held that that the filing of an EEOC right-to-sue letter does not satisfy the 90-day statutory limitation period. Unlike *NIFLA, Baldwin County* did not mention, let alone explicitly abrogate, *Judkins*. Nevertheless, the Eleventh Circuit found that *Baldwin County* flatly rejected the legal basis and effectively reversed *Judkins*, thus justifying a recall of the mandate. *Id.* The Ninth Circuit's refusal to recall its mandate in light of *NIFLA*'s explicit abrogation presents a conflict that should be resolved by this Court.

The Second Circuit recalled its mandate after a state Supreme Court decision changed the governing law regarding private rights of action for workers fired in retaliation for filing a worker's compensation claim. *Sargent v. Columbia Forest Prod., Inc.,* 75 F.3d 86, 90 (2d Cir. 1996). "One circumstance that may justify recall of a mandate is '[a] supervening change in governing law that calls into serious question the correctness of the court's judgment.'" *Id.* (quoting *McGeshick v. Choucair*, 72 F.3d 62, 63 (7th Cir.1995).

> Based upon a seemingly clear canon of statutory construction barring an implication of a private right of action where a statute provides an express right, we confidently predicted that the Vermont Supreme Court would not imply a private right of action under the workers' compensation statute. Our prediction was incorrect.

Id. at 89-90. Consequently, the Vermont Supreme Court decision "is beyond any question inconsistent with our earlier decision" and justified recalling the mandate. *Id.* at 90. If there can be no question that a subsequent unrelated state Supreme Court case renders a federal case subject to recall of the mandate, then this Court's explicit abrogation of *Pickup v. Brown* in *NIFLA* is beyond question and the Ninth Circuit's contrary decision is irreconcilable.

The Third Circuit recalled its mandate when a subsequent decision clarified Congress' intent regarding retroactive application of statutory amendments. *United States v. Skandier*, 125 F.3d 178, 182–83 (3d Cir. 1997). In this case, there was not merely a clarification of intent, but express abrogation by name of the panel's decision here.

This Court's explicit abrogation of the panel decision in *NIFLA* has rendered the Ninth Circuit's decision unconstitutional and exposes individuals subject to California's content-based speech restriction not merely to a denial of legal remedies, but to the irreparable injury of violation of free speech rights, as described *infra*.

II. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT BETWEEN THE NINTH CIRCUIT'S REFUSAL TO RECALL THE MANDATE WHEN FREE SPEECH RIGHTS ARE BEING INFRINGED AND OTHER CIRCUITS WHICH HAVE RECALLED MANDATES WHEN CIVIL RIGHTS ARE BEING INFRINGED.

The Ninth Circuit's refusal to recall its mandate following this Court's explicit abrogation of its intermediate scrutiny analysis of a content-based "professional" speech/conduct restriction conflicts with decisions by other appellate courts that have recalled their mandates when subsequent decisions meant the initial decisions infringe on civil rights. Courts of appeal have found that justice requires a recall of their mandate when supervening decisions showed that the initial decision denied due process, wrongly upheld a conviction or

sentence, wrongly deprived a party of legal remedies or otherwise deprived them of civil rights protection.

This case involves just such a deprivation of rights, *i.e.*, infringement of freedom of speech, that requires recall of the mandate. The *NIFLA* Court referred to the Ninth Circuit's decision *by name* and said that the panel's adoption of intermediate scrutiny analysis for a content-based restriction on professional conduct was wrong. *NIFLA,* 138 S.Ct. 2361, 2371-72 (2018) As a consequence, the content of Petitioners' and their minor clients' speech is being restricted without the constitutionally required proof that the restriction is narrowly tailored and necessary to meet a compelling state interest. Far less than an explicit abrogation of a decision infringing upon First Amendment rights has triggered recalls of mandates in other circuits.
The Ninth Circuit's refusal to recall the mandate under such circumstances creates an issue of profound constitutional importance. That is particularly true in light of the fact that *Pickup v. Brown,* 740 F.3d 1208 (9th Cir. 2014) and the related Third Circuit decision in *King v. Christie*, 767 F.3d 216, 232 (3d Cir. 2014), also abrogated by name in *NIFLA,* have been the impetus for similar content-based speech restrictions, and consequently similar deprivations of constitutional rights, across the country. Without this Court's review, those

constitutionally deficient bills will continue to proliferate as legislators rely upon the abrogated decision here to justify enacting similar bills.

A. The Ninth Circuit's Refusal To Recall Its Mandate After This Court Explicitly Abrogated Its Decision By Name Conflicts With Other Circuit Decisions Recalling Mandates When Civil Rights Are At Risk.

While recognizing the importance of the repose that attaches to their judgments, courts of appeal also recognize that is necessary to recall their mandates when they impinge upon civil rights, interfere with judicially prescribed remedies or affect continuing conduct. *See Meredith v. Fair,* 306 F.2d 374, 378 (5th Cir. 1962); *Tolliver*, 116 F.3d at 123; *Ute Indian Tribe of the Uintah & Ouray Reservation v. State of Utah,* 114 F.3d 1513, 1526 (10th Cir. 1997).

In *Ute Indian Tribe*, the Tenth Circuit opted to modify their mandate instead of recalling it, but confirmed that recall is appropriate when a subsequent change in law impacts ongoing conduct. 114 F.3d at 1526. "Where a prior erroneous judgment necessarily affects continuing conduct, the interests of uniformity may demand departure from the

prior judgment to bring a court's view of the law into line with the prevailing view." *Id.* This Court's abrogation of the *Pickup* panel decision by name has rendered the judgment erroneous. As discussed more fully *infra*, the erroneous judgment is adversely affecting the continuing free speech conduct of Petitioners and their minor clients, and similar parties all over the country. This should demand departure from the prior judgment in the form of recall of the mandate.

The Fifth Circuit recalled its mandate when it recognized that its original decision was being interpreted to deprive James Meredith of his equal protection right to enroll in and continue to attend the University of Mississippi. *Meredith*, 306 F.2d at 378. The court recognized the personal nature of the rights recently secured by Mr. Meredith and that the clarification of those rights was an extraordinary circumstance justifying recall of the mandate. Likewise, here, the Ninth Circuit's decision is being used to deprive Petitioners of their First Amendment rights, justifying a recall of the mandate. The Ninth Circuit's refusal to do so is even more egregious in light of the fact that, unlike in *Meredith*, in this case this Court has abrogated the lower court's decision *by name*.

Also, as discussed above, the Fifth Circuit recalled its mandate when a subsequent decision of this Court effectively overruled the

appellate court's affirmation of a criminal conviction, thus implicating the petitioner's constitutional rights. *Tolliver*, 116 F.3d at 123. Notably, this Court's subsequent decision only effectively, not explicitly, abrogated the *Tolliver* court's decision. *Id.* Yet the mandate in *Tolliver* was recalled and the mandate here was not.

Petitioners have faced and are continuing to face the deprivation of their free speech rights by being subjected to a content-based prohibition that does not comport with this Court's First Amendment precedent. If the mandate is not recalled then the State of California will benefit from restricting speech on the basis of content without having to satisfy strict scrutiny review, and Petitioners' and their minor clients' free speech rights will continue to be infringed. The Ninth Circuit's refusal to recall the mandate cannot be reconciled with established precedent.

This Court explicitly rejected the Ninth Circuit's determination that professional speech should be accorded different, less protective, treatment under the First Amendment than are other forms of speech. That clear repudiation of the analytical framework upon which the Ninth Circuit's decision was built requires a reversal in the form of recalling the mandate.

B. The Ninth Circuit's Refusal To Recall Its Mandate Exacerbates A Ripple Effect Of Expanding Irreparable Harm As States and Localities Continue To Enact Laws In Reliance Upon The Decision That This Court Abrogated By Name.

This Court's review of the Ninth Circuit's refusal to recall its mandate is particularly critical because of the irreparable injuries that the Ninth Circuit decision and the Third Circuit decision in *King* (also abrogated by name in *NIFLA*) have caused and are continuing to cause across the country. The Ninth and Third circuits' validation of California's and New Jersey's, respectively, content-based prohibitions against voluntary talk therapy on the issue of reducing or eliminating same-sex attractions and gender identity in children has spawned similar content-based speech prohibitions in fourteen additional states.[1]

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[1] Connecticut, H.B. 6695, January Sess. 2017 (Conn. 2017); Delaware, S.B. 65, 149th Assembly, 2017 Reg. Session, (Del. 2017); District of Columbia, D.C. Code §7-1231.14 (2017); Hawaii, S.B. 270, 29th Leg. (Hawaii

Forty-nine municipalities have also enacted similar content-based speech prohibition ordinances relying on *Pickup* and *King*, both of which were expressly abrogated by this Court.[2]

2017); Illinois, H.B. 0217, 2017 Leg. Sess. (Ill. 2017); Maryland, S.B. 1028, 2018 Reg. Session (Md. 2018); Nevada, S.B. 201, 79th Sess. (2017); New Hampshire, H.B. 587-FN, 2018 Session (N.H. 2018); New Mexico, S.B. 121, 53rd Leg., 1st Sess. (N.M. 2017); New York, S.1046, 2019 Session (N.Y. 2019); Oregon, H.B 2307, 78th Leg. 2015 Sess. (Oregon 2015); Rhode Island, H. 5277 2017 Leg. Sess. (R.I. 2017); Vermont, S.132 2015-16 Leg. Sess. (Vermont 2016); Washington, H.B. 2753, 65th Leg., 2018 Regular Session (Wash. 2018).

[2] Pima County, AZ; Denver, CO; Bay Harbor Islands, FL; Boca Raton, FL; Broward County, FL; Boynton Beach, FL; Delray Beach, FL; El Portal, FL; Gainesville, FL; Greenacres, FL; Key West, FL; Lake Worth, FL; Miami, FL; Miami Beach, FL; North Bay Village, FL; Oakland Park, FL; Palm Beach County, FL; Riviera Beach, FL; Tampa, FL; Wellington, FL; West Palm Beach, FL; Wilton Manors, FL; Albany, NY; Albany County, NY; Erie County, NY; New York City, NY; Rochester, NY; Ulster County, NY; Westchester County, NY; Athens, OH; Cincinnati, OH; Columbus, OH; Dayton, OH; Lakewood, OH; Toledo, OH; Allentown, PA;

Those statutes and ordinances are based on the abrogated decisions in *King* and *Pickup* that the content-based speech restrictions need not satisfy strict scrutiny because they regulate "professional" speech. In the case of Nevada, the legislature specifically cited to both lower court decisions as support for the bill.

> This bill is modeled on similar laws enacted in California and New Jersey. (Cal. Bus. & Prof. Code §§ 865 et seq.; N.J. Stat. Ann. §§ 45:1-54 et seq.).... [C]ourts have ... held that the laws: (1) are a constitutional exercise of the legislative power to regulate licensed health care professionals for the benefit of the public's health, safety and welfare and to protect the well-being of children from ineffective or harmful professional services; (2) do not violate any rights to freedom of speech, association or

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Bellefonte, PA; Bethlehem, PA; Doylestown, PA; Newtown Township, PA; Philadelphia, PA; Pittsburgh, PA; Reading, PA; State College, PA; Yardley Borough, PA; Cudahy, WI; Eau Claire , WI; Madison, WI; Milwaukee, WI. *See* https://williamsinstitute.law.ucla.edu/wp-content/uploads/Conversion-Therapy-LGBT-Youth-Jan-2018.pdf.

> religion and are not unconstitutionally overbroad or vague under the First and Fourteenth Amendments to the United States Constitution; and (3) do not violate any other fundamental or substantive due process rights of licensed health care professionals or the parents or children who seek their professional services. (*Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), cert. denied, 134 S.Ct. 2871 and 2881 (2014); *Welch v. Brown*, 834 F.3d 1041 (9th Cir. 2016), cert. denied, No. 16-845, --- S.Ct. --- (May 1, 2017); *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014), cert. denied, 135 S.Ct. 2048 (2015).

S.B. 201, 79th Sess. (Nevada 2017), at 1-2. Other states relied upon the assumed constitutionality of provisions in New Jersey's and California's statutes in enacting their statutes.

This Court's explicit abrogation of *Pickup* and *King* in *NIFLA,* 138 S.Ct. at 2371-72 means that the assumption of constitutionality upon which the laws were passed is invalid. As a result, unconstitutional content-based speech restrictions are being imposed not only on counselors and minor clients in California and

New Jersey, but on counselors and minor clients across the United States.

By refusing to recall the mandate, the Ninth Circuit is perpetuating irreparable injury to First Amendment rights that is being suffered all over the nation. The injuries are continuing as fourteen more states have introduced similar bills based upon the abrogated analyses in *King* and *Pickup*. [3] Unless and until the demonstrably wrong analytical framework adopted by the Ninth Circuit is reversed, individuals and organizations across the country will continue to be chilled in their constitutionally protected

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[3] Arizona, S.B. 1047, 54th Leg., 1st Sess. (Ariz. 2019); Colorado, H.B. 19-1129, 72nd Leg., 1st Reg. Sess. (Colo. 2019); Florida, S.B. 84, H.B. 109,2019 Leg. Sess. (Fla. 2019); Idaho, H.B. 52, 65th Leg. 1st Reg. Sess. (Idaho 2019); Indiana, H.B. 1231, S.B. 284, 121st Gen. Assy., 1st Reg. Sess. (Ind. 2019); Iowa, H.F. 106, 88th Sess. (Iowa 2019); Minnesota, S.F. 83, H.F. 12, 91st Leg. Sess. (Minn. 2019); Missouri, H.B. 516, 100th Gen. Assy., 1st Reg. Session (Missouri 2019); Nebraska, L.B. 167, 106th Leg., 1st Sess. (Neb. 2019); Oklahoma, H.B. 2456, 57th Leg., 1st Sess. (Okla. 2019); Pennsylvania S.B. 56, 2019 Leg. Sess. (Penn. 2019); Texas H.B. 517, 86th Leg. (Texas 2019); Virginia, S.B. 1773, 2019 Sess. (Virginia 2019); West Virginia, S.B. 359, 2019 Reg. Sess. (W.V. 2019);

speech under *Pickup*'s now repudiated analysis.

Some of the statutes and ordinances are being challenged based on the *NIFLA* abrogation of *Pickup* and *King*. *See e.g., Doyle v. Hogan,* No. 1:19-cv-190 (D. Maryland filed January 18, 2019); *Vazzo v. City of Tampa,* No. 8:17-cv-2896 (M.D. Fla. filed December 4, 2017);[4] *Otto v. City of Boca Raton and County of Palm Beach, Florida,* No. 9:18-cv-80771 (S.D. Fla. filed June 16, 2018). However, if the *King* mandate is not recalled and the decision reversed, overturning all of the statutes and ordinances would require at least 63 lawsuits. Recalling the mandate and reversing *King* (and *Pickup*) would provide a precedent that would invalidate the statutes and ordinances without having to pursue multi-state litigation that would consume judicial resources and permit protracted losses of precious constitutional

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[4] On January 30, 2019, Magistrate Judge Amanda Arnold Sansone recommended the district court find that a city ordinance which expressly relied upon *King* violates every free speech test, citing to the *NIFLA* Court's abrogation of *King* to support a recommendation that Plaintiffs stated a plausible claim for violation of the First Amendment. *Vazzo v. City of Tampa,* No. 8:17-cv-2896 (M.D. Fla. January 30, 2019) (Report and Recommendation, Dkt. No. 148, at 15-16).

freedoms. This Court should grant review and direct that the mandate be recalled.

III. THIS COURT SHOULD GRANT THE PETITION TO PROVIDE DEFINITIVE GUIDANCE ON WHAT CONSTITUTES EXTRAORDINARY CIRCUMSTANCES SUFFICIENT TO OVERCOME THE INTEREST IN REPOSE ATTACHING TO THE MANDATE OF A COURT OF APPEALS.

In *Calderon* this Court confirmed that courts of appeals have inherent power to recall their mandates "in extraordinary circumstances." 523 U.S. at 549-50. This Court emphasized that "[t]he sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Id.* at 550. However, it has not elucidated what constitutes "extraordinary circumstances" or "grave, unforeseen contingencies" sufficient to activate the power. Without such guidance from this Court, courts of appeal have created an inconsistent patchwork of decisions in response to subsequent changes in law, creating confusion and sometimes, as seen in this case, an infringement of constitutional rights.

The confusion caused by the lack of guidance in defining the "extraordinary circumstances" sufficient to justify recalling the

mandate are reflected in the Second Circuit's discussion in *Sargent:*

> One circumstance that may justify recall of a mandate is "[a] supervening change in governing law that calls into serious question the correctness of the court's judgment."...However, under the strict standards governing the exercise of power to recall a mandate, "an alleged failure to correctly construe and apply the applicable state law does not constitute" by itself a circumstance justifying recall. *Hines v. Royal Indem. Co.*, 253 F.2d 111, 114 (6th Cir.1958). Even where the law governing the disposition of a diversity case is unquestionably at odds with subsequent state court decisions, recall of the mandate is not necessarily justified.
>
> Nevertheless, a variety of factors lead us to conclude that a recall of the mandate is appropriate in this case.

75 F.3d at 90. In other words, a supervening change in governing law might justify recalling

the mandate, but not necessarily, but might when other factors are considered. *Id.*

The Second Circuit acknowledged that an intervening change in law related to a criminal conviction and sentencing created an inequity for the defendant but said "it is not the kind of 'grave, unforeseen contingenc[y]' that makes recall of the mandate appropriate." *Bottone v. United States*, 350 F.3d 59, 64 (2d Cir. 2003) (quoting *Calderon*, 523 U.S. at 550). In other words, being unable to collect attorneys' fees can be a grave unforeseen contingency, but an erroneous criminal conviction is not.

While the Second Circuit found that a subsequent state supreme court decision that changed the governing law rendered their decision demonstrably wrong and justified recall of their mandate, *Sargent,* 75 F.3d at 90, the First Circuit said that a subsequent state supreme court decision that explicitly declared parts of its reasoning erroneous did not render its judgment demonstrably wrong and subject to recall. *Boston & Maine Corp. v. Town of Hampton*, 7 F.3d 281, 283 (1st Cir. 1993).

The lack of definitive guidance from this Court on what constitutes "extraordinary circumstances" sufficient to justify recall of a mandate has left appellate courts hopelessly confused and, in this case, permitted them to simply ignore this Court's explicit abrogation of the panel decision. Meanwhile, Petitioners, their

minor clients and others are subjected to content-based speech prohibitions that are not narrowly tailored to serve compelling state interests. Moreover, other states and municipalities are emboldened to impose similar irreparable injuries on their citizens.

By granting review, this Court can provide the necessary definitive guidance to courts of appeal. This would serve the interests of justice in providing one decision that can resolve a constitutional question that is present in at least 15 other states and nearly 50 cities and counties. This will not only create a uniform standard but will also halt the continuing deprivation of constitutional rights occurring as states continue to replicate the content-based speech provisions enacted in New Jersey and California.

CONCLUSION

The Ninth Circuit abused its discretion when it refused to recall its mandate after this Court abrogated the panel's decision by name in *NIFLA,* 138 S.Ct. 2361, 2371-74 (2018). The refusal to recall the mandate conflicts with decisions in other circuits which recalled mandates when confronted with only effective, not actual, abrogation, and when recall of a mandate was necessary to prevent continuing violations.

This Court should grant review to resolve the conflict and to provide needed guidance on what constitutes extraordinary circumstances sufficient to exercise the right to recall a mandate.

March 21, 2019.

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APPENDIX

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.
No. 12-17681

David H. PICKUP, et. al.
Plaintiffs-Appellants,
v.
EDMUND G. BROWN, JR., Governor of the State of California, in his official capacity; et al.,
Defendants-Appellees,
and
EQUALITY CALIFORNIA,
Intervenor-Defendant-Appellee.

D.C. No.
2:12-cv-02497-KJM-EFB Eastern District of California, Sacramento

ORDER

Before: GRABER, MURGUIA, and CHRISTEN, Circuit Judges.

Plaintiffs-Appellants' Motion to Recall Mandate, Docket Entry No. 140, is DENIED. See Calderon v. Thompson, 523 U.S. 538, 549–50 (1998) (recognizing a court of appeals' inherent power to recall a mandate but, because of the profound importance of repose, limiting the exercise of that power to "extraordinary circumstances"; and reversing

this court's decision to recall a mandate).

FILED NOV 06 2018
MOLLY C. DWYER, CLERK U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.
Nos. 12–17681, 13–15023.

David H. PICKUP; Christopher H. Rosick; Joseph Nicolosi; Robert Vazzo; National Association for Research and Therapy of Homosexuality, a Utah non-profit organization; American Association of Christian Counselors, a Virginia non-profit association; Jack Doe 1, Parent of John Doe 1; Jane Doe 1, Parent of John Doe 1; John Doe 1, a minor, guardian ad litem Jane Doe, guardian ad litem Jack Doe; Jack Doe 2, Parent of John Doe 2; Jane Doe 2, Parent of John Doe 2; John Doe 2, a minor, guardian ad litem Jack Doe, guardian ad litem Jane Doe, Plaintiffs–Appellants,
v.
Edmund G. BROWN, Jr., Governor of the State of California, in his official capacity; Anna M. Caballero, Secretary of the California State and Consumer Services Agency, in her official capacity; Sharon Levine, President of the Medical Board of California, in her official capacity; Kim Madsen, Executive Officer of the California Board of Behavioral Sciences, in her official capacity; Michael Erickson, President of the California Board of Psychology, in his official capacity, Defendants–Appellees,
and

Equality California, Intervenor–Defendant–Appellee.

Donald Welch; Anthony Duk; Aaron Bitzer, Plaintiffs–Appellees,
v.
Edmund G. Brown, Jr., Governor of the State of California, in his official capacity; Anna M. Caballero, Secretary of California State and Consumer Services Agency, in her official capacity; Denise Brown, Case Manager, Director of Consumer Affairs, in her official capacity; Christine Wietlisbach, Patricia Lock Dawson, Samara Ashley, Harry Douglas, Julia Johnson, Sarita Kohli, Renee Lonner, Karen Pines, Christina Wong, in their official capacities as members of the California Board of Behavioral Sciences; Sharon Levine, Michael Bishop, Silvia Diego, Dev Gnanadev, Reginald Low, Denise Pines, Janet Salomonson, Gerrie Schipske, David Serrano Sewell, Barbara Yaroslavsky, in their official capacities as members of the Medical Board of California, Defendants–Appellants.

Argued and Submitted April 17, 2013.
Filed Aug. 29, 2013.
Amended Jan. 29, 2014.

OPINION

GRABER, Circuit Judge:

The California legislature enacted Senate Bill 1172 to ban state-licensed mental health providers from engaging in "sexual orientation change efforts" ("SOCE") with patients under 18 years of age. Two groups of plaintiffs sought to enjoin enforcement of the law, arguing that SB 1172 violates the First Amendment and infringes on several other constitutional rights.

In *Welch v. Brown,* No. 13–15023, the district court ruled that Plaintiffs were likely to succeed on the merits of their First Amendment claim and that the balance of the other preliminary-injunction factors tipped in their favor; thus, the court granted a preliminary injunction. In *Pickup v. Brown,* No. 12–17681, the district court ruled that Plaintiffs were unlikely to succeed on the merits of any of their claims and denied preliminary relief. The losing parties timely appealed. We address both appeals in this opinion.

Although we generally review for abuse of discretion a district court's decision to grant or deny a preliminary injunction, we may undertake plenary review of the issues if a

district court's ruling " 'rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance.' " *Gorbach v. Reno,* 219 F.3d 1087, 1091 (9th Cir.2000) (en banc) (quoting *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists,* 476 U.S. 747, 755–57 (1986)). Because those conditions are met here, we undertake plenary review and hold that SB 1172, as a regulation of professional conduct, does not violate the free speech rights of SOCE practitioners or minor patients, is neither vague nor overbroad, and does not violate parents' fundamental rights. Accordingly, we reverse the order granting preliminary relief in *Welch* and affirm the denial of preliminary relief in *Pickup*.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Sexual Orientation Change Efforts ("SOCE")*

***7** SOCE, sometimes called reparative or conversion therapy, began at a time when the medical and psychological community considered homosexuality an illness. SOCE encompasses a variety of methods, including both aversive and non-aversive treatments, that share the goal of changing an individual's sexual orientation from homosexual to

heterosexual. In the past, aversive treatments included inducing nausea, vomiting, or paralysis; providing electric shocks; or having an individual snap an elastic band around the wrist when aroused by same-sex erotic images or thoughts. Even more drastic methods, such as castration, have been used. Today, some non-aversive treatments use assertiveness and affection training with physical and social reinforcement to increase other-sex sexual behaviors. Other non-aversive treatments attempt "to change gay men's and lesbians' thought patterns by reframing desires, redirecting thoughts, or using hypnosis, with the goal of changing sexual arousal, behavior, and orientation." American Psychological Association, *Appropriate Therapeutic Responses to Sexual Orientation* 22 (2009). The plaintiff mental health providers in these cases use only non-aversive treatments.

In 1973, homosexuality was removed from the Diagnostic and Statistical Manual of Mental Disorders. Shortly thereafter the American Psychological Association declared that homosexuality is not an illness. Other major mental health associations followed suit. Subsequently, many mental health providers began questioning and rejecting the efficacy and appropriateness of SOCE therapy.

Currently, mainstream mental health professional associations support affirmative therapeutic approaches to sexual orientation that focus on coping with the effects of stress and stigma. But a small number of mental health providers continue to practice, and advocate for, SOCE therapy.

B. *Senate Bill 1172*

Senate Bill 1172 defines SOCE as "any practices by mental health providers [’] that seek to change an individual's sexual orientation[1] ... includ[ing] efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex." Cal. Bus. & Prof.Code § 865(b)(1). SOCE, however,

[1] California Business and Professions Code section 865(a) defines "mental health provider" as

> a physician and surgeon specializing in the practice of psychiatry, a psychologist, a psychological assistant, intern, or trainee, a licensed

> marriage and family therapist, a registered marriage and family therapist, intern, or trainee, a licensed educational psychologist, a credentialed school psychologist, a licensed clinical social worker, an associate clinical social worker, a licensed professional clinical counselor, a registered clinical counselor, intern, or trainee, or any other person designated as a mental health professional under California law or regulation.

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. § 865(b)(2). A licensed mental health

provider's use of SOCE on a patient under 18 years of age is "considered unprofessional conduct," which will subject that provider to "discipline by the licensing entity for that mental health provider ." *Id.* § 865.2.

Importantly, SB 1172 does *not* do any of the following:

***8** • Prevent mental health providers from communicating with the public about SOCE

• Prevent mental health providers from expressing their views to patients, whether children or adults, about SOCE, homosexuality, or any other topic

• Prevent mental health providers from recommending SOCE to patients, whether children or adults

• Prevent mental health providers from administering SOCE to any person who is 18 years of age or older

• Prevent mental health providers from referring minors to unlicensed counselors, such as religious leaders

• Prevent unlicensed providers, such as religious leaders, from administering SOCE to children or adults

- Prevent minors from seeking SOCE from mental health providers in other states

Instead, SB 1172 does just one thing: it requires licensed mental health providers in California who wish to engage in "practices ... that seek to change a [minor's] sexual orientation" either to wait until the minor turns 18 or be subject to professional discipline. Thus, SB 1172 regulates the provision of mental treatment, but leaves mental health providers free to discuss or recommend treatment and to express their views on any topic.

The legislature's stated purpose in enacting SB 1172 was to "protect[ ] the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and [to] protect[ ] its minors against exposure to serious harms caused by sexual orientation change efforts." 2012 Cal. Legis. Serv. ch. 835, § 1(n). The legislature relied on the well-documented, prevailing opinion of the medical and psychological community that SOCE has not been shown to be effective and that it creates a potential risk of serious harm to those who experience it. Specifically, the legislature relied on position statements, articles, and reports published by the following

organizations: the American Psychological Association, the American Psychiatric Association, the American School Counselor Association, the American Academy of Pediatrics, the American Medical Association, the National Association of Social Workers, the American Counseling Association, the American Psychoanalytic Association, the American Academy of Child and Adolescent Psychiatry, and the Pan American Health Organization.

In particular, the legislature relied on a report created by a Task Force of the American Psychological Association. That report resulted from a systematic review of the scientific literature on SOCE. Methodological problems with some of the reviewed studies limited the conclusions that the Task Force could draw. Nevertheless, the report concluded that SOCE practitioners have not demonstrated the efficacy of SOCE and that anecdotal reports of harm raise serious concerns about the safety of SOCE.

C. *Procedural History*

Plaintiffs in *Welch* include two SOCE practitioners and an aspiring SOCE

practitioner. Plaintiffs in *Pickup* include SOCE practitioners, organizations that advocate SOCE, children undergoing SOCE, and their parents. All sought a declaratory judgment that SB 1172 is unconstitutional and asked for injunctive relief to prohibit enforcement of the law.[2]

[2] In *Pickup,* Equality California, an advocacy group for gay rights, sought and received intervenor status to defend SB 1172. *Pickup* Plaintiffs argue that the Supreme Court's recent decision in *Hollingsworth v. Perry,* 133 S.Ct. 2652 (2013), means that Equality California does not have standing to defend the statute. We need not resolve that question, however, because the State of California undoubtedly has standing to defend its statute, and "the presence in a suit of even one party with standing suffices to make a claim justiciable." *Brown v. City of Los Angeles,* 521 F.3d 1238, 1240 n.1 (9th Cir.2008) (per curiam).

***9** In *Welch,* Plaintiffs moved for preliminary injunctive relief, arguing that SB 1172 violates their free speech and privacy rights. They also argued that the law violates the religion clauses and is unconstitutionally vague and overbroad under the First Amendment.

The *Welch* court held that SB 1172 is subject to strict scrutiny because it would restrict the content of speech and suppress the expression of particular viewpoints. It reasoned that the fact that the law is a professional regulation does not change the level of scrutiny. The court granted preliminary relief because it determined that the state was unlikely to satisfy strict scrutiny, Plaintiffs would suffer irreparable harm in the absence of an injunction, the balance of the equities tipped in their favor, and the injunction was in the public interest. Because the district court granted relief on their free speech claim, it did not reach Plaintiffs' other constitutional challenges.[3]

[3] The *Welch* Plaintiffs' response brief contains a single paragraph asserting that SB 1172 violates the religion clauses of the First

Amendment. That paragraph, which cites neither the record nor any case, is part of Plaintiffs' argument that SB 1172 is not narrowly tailored to achieve a compelling government purpose, as required by the Free Speech Clause, because it contains no clergy exemption. The religion claim, however, is not "specifically and distinctly argued," as ordinarily required for us to consider an issue on appeal. *Thompson v. Runnels,* 705 F.3d 1089, 1099–1100 (9th Cir.) (internal quotation marks omitted), *cert. denied,* 134 S.Ct. 234 (2013); *see also Maldonado v. Morales,* 556 F.3d 1037, 1048 n.4 (9th Cir.2009) ("Arguments made in passing and inadequately briefed are waived."). Moreover, although the *Welch* Plaintiffs raised the claim in the district court, the court did not rule on it because it granted relief on their free speech claim. In these circumstances, we decline to address the religion claim. The

> district court may do so in the first instance.

In *Pickup,* Plaintiffs moved for preliminary injunctive relief, arguing that SB 1172 violates the First and Fourteenth Amendments by infringing on SOCE practitioners' right to free speech, minors' right to receive information, and parents' right to direct the upbringing of their children. They also argued that SB 1172 is unconstitutionally vague.

The *Pickup* court denied Plaintiffs' motion because it determined that they were unlikely to prevail on the merits of any of their claims. It reasoned that, because the plain text of SB 1172 bars only treatment, but not discussions about treatment, the law regulates primarily conduct rather than speech. Applying the rational basis test, the court ruled that Plaintiffs were unlikely to show a violation of the SOCE practitioners' free speech rights or the minors' right to receive information. As for vagueness, the court ruled that the text of the statute is clear enough to put mental health providers on notice of what is prohibited. Finally, the court ruled that SB 1172 does not implicate parents' right to control the

upbringing of their children because that right does not encompass the right to choose a specific mental health treatment that the state has reasonably deemed harmful to minors.

DISCUSSION

A. Free Speech Rights

At the outset, we must decide whether the First Amendment requires heightened scrutiny of SB 1172. As explained below, we hold that it does not.

The first step in our analysis is to determine whether SB 1172 is a regulation of conduct or speech. "[W]ords can in some circumstances violate laws directed not against speech but against conduct...." *R.A. V. v. City of St. Paul,* 505 U.S. 377, 389 (1992). "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. ("FAIR II"),* 547 U.S. 47, 62 (2006). The

Supreme Court has made clear that First Amendment protection does not apply to conduct that is not "inherently expressive." *Id.* at 66. In identifying whether SB 1172 regulates conduct or speech, two of our cases guide our decision: *National Association for the Advancement of Psychoanalysis v. California Board of Psychology ("NAAP"),* 228 F .3d 1043 (9th Cir.2000), and *Conant v. Walters,* 309 F.3d 629 (9th Cir.2002).

***10** In *NAAP,* 228 F.3d at 1053, psychoanalysts who were not licensed in California brought a First Amendment challenge to California's licensing scheme for mental health providers. The licensing scheme required that persons who provide psychological services to the public for a fee obtain a license, which in turn required particular educational and experiential credentials. *Id.* at 1047. The plaintiffs alleged that the licensing scheme violated their First Amendment right to freedom of speech because the license examination tested only certain psychological theories and required certain training; plaintiffs had studied and trained under different psychoanalytic theories. *Id.* at 1055. We were equivocal about whether, and to what extent, the licensing scheme in *NAAP* implicated any free speech concerns. *Id.* at 1053

("We conclude that, *even if* a speech interest is implicated, California's licensing scheme passes First Amendment scrutiny." (emphasis added)); *id.* at 1056 ("Although some speech interest *may be* implicated, California's content-neutral mental health licensing scheme is a valid exercise of its police power ...." (emphasis added)). We reasoned that prohibitions of conduct have " 'never been deemed an abridgement of freedom of speech ... merely because the conduct was in part initiated, evidenced, or carried out by means of language.' " *See id.* at 1053 (ellipsis in original) (quoting *Giboney v. Empire Storage & Ice Co.,* 336 U .S. 490, 502 (1949)). And, importantly, we specifically rejected the argument that "because psychoanalysis is the 'talking cure,' it deserves special First Amendment protection because it is 'pure speech.' " *Id.* at 1054. We reasoned: "[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.* (internal quotation marks and ellipsis omitted).

Nevertheless, we concluded that the "communication that occurs during psychoanalysis is entitled to constitutional

protection, but it is not immune from regulation." *Id.* But we neither decided how *much* protection that communication should receive nor considered whether the level of protection might vary depending on the function of the communication. Given California's strong interest in regulating mental health, we held that the licensing scheme at issue in *NAAP* was a valid exercise of its police power. *Id.* at 1054–55.

We went on to conclude that, even if the licensing scheme in *NAAP* regulated speech, it did not trigger strict scrutiny because it was both content neutral and viewpoint neutral. *Id.* at 1055. We reasoned that the licensing laws did not "dictate what can be said between psychologists and patients during treatment." *Id.* Further, we observed that those laws were "not adopted because of any disagreement with psychoanalytical theories" but for "the important purpose of protecting public health, safety, and welfare." *Id.* at 1056 (internal quotation marks omitted). We again concluded that the laws were a valid exercise of California's police power. *Id.*

***11** In *Conant,* 309 F.3d at 633–34, we affirmed a district court's order granting a permanent injunction that prevented the federal

government from revoking a doctor's DEA registration or initiating an investigation if he or she recommended medical marijuana. The federal government had adopted a policy that a doctor's "recommendation" of marijuana would lead to revocation of his or her license. *Id.* at 632. But the government was "unable to articulate exactly what speech [the policy] proscribed, describing it only in terms of speech the patient believes to be a recommendation of marijuana." *Id.* at 639. Nevertheless, the demarcation between conduct and speech in *Conant* was clear. The policy prohibited doctors from *prescribing* or *distributing* marijuana, and neither we nor the parties disputed the government's authority to prohibit doctors from *treating* patients with marijuana. *Id.* at 632, 635–36. Further, the parties agreed that "revocation of a license was not authorized where a doctor *merely discussed* the pros and cons of marijuana use." *Id.* at 634 (emphasis added).

We ruled that the policy against merely "recommending" marijuana was both content- and viewpoint-based. *Id.* at 637. It was content-based because it covered only doctor-patient speech "that include[d] discussions of the medical use of marijuana," and it was viewpoint-based because it

"condemn[ed] expression of a particular viewpoint, i.e., that medical marijuana would likely help a specific patient." *Id.* We held that the policy did not withstand heightened First Amendment scrutiny because it lacked "the requisite narrow specificity" and left "doctors and patients no security for free discussion." *Id.* at 639 (internal quotation marks omitted).

We distill the following relevant principles from *NAAP* and *Conant*:(1) doctor-patient communications *about* medical treatment receive substantial First Amendment protection, but the government has more leeway to regulate the conduct necessary to administering treatment itself; (2) psychotherapists are not entitled to special First Amendment protection merely because the mechanism used to deliver mental health treatment is the spoken word; and (3) nevertheless, communication that occurs during psychotherapy does receive *some* constitutional protection, but it is not immune from regulation.

Because those principles, standing alone, do not tell us whether or how the First Amendment applies to the regulation of specific mental health treatments, we must go on to consider more generally the First Amendment rights of

professionals, such as doctors and mental health providers. In determining whether SB 1172 is a regulation of speech or conduct, we find it helpful to view this issue along a continuum.

At one end of the continuum, where a professional is engaged in a public dialogue, First Amendment protection is at its greatest. Thus, for example, a doctor who publicly advocates a treatment that the medical establishment considers outside the mainstream, or even dangerous, is entitled to robust protection under the First Amendment—just as any person is—even though the state has the power to regulate medicine. *See Lowe v. SEC,* 472 U.S. 181, 232 (1985) (White, J., concurring) ("Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that 'Congress shall make no law ... abridging the freedom of speech, or of the press.' ");

Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech,* 2007 U. Ill. L.Rev. 939, 949 (2007) ("When a physician speaks to the public, his opinions cannot be censored and suppressed, even if they are at odds with preponderant opinion within the medical establishment."); *cf. Bailey v. Huggins Diagnostic & Rehab. Ctr., Inc.,* 952 P.2d 768, 773 (Colo.Ct . App.1997) (holding that the First Amendment does not permit a court to hold a dentist liable for statements published in a book or made during a news program, even when those statements are contrary to the opinion of the medical establishment). That principle makes sense because communicating to the *public* on matters of *public concern* lies at the core of First Amendment values. *See, e.g., Snyder v. Phelps,* 131 S.Ct. 1207, 1215 (2011) ("Speech on matters of public concern is at the heart of the First Amendment's protection." (internal quotation markets, brackets, and ellipsis omitted)). Thus, outside the doctor-patient relationship, doctors are constitutionally equivalent to soapbox orators and pamphleteers, and their speech receives robust protection under the First Amendment.

***12** At the midpoint of the continuum, within the confines of a professional relationship, First

Amendment protection of a professional's speech is somewhat diminished. For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 884 (1992), the plurality upheld a requirement that doctors disclose truthful, nonmisleading information to patients about certain risks of abortion:

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, *subject to reasonable licensing and regulation by the State.* We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.[4]

[4] Although the plurality opinion garnered only three votes, four

> additional justices would have upheld the challenged law in its entirety. *Casey,* 505 U.S. at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Thus, there were seven votes to uphold the disclosure requirement.

(Citations omitted; emphasis added.) Outside the professional relationship, such a requirement would almost certainly be considered impermissible compelled speech. *Cf. Wooley v. Maynard,* 430 U.S. 705, 717 (1977) (holding that a state could not require a person to display the state motto on his or her license plate).

Moreover, doctors are routinely held liable for giving negligent medical advice to their patients, without serious suggestion that the First Amendment protects their right to give advice that is not consistent with the accepted standard of care. A doctor "may not counsel a patient to rely on quack medicine. The First Amendment would not prohibit the doctor's loss of license for doing so." *Conant v. McCaffrey,* No. C 97–00139 WHA, 2000 WL 1281174, at

*13 (N.D.Cal. Sept. 7, 2000) (order) (unpublished); *see also Shea v. Bd. of Med. Exam'rs,* 146 Cal.Rptr. 653, 662 (Ct.App.1978) ("The state's obligation and power to protect its citizens by regulation of the professional conduct of its health practitioners is well settled.... [T]he First Amendment ... does not insulate the verbal charlatan from responsibility for his conduct; nor does it impede the State in the proper exercise of its regulatory functions." (citations omitted)); *cf.* Post, 2007 U. Ill. L.Rev. at 949 ("[W]hen a physician speaks to a patient in the course of medical treatment, his opinions are normally regulated on the theory that they are inseparable from the practice of medicine."). And a lawyer may be disciplined for divulging confidences of his client, even though such disclosure is pure speech. *See, e.g., In re Isaacson,* State Bar Court of California, Case No. 08–O–10684, 2012 WL 6589666, at *4–5 (Dec. 6, 2012) (unpublished) (noting prior suspension of bar license for failure to preserve client confidences). Thus, the First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it. And that toleration makes sense: When professionals, by means of their state-issued licenses, form relationships with clients, the

purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate. *Cf. Lowe,* 472 U.S. at 232 (White, J., concurring) ("One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession.").

***13** At the other end of the continuum, and where we conclude that SB 1172 lands, is the regulation of professional *conduct,* where the state's power is great, even though such regulation may have an incidental effect on speech. *See id.* ("Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession."). Most, if not all, medical and mental health treatments require speech, but that fact does not give rise to a First Amendment claim when the state bans a particular treatment. When a drug is banned, for example, a doctor who treats patients with that drug does not have a First Amendment right to speak the words necessary to provide or administer the banned drug. *Cf. Conant,* 309 F.3d at 634–35 (noting the government's authority to ban prescription of marijuana).

Were it otherwise, then any prohibition of a particular medical treatment would raise First Amendment concerns because of its incidental effect on speech. Such an application of the First Amendment would restrict unduly the states' power to regulate licensed professions and would be inconsistent with the principle 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, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney,* 336 U.S. at 502.

Senate Bill 1172 regulates conduct. It bans a form of treatment for minors; it does nothing to prevent licensed therapists from discussing the pros and cons of SOCE with their patients. Senate Bill 1172 merely prohibits licensed mental health providers from engaging in SOCE with minors. It is the limited reach of SB 1172 that distinguishes the present cases from *Conant,* in which the government's policy prohibited speech *wholly apart* from the actual provision of treatment. Pursuant to its police power, California has authority to regulate licensed mental health providers' administration of therapies that the legislature has deemed harmful. Under *Giboney,* 336 U.S. at 502, the fact that speech may be used to

carry out those therapies does not turn the regulation of conduct into a regulation of speech. In fact, the *Welch* Plaintiffs concede that the state has the power to ban aversive types of SOCE. And we reject the position of the *Pickup* Plaintiffs—asserted during oral argument—that even a ban on aversive types of SOCE requires heightened scrutiny because of the incidental effect on speech.[5] Here, unlike in *Conant,* 309 F .3d at 639, the law *allows* discussions about treatment, recommendations to obtain treatment, and expressions of opinions about SOCE and homosexuality.

[5] We do not mean to suggest that any Plaintiff here conducts aversive SOCE therapy. The record shows that Plaintiffs who are licensed mental health providers practice SOCE only through talk therapy. We mention aversive techniques merely to highlight the state's legitimate power to regulate professional conduct.

Plaintiffs contend that *Holder v. Humanitarian Law Project,* 130 S.Ct. 2705 (2010), supports

their position. It does not.

As we have explained, SB 1172 regulates only (1) therapeutic treatment, not expressive speech, by (2) licensed mental health professionals acting within the confines of the counselor-client relationship. The statute does not restrain Plaintiffs from imparting information or disseminating opinions; the regulated activities are therapeutic, not symbolic. And an act that "symbolizes nothing," even if employing language, is not "an act of communication" that transforms conduct into First Amendment speech. *Nev. Comm'n on Ethics v. Carrigan,* 131 S.Ct. 2343, 2350 (2011). Indeed, it is well recognized that a state enjoys considerable latitude to regulate the conduct of its licensed health care professionals in administering treatment. *See, e.g., Gonzales v. Carhart,* 550 U.S. 124, 157 (2007) ("Under our precedents it is clear the State has a significant role to play in regulating the medical profession.").

***14** In sharp contrast, *Humanitarian Law Project* pertains to a different issue entirely: the regulation of (1) political speech (2) by ordinary citizens. The plaintiffs there sought to communicate information about international law and advocacy to a designated terrorist

organization. The federal statute at issue barred them from doing so, because it considered the plaintiffs' expression to be material support to terrorists. As the Supreme Court held, the material support statute triggered rigorous First Amendment review because, even if that statute "*generally* functions as a regulation of conduct ... as applied to plaintiffs the conduct triggering coverage under the statute consists of *communicating a message*." *Humanitarian Law Project,* 130 S.Ct. at 2724 (second emphasis added).[6] Again, SB 1172 does not prohibit Plaintiffs from "communicating a message." *Id.* It is a state regulation governing the conduct of state-licensed professionals, and it does not pertain to communication in the public sphere. Plaintiffs may express their views to anyone, including minor patients and their parents, about any subject, including SOCE, insofar as SB 1172 is concerned. The *only* thing that a licensed professional cannot do is avoid professional discipline for *practicing* SOCE on a minor patient.

[6] We also note that Plaintiffs here bring a facial, not an as-applied, challenge to SB 1172.

This case is more akin to *FAIR II*. There, the Supreme Court emphasized that it "extended First Amendment protection only to conduct that is *inherently expressive*." 547 U.S. at 66 (emphasis added). The Court upheld the Solomon Amendment, which conditioned federal funding for institutions of higher education on their offering military recruiters the same access to campus and students that they provided to nonmilitary recruiters. The Court held that the statute did not implicate First Amendment scrutiny, even as applied to law schools seeking to express disagreement with military policy by limiting military recruiters' access, reasoning that the law schools' "actions were expressive only because the law schools accompanied their conduct with speech explaining it." *Id* . at 51, 66. Like the conduct at issue in *FAIR II,* the administration of psychotherapy is not "inherently expressive." Nor does SB 1172 prohibit any speech, either in favor of or in opposition to SOCE, that might accompany mental health treatment. Because SB 1172 regulates a professional practice that is not inherently expressive, it does not implicate the First Amendment.

We further conclude that the First Amendment does not prevent a state from regulating

treatment even when that treatment is performed through speech alone. As we have already held in *NAAP,* talk therapy does not receive special First Amendment protection merely because it is administered through speech. 228 F.3d at 1054. That holding rested on the understanding of talk therapy as "the *treatment* of emotional suffering and depression, *not* speech." *Id.* (internal quotation marks omitted) (first emphasis added). Thus, under *NAAP,* to the extent that talk therapy implicates speech, it stands on the same First Amendment footing as other forms of medical or mental health treatment. Senate Bill 1172 is subject to deferential review just as are other regulations of the practice of medicine.

***15** Our conclusion is consistent with *NAAP's* statement that "communication that occurs during psychoanalysis is entitled to constitutional protection, but it is not immune from regulation." *Id.* Certainly, under *Conant,* content-or viewpoint-based regulation of communication *about* treatment must be closely scrutinized. But a regulation of only *treatment itself*—whether physical medicine or mental health treatment—implicates free speech interests only incidentally, if at all. To read *NAAP* otherwise would contradict its holding that talk therapy is not entitled to

"special First Amendment protection," and it would, in fact, make talk therapy virtually "immune from regulation." *Id.*

Nor does *NAAP's* discussion of content and viewpoint discrimination change our conclusion. There, we used both a belt and suspenders. In addition to holding that the licensing scheme at issue was a permissible regulation of conduct, we reasoned that *even if* California's licensing requirements implicated First Amendment interests, the requirements did not discriminate on the basis of content or viewpoint. *Id.* at 1053, 1055–56. But here, SB 1172 regulates only treatment, and nothing in *NAAP* requires us to analyze a regulation of treatment in terms of content and viewpoint discrimination.[7]

[7] We acknowledge that Plaintiffs ask us to apply strict scrutiny, but they have not cited any case in which a court has applied strict scrutiny to the regulation of a medical or mental health treatment. Nor are we aware of any.

Because SB 1172 regulates only treatment, while leaving mental health providers free to discuss and recommend, or recommend against, SOCE, we conclude that any effect it may have on free speech interests is merely incidental. Therefore, we hold that SB 1172 is subject to only rational basis review and must be upheld if it bears a rational relationship to a legitimate state interest. *See Casey,* 505 U.S. at 884, 967–68 (a plurality of three justices, plus four additional justices concurring in part and dissenting in part, applied a reasonableness standard to the regulation of medicine where speech may be implicated incidentally).

According to the statute, SB 1172 advances California's 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." 2012 Cal. Legis. Serv. ch. 835, § 1(n). Without a doubt, protecting the well-being of minors is a legitimate state interest. And we need not decide whether SOCE actually causes "serious harms"; it is enough that it could "reasonably be conceived to be true by the governmental decisionmaker." *NAAP,* 228 F.3d at 1050 (internal quotation marks omitted).

The record demonstrates that the legislature acted rationally when it decided to protect the well-being of minors by prohibiting mental health providers from using SOCE on persons under 18.[8] The legislature relied on the report of the Task Force of the American Psychological Association, which concluded that SOCE has not been demonstrated to be effective and that there have been anecdotal reports of harm, including depression, suicidal thoughts or actions, and substance abuse. The legislature also relied on the opinions of many other professional organizations. Each of those organizations opposed the use of SOCE, concluding, among other things, that homosexuality is not an illness and does not require treatment (American School Counselor Association), SOCE therapy can provoke guilt and anxiety (American Academy of Pediatrics), it may be harmful (National Association of Social Workers), and it may contribute to an enduring sense of stigma and self-criticism (American Psychoanalytic Association). Although the legislature also had before it some evidence that SOCE is safe and effective, the overwhelming consensus was that SOCE was harmful and ineffective. On this record, we have no trouble concluding that the legislature acted rationally by relying on that consensus.

[8] We need not and do not decide whether the legislature would have acted rationally had it banned SOCE for adults. One could argue that children under the age of 18 are especially vulnerable with respect to sexual identity and that their parents' judgment may be clouded by this emotionally charged issue as well. The considerations with respect to adults may be different.

***16** Plaintiffs argue that the legislature acted irrationally when it banned SOCE for minors because there is a lack of scientifically credible proof of harm. But, under rational basis review, "[w]e ask only whether there are plausible reasons for [the legislature's] action, and if there are, our inquiry is at an end." *Romero–Ochoa v. Holder,* 712 F.3d 1328, 1331 (9th Cir.2013) (internal quotation marks omitted).

Therefore, we hold that SB 1172 is rationally related to the legitimate government interest of

protecting the well-being of minors.[9]

[9] The foregoing discussion relates as well to the *Pickup* Plaintiffs' claim that SB 1172 violates minors' right to receive information. *See Monteiro v. Tempe Union High Sch. Dist.*, 158 F .3d 1022, 1027 n.5 (9th Cir.1998) (recognizing the "well-established rule that the right to receive information is an inherent corollary of the rights of free speech and press").

B. *Expressive Association*

We also reject the *Pickup* Plaintiffs' argument that SB 1172 implicates their right to freedom of association because the First Amendment protects their "choices to enter into and maintain the intimate human relationships between counselors and clients."[10]

[10] The *Pickup* Plaintiffs arguably

> waived their expressive association argument by not raising it in the district court. But "the rule of waiver is a discretionary one." *Ruiz v. Affinity Logistics Corp.,* 667 F.3d 1318, 1322 (9th Cir.2012) (internal quotation marks omitted). We have discretion to address an argument that otherwise would be waived "when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." *Id.* (internal quotation marks omitted). Whether SB 1172 violates the right to expressive association is such an issue, and we exercise our discretion to address it.

First, SB 1172 does not prevent mental health providers and clients from entering into and maintaining therapeutic relationships. It prohibits only "practices ... that seek to change [a minor] individual's sexual orientation." Cal.

Bus. & Prof.Code § 865(b)(1). Therapists are free, but not obligated, to provide therapeutic services, as long as they do not "seek to change [the] sexual orientation" of minor clients.

Moreover, the therapist-client relationship is not the type of relationship that the freedom of association has been held to protect. The Supreme Court's decisions "have referred to constitutionally protected 'freedom of association' in two distinct senses." *Roberts v. U.S. Jaycees,* 468 U.S. 609, 617 (1984). The first type of protected association concerns "intimate human relationships," which are implicated in personal decisions about marriage, childbirth, raising children, cohabiting with relatives, and the like. *Id.* at 617–19. That type of freedom of association "receives protection as a fundamental element of personal liberty." *Id.* at 618. The second type protects association "for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id.* at 618. Plaintiffs in *Pickup* claim an infringement of only the first type of freedom of association.

Although we have not specifically addressed the therapist-client relationship in terms of

freedom of association, we have explained why the therapist-client relationship is not protected by the Due Process Clause of the Fourteenth Amendment: "The relationship between a client and psychoanalyst lasts only as long as the client is willing to pay the fee. Even if analysts and clients meet regularly and clients reveal secrets and emotional thoughts to their analysts, these relationships simply do not rise to the level of a fundamental right." *NAAP,* 228 F.3d at 1050 (internal quotation marks and citation omitted). Because the type of associational protection that the *Pickup* Plaintiffs claim is rooted in "personal liberty," *U.S. Jaycees,* 468 U.S. at 618, and because we have already determined that the therapistclient relationship does not "implicate the fundamental rights associated with ... close-knit relationships," *NAAP,* 228 F.3d at 1050, we conclude that the freedom of association also does not encompass the therapist-client relationship.

C. *Vagueness*

***17** We next hold that SB 1172 is not void for vagueness.

"It is a basic principle of due process that an

enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). Nevertheless, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism,* 491 U.S. 781, 794 (1989). "[U]ncertainty at a statute's margins will not warrant facial invalidation if it is clear what the statute proscribes 'in the vast majority of its intended applications.' " *Cal. Teachers Ass'n v. State Bd. of Educ.,* 271 F.3d 1141, 1151 (9th Cir.2001) (quoting *Hill v. Colorado,* 530 U.S. 703, 733 (2000)). "A defendant is deemed to have fair notice of an offense if a reasonable person of ordinary intelligence would understand that his or her conduct is prohibited by the law in question." *United States v. Weitzenhoff,* 35 F.3d 1275, 1289 (9th Cir.1994) (internal quotation marks omitted). But, "if the 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 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." *Id.* (internal quotation marks omitted).

Although the *Pickup* Plaintiffs argue that they cannot ascertain where the line is between what is prohibited and what is permitted—for example, they wonder whether the mere dissemination of information about SOCE would subject them to discipline—the text of SB 1172 is clear to a reasonable person. Discipline attaches only to "practices" that "seek to change" a minor "patient ['s]" sexual orientation. Cal. Bus. & Prof.Code §§865–865.1. A reasonable person would understand the statute to regulate only mental health treatment, including psychotherapy, that aims to alter a minor patient's sexual orientation. Although Plaintiffs present various hypothetical situations to support their vagueness challenge, the Supreme Court has held that "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Hill,* 530 U.S. at 733 (internal quotation marks omitted).

Moreover, considering that SB 1172 regulates licensed mental health providers, who constitute "a select group of persons having specialized knowledge," the standard for clarity is lower. *Weitzenhoff,* 35 F.3d at 1289. Indeed,

it is hard to understand how therapists who identify themselves as SOCE practitioners can credibly argue that they do not understand what practices qualify as SOCE.

Neither is the term "sexual orientation" vague. Its meaning is clear enough to a reasonable person and should be even more apparent to mental health providers. In fact, several provisions in the California Code—though not SB 1172 itself—provide a simple definition: "heterosexuality, homosexuality, or bisexuality." Cal. Educ.Code §§ 212.6, 66262.7;Cal. Gov't Code § 12926®; Cal.Penal Code §§ 422.56(h), 11410(b)(7). Moreover, courts have repeatedly rejected vagueness challenges that rest on the term "sexual orientation." *E.g., United States v. Jenkins,* 909 F.Supp.2d 758, 778–79 (E.D.Ky.2012); *Hyman v. City of Louisville,* 132 F.Supp.2d 528, 546 (W.D.Ky.2001), *vacated on other grounds,* 53 F. App'x 740 (6th Cir.2002) (unpublished).

D. *Overbreadth*

***18** We further hold that SB 1172 is not overbroad.[11]

[11] Intervenor Equality California

> argues that the *Pickup* Plaintiffs waived their overbreadth challenge by failing to raise it adequately in the district court. Although they did not argue overbreadth with specificity, they did allege it in their complaint and in their memorandum in support of preliminary injunctive relief. Moreover, whether the statute is overbroad is a question of law that "does not depend on the factual record developed below." *Ruiz,* 667 F.3d at 1322. Therefore, we exercise our discretion to address Plaintiffs' overbreadth challenge.

Overbreadth doctrine permits the facial invalidation of laws that prohibit "a substantial amount of constitutionally protected speech ." *City of Houston v. Hill,* 482 U.S. 451, 466 (1987). "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 800 (1984). Rather, "particularly where conduct

and not merely speech is involved, ... the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973).

Senate Bill 1172's plainly legitimate sweep includes SOCE techniques such as inducing vomiting or paralysis, administering electric shocks, and performing castrations. And, as explained above, it also includes SOCE techniques carried out solely through words. As with any regulation of a particular medical or mental health treatment, there may be an incidental effect on speech. Any incidental effect, however, is small in comparison with the "plainly legitimate sweep" of the law. *Broadrick,* 413 U.S. at 615.

Thus, SB 1172 is not overbroad.

E. *Parents' Fundamental Rights*

The *Pickup* Plaintiffs also argue that SB 1172 infringes on their fundamental parental right to make important medical decisions for their children. The state does not dispute that parents have a fundamental right to raise their

children as they see fit, but argues that Plaintiffs "cannot compel the State to permit licensed mental health [professionals] to engage in unsafe practices, and cannot dictate the prevailing standard of care in California based on their own views." Because Plaintiffs argue for an affirmative right to access SOCE therapy from licensed mental health providers, the precise question at issue is whether parents' fundamental rights include the right to choose for their children a particular type of provider for a particular medical or mental health treatment that the state has deemed harmful. *See Washington v. Glucksberg,* 521 U.S. 702, 720–21 (1997) (holding that courts should precisely define purported substantive due process rights to direct and restrain exposition of the Due Process Clause).

Parents have a constitutionally protected right to make decisions regarding the care, custody, and control of their children, but that right is "not without limitations." *Fields v. Palmdale Sch. Dist.,* 427 F.3d 1197, 1204 (9th Cir.2005). States may require school attendance and mandatory school uniforms, and they may impose curfew laws applicable only to minors. *See id.* at 1204–05 (collecting cases demonstrating the "wide variety of state actions that intrude upon the liberty interest of

parents in controlling the upbringing and education of their children"). In the health arena, states may require the compulsory vaccination of children (subject to some exceptions), *see Prince v. Massachusetts,* 321 U.S. 158, 166 (1944), and states may intervene when a parent refuses necessary medical care for a child, *see Jehovah's Witnesses v. King Cnty. Hosp.,* 278 F.Supp. 488, 504 (W.D.Wash.1967) (three judge panel) (per curiam), *aff'd,* 390 U.S. 598 (1968) (per curiam). "[A] state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." *Parham v. J.R.,* 442 U.S. 584, 603 (1979).

***19** We are unaware of any case that specifically addresses whether a parent's fundamental rights encompass the right to choose for a child a particular type of provider for a particular treatment that the state has deemed harmful, but courts that have considered whether patients have the right to choose specific treatments for *themselves* have concluded that they do not. For example, we have held that "substantive due process rights do not extend to the choice of type of treatment or of a particular health care provider." *NAAP,* 228 F.3d at 1050. Thus, we concluded that

"there is no fundamental right to choose a mental health professional with specific training." *Id.* The Seventh Circuit has also 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." *Mitchell v. Clayton,* 995 F.2d 772, 775 (7th Cir.1993). Moreover, courts have held that there is no substantive due process right to obtain drugs that the FDA has not approved, *Carnohan v. United States,* 616 F.2d 1120, 1122 (9th Cir.1980) (per curiam), even when those drugs are sought by terminally ill cancer patients, *see Rutherford v. United States,* 616 F.2d 455, 457 (10th Cir.1980) ("It is apparent in the context with which we are here concerned that the decision by the patient whether to have a treatment or not is a protected right, but his selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health ."). Those cases cut against recognizing the right that Plaintiffs assert; it would be odd if parents had a substantive due process right to choose specific treatments for their children—treatments that reasonably have been deemed harmful by the state—but not for themselves. It would be all the more anomalous

because the Supreme Court has recognized that the state has greater power over children than over adults. *Prince,* 321 U.S. at 170 (stating that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults").

Further, our decision in *Fields* counsels against recognizing the right that Plaintiffs assert. In that case, parents of school children argued that a school violated their parental rights when it administered to students a survey that contained several questions about sex. *Fields,* 427 F.3d at 1203. We rejected that argument, holding that, although parents have the right to inform their children about sex when and as they choose, they do not have the right to "compel public schools to follow their own idiosyncratic views as to what information the schools may dispense." *Id.* at 1206. Similarly, here, to recognize the right Plaintiffs assert would be to compel the California legislature, in shaping its regulation of mental health providers, to accept Plaintiffs' personal views of what therapy is safe and effective for minors. The aforementioned cases lead us to conclude that the fundamental rights of parents do not include the right to choose a specific type of provider for a specific medical or mental health treatment that the state has reasonably

deemed harmful.

***20** Therefore, SB 1172 does not infringe on the fundamental rights of parents.

CONCLUSION

Senate Bill 1172 survives the constitutional challenges presented here. Accordingly, the order granting preliminary relief in *Welch,* No. 13–15023, is **REVERSED,** and the order denying preliminary relief in *Pickup,* No. 12–17681, is **AFFIRMED.** We remand both cases for further proceedings consistent with this opinion.

2013 WL 4564249

United States Court of Appeals,
Ninth Circuit.

David H. PICKUP; Christopher H. Rosick; Joseph Nicolosi; Robert Vazzo; National Association for Research and Therapy of Homosexuality, a Utah non-profit organization; American Association of Christian Counselors, a Virginia non-profit association; Jack Doe 1, Parent of John Doe 1; Jane Doe 1, Parent of John Doe 1; John Doe 1, a minor, guardian ad litem Jane Doe, guardian ad litem Jack Doe; Jack Doe 2, Parent of John Doe 2; Jane Doe 2, Parent of John Doe 2; John Doe 2, a minor, guardian ad litem Jack Doe, guardian ad litem Jane Doe, Plaintiffs–Appellants,
v.
Edmund G. BROWN, Jr., Governor of the State of California, in his official capacity; Anna M. Caballero, Secretary of the California State and Consumer Services Agency, in her official capacity; Sharon Levine, President of the Medical Board of California, in her official capacity; Kim Madsen, Executive Officer of the California Board of Behavioral Sciences, in her official capacity; Michael Erickson, President of the California Board of Psychology, in his official capacity, Defendants–Appellees,

and
Equality California,
Intervenor–Defendant–Appellee.

Donald Welch; Anthony Duk; Aaron Bitzer, Plaintiffs–Appellees,
v.
Edmund G. Brown, Jr., Governor of the State of California, in his official capacity; Anna M. Caballero, Secretary of California State and Consumer Services Agency, in her official capacity; Denise Brown, Case Manager, Director of Consumer Affairs, in her official capacity; Christine Wietlisbach, Patricia Lockdawson, Samara Ashley, Harry Douglas, Julia Johnson, Sarita Kohli, Renee Lonner, Karen Pines, Christina Wong, in their official capacities as members of the California Board of Behavioral Sciences; Sharon Levine, Michael Bishop, Silvia Diego, Dev Gnanadev, Reginald Low, Denise Pines, Janet Salomonson, Gerrie Schipske, David Serrano Sewell, Barbara Yaroslavsky, in their official capacities as members of the Medical Board of California, Defendants–Appellants.
No. 12–17681, 13–15023. | Argued and Submitted April 17, 2013. | Filed Aug. 29, 2013.

Synopsis

Background: Mental health providers that offered sexual orientation change efforts (SOCE) therapy, organizations that advocated SOCE therapy, and children undergoing SOCE therapy and their parents brought action challenging the constitutionality of state law prohibiting licensed mental health providers from providing SOCE therapy to children under 18 on grounds the statute violated First Amendment free speech, privacy, and religious protections, and was unconstitutionally vague and overbroad. The United States District Court for the Eastern District of California, 2012 WL 6021465, Kimberly J. Mueller, J., denied a request for a preliminary injunction. The United States District Court for the Eastern District of California, 907 F.Supp.2d 1102, William B. Shubb, Senior District Judge, granted a request for a preliminary injunction.

Holdings: In a consolidated appeal, the Court of Appeals, Graber, Circuit Judge, held that:

[1] the prohibition of SOCE therapy on children under 18 was subject to rational basis review;

[2] the prohibition of SOCE therapy on children under 18 was rationally related to government interest in protecting well-being of minors;

[3] the therapist-client relationship is not a protected intimate human relationship;

[4] the prohibition of SOCE therapy on children under 18 was not facially void for vagueness;

[5] the prohibition of SOCE therapy on children under 18 was not constitutionally overbroad; and

[6] in a matter of first impression, parents do not have a fundamental right to chose for children medical or mental health treatment that the state has deemed harmful.

Denial of preliminary injunction affirmed and grant of preliminary injunction reversed.

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Appeal from the United States District Court for the Eastern District of California, Kimberly J. Mueller, District Judge, Presiding. D.C. No. 2:12–CV–02497–KJM–EFB.

Appeal from the United States District Court for the Eastern District of California, William B. Shubb, Senior District Judge, Presiding. D.C. No. 2:12–CV–02484–WBS–KJN.

Before: ALEX KOZINSKI, Chief Judge, and SUSAN P. GRABER, and MORGAN CHRISTEN, Circuit Judges.

OPINION

GRABER, Circuit Judge:

***1** The California legislature enacted Senate Bill 1172 to ban state-licensed mental health providers from engaging in "sexual orientation change efforts" ("SOCE") with patients under 18 years of age. Two groups of plaintiffs sought to enjoin enforcement of the law, arguing that SB 1172 violates the First Amendment and

infringes on several other constitutional rights.

In *Welch v. Brown,* No. 13–15023, the district court ruled that Plaintiffs were likely to succeed on the merits of their First Amendment claim and that the balance of the other preliminary-injunction factors tipped in their favor; thus, the court granted a preliminary injunction. In *Pickup v. Brown,* No. 12–17681, the district court ruled that Plaintiffs were unlikely to succeed on the merits of any of their claims and denied preliminary relief. The losing parties timely appealed. We address both appeals in this opinion.

Although we generally review for abuse of discretion a district court's decision to grant or deny a preliminary injunction, we may undertake plenary review of the issues if a district court's ruling " 'rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance.' " *Gorbach v. Reno,* 219 F.3d 1087, 1091 (9th Cir.2000) (en banc) (quoting *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists,* 476 U.S. 747, 755–57, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986)). Because those conditions are met here, we undertake plenary review and hold that SB 1172, as a regulation of professional conduct, does not violate the free

speech rights of SOCE practitioners or minor patients, is neither vague nor overbroad, and does not violate parents' fundamental rights. Accordingly, we reverse the order granting preliminary relief in *Welch* and affirm the denial of preliminary relief in *Pickup*.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Sexual Orientation Change Efforts ("SOCE")*

SOCE, sometimes called reparative or conversion therapy, began at a time when the medical and psychological community considered homosexuality an illness. SOCE encompasses a variety of methods, including both aversive and non-aversive treatments, that share the goal of changing an individual's sexual orientation from homosexual to heterosexual. In the past, aversive treatments included inducing nausea, vomiting, or paralysis; providing electric shocks; or having an individual snap an elastic band around the wrist when aroused by same-sex erotic images or thoughts. Even more drastic methods, such as castration, have been used. Today, some non-aversive treatments use assertiveness and affection training with physical and social

reinforcement to increase other-sex sexual behaviors. Other non-aversive treatments attempt "to change gay men's and lesbians' thought patterns by reframing desires, redirecting thoughts, or using hypnosis, with the goal of changing sexual arousal, behavior, and orientation." American Psychological Association, *Appropriate Therapeutic Responses to Sexual Orientation* 22 (2009). The plaintiff mental health providers in these cases use only non-aversive treatments.

***2** In 1973, homosexuality was removed from the Diagnostic and Statistical Manual of Mental Disorders. Shortly thereafter the American Psychological Association declared that homosexuality is not an illness. Other major mental health associations followed suit. Subsequently, many mental health providers began questioning and rejecting the efficacy and appropriateness of SOCE therapy. Currently, mainstream mental health professional associations support affirmative therapeutic approaches to sexual orientation that focus on coping with the effects of stress and stigma. But a small number of mental health providers continue to practice, and advocate for, SOCE therapy.

B. *Senate Bill 1172*

Senate Bill 1172 defines SOCE as "any practices by mental health providers[[1] that seek to change an individual's sexual orientation [,] ... includ[ing] efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex." Cal. Bus. & Prof.Code § 865(b)(1). SOCE, however, 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. § 865(b)(2). A licensed mental health provider's use of SOCE on a patient under 18 years of age is "considered unprofessional conduct," which will subject that provider to "discipline by the licensing entity for that mental health provider." *Id.* § 865.2.

Importantly, SB 1172 does *not* do any of the following:
• Prevent mental health providers from communicating with the public about SOCE

- Prevent mental health providers from expressing their views to patients, whether children or adults, about SOCE, homosexuality, or any other topic
- Prevent mental health providers from recommending SOCE to patients, whether children or adults
- Prevent mental health providers from administering SOCE to any person who is 18 years of age or older
- Prevent mental health providers from referring minors to unlicensed counselors, such as religious leaders
- Prevent unlicensed providers, such as religious leaders, from administering SOCE to children or adults
- Prevent minors from seeking SOCE from mental health providers in other states

Instead, SB 1172 does just one thing: it requires licensed mental health providers in California who wish to engage in "practices ... that seek to change a [minor's] sexual orientation" either to wait until the minor turns 18 or be subject to professional discipline. Thus, SB 1172 regulates the provision of medical treatment, but leaves mental health providers free to discuss or recommend treatment and to express their views on any topic.

***3** The legislature's stated purpose in enacting SB 1172 was to "protect [ ] the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and [to] protect[ ] its minors against exposure to serious harms caused by sexual orientation change efforts." 2012 Cal. Legis. Serv. ch. 835, § 1(n). The legislature relied on the well documented, prevailing opinion of the medical and psychological community that SOCE has not been shown to be effective and that it creates a potential risk of serious harm to those who experience it. Specifically, the legislature relied on position statements, articles, and reports published by the following organizations: the American Psychological Association, the American Psychiatric Association, the American School Counselor Association, the American Academy of Pediatrics, the American Medical Association, the National Association of Social Workers, the American Counseling Association, the American Psychoanalytic Association, the American Academy of Child and Adolescent Psychiatry, and the Pan American Health Organization.

In particular, the legislature relied on a report created by a Task Force of the American

Psychological Association. That report resulted from a systematic review of the scientific literature on SOCE. Methodological problems with some of the reviewed studies limited the conclusions that the Task Force could draw. Nevertheless, the report concluded that SOCE practitioners have not demonstrated the efficacy of SOCE and that anecdotal reports of harm raise serious concerns about the safety of SOCE.

C. *Procedural History*

Plaintiffs in *Welch* include two SOCE practitioners and an aspiring SOCE practitioner. Plaintiffs in *Pickup* include SOCE practitioners, organizations that advocate SOCE, children undergoing SOCE, and their parents. All sought a declaratory judgment that SB 1172 is unconstitutional and asked for injunctive relief to prohibit enforcement of the law.[2]

In *Welch,* Plaintiffs moved for preliminary injunctive relief, arguing that SB 1172 violates their free speech and privacy rights. They also argued that the law violates the religion clauses and is unconstitutionally vague and overbroad under the First Amendment.

The *Welch* court held that SB 1172 is subject to strict scrutiny because it would restrict the content of speech and suppress the expression of particular viewpoints. It reasoned that the fact that the law is a professional regulation does not change the level of scrutiny. The court granted preliminary relief because it determined that the state was unlikely to satisfy strict scrutiny, Plaintiffs would suffer irreparable harm in the absence of an injunction, the balance of the equities tipped in their favor, and the injunction was in the public interest. Because the district court granted relief on their free speech claim, it did not reach Plaintiffs' other constitutional challenges.[3]

***4** In *Pickup,* Plaintiffs moved for preliminary injunctive relief, arguing that SB 1172 violates the First and Fourteenth Amendments by infringing on SOCE practitioners' right to free speech, minors' right to receive information, and parents' right to direct the upbringing of their children. They also argued that SB 1172 is unconstitutionally vague.

The *Pickup* court denied Plaintiffs' motion because it determined that they were unlikely to prevail on the merits of any of their claims.

It reasoned that, because the plain text of SB 1172 bars only treatment, but not discussions about treatment, the law regulates primarily conduct rather than speech. Applying the rational basis test, the court ruled that Plaintiffs were unlikely to show a violation of the SOCE practitioners' free speech rights or the minors' right to receive information. As for vagueness, the court ruled that the text of the statute is clear enough to put mental health providers on notice of what is prohibited. Finally, the court ruled that SB 1172 does not implicate parents' right to control the upbringing of their children because that right does not encompass the right to choose a specific mental health treatment that the state has reasonably deemed harmful to minors.

DISCUSSION

A. *Free Speech Rights*

At the outset, we must decide whether the First Amendment requires heightened scrutiny of SB 1172. As explained below, we hold that it does not.

The first step in our analysis is to determine whether SB 1172 is a regulation of conduct or speech. Two of our cases guide our decision:

National Association for the Advancement of Psychoanalysis v. California Board of Psychology, 228 F.3d 1043 (9th Cir.2000) ("*NAAP* "), and *Conant v. Walters,* 309 F.3d 629 (9th Cir.2002).

In *NAAP,* 228 F.3d at 1053, psychoanalysts who were not licensed in California brought a First Amendment challenge to California's licensing scheme for mental health providers. The licensing scheme required that persons who provide psychological services to the public for a fee obtain a license, which in turn required particular educational and experiential credentials. *Id.* at 1047. The plaintiffs alleged that the licensing scheme violated their First Amendment right to freedom of speech because the license examination tested only certain psychological theories and required certain training; plaintiffs had studied and trained under different psychoanalytic theories. *Id.* at 1055. We were equivocal about whether, and to what extent, the licensing scheme in *NAAP* implicated any free speech concerns. *Id.* at 1053 ("We conclude that, *even if* a speech interest is implicated, California's licensing scheme passes First Amendment scrutiny." (emphasis added)); *id.* at 1056 ("Although some speech interest *may be* implicated, California's content-neutral

mental health licensing scheme is a valid exercise of its police power....” (emphasis added)). We reasoned that prohibitions of conduct have “ ‘never been deemed an abridgement of freedom of speech ... merely because the conduct was in part initiated, evidenced, or carried out by means of language.’ ” *See id.* at 1053 (ellipsis in original) (quoting *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 502, 69 S.Ct. 684, 93 L.Ed. 834 (1949)). And, importantly, we specifically rejected the argument that “because psychoanalysis is the ‘talking cure,’ it deserves special First Amendment protection because it is ‘pure speech.’ ” *Id.* at 1054. We reasoned: “[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.* (internal quotation marks and ellipsis omitted).

***5** Nevertheless, we concluded that the “communication that occurs during psychoanalysis is entitled to constitutional protection, but it is not immune from regulation.” *Id.* But we neither decided how *much* protection that communication should receive nor considered whether the level of

protection might vary depending on the function of the communication. Given California's strong interest in regulating mental health, we held that the licensing scheme at issue in *NAAP* was a valid exercise of its police power. *Id.* at 1054–55.

We went on to conclude that, even if the licensing scheme in *NAAP* regulated speech, it did not trigger strict scrutiny because it was both content neutral and viewpoint neutral. *Id.* at 1055. We reasoned that the licensing laws did not "dictate what can be said between psychologists and patients during treatment." *Id.* Further, we observed that those laws were "not adopted because of any disagreement with psychoanalytical theories" but for "the important purpose of protecting public health, safety, and welfare." *Id.* at 1056 (internal quotation marks omitted). We again concluded that the laws were a valid exercise of California's police power. *Id.*

In *Conant,* 309 F.3d at 633–34, we affirmed a district court's order granting a permanent injunction that prevented the federal government from revoking a doctor's DEA registration or initiating an investigation if he or she recommended medical marijuana. The federal government had adopted a policy that a

doctor's "recommendation" of marijuana would lead to revocation of his or her license. *Id.* at 632. But the government was "unable to articulate exactly what speech [the policy] proscribed, describing it only in terms of speech the patient believes to be a recommendation of marijuana." *Id.* at 639. Nevertheless, the demarcation between conduct and speech in *Conant* was clear. The policy prohibited doctors from *prescribing* or *distributing* marijuana, and neither we nor the parties disputed the government's authority to prohibit doctors from *treating* patients with marijuana. *Id.* at 632, 635–36. Further, the parties agreed that "revocation of a license was not authorized where a doctor *merely discussed* the pros and cons of marijuana use." *Id.* at 634 (emphasis added).

We ruled that the policy against merely "recommending" marijuana was both content- and viewpoint-based. *Id.* at 637. It was content-based because it covered only doctor-patient speech "that include[d] discussions of the medical use of marijuana," and it was viewpoint-based because it "condemn[ed] expression of a particular viewpoint, i.e., that medical marijuana would likely help a specific patient." *Id.* We held that the policy did not withstand heightened First

Amendment scrutiny because it lacked "the requisite narrow specificity" and left "doctors and patients no security for free discussion." *Id.* at 639 (internal quotation marks omitted).

***6** We distill the following relevant principles from *NAAP* and *Conant*: (1) doctor-patient communications *about* medical treatment receive substantial First Amendment protection, but the government has more leeway to regulate the conduct necessary to administering treatment itself; (2) psychotherapists are not entitled to special First Amendment protection merely because the mechanism used to deliver mental health treatment is the spoken word; and (3) nevertheless, communication that occurs during psychotherapy does receive *some* constitutional protection, but it is not immune from regulation.

Because those principles, standing alone, do not tell us whether or how the First Amendment applies to the regulation of specific mental health treatments, we must go on to consider more generally the First Amendment rights of professionals, such as doctors and mental health providers. In determining whether SB 1172 is a regulation of speech or conduct, we find it helpful to view this issue along a

continuum.

At one end of the continuum, where a professional is engaged in a public dialogue, First Amendment protection is at its greatest. Thus, for example, a doctor who publicly advocates a treatment that the medical establishment considers outside the mainstream, or even dangerous, is entitled to robust protection under the First Amendment—just as any person is—even though the state has the power to regulate medicine. *See Lowe v. SEC,* 472 U.S. 181, 232, 105 S.Ct. 2557, 86 L.Ed.2d 130 (1985) (White, J., concurring) ("Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that 'Congress shall make no law ... abridging the freedom of speech, or of the press.' "); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech,* 2007 U. Ill. L.Rev. 939, 949 (2007) ("When a physician speaks to

the public, his opinions cannot be censored and suppressed, even if they are at odds with preponderant opinion within the medical establishment."); *cf. Bailey v. Huggins Diagnostic & Rehab. Ctr., Inc.,* 952 P.2d 768, 773 (Colo.Ct.App.1997) (holding that the First Amendment does not permit a court to hold a dentist liable for statements published in a book or made during a news program, even when those statements are contrary to the opinion of the medical establishment). That principle makes sense because communicating to the *public* on matters of *public concern* lies at the core of First Amendment values. *See, e.g., Snyder v. Phelps,* —— U.S. ——, 131 S.Ct. 1207, 1215, 179 L.Ed.2d 172 (2011) ("Speech on matters of public concern is at the heart of the First Amendment's protection." (internal quotation markets, brackets, and ellipsis omitted)). Thus, outside the doctor-patient relationship, doctors are constitutionally equivalent to soapbox orators and pamphleteers, and their speech receives robust protection under the First Amendment.

***7** At the midpoint of the continuum, within the confines of a professional relationship, First Amendment protection of a professional's speech is somewhat diminished. For example, in *Planned Parenthood of Southeastern*

Pennsylvania v. Casey, 505 U.S. 833, 884, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), the plurality upheld a requirement that doctors disclose truthful, nonmisleading information to patients about certain risks of abortion:

All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, *subject to reasonable licensing and regulation by the State.* We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.[4]

(Citations omitted; emphasis added.) Outside the professional relationship, such a requirement would almost certainly be considered impermissible compelled speech. *Cf. Wooley v. Maynard,* 430 U.S. 705, 717 [97 S.Ct. 1428, 51 L.Ed.2d 752] (1977) (holding that a state could not require a person to display the state motto on his or her license plate).

Moreover, doctors are routinely held liable for giving negligent medical advice to their patients, without serious suggestion that the First Amendment protects their right to give advice that is not consistent with the accepted

standard of care. A doctor "may not counsel a patient to rely on quack medicine. The First Amendment would not prohibit the doctor's loss of license for doing so." *Conant v. McCaffrey,* No. C 97–00139 WHA, 2000 WL 1281174, at *13 (N.D.Cal. Sept. 7, 2000) (order) (unpublished); *see also Shea v. Bd. of Med. Exam'rs,* 81 Cal.App.3d 564, 146 Cal.Rptr. 653, 662 (1978) ("The state's obligation and power to protect its citizens by regulation of the professional conduct of its health practitioners is well settled.... [T]he First Amendment ... does not insulate the verbal charlatan from responsibility for his conduct; nor does it impede the State in the proper exercise of its regulatory functions." (citations omitted)); *cf.* Post, 2007 U. Ill. L.Rev. at 949 ("[W]hen a physician speaks to a patient in the course of medical treatment, his opinions are normally regulated on the theory that they are inseparable from the practice of medicine."). And a lawyer may be disciplined for divulging confidences of his client, even though such disclosure is pure speech. *See, e.g., In re Isaacson,* State Bar Court of California, Case No. 08–O–10684, 2012 WL 6589666, at *4–5 (Dec. 6, 2012) (unpublished) (noting prior suspension of bar license for failure to preserve client confidences). Thus, the First Amendment tolerates a substantial amount of speech

regulation within the professional-client relationship that it would not tolerate outside of it. And that toleration makes sense: When professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate. *Cf. Lowe,* 472 U.S. at 232, 105 S.Ct. 2557 (White, J., concurring) ("One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession.").

***8** [At the other end of the continuum, and where we conclude that SB 1172 lands, is the regulation of professional *conduct,* where the state's power is great, even though such regulation may have an incidental effect on speech. *See id.* ("Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession."). Most, if not all, medical treatment requires speech, but that fact does not give rise to a First Amendment claim when the state bans a particular treatment. When a drug is banned, for example, a doctor who treats patients with that drug does not have a First

Amendment right to speak the words necessary to provide or administer the banned drug. *Cf. Conant,* 309 F.3d at 634–35 (noting the government's authority to ban prescription of marijuana). Were it otherwise, then any prohibition of a particular medical treatment would raise First Amendment concerns because of its incidental effect on speech. Such an application of the First Amendment would restrict unduly the states' power to regulate the medical profession and would be inconsistent with the principle 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, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney,* 336 U.S. at 502, 69 S.Ct. 684.

Senate Bill 1172 regulates conduct. It bans a form of medical treatment for minors; it does nothing to prevent licensed therapists from discussing the pros and cons of SOCE with their patients. Senate Bill 1172 merely prohibits licensed mental health providers from engaging in SOCE with minors. It is the limited reach of SB 1172 that distinguishes the present cases from *Conant,* in which the government's policy prohibited speech *wholly apart* from the actual provision of treatment.

Under its police power, California has authority to prohibit licensed mental health providers from administering therapies that the legislature has deemed harmful and, under *Giboney,* 336 U.S. at 502, 69 S.Ct. 684, the fact that speech may be used to carry out those therapies does not turn the prohibitions of conduct into prohibitions of speech. In fact, the *Welch* Plaintiffs concede that the state has the power to ban aversive types of SOCE. And we reject the position of the *Pickup* Plaintiffs—asserted during oral argument—that even a ban on aversive types of SOCE requires heightened scrutiny because of the incidental effect on speech.[5] Here, unlike in *Conant,* 309 F.3d at 639, the law *allows* discussions about treatment, recommendations to obtain treatment, and expressions of opinions about SOCE and homosexuality.

We further conclude that the First Amendment does not prevent a state from regulating treatment even when that treatment is performed through speech alone. As we have already held in *NAAP*, talk therapy does not receive special First Amendment protection merely because it is administered through speech. 228 F.3d at 1054. That holding rested on the understanding of talk therapy as "the *treatment* of emotional suffering and

depression, *not* speech." *Id.* (internal quotation marks omitted) (first emphasis added). Thus, under *NAAP*, to the extent that talk therapy implicates speech, it stands on the same First Amendment footing as other forms of medical or mental health treatment. Senate Bill 1172 is subject to deferential review just as are other regulations of the practice of medicine.

***9** Our conclusion is consistent with *NAAP* 's statement that "communication that occurs during psychoanalysis is entitled to constitutional protection, but it is not immune from regulation." *Id.* Certainly, under *Conant,* content- or viewpoint-based regulation of communication *about* treatment must be closely scrutinized. But a regulation of only *treatment itself*—whether physical medicine or mental health treatment—implicates free speech interests only incidentally, if at all. To read *NAAP* otherwise would contradict its holding that talk therapy is not entitled to "special First Amendment protection," and it would, in fact, make talk therapy virtually "immune from regulation." *Id.*

Nor does *NAAP*'s discussion of content and viewpoint discrimination change our conclusion. There, we used both a belt and suspenders. In addition to holding that the

licensing scheme at issue was a permissible regulation of conduct, we reasoned that *even if* California's licensing requirements implicated First Amendment interests, the requirements did not discriminate on the basis of content or viewpoint. *Id.* at 1053, 1055–56. But here, SB 1172 regulates only treatment, and nothing in *NAAP* requires us to analyze a regulation of treatment in terms of content and viewpoint discrimination.[6]

Because SB 1172 regulates only treatment, while leaving mental health providers free to discuss and recommend, or recommend against, SOCE, we conclude that any effect it may have on free speech interests is merely incidental. Therefore, we hold that SB 1172 is subject to only rational basis review and must be upheld if it "bear[s] ... a rational relationship to a legitimate state interest."[7] *Id.* at 1049.

According to the statute, SB 1172 advances California's 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." 2012 Cal. Legis. Serv. ch. 835, § 1(n). Without a doubt, protecting the well-being of minors is a

legitimate state interest. And we need not decide whether SOCE actually causes "serious harms"; it is enough that it could "reasonably be conceived to be true by the governmental decisionmaker." *NAAP,* 228 F.3d at 1050 (internal quotation marks omitted).

The record demonstrates that the legislature acted rationally when it decided to protect the well-being of minors by prohibiting mental health providers from using SOCE on persons under 18.[8] The legislature relied on the report of the Task Force of the American Psychological Association, which concluded that SOCE has not been demonstrated to be effective and that there have been anecdotal reports of harm, including depression, suicidal thoughts or actions, and substance abuse. The legislature also relied on the opinions of many other professional organizations. Each of those organizations opposed the use of SOCE, concluding, among other things, that homosexuality is not an illness and does not require treatment (American School Counselor Association), SOCE therapy can provoke guilt and anxiety (American Academy of Pediatrics), it may be harmful (National Association of Social Workers), and it may contribute to an enduring sense of stigma and self-criticism (American Psychoanalytic Association).

Although the legislature also had before it some evidence that SOCE is safe and effective, the overwhelming consensus was that SOCE was harmful and ineffective. On this record, we have no trouble concluding that the legislature acted rationally by relying on that consensus.

***10** Plaintiffs argue that the legislature acted irrationally when it banned SOCE for minors because there is a lack of scientifically credible proof of harm. But, under rational basis review, "[w]e ask only whether there are plausible reasons for [the legislature's] action, and if there are, our inquiry is at an end." *Romero–Ochoa v. Holder,* 712 F.3d 1328, 1331 (9th Cir.2013) (internal quotation marks omitted).

Therefore, we hold that SB 1172 is rationally related to the legitimate government interest of protecting the well-being of minors.[9]

B. *Expressive Association*

We also reject the *Pickup* Plaintiffs' argument that SB 1172 implicates their right to freedom of association because the First Amendment protects their "choices to enter into and maintain the intimate human relationships between counselors and clients."[10]

First, SB 1172 does not prevent mental health providers and clients from entering into and maintaining therapeutic relationships. It prohibits only "practices ... that seek to change an individual's sexual orientation." Cal. Bus. & Prof.Code § 865(b)(1). Therapists are free, but not obligated, to provide therapeutic services, as long as they do not "seek to change sexual orientation."

Moreover, the therapist-client relationship is not the type of relationship that the freedom of association has been held to protect. The Supreme Court's decisions "have referred to constitutionally protected 'freedom of association' in two distinct senses." *Roberts v. U.S. Jaycees,* 468 U.S. 609, 617, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). The first type of protected association concerns "intimate human relationships," which are implicated in personal decisions about marriage, childbirth, raising children, cohabiting with relatives, and the like. *Id.* at 617–19, 104 S.Ct. 3244. That type of freedom of association "receives protection as a fundamental element of personal liberty." *Id.* at 618, 104 S.Ct. 3244. The second type protects association "for the purpose of engaging in those activities protected by the First Amendment—speech,

assembly, petition for the redress of grievances, and the exercise of religion." *Id.* at 618, 104 S.Ct. 3244. Plaintiffs in *Pickup* claim an infringement of only the first type of freedom of association.

Although we have not specifically addressed the therapist-client relationship in terms of freedom of association, we have explained why the therapist-client relationship is not protected by the Due Process Clause of the Fourteenth Amendment: "The relationship between a client and psychoanalyst lasts only as long as the client is willing to pay the fee. Even if analysts and clients meet regularly and clients reveal secrets and emotional thoughts to their analysts, these relationships simply do not rise to the level of a fundamental right." *NAAP,* 228 F.3d at 1050 (internal quotation marks and citation omitted). Because the type of associational protection that the *Pickup* Plaintiffs claim is rooted in "personal liberty," *U.S. Jaycees,* 468 U.S. at 618, 104 S.Ct. 3244, and because we have already determined that the therapist-client relationship does not "implicate the fundamental rights associated with ... close-knit relationships," *NAAP,* 228 F.3d at 1050, we conclude that the freedom of association also does not encompass the therapist-client relationship.

C. *Vagueness*

***11** We next hold that SB 1172 is not void for vagueness.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Nevertheless, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism,* 491 U.S. 781, 794, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). "[U]ncertainty at a statute's margins will not warrant facial invalidation if it is clear what the statute proscribes 'in the vast majority of its intended applications.' " *Cal. Teachers Ass'n v. State Bd. of Educ.,* 271 F.3d 1141, 1151 (9th Cir.2001) (quoting *Hill v. Colorado,* 530 U.S. 703, 733, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000)). "A defendant is deemed to have fair notice of an offense if a reasonable person of ordinary intelligence would understand that his or her conduct is prohibited by the law in question." *United States v. Weitzenhoff,* 35 F.3d 1275, 1289 (9th Cir.1994) (internal quotation marks omitted). But, "if the 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 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." *Id.* (internal quotation marks omitted).

Although the *Pickup* Plaintiffs argue that they cannot ascertain where the line is between what is prohibited and what is permitted—for example, they wonder whether the mere dissemination of information about SOCE would subject them to discipline—the text of SB 1172 is clear to a reasonable person. It prohibits "mental health providers" from engaging in "practices" that "seek to change" a minor "patient['s]" sexual orientation. Cal. Bus. & Prof.Code §§ 865–865.1. A reasonable person would understand the statute to prohibit only mental health treatment, including psychotherapy, that aims to alter a minor patient's sexual orientation. Although Plaintiffs present various hypothetical situations to support their vagueness challenge, the Supreme Court has held that "speculation about possible vagueness in hypothetical situations not before the Court will not support

a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Hill,* 530 U.S. at 733, 120 S.Ct. 2480 (internal quotation marks omitted).

Moreover, considering that SB 1172 regulates licensed mental health providers, who constitute "a select group of persons having specialized knowledge," the standard for clarity is lower. *Weitzenhoff,* 35 F.3d at 1289. Indeed, it is hard to understand how therapists who identify themselves as SOCE practitioners can credibly argue that they do not understand what the ban on SOCE prohibits.

Neither is the term "sexual orientation" vague. Its meaning is clear enough to a reasonable person and should be even more apparent to mental health providers. In fact, several provisions in the California Code—though not SB 1172 itself—provide a simple definition: "heterosexuality, homosexuality, or bisexuality." Cal. Educ.Code §§ 212.6, 66262.7;Cal. Gov't Code § 12926®; Cal.Penal Code §§ 422.56(h), 11410(b)(7). Moreover, courts have repeatedly rejected vagueness challenges that rest on the term "sexual orientation." *E.g., United States v. Jenkins,* 909 F.Supp.2d 758, 778–79 (E.D.Ky.2012); *Hyman v. City of Louisville,* 132 F.Supp.2d 528, 546

(W.D.Ky.2001), *vacated on other grounds,* 53 Fed.Appx. 740 (6th Cir.2002) (unpublished).

D. *Overbreadth*

***12** We further hold that SB 1172 is not overbroad.[11]

Overbreadth doctrine permits the facial invalidation of laws that prohibit "a substantial amount of constitutionally protected speech." *City of Houston v. Hill,* 482 U.S. 451, 466, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987). "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 800, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). Rather, "particularly where conduct and not merely speech is involved, ... the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma,* 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

Senate Bill 1172's plainly legitimate sweep includes the prohibition of SOCE techniques such as inducing vomiting or paralysis, administering electric shocks, and performing

castrations. And, as explained above, it also includes SOCE techniques carried out solely through words. As with any ban on a particular medical treatment, there may be an incidental effect on speech. Any incidental effect, however, is small in comparison with the "plainly legitimate sweep" of the ban. *Broadrick,* 413 U.S. at 615, 93 S.Ct. 2908.

Thus, SB 1172 is not overbroad.

E. *Parents' Fundamental Rights*

The *Pickup* Plaintiffs also argue that SB 1172 infringes on their fundamental parental right to make important medical decisions for their children. The state does not dispute that parents have a fundamental right to raise their children as they see fit, but argues that Plaintiffs "cannot compel the State to permit licensed mental health [professionals] to engage in unsafe practices, and cannot dictate the prevailing standard of care in California based on their own views." Because Plaintiffs argue for an affirmative right to access SOCE therapy from licensed mental health providers, the precise question at issue is whether parents' fundamental rights include the right to choose for their children a particular type of provider for a particular medical or mental

health treatment that the state has deemed harmful. *See Washington v. Glucksberg,* 521 U.S. 702, 720–21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (holding that courts should precisely define purported substantive due process rights to direct and restrain exposition of the Due Process Clause).

Parents have a constitutionally protected right to make decisions regarding the care, custody, and control of their children, but that right is "not without limitations." *Fields v. Palmdale Sch. Dist.,* 427 F.3d 1197, 1204 (9th Cir.2005). States may require school attendance and mandatory school uniforms, and they may impose curfew laws applicable only to minors. *See id.* at 1204–05 (collecting cases demonstrating the "wide variety of state actions that intrude upon the liberty interest of parents in controlling the upbringing and education of their children"). In the health arena, states may require the compulsory vaccination of children (subject to some exceptions), *see Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944), and states may intervene when a parent refuses necessary medical care for a child, *see Jehovah's Witnesses v. King Cnty. Hosp.,* 278 F.Supp. 488, 504 (W.D.Wash.1967) (three judge panel) (per curiam), *aff'd,* 390 U.S. 598, 88

S.Ct. 1260, 20 L.Ed.2d 158 (1968) (per curiam). "[A] state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." *Parham v. J.R.,* 442 U.S. 584, 603, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979).

***13** We are unaware of any case that specifically addresses whether a parent's fundamental rights encompass the right to choose for a child a particular type of provider for a particular treatment that the state has deemed harmful, but courts that have considered whether patients have the right to choose specific treatments for *themselves* have concluded that they do not. For example, we have held that "substantive due process rights do not extend to the choice of type of treatment or of a particular health care provider." *NAAP,* 228 F.3d at 1050. Thus, we concluded that "there is no fundamental right to choose a mental health professional with specific training." *Id.* The Seventh Circuit has also 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." *Mitchell v. Clayton,* 995 F.2d 772, 775 (7th Cir.1993). Moreover, courts have held that there is no

substantive due process right to obtain drugs that the FDA has not approved, *Carnohan v. United States,* 616 F.2d 1120, 1122 (9th Cir.1980) (per curiam), even when those drugs are sought by terminally ill cancer patients, *see Rutherford v. United States,* 616 F.2d 455, 457 (10th Cir.1980) ("It is apparent in the context with which we are here concerned that the decision by the patient whether to have a treatment or not is a protected right, but his selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health."). Those cases cut against recognizing the right that Plaintiffs assert; it would be odd if parents had a substantive due process right to choose specific treatments for their children—treatments that reasonably have been deemed harmful by the state—but not for themselves. All the more anomalous because the Supreme Court has recognized that the state has greater power over children than over adults. *Prince,* 321 U.S. at 170, 64 S.Ct. 438 (stating that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults").

Further, our decision in *Fields* counsels against recognizing the right that Plaintiffs assert. In that case, parents of school children argued

that a school violated their parental rights when it administered to students a survey that contained several questions about sex. *Fields,* 427 F.3d at 1203. We rejected that argument, holding that, although parents have the right to inform their children about sex when and as they choose, they do not have the right to "compel public schools to follow their own idiosyncratic views as to what information the schools may dispense." *Id.* at 1206. Similarly, here, to recognize the right Plaintiffs assert would be to compel the California legislature, in shaping its regulation of mental health providers, to accept Plaintiffs' personal views of what therapy is safe and effective for minors. The aforementioned cases lead us to conclude that the fundamental rights of parents do not include the right to choose a specific type of provider for a specific medical or mental health treatment that the state has reasonably deemed harmful.

***14** Therefore, SB 1172 does not infringe on the fundamental rights of parents.

CONCLUSION

Senate Bill 1172 survives the constitutional challenges presented here. Accordingly, the

order granting preliminary relief in *Welch,* No. 13–15023, is **REVERSED,** and the order denying preliminary relief in *Pickup,* No. 12–17681, is **AFFIRMED.** We remand both cases for further proceedings consistent with this opinion.

[1] California Business and Professions Code section 865(a) defines "mental health provider" as

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

or regulation.

[2] In *Pickup,* Equality California, an advocacy group for gay rights, sought and received intervenor status to defend SB 1172. *Pickup* Plaintiffs argue that the Supreme Court's recent decision in *Hollingsworth v. Perry*, ___ U.S. ___, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013), means that Equality California does not have standing to defend the statute. We need not resolve that question, however, because the State of California undoubtedly has standing to defend its statute, and "the presence in a suit of even one party with standing suffices to make a claim justiciable." *Brown v. City of Los Angeles,* 521 F.3d 1238, 1240 n. 1 (9th Cir.2008) (per curiam).

[3] The *Welch* Plaintiffs' response brief contains a single paragraph

asserting that SB 1172 violates the religion clauses of the First Amendment. That paragraph, which cites neither the record nor any case, is part of Plaintiffs' argument that SB 1172 is not narrowly tailored to achieve a compelling government purpose, as required by the Free Speech Clause, because it contains no clergy exemption. The religion claim, however, is not "specifically and distinctly argued," as ordinarily required for us to consider an issue on appeal. *Thompson v. Runnels*, 705 F.3d 1089, 1099–1100 (9th Cir.2013) (internal quotation marks omitted), *petition for cert. filed,* —— U.S.L.W. —— (U.S. June 28, 2013) (No. 13–5127); *see also Maldonado v. Morales*, 556 F.3d 1037, 1048 n. 4 (9th Cir.2009) ("Arguments made in passing and inadequately briefed are waived."). Moreover, although the *Welch* Plaintiffs raised the claim in the district court, the court did not rule on it

because it granted relief on their free speech claim. In these circumstances, we decline to address the religion claim. The district court may do so in the first instance.

[4] Although the plurality opinion garnered only three votes, four additional justices would have upheld the challenged law in its entirety. *Casey*, 505 U.S. at 944, 112 S.Ct. 2791 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Thus, there were seven votes to uphold the disclosure requirement.

[5] We do not mean to suggest that any Plaintiff here conducts aversive SOCE therapy. The record shows that Plaintiffs who are licensed mental health providers practice SOCE only through talk therapy. We

mention aversive techniques merely to highlight the state's legitimate power to regulate professional conduct.

[6] We acknowledge that Plaintiffs ask us to apply strict scrutiny, but they have not cited any case in which a court has applied strict scrutiny to the regulation of a medical or mental health treatment. Nor are we aware of any.

[7] The parties dispute whether we are limited to the legislative record in assessing the constitutionality of SB 1172. We need not resolve that dispute because, whether or not we restrict our review to the legislative record, we conclude that the legislature acted rationally.

[8] We need not and do not decide whether the legislature would have acted rationally had it banned SOCE for adults. One could argue that children under the age of 18 are especially vulnerable with respect to sexual identity and that their parents' judgment may be clouded by this emotionally charged issue as well. The considerations with respect to adults may be different.

[9] The foregoing discussion relates as well to the *Pickup* Plaintiffs' claim that SB 1172 violates minors' right to receive information. *See* *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1027 n. 5 (9th Cir.1998) (recognizing the "well-established rule that the right to receive information is an inherent corollary of the rights of free speech and press").

10 The *Pickup* Plaintiffs arguably waived their expressive association argument by not raising it in the district court. But "the rule of waiver is a discretionary one." *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1322 (9th Cir.2012) (internal quotation marks omitted). We have discretion to address an argument that otherwise would be waived "when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." *Id.* (internal quotation marks omitted). Whether SB 1172 violates the right to expressive association is such an issue, and we exercise our discretion to address it.

11 Intervenor Equality California argues that the *Pickup* Plaintiffs waived their overbreadth challenge by failing to raise it

adequately in the district court. Although they did not argue overbreadth with specificity, they did allege it in their complaint and in their memorandum in support of preliminary injunctive relief. Moreover, whether the statute is overbroad is a question of law that "does not depend on the factual record developed below." *Ruiz*, 667 F.3d at 1322. Therefore, we exercise our discretion to address Plaintiffs' overbreadth challenge.

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.
No. 12-17681

David H. PICKUP, et. al.
Plaintiffs-Appellants,
v.
EDMUND G. BROWN, JR., Governor of the State of California, in his official capacity; et al.,
Defendants-Appellees,
and
EQUALITY CALIFORNIA,
Intervenor-Defendant-Appellee.
D.C. No. 2:12-cv-02497-KJM-EFB Eastern District of California, Sacramento

ORDER

Before: GRABER, MURGUIA, and CHRISTEN, Circuit Judges.
The panel has voted to deny Appellant's petition for rehearing en banc, Docket Entry No. 157.

The full court has been advised of Appellant's petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellant's petition for rehearing en banc is DENIED.

FILED DECEMBER 21, 2018

MOLLY C. DWYER, CLERK U.S. COURT OF APPEALS

ENROLLED SEPTEMBER 05, 2012

PASSED IN SENATE AUGUST 30, 2012

PASSED IN ASSEMBLY AUGUST 28, 2012

AMENDED IN ASSEMBLY JULY 05, 2012

AMENDED IN SENATE MAY 25, 2012

AMENDED IN SENATE APRIL 30, 2012

AMENDED IN SENATE APRIL 25, 2012

AMENDED IN SENATE APRIL 16, 2012

AMENDED IN SENATE APRIL 09, 2012

CALIFORNIA LEGISLATURE— 2011–2012
REGULAR SESSION

SENATE BILL **No. 1172**

Introduced by Senator Lieu
(Coauthor(s): Assembly Member Ma)

February 22, 2012

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

LEGISLATIVE COUNSEL'S DIGEST

SB 1172, Lieu. Sexual orientation change efforts.

Existing law provides for licensing and regulation of various professions in the healing arts, including physicians and surgeons, psychologists, marriage and family therapists, educational psychologists, clinical social workers, and licensed professional clinical counselors.

This bill would prohibit a mental health provider, as defined, from engaging in sexual orientation change efforts, as defined, with a patient under 18 years of age. The bill would provide that any sexual orientation change efforts attempted on a patient under 18 years of age by a mental health provider shall be considered unprofessional conduct and shall

subject the provider to discipline by the provider's licensing entity.

The bill would also declare the intent of the Legislature in this regard.

DIGEST KEY
Vote: MAJORITY Appropriation: NO Fiscal Committee: YES Local Program: NO

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

SECTION 1.

The Legislature finds and declares all of the following:

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

(b) The American Psychological Association convened a Task Force on Appropriate Therapeutic Responses to Sexual Orientation.

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

(c) The American Psychological Association issued a resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts in 2009, which states: "[T]he [American Psychological Association] advises parents, guardians, young people, and their families to avoid sexual orientation change efforts that portray homosexuality as a mental illness or developmental disorder and to seek psychotherapy, social support, and educational

services that provide accurate information on sexual orientation and sexuality, increase family and school support, and reduce rejection of sexual minority youth."

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

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

The potential risks of reparative therapy are great, including depression, anxiety and self-destructive behavior, since therapist alignment with societal prejudices against homosexuality may reinforce self-hatred already experienced by the patient. Many

patients who have undergone reparative therapy relate that they were inaccurately told that homosexuals are lonely, unhappy individuals who never achieve acceptance or satisfaction. The possibility that the person might achieve happiness and satisfying interpersonal relationships as a gay man or lesbian is not presented, nor are alternative approaches to dealing with the effects of societal stigmatization discussed.

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

(e) The American School Counselor Association's position statement on professional school counselors and lesbian, gay, bisexual, transgendered, and questioning (LGBTQ) youth states: "It is not the role of the professional school counselor to attempt to change a student's sexual orientation/gender identity but instead to provide support to LGBTQ students to promote student achievement and personal well-being.

Recognizing that sexual orientation is not an illness and does not require treatment, professional school counselors may provide individual student planning or responsive services to LGBTQ students to promote self-acceptance, deal with social acceptance, understand issues related to coming out, including issues that families may face when a student goes through this process and identify appropriate community resources."

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

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

orientation and understand the societal response to it."

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

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

(j) The American Psychoanalytic Association issued a position statement in June 2012 on attempts to change sexual orientation, gender, identity, or gender expression, and in it the association states: "As with any societal prejudice, bias against individuals based on actual or perceived sexual orientation, gender identity or gender expression negatively affects

mental health, contributing to an enduring sense of stigma and pervasive self-criticism through the internalization of such prejudice.

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

(k) The American Academy of Child and Adolescent Psychiatry in 2012 published an article in its journal, Journal of the American Academy of Child and Adolescent Psychiatry, stating: "Clinicians should be aware that there is no evidence that sexual orientation can be altered through therapy, and that attempts to do so may be harmful. There is no empirical evidence adult homosexuality can be prevented if gender nonconforming children are influenced to be more gender conforming. Indeed, there is no medically valid basis for attempting to prevent homosexuality, which is not an illness. On the contrary, such efforts may encourage family rejection and undermine self-esteem, connectedness and caring,

important protective factors against suicidal ideation and attempts. Given that there is no evidence that efforts to alter sexual orientation are effective, beneficial or necessary, and the possibility that they carry the risk of significant harm, such interventions are contraindicated."

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

(m) Minors who experience family rejection based on their sexual orientation face especially serious health risks. In one study, lesbian, gay, and bisexual young adults who reported higher levels of family rejection during adolescence were 8.4 times more likely to report having attempted suicide, 5.9 times more likely to report high levels of depression, 3.4 times more likely to use illegal drugs, and 3.4 times more likely to report having engaged in unprotected

sexual intercourse compared with peers from families that reported no or low levels of family rejection. This is documented by Caitlin Ryan et al. in their article entitled Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults (2009) 123 Pediatrics 346.

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

(o) Nothing in this act is intended to prevent a minor who is 12 years of age or older from consenting to any mental health treatment or counseling services, consistent with Section 124260 of the Health and Safety Code, other than sexual orientation change efforts as defined in this act.

SEC. 2.

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

Article 15. Sexual Orientation Change Efforts

865.

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

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

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

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

865.1.

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

865.2.

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

U.S. Constitution Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for

President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including

debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.