S240156



**IN THE SUPREME COURT**

**OF THE**

**STATE OF CALIFORNIA**

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DON L. MATHEWS, MICHAEL L. ALVAREZ and WILLIAM OWEN
*Plaintiffs and Appellants,*

v.

XAVIER BECERRA and JACKIE LACEY
*Defendants and Respondents.*

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*On Review From The Court Of Appeal For the Second Appellate District,*
*Division Two*
*2nd Civil No. B265990*
*After An Appeal From the Superior Court of Los Angeles County*
*Honorable Michael L. Stern, Judge*
*Case Number BC573135*

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# ANSWER BRIEF ON THE MERITS

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page**

**CASES**

**OTHER AUTHORITIES**

## INTRODUCTION

Petitioners challenge the constitutionality of Assembly Bill 1775 (AB 1775), an amendment to the State's mandatory reporting laws designed to protect children from sexual exploitation. The Court of Appeal correctly held that AB 1775 is constitutional under the state and federal Constitutions.

As the Court of Appeal observed, the well-settled legal precedent and this State's Legislature have recognized that child pornography is a serious threat to the children of this nation and the State. Child pornography accessibility has grown exponentially since the advent of the Internet, and so has the harm that the victims suffer.

In recognition of the need to protect the safety and welfare of children, in 2014 the California Legislature enacted AB 1775, codified at Penal Code section 11165.1, to modernize its long-standing mandatory reporting laws. The statute was designed to improve the State's mandatory reporting requirements by clarifying that mandated reporters, including psychotherapists, are required to report incidents of the sexual exploitation of children, including patients accessing child pornography on the Internet.

While recognizing the pervasive harms of child pornography, plaintiffs seek to proscribe the Legislature's right to enact laws designed to eradicate the State's market for child pornography. Plaintiffs urge this

Court to diminish the State's strong protective interest in the detection of child abuse by arguing, in essence, that psychotherapy patients have a legally protected privacy interest in the sexual exploitation of children and that there is no necessity to report or identify patients who access child pornography if they have not engaged in known physical sexual abuse. This Court should decline to support plaintiffs' efforts to evade enforcement of a law, enacted to protect children from sexual exploitation, to which they are reasonably bound.

As a threshold matter, plaintiffs have failed to meet their burden of showing that AB 1775 is unconstitutional as applied to them or on its face. On this ground alone, this Court can affirm the judgment of the Court of Appeal against plaintiffs.

Moreover, under the test established by *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1 [26 Cal.Rptr.2d 834] (*Hill*), plaintiffs have not established that their patients have a legally protected privacy interest or a reasonable expectation of privacy in their communications with a psychotherapist regarding disclosure of child exploitation under the California Constitution. Nor have plaintiffs established that the mandated reporting of consumption of Internet child pornography amounts to a serious invasion of psychotherapy patients' rights to privacy. If, however, the minimal invasion effected by psychotherapists' submission of a basic report to law enforcement were enough to shift the burden to the State to

put forward a countervailing interest under the *Hill* framework, the State's interests are more than sufficient. Notably, plaintiffs admit the State has a compelling interest under the balancing test set forth in *Hill*.

Plaintiffs' remaining claims likewise fail, in that plaintiffs' Fourteenth Amendment claim is precluded and has been rejected by the United States Supreme Court in *Whalen v. Roe* (1977) 429 U.S. 589 [97 S.Ct. 869, 51 L.Ed.2d 64] (*Whalen*).

Respectfully, the Court of Appeal's decision should be affirmed.

## BACKGROUND

### I. Child Pornography Is A Damaging Epidemic That Harms Victims Nationwide.

Well-established precedent recognizes that child pornography is a serious and continuing problem. By way of example, in the landmark case of *New York v. Ferber* (1982) 458 U.S. 747, 757 [102 S.Ct. 3348, 73 L.Ed.2d 1113], the United States Supreme Court concluded that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." In making this finding, the high Court cited studies indicating "[p]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution." (*Id.* at 759, fn. 10; see also *In re Grant* (2014) 58 Cal.4th 469, 477 [167

Cal.Rptr.3d 401] ("Child pornography harms and debases the most defenseless of our citizens.").) Beyond the initial trauma of the sexual abuse suffered by the victims of child pornography, victims depicted in these images are repeatedly exploited as the images are continually disseminated and viewed. (See *Osborne v. Ohio* (1990) 495 U.S. 103, 111 [110 S.Ct. 1691, 109 L.Ed. 2d 98].) As child pornography is now traded with ease on the Internet, "the number of still images and videos memorializing the sexual assault and other sexual exploitation of children, many very young in age, has grown exponentially." (*Paroline v. United States* (2014) __ U.S. __ [134 S.Ct. 1710, 1717-1718, 188 L.Ed. 714].)

The gravity of the State's interest in this context belies plaintiffs' constitutional challenge and mandates that the Court of Appeal's decision be upheld.

## II. The Challenged Statute Is Part Of A Broad Legislative Scheme Designated To Protect Children From Sexual Exploitation.

For over 50 years, California has used mandatory reporting obligations to identify and protect child abuse victims. (*Elijah W. v. Superior Court* (2013) 216 Cal.App.4th 140, 153 [156 Cal.Rptr.3d 592] (*Elijah W.*).) In 1963, the Legislature passed former section 11161.5, its first attempt at imposing the obligation to report suspected child abuse.

(*Stecks v. Young* (1995) 38 Cal.App.4th 365, 370–71 [45 Cal.Rptr. 2d 475] (*Stecks*).)

Faced with a growing population of abused children, in 1980 the Legislature enacted the Child Abuse Reporting Law (§ 11165 et seq.), a comprehensive scheme of reporting requirements "aimed at increasing the likelihood that child abuse victims are identified." (*James W. v. Superior Court* (1993) 17 Cal.App.4th 246, 254 [21 Cal.Rptr.2d 169].) The Legislature subsequently renamed the law the Child Abuse and Neglect Reporting Act (Act) (§ 11164) (Stats. 1987, ch. 1444, § 1.5, p. 5369) ("CANRA"). Over time both the definition of "mandated reporter" and the type of abuse that must be reported have expanded to implement the belief that "reporting suspected child abuse is fundamental to protecting children." (*Stecks*, *supra*, 38 Cal.App.4th at 371.)

Under CANRA psychiatrists, psychologists and other mental health professionals are "mandated reporters"[1] (Pen. Code, § 11165.7, subd. (a)(21)) and, as such, have an affirmative duty to report suspected child abuse to appropriate authorities. (Pen. Code, § 11165.9.) Failure to report suspected abuse is a misdemeanor. (Pen. Code, § 11166, subd. (c).) The

[1] Today, all doctors, psychiatrists, psychologists, clinical social workers and other mental health professionals are included in the nearly four dozen separate categories of mandated reporters identified in CANRA. (Pen. Code, § 11165.7, subd. (a)(1)–(44).)

duty to report is not excused by the psychotherapist-patient privilege of Evidence Code section 1014. (Pen. Code, § 11171.2, subd. (b); (*People v. Stritzinger* (1983) 34 Cal.3d 505, 512 [194 Cal.Rptr. 431] (*Stritzinger*) ("the Legislature intended the child abuse reporting obligation to take precedence over the physician-patient or psychotherapist-patient privilege."); see Evid. Code, § 1027.)

Reports must be made of physical abuse, sexual abuse, neglect, willful cruelty or unjustifiable punishment, and unlawful corporal punishment or injury. (Pen. Code, §§ 11165.1, 11165.2, 11165.3, 11165.4, 11165.5.) The duty to report is triggered when, based on knowledge or observation, the mandated reporter knows or reasonably suspects child abuse. (See Pen. Code, § 11166, subd. (a); *Elijah W.*, *supra*, 216 Cal.App.4th at 153-154.) Committed to the belief that reporting requirements protect children, the Legislature consistently has increased, not decreased, the reporting obligations. (*Stecks*, *supra*, 38 Cal.App.4th at 371.)

## III. The Challenged Statute.

Section 11165.1 defines "sexual abuse" as used in CANRA as sexual assault *or* sexual exploitation. (Pen. Code, § 11165.1.)[2] Penal Code

[2] The Legislature enacted Penal Code section 11165.1 in 1987 to expand the definition of "child abuse" to include "sexual exploitation." (Respondent's Motion for Judicial Notice ("MJN"), Exh. A (AB 2709).)

section 11165.1, subdivision (c), originally defined "sexual exploitation" as any of the following:

> (1) Conduct involving matter depicting a minor engaged in obscene acts in violation of Section 311.2 (preparing, selling, or distributing obscene matter) or subdivision (a) of Section 311.4 (employment of minor to perform obscene acts).
>
> (2) A person who knowingly promotes, aids, or assists, employs, uses, persuades, induces, or coerces a child, or a person responsible for a child's welfare, who knowingly permits or encourages a child to engage in, or assist others to engage in, prostitution or a live performance involving obscene sexual conduct. . . .
>
> (3) A person who depicts a child in, or who knowingly develops, duplicates, prints, or exchanges, any film, photograph, video tape, negative, or slide in which a child is engaged in an act of obscene sexual conduct, except for those activities by law enforcement and prosecution agencies and other persons described in subdivisions (c) and (e) of Section 311.3

(Pen. Code, § 11165.1(c).) (AR 10:10-17.)

In 2014, and effective January 1, 2015, the Legislature updated Penal Code section 11165.1, subdivision (c)(3) as follows:

> (c)(3) A person who depicts a child in, or who knowingly develops, duplicates, prints, **downloads, streams, accesses through any electronic or digital media**, or exchanges, a film, photograph, videotape, video recording, negative, or slide in which a child is engaged in an act of obscene sexual conduct. . .

(Pen. Code, § 11165.1(c)(3) (emphasis added).) (Appellants' Appendix, ("AA") 10:10-17.)[3]

Notably, plaintiffs do not challenge the original version of the statute, which by its plain language, mandates that it is unlawful for any person to duplicate, print, or exchange hard prints or films of child pornography. Rather, plaintiffs challenge the addition of "downloads, streams, accesses through any electronic or digital media" to the language of section 11165.1(c)(3), arguing that the amended provision is unconstitutional because it impinges on psychotherapy patients' privacy rights. In essence, plaintiffs argue that because of the widespread availability of child pornography on the Internet, the accessing of child pornography should not be a reportable crime. However, the fact that such content is so readily available is precisely why it must be illegal to download it. Furthermore, as detailed below, section 11165.1 was amended to keep up with technology to attempt to stop sexual abuse of children, in the form of accessing materials off the Internet. Plaintiffs' arguments to the contrary are illogical and meritless.

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[3] Effective January 1, 2016, the Legislature added subdivision (d) to Penal Code section 11165.1, which reads as follows: (d) "Commercial sexual exploitation" refers to either of the following: [¶] (1) The sexual trafficking of a child, as described in subdivision (c) of Section 236.1. [¶] (2) The provision of food, shelter, or payment to a child in exchange for the performance of any sexual act described in this section or subdivision (c) of Section 236.1." (Pen. Code, § 11165.1(d).)

## IV. Legislative Intent Behind AB 1775.

A finding that the right to privacy of psychotherapy patients extends to the viewing of online child pornography is squarely in conflict with the Legislature's intent in enacting AB 1775. The author of AB 1775, Assemblywoman Melissa A. Melendez, states in part:

> This bill will amend the Child Abuse and Neglect Reporting Act to include "downloading" and "streaming" as part of its definition of "sexual exploitation" to ensure the reporting requirements related to internet child pornography are defined to reflect modern technology. This will further ensure the protection of children from the proliferation of sexual exploitation through the internet child pornography as well as possibly others forms of abuse.

(MJN, Exh. B, AB 1775 (Melendez), Senate Committee on Public Safety Report, June 10, 2014.)

Furthermore, the bill's Senate floor analysis states:

> Currently, many mandated reporters, psychotherapists included, are confused on whether they should report the downloading or streaming of child pornography, as they are required to with the printing and copying of such material.
>
> [¶] . . . In the absence of specific language allowing mandatory reports to be made for the "downloading" or "streaming" of child pornography, the child Abuse and Neglect Reporting Act, as it reads, may be inadequate to protect against sexual exploitation of children . .

(MJN, Exh. C, AB 1775 (Melendez), Senate Rules Committee Report, June 23, 2014.) "The State has a duty to ensure it does everything within its power to make certain the most vulnerable of our society, our children, are protected." (RJN at Exh. E, AB 1775, Office of Assembly Floor Analysis.)

In sum, historically, a report was required when a therapist learned someone printed, exchanged or developed a photograph or video of a child engaged in obscene sexual conduct. (*Supra.*) In 2014, AB 1775 added downloading, streaming and accessing through electronic or digital media to clarify and reinforce existing law, which creates the duty to report accessing child pornography regardless of whether it is in hard copy or digital form. Since the accessing of child pornography harms society by increasing demand, the State's attempt to deal with the problem is neither capricious nor irrational.

## PROCEDURAL HISTORY

### I. Plaintiffs' Complaint.

On February 20, 2015, plaintiffs filed the Complaint in this matter in the Los Angeles Superior Court. (AA 1.) Therein, plaintiffs set forth two causes of action for declaratory relief challenging the constitutionality of AB 1775 under the California Constitution, Article I, Section 1, as well as the Fourteenth Amendment of the United States Constitution. (AA 26-28.) Plaintiffs also brought a cause of action for injunctive relief. (AA 28.)

In their Complaint, plaintiffs allege that AB 1775's amendment to the Child Abuse and Neglect Reporting Act ("CANRA"), Penal Code section 11165.1, subdivision (c), requiring psychotherapists to report patients who have downloaded, streamed or accessed child pornography on the Internet to law enforcement, violates the patient's constitutional right to privacy regarding their confidential communications with a psychotherapist under the state and federal constitutions, and subjects psychotherapists to prosecution and loss of their licenses if they fail to comply with this law. (AA 1:24-2:8, 13:16-27).

As psychotherapists, plaintiffs Mathews and Alvarez claim that they have treated patients who are seeking treatment for sex addiction, and disorders involving a sexual attraction to children, many of whom have admitted downloading child pornography on the Internet, but whom the petitioners, based on their training and experience, do not believe present a danger of engaging in "hands-on" sexual abuse of children. (AA 10:22-11:13.) Plaintiffs further allege that these patients typically have no prior criminal history, have never expressed a sexual preference for children, and are voluntary participants to treat their sexual disorders. (*Ibid.*) Plaintiff Owen, an alcohol and drug counselor, maintains similar claims and brings his complaint to assert his interest as a citizen concerned for the proper performance of a public duty in an area of general public interest and his separate interest as a taxpayer. (AA 5:5-13).

According to the Complaint, since plaintiffs Mathews and Alvarez are psychotherapists, statements made by their patients to them during therapy "are generally treated as confidential and enjoy the protection of a psychotherapist-patient privilege" under California's psychotherapist-patient privilege (Evid. Code, § 1014) guaranteed under article I, section 1 of the state Constitution. (AA 11:14-20.) Further, plaintiffs maintain that the right to privacy, which extends to psychotherapist-patient communications, is one of the personal liberties guaranteed by the Fourteenth Amendment of the federal Constitution. (AA 11:24-12:2.)

Plaintiffs contend that AB 1775 violates patients' constitutional rights to privacy because it compels plaintiffs to report current or future patients who admit downloading child pornography, despite the psychotherapists' professional opinions that these patients present no danger of "hands-on" sexual abuse, or risk a misdemeanor conviction and the revocation of their licenses. (AA 13:16-22.)

Reporting such patients for viewing child pornography under AB 1775 therefore would not, in plaintiffs' opinion, further the stated goal of protecting children from abuse, and, at the same time would defeat the purposes of psychotherapy. (AA 2:9-19.) Plaintiffs claim that AB 1775's mandated reporting will destroy the patient trust that communications during therapy will be kept confidential. (AA 14:1-5.)

Plaintiffs contend that once current patients who have admitted to accessing child pornography learn that CANRA requires psychotherapists to report such activity, they will either cease therapy or, if they continue, will be unlikely to provide the full disclosure needed for effective therapy. (AA 14:5-11.) Plaintiffs further contend that enforcement of AB 1775 will deter new patients with serious sexual disorders from seeking psychotherapy. (AA 14:11-19.)

Lastly, plaintiffs allege that the overly broad nature of AB 1775, including reporting minors who view sexually explicit photos sent to them by their peers ("sexting") would not further the stated goal of protecting children from abuse. (AA 13:22-27.)

## II. Defendants' Demurrers.

On May 7, 2015, the Attorney General filed a demurrer to plaintiffs' Complaint. (AA 30-50.) Defendant Jackie Lacey also filed a demurrer on the same day. (AA 51-74.) Therein, both defendants maintained that the challenged AB 1775 was constitutional under the state and federal constitutions. (AA 42:10-49:18, 59:19-72:21.)

Specifically, Defendant Lacey argued the following regarding plaintiffs' state law claim: that plaintiffs raised no legally protected privacy interest; that there is no legally protected privacy interest to seek a particular form of psychiatric treatment and to view child pornography; that there is no reasonable expectation of privacy in disclosure to a

psychotherapist the consumption of child pornography on the Internet; and that there is no serious invasion of privacy where the psychotherapist is only required to submit a report without any details obtained in the course of counseling. (AA 59:19-67:6.)

In addition, defendant Lacey argued the following with regard to plaintiffs' federal claim: that the United States Supreme Court has not acknowledged the existence of a constitutional right to informational privacy; that the California Supreme Court has assumed the existence of a non-fundamental right to psychotherapist-patient privilege in some circumstances; and that a rational basis exists for the Legislature to enact AB 1775. (AA 67:7-72:21)

## III. The Superior Court Dismissed Plaintiffs' Complaint Without Leave To Amend Finding The Challenged Statute Does Not Violate Patients' Right To Privacy Under The California Or Federal Constitutions.

On July 29, 2015, the trial court issued an order sustaining defendants' demurrers without leave to amend, finding that AB 1775 does not violate patients' privacy rights under the California Constitution because there is no recognized absolute fundamental right to possess or view child pornography, that there is no reasonable expectation of privacy in psychotherapeutic treatment given that the legal system allows no "zone of privacy" for illegal conduct, and that disclosure of viewing child

pornography does not entail a serious invasion of privacy. (AA 164:20-168-26.)

The trial court also stated that AB 1775 does not violate patients' right to privacy under the federal Constitution since there is no fundamental constitutional right to informational privacy. (AA 169:18-20.) When no fundamental right is at issue, the Court found that the rational basis test determines the validity of legislative policy decisions. (AA 170:11-12.) Moreover, the trial court noted that given that this standard customarily accords a strong presumption of validity to uphold legislation, which plaintiffs bore the burden to rebut and failed, the Legislature had the constitutional authority to enact AB 1775 to assist the State's efforts to prevent the possession and distribution of child pornography. (AA 170:13-171:16.)

## IV. The Court of Appeal Affirmed.

Plaintiffs filed an appeal to the Second Appellate District of the California Court of Appeal on August 6, 2015. The case was assigned to Division Two. In a published decision, on January 10, 2017, the Court of Appeal affirmed the lower court's order sustaining defendants' demurrers without leave to amend. (*Mathews v. Haris* (2017) 7 Cal.App.5th 334 [212 Cal.Rptr.3d 547], Plaintiffs' Attachment ("PA"), 1-36.)

The Court first rejected plaintiffs' claim based upon an invasion of privacy under the California Constitution. (PA 14-33.) Applying the

frameworks this court set forth in *Hill*, *supra*, 7 Cal.4th 1, the Court of Appeal held that psychotherapy patients have no legally protected privacy interest to keep confidential their admissions that they have violated the law by downloading, streaming or accessing child pornography from the Internet. (PA 15-23.) The Court rejected plaintiffs' implicit argument that Internet child pornography was entitled to more protection than pornography that was regulated prior to the enactment of AB 1775, finding no basis to distinguish between obscene images of children in prints or on the Internet, both of which involve the "sexual exploitation" of the most vulnerable members of society. (PA 19-20; 29-30.) Further, the Court concluded that the fact that a patient might share the information of his past conduct in possessing Internet child pornography with a psychotherapist does not implicate a constitutionally protected privacy interest. (PA 18.) In addition, the Court found information regarding suspected child abuse was excepted from the psychotherapist-patient privilege under CANRA, and thus there is no legally protected activity at issue. (PA 21.) The Court of Appeal also agreed there was no fundamental privacy interest which guarantees treatment for a sexual disorder that causes a patient to indulge in the criminal conduct of viewing Internet child pornography. (PA 22-23.)

The Court of Appeal stated plaintiffs' patients have no reasonable expectation of privacy in communicating the illegal activity of viewing Internet child pornography. (PA 23-24.) Observing that the Legislature

had decided long ago that child abuse, including the sexual exploitation of children should be reported to authorities, and that psychotherapists are among the mandated reporters, the Court held there was no breach of social norms in requiring reports of such criminal activity. (PA 24.)

Since the Court of Appeal already held that psychotherapy patients have no legally protected privacy interest, as well as no reasonable expectation of privacy in communicating the illegal conduct, the Court determined that it did not need to examine the seriousness of CANRA's intrusion into that nonexistent interest. (PA 25.)

Although the Court concluded that plaintiffs failed to establish *Hill's* three threshold elements, it further held that the State would still prevail even under the applicable general balancing test. (PA 25-26.) Specifically, the Court held that the State's countervailing interest in discovering and protecting sexually exploited children justifies the intrusion into any privacy interests of the plaintiffs' patients. (PA 25-26.) The Court highlighted that the plaintiffs had conceded that the State has a compelling interest in identifying and protecting children from known or suspected sexual abuse in "real life," although the State is not required, but *may*, show a compelling interest in the circumstances of this case. (PA 27.) The Court further concluded that the paramount interest of protecting children from sexual exploitation on the Internet justifies any intrusion of privacy mandated by AB 1775. (PA 33.)

The Court of Appeal also rejected plaintiffs' arguments that they did not believe their patients abused or exploited a child "in real life" or present an imminent danger of doing so. (PA 28.) The conduct of viewing of child pornography is criminal, and there was no guarantee the patients would not ever physically abuse a child. (PA 28.) The Court of Appeal recognized that a report to authorities may disrupt the proliferation of child pornography and deter the underlying conduct of viewing children who have already been exploited. (PA 28-29.)

In light of these conclusions, the Court rejected plaintiffs' contention that CANRA cannot be expanded to include Internet child pornography victims because they are "virtual," and therefore not harmed, as "patently absurd." (PA 29.) The Court of Appeal found plaintiffs' state privacy claim failed as a matter of law because any invasion of privacy was justified by AB 1775, which "substantially furthers" one or more "legitimate and important competing interests." (PA 32-33.)

The Court of Appeal also rejected plaintiffs' claim of a federal constitutional violation, and a violation of their privacy rights under the Fourteenth Amendment. (PA 33-35.) The Court held that even if it assumed the existence of a federal privacy right in the psychotherapy privilege, AB 1775 must be accorded a strong presumption of validity and will be upheld if there was any reasonably conceivable set of facts that could provide a rational basis for the classification. (PA 34.) Here, the

Court observed that California has a legitimate interest in the identification and protection of sexually exploited children, which is a reasonable exercise of its police power. (PA 34-35.)

Finally, the Court of Appeal stated plaintiffs had not met their burden of showing that AB 1775 is invalid as to "sexting" minors. (PA 35.) The Court concluded that the State has an interest in monitoring situations that may involve undue influence, coercion, or exploitation, such a sexual conduct between a minor under 14 and an older adolescent. It found that law enforcement agencies have discretion to investigate or not, and the fact that minors are involved does not render AB 1775 unconstitutional. (PA 35.)

## ARGUMENT

### I. PLAINTIFFS HAVE FAILED TO MEET THEIR BURDEN OF SHOWING THAT AB 1775 IS UNCONSTITUTIONAL AS APPLIED TO THEM OR ON ITS FACE.[4]

"An as applied challenge may seek (1) relief from a specific application of a facially valid statute [] to an individual or class of individuals who are under allegedly impermissible present restraint [] as a result of the manner or circumstance in which the statute [] has been applied, or (2) an injunction against future application of the statute [] in the allegedly impermissible manner it is shown to have been applied in the past. It contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute [] has been applied and to consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 [40 Cal.Rptr.2d 402] (*Tobe*).) "[A]n as applied challenge assumes that the statute or ordinance violated is

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[4] This Court generally does not address constitutional questions when there is another ground on which to reach a decision. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 233, [149 Cal.Rptr. 239].)

valid and asserts that the manner of enforcement against a particular individual or individuals or the circumstances in which the statute or ordinance is applied is unconstitutional." (*Id.* at 1089.) To perfect an as applied challenge, a plaintiff must show the statute was applied "in a constitutionally impermissible manner either to themselves or to others in the past." (*Id.* at 1083.)

Under the first prong, if plaintiffs seek to pursue an as-applied challenge, they must admit that AB 1775 is valid. Second, assuming that the statute is valid, plaintiffs must show that, as to themselves or others, it has been enforced in an unconstitutional manner. Plaintiffs necessarily fail this test. There is no allegation in the record of enforcement of the statute against anyone. Thus, plaintiffs fail to perfect an as applied challenge to AB 1775. (See, *Tobe*, *supra*, 9 Cal.4th at 1089.)

Given these circumstances, plaintiffs only present a facial challenge to the statute. (See *ibid.*) However, a statute will not be deemed facially invalid on constitutional grounds unless its provisions present **a total and fatal** conflict with applicable constitutional prohibitions. (*California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 338 [84 Cal.Rptr.2d 425]; *Tobe*, *supra*, 9 Cal.4th at 1084.) "The Supreme Court has explained: Unconstitutionality must be clearly, positively, and certainly shown by the party attacking the statute, and we resolve doubts in favor of the statute's validity." (*U.D. Registry, Inc. v. State* (2006) 144 Cal.App.4th

405, 429 [50 Cal.Rptr.3d 647].) Plaintiffs have a **heavy burden** to show that a statute is unconstitutional in all or most cases, and "cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute." (*City of San Diego*, *supra*, 216 Cal.App.4th at 1504.) Plaintiffs have not met their burden, and on this ground alone, this Court should affirm the judgment of the Court of Appeal.

## II. THE REQUIREMENT TO REPORT ACCESSING OF CHILD PORNOGRAPHY IS CONSISTENT WITH THE RIGHT TO PRIVACY UNDER THE CALIFORNIA CONSTITUTION.

If the Court reaches the constitutional issue in plaintiffs' opening brief, it should uphold the appellate court's ruling in defendants' favor.

Article I, section 1 of the California Constitution guarantees, among other things, a right to privacy: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Cal. Const., Art. I § 1.) However, the history of the right to privacy, which was added to the State Constitution by the 1972 Privacy Initiative, makes clear that it was not intended to apply the "trump card of unconstitutionality" to every

regulation that impinges on individual privacy. (*See Wilkinson v. Times Mirror Corp.* (1989) 215 Cal.App.3d 1034, 1046.) The proponents of the measure stated: "The right to privacy will not destroy welfare or undermine any important government program. [] [*It*] *will not prevent the government from collecting any information it legitimately needs. It will only prevent misuse of this information for unauthorized purposes and preclude the collection of extraneous or frivolous information.* [Citation.]" (*Hill, supra*, 7 Cal.4th at 22) (emphasis in original.)

The principal focus of the Ballot Argument was the concern of "unnecessary information gathering, use, and dissemination" and "government snooping." (*Hill, supra*, 7 Cal.4th at 22.) While the Privacy Initiative did not define "privacy," the Ballot Argument in its favor included a nonspecific reference to a "right to be left alone." (*Id.* at 20.) Here, AB 1775 is fully consistent with the scope of the State's right to privacy.

### A. Plaintiffs Have Not Established An Actionable Invasion Of The Right To Privacy.

There are three elements of a privacy violation which a plaintiff must demonstrate: (1) the existence of a legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances; and (3) a serious invasion of that privacy interest. (*Hill*, supra, 7 Cal.4th 1, 39-40; *County of Los Angeles v. Los Angeles County Employee Relations Com.*

(2013) 56 Cal.4th 905, 926 [157 Cal.Rptr.3d 481].) These threshold elements are intended to "screen out claims that do not involve a significant intrusion" on a protected privacy interest. (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 893 [59 Cal.Rptr.2d 696] (*Loder*).) A defendant may prevail by negating any one of the above elements or by asserting the affirmative defense that any invasion of privacy was justified by one or more legitimate interests. (*Hill*, *supra*, 7 Cal.4th at 40.) If the claimant satisfies each of the elements, and establishes an actionable invasion of privacy, the court weighs the strength of the asserted privacy interest against the defendant's countervailing interests. (*County of Los Angeles*, *supra*, 56 Cal.4th at 926.)

Plaintiffs' claim fails at the *Hill* threshold because they have not shown that there is legally protected privacy interest in accessing child pornography and disclosing said criminal conduct to a psychotherapist. Further, plaintiffs do not show that patients reasonably expect non-disclosure of their admission to a psychotherapist of child pornography consumption. Nor do they show that the reporting of limited information from the psychotherapist to authorities, as intended by the Legislature and subject to continuing protections against public disclosure, involves a serious invasion of patient privacy.

1. There Is No Legally Protected Privacy Interest In The Consumption Of Child Pornography.

The first essential element of a state constitutional cause of action for invasion of privacy is the identification of a specific, legally protected privacy interest. (*Hill*, *supra*, 7 Cal.4th at 35.) Just as the right to privacy is not absolute, privacy interests do not encompass all conceivable assertions of individual rights. (*Hill*, *supra*, 7 Cal.4th at 35; *White v. Davis* (1975) 13 Cal.3d 757, 775 [120 Cal.Rptr. 94] (the right to privacy "does not purport to prohibit all incursion into individual privacy.")) *Hill* explained that legally cognized privacy interests are generally in two classes: (1) "informational privacy" and (2) "autonomy privacy." (*Hill*, *supra*, 7 Cal.4th at 35.)

The first of these classes, information privacy, is implicated here. A particular class of information is legally cognized as private when well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent embarrassment or indignity. (*Hill*, *supra*, 7 Cal.4th at 35.) The right to privacy "prevents government and business interests from [1] collecting and stockpiling unnecessary information about [citizens] and from [2] misusing information gathered for one purpose in order to serve other purpose to embarrass [citizens."] [Citation.] (*Id.* at 36.) Whether established social norms safeguard a particular type of information is determined from "the usual sources of

positive governing the right to privacy- common law development, constitutional development, statutory enactment, and ballot argument accompanying the Privacy Initiative." (*Id.* at 35-36.)

CANRA's enactment reflects the interest of the State to maintain social order through enforcement of the criminal law and the protection of the lives and safety of children. In that regard, this Court has consistently held that "the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins." (*People v. Wharton* (1991) 53 Cal.3d 522, 558 [280 Cal.Rptr. 631], citing to *Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425 [131 Cal.Rptr. 14.) In other words, established social norms offer no safeguard of psychotherapeutic communications regarding suspected child abuse. (See, *People v. Stritzinger* (1983) 34 Cal.3d 505, 511-512 [194 Cal.Rptr. 431] ; *Elijah W. v. Superior Court* (2013) 216 Cal.App.4th 140, 154 [156 Cal.Rptr.3d 592].)[5]

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[5] Furthermore, because psychotherapy communications regarding child exploitation have not been regarded as a right of any kind under the federal Constitution or common law (*see Hill, supra*, 7 Cal.4th at 16 [describing legal sources of privacy rights when voters added privacy to the Constitution]), it would be inconsistent with the voters' intent to expand the constitutional privacy right to encompass patient-psychotherapist communications regarding consumption of Internet child pornography.

Plaintiffs cite to a number of cases arguing that post *Hill*, California courts have uniformly held that there is a legally protected privacy interest in maintaining the confidentiality of patients' communications with a psychotherapist. (Plaintiffs' Opening Brief on the Merits ("POB") 18-19.) Plaintiffs' reliance of said cases is unavailing. Specifically, *Ruiz v. Podolsky* (2010) 50 Cal.4th 838 [114 Cal.Rptr. 3d 263] involved a statutory scheme that justified flexibility in binding nonsignatories to arbitration clauses. There, the question presented was whether an arbitration agreement signed by a patient applied to the resolution of wrongful death claims. (*See Ruiz*, at 841.) In *People v. Hammon* (1997) 15 Cal.4th 1117 [65 Cal.Rptr.2d 1], this Court held the trial court properly quashed a subpoena duces tecum the defendant served on the victim's psychotherapists, without first conducting an in camera review of the material. (*Id.* at 1119.) The court held "the trial court was not required, at the pretrial stage of the proceedings, to review or grant discovery of privileged information in the hands of third party psychotherapy providers." (*Ibid.*) In *Kirchmeyer v. Phillips* (2016) 245 Cal.App.4th 1394 [200 Cal.Rptr.3d 515], an appellate court affirmed a trial court's refusal to enforce a Board subpoena for a psychiatrist's patient records, based on findings that the subpoenaed medical records "were protected by the psychotherapist-patient privilege of Evidence Code section 1014." (*Id.* at 1398.) In *People v. Martinez* (2001) 88 Cal.App.4th 465 [105 Cal.Rptr.2d

841], the court held that records of prior inpatient psychotherapy treatment conducted during a mentally disordered sex offender commitment were properly admitted in a subsequent proceeding under the Sexually Violent Predators Act. Therefore, the public policy in favor of confidential psychotherapist-patient communications had to yield to the public safety purpose of a full assessment of the sexual predator's mental condition, including review of institutional psychotherapy records. (*Id.* at 483-484.) In *San Diego Trolley v. Superior Court* (2001) 87 Cal.App.4th 1083 [105 Cal.Rptr.2d 476] (disapproved by W*illiams v. Superior Court* (2017) 3 Cal.5th 531, fn. 8 [220 Cal.Rptr.3d 472] to the extent it contradicts *Hill, supra*, 7 Cal.4th 1), the court addressed the express exception to the psychotherapist-patient privilege created by the Legislature under *Evidence Code* section 1024 for dangerous patients and construed section 1024 narrowly to limit disclosure only to "those communications which triggered the psychotherapist's conclusion that disclosure of a communication was needed to prevent harm." (*Id.* at 1091.) In *Susan S. v. Israels* (1997) 55 Cal.App.4th 1290 [67 Cal.Rptr.2d 42], the court held an attorney could be liable for invasion of privacy for reading and disseminating the plaintiff's private medical records, but not for using them at trial. (*Id.* at 1301.) Finally, in *Pettus v. COLA* (1996) 49 Cal.App.4th 402 [57 Cal.Rptr.2d 46], the Court found that an employee's psychiatrist violated the employee's right to medical confidentiality by releasing without authorization

information about the employee. (*Id.* at 414-415.) None of the foregoing authorities relied upon by plaintiffs grant a "legally protected" status to communications between patients and psychotherapists regarding consumption of child pornography.

Further, plaintiffs cite to no authority for their proposition that the fact that a patient may discuss viewing of child pornography with a psychotherapist is "legally irrelevant" to the existence of the patient's legally protected informational and autonomy privacy interests. (POB 20.) That assertion ignores the multiple exceptions to the psychotherapy-patient privilege created by *Evidence Code* sections 1016 to 1027. Significantly, at least three of the exceptions further the State's public protection mandate. There is no privilege where the services of a psychotherapist are sought to aid commission of a crime or to escape detection after such commission. (Evid. Code, § 1018.) There is no privilege where the psychotherapist has reasonable cause to believe the patient is dangerous to self or others. (Evid. Code, § 1024.) There is no privilege where the patient is an abused minor and disclosure is in the best interests of the child. (Evid. Code, § 1027.) *Likewise, there is no psychotherapist-patient privilege where information is reported pursuant to CANRA.* (Pen. Code, §11171.2(b).)

Plaintiffs' contentions likewise fail because the conduct for which plaintiffs seek constitutional protection is criminalized in California (Pen.

Code, § 311.3[6], Pen. Code, § 311.11[7]; *In re Grant* (2014) 58 Cal.4th 469, 477 [167 Cal.Rptr.3d 401]), and the access of such materials does not involve any vital privacy interest. (*People v. Luera* (2001) 86 Cal.App.4th 513, 522 [103 Cal.Rptr.2d 438] (*Luera*).)

In *Luera*, the defendant challenged the constitutionality of Penal Code section 311.11, the statute prohibiting possession of child pornography arguing that it violated his right to privacy under the state Constitution. (*Id.* at 518.) The police confiscated several computers and found images of child pornography obtained from the Internet. (*Id.* at 517.) The *Luera* court held that possession of child pornography does not involve fundamental privacy interests. (*Id.* at 521-522.) *Luera's* decision directly supports defendant's position that the fact that a patient might share the information of his criminal conduct in accessing Internet child pornography

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[6] Section 311.3, subdivision (a) provides: "A person is guilty of sexual exploitation of a child if he or she knowingly develops, duplicates, prints, or exchanges any representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image. . ."

[7] Section 311.11, subdivision (a) provides: "Every person who knowingly possesses or controls any matter, representation of information, data, or image, including, but not limited to, any film, filmstrip, photograph, negative, slide, photocopy, videotape, video laser disc, computer hardware, computer software, computer floppy disc, data storage media, CD-ROM, or computer-generated equipment or any other computer-generated image ...."

with a psychotherapist does not implicate a constitutionally protected privacy interest.

Plaintiffs' assertion that the Legislature did not include the possession of child pornography (as prohibited by Penal Code section 311.11) in CANRA's enumerated statutory crimes constituting "sexual exploitation" of children, and thus AB 1775 should not be construed to expand the mandated reporting requirement to simple viewing or possession of child pornography, is unpersuasive. (POB 24-27.)

As the Court of Appeal (*Mathews*, *supra*, 7 Cal.App.5th at 355; PA at 20) pointed out and plaintiffs concede (POB 24-25), CANRA's definition of "sexual exploitation" in former section 11165.1, subdivision (c)(3) is consistent with former section 311.3, which criminalized the acts of duplicating, printing, or exchanging[8] of any film, photograph, or video containing child pornography. Both statues were expanded to encompass computerized images of child pornography.[9] The Legislature is presumed

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[8] Child pornography is often traded and exchanged on the Internet in addition to being bought and sold. (See L. Jill Rettinger, The Relationship between Child Pornography and the Commission of Sexual Offences against Children: A Review of the Literature (March 2000), available at https://ccoso.org/sites/default/files/import/Research-and-Statistics---T...pdf (Offers to trade sexually explicit pictures of children is common practice in the underworld of Internet pornography.)

[9] The Legislature expanded section 311.3 in 1996 to "to bring California's law against obscene mater up to date with respect to the advent and use of

to have been aware of the 2001 *Luera* case (see, *People v. Bouzas* (1991) 53 Cal.3d 467, 475 [279 Cal.Rptr. 847]), upholding the conviction of a defendant under section 311.11 with possession of images of child pornography downloaded from the Internet. (*Luera, supra*, 86 Cal.App,4th at 518, 521-522.) In enacting AB 1775, the Legislature clearly intended to make possession or viewing of computer-generated images of child pornography reportable. (*Mathews, supra*, 7 Cal.App.5th at 356.)

Plaintiffs' argument also does not account for the fact that the regulation of child pornography is not primarily directed at the distribution or production of child pornography. (See, *In re Duncan* (1987) 189 Cal.App.3d 1348, 1358 [234 Cal.Rptr. 877].) The issue is not which category of prohibited conduct encompasses offenses that are most egregious or harmful to the victims. (See, *Shoemaker v. Harris* (2013) 214 Cal.App.4th 1210, 1229 [155 Cal.Rptr.3d 76].) Although patients who disclose accessing child pornography online may not necessarily prepare the images themselves or have contact with the children who were their subjects, the Legislature is entitled to classify those who possess and exchange the offending images for the purpose of their sexual stimulation

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new technologies. (MJN, Exh. F, California Bill Analysis, Assembly Floor, A.B. 295 (Baldwin), August 23, 1996.)

as active participants in the perpetuation of child pornography and the exploitation of children. (*Id.* at 1230.)

Ultimately, plaintiffs have failed to establish that the prior version of section 11165.1 subdivision (c)(3) did not trigger the mandated reporter's obligation to report known or suspected instance of child abuse, including for example, a patient accessing child pornography online. (See, *Tecklenburg v. Appellate Div. of Superior Court* (2009) 169 Cal.App.4th 1402, 1419, fn. 16 [87 Cal.Rptr. 3d 460] ("[A] defendant may also knowingly possess or control child pornography by actively downloading and saving it to his or her computer, by printing it or by e-mailing it."); see also, *People v. Petrovic* (2014) Cal.App.4th 1510, 1516 [169 Cal.Rptr.3d 648] ("By accessing the Web sites, the defendant has the ability to manipulate, download, copy, print, save, or email the images. . ."); *United States v. Mohrbacher* (9th Cir. 1999) 182 F.3d 1041, 1047 (Downloading is analogous to placing an order trough a mail order catalogue except that the inventory is not depleted because a new copy of the image is generated.)) Further, as this Court emphasized "there is no sense in distinguishing. . . between the producers and the consumers of child pornography. . . neither could exist without the other." (*In re Grant, supra*, 58 Cal.4th at 477-478.)

2. There Is No Legally Protected Privacy Interest To Seek A Particular Form Of Psychiatric Treatment.

Autonomy privacy, which plaintiffs also contend is implicated here (POB 17), generally deals with "interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference." (*Hill*, *supra*, 7 Cal.4th at 35.) As the Court of Appeal correctly held, AB 1775 does not interfere with patients' right to seek treatment for sexual disorders involving the viewing of Internet child pornography. (PA 22.)

At the outset, plaintiffs attempt to obfuscate the issues by mischaracterizing the Court of Appeal's opinion in stating that "the Court of Appeal appears to be suggesting that the State can constitutionally require psychotherapists to report any patient communication that involve a crime without violating the patients' right to privacy because patients have no 'fundamental' constitutional right to any particular form of medical treatment, including psychotherapy." (POB 32-33.) However, the Court of Appeal simply affirmed that no fundamental privacy interest guarantees treatment for a sexual disorder that causes a patient to indulge in the criminal conduct of viewing Internet child pornography. (PA 22-23.) Plaintiffs' overblown claims that the Court of Appeal supposedly found that psychotherapy patients have no fundamental right to any form of medical treatment, and thus psychotherapists can be constitutionally

required to divulge *any* patient communication that involve a crime are wholly without support. (POB 32-33.)

In reviewing *People v. Younghanz* (1984) 156 Cal.App.3d 811, 816 [202 Cal.Rptr. 907] (*Younghanz*)[10], the Court of Appeal explained that the *Younghanz* court had rejected a contention that the mandatory disclosure in child abuse reporting statutes violated a "fundamental right to seek a cure for [] illness" guaranteed by the federal and state Constitutions. (PA 22.) To explain, the criminal defendant in *Younghanz* challenged his conviction for sexual acts with his daughter, claiming that the psychotherapist's mandatory reporting requirement violated his "fundamental" right to obtain treatment for his mental illness. (*Id.* at 815-818.) The court stated, "The right to seek a particular form of medical treatment as cure for one's illness has not been recognized as a fundamental right in California." (*Id.* at 816.) It expounded that the "important decisions" recognized by the high court "as falling within the right of privacy" include "matters relating to

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[10] Plaintiffs' attempt to distinguish *Younghanz* (POB 32-34) is unavailing. While the case involved a due process challenge under the California and federal Constitutions, the appellate court expressly decided the issue of whether the plaintiff had a fundamental right to seek medical or psychiatric treatment. It relied directly on this Court's decision in *People v. Privitera* (1979) 23 Cal.3d 697, 702 [153 Cal.Rptr. 431] (*Privitera*), which discussed the right of privacy under section I, article 1 of the California Constitution and held that the right to seek a particular form of medical treatment as a cure for one's illness has not been recognized as a fundamental right in California. (*Ibid.*) *Younghanz* is persuasive authority.

marriage, procreation, contraception, family relationships, and child rearing and education" [citations omitted], but do not include medical treatment." (*Ibid.*, quoting *Privitiera*, *supra*, 23 Cal.3d at 702.) *Younghanz's* conclusion that the realm of fundamental rights to privacy does not include medical treatment in a particular form is persuasive authority on the issue of whether a protected privacy interest exists in this case. It does not.

Next, plaintiffs incorrectly argue that *Ruiz*, *supra*, 50 Cal.4th 838, 851 and *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 332-333 [66 Cal.Rptr.2d 210] expressly recognize that the right to privacy includes the right to make medical decisions "free from state interference." (POB 34.) Neither case stands for this erroneous proposition. Contrary to plaintiffs' assertions, no court has acceded to the notion that the right to privacy encompasses an affirmative right to access psychotherapy treatment (*see*, *Privitera*, *supra*, 23 Cal.3d at 702), and the notion was expressly rejected by this Court in *Privitera*. There, the defendants were convicted of conspiracy to sell an unapproved drug intended to alleviate cancer. The defendants argued that the statute prohibiting the sale of an unapproved cancer drug was unconstitutional because it violated the defendants' fundamental right to privacy under the federal and state Constitutions. (*Id.* at 921.) The court rejected the defendants' contention and concluded that "the asserted right to obtain drugs of unproven efficacy is *not* encompassed by either the right of

privacy embodied in either the federal or the state Constitutions." (*Id.* at 921) (emphasis in original).

In sum, the challenged AB 1775 does not implicate a fundamental autonomy right. While the mandated reporting of limited information regarding the patients "may chill patients' willingness to pursue treatment," it cannot '"be said that any individual has been deprived of the right to decide,"' to avail himself to psychotherapy. (See, *Lewis* v. *Superior Court* (2017) 3 Cal.5th 561 [220 Cal.Rptr.3d 319] (*Lewis*).)

3. There Is No Reasonable Expectation Of Privacy In Disclosure To A Psychotherapist Of Downloading, Streaming Or Accessing Child Pornography.

Even if patients have a recognized privacy interest in the confidentiality of their communications with psychotherapists (Evid. Code, § 1014), patients have no reasonable expectation that information will be shielded from disclosure for the investigation of child abuse. The right to privacy protects only an individual's reasonable expectation of privacy, defined as "an objective entitlement founded on broadly based and widely accepted community norms." (*Hill*, *supra*, 7 Cal.4th at 37.) "A plaintiff's expectation of privacy in a specific context must be objectively reasonable under the circumstances, especially in light of the competing social interests involved[.]" (*Id.* at 26.) Custom and practice, including

background legal rules, "may create or inhibit reasonable expectations of privacy." (*Id.* at 36; *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 331-332, 338 [64 Cal.Rptr.3d 693] (looking to widespread practices of federal, state, and local governments and conclusions in Attorney General opinions to find no reasonable expectation of privacy).)

Here, the long history of government regulation and the established practice of reporting to state agencies demonstrate that patients have no reasonable expectation that information implicating child exploitation will be shielded from disclosure. (*People v. Cook* (1985) 41 Cal.3d 373, 384 [221 Cal.Rptr. 499] (Society does not condone a reasonable expectation of privacy in criminal activity.)) "[S]ubjective expectations of privacy that society is not prepared to recognize as legitimate have no [constitutional] protection." (*People v. Reyes* (1998) 19 Cal.4th 743, 751 [80 Cal.Rptr.2d 734].)

Furthermore, existing laws have placed additional limits on the psychotherapist-patient privilege. (See, Pen. Code, § 11171.2, subd. (b) (the duty to report is **not excused or barred** by the psychotherapist-patient privilege); Evid. Code, § 1024 (dangerous patient); Welf. & Inst. Code, § 5328, subd. (r); Civ. Code, § 56.10, subd. (c)(19) (dangerous patient); see also Civ. Code, § 43.92; also see *Tarasoff, supra*, 17 Cal.3d 425 (dangerous patient); Welf. & Inst. Code, §§ 15600-15659 (elder or dependent abuse).)

These background rules along with the long-established legislative scheme designated to protect children from sexual abuse gives patients no reasonable expectation that information regarding accessing child pornography on the Internet will be shielded from authorities.

*a. CANRA Mandates The Reporting Of Past Or Present Child Abuse, Which Further Negates Any Reasonable Expectation of Privacy.*

Plaintiffs' argument that the Court of Appeal created a new "past crimes" exception (POB 30) to a patient's right to privacy regarding the confidential nature of communications to a psychotherapist completely lacks merit. CANRA is not limited to conduct which warrants *Tarasoff* warnings. Under section 11166, a mandated reporter shall make a report whenever the reporter has knowledge of a child whom the reporter knows or reasonably suspects **has been** the victim of abuse. (Pen. Code, § 11166, subd. (a).) Thus, by its very terms, the plain meaning of the statute requires a report of any instance of child abuse, and is not limited to circumstances where the reporter believes abuse may occur in the future. (*Ibid*; see also, *B.H. v. County of San Bernardino* (2015) 62 Cal.4th 168, 242 [195 Cal.Rptr.3d 220] (under CANRA, mandated reporter required to report suspicions of prior, previously unreported incident of child abuse).)

Plaintiffs cite to two cases – *People v. Gonzales* (2013) 56 Cal.4th 353 [154 Cal.Rptr.3d 38] (*Gonzales*) and *Story v. Superior Court* (2003)

109 Cal.App.4th 1007 [135 Cal.Rptr.2d 532] (*Story*) – in support of their erroneous extrapolation that a patient who discloses *past* incidents of viewing child pornography or having engaged in other forms of child abuse is entitled to full confidentiality under the psychotherapy-patient privilege. (POB 29.) Plaintiffs mischaracterize the holdings of both cases, neither of which involved CANRA or the mandated reporting of child abuse.

In *Gonzales*, this Court considered the psychotherapist-patient privilege in the context of proceedings under the Sexually Violent Predator Act ("SVPA"). The defendant, Gonzales, had been convicted of multiple sex offenses. (*Gonzales*, *supra*, 56 Cal.4th at 358.) Gonzales was paroled and underwent psychological treatment as a condition of parole. (*Id.* at 359.) After violating his parole, Gonzales was arrested. (*Id.* at 359-360.) The prosecution sought to subpoena Gonzales's psychological records as a parolee. (*Id.* at 361.) Gonzales objected on the basis the records were protected under the psychotherapist-patient privilege. The trial court allowed the disclosure. (*Id.* at 378.)

This Court agreed with the Court of Appeal's conclusion that the trial court erred in relying on section 1024 of the Evidence Code in ordering disclosure of the records. (*Id.* at 381.) The Court reasoned that the exception was not properly applied because the district attorney had presented no evidence that the defendant had said anything to his psychotherapist or that the psychotherapist considered it necessary to

disclose confidential communications to prevent defendant from harming anyone. (*Id.* at 381-382.) However, the Court observed that the federal constitution grants states considerable leeway to impose substantial limitations on the right to privacy. (*Id.* at 386.) Balanced against this limited intrusion of the privacy right, the court held the state has a strong interest in authorizing the disclosure and use of a parolee's prior statements that occurred in parole-mandated therapy. (*Id.* at 387-388.) The Court also held that Gonzales's federal constitutional right to the psychotherapist-patient privilege was not violated by the release of the records. (*Id.* at 388.)

In *Story*, the defendant was indicted for murder, which took place in 1976. Prior to that, the defendant underwent psychotherapy as a condition of probation for his 1974 conviction for assault with a deadly weapon. (*Story, supra*, 109 Cal.App.4th at 1010-1011.) After the defendant was indicted, the People sought release of all psychotherapy records, which defendant objected to on the basis of the psychotherapy-patient privilege. (*Ibid.*) An extraordinary writ to the court of appeal was taken. (*Id.* at 1013.) The appellate court directed the lower court to deny the People's motion for release of the defendant's psychiatric records because the People sought *full* disclosure of *all* psychotherapy records. (*Id.* at 1019.) The court reasoned that the People were not entitled to *all* records because they may include privileged information such as details of the therapy. (*Id.*)

In short, neither *Gonzales* nor *Story* support plaintiffs' erroneous proposition that admissions of *past* crimes are absolutely privileged and not subject to disclosure. There is no past crime exception for reporting child abuse under CANRA.[11] As plaintiffs failed to challenge the original version of CANRA which also mandated the reporting of past incidents of sexual abuse, the argument is waived. (See, *T.P. v. T.W.*, (2011) 191 Cal.App.4th 1428, 1440, fn. 12 [120 Cal.Rptr.3d 477] (court declined to consider argument since it was not stated under a separate heading, and it not sufficiently developed).)

Furthermore, accessing child pornography is not a past crime in any event. In *Grant*, this Court rejected the petitioner's argument that "simple possession" of child pornography did not include an intent to harm a child by recognizing that "'[t]he 'victimization' of the children ... does not end when the pornographer's camera is put away. The consumer, or end recipient, of pornographic materials may be considered to be causing the children depicted in those materials to suffer as a result of his actions in at

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[11] Plaintiffs' also extrapolate that "under *Hill*, patients have a reasonable expectation that their psychotherapy communications, including about child pornography viewing" (POB 31) will be "kept private and not revealed to law enforcement officers and the world." (*Ibid.*) Plaintiffs' conclusions lack merit and find no support in *Hill*. The statement is further misleading because CANRA mandates only a limited disclosure to designated agencies. The statute does not require the psychotherapist to reveal any medical records, diagnosis, or treatment plan for the patient.

least three ways. [¶] *First*, the simple fact that the images have been disseminated perpetuates the abuse initiated by the producer of the materials.... The consumer who 'merely' or 'passively' receives or possesses child pornography directly contributes to this continuing victimization. [¶] *Second*, ... [t]he recipient of child pornography obviously perpetuates the existence of the images received, and therefore the recipient may be considered to be invading the privacy of the children depicted, directly victimizing these children. [¶] *Third*, the consumer of child pornography instigates the original production of child pornography by providing an economic motive for creating and distributing the materials.... The underlying point ... is that there is no sense in distinguishing ... between the producers and the consumers of child pornography. Neither could exist without the other. [Citations.]'" (*In re Grant*, *supra*, 58 Cal.4th at 477-478) (italics in original.)

Accordingly, psychotherapy patients have no reasonable expectation that disclosing information regarding accessing child pornography will not be reported to authorities.

*b. The Legislative Intent Behind AB 1775 Supports The Conclusion Psychotherapy Patients Have No Reasonable Expectation That Disclosure of Child Pornography Viewing Will No Be Reported.*

By its plain meaning, former section 11165.1 mandated the reporting of child abuse, including consumption of child pornography, which gives rise to a reasonable suspicion of duplicating, printing, or exchanging said material. An exchange is the act of giving or taking of one thing in return for another. Before one can exchange an item, he must necessarily possess it. (See *Black's Law Dictionary* (7th ed. 1999) 484, 585 ("exchange" is the act of transferring interests, each in consideration for the other).) Further, in *Duncan*, *supra*, 189 Cal.App.3d 1348, while discussing the purpose of section 311.3, the Court explained that the Legislature sought to implement a mechanism to prevent *noncommercial* exchange of child pornography. (*Id.* at 1358-59.)

The fact that the Legislature would take measures to fight the dissemination of child pornography by mandating the reporting of producers of such material as well as its consumers is neither surprising nor unjustified. (See, *Ferber*, *infra*.) This Court's decision in *Grant*, *supra*, 58 Cal.4th at 477-478 further provides support for the conclusion that there

can be no expectation of privacy or constitutional protection for conduct that is criminalized and seen as a form of child abuse. (*Ibid.*)

Additionally, a finding that the right to privacy of psychotherapy patients extends to the viewing of online child pornography is in conflict with the Legislature's purpose in enacting AB 1775. As the author of AB 1775 stated:

> This bill will amend the [CANRA] to include "downloading" and "streaming" as part of its definition of "sexual exploitation" to ensure the reporting requirements related to internet child pornography are defined to reflect modern technology. This will further ensure the protection of children from the proliferation of sexual exploitation through the internet child pornography . . . .

(MJN, Exh. B, AB 1775 (Melendez), Senate Committee on Public Safety Report, June 10, 2014.)

Furthermore, the bill's Senate floor analysis added:

> [¶] . . . In the absence of specific language allowing mandatory reports to be made for the "downloading" or "streaming" of child pornography, the child Abuse and Neglect Reporting Act, as it reads, may be inadequate to protect against sexual exploitation of children[.]

(MJN, Exh. C, AB 1775 (Melendez), Senate Rules Committee Report, June 23, 2014.) "The State Legislature has a duty to ensure it does everything within its power to make certain the most vulnerable of our society, our

children, are protected." (MJN, Exh. E, AB 1775, Office of Assembly Floor Analysis.)

4. There Is No Serious Invasion Of Privacy Where The Psychotherapist Is Only Required To Submit A Report Without Any Details Regarding The Patient.

Plaintiffs have also failed to satisfy *Hill's* third threshold element, which asks whether the defendant's conduct rises to the level of a serious invasion of privacy. Because "[n]o community could function if every intrusion into the realm of private action, no matter how slight or trivial, gave rise to a cause of action for invasion of privacy[,] . . . [a]ctionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." (*Hill, supra*, 7 Cal.4th at 37.) Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy." (*Ibid.*)

The statute only requires that the psychologist make an initial report to authorities indicating suspected child abuse. (*Stritzinger, supra*, 34 Cal.3d 505.) The statute does not impose investigative duties on a reporter. In order to preserve the possibility of meaningful therapy for the patient, a psychotherapist need not reveal "details given to him by the adult patient in subsequent sessions . . ." (*Id.* at 514.) Notably, the statute is limited to the sexual exploitation of the children, and there no requirement under the

amendment for the reporter to disclose any diagnosis, medical condition or treatment of the patient.

Further, the report is submitted to designated agencies only (Pen. Code, § 11165.9), and is subject to extensive privacy protections. (Pen. Code, § 11167.5.) This limited and confidential disclosure for the precise purpose for which CANRA was enacted does not rise to the level of an actionable invasion of privacy. (See *Gonzales*, *supra*, 56 Cal.4th at 387-388.)

### B. CANRA's Reporting Mandate Serves Vital Public Safety Interests That Outweigh Any Intrusion On Patients' Privacy Interests.

Even if plaintiffs could satisfy *Hill's* threshold requirements, which they cannot, defendant would still prevail because of balance of the State's countervailing interests of protecting children from sexual exploitation outweighs the limited intrusion resulting from the mandated reporting of child pornography consumers. Furthermore, the foregoing is clearly a compelling interest, even if the countervailing balancing test is not applied.

#### 1. The "Compelling Interest"/ "Narrowly Tailored" Test Does Not Apply.

At the outset, plaintiffs argue the wrong standard for determining a violation under the state Constitution. Plaintiffs contend that defendant must demonstrate that the State's mandated reporting requirement serves a

"compelling interest" and is "narrowly tailored" to protecting children from abuse. (POB 34-37.) This contention is incorrect.[12] Indeed, on July 17, 2017, this Court issued its opinion in *Lewis*, *supra*, 3 Cal.5th 561, wherein the Court confirmed that the general balancing test should be applied in cases, such as this one, where there are no interests fundamental to personal autonomy implicated. (*Id.* at 6; see also, *Williams*, *supra*, 3 Cal.5th 531 (same).) An invasion of privacy does not violate the state Constitution so long as "it substantively furthers one or more countervailing interests." (*Lewis*, *supra*, 3 Cal.5th 561; *Hill*, *supra*, 7 Cal.4th at 40.)

Although this Court has applied a strict scrutiny standard to cases involving infringements on bodily autonomy or speech and associational rights (*American Academy of Pediatrics* (1997) 16 Cal.4th 307, 340-341 [66 Cal.Rptr.2d 210] (abortion); *White*, *supra*, 13 Cal.3d at 761 (freedom of speech and association)), the Court has made clear that this heightened standard does not apply outside of that context. (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 288 [97 Cal.Rptr.3d 274] ["For purposes of this balancing function [under *Hill*]-and except in the rare case in which a 'fundamental' right of personal autonomy is involved-the defendant need

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[12] The two cases plaintiffs primarily rely on, *Stritzinger*, *supra*, 34 Cal.3d at 511-513 and *Lifschultz*, *supra*, 2 Cal.3d at 432, pre-date *Hill* and are inapposite. *Stritzinger* discusses information beyond the initial reports to authorities. In turn, *Lifschultz* predates even the Privacy Initiative of 1972.

not present a "compelling" countervailing interest; only 'general balancing tests are employed,'" quoting *Hill, supra*, 7 Cal.4th at 34; *see also*, *Lewis*, *supra*, 3 Cal.5th 561].)

This Court has repeatedly applied *Hill's* legitimate-interests balancing test, in cases where the government is alleged to have infringed an informational privacy interest, including in the context of medical information. (See *Loder*, *supra*, 14 Cal.4th at 897-898 (city's "substantial interest in conducting suspicion less drug testing of a job applicant" justified "the relatively minor intrusion upon such an applicant's reasonable expectations of privacy"); *County of Los Angeles*, *supra*, 56 Cal.4th at 930-932 (applying the legitimate-interests balancing test to permit a county to reveal employees' home addresses to the employees' union); *IFPTE*, *supra*, 42 Cal.4th at 338-339 (applying balancing test in challenge to public disclosure of employee salary information by county).

To the extent plaintiffs attempt to argue that the State should be required to employ "less intrusive means" of monitoring child, this argument too is precluded by the *Lewis* decision. As this Court observed, the State does not bear the burden of showing it has adopted the least intrusive means to achieving its legitimate objectives. (*Lewis*, *supra*, 3 Cal.5th 561.) Here, plaintiffs have altogether failed to develop this argument because they have failed to allege in their Complaint, let alone

demonstrate, the presence of any viable alternatives to protecting children from Internet child exploitation. (See, *Ibid.*)

2. CANRA's Vital And Compelling Interest In Protecting Children Justifies The Use Of Mandated Reporting To Prevent Child Exploitation.

Reporting of psychotherapy patients who admit to consuming child pornography is justified by legitimate, indeed, compelling-State interests. Tellingly, plaintiffs admit that the State has a compelling interest in protecting children from abuse. (POB 39.) As the Supreme Court explained in *Hill*, "[legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities[.]" (*Hill*, *supra*, 7 Cal.4th at 38; *People v. Hodges* (1992) 10 Cal.App.4th Supp. 20, 32 [13 Cal.Rptr.2d 412] (the state has a compelling state interest furthered by the reporting statute, protecting children from child abuse).)

Here, mandated reporting of child sexual exploitation serves the State's vital dual interests in protecting children from exploitation and eradicating the State's market for child pornography. AB 1775 furthers this purpose.

3. The Identification And Prosecution Of Suspects Is In Line With CANRA's Goal To Protect Children.

Plaintiffs' contention that AB 1775 is unconstitutional because CANRA's mandated reporting is intended to protect children who are the

victims of abuse and not to identify persons who may pose danger to the child is unconvincing. Notably, the Legislature elected to place CANRA in the Penal Code, specifically in part 4 (Prevention of Crimes and Apprehension of Criminals), title 1 (Investigation and Control of Crimes and Criminals), rather than other statutory schemes such as the Welfare and Institutions Code, the Government Code, or the Health and Safety Code. Its placement in the code governing criminal culpability shows that it was meant to address criminal conduct. (See *Planned Parenthood Affiliates v. Van de Kamp* (1986) 181 Cal.App.3d 245, 267 [226 Cal.Rptr. 361] (*Planned Parenthood*).)

Detection and prosecution of child abuse is in line with CANRA's goal to protect children. (*Roe v. Superior Court* (1991) 229 Cal.App.3d 832, 845 [280 Cal.Rptr. 380].) "The Legislature obviously intended . . . incidents of child abuse [] be promptly ***investigated and prosecuted***." (*Stritzinger*, *supra*, 34 Cal.3d at 512) (emphasis added.).) Justice Kaus, in his concurrence with the majority, stated: "In the area of sexual abuse of children by adults, the law, presumably, has three objectives: ***to punish the abuser***, to identify and protect his victims and to cure him in order to protect future potential victims." (*Id.* at 523, conc. and dis. opn of Kaus, J. (emphasis added).) Courts have clearly identified prosecution of child abusers as a purpose of the act. (See *People v. Battaglia* (1984) 156 Cal.App.3d 1058, 1063 [203 Cal.Rptr. 370].)

Relying on *James W.*, *supra*, 17 Cal.App.4th at 255 plaintiffs erroneously conclude that the purpose of CANRA's reporting requirement excludes the criminal prosecution of child abusers. (POB 40.) While the primary concern of CANRA's reporting scheme may be promotion of child welfare, *James W.* does not stand for the proposition that the investigation and prosecution of child abusers falls outside CANRA's scope. *James W.* involved activities that were neither required nor authorized under CANRA and narrowly held "that section 11172 . . . does not apply to activities that continue more than two years after the initial report of abuse by parties who are not acting as reporters." (*Stecks*, *supra*, 38 Cal.App.4th at 373, fn. 7.) *James W.* is inapposite. The protection of children from exploitation is consistent with a concurrent investigation and prosecution of persons who engage in child exploitation. Plaintiffs' argument to the contrary is illogical.

4. Consumption of Child Pornography Constitutes Child Exploitation.

The underlying predicate to plaintiffs' argument is that AB 1775 does not accomplish its intended purpose under CANRA because there is no evidence that patients who have viewed child pornography have engaged in physical abuse of children. (POB 38, 44.) That predicate is wrong and such arguments have been thoroughly discredited.

In *Paris Adult Theatre I v. Slaton* (1973) 413 U.S. 49 [93 S.Ct. 2628, 37 L.Ed.2d 446] (*Paris Adult Theatre I*),[13] the United States Supreme Court rejected petitioners' assertion that state regulation must be validated by concrete data if it is to pass constitutional muster. It stated: "We do not demand of legislatures 'scientifically certain criteria of legislation.' . . . From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation. . . . The fact that a congressional directive reflects unprovable assumptions about what is good for the people . . . is not a sufficient reason to find that statute unconstitutional." (*Id.* at 60-62.) Continuing, the court noted: "Nothing in the Constitution prohibits a State from reaching . . . [a conclusion] and acting on it legislatively simply because there is no conclusive evidence or empirical data." (*Id.* at 63.)[14] In other words, even if, as plaintiffs claim, AB 1775 is more poison than panacea, it constitutes a proper exercise of the police powers of the State,

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[13] *Paris Adult Theatre I, supra*, was cited with approval by the California Supreme Court in *Bloom v. Municipal Court for Inglewood Judicial Dist.* (1976) 16 Cal.3d 71, 82-83 [127 Cal.Rptr. 317] on this specific issue.

[14] Notably, according to *United States v. Apodaca* (9th Cir. 2011) 641 F.3d 1077, 1083, a case cited by plaintiffs in their POB at page 38, the existing scientific evidence does not firmly discredit the purported causal link between the crime of possession of child pornography and physical sexual crimes against children.

and it is rationally related to the Legislature's purpose of ensuring the welfare of children.

Plaintiffs also rely on *People v. Haraszewski* (2012) 203 Cal.App.4th 924, 942 [137 Cal.Rptr.3d 641] for the wrong proposition that possession of child pornography does not constitute sexual abuse of the children depicted in the image. (POB 42.) *Haraszewski* dealt with the limited question of how many crimes a defendant can be charged with having committed, and addressed whether the crime of child pornography possession was different from the crime of child pornography production and distribution. Contrary to plaintiffs' claims, no statute or case has stated that child pornography possession does not constitute child exploitation. Indeed, this Court's decision in *Grant*, *supra*, mandates the opposite conclusion. (*Grant*, *supra*, 58 Cal.4th at 477) (finding no distinction between the producers and the consumers of child pornography.") Accessing child pornography is not a victimless crime. (See, *Osborne*, *supra*, 495 U.S. at 110.)

Lastly, plaintiffs' reliance on *Fults v. Superior Court* (1979) 88 Cal.App.3 899, 904 [152 Cal.Rptr. 210] and *Britt v. Superior Court* (1978) 20 Cal.3d 844, 856 [143 Cal.Rptr. 697] is misplaced. (POB 44-45.) Both cases deal with civil discovery orders regarding detailed medical and sexual information of the parties involved. Neither was based on CANRA or addressed the scope of mandated reporting of child exploitation.

Plaintiffs' extensive citation to these civil discovery cases is, therefore, immaterial.

5. Even If A Victim May Ultimately Not Be Located, The State Has A Legitimate Interest In Conducting An Investigation To Identify The Child.

To the extent plaintiffs argue that there is no reasonable likelihood that the children depicted in pornography can be identified and protected by the state (POB 44-46), the argument is unavailing. "Pornography may well involve 'a' specific, identifiable child even if neither covered professionals nor their patients know the child's identity." (MJN, Exh. D, Opinion Of The Office Of Legal Counsel, Duty to Report Suspected Child Abuse Under 42 U.S.C. § 13031, 2012 OLC Lexis 6, 28-30.) While some child pornography may be the work of professionals and difficult to link to identifiable children, other images are homemade recordings of sexually abusive acts "committed against young neighbors or family members, and therefore traceable through law enforcement investigation to a protected child or children. [Citations]." (*Id.*)

Moreover, California has addressed the problem of criminal activity that spans more than one state by adopting statutes that provide the state with broader jurisdiction over interstate crimes. For instance, Penal Code section 27 permits the punishment of a defendant under California law for any crime committed 'in whole or in part' in the state. (Pen. Code, § 27

(a)(1).) In addition, state and federal agencies are known to participate in task forces to address interstate crimes and promote prosecutorial efficiency. To discourage pernicious international conspiracies and trade, prohibiting "this vice at all levels in the distribution chain," (*Osborne*, *supra*, 495 U.S. at 110), may be "[t]he most expeditious if not the only practical method of law enforcement . . . to dry up the market for this material." (*Ferber*, *supra*, 458 U.S. at 760.)

6. Reporting Of Creation, Or Exchange Of Child Pornography Is Justified Even When Done Among Minors As "Sexting."

*a. Plaintiffs Lack Standing To Raise A Claim On Behalf Of Minors.*

While plaintiffs argue that AB 1775 is an overbroad invasion of patients' privacy rights due to mandated reporting of minors who have "sexted" images of themselves to other minors (POB 47), plaintiffs' Complaint contains no allegations that they have minor patients, let alone ones that have engaged in "sexting." This is fatal to plaintiffs' argument, as they do not have standing to pursue such claims. (See *Parker v. Bowron* (1953) 40 Cal.2d 344, 351 [254 P.2d 6] (the questions for "standing to sue" goes to the existence of a cause of action, and may be raised at any point in the proceedings).)

*b. Plaintiffs Have Failed To Raise An As Applied Challenge Regarding Minors.*

As discussed above, an as applied challenge assumes that the subject statute is valid and asserts the manner of enforcement against particular individuals or the circumstances in which the statute is applied is unconstitutional. (*Tobe*, *supra*, 9 Cal.4th at 1089.) Since the allegations of the Complaint do not describe the circumstances of any past arrests, and there are no allegations that describe a pattern of enforcement that is constitutionally impermissible as to minors, plaintiffs failed to perfect an as applied challenge. (See *id.* at 1086-87.) Accordingly, plaintiffs' AB 1775 challenge as it relates to minors is a facial challenge. (See *ibid.*)

A statute will not be deemed facially invalid on constitutional grounds unless its provisions present a total and fatal conflict with applicable constitutional prohibitions. (*Tobe*, *supra*, 9 Cal.4th at 1084.) "[P]etitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute." (*Ibid.*) Further, a facial challenge to a law on the grounds that it is overbroad is an assertion that the law is invalid in all respects and cannot have *any* valid application. (*Id.* at 1109.) Since AB 1775 does not inevitably conflict with any alleged right to privacy, the statute is capable of constitutional application. Therefore, the statute is not facially invalid or unconstitutionally overbroad.

*c. Plaintiffs Have Not Met Their Burden Of Showing That AB 1775 Is Invalid As To "Sexting" Minors.*

Plaintiffs rely on *Planned Parenthood, supra*, 181 Cal.App.3d 245 and its ruling that CANRA's statutory scheme "did not contemplate the reporting of voluntary associations between young children under 14 who are not child abuse victims and are not subjects of sexual victimization." (*Id.* at 267; see POB 47.) *Planned Parenthood* is fully distinguishable because the court's decision was limited to voluntary sexual activity between minors 14 and under and did not decide the question whether the reporting law applies to voluntary conduct of a minor under 14 whose partner is a minor over 14 or an adult. (*Id.* at 283, fn. 14 and 16.) Moreover, plaintiffs fail to distinguish between engaging in consensual sexual activity and "documenting" it via "sexting," which turns into the impermissible creation of child pornography, requiring a report under AB 1775 whether both minors are under 14 or over 14. (See Pen. Code, § 311.3; Pen. Code, § 11165.1(2) (requiring a report when a person knowingly "persuades . . . or coerces a child . . . to pose . . . for purposes of preparing a film, photograph . . . ").)

Knowledge of "sexting" between minors mandates a report. Whether authorities decides to investigate is not within the reporter's

prerogative. Nonetheless, the inclusion of "sexting" between minors within the reportable conduct does not render the statute unconstitutional.

## III. AB 1775 DOES NOT VIOLATE PATIENTS' RIGHTS TO PRIVACY UNDER THE FEDERAL CONSTITUTION.

AB 1775 does not impinge on a fundamental constitutional right. Plaintiffs' argument to the contrary misconstrues well-established United States Supreme Court precedent.

### A. Neither *Whalen* Nor *Jaffe* Support The Proposition That The Psychotherapist Privilege Involves Fundamental Privacy Interests Under The Federal Constitution.

*Whalen, supra*, 429 U.S. 589 does not support plaintiffs' proposition that psychotherapy patients have a fundamental right to informational privacy. In *Whalen*, the high Court expressly addressed the constitutional protection against disclosure of personal matters and rejected the argument that the State's collection of prescription information violated a constitutional informational privacy right. (*Id.* at 600, 604.)

The Court also held that recording the names of persons who obtained certain drugs did not violate any constitutional right to have information kept private. (*Id.* at 599-604.) To assure no misunderstanding, Justice Stewart wrote separately to note that the Court's opinion did not

support the proposition that broad dissemination of the information collected by New York would violate the Constitution. (*Id.* at 608-609.)

Likewise, *Jaffe v. Redmon* (1996) 518 U.S. 1 [116 S.Ct. 1923, 135 L.Ed. 337] (*Jaffee*) provides no support for the proposition that the Supreme Court has recognized a fundamental privacy right in non-disclosure of personal information. The Court in *Jaffe* recognized a psychotherapist privilege under Rule 501 of the Federal Rules of Evidence and under federal common law applicable to confidential communications made to psychiatrists and psychologists. (*Jaffee, supra*, 518 U.S. at 12-18.) The privilege was not based on the Constitution or rooted in any constitutional right. (*United States v. Glass* (10th Cir. 1998) 133 F.3d 1356, 1358; *United States v. Squillacote* (4th Cir. 2000) 221 F.3d 542, 560 (the psychotherapist-patient privilege recognized in *Jaffee* "is a testimonial or evidentiary one, and not constitutionally based").)

**B. The Proposition That The Psychotherapy Privilege Implicates Fundamental Rights To Privacy Is Misplaced.**

Plaintiffs cite to Ninth Circuit precedent to erroneously argue that the psychotherapy privilege implicates fundamental rights to privacy under the federal constitution. In *Caesar v. Mountanos* (9th Cir. 1976) 542 F.2d 1064, 1067, footnote 9, cert. denied 430 U.S. 954 [97 S.Ct. 1598, 51 L.Ed 2d 804], the Ninth Circuit indicated psychotherapist-patient

communications are protected by the right of privacy and used a compelling interest test in connection with the right of privacy encompassing the psychotherapist-patient relationship. (See also, *Hawaii Psychiatric Society v. Ariyoshi* (D. Haw. 1979) 481 F.Supp. 1028, 1039.) By contrast, most of the federal courts finding a right of confidentiality have used a balancing test to assess violations of that right. (See *Barry v. City of New York* (2nd Cir. 1983) 712 F.2d 1554, 1559 (most courts considering question agree that intermediate scrutiny or balancing approach is appropriate standard of review); *J.P. v. Desanti* (6th Cir. 1981) 653 F.2d 1080, 1089 (concluding that the Constitution does not encompass a general right to nondisclosure of private information).)

Decisions of the lower federal courts on questions of federal law are persuasive but are not binding precedent. (*Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 763 [134 Cal.Rptr.2d 138].) Absent a clear indication from the United States Supreme Court, this Court should not rely on isolated Ninth Circuit authority to recognize a constitutional right to privacy encompassing the psychotherapist patient relationship.

### C. The United States Supreme Court Has Not Acknowledged The Existence Of A Constitutional Right To Informational Privacy.

The Due Process Clause protects "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." (*Washington v. Glucksberg* (1997) 521 U.S. 702, 720-21 [117 S.Ct. 2258, 138 L.Ed.2d 772] (*Glucksberg*).) Thus, the Supreme Court has held that it protects "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion," *id.* at 720, but has cautioned against expanding these rights. (See *id.*; see also *Collins v. City of Harker Heights* (1992) 503 U.S. 115, 125 [112 S.Ct. 1061, 117 L.Ed.2d 261].) The Supreme Court has also required "a careful description of the asserted fundamental liberty interest," *Glucksberg*, *supra*, 521 U.S. at 721, or "a narrow definition of the interest at stake." (*Raich v. Gonzalez* (9th Cir. 2007) 500 F.3d 850, 863.) The fact that the Constitution protects several specific aspects of individual privacy does not mean that it protects all aspects of individual privacy.

The Supreme Court has thus far never acknowledged the existence of a constitutional right to information privacy. (See *Whalen, supra*, 429

U.S. at 605.) Likewise, in a more recent decision, the high Court assumed, without deciding, that a questionnaire asking government contract employees to disclose treatment and counseling for recent illegal drug use implicated the *Whalen* interest in avoiding divulgement of personal information and held that the inquiries were reasonable. (*NASA v. Nelson* (2011) 562 U.S. 134, 147-151 [131 S.Ct. 746, 178 L.Ed.2d 667].) In a concurring opinion to the NASA decision, Justice Scalia, joined by Justice Thomas, explained why they believe that "a federal constitutional right to 'informational privacy' does not exist." (*Id.* at 161 (conc. opn. of Scalia, J.).) The Supreme Court has not extended the Fourteenth Amendment right to privacy beyond fundamental family-related concerns.

### D. This Court Has Assumed, Without Deciding, The Existence Of A Non-Fundamental Right To A Psychotherapist-Patient Privilege Based On The Federal Constitution.

This Court has found that communications between a patient and psychotherapist are protected by a psychotherapist-patient privilege based on a federal constitutional right to privacy. "The psychotherapist-patient privilege has been recognized as an aspect of the patient's constitutional right to privacy." (*Stritzinger*, *supra*, 34 Cal.3d at 511.) "In *Griswold v. Connecticut* (1965) 381 U.S. 479, 484, the United States Supreme Court

declared that 'Various guarantees [of the Bill of Rights] create zones of privacy,' and we believe that the confidentiality of the psychotherapeutic session falls within one such zone." (*In re Lifschutz*, *supra*, 2 Cal.3d at 431-432.) More recently, this Court has questioned the continuing vitality of the constitutional bases for the psychotherapist-patient privilege. "Although over 40 years have elapsed since our decision in *Lifschutz*, the United States Supreme Court itself has not yet definitively determined whether the federal Constitution embodies even a general right of informational privacy." (*Gonzales*, *supra*, 56 Cal.4th at 384 (italics omitted).) Following the lead of the United States Supreme Court in *Whalen, supra*, and *NASA*, *supra*, this Court in *Gonzales* merely assumed, without deciding, that such right exists in some, but not all, circumstances involving communications with a psychotherapist. (*Gonzales*, *supra*, 56 Cal.4th at 385.)

### E. Assembly Bill 1775 Satisfies Rational Basis Review.

The murky federal right to privacy is not broad and may be infringed upon by balancing the intrusion with a showing of the proper governmental interest. (*Whalen*, *supra*, 429 U.S. at 598.) *Whalen* appears to use a rational basis test, though it states no express standard. (See *Whalen*, generally; *Privitera*, *supra*, 23 Cal.3d at 697 (finding that *Whalen* "upheld the patient-identification requirement under the rational basis test".) In

privacy cases, the federal courts have generally applied balancing tests that avoid rigid "compelling interest" or "strict scrutiny" formulations. (*Hill*, *supra*, 7 Cal.4th at 30.) "The Supreme Court has repeatedly applied the simple rational basis test in reviewing the complex social welfare system which 'necessarily deals with the intimacies of family life' [Citation.][]." (*Sturgell v. Creasy* (6th Cir. 1981) 640 F.2d 843, 854.)

1. The Rational Basis Standard.

Where, as here, the challenged statute does not implicate a fundamental right, there is no need "for complex balancing of competing interests" and it may be upheld if it possesses "a reasonable relationship to a legitimate state interest." (*Glucksberg*, *supra*, 521 U.S. at 722.)

The rational basis standard of scrutiny is the most deferential because the Constitution does not authorize the judiciary to "sit as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." (*New Orleans v. Dukes* (1976) 427 U.S. 297, 303 [96 S.Ct. 2513, 49 L.Ed.2d 511].) Thus, AB 1775 should be "accorded a strong presumption of validity" and must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (*Heller v. Doe* (1993) 509 U.S. 312, 319-20 [113 S.Ct. 2637, 125 L.Ed.2d 257].) The burden is on the plaintiffs "to negative every

conceivable basis which might support it, whether or not the basis has a foundation in the record." (*Id.* at 320-21.) "A court may even hypothesize the motivations of the . . . legislature to find a legitimate objective promoted by the provision under attack." (*Shaw v. Oregon Public Employees' Ret. Bd.* (9th Cir. 1989) 887 F.2d 947, 948-49 (internal quotations omitted).)

2. AB 1775 Satisfies The Rational Basis Standard.

Applying these principles, this Court should find that AB 1775 is constitutional.[15] There are a number of legitimate concerns that rationally and legitimately could have led and did lead the Legislature to pass the mandatory reporting laws requiring mandated reporters, including psychotherapists, to report consumption of child pornography. (See, *Ferber*, *supra*, 458 U.S. at 756) ("Because of the surpassing importance of the government's interest in safeguarding the physical and psychological

[15] Even if this Court were to apply a general balancing test in determining whether the mandated reporting of child pornography consumption would violate a psychotherapy patient's asserted federal constitutional right to privacy against the justification for the mandated report, there is no violation of the patient's purported federal rights to privacy. (See, *Gonzales*, *supra*, 56 Cal.4th at 386.) Taking into account the limited intrusion upon a patient's federal constitutional right to informational privacy, if any, and the substantial state interest that supports the disclosure of child pornography consumption, the report to a designated government agency about suspected child abuse does not violate a patient's federal constitutional right of privacy. (See, *id.* at 386.)

wellbeing of children, the government has greater leeway to regulate child pornography than it does other areas.")

*a. A Legitimate Government Purpose.*

The Legislature has a strong and legitimate interest in protecting the nation's children and specifically the children residing within this State. (*Stecks*, *supra*, 38 Cal.App.4th at 371; *Elijah W.*, *supra*, 216 Cal.App.4th at 153-154.) "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" (*Osborne*, *supra*, 495 U.S. at 109-110; *Ferber*, *supra*, 458 U.S. at 757 ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.").

Moreover, AB 1775 constitutes a proper exercise of the State's police power, authorizing the State to provide for the public health, safety, and morals of its citizens. (See *Paris Adult Theatre I*, *supra*, 413 U.S. at 61 (holding that Georgia had a legitimate interest in regulating obscene material because the legislature "could legitimately act . . . to protect 'the social interest in order and morality'").

*b. A Rational Basis Exists For The Legislature To Believe That AB 1775 Furthers Its Purpose Of Child Abuse Protection And Prevention.*

A state has broad latitude in experimenting with solutions to problems of vital local concern. (*Whalen, supra*, 429 U.S. at 597.) The challenged statute here represents a considered attempt to deal with such a problem. It was sponsored by the California Association of Marriage and Family Therapists, and drew on the support of many professional organizations, including the California Psychological Association, The Board of Behavior Sciences, the Child Abuse Prevention Center, the California State Sheriff's Association, and the California District Attorneys Association. Notably, AB 1775 passed without opposition on both the Senate and Assembly Floors. (See MJN, Exh. B, AB 1775 (Melendez), Senate Committee on Public Safety Report, June 10, 2014; Exh. C, AB 1775 (Melendez), Senate Rules Committee Report, June 23, 2014; Exh. E, AB 1775, Office of Assembly Floor Analysis.)

The statute is manifestly the product of an orderly and rational legislative decision. There surely is nothing unreasonable in the assumption that the reporting requirement of patients who view child pornography online might aid in the enforcement of laws designed to identify and minimize child abuse. Enforcement of laws criminalizing the

consumption of child pornography is rationally and reasonably related to these goals; courts have repeatedly upheld such criminal statutes based on these reasons. (See, *Osborne*, *supra*, 495 U.S. 103; *Ferber*, *supra*, 458 U.S. 747.) Accordingly, AB 1775 does not violate the federal constitution.

## CONCLUSION

Defendant respectfully submits the decision of the Court of Appeal should be affirmed in full.

DATED: August 31, 2017

HURRELL CANTRALL LLP

By: _____

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## CERTIFICATE OF WORD COUNT

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 13,946 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

DATED: August 31, 2017

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## PROOF OF SERVICE

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 300 South Grand Avenue, Suite 1300, Los Angeles, California 90071.

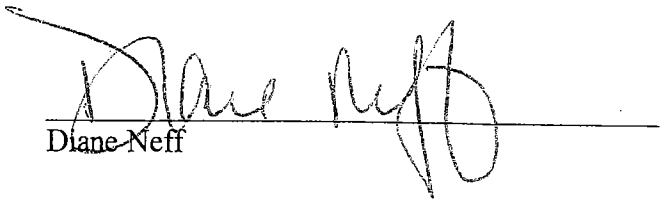
On August 31, 2017, I served true copies of the following document(s) described as **ANSWER BRIEF ON THE MERITS** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**BY FEDEX:** I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 31, 2017, at Los Angeles, California.



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