No. S240156

In the

Supreme Court

of the

State of California

DON MATHEWS, M.F.T., MICHAEL ALVAREZ, M.F.T., and WILLIAM OWEN, CADC II,
Appellants and Plaintiffs,
vs.
XAVIER BECERRA, in his official capacity as Attorney General of California; and JACKIE LACEY in her official capacity as the District Attorney of the county of Los Angeles and representative of the California district attorneys,
Respondents and Defendants.

COURT OF APPEAL, SECOND DISTRICT, DIVISION TWO, CASE NO. B265990
SUPERIOR COURT Case No. BC573135
HON. MICHAEL L. STERN, JUDGE, DEPARTMENT 62

PLAINTIFFS' CONSOLIDATED REPLY BRIEF

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I. INTRODUCTION

The ultimate problem with A.B. 1775's new requirement that psychotherapists report all patients admitting to or suspected of viewing child pornography is that it fails to serve the Child Abuse and Neglect Reporting Act's ("CANRA") compelling purpose of protecting children in California from sexual abuse or exploitation, but instead has the perverse effect of frustrating CANRA's purpose by deterring only those individuals *struggling* with sexual disorders, including the unwanted attraction to children, from voluntarily seeking the psychotherapy that might otherwise help control those behaviors.

In other words, the State's *need* for the disclosure of psychotherapy communications at issue this case, which is required to justify its invasion of the patients' right to privacy, is utterly lacking, rendering A.B. 1775 unconstitutional under both Article 1, section 1 of the California Constitution and the Fourteenth Amendment of the U.S. Constitution.

Also unconstitutional, in the case of all mandated reporters, is A.B. 1775's requirement that consensual "sexting" between minors requires a report to law enforcement, regardless whether the reporter believes in the particular case that there is no abuse and hence no "victim." This mandate is particularly anomalous given case law confirming that minors under the age of 14, at least when of a similar age and where no indicia of abuse is evident, may engage in consensual sexual activity without a report. A.B.

1775 in this regard results in absurdity, and is therefore unconstitutional as to all mandated reporters because it embraces voluntary, non-abusive conduct that would be entirely legal if it occurred between adults.

In sum, as applied to psychotherapists and to all reporters in the case of teenage sexting, A.B. 1775 does not further CANRA's otherwise compelling purpose and makes children in this state *less* safe by "overburden[ing] the reporting system and divert[ing] resources from the investigation of reports of actual abuse – thereby working a detriment to the very abused children the Legislature has acted to protect." (*Planned Parenthood Affiliates v. Van de Kamp* (1986) 181 Cal.App.3d 245, 269.)

II. ARGUMENT

A. PLAINTIFFS HAVE SUCCESSFULLY MOUNTED AN AS APPLIED AND FACIAL CHALLENGE TO A.B. 1775 AS IT CONCERNS PSYCHOTHERAPY PATIENTS.

Defendants first seek to avoid a review of the merits by arguing that Plaintiffs' challenge to A.B. 1775 is only a facial constitutional challenge (*see* Lacey Answering Brief ["LAB"] at 29; Becerra Answering Brief ["BAB"] at 24) and that it must fail because invalidity requires a "total and fatal conflict" with constitutional prohibitions. (*See* LAB at 29-30; BAB at 50.) Defendants are incorrect on both counts.

Plaintiffs expressly allege that "A.B. 1775 's amendment of CANRA to require that mandated reporters, including psychotherapists, report any persons who view child pornography, as applied to psychotherapy patients,

is an unconstitutional and overbroad violation of the patients' right to privacy" under the California and U.S. Constitutions. (*See* AA 26-27, Complaint ¶¶ 62, 66 [emphasis added].) Plaintiffs also challenge A.B. 1776 as applied to minors who engage in consensual sexting, without any indication of child abuse. (AA 13, ¶ 32.) Since there is no dispute that A.B. 1775 currently requires psychotherapists to report patients who have viewed or possessed child pornography and all mandated reporters to report minor engaging in consensual sexting, Plaintiffs have alleged valid "as applied" challenges to the current application of the statute and therefore are not required to allege an actual instance in the past where this amendment was actually enforced against a psychotherapist or other reporter who violated this new express reporting requirement. (*See U.D. Registry, Inc. v. State* (2006) 144 Cal.App.4th 405, 418-419 [credit agency alleged valid "as applied" challenge where there was no dispute that state law required agency to freeze release of information derived from public documents.])

Plaintiffs also challenge A.B. 1775 as facially unconstitutional in that it violates the privacy of all psychotherapy patients by expressly requiring their therapists to report their viewing and possession of child pornography to law enforcement. Defendants contend that such a challenge requires Plaintiffs to show that the statute operates impermissibly in virtually every instance; in other words, that A.B. 1775 is "incapable of *any*

valid application." (BAB at 26-27, 48; LAB at 29, both citing *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1089.) Defendants are wrong again.

"[A] facial challenge to a statutory provision that broadly impinges upon fundamental constitutional rights may not be defeated simply by showing that there may be some circumstances in which the statute constitutionally could be applied." (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 347-348.) Rather, when a statute broadly and directly impinges upon the fundamental constitutional privacy rights of a substantial portion of those persons to whom the statute applies, "the statute can be upheld only if those defending the statute can establish that, considering the statute's general and normal application, the compelling justifications for the statute outweigh the statute's impingement on constitutional privacy rights and cannot be achieved by less intrusive means." (*Academy of Pediatrics*, 16 Cal.4th at 348; *see City of Los Angeles, California v. Patel* (2010) 135 S. Ct. 2443, 2451 ["'proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.'"]) Accordingly, Plaintiffs in this case present valid facial *and* "as applied" challenges to the constitutionality of A.B. 1775. (*See Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 767 [challenge to county land-use ordinance regulating size and occupancy limits of second dwelling units presented both facial and applied challenges to ordinance.])

B. PLAINTIFFS' COMPLAINT SATISFIES EACH OF THE *HILL* ELEMENTS AND THEREFORE STATES A VALID CLAIM UNDER ARTICLE 1, SECTION 1 OF THE CALIFORNIA CONSTITUTION.

A plaintiff alleging an invasion of privacy in violation of the Article 1, Section 1 of the California Constitution must establish (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy. (*Hill v. National Collegiate Athletic Ass'n* (1994) 7 Cal.4th 1 (*"Hill"*) 7 Cal.4th 1 at 39-40.)[1] Contrary to Defendants' view, the three *Hill* "elements" must be used to screen out challenges that do not implicate significant constitutional intrusions, but a failure to meet one of these elements does not eliminate the necessity for weighing and balancing the justification for the conduct in question against the intrusion on privacy in any case raising a genuine, nontrivial invasion of a protected privacy interest. (*American Academy of Pediatrics*, 16 Cal.4th at 330.)

Relying on *Hill*, Defendants first argue that Plaintiffs have failed to establish that patients have a legally protected privacy interest in their communications with their psychotherapists and, even if they do, have not

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[1] The determination of the first *Hill* element is a pure question of law, while the inquiry as to the remaining elements presents mixed questions of law and fact unless the material facts relevant to the determination are undisputed. (*Hill,* 7 Cal.4th at 40.)

shown that their expectation of privacy with respect to telling psychotherapists about viewing child pornography is reasonable under the circumstances. (*See* BAB at 27-37; LAB at 31-53.) Defendants are incorrect on both counts.

1. Plaintiffs' Patients Have A Legally Protected Privacy Interest In Being Able To Disclose The Fact That They Have Viewed Child Pornography In Confidence During The Course Of Psychotherapy.

"Whatever their common denominator, privacy interests are best assed separately and in context." (*Hill, supra*, 7 Cal.4th at 35.) Recognizable privacy interests may come in two general types: (1) a right of "informational privacy," which refers to the interest in precluding the dissemination or misuse of sensitive and confidential information; and (2) a right of "autonomy privacy," which concerns the interests in making intimate personal decisions or conducting personal activities without observation, intrusion or interference. (*Id.*)

In *Hill,* university athletes challenged the National Collegiate Athletic Association's ("NCAA") drug testing program as a violation of their constitutional right to privacy under Article 1, Section 1 of the California Constitution. (*Hill*, 7 Cal.4th at 9.) The Court concluded that the NCAA's monitoring of an athlete's urination and its disclosure of medical information implicated the athletes' legally protected informational *and* autonomy privacy interests, reasoning that the NCAA's testing

program intruded on a bodily function "that by law and social custom is generally performed in private without observers" and also revealed medical information about the state of an athlete's body, something "that is regarded as personal and confidential." (*Id.* at 40-41.)

Like the athletes in *Hill*, there can be no serious debate that patients undergoing psychotherapy also have a legally protected privacy right in (1) the highly intimate and sensitive information about their mental state that is disclosed to their therapist, as well as in (2) their personal autonomy based on the confidential context of psychotherapy which "by law and social custom," is an activity "performed in private without observers." Indeed, the privacy rights are far stronger here than in *Hill*, since "it is well-settled that the zone of privacy created by [article I, section 1] extends to the details of a patient's medical and psychiatric history." (*Pettus v. Cole* (1996) 49 Cal.App.4th 402, 440; *see id.* at 458 ["Pettus had an 'autonomy privacy' interest in making intimate personal decisions about an appropriate course of medical treatment for his disabling stress condition, without undue intrusion or interference from his employer"].) "If there is a quintessential zone of human privacy it is the mind. Our ability to exclude others from our mental processes is intrinsic to the human personality." (*Id.* at 441, quoting *Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d 937, 944.)

Nevertheless, Defendants and the Court of Appeal articulate a new

standard in which there can be no legally protected privacy interest in communications to one's therapist to the extent they include the disclosure that a psychotherapy patient has viewed child pornography because the "possession of child pornography is a crime." (*See* BAB at 29; LAB at 32, 37-38 ["Plaintiffs' contentions likewise fail because the conduct for which plaintiffs seek constitutional protection is criminalized in California"].) But this conclusion ignores the law and issues relevant to this case.

Initially, Plaintiffs have never asserted that psychotherapy patients (or any person) should be afforded any privacy right to engage in the *act* of viewing or possessing child pornography. What is at issue here is the right to *communicate* the fact that child pornography has been viewed to one's therapist in the confidential setting of psychotherapy without fear of prosecution. If the criminal nature of a past act discussed during psychotherapy were relevant to determining whether a legally protected privacy right existed in that communication, then psychotherapy patients would have no legally protected privacy interest whenever they revealed the commission of past criminal behavior. This is obviously not the law. (*See e.g.*, *Hill*, 7 Cal.4th at 10-11 [making no mention of the athlete's presumably illegal acts of possessing or taking controlled substances, including marijuana, hashish and cocaine, when assessing the students' reasonable expectation of privacy]; *People v. Gonzales* (2013) 56 Cal.4th 353, 364, 372-382 [applying psychotherapist-patient privilege to patient's

statements that he was very attracted to small children and had molested 16 children]; *Story v. Superior Court* (2003) 109 Cal.App.4th 1007, 1010-1012, 1014-1019 [applying psychotherapist-patient privilege to patient's statements that he had committed a prior sexual assault and had "urges to force himself sexually upon non-consenting females by means of violence including choking or strangulation"]). Thus, the fact that child pornography viewing is itself illegal does not change that the *communication* about such an act during the course of psychotherapy remains a communication pursuant to "law and social custom . . . generally performed in private without observers."

Defendants next claim that no legally protected privacy interest exists because of "multiple exceptions to the psychotherapy-patient privilege created by Evidence Code section 1016 to 1027," including the exception "where the psychotherapist has reasonable cause to believe the patient is dangerous to self or others," and "where information is reported pursuant to CANRA." (LAB at 37-38; BAB at 30.) This argument also fails.

First, as this Court has previously observed in *American Academy of Pediatrics*, 16 Cal. 4th at 339:

> "[I]t plainly would defeat the voters' fundamental purpose in establishing a constitutional right of privacy if a defendant could defeat a constitutional claim simply by maintaining that

> statutory provisions or past practices that are inconsistent with the constitutionally protected right eliminate any 'reasonable expectation of privacy' with regard to the constitutionally protected right."

Yet "maintaining that statutory provisions or past practices...are inconsistent with the constitutionally protected right" is precisely what Defendants argue here. And while the Attorney General acknowledges the above language from *American Academy of Pediatrics*, he claims: "At the same time, the Court has made clear that the reasonableness of privacy expectations is shaped by background legal principles." (BAB at 33 fn. 3.) However, the cases cited by the Attorney General to illustrate these supposed "background legal principles" do not further his argument because they do not involve psychotherapist communications and instead addressed situations where *disclosure* of the information was the "norm."[2]

In contrast here, the "norm" applicable to psychotherapist communications, even those including discussion of serious crimes, has long been one of confidentiality unless "disclosure is essential to avert

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[2] In *Int'l Fed'n of Prof'l & Tech. Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal. 4th 319, 331, the Court found that the "'broadly based and widely accepted community norm[ ]' applicable to government employee salary information is public disclosure." Similarly, in *Cty. of Los Angeles v. Los Angeles Cty. Employee Relations Com.* (2013) 56 Cal. 4th 905, 929, the Court reasoned that disclosure of employees' home contact information to their union "'is overwhelmingly the norm.'"

danger to others." (*Tarasoff v. Regents of Univ. of California* (1976) 17 Cal. 3d 425, 442.) That is not our case.

2. Psychotherapy patients have a reasonable expectation of privacy in communications to their therapist, including communications revealing that the patient has viewed or possessed child pornography.

Similarly, Defendants conclude that a psychotherapy patient does not have a reasonable expectation of privacy that a communication about viewing child pornography will not be reported to law enforcement. (*See* BAB at 27, 30-36, 40, 55; LAB at 45-53; *see* Appendix at 23-24.) As discussed below, Defendants' arguments in support of this conclusion are unavailing.

a. The Pre-A.B. 1775 Version of CANRA Did Not Include The Duty To Report A Patient's Viewing or Possession of Hard Copy or Internet Child Pornography.

Defendants' chief argument is that a patient does not have a reasonable expectation of privacy because CANRA has long-required the reporting of child pornography offenses and the act of child pornography viewing added by A.B. 1775 to the list of reportable conduct is essentially no different than the pre-amended version of CANRA. (*See* BAB at 31, 34, 47; LAB at 41, 46, 52.)

For example, the District Attorney contends that A.B. 1775's addition of "downloading, streaming and accessing" of child pornography through electronic or digital media merely clarified the statute, and that

"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." (LAB at 41.) Likewise, the Attorney General argues that the downloading of child pornography is not distinguishable "for constitutional purposes" from mandating the report of "the exchange or duplication of materials such as physical photographs" (BAB at 47) and that "it has been established for at least three decades that therapists must report revelations made by a patient about...obtaining child pornography." (*See* BAB at 31; *id.* at 35 ["certain acts of obtaining child pornography-has been reportable and expressly exempted from the psychotherapist-patient privilege for thirty years"].) Defendants' attempt to rewrite the previous version of CANRA to fit their novel "constitutional equivalency argument" is easily refuted.

Prior to A.B. 1775, CANRA defined "sexual exploitation" to include violations of Penal Code sections 311.2 (preparation, distribution or possession of child pornography with intent to distribute) and 311.4, subdivision (a) (employing child to participate in preparation or distribution of child pornography) and encouraging or coercing a child to engage in obscene conduct, including the creation of child pornography, conduct prohibited by Penal Code section 311.4, subdivision (b). (Pen. Code §11165.1, subd. (c)(1), (2) (2014).) In addition, Penal Code section 11165.1, subdivision (c)(3) defined "sexual exploitation" consistent with

Penal Code section 311.3 to include a person who "duplicates, prints, or exchanges, a film, photograph, videotape, video recording, negative, or slide" constituting child pornography. (Pen. Code § 11165.1, subd. (c)(3) (2014).) Notably absent from the earlier version of CANRA was any reference to Penal Code section 311.11, the statute prohibiting child pornography possession and, by implication, viewing of such illegal images. As a result, before A.B. 1775, CANRA's definition of "sexual exploitation" did not require the reporting of any person who had possessed or viewing child pornography in either digital or print form.

And while A.B. 1775 could have, it did not add the crime of child pornography possession (Penal Code section 311.11) to the list of reportable crimes. Rather, the amendment revised Penal Code section 11165.1, subdivision (c)(3)'s definition of sexual exploitation and the conduct proscribed by Penal Code section 311.3 to now make reportable any 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" depicting child pornography. (Pen. Code §11165.1, subd. (c)(3) (2015) [emphasis added].) A.B. 1775's addition of electronic downloading, streaming and accessing of child pornography to the list of reportable conduct therefore clearly takes the unprecedented step of making *possession and viewing* of such illegal images over a computer illegal and

Defendants do not contend otherwise.

In other words, A.B. 1775 *dramatically* expanded the scope of CANRA to include psychotherapy patients who admit during therapy (or are reasonably suspected) of streaming or accessing (i.e., viewing) or downloading (i.e., possessing) child pornography on the Internet without any involvement in its production, exchange, or distribution to others, in addition to mandating the report of minors who engage in consensual sexting with other minors.

b. The Ability To Warn Patients That They Will Be Reported To Law Enforcement Pursuant to A.B. 1775 Does Not Diminish Patients' Reasonable Expectation of Privacy.

The Attorney General argues further that professional standards require therapists to give "notice" to patients about the "relevant limits" of confidentiality, which supposedly "underscores the unreasonableness of any expectation that information...will not be reported." (BAB at 33-34.) This argument is circular and erroneous.

While a person's opportunity to consent to disclosure of private information may be relevant to whether an expectation of privacy is reasonable, (*Hill*, 7 Cal.4th at 42-43), such an opportunity cannot be used to actually validate the disclosure of information that is otherwise protected by a constitutional right to privacy. If it could, then any intrusion would be permissible so long as "notice" was given before it occurred.

Further, unlike *Hill*, the opportunity to consent to or forgo treatment upon receiving notice of A.B. 1775 must be viewed with additional scrutiny as it involves a State-wide compelled disclosure. This distinction is significant according to *Hill* because "'an individual generally has greater choice and alternatives in dealing with private actors than when dealing with the government.'" (*Hill, supra*, 7 Cal.4th at 38, quoting Sundby, *Is Abandoning State Action Asking Too Much of the Constitution?* (1989) 17 Hastings Const.L.Q. 139, 142-143.) As this Court explained:

> If, for example, a plaintiff claiming a violation of the state constitutional right to privacy was able to choose freely among competing public or private entities in obtaining access to some opportunity, commodity, or service, his or her privacy interest may weigh less in the balance. In contrast, if a public or private entity controls access to a vitally necessary item, it may have a correspondingly greater impact on the privacy rights of those with whom it deals.

(*Id.* at 39 [emphasis added].)

In this case, it is the State that "controls access" to the "vitally necessary item" of confidential psychotherapy, and A.B. 1775 necessarily applies to psychotherapists statewide. As a result, the opportunity to "consent" to a disclosure under A.B. 1775 or forgo treatment presents a patient with no real "choice" at all.

c. Patients' Reasonable Expectation Of Privacy In Their Psychotherapeutic Communications Does Not Become Unreasonable Whenever Past Criminal or Morally Repugnant Behavior is Discussed.

Like the first *Hill* element, Defendants argue that psychotherapy patients' reasonable expectation of privacy in their communications become unreasonable to the extent the patient admits (or leads his therapist to reasonably suspect) the "crime" of viewing or possessing child pornography has been committed. The Court of Appeal likewise held that a patient could not reasonably expect that a psychotherapist would not report his child pornography viewing to law enforcement because such conduct is a crime and is "reprehensible, shameful and abhorred by any decent and normal standards of society." (Appendix at 23-24.) However, as matter of law, a reasonable expectation of privacy in the context of psychotherapy is neither diminished nor lost simply because a patient reveals the commission of a past crime, even a morally repugnant one.

A psychotherapy patient's reasonable expectation of privacy lies not in the content of that communication but rather "in the public interest in encouraging confidential communications within a proper professional framework," (*Urbaniak v. Newton* (1991) 226 Cal.App.3d 1129, 1139), including communications about various "social disorders" that may be prevented through psychotherapy. (*Scull v. Superior Court* (1988) 206 Cal.App.3d 784, 788.) This expectation of privacy in the confidential

nature of psychotherapy communications is also practical in that it serves to encourage those patients who "may pose a threat to . . . others, because of some mental or emotional disturbance, to seek professional assistance." (*People v. Stritzinger* (1983) 34 Cal.3d 505, 511.)

Given the strong policy in favor of promoting access to psychotherapy, this expectation of privacy is consistent with the numerous California courts that have routinely *ignored* the criminal and socially reprehensible nature of the acts discussed during psychotherapy in the context of determining whether the psychotherapist-patient privilege applies. (*See e.g., Gonzales*, 56 Cal.4th at 364, 372-382; *Story*, 109 Cal.App.4th at 1010-1012, 1014-1019.)

Consistent with these cases, psychotherapy patients' discussion of illegal acts during therapy, including the viewing of child pornography, by itself cannot destroy a patient's reasonable expectation of privacy in those communications as a matter of law.

d. Legislative Intent Cannot Insulate A.B. 1775 From Constitutional Scrutiny, Particularly Given The Important Constitutional Rights Involved.

The District Attorney claims further that no reasonable expectation of privacy exists because such a finding would be "in conflict with the Legislature's purpose in enacting A.B. 1775." (LAB 51-52.)

But Defendant has it backwards: "when a statute impinges upon a constitutional right, legislative findings with regard to the need for, or

probable effect of, the statutory provision cannot be considered determinative for constitutional purposes." (*American Academy of Pediatrics,* 16 Cal.4th at 349-350.) Rather, a court "must go beyond the legislative findings accompanying the statute to determine whether the provisions . . . can be sustained . . . on the basis of the state's interests." (*Id.; see In re Lifschutz* (1970) 2 Cal.3d 415, 432 [examining whether Legislature's passage of the patient-litigant exception to the psychotherapist-patient privilege impermissibly invaded psychotherapy patient's right to privacy].)

3. Reporting Psychotherapy Patients To Law Enforcement For Viewing Child Pornography Is Unquestionably A "Serious" Invasion Of Privacy.

Finally, while the Attorney General does not argue and concedes that a mandatory report under CANRA represents a "serious" invasion of privacy under *Hill,* the District Attorney insists that reporting psychotherapy patients to law enforcement as child pornography consumers is not serious because it "only" requires an initial report to the authorities concerning the suspected exploitation and the patients' other information (diagnosis, medical condition or treatment) "is subject to extensive privacy protections." (LAB at 53-54.) This is a meritless argument.

"Actionable 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,* 7 Cal.4th at

37.) "Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy." (*Id.*)

In this case, any invasion of a patient's right to privacy in psychotherapy communications "is a serious invasion of the person's privacy." (*Susan S. v. Israels* (1997) 55 Cal.App.4th at 1290, 1298.) Even disclosing a psychotherapy patient's identity is serious given the stigma attached mental illness. (*Scull,* 206 Cal. App. 3d at 789.) As the U.S. Supreme Court has recognized, "[b]ecause of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace." (*Jaffee v. Redmond* (1196) 518 U.S. 1, 10.) Moreover, it is not true that disclosures to *law enforcement* are not serious. On the contrary, where a professional relationship is premised on confidentiality, the right of privacy can be infringed without "public" dissemination. (*See, e.g., Urbaniak*, 226 Cal.App.3d at 1138 [complaint stated cause of action against physicians for nonpublic disclosure of positive status for human immunodeficiency virus].)

Accordingly, there can be no serious dispute that a report made pursuant to A.B. 1775 to law enforcement constitutes a serious invasion by the State of a psychotherapy patient's informational and autonomy privacy interests.

C. DEFENDANTS' SPECULATIVE AND ATTENUATED JUSTIFICATIONS FOR A.B. 1775 DO NOT SUBSTANTIALLY FURTHER AND ARE NOT NARROWLY TAILORED TO CANRA'S GOAL OF PROTECTING CHILDREN IN THIS STATE FROM ABUSE AND DO NOT OUTWEIGH PYSCHOTHERAPY PATIENTS' FUNDAMENTAL RIGHT OF PRIVACY UNDER THE CALIFORNIA AND UNITED STATES CONSTITUTIONS.

Since psychotherapy patients have legally protected informational and autonomy privacy interests in their professional relationship and communications with psychotherapists and a reasonable expectation of privacy, the State must demonstrate that A.B. 1775's serious invasion of this privacy right is justified by a compelling state interest and substantially furthers that purpose in a narrowly tailored manner.[3]

As discussed below, not only has the State has failed to meet these standards, it is evident that A.B. 1775, as applied to psychotherapists and to all mandated reporters as it concerns minors engaging in consensual sexting, is unrealistic, counterproductive, and would authorize a tremendous waste of taxpayer dollars needed to protect children actually residing in this state.

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[3] Even if Plaintiffs had failed to satisfy *Hill*'s threshold elements, this would not insulate A.B. 1775 from constitutional review. (*See American Academy of Pediatrics*, 16 Cal.4th at 330 [*Hill* elements do not eliminate the necessity for weighing the State's justification for conduct against the intrusion on privacy resulting from such conduct in any case "that raises a genuine, nontrivial invasion of a protected privacy interest."])

1. An Invasion of Psychotherapy Patients' Privacy Rights Must Meet The Compelling Interest/Narrowly Tailored Test Given The Fundamental Rights Involved.

Under *Hill,* "when a challenged action or regulation directly invades 'an interest fundamental to personal autonomy , . . . a 'compelling interest' must be present to overcome the vital privacy interest.'" (*American Academy of Pediatrics*, 16 Cal.4th at 329-330, quoting *Hill*, 7 Cal.4th at 34.) In addition to substantially furthering a compelling state interest, an invasion of a privacy right must also be "narrowly drawn" to further such interest. (*Stritzinger*, 34 Cal.3d at 511; *In re Lifschutz*, 2 Cal.3d at 432; *see also Kirchmeyer v. Phillips* (Cal. App. 2016) 2016 WL 1183324, at * 5 ["The psychotherapist-patient privilege is a kind of privacy interest that may be overcome only on a showing of a compelling state interest"]; *Scull,* 206 Cal.App.3d at 792 ["limited intrusions may be made upon the confidential character of patient-psychotherapist conversations where the government seeks to promote a compelling interest and where there is no less intrusive means of accomplishing its purpose"]; *Pettus,* 49 Cal.App.4th at 461 [medical and psychiatric records implicate a privacy interest "fundamental to personal autonomy."])

Notwithstanding the agreement among courts that intrusions into the psychotherapy-patient relationship must meet the compelling interest test, Defendants insist that only a simple "balancing" of a competing State interest against the asserted privacy right is required. (*See* BAB at 37-42;

LAB 55-58.) However, in so doing, Defendants fail to acknowledge that *Hill* specifically cited *Stritzinger* as an illustration of when a compelling state interest is required to justify an invasion of a psychotherapy patient's privacy interests. (*Hill,* 7 Cal.4th at 34 n.11.) Very recently in *Cross v. Superior Court*, 11 Cal. App. 5th 305, 326 (2017), the Court of Appeal interpreted this reference to *Hill* in the same way as Plaintiffs: "We read the citation to *People v. Stritzinger* [in *Hill*] as an indication of the interest that must be shown in a case like this one, and we hold the Department must therefore demonstrate a compelling interest to overcome the patients' right to privacy in their psychiatric records."

Defendants' citations to this Court's decisions in *Williams v. Superior Court* (2017) 3 Cal.5th 531 and *Lewis v. Superior Court* (2017) 3 Cal.5th 561, (*see* LAB at 56-57; BAB at 38-41), do not suggest a different result. Specifically, neither of these cases dealt with disclosures of information as remotely as sensitive as psychotherapeutic communications; neither involved an invasion of a patient's autonomy privacy rights; and in both cases, the intrusions were far less serious.[4] Furthermore, in neither

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[4] *Lewis v Superior Court* dealt with the disclosure of drug prescription records from the Controlled Substance Utilization Review and Evaluation System to the Medical Board of California for the purposes of investigating allegedly unprofessional prescribing behavior by a physician licensee. (*See* 3 Cal.5th 531; *id.* at 573 ["[I]t cannot "be said that any individual has been deprived of the right to decide independently, with the advice of his physician, to acquire and to use needed medication."].) And *Williams v.*

case did this Court did fashion any bright line rule, instead merely holding that "a party seeking discovery of private information" need not "always establish a compelling interest or compelling need, without regard to the other considerations articulated in [*Hill.*]" *Williams,* 3 Cal. 5th at 557.

In this case, however, the compelling interest standard applies based on a consideration of all of the *Hill* elements and the State must therefore not only show that it has a concededly compelling interest in protecting children from abuse, but must also show that A.B. 1775 is necessary and narrowly tailored to serve that interest.

2. As Applied To Psychotherapy Patients, A.B. 1775 Does Not Substantially Further CANRA's Purpose of Protecting Children From Sexual Abuse or Exploitation And Is Not Narrowly Tailored.

As this Court has made clear: "Even where a compelling state purpose is present . . . [p]recision of (compelled disclosure) is required so that the exercise of our most precious freedoms will not be unduly curtailed except to the extent necessitated by the legitimate governmental objective.'" (*Britt v. Superior Court* (1978) 20 Cal.3d 844, 856 [quoting *Vogel v. County of Los Angeles* (1967) 68 Cal.2d 18, 22].) "'[W]hen the government seeks to require a limitation of constitutional rights . . . it bears

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Superior Court involved the comparatively innocuous disclosure of employee contact information in discovery propounded to identify potential additional employees subject to allegedly illegal wage and hour labor practices. (*See* 3 Cal.5th 561.)

the heavy burden of demonstrating the practical necessity for the limitation. The (limiting) conditions . . . must reasonably tend to further the purposes of the government . . . and the utility of imposing the conditions must manifestly outweigh the impairment of constitutional rights.'" (*Fults v. Superior Court* (1979), 88 Cal.App.3d 899, 904 [quoting *Vogel*, 68 Cal.2d 18, 21]; *John B. v. Superior Court* (2006) 38 Cal.4th 1177 [same].) "Simple speculation that an answer may uncover something helpful is not enough." (*Fults*, 88 Cal.App.3d at 905 [citing *Britt*, 20 Cal.3d at 861, fn. 4].)[5]

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[5] This Court's constitutional analysis is consistent with that of the U.S. Supreme Court. "To survive strict scrutiny, however, a State must do more than assert a compelling state interest – it must demonstrate that its law is necessary to serve the asserted interest." (*Burson v. Freeman* (1992) 504 U.S. 191, 199); *Brown v. Entm't Merchs. Ass'n* (2011) 564 U.S. 786, 799 [strict scrutiny requires a State to show that a law "is justified by a compelling government interest and is narrowly drawn to serve that interest."]) In other words, "[t]he state must specifically identify an 'actual problem' in need of solving." (*Brown*, 564 U.S. at 799 [quoting *U.S. v. Playboy Entertainment Group, Inc.* (2000) 529 U.S. 803, 822-823].) "Ambiguous proof will not suffice" to meet the State's burden. (*Brown* , 564 U.S. at 800-801 [State failed to show that violent video games harm children]; *see also Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York* (1980) 447 U.S. 530, 543 ["Mere speculation of harm does not constitute a compelling interest."]) The State "must do more than simply 'posit the existence of the disease sought to be cured'" and must instead "demonstrate that the recited harms are real, not merely conjectural, and that the [law] will in fact alleviate these harms in a direct and material way." (*Turner Broadcasting System, Inc. v. F.C.C.* (1994) 512 U.S. 622, 664 [quoting *Quincy Cable TV, Inc. v. FCC* (D.C. Cir. 1985) 768 F.2d 1434, 1455.)

Here, each of Defendants' "justifications" in support of A.B. 1775 as applied to psychotherapy patients fails to establish that this law is necessary to serve CANRA's interest and are entirely speculative or too attenuated to justify the State's invasion of those patients' right to privacy in their psychotherapy communications.

a. The Likelihood Of Identifying And Rescuing A Child Depicted In An Image Obtained From A Psychotherapy Patient Under A.B. 1775 Is Extremely Remote.

Defendants first argue that A.B. 1775 furthers CANRA's purpose by helping law enforcement locate and rescue the children depicted in the child pornography images viewed by psychotherapy patients, even if locating a particular child is unlikely. (LAB at 63-64; BAB at 49.)

In particular, the Attorney General cites to Plaintiffs' complaint which states that the Child Victim Identification Program of the National Center for Missing and Exploited Children identified 1,600 child victims after reviewing 15 million child pornography images between 2003 and 2009, which according to the Attorney General purportedly shows that identification of children is possible. (BAB at 49.) However, this statistic that children were identified in only 0.01% of the images reviewed only serves to confirm that the likelihood of identifying any depicted child, much less one located in California based on images seized from a psychotherapy patient is far too remote and attenuated to justify the State's

invasion of the patient's privacy.

More importantly, the State has failed to show that A.B. 1775 is necessary to help law enforcement identify and rescue the children (assuming they are not now adults) depicted in child pornography. In particular, the advent of the Internet and advanced digital technology has made non-production child pornography offenses almost exclusively Internet-enabled crimes, with child pornography now freely and easily accessible for viewing and downloading from the Internet to anyone who has a computer and Internet access. (*See* AA 16-17, ¶¶ 39-40.) As a result, identifying psychotherapy patients who have viewed Internet child pornography images puts law enforcement agents in no better position to identify the depicted child than if they had accessed the same images on the Internet themselves. (*See U.S. v. Thomas* (2015) 788 F.3d 345, 348 [discussing software available to licensed law enforcement professionals free of charge to automatically detect suspected child pornography images shared over peer-to-peer networks along with the corresponding Internet Protocol addresses of individuals engaged in the possession and distribution of child pornography].) [6]

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[6] Patients who have simply viewed Internet child pornography are highly unlikely to have any information about the identity, location, or any other information concerning the depicted child.

Thus, A.B. 1775 does not substantially further CANRA's interest because the mere identification of child pornography viewers is not necessary to assist the State in identifying the depicted children.

b. CANRA's Purpose Is To Identify And Rescue Children In This State From Actual or Potential Sexual Abuse, Not To Prosecute And Deter The Crime of Child Pornography Viewing or Possession.

Defendants also stress that, regardless of whether children can be identified and located in the State of California, A.B. 1775's newly-expanded definition of reportable "child exploitation" helps law enforcement identify and prosecute consumers of child pornography in California or other states, which benefits children overall. (*See* LAB at 43; BAB at 44.) Similarly, Defendants argue that A.B. 1775 is justified because it can supposedly help dry up or "eradicate" the "market" and demand for child pornography and therefore help protect children from sexual exploitation via the Internet. (*See* LAB at 9, 58, 64; BAB at 43-45.) These justifications do not pass constitutional muster.

Defendants' "crime-fighting" justification fails because the compelling state interest furthered by CANRA is the detection and prevention of actual child abuse, not the prosecution of child pornography viewers. Specifically, CANRA's reporting scheme is "directed toward discovering suspected child abuse . . . so that independent governmental agencies can remove the child from immediate danger and investigate."

(*James W. v. Superior Court* (1993) 17 Cal.App.4th 246, 254.) "Identification of abuse – not identification of the perpetrator – is the chief concern" of CANRA's reporting scheme and any criminal prosecution of a child abuser is the separate responsibility of the law enforcement "authorities investigating the abuse and the criminal justice system." (*Id.* at 255.) Accordingly, while prosecution of child abusers may certainly be an incidental result of CANRA's mandated reported scheme, the State's interest in prosecuting child pornography viewers cannot alone justify the State's serious invasion of psychotherapy patients' privacy rights. Put another way, A.B. 1775 is not necessary to prosecute child pornography viewers because that function is fulfilled by the State's penal code system.[7]

Likewise, the State's argument that A.B. 1775 will help deter child pornography viewing through criminal prosecutions is profoundly misguided with respect to psychotherapy patients. Unlike firefighters or gym teachers for example, the only class of individuals who a psychotherapist-reporter is likely to encounter and would trigger A.B. 1775 in the first place are those voluntarily seeking treatment because they want to control their impulses or behaviors, including the attraction to children and the consumption of Internet child pornography. By applying A.B. 1775

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[7] As previously noted in Plaintiffs' opening brief, mandated reporting under A.B. 1775 is also very unlikely to provide actionable evidence of child pornography possession as a practical matter.

to these otherwise willing psychotherapy patients, CANRA would have the contrary effect of making children in this state less safe by forcing individuals struggling with serious sexual disorders, including pedophilia, to forgo treatment and "[i]nstead of exposing their thoughts for treatment...repress them and act on them. Such a result would not further the interests of victims, psychotherapy, or the criminal justice system." (*People v. Felix* (2001) 92 Cal. App. 4th 905, 915.) As applied to psychotherapy patients, using A.B. 1775 to dry up the market for child pornography is equivalent to trying to eradicate the market for heroin by compelling all drug treatment centers in the State of California to report patients suspected of using heroin.

c. A.B. 1775 Cannot Be Justified By Equating The Viewing or Possessing Child Pornography With Contact Sexual Abuse Or The Production And Distribution Of Child Pornography.

Defendants also attempt to justify A.B. 1775's intrusion by arguing that the viewing or possession of child pornography is itself sexual abuse or "exploitation" that is indistinguishable from the production and distribution of child prosecution previously reportable under CANRA. (*See* LAB at 41, 50-52, 60-62; BAB at 14-15, 47-48.) As discussed below, this claim does not comport with the scope or history of the statute, even assuming that mandated reporting of psychotherapy patients engaged in child

pornography distribution is constitutional.[8]

The Penal Code does not consider possession of child pornography to be sexual exploitation of children. (*See People v. Haraszewski* (2012) 203 Cal. App. 4th 924, 942 ["illegal acts of mere possession of child pornography . . . did not constitute acts of abusive or exploitive use of children in the production and distribution of child pornography"].) Likewise, until A.B. 1775 was passed, CANRA itself did not consider possession or viewing of child pornography (whether in electronic or print form) to be sexual exploitation because such conduct was not included in the list of reportable offenses. Defendants' attempt to legally merge child pornography possession with the sexual exploitation of minors previously reportable under CANRA must therefore be rejected.

Nor can Defendants credibly claim that the emotional harm caused by every viewing of a depicted child constitutes the type of child sexual abuse or exploitation that CANRA was intended to detect and prevent. While Plaintiffs do not quarrel with observations by this Court and others in the context of criminal prosecutions for child pornography possession that viewing of the illegal images repeatedly harms or "abuses" the children

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[8] The Attorney General has not cited and Plaintiffs are unaware of any case upholding the constitutional validity of CANRA's mandated reporting of child pornography distribution in the face of a challenge by psychotherapists or their patients.

depicted in them, (*see e.g.*, *In re Grant* (2014) 58 Cal.4th 469; *U.S. v. Norris* (5th Cir. 1998) 159 F.3d 926), those courts had no reason to address the issue of whether A.B. 1775's mandated reporting by psychotherapists of patients who view child pornography substantially furthers CANRA's compelling purpose without any evidence that the patient has actually engaged in physical sexual abuse of children or at least poses a serious danger of doing so, or that such reporting will meaningfully assist law enforcement in identifying and rescuing the children depicted in the images.

Finally, CANRA itself dispels Defendants' notion that the viewing of child pornography, by itself, causes the same type of harm that requires a mandatory report, since even the current version of the CANRA provides that mandated reporters are not required to report known or suspected "serious emotional damage" of a child, although they may choose to do so. (*See* Pen. Code § 11166.05.)

d. Mandated Reporting Of Child Pornography Viewers Cannot Be Justified Based On the Alleged Danger Such Viewers Pose to Children.

The Attorney General next claims that "[m]andated reporting of child pornography consumption also advances the State's interest in ensuring that those with direct access to children do not threaten them with harm." (BAB at 45; *see id.* at 46 [suggesting that the "protection" afforded by A.B. 1775 can be analogized to the justification underlying the

"dangerous patient" exception to the statutory privilege].) However, A.B. 1775 cannot be justified based on sheer speculation that a psychotherapist patient who views child pornography *may* have access to children and *may* pose a danger of sexually abusing them.

First, CANRA only mandates reporting of known or suspected *actual* child sexual abuse and does not require any report based solely on a danger, risk, or possibility that a child may be abused in the future. As a result, A.B. 1775 cannot be justified as a prophylactic measure to screen child pornography viewers who may pose a danger to children because this goal does not serve CANRA's purpose and is at odds with the statutory scheme. With respect to this State justification, the law is also unnecessary because psychotherapists are already required by CANRA to report any patient who is known to have, or reasonably suspected of having, abused a child and, under the statutory "dangerous patient" exception to the psychotherapist-patient privilege and the Civil Code, also have a duty to warn any child that they believe is in danger of being sexually abused by a patient. *See* Evidence Code §1024; Civil Code, § 43.92.

Second, the State's unstated premise for this justification is that all psychotherapy patients who view child pornography pose a danger of sexually abusing children in real life. The State states no authority for this overbroad proposition and available empirical research is to the contrary. (*See e.g., United States v. Apodaca*, 641 F.3d 1077, 1083 (9th Cir. 2011);

C.R., 792 F. Supp. at 376 ["Scientifically acceptable empirical analyses have thus far failed to establish a causal link between the mere passive viewing of child pornography . . . and the likelihood of future contact offenses"]; United States Sentencing Commission, *Federal Child Pornography Offenses, Executive Summary*, 102 (2012) ["most current social science research suggests that viewing child pornography, in the absence of other risk factors, does not 'cause' individuals to commit sex offenses."]) Further, this justification becomes even more tenuous when applied to psychotherapy patients who are actively seeking treatment for mental health issues, including a sexual attraction to children.

Accordingly, the State cannot justify A.B. 1775 based on sheer speculation that any psychotherapy patient who views child pornography poses a possible danger to children because this justification falls outside of CANRA's mandated reported scheme and is based on an empirically unsupported prediction about how child pornography viewers behave.[9]

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[9] As correctly noted by Justice Mosk in *Tarasoff*, "'[p]redictions of dangerous behavior, no matter who makes them, are incredibly inaccurate." (17 Cal.3d at 452 [conc. & dis. opn. of Mosk, J.] [quoting *Murel v. Baltimore City Criminal Court* (1972) 407 U.S. 355, 364–365 n.2 [Douglas, J., dissenting from dismissal of certiorari].)

D. A.B. 1775 IS OVERBROAD AS TO ALL MANDATED REPORTERS WITH RESPECT TO TEENAGE SEXTING BECAUSE IT EMBRACES CONSENSUAL CONDUCT BETWEEN MINORS THAT DOES NOT INVOLVE ANY CHILD ABUSE THAT CANRA WAS INTENDED TO DETECT AND PREVENT.

Defendants' substantive response to Plaintiffs' overbreadth argument with respect to A.B. 1775's embrace of consensual teenage "sexting" is equally unpersuasive.

According to the District Attorney, the reasoning of *Planned Parenthood Affiliates v. Van de Kamp* (1986) 181 Cal.App.3d 245 ("*Planned Parenthood*") is somehow inapplicable because that case involved voluntary non-abusive sexual conduct between minors under the age of 14. (LAB at 66.) [10] The Attorney General, on the other hand, assumes that A.B. 1775 embraces consensual, voluntary "sexting" between minors (presumably of any age) but argues that this "pose[s] no constitutional concern." (BAB at 50.) For example, the Attorney General reasons that even in the case of "self-produced" pornography in which both minors consent to the sending and receiving of the image, the minor cannot

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[10] The District Attorney also argues that Plaintiffs were required to allege that they treat minor patients and therefore lack standing. (*See* LAB at 64.) Again, however, this aspect of an "as applied" challenge is inapplicable because A.B. 1775 amends CANRA to expressly require the reporting of sexting minors. Further, Plaintiffs are also asserting their interests as citizens concerned for the proper performance of a public duty in an area of general public interest, and as taxpayers seeking to enjoin the expenditure of public monies in the enforcement of an invalid and unconstitutional law.

be sure that the image will not be possessed by someone else and "reproduced and transmitted indefinitely." (BAB at 50.) These arguments lack merit.

First, neither Defendant offers any rational explanation why *Planned Parenthood* should not control this case, since there, like here, the issue was CANRA's application in a manner that mandates the reporting of consensual sexual activity between minors, thereby impermissibly invading their constitutional right to sexual privacy and deterring them from seeking professional counseling. (181 Cal.App.3d at 268.) And here, like in *Planned Parenthood*, the reason why A.B. 1775 is overbroad is because CANRA was not intended to apply to the voluntary sexual conduct between minors who happen to fall within the definition of a law mandating protection from exploitive adults. (*Id.* at 275.)

Indeed, Defendants' clear application of CANRA to patently non-abusive, consensual conduct is even more extreme than in *Planned Parenthood* because Defendants contend that any photo taken by a minor of any age amounts to child pornography that must be reported to law enforcement. (LAB at 66 ["Knowledge of 'sexting' between minors mandates a report"].) Under Defendants' disturbingly literal interpretation of A.B. 1775, a minor would have to be reported to law enforcement simply for viewing a sexually explicit cellphone photo she took of herself – conduct that cannot amount to sexual abuse because there is no "abuser" in

that instance under any conceivable definition of the word.

This is not a close case. As applied to minors, A.B. 1775 is unconstitutionally overbroad with respect to all mandated reporters because it invades minors' right to sexual privacy by reporting conduct that is entirely consensual and non-exploitative.

E. A.B. 1775 ALSO VIOLATES PSYCHOTHERAPY PATIENTS' RIGHT TO PRIVACY UNDER THE U.S. CONSTITUTION

Contrary to Defendants' arguments, the issue of whether A.B. 1775 also violates psychotherapy patients' right to privacy guaranteed by the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution was presented in the petition for review. (*See* BAB at 52-56.) While it is true that the U.S. Supreme Court has not expressly recognized a right to informational privacy and that the cited Ninth Circuit cases are not controlling, the reasoning of those cases in concluding that an informational right to privacy exists under the U.S Constitution is persuasive and should be adopted by this Court in the specific context of psychotherapy communications. (*See Coons v. Lew* (9th Cir. 2014) 762 F.3d 891, 900; *Caesar v. Mountanos* (9th Cir. 1976) 542 F.2d 1064, 1067, *cert. denied*, 430 U.S. 954 (1977).)

Similarly, for the same reasons described above with respect to the A.B. 1775's violation of article 1, section 1 of the California Constitution, this Court should likewise conclude that this statute also violates the right

to privacy guaranteed by the Due Process Clause of the Fourteenth Amendment because it does not serve CANRA's compelling purpose and is not narrowly tailored to do so. (*See Planned Parenthood of Southern Arizona v. Lawall* (9th Cir. 2002) 307 F.3d 783, 790.)

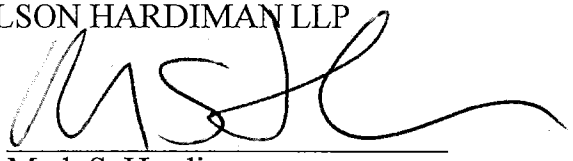
III. CONCLUSION

For the foregoing reasons, the trial court's order dismissing Plaintiffs' original complaint without leave to amend should be reversed and enforcement of A.B. 1775 should be enjoined.

Dated: September 21, 2016

Respectfully submitted,

NELSON HARDIMAN LLP

By: 

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rules 8.520(c).)

I, the undersigned appellate counsel, certify that this brief consists of 8,334 words exclusive of those portions of the brief specified in California Rules of Court, rule 8.520(c), relying on the word count of the Microsoft Word 2010 computer program used to prepare the brief.

Respectfully submitted,

Dated: September 21, 2017

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PROOF OF SERVICE

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of 18 and not a party to the within action. My business address is 11835 West Olympic Boulevard, 9th Floor, Los Angeles, California 90064.

On September 21, 2017, I served on the interested parties the document(s) described as PLAINTIFFS' CONSOLIDATED REPLY BRIEF by transmitting a true and correct copy thereof in sealed envelopes addressed as follows:

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