S240156

IN THE

Supreme Court

OF THE STATE OF CALIFORNIA

DON L. MATHEWS, et al,
Plaintiffs and Appellants,

v.

XAVIER BECERRA, as Attorney General, etc., et al.,
Defendants and Respondents.

After a Published Decision by the Court of Appeal
Second Appellate District
Case No. B265990

AMICI CURIAE BRIEF OF CALIFORNIA MEDICAL ASSOCIATION, CALIFORNIA DENTAL ASSOCIATION, AND CALIFORNIA HOSPITAL ASSOCIATION

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INTRODUCTION

Amici Curiae California Medical Association, California Dental Association, and California Hospital Association agree with Plaintiffs and Defendants that child pornography viewing is a serious problem. (See, *e.g.*, Plaintiffs' Opening Brief, p. 4 ["despicable and inflammatory nature of child pornography viewing or of any sexual crimes involving children"]; Defendant's Answering Brief of the California Attorney General, p. 14 ["'[c]hild pornography harms and debases the most defenseless of our citizens'"], citation omitted; Answer Brief on the Merits of Defendant District Attorney, p. 9 ["child pornography is a serious threat to the children of this nation and the State"].) California health care providers, after all, are expected to diagnose and treat the victims of child abuse. California psychotherapists, in particular, treat the mental and emotional harm to children.

More to the point of this case, California therapists are expected to diagnose and treat the child abusers before they cause harm.

The Court has identified two legal questions in this case.[1] The first is a general question: "Does a psychotherapy patient have a constitutional right of privacy in seeking psychotherapeutic treatment, even if the treatment entails a communication with a psychotherapist that refers to conduct constituting a crime?" The second is specific:

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[1] *Amici* note the two issues in the Court's "Pending Issues in Civil Cases" are different from the three issues in Plaintiffs' Petition for Review and Plaintiffs' Opening Brief on the Merits. In this brief, *Amici* will focus on the Court's statement of the issues.

"Does the Child Abuse and Neglect Reporting Act (Pen. Code, § 11164 et seq.) violate a patient's rights under the California Constitution by compelling disclosure of communications demonstrating 'sexual exploitation,' which includes, among other things, downloading, streaming, and accessing through any electronic or digital media a depiction of a child engaged in an act of obscene sexual conduct?"

The answer to the Court's first question can be readily found in the Evidence Code. Notwithstanding a psychotherapy patient's constitutional right of privacy in seeking psychotherapeutic treatment, a psychotherapist can be compelled to disclose patient communications demonstrating "sexual exploitation" in two circumstances: "if the services of the psychotherapist were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort" (Evid. Code, § 1018) and "if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger" (Evid. Code, § 1024). In either of those two circumstances, the psychotherapist's disclosure could include "communications demonstrating 'sexual exploitation,' which includes, among other things, downloading, streaming, and accessing through any electronic or digital media a depiction of a child engaged in an act of obscene sexual conduct." (See Pen. Code, § 11165.1, subd. (c).) That answer to the first, general question in this

case correctly analyzes the implications for patient privileges. (Evid. Code, § 990 et seq.)

As to the second question, however, *Amici* submit the record in this appeal, which arises from a demurrer, is insufficient. The only information the Court has by which to analyze the health care implications of the question are Plaintiffs' *conclusory* allegations of fact and Defendants' *conclusory* arguments of law. For example, Defendant District Attorney argued, "in order to protect a patient's expectation of privacy regarding the seemingly therapeutic and confidential therapy session, the therapist should warn the patient of his or her statutory duty to report the patient concerning instances of viewing child pornography."[2] (Appellants' Appendix ("AA") 0062.) Therefore, as to the second question, judgment should be reversed and the matter remanded to the Superior Court for further proceedings.

INTERESTS OF *AMICI CURIAE* IN THE ISSUES PRESENTED

Amici are interested in all legal issues relating to health care

The California Medical Association ("CMA") is a non-profit, incorporated, professional association of more than 43,700 member-physicians practicing in the State of California, in all specialties. The California Dental Association ("CDA") represents over 27,000 California dentists, more than 70% percent of the dentists practicing in the State. CMA's and CDA's membership includes most of the

[2] In other words, the adverse impact on the privilege can be avoided with a strategy of "Don't ask, don't tell."

physicians and dentists engaged in the private practices of medicine and dentistry in California. The California Hospital Association ("CHA") represents the interests of more than 400 hospitals and health systems in California, having approximately 94 percent of the patient hospital beds in California, including acute care hospitals, county hospitals, non-profit hospitals, investor-owned hospitals, and multi-hospital systems.

Thus, *Amici* represent a wide variety of health care providers and hospitals. CMA, CHA, and CDA have provided substantial input to the Legislature on health care issues. *Amici* also have been active before the California Supreme Court and Courts of Appeal in cases affecting California health care providers, including *Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, *Western Steamship Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, *Delaney v. Baker* (1999) 20 Cal.4th 23, *Bird v. Saenz* (2002) 28 Cal.4th 910, *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, and *Ruiz v. Podolsky* (2010) 50 Cal.4th 838. They recently filed a brief in and orally argued *Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75. More recently, they filed a brief in *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148.

Amici **are interested in the issue of patient confidentiality**

The duty of physicians to protect patient privacy lies at the very core of the medical profession.[3] Confidentiality is one of the most enduring ethical tenets in the practice of medicine, and is essential to

[3] Confidentiality is one of the oldest medical ethical precepts, dating back to the Hippocratic Oath.

the patient-physician relationship. It is the cornerstone of the patient's trust, successful medical information gathering for accurate diagnosis and treatment, an effective physician-patient relationship, good medicine, and quality care. This duty is heightened for psychiatrists and other psychotherapists, whose records are also protected as psychotherapy records.

Confidentiality is a necessary precondition for any patient to willingly and fully share sensitive personal information with a physician. This is even more important in the context of mental health treatment and psychotherapy where full candor is crucial to providing effective treatment. This is why the Legislature created the psychotherapist-patient privilege as "a new privilege that grants to patients of psychiatrists a privilege much broader in scope than the ordinary physician-patient privilege." (Cal. Law Revision Com. com., reprinted in Deering's Ann. Evid. Code (2004 ed.) foll. § 1014, p. 217.) Patients are routinely asked to disclose private, intimate, and even embarrassing information to psychotherapists who are entrusted to protect this information from unwarranted disclosures. Only within this trusting relationship can psychotherapists provide effective psychotherapy treatment and preserve the basic human dignity and privacy rights of their patients. The Court of Appeal's decision in *Mathews v. Harris* (2017) 7 Cal.App.5th 334, review granted May 10, 2017, No. S240156 ("Slip Opn.") requires all physicians, psychiatrists, psychologists, clinical social workers and other mental health professionals to disclose to the State highly sensitive information regarding their patients, who may then be subject to prosecution. (See Pen. Code, § 11165.7, subd. (a)(1)-(46).)

Amici's interests are shared by others

Some funding for this brief was provided by organizations and entities that share *Amici*'s interests, including physician-owned and other medical and dental professional liability organizations and non-profit entities engaging physicians, dentists, and other health care providers for the provision of medical services, specifically The Cooperative of American Physicians, Inc. (through the Mutual Protection Trust), The Dentists Insurance Company, The Doctors Company, Kaiser Foundation Health Plan, Inc., Medical Insurance Exchange of California, NORCAL Mutual Insurance Company, and The Regents of the University of California.

This brief was not authored, either in whole or in part, by any party to this litigation or by any counsel for a party to this litigation. No party to this litigation or counsel for a party to this litigation made a monetary contribution intended to fund the preparation or submission of this brief.

STATEMENT OF THE CASE

The specific health care provider-patient privacy interest at issue in the case is that of patients who seek psychotherapy for the sexual disorder of pedophilia. (AA 0002 ["patients seeking psychotherapy treatment for sexual disorders, including pedophilia"], 0003 ["will unnecessarily deter persons with sexual disorders from seeking psychotherapy treatment" and "persons seeking psychotherapy to address sexual disorders"].) Pedophilia is a mental and emotional condition that, among other things, has been characterized as "sexual addiction and compulsivity." (AA 0004.) The statute at issue in the case defines one manifestation of pedophilia – the patient viewing child pornography on the Internet – as a form of "sexual exploitation." (AA 0055-0056.)

The health care provider professional duty that is at issue in this case is the duty of those psychotherapists who provide therapy for the sexual disorder of pedophilia (AA 0003-0005) not to disclose their patient's confidences unless authorized by the patient (Evid. Code, § 1014, subd. (b) ["A person who is authorized to claim the privilege by the holder of the privilege"]) and, to that end, to assert the patient's privilege to keep their communications confidential (Evid. Code, § 1015 ["shall claim the privilege whenever he is present when the communication is sought to be disclosed"]).

The type of health care that is at issue in this case is psychotherapy. The three psychotherapist Plaintiffs allege that such patients can be treated (AA 0010 ["treated numerous patients who are seeking treatment for sex addiction, sexual compulsivity, and other

sexual disorders, many of whom have admitted downloading and viewing child pornography on the Internet"].) Plaintiffs allege that there are patients who sincerely seek therapy. (AA 0011 ["[t]hese patients . . . often express disgust and shame about their sexual attraction to children for which they are actively and voluntarily seeking psychotherapy treatment"].) Plaintiffs allege there is a public policy that favors such patients receiving therapy. (AA 0026 ["the state's interest in ensuring that its citizens can obtain needed psychotherapy, the confidentiality of which is critical and essential to its successful treatment of mental health issues, including sexual disorders"].) Plaintiffs allege that they can successfully treat such patients.[4]

The constitutional issue in this case arises from a 2015 amendment (hereinafter referred to as "AB 1775") to the Child Abuse and Neglect Reporting Act ("CANRA") (Pen. Code, § 11164 et seq.) that requires certain professionals to report to law enforcement or child welfare agencies patients who disclose that they have downloaded, streamed, or accessed child pornography through electronic or digital media. (Pen. Code, § 11165.1, subd. (c).)

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[4] As described by the Court of Appeal, Plaintiff William Owen is "a certified alcohol and drug counselor who works with sex addicts as a counselor and intake director at treatment programs." (Slip Opn., p. 2.) Plaintiffs Don Mathews and Michael Alvarez are "licensed marriage and family therapists. Mathews is founder and director of Impulse Treatment Center, the largest outpatient treatment center for sexual compulsion/addiction in the United States. Alvarez has a private practice specializing in addictions, including sexual addiction." (*Ibid.*)

Thus, there are at least five dimensions to analysis of the issues in this case: (1) the *psychopathology* of the patients' pedophilia, (2) the patients' need for *treatment* of that psychopathology, (3) the patients' *right of privacy* as it relates to health care, (4) the patients' *privilege* to maintain the privacy of their statements to their providers, and (5) the corresponding providers' *duty not to disclose* those patient confidences. All five dimensions were raised in the complaint Plaintiffs filed in the Los Angeles Superior Court. (AA 0001-0029.) Plaintiffs alleged that, under the 2015 amendment to CANRA (which is referred to in this case as "AB 1775"), California psychotherapists will be compelled to violate their patients' constitutional rights, or otherwise risk a criminal misdemeanor conviction and the revocation of their licenses. (Slip Opn., p. 4.)

Plaintiffs named two defendants/respondents, the Attorney General of California (hereafter "Defendant AG") and the District Attorney for the County of Los Angeles (hereafter "Defendant DA"). Both Defendants demurred to Plaintiffs' complaint. (AA 0030-0050 [Defendant AG], 0051-0074 [Defendant DA].) Defendant AG argued that the purpose of AB 1775 is "to help law enforcement identify abused children." (AA 0036-0037, emphasis in heading omitted.) "Electronic access to child pornography harms children." (AA 0039, emphasis in heading omitted.) Defendant DA argued, "Beyond the initial trauma of the sexual abuse suffered by the victims of child pornography, child victims depicted in these images are repeatedly exploited as the images are continually disseminated and viewed." (AA 0055, citation omitted.) Defendant DA also argued, "There is no reasonable expectation of privacy in disclosing the fact of possession

of internet child pornography to a psychotherapist." (AA 0061, emphasis in heading omitted.)

Defendant DA's prediction of one way to balance the patient's constitutional right of privacy against society's need to protect children was, essentially, *for everyone involved to agree not to talk about viewing child pornography*. Defendant DA explained, "in order to protect a patient's expectation of privacy regarding the seemingly therapeutic and confidential therapy session, the therapist should warn the patient of his or her statutory duty to report the patient concerning instances of viewing child pornography." (AA 0062.) The obvious implication is that patients will understand the warning and not reveal that they have been viewing child pornography.

The Superior Court granted the demurrers (AA 0157-0172) and dismissed the complaint (AA 0173-0174). The court declared, "there is no legally protected privacy right" (AA 0166, emphasis in heading omitted), by focusing on the "privacy right to possess or view child pornography" (*ibid.*, citation omitted). Then, as to the privacy right to seek treatment, the court declared, "there is no reasonable absolute expectation of privacy in psychotherapeutic treatment." (*Ibid.*, emphasis in heading omitted.) The court entered judgment in favor of Defendants. (AA 0180-0181.)

Plaintiffs appealed (AA 0175), and the Court of Appeal affirmed (Slip Opn., p. 36). The Court of Appeal acknowledged that "[t]he issue of whether there is a reasonable expectation of privacy under the circumstances is a mixed question of law and fact" (Slip Opn., p. 15, citing *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 40), and that "plaintiffs' opening brief is based primarily on

factual claims" (*id.* at p. 15) as well as "policy considerations" (*ibid.*). Like the Superior Court, the Court of Appeal focused on the right to possess child pornography. (*Id.* at p. 17 ["The issue here is whether patients receiving therapy for sexual disorders have a right to keep confidential their admissions that they have violated the law by downloading, streaming or accessing child pornography from the Internet" and "the right to keep private information about whether they possessed Internet child pornography"].)

The Court of Appeal acknowledged there were factual allegations that AB 1775 creates disincentives for patients to seek treatment. "Plaintiffs allege that AB 1775 will destroy patient trust that communications made during therapy will be kept confidential, induce patients to cease therapy, make them unlikely to disclose intimate details needed to provide effective therapy, or deter existing or potential patients with serious sexual disorders from obtaining therapy at all." (Slip Opn., p. 4.) The court did not analyze these allegations, however. At most, the court held, "The privilege does not apply" and "There is no reasonable expectation of privacy." (*Id.* at pp. 21, 23, emphasis in headings omitted).

Plaintiffs petitioned for review, and this Court granted the petition. The Court identified two questions, the first of which characterized *the privacy right at issue* in this case as "a constitutional right of privacy in seeking psychotherapeutic treatment," and the second of which characterized *the interference with that right* as "compelling disclosure of communications demonstrating 'sexual exploitation[.]'" (Issues Pending Before the California Supreme Court in Civil Cases, *Mathews v. Harris*, S240156 (Sept. 29, 2017).)

SUMMARY OF *AMICI*'S ANALYSIS OF THE ISSUES

In general, a psychotherapy patient has a constitutional right of privacy in seeking psychotherapeutic treatment. That right is based on the patient's expectation of privacy. The expectation and the right are both manifested in the psychotherapist-patient privilege. (Evid. Code, § 1014.) So too is the psychotherapist's duty of confidentiality, which prohibits disclosure of patient confidences. (Evid. Code, § 1015.)

Analysis of the first question in this case ("Does a psychotherapy patient have a constitutional right of privacy in seeking psychotherapeutic treatment") begins with the two statutory exceptions that apply "to conduct constituting a crime." (Evid. Code, §§ 1018 ["crime or tort"] and 1024 ["patient dangerous to himself or others"].) Narrowly read, neither the "*crime* or tort" exception nor the "patient *dangerous* to himself or others" exception can be applied in this case unless and until the Court has more information.

Such statutory exceptions should be *narrowly* construed, however, to avoid "impermissibly invading" the right of privacy. (*People v. Stritzinger* (1983) 34 Cal.3d 505, 511 ["impermissibly invade the patient's right to privacy"], citing *In re Lifschutz* (1970) 2 Cal.3d 415, 432, and *Jones v. Superior Court* (1981) 119 Cal.App.3d 534, 550, disapproved on another ground in *Williams v. Superior Court* (2017) 3 Cal.5th 531, 557, fn. 8.)

Therefore, *Amici* submit, the first question in this case only can be answered generally – that the constitutional right of privacy is subject to the two exceptions that do not "impermissibly invade" the

patient's right to privacy. Beyond that, because the right to seek psychotherapeutic treatment is "a fundamental autonomy right," "the asserted countervailing interest must be compelling." (*Lewis v. Superior Court* (2017) 3 Cal.5th 561, 573.)

That leads to the second, specific question in this case, whether CANRA violates that fundamental autonomy right by requiring psychotherapists to disclose patient "communications demonstrating 'sexual exploitation,' which includes, among other things, downloading, streaming, and accessing through any electronic or digital media a depiction of a child engaged in an act of obscene sexual conduct?" (See Pen. Code, § 11165.1, subd. (c)(3).) In other words, is the State's interest in identifying and prosecuting those who view child pornography so "compelling" as to justify interfering with the psychotherapy of those pedophiles who seek treatment for the very problem the State is determined to solve?

The Court of Appeal answered the specific question in this case, but only by holding that Penal Code section 11171.2, subdivision (b), is an exception to the psychotherapist duty to disclose. (Slip Opn., p. 21.) It is not. Section 11171.2, subdivision (b), by its terms, applies to "any court proceeding or administrative hearing." Worse, the court's reasoning was circular, essentially holding that CANRA provides its own exception and, therefore, its own constitutional justification. Worst of all, the court read Section 11171.2, subdivision (b), so broadly as to cover the psychotherapist duty never to disclose, in addition to the admissibility of statements once disclosed. The result was to impermissibly invade the right of privacy.

Regardless, *Amici* submit the appellate record in this case is insufficient to answer that specific question. That is because this appeal arose from a demurrer. The Court has only Plaintiffs' factual allegations and Defendants' conclusory arguments to analyze the psychotherapy that patients seek for treatment of pedophilia.

Assuming Plaintiffs' factual allegations to be true, there are patients who seek treatment for the very problem that the Legislature intended to address when it enacted the 2015 amendment to CANRA – sexual exploitation of children in the form of child pornography that is downloaded from the Internet and viewed by those patients. And, it can be presumed from Plaintiffs' allegations that those patients seek treatment so they can *avoid* the criminal behavior to which CANRA is directed. Put another way, those patients seek treatment to *avoid* danger to themselves or others, in particular danger to children who have been abused in the past or might be in the future.

To be clear, *Amici* acknowledge that those children who are depicted in child pornography are themselves victims of child abuse. Even as to those children, however, the Court needs more information – about the children depicted, about the psychotherapy patients who looked at those depictions, about the psychotherapist's analysis of what the patients said in that regard, about the efficacy of the psychotherapy for those patients, and so forth. Only then can the Court meaningfully analyze whether there should be an exception to the psychotherapist-patient privilege for patient confidences about using the Internet to view child pornography.

As the record now stands, there is only one thing that is certain. As Defendant DA proposed: "in order to protect a patient's expectation of privacy regarding the seemingly therapeutic and confidential therapy session, the therapist should warn the patient of his or her statutory duty to report the patient concerning instances of viewing child pornography." (AA 0062.) In other words, "Don't ask, don't tell." That is an outcome that obviously will benefit no one, particularly the patients who, by definition, seek therapy in the sincere hope that it will help them to overcome their compulsion to view child pornography on the Internet.

LEGAL ANALYSIS

I. THE DUTY OF PSYCHOTHERAPISTS NOT TO DISCLOSE PATIENT CONFIDENCES DERIVES FROM THE PATIENTS' PRIVACY RIGHT TO SEEK TREATMENT, AND THE STATUTORY EXCEPTIONS TO THAT DUTY SHOULD BE NARROWLY APPLIED

A. Psychotherapists Have A General Duty Not To Disclose Statements Made By Patients During Therapy, But There Are Specific Exceptions To That Duty

Psychotherapy patients have an expectation of privacy, and their psychotherapists have a corresponding duty to not disclose patient statements. As this Court explained in *People v. Gonzales* (2013) 56 Cal.4th 353,

> In California, as in all other states, statements made by a patient to a psychotherapist during therapy are generally treated as confidential and enjoy the protection of a psychotherapist-patient privilege. Evidence Code section 1014—the basic provision setting forth California's psychotherapist-patient privilege—provides in relevant part: "Subject to [Evidence Code] Section 912 [waiver] and except as otherwise provided in this article, the patient ... has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist...." Evidence Code section 1012, in turn, defines "'confidential communication between patient and psychotherapist'" to mean "information,

including information obtained by an examination of the patient, transmitted between a patient and his psychotherapist in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted, and includes a diagnosis made and the advice given by the psychotherapist in the course of that relationship."

The statutory provisions embodying the psychotherapist-patient privilege were initially enacted in California in 1965. The Law Revision Commission comment accompanying Evidence Code section 1014 sets forth an overview of the scope and purpose of the psychotherapist-patient privilege as envisioned by its legislative authors. The comment states in part: "This article creates a psychotherapist-patient privilege that provides much broader protection than the physician-patient privilege. [¶] ... [¶] A broad privilege should apply to both psychiatrists and certified psychologists. **Psychoanalysis and psychotherapy are dependent upon the fullest revelation of the most intimate and embarrassing details of the patient's life.** Research on mental or emotional problems requires similar disclosure. **Unless a patient or research subject is assured that such information can and will be held in utmost confidence, he will**

> **be reluctant to make the full disclosure** upon which diagnosis and treatment or complete and accurate research depends. [¶] The Law Revision Commission has received several reliable reports that persons in need of treatment sometimes refuse such treatment from psychiatrists because the confidentiality of their communications cannot be assured under existing law. Many of these persons are seriously disturbed and constitute threats to other persons in the community. Accordingly, this article establishes a new privilege that grants to patients of psychiatrists a privilege much broader in scope than the ordinary physician-patient privilege. Although it is recognized that the granting of the privilege may operate in particular cases to withhold relevant information, the interests of society will be better served if psychiatrists are able to assure patients that their confidences will be protected. [¶] ... [¶] The privilege also applies to psychologists and supersedes the psychologist-patient privilege provided in Section 2904 of the Business and Professions Code. The new privilege is one for psychotherapists generally." (Cal. Law Revision Com. com., reprinted in Deering's Ann. Evid.Code (2004 ed.) foll. § 1014, p. 217.)

(*Gonzales, supra*, 56 Cal.4th at 371-372, emphasis added.)

There are exceptions to that general rule, however. As this Court also explained in *People v. Gonzales*,

> Although the Legislature established a broad psychotherapist-patient privilege in [Evidence Code] section 1014, it at the same time adopted numerous explicit statutory

> exceptions to the privilege that limit the circumstances in which the privilege is applicable. (See Evid.Code, §§ 1016 [patient-litigant exception], 1017 [psychotherapist appointed by court or Board of Prison Terms (now Board of Parole Hearings) to examine individual], 1018 [crime or tort], 1019 [parties claiming through deceased patient], 1020 [breach of duty arising out of psychotherapist-patient relationship], 1021 [intention of deceased patient concerning writing affecting property interest], 1022 [validity of writing affecting property interest], 1023 [proceeding to determine sanity of criminal defendant], 1024 [patient dangerous to self or others], 1025 [proceeding to establish competence], 1026 [required report open to public inspection].)

(*Gonzales*, *supra*, 56 Cal.4th at 372.)

Finally, this Court explained that the burden is on the party seeking to invoke the privilege.

> Past cases establish that a person seeking to invoke the psychotherapist-patient privilege has the initial burden of establishing the basic facts to show that the privilege is presumptively applicable—in general, that the person consulted constitutes a "psychotherapist" and that the communication in question constitutes a "confidential communication between patient and psychotherapist," within the meaning of the privilege. (Evid.Code, §§ 1010, 1012.) Once the patient has met that burden, the burden shifts to the party who contends that the privilege is inapplicable because one or more of the

> statutory exceptions applies. (See, e.g., *People v. Wharton* (1991) 53 Cal.3d 522, 551-552, 280 Cal.Rptr. 631, 809 P.2d 290.)

(*Gonzales*, *supra*, 56 Cal.4th at 372.)

In this case, the duty not to disclose generally applies. The three Plaintiffs are psychotherapists that treat psychotherapy patients who have mental and emotional problems of a sexual nature which often result in "compulsive" behavior like viewing child pornography on the Internet. The specific statute in question requires those Plaintiffs and all other psychotherapists to disclose statements made by patients during therapy, in violation of the duty. The question then is *whether one of the statutory exceptions applies*.

B. To Avoid "Impermissibly Invading The Patient's Right To Privacy," Any Exception To The Privilege Should Be Narrowly Applied

As this Court explained in *People v. Stritzinger*, *supra*, 34 Cal.3d 505, exceptions to the psychotherapist-patient privilege are constitutional *if narrowly construed* so as not to "impermissibly invade the patient's right to privacy." (*Id.* at 511, citing *In re Lifschutz*, *supra*, 2 Cal.3d at 432 and *Jones v. Superior Court*, *supra*, 119 Cal.App.3d at 550, disapproved on another ground in *Williams v. Superior Court*, *supra*, 3 Cal.5th at 557, fn. 8.)

1. The Exception For Crime Or Tort In Evidence Code Section 1018 Should Be Applied Narrowly

Child pornography is a form of child abuse. It is a crime. The crime or tort exception to the psychotherapist-patient privilege in

Evidence Code section 1018 provides, "There is no privilege under this article if the services of the psychotherapist were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort." AB 1775, however, is not limited to situations where "the services of the psychotherapist were sought or obtained to enable or aid anyone to" engage in child pornography.

If the exception in Evidence Code section 1018 is so broadly applied that psychotherapists must disclose all patient statements about child pornography, regardless of the context, Section 1018 will operate to "impermissibly invade the patient's right to privacy." If narrowly applied, for example by limiting the exception to those situations where the psychotherapist's services "were sought or obtained to enable or aid anyone to" engage in the crime of possessing child pornography or some other form of child abuse, Section 1018 will not operate to "impermissibly invade the patient's right to privacy." As narrowly interpreted, psychotherapists would not be required to disclose statements made by patients who are sincerely seeking psychotherapy for the purpose of overcoming their impulses to watch child pornography or, worse, to actually engage themselves in child abuse.

That narrow situation is the one Plaintiffs allege in this case. The patients seek treatment for the problem of child abuse, not for enablement or aid in committing child abuse. Unless and until the Court has more information about such patients, it is premature to decide whether Evidence Code section 1018 can be applied.

2. The Exception For Patient Danger To Himself Or Others In Evidence Code Section 1024 Should Be Applied Narrowly

A person who commits child abuse is a potential danger to child victims. Evidence Code section 1024, codifying the exception to the privilege where the patient is a danger to himself or others, provides "There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger." AB 1775 is not limited to such situations, however. If the exception in Section 1024 is so broadly applied that psychotherapists must disclose all patient statements about child pornography, regardless of the context, AB 1775 will operate to "impermissibly invade the patient's right to privacy." If Section 1024 is narrowly applied, for example by limiting the exception to those situations where "the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger," AB 1775 will not operate to "impermissibly invade the patient's right to privacy."

Again, that narrow situation is the one Plaintiffs allege in this case. The patients seek treatment for the problem of child abuse, not for enablement or aid in committing child abuse. Unless and until the Court has more information about such patients, it is premature to decide whether Evidence Code section 1024 can be applied.

3. Penal Code Section 11171.2, Subdivision (B), Should Be Applied Narrowly

The Child Abuse and Neglect Reporting Act provides that information regarding suspected child abuse or neglect that comes from the evidentiary psychotherapist-patient privilege is admissible in any court proceeding or administrative hearing. Penal Code section 11171.2, subdivision (b), provides "Neither the physician-patient privilege nor the psychotherapist-patient privilege applies to information reported pursuant to this article in any court proceeding or administrative hearing." There is nothing in Section 11171.2, subdivision (b), however, that corresponds to the language in the Evidence Code sections which provide exceptions to the duty by providing "There is no privilege under this article ...." If the Legislature had intended to create an exception to the psychotherapist duty not to disclose, the Legislature would have added another such exception to the list of exceptions in the Evidence Code that this Court detailed in *People v. Gonzales, supra,* 56 Cal.4th 353. (See discussion with quotation from *People v. Gonzales*, *infra,* pp. 22-26.)

Like the Superior Court, the Court of Appeal read Penal Code section 11171.2, subdivision (b), broadly. Although Section 11171.2, subdivision (b), expressly refers to "information reported" by a mandated reporter which then is presented "in any court proceeding or administrative hearing," those courts read it so broadly as to include statements by patients to psychotherapists in the psychotherapists' offices. Those courts did not read Section 1117.2, subdivision (b), narrowly to avoid impermissibly invading patients' rights to privacy, as this Court requires. (*People v. Stritzinger, supra,* 34 Cal.3d at 511.)

Read narrowly, Section 11171.2, subdivision (b), only refers to the use of information in court proceedings or administrative hearings.

Instead of interpreting the statute narrowly so as not to "impermissibly invade the patient's right to privacy," the Court of Appeal simply declared that "there is no legally protected activity at issue in this case" and "no privacy interest is at stake" (Slip Opn., p. 21, internal quotation marks and citation omitted), relying upon *Elijah W. v. Superior Court* (2013) 216 Cal.App.4th 140, 154, for that proposition.

The court in *Elijah W. v. Superior Court* analyzed CANRA before AB 1775 was enacted. The court discussed "[t]he interplay between the lawyer-client privilege and the psychotherapist-patient privilege" (*Elijah W., supra*, 216 Cal.App.4th at 152, emphasis in subheading omitted), and then "CANRA and mandated reporters' duty to report suspected child abuse" (*id.* at 153, emphasis in subheading omitted). The court ruled that the defense attorney team should have the psychotherapist as a defense expert. "In the absence of clear legislative guidance, we decline to read into CANRA a reporting requirement that contravenes established law on confidentiality and privilege governing defense experts and potentially jeopardizes a criminal defendant's right to a fair trial." (*Id.* at 146.)

Even assuming, however, that Penal Code section 11171.2, subdivision (b), is broadly read to apply to psychotherapist's offices as well as court proceedings and administrative hearings, it is premature to decide the second question in this case. Unless and until

the Court has more information about the patients, there is no way to know if they seek treatment for the problem of child abuse.

The judgment should be reversed and the matter remanded for further proceedings, to determine whether there are in fact patients who acknowledge they have a problem and sincerely seek therapy to cure that problem.

C. Because The Patients' Right To Seek Treatment Is "A Fundamental Autonomy Right," There Must Be A "Compelling" Countervailing Interest To Justify Overcoming That Right

As the Court recently explained in *Lewis v. Superior Court, supra,* if the right of privacy is "a fundamental autonomy right," the countervailing interest of the state must be so "compelling" as to justify overcoming that right. (*Lewis*, *supra*, 3 Cal.5th at 572-573.) The right to seek psychotherapeutic treatment for an abnormal attraction to child pornography is fundamental. (*Ibid.* ["patients' willingness to pursue treatment" and "a patient's choice to pursue treatment"].) AB 1775's requirement that the psychotherapist report any patient acknowledgement of that abnormality creates a disincentive to seek treatment for that problem. (*Ibid.* ["significantly impair the patient's ultimate ability to make that choice on his or her own"].)

In that regard, this case is more like *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, where the Court required a compelling countervailing interest to justify a state requiring a pregnant minor to obtain parental consent or judicial authorization before having an abortion. The Court held that statute

"unquestionably impinges upon 'an interest fundamental to personal autonomy[.]'" (*Id.* at 340, citation omitted.)

That is not to say that the right of a patient to seek treatment for pedophilia is so fundamental that it never can be overcome by the countervailing state interest in preventing child abuse. The most obvious example is Evidence Code section 1024, discussed *supra.*

D. Under The "General Balancing Test," The Public Policies Behind The Patients' Right To Seek Treatment Should Be Balanced Against The Public Policies Of The State's Duty To Prevent Child Abuse

Assuming this Court concludes that the privacy right to treatment in this case is not "a fundamental autonomy right," such that the "compelling countervailing interest test" does not apply, the Court will apply the "general balancing test[.]" (*Hill v. National Collegiate Athletic Assn., supra,* 7 Cal.4th at 34-35; see *Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 288, internal quotation marks and citation omitted.) Under that test, does the policy interest of the State in addressing the problem of child abuse outweigh the policy interest of patients to seek treatment for child abuse? Again, unless and until the Court has more information, there is no way to answer that question. For example, does the treatment that Plaintiffs allegedly provide have any proven efficacy in helping patients overcome their pedophilia?

The court in *Elijah W. v. Superior Court, supra,* 216 Cal.App.4th 140, described the interplay of privileges and reporting duties as "this intricate tapestry" (*id.* at 155), recognizing that "the psychotherapists' duty to protect potential victims of their dangerous patients" was "[t]he final strand" in that tapestry (*ibid.*). The court in

Elijah W. was referring, of course, to this Court's decision in *Tarasoff v. Regents of the Univ. of Cal.* (1976) 17 Cal.3d 425. The court in *Elijah W.* said of *Tarasoff*,

> Acknowledging the public importance of safeguarding the confidential character of psychotherapeutic communications, the Court explained the Legislature had already balanced the importance of effective treatment of mental illness and protecting the privacy rights of patients, on the one hand, and the public interest in safety from violent assault, on the other hand, in Evidence Code section 1024, which creates a specific and limited exception to the psychotherapist-patient privilege: "There is no privilege ... if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger." "We conclude 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." (*Tarasoff, supra*, 17 Cal.3d at pp. 440–442, 131 Cal.Rptr. 14, 551 P.2d 334.)
>
> Nonetheless, the *Tarasoff* Court emphasized a psychotherapist's determination a patient poses a serious danger of violence to others does not automatically translate into an obligation to notify either the potential victim or law enforcement authorities. Rather, the psychotherapist's duty is to exercise due care: "[I]n each instance the

> adequacy of the therapist's conduct must be measured against the traditional negligence standard of the rendition of reasonable care under the circumstances." (*Tarasoff, supra*, 17 Cal.3d at p. 439, 131 Cal.Rptr. 14, 551 P.2d 334; see also *id.* at p. 431, 131 Cal.Rptr. 14, 551 P.2d 334 ["[t]he discharge of this duty may require the therapist to take one or more of various steps, depending on the nature of the case"].)

(*Elijah W.*, *supra*, 216 Cal.App.4th at 155-156.)

Such a balancing approach could be applied to this case, as well. One difference in this case is that the psychotherapist Plaintiffs are not treating "dangerous patients" of the type described in *Tarasoff*, but, rather, patients who seek therapy for their compulsion to view child pornography. Another difference is that in many, if not most, of the child pornography in question, the child victim is not "reasonably identifiable." It was upon that basis that this Court in *Tarasoff* rejected the defendant therapist's contention that he owed no duty to the victim because she was not his patient. The Court held, "once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger." (*Tarasoff, supra,* 17 Cal.3d at 439.)

E. To Be Clear, The Relevant Privacy Interest In This Case Is The Patient's Right To Treatment; It Is Not The Patient's Right To View Child Pornography

The relevant privacy interest in this case is the right of a health care patient to communicate personal information to his or her health care provider with the expectation that the information will not be shared with others. It is critical to distinguish that privacy interest from other privacy interests. The privacy interest in this case is *not* the right to view child pornography.

The relevant professional duty in this case is the duty of a health practitioner to maintain the confidentiality of the personal information that the patient communicates to the practitioner. It is critical to distinguish that duty from other duties. The duty of the health practitioner in this case is *not* to protect the patient from criminal prosecution. It is *not* to protect the patient from family court restraining orders. It is *not* to protect the patient from civil liability. Those are the duties of the patient's lawyer.

F. Arguably, The Patients' Interest In Getting Treatment For Their Pedophilia And The State's Interest In Preventing Children From Harm As A Result Of Pedophilia Derive From The Same Public Policy

Plaintiffs and Defendants have the same basic goal, to address the problem of pedophilia and, thereby, protect the child victims. Plaintiffs claim they can do so by treating the source of the problem, their patients' abnormal mental and emotional conditions. Defendants

claim they can do so by deterring the sexual exploitation that is a result of the problem, through criminal prosecution.

The irony is, when the State identifies an individual with the problem, the most likely outcome will be an order requiring psychotherapy. Viewed from that perspective, Defendant DA's proposed approach – which recommends that psychotherapists adopt a technique of "Don't ask, don't tell" – is counterproductive.

II. WHEN CALIFORNIANS VOTED FOR THE 1972 INITIATIVE THAT CREATED THE CONSTITUTIONAL RIGHT OF PRIVACY, THEY WERE AWARE OF THE LEADING FEDERAL DECISIONS ON PRIVACY – MANY OF WHICH AROSE IN THE CONTEXT OF HEALTH CARE

The California Constitution provides that "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, emphasis added.) The phrase "*and privacy*" was added by way of an initiative, the Privacy Initiative, which was adopted by the voters on November 7, 1972. The problem is that the initiative did not provide a "workable legal definition" of "privacy," as Chief Justice Lucas explained for the majority in *Hill v. National Collegiate Athletic Assn., supra,* 7 Cal.4th 1,

> The text of the Privacy Initiative does not define "privacy." The Ballot Argument in favor includes broad references to a "right to be left alone," calling it a "fundamental and compelling interest," and purporting to include within its dimensions no less than

> "our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose." (Ballot Argument, *supra*, at p. 27.) Regrettably, such vague and all-encompassing terms afford little guidance in developing a workable legal definition of the state constitutional right to privacy.
>
> The principal focus of the Privacy Initiative is readily discernible. The Ballot Argument warns of unnecessary information gathering, use, and dissemination by public and private entities—images of "government snooping," computer stored and generated "dossiers" and "'cradle-to-grave' profiles on every American" dominate the framers' appeal to the voters. (Ballot Argument, *supra*, at p. 26.) The evil addressed is government and business conduct in "collecting and stockpiling unnecessary information ... and misusing information gathered for one purpose in order to serve other purposes or to embarrass ...." (*Id.* at p. 27.) "The [Privacy Initiative's] primary purpose is to afford individuals some measure of protection against this most modern threat to personal privacy." (*White v. Davis* [(1975)] 13 Cal.3d [757,] 774, 120 Cal.Rptr. 94, 533 P.2d 222.)

(*Hill*, *supra*, 7 Cal.4th at 20-21.) The Chief Justice noted that "[t]he term 'privacy' was not coined by the authors of the Privacy Initiative. At the time the Privacy Initiative was considered and adopted by the voters, a right to privacy had been recognized and defined in several

distinct branches of the law." (*Id.* at 23.) He looked to those sources of the right to privacy.

> The pre-initiative judicial construction of the right to privacy developed along two distinct lines: (1) **a common law right**, supplemented in some instances by statutes, protecting a diverse set of individual interests from interference by nongovernmental entities; and (2) **a federal constitutional right**, derived from various provisions of the Bill of Rights, that took distinct shape in United States Supreme Court decisions in the 1960's safeguarding the rights of individuals and private entities from government invasion.

(*Ibid.*, emphasis added.)

The majority opinion in *Hill* acknowledged that the right of privacy in the California Constitution owed much to the prior discussions of privacy in federal constitutional law decisions, many of which arose in the context of health care:

> The ballot arguments refer to the right to privacy as "an important American heritage and essential to the fundamental rights guaranteed by the First, Third, Fourth, and Ninth Amendments to the U.S. Constitution," thereby invoking the federal constitutional right to privacy as recognized in decisions of the United States Supreme Court. (Ballot Argument, *supra*, at p. 27.)
>
> The Privacy Initiative was placed before the voters following a two-thirds vote of each house of the Legislature. (Cal. Const., art. XVIII, § 1.) Testimony before the

> Assembly Constitution Committee, together with staff reports and analyses prepared for that committee and the Senate Constitution Committee, makes explicit reference to the federal constitutional right to privacy, particularly as it developed beginning with *Griswold v. Connecticut* (1965) 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510. (Kelso, [*California's Constitutional Right to Privacy* (1992)] 19 Pepperdine L.Rev. [327,] 468, 473, 475, 477 [reproducing legislative history of Privacy Initiative].)
>
> In *Griswold*, the Supreme Court invalidated a state statute prohibiting the use of contraceptive devices and the giving of medical advice regarding their use. Although the federal Constitution contains no explicit reference to a "privacy" right, the court found implicit in the Bill of Rights provisions cited in the ballot argument—the First, Third, Fourth, and Ninth Amendments—"zones of privacy" emanating from what it called the "penumbras" of the specific constitutional guarantees. The court located with those "zones of privacy" personal decisions made by married persons regarding the use of birth control devices. (*Griswold v. Connecticut*, *supra*, 381 U.S. at p. 484, 85 S.Ct. at 1681.)

(*Hill*, *supra*, 7 Cal.4th at 28-31, fns. omitted.)

By 1972, *Griswold* was well known. Since then, there have been many other federal privacy cases that arose in the context of health care: *Roe v. Wade* (1973) 410 U.S. 113, *Webster v. Reproductive Health Services* (1989) 492 U.S. 490 [abortion laws

struck down in part and upheld in part], *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833 [same], and *Cruzan v. Director, Missouri Dept. of Health* (1990) 497 U.S. 261, 279, fn. 7 [right to refuse medical treatment analyzed as Fourteenth Amendment liberty interest rather than part of right to privacy]. These decisions were all discussed in *Hill v. National Collegiate Athletic Assn., supra.* (7 Cal.4th at 28-31, fns. omitted.)

That so many of those well-known constitutional cases arise in the context of health care demonstrates that privacy as it relates to health care is one of the most important aspects of the right of privacy.

III. THE COURT SHOULD HAVE MORE INFORMATION TO ANALYZE THE SECOND ISSUE IN THIS CASE

Given the limited factual and procedural background of this case – so limited as to suggest that the parties are seeking little more than an advisory opinion from the Court – *Amici* do not feel that it is appropriate to answer the second issue presented in this case, "Does the Child Abuse and Neglect Reporting Act (Pen. Code, § 11164 et seq.) violate a patient's rights under the California Constitution by compelling disclosure of communications demonstrating 'sexual exploitation,' which includes, among other things, downloading, streaming, and accessing through any electronic or digital media a depiction of a child engaged in an act of obscene sexual conduct?" There is insufficient information about the patient, the treatment the patient seeks from the psychotherapist, and the patient's communication to the therapist—let alone the child victim.

This case is both a "facial" and an "as applied" constitutional challenge. (Plaintiffs' Consolidated Reply Brief, pp. 2-4.) This case did not arise from enforcement, however. If it had, the Court could determine whether the patient had an expectation of privacy.

The Court should not issue a broad advisory opinion in this case, such as requested by the parties. The three psychotherapist Plaintiffs seek a rule that AB 1775 is totally unenforceable, even to protect identifiable victims of child abuse.

The Attorney General and the District Attorney seek a rule that would require AB 1775 reports even where the State cannot fulfill its interest in protecting children because the victim cannot be identified.

At most, the Court only should answer the first question and only with a qualified answer: a psychotherapy patient does have a constitutional right of privacy in seeking psychotherapeutic treatment, even if the treatment entails a communication with a psychotherapist that refers to conduct constituting a crime. The therapist has a duty not to disclose. The only exceptions are (1) where the patient obtains the psychotherapist's services to commit a crime or tort or (2) where the patient reveals to the psychotherapist an intention to cause harm to an identifiable victim.

CONCLUSION

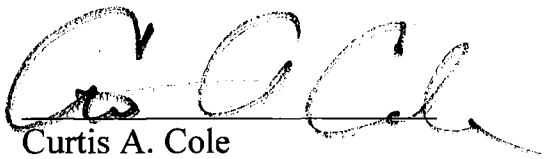
In answer to the first, general question in this case, there is a constitutional right of privacy, but there are two statutory exceptions that may apply to "behavior constituting a crime" – Evidence Code sections 1018 for "crime or tort" and 1024 for "patient dangerous to himself or others."

The second, specific question this case presents is whether either or both of those statutory exceptions to the psychotherapists' duty not to disclose can be construed so as not to "impermissibly invade" the patients' constitutional right of privacy. That requires a balancing of societal interests. For the reasons set forth in this brief, the record in this case is insufficient for any meaningful analysis of the competing societal interests.

In summary, this Court should reverse the judgment and remand the matter to the Court of Appeal for remand to the Superior Court for further proceedings in the underlying action.

Dated: October 5, 2017

COLE PEDROZA LLP

By: 

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CERTIFICATION

Appellate counsel certifies that this document contains 8,380 words. Counsel relies on the word count of the computer program used to prepare the document.

Dated: October 5, 2017

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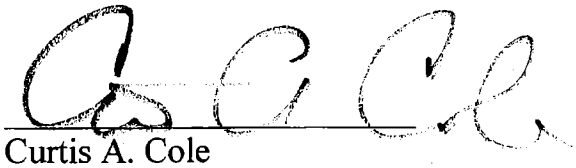
By: 

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PROOF OF SERVICE

I am a resident of or employed in the County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 2670 Mission Street, Suite 200, San Marino, California 91108.

On this date, I served the *AMICI CURIAE* BRIEF OF CALIFORNIA MEDICAL ASSOCIATION, CALIFORNIA DENTAL ASSOCIATION, AND CALIFORNIA HOSPITAL ASSOCIATION on all persons interested in said action in the manner described below and as indicated on the service list:

SEE ATTACHED SERVICE LIST

By United States Postal Service – I am readily familiar with the business's practice for collecting and processing of correspondence for mailing with the United States Postal Service. In that practice correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business, with the postage thereon fully prepaid, in San Marino, California. The envelope was placed for collection and mailing on this date following ordinary business practice.

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

Executed this 5th day of October 2017, at San Marino, California.

Sara Mazzeo

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