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,

Plaintiffs and Petitioners,

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,

Defendants and Respondents.

After a Decision of the Court of Appeal, Second Appellate District,
Division Two Case No. B265990
(Los Angeles County Superior Court Case No. BC573135,
Honorable Michael L. Stern, Judge)

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE SCHOLARS IN SUPPORT OF PLAINTIFFS AND PETITIONERS; BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFFS AND PETITIONERS

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE SCHOLARS

Pursuant to California Rule of Court 8.520(f), the Amici Curiae identified below ("Amici" or "Scholar Amici") respectfully request leave to file the brief accompanying this application.

Amici are scholars who are concerned that Assembly Bill 1775 (Stats. 2014, ch. 264, § 1 [hereinafter "AB 1775"] {Ex. 27}[1]) and the published decision of the Court of Appeal below (*Mathews v. Harris* (2017) 7 Cal.App.5th 334) harm people by denying them meaningful access to psychotherapeutic treatment without providing any countervailing benefit to children or their safety. The Court of Appeal's decision upholding AB 1775 and Respondents' arguments in defense of the decision flow from mistaken, baseless assumptions about the purpose of the privacy right in the psychotherapeutic context, the nature of child pornography production and distribution in the internet age, and the psychological traits of individuals who view such material. As scholars in the areas of criminal justice, sex offender laws, and psychology, Amici are interested in identifying the mistaken assumptions underlying the defense of AB 1775 and providing this Court with accurate information that will assist it in fulfilling its constitutional duty to strictly scrutinize laws that impinge the right to privacy in communications between patients and psychotherapists.

The following scholars[2] comprise the Amici:

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[1] All references to "Ex." refer to the exhibits to Scholar Amici's Motion for Judicial Notice filed concurrently herewith.

[2] Current institutional affiliations are offered for identification purposes only.

Amanda Agan is Assistant Professor of Economics and an Affiliated Professor in the Program in Criminal Justice at Rutgers University. She received her Ph.D. in Economics from the University of Chicago. Her research focuses on the economics of crime, and her studies spotlight the unintended consequences of policies such as sex offender registration and ban-the-box laws. Her studies on the consequences of sex offender registration include papers in the Journal of Law and Economics and the Journal of Empirical Legal Studies.

Ira Ellman is Distinguished Affiliated Scholar, Center For The Study Of Law And Society, University Of California, Berkeley, and Affiliated Faculty of the Berkeley Center for Child and Youth Policy. He was Chief Reporter for the American Law Institute's major project, Principles of the Law of Family Dissolution. His empirical studies with social psychologists have focused on family policy. His 2015 article, "*Frightening and High:" The Supreme Court's Crucial Mistake About Sex Crime Statistics*, has been widely discussed in both legal publications and in key national media.

Eric Janus is a professor of law at Mitchell Hamline School of Law, former dean of William Mitchell College of Law, a scholar and expert in sex offender civil commitment laws, author of Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State, and director of the Sex Offense Litigation and Policy Resource Center, established in 2017.

Roger Lancaster is Professor of Anthropology and Cultural Studies at George Mason University. He has won the C. Wright Mills Award and two Ruth Benedict Prizes for his research, which tries to understand how sexual mores, racial hierarchies, and class predicaments interact in a changing world. His most recent book is Sex Panic and the Punitive State

(University of California Press, 2011), an examination of American sex offender laws.

Richard A. Leo, Ph.D., J.D., is the Hamill Family Professor of Law and Psychology at the University of San Francisco School of Law. He is an expert on police interrogation practices, the impact of Miranda, psychological coercion, false confessions, and the wrongful conviction of the innocent. Dr. Leo has won numerous individual and career achievement awards for research excellence and distinction, and in 2016, the Wall Street Journal named him as one of the 25 law professors most cited by appellate courts in the United States.

Chrysanthi Leon, J.D., Ph.D., is Associate Professor of Sociology and Criminal Justice at the University of Delaware. She received her JD and PhD from the University of California, Berkeley. She is the author of Sex Fiends, Perverts, and Pedophiles: Understanding Sex Crime Policy in America, and co-editor of Challenging Perspectives on Street-Based Sex Work.

Jill Levenson, Ph.D., is a Professor of Social Work at Barry University in Miami, Florida. She studies the impact and effectiveness of social policies and therapeutic interventions designed to reduce sexual violence. She has published over 100 articles about sex offender management policies and clinical interventions, including projects funded by the National Institutes of Justice and the National Sexual Violence Resource Center.

Wayne A. Logan is Gary & Sallyn Pajcic Professor, Florida State University College of Law. Professor Logan is the author of Knowledge as Power: Criminal Registration and Community Notification Laws in America (Stanford University Press, 2009), cited by the U.S. Supreme Court in *United States v. Kebodeaux* (2013), and co-editor (with J.J.

Prescott) of Sex Offender Registration and Community Notification Laws: An Empirical Evaluation (Cambridge Univ. Press, under contract, forthcoming 2018).

J.J. Prescott, Ph.D., J.D., is an economist and Professor of Law at the University of Michigan where he is Co-Director of the Empirical Legal Studies Center and the Program in Law and Economics. His recent research includes examination of the ramifications of post-release sex offender laws and the socio-economic consequences of criminal record expungement. The Sixth Circuit Court of Appeals relied upon his work in *Does v. Snyder*, 834 F.3d 696 (2016), *cert den.*, __ U.S. __ (Oct. 2, 2017), in holding that portions of Michigan's sex offender registration law violated the *Ex Post Facto* clause.

Michael Seto, Ph.D., is the forensic research director of the Royal Ottawa Health Care Group. A clinical and forensic psychologist, he has presented and published extensively on the topics of pedophilia, sexual offending, online offending, and risk assessment. He is internationally recognized for this work and has authored two well-reviewed books on these topics published by the American Psychological Association, including his 2013 volume, Internet Sex Offenders.

Jonathan Simon, J.D., Ph.D., is the Adrian Kragen Professor of Law and Director of the Center for the Study of Law and Society at the University of California, Berkeley. His work focuses on the political dimensions of criminal law and crime policies.

Christopher Slobogin, J.D., LL.M. occupies the Milton Underwood Chair at Vanderbilt University School of Law. He is co-author of the leading casebook on mental health law and the best-selling treatise on the same subject. He has written several articles about preventive detention of sex offenders and also addresses the topic in his Harvard University Press

book, Minding Justice: Laws that Deprive People with Mental Disability of Life and Liberty.

Richard Wollert, Ph.D., is a member of the Mental Health, Law, and Policy Institute at Simon Fraser University. An expert witness in many SVP cases, his publications critique sex offender recidivism risk assessments, DSM paraphilia diagnoses, and federal sentencing guidelines for child pornography. Dr. Wollert and his associates have treated over 5,000 sex offenders at his Oregon and Canadian clinics.

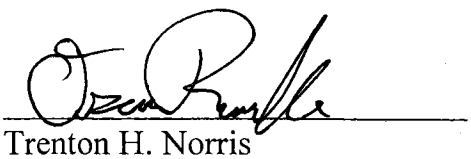
Franklin Zimring is the William G. Simon Professor of Law and Faculty Director, Criminal Justice Studies, at the University of California, Berkeley. He is known worldwide for his empirical work on criminal justice policy. Among his many books are Criminal Law and the Regulation of Vice, and An American Travesty: Legal Responses to Adolescent Sexual Offending.

No party or counsel for any party authored this brief in whole or in part. No party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief.

Dated: October 23, 2017

Respectfully submitted,

ARNOLD & PORTER
KAYE SCHOLER LLP

By: 

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BRIEF OF AMICI CURIAE SCHOLARS

INTRODUCTION

Respondents ask the Court to apply the most deferential standard of review possible and uphold AB 1775 because its purpose is to protect children from sexual exploitation. AB 1775 does not serve that purpose, and a court may not uphold a law intruding on a constitutional right based on the law's good intentions alone. (See *Packingham v. North Carolina*, (2017) __ U.S. __, __[137 S.Ct. 1730, 1738] ["The primary response from the State is that the law must be this broad to serve its preventative purpose of keeping convicted sex offenders away from vulnerable victims. The State has not, however, met its burden to show that this sweeping law is necessary or legitimate to serve that purpose"].)

AB 1775 is not necessary to ensure that psychotherapists report patients whom they suspect are a threat to children. AB 1775 is an amendment to the Child Abuse and Neglect Reporting Act ("CANRA"), which long before AB 1775 required psychotherapists to report patients they believed sexually abused children or produced or distributed child pornography. The practical effect of AB 1775 is to require a psychotherapist to report individuals who view child pornography but whom the psychotherapist does *not* believe are a threat to children, including those who seek therapy because they want to cease looking at these images.

People who voluntarily seek psychotherapeutic treatment for the desire to view child pornography – the very individuals AB 1775 targets – are uncomfortable with their conduct and are least likely to have the antisocial traits found in those who sexually abuse children. Amici agree that victims of child pornography suffer harm knowing that others may be

viewing their pictures, but AB 1775 does not and cannot do anything to prevent this harm.

Because AB 1775 does not actually protect children, what's left is a desire to catch lawbreakers. The privacy right in psychotherapeutic communications, however, has never been viewed as so flimsy as to yield to any desire to catch and prosecute criminals. The California Constitution blocks the state from learning of the most horrendous of crimes confessed in psychotherapy because it recognizes the value psychotherapy provides to an individual's development and maintenance of mental health and personal autonomy and the value it provides to the state in giving people access to treatment that can prevent antisocial conduct.

Ironically, AB 1775 does not even advance the desire to catch lawbreakers because individuals are more likely to avoid treatment rather than seek it and risk imprisonment. The law's practical effect is thus to deny people access to psychotherapy. AB 1775 makes life more difficult for a despised group of people who want to change their behavior for the better, without making children safer. AB 1775's intrusion into the right of privacy is unjustifiable and should be struck down by this Court.

ARGUMENT

I. Because Confidentiality Is Essential to the Patient-Psychotherapist Relationship, the Court Should Reject a Categorical Rule that Allows the State to Invade any Conversation in Which a Patient Discusses Past Criminal Acts.

It is beyond dispute that "[t]he psychotherapist-patient privilege has been recognized as an aspect of the patient's constitutional right to privacy." (*People v. Stritzinger* (1983) 34 Cal.3d 505, 511.) As this Court explained, the reason for shielding the relationship with a privacy right is that it cannot function without confidentiality:

> The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition .... It would be too much to expect them to do so if they knew that all they say-and all that the psychiatrist learns from what they say-may be revealed to the whole world from a witness stand.

(*In re Lifschutz* (1970) 2 Cal.3d 415, 431.)

This reason for the state's recognition of a privacy right in this relationship does not evaporate when the patient tells the psychotherapist about criminal or wrongful conduct. Precisely the opposite is true: "[c]onfidential communications between psychotherapist and patient are protected in order to encourage those who may pose a threat to themselves or to others, because of some mental or emotional disturbance, to seek professional assistance." (*Stritzinger*, *supra*, 34 Cal.3d at p. 511.) Thus, as recognized in this Court's precedents, the privacy right is most beneficial to the state's interest when the patient confesses negative behavior to the psychotherapist.

Empirical evidence confirms this Court's prior holdings. Experimental research suggests that "laws that limit the privacy of particular types of 'confessions' may discourage certain patients from being candid in the first place. As a result, such laws may fail to achieve their intended aim of protecting society, and they may hinder treatment." (Taube & Elwork, *Researching the Effects of Confidentiality Law on Patients' Self-Disclosures* (1990) 21 Prof. Psychol.: Res. & Prac. 72, 74 {Ex. 21}.)

Consistent with this research, professional standards in the field strictly limit the circumstances under which patient confidences can be disclosed, such as preventing significant imminent danger. (E.g., National

Association of Social Workers, Code of Ethics (2008) § 1.07 ["Social workers should protect the confidentiality of all information obtained in the course of professional service, except for compelling professional reasons. The general expectation that social workers will keep information confidential does not apply when disclosure is necessary to prevent serious, foreseeable, and imminent harm to a client or other identifiable person" {Ex. 18}]; American Psychiatric Association, The Principles of Medical Ethics: With Annotations Especially Applicable to Psychiatry (2013) pp. 6-7 ["Confidentiality is essential to psychiatric treatment" but confidential information may be revealed where "the risk of danger is deemed to be significant"] {Ex. 9}.)

The Court of Appeal's analysis was blind to the reasoning behind this Court's recognition of a privacy interest in patient-psychotherapist communications. Instead, it began its analysis of the right to privacy with *People v. Luera* (2001) 86 Cal.App.4th 513, 522, a case which held that there is no privacy right in the *criminal act* of possessing child pornography. (*Mathews*, *supra*, 7 Cal.App.5th at p. 354.) From there, the Court of Appeal jumped to the conclusion that there is no privacy interest in a patient's *communication to a psychotherapist* describing the criminal act of possessing child pornography for the purposes of seeking treatment. (*Ibid.*) Having decided that there is no privacy interest in talking about a past criminal act to a psychotherapist, the outcome of the Court of Appeal's analysis was predictable. While Respondents protest that the Court of Appeal created no broad exception to communications about criminal acts,

every step in the Court of Appeal's privacy analysis hinged on the criminality of the underlying conduct discussed with the psychotherapist.[3]

Neither the Court of Appeal nor Respondents have cited any authority that supports the startling proposition that the right of privacy in patient-psychotherapist communications disappears whenever the communication describes a patient's past crime.[4] Indeed, the patient-psychotherapist privilege is used to block the state from inquiring into communications about the most horrendous of crimes, including rape and murder. (*Story v. Superior Court* (2003) 109 Cal.App.4th 1007, 1010 [quashing subpoena of defendant's psychiatric records in prosecution of murder during the perpetration of rape and burglary].)

Precedent requires this Court to reject the faulty premise that a communication to a psychotherapist about a crime is equivalent to the

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[3] *Mathews*, 7 Cal.App.5th at p. 353 ("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...."); *id.* at p. 354 ("The fact that a patient might share the information of his or her past criminal conduct in possessing Internet child pornography with a psychotherapist does not implicate a constitutionally protected privacy interest."); ("No fundamental privacy interest guarantees treatment for a sexual disorder that causes a patient to indulge in the criminal conduct of viewing Internet child pornography."); *id.* at p. 359 ("As stated above, the conduct, which is criminal under state and federal law, is not entitled to constitutional protection.").

[4] *People v. Younghanz* (1984) 156 Cal.App.3d 811, on which the Court of Appeal heavily relied (*Mathews*, *supra*, 7 Cal.App.5th at pp. 357-358), does not support the Court of Appeal's holding. *Younghanz* expressly recognized the existence of "a patient's expectation of privacy" (*Younghanz*, *supra*, 156 Cal.App.3d at p. 818) even where the patient confesses child molestation to a psychotherapist, but found it was "outweigh[ed]" (*id.* at 816) on those facts. Amici and Petitioners do not argue the privacy right shields confessions of ongoing child molestation.

commission of the crime, and instead to apply the three part analysis requiring a plaintiff asserting a privacy right to show "(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. NCAA* (1994) 7 Cal 4th 1, 39-40.) That analysis self-evidently requires finding a privacy right in this case. There is a well-established privacy interest in patient-psychotherapist communications. (*Stritzinger*, *supra*, 34 Cal.3d at p. 511.) There is a reasonable expectation that a patient who "bares ... his sins" would not "expect ... all they say—and all that the psychiatrist learns from what they say—may be revealed to the whole world." (*In re Lifschutz*, *supra*, 2 Cal.3d at 431.) Revealing a patient's confidences to law enforcement is a serious invasion of privacy because the patient-psychotherapist relationship cannot function without confidentiality. (*Ibid.*)

There are, of course, situations where the privacy right should yield to other state interests. *Hill* correctly instructs that courts should handle these situations by "carefully compar[ing]" the privacy interest "with competing or countervailing privacy and nonprivacy interests." (*Hill*, *supra*, 7 Cal.4th at p. 37.) The Court of Appeal's contrary approach – a blunderbuss exclusion of any discussion of past criminal activity with a psychotherapist from the right of privacy – would eviscerate the right of an individual seeking treatment to speak freely, knowing the state cannot invade the relationship, absent the most compelling of circumstances. It is especially important to apply the *Hill* balancing test in this case because, as discussed below, the balancing test compels a conclusion that the privacy interest should be protected here.

II. AB 1775 Is Subject to Strict Scrutiny Because It Invades an Interest Fundamental to Personal Autonomy.

A state law that intrudes on "an interest fundamental to personal autonomy," must be "narrowly drawn" to further a "compelling state interest." (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 323-24.) An essential facet of personal autonomy is the "capacit[y] for rational thought, self control, and freedom from debilitating pathologies." (Christman, *Autonomy in Moral and Political Philosophy*, Stanford Encyclopedia of Philosophy (Jan. 9, 2015) § 1.2. {Ex. 12}.) Thus, a patient approaching a psychotherapist to ask for help in changing his pathological desires exercises a choice at the core of human personal autonomy. (See Frankfurt, *Freedom of the Will and the Concept of a Person* (1971) 68 J. Phil. 5, 7 [while many animals have capacity for desires, only humans "are capable of wanting to be different, in their preferences and purposes, from what they are"] {Ex. 16}.) AB 1775 is a serious invasion into personal autonomy because it forces a patient to choose between striving for autonomy and being sent to prison. (*Pettus v. Cole* (1996) 49 Cal.App.4th 402, 441 ["If there is a quintessential zone of human privacy it is the mind"].)

Respondents characterize AB 1775 as implicating only an informational privacy interest because AB 1775 "requires only that mandated reporters inform authorities of information" about the patient and their suspicion that the patient has viewed child pornography. (A.G. Br. at 40; D.A. Br. at 57.) Under that logic, requiring disclosure to the husband or parents of a woman's decision to seek an abortion also implicates only an interest in informational privacy. But of course the law does not adopt such an absurd blindness to the constraints that forced disclosure of this kind would impose on women's choices. (*Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833, 893 [striking spousal

notification requirement because it is "likely to prevent a significant number of women from obtaining an abortion"].)

Nor can it be blind to the impact of AB 1775's required reports on a potential patient's ability to seek treatment for his condition, treatment critical to his desire – his choice – to lead a normal, law-abiding life. None of the authorities Respondents cite involves remotely similar intrusions into privacy. (E.g. *Lewis v. Superior Court* (2017) 3 Cal.5th 561, 573 [limited disclosure of pharmacy records that "does not significantly impair the patient's ultimate ability to make that choice [to seek treatment] on his or her own"]; *Williams v. Superior Court* (2017) 3 Cal.5th 531, 539 [contact information].) Because AB 1775 invades an individual's personal autonomy, it can only be justified if it is narrowly drawn to further a compelling interest.

III. Meaningful Access to Psychotherapy Advances CANRA's Purpose of Protecting Children, While AB 1775 Undercuts It.

Studies find that psychotherapy can reduce sexual re-offending rates among those convicted of contact sex offenses. (Schmucker & Lösel, *Sexual offender treatment for reducing recidivism among convicted sex offenders: a systematic review and meta-analysis*, Campbell Systematic Reviews (July 2017) p. 20 [meta-analysis of studies finds a 25% reduction in sexual re-offending] {Ex. 19}; Hanson, et al., *First Report of the Collaborative Outcome Data Project on the Effectiveness of Psychological Treatment for Sex Offenders* (2002) 14 Sexual Abuse: J. of Res. & Treatment 169, 181 [meta-study of 43 studies finding psychological treatment of sex offenders resulted in statistically significant reduction in sexual offense recidivism and general recidivism] {Ex. 17}.) The efficacy of psychotherapy in reducing the re-offense risk posed by sex offenders is the obvious basis for the requirement under both California and federal law that sex offenders on probation or supervised release participate in therapy.

(E.g., U.S. Sentencing Commission, 2016 Guidelines Manual, § 5D1.3(d)(7)(A) [specifying that "participation in a program approved by the United State Probation Office for treatment" is a mandatory condition of supervised release from a sex offense]; Pen. Code, § 9000, subds. (c) and (d), § 1203.067, subd. (b) [specifying that sex offenders on probation must participate in a management program that includes "specialized treatment"].) Facilitating access to psychotherapy by willing patients concerned about their interest in pictures of children furthers the same public policy reflected by these provisions, and is consistent with the goals of CANRA.

At the same time, CANRA's compelling purpose "to protect children from abuse and neglect" (Pen. Code, § 11164, subd. (b)) includes rescuing them from situations threatening imminent, serious harm. (*B.H. v. County of San Bernardino* (2015) 62 Cal.4th 168, 190 ["immediate protection of the child is the paramount concern"].) The goal of protecting children from imminent harm can be in tension with the goal of facilitating treatment. Prior to the passage of AB 1775, CANRA resolved that tension in the context of child pornography by requiring therapists to report individuals who sexually abused children to create pornography, or who commercially participated in such exploitation. CANRA was supplemented by federal programs that exhaustively catalog child pornography circulated on the internet and that use the catalog to help identify, rescue, and compensate victims of child pornography.

AB 1775's revision of CANRA placed additional burdens on access to treatment without advancing CANRA's compelling interest in protecting children from imminent harm. AB 1775 is unlikely to identify children for rescue who would not have been identified through the prior version of CANRA or through federal efforts. It is also unlikely to have any marginal

effect in reducing supply or demand for child pornography and is similarly unlikely to catch in its net contact child abusers who would not have otherwise been caught by prior law. AB 1775 is, indeed, counterproductive to CANRA's purpose because it effectively prevents the type of individuals who are most likely to benefit from treatment and who pose the lowest risk to children from voluntarily seeking treatment to cure themselves of the desire to view child pornography.

A. AB 1775 ensnares in the criminal justice system individuals who are most likely to benefit from psychotherapy and not those who are likely to sexually assault children.

Long before AB 1775's passage, CANRA required psychotherapists to report suspected incidents of sexual assault and sexual exploitation to the authorities. (Stats. 1984, ch. 1613, § 2, pp. 5718-5719 {Ex. 26}.) And in addition to potential criminal liability for violating CANRA's mandatory reporting requirements, psychotherapists have long had a tort duty to warn of any patient who "has made a credible threat of serious physical violence." (*Calderon v. Glick* (2005) 131 Cal.App.4th 224, 231; *Doe v. Superior Court* (2015) 237 Cal.App.4th 239, 244 [finding duty includes duty to disclose "suspected molestation"].) Petitioners do not challenge these provisions or ask the Court to leave children in harm's way. To the contrary, Petitioners' objection to AB 1775 is that it requires psychotherapists to report individuals whom they *do not* believe or reasonably suspect pose a threat to assault children.

Indeed, after AB 1775, the single fact of having looked at pictures *alone* requires the therapist to report the patient, without regard to anything else the therapist knows about the patient. AB 1775 effectively replaced the therapist's judgment with an irrebuttable presumption that every patient who confides his interest in pictures of children threatens harm to them.

One would expect the state to have reams of data showing that looking at pictures of children establishes that the looker-client poses a threat to children, no matter what other facts are known to the therapist—data persuasive enough to justify replacing the therapist's overall judgment with this single item of information about the patient. Respondents, however, cite no data supporting their view. The District Attorney even argues the Court must uphold the statute, although it is concededly not "validated by concrete data." (D.A. Br. at p. 61 [quoting *Paris Adult Theatre I v. Slaton* (1973) 413 U.S. 49, 60-62].)

There are two difficulties with the state's position. First, evidence connecting the statutory requirement to the valid state purpose *is* required when the statute impinges on a constitutional right. Second, there *are* data on the connection between looking at child pornography and committing contact offenses against children – but the data show the opposite of what the state asks the Court to assume to be true.

"Numerous decisions establish that 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*, *supra*, 16 Cal.4th at p. 349.) Where the statute impinges on the constitutional right of privacy, this Court has found that to not apply such "greater judicial scrutiny" would "abandon [the Court's] constitutional duty." (*Ibid.*)

Applying such scrutiny completely undermines the state's claim because the data do *not* support a reasonable inference that having looked at pictures alone establishes that the client has or will assault a child. Modern studies by leading experts and government agencies all reach the same conclusion on this point.

For example, in connection with its review of sentencing guidelines for possession of child pornography, the United States Sentencing Commission looked at the post-release conduct of every one of the 610 individuals released from federal custody in 1999 and 2000 who (1) was convicted of possession, receipt, or distribution of child pornography and (2) had no convictions for any other sex offense. (U.S. Sentencing Commission, Federal Child Pornography Offenses (2011) pp. 295-296 {Ex. 23}.) No other filter was applied. For example, 93 of the 610 had prior convictions for non-sexual offenses. (*Id.* at p. 302.)

The study followed these individuals for an average of 8.5 years after their release from custody. All but 22 of the 610 (96.4%) remained free of a contact sex offense of any kind. (Federal Child Pornography Offenses, *supra*, at p. 300.) Fourteen looked at pictures again. But the overwhelming majority did neither. (*Ibid.*)

Other studies show similar results. A 2010 paper co-authored by Michael Seto, Karl Hanson, and Kelly M. Babchishin is notable because of its authors. (See Seto, et al., *Contact Sexual Offending by Men With Online Sexual Offenses* (2010) 23 Sexual Abuse: J. Res. & Treatment 1 {Ex. 20}.) Seto also wrote Internet Sex Offenders, published in 2013 by the American Psychological Association, and is the leading scholar studying individuals who access child pornography on the internet. Hanson is the leading scholar studying re-offense rates by individuals convicted of sex crimes. The test he has authored and perfected to assess the re-offense risk posed by a contact

sex offender has been adopted by California as the appropriate test to employ.[5]

Seto and Hanson's study, a meta-analysis combining data from many others, found that just 25 of 1,247 online child pornography offenders committed a contact sexual offense after release. They concluded that "online offenders rarely go on to commit detected contact sexual offenses." (Seto, et al., *supra*, p. 136 {Ex. 20}.)

Similarly, researchers at the Federal Bureau of Prisons who studied re-offense rates in 2014 concluded that efforts to reduce the re-offense rates for internet child pornography offenders should be reconsidered, because the "overall re-offense base rate of CP offenders" was so low it was difficult to further reduce. (Faust, et al., *Child Pornography Possessors and Child Contact Sex Offenders: A Multilevel Comparison of Demographic Characteristics and Rates of Recidivism* (2014) 27 Sexual Abuse: J. Res. & Treatment 1, 15{Ex. 15}.)

These results are repeated in study after study in American, as well as in foreign, populations. (Note, *Inequitable Sentencing for Possession of Child Pornography: A Failure to Distinguish Voyeurs from Pederasts*

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[5] The SARATSO committee (State Authorized Risk Assessment Tool for Sex Offenders) is charged by statute with determining the tools California law enforcement authorities should employ to assess an offender's re-offense risk. (Pen. Code, § 290.5, subd. (d).) The committee has chosen the Static-99R, developed by Hanson, as the tool to employ for adult male contact sex offenders. (SARATSO, *Risk Assessment Instruments* <http:// saratso.org/index.cfm?pid=1360> [as of Oct. 4, 2017].) "The Static-99R is the most widely used [risk assessment] instrument. Many research studies have proven its predictive accuracy." (*Ibid.*) The same site explains that SARATSO partnered with the California Department of Justice to conduct validation studies of the Static-99R; these were actually performed by Hanson and his colleagues, as their authorship indicates. (*Ibid.*)

(2010) 61 Hastings L.J. 1281, 1294-97 [collecting additional studies]; Endrass, *The consumption of Internet child pornography and violent and sex offending* (July 14, 2009) BMC Psychiatry, at p. 6 [Study of Swiss offenders concludes that "the consumption of child pornography alone does not seem to represent a risk factor for committing hands-on sex offenses"] {Ex. 14}.)[6]

Of course, this data does not show that people convicted of possession of child pictures never commit a contact offense. But *no* group in the population presents a *zero* risk of committing a sex offense. A privacy right that only protects groups of individuals at zero risk of offending is no privacy right at all, and this state's courts have never

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[6] The now infamous exception, the "Butner study" (Bourke & Hernandez, *The 'Butner Study' redux: a report of the incidence of hands-on child victimization by child pornography offenders* (2009) 24 J. of Fam. Violence 183) is still sometimes cited for the claim that those who look at pictures regularly commit contact offenses as well. But the study is widely discounted because of its scientific flaws, the most obvious being that it relied on self-reports by currently incarcerated prisoners who likely believed that their favorable treatment by prison authorities depended on their cooperating with interviewers who sought their admission of such behavior. Indeed, the Ninth Circuit has pointed out that "one of the study's authors has disavowed the government's citation of his work to support this claim, and has cautioned that "the argument that the majority of [child pornography] offenders are indeed contact sexual offenders and, therefore, dangerous predators ... simply is not supported by the scientific evidence." (*United States v. Apodaca* (9th Cir. 2010) 641 F.3d 1077, 1087) [quoting Hernandez, *Psychological and Behavioral Characteristics of Child Pornography Offenders in Treatment* (unpublished manuscript) (Apr. 2009) p. 4 (emphasis deleted).) The Seto study discussed above concluded the Butner study was "an outlier" with results completely different than reported by the other 23 studies included in their meta analysis. (Seto, *Contact Sexual Offending by Men With Online Sexual Offenses*, *supra*, 23 Sexual Abuse: J. Res. & Treatment at p. 133 {Ex. 20}.)

endorsed such a self-defeating view of the privacy right. (See *People v. Hackler* (1993) 13 Cal.App.4th 1049, 1061 [holding probation condition requiring thief to wear in public a sign around his neck that says "I am a thief" "has some bearing on future criminality" but "is so incidental, however, that we cannot find it reasonable" in light of privacy right].)

Professional judgment is particularly appropriate in this case because the empirical literature establishes clear differences between the psychological traits of men known to have committed contact sex offenses against children and men known only to have looked at child pornography. It is common for normal individuals to fantasize about causing harm to others, and millions of Americans routinely enjoy movies that depict interpersonal violence. But those who actually harm others are more likely to have an antisocial[7] personality, and to lack the normal psychological barriers against committing such harmful acts, such as the capacity for victim empathy. These typical differences have been found in this particular context and distinguish those who commit contact offenses against children from those who do not commit contact offenses but do look at pictures. (Babchishin, et al., *Online Child Pornography Offenders are Different: A Meta-analysis of the Characteristics of Online and Offline Sex Offenders Against Children* (2015) 44 Archives of Sexual Behavior 45, 51 {Ex. 11}.)

Consistent with these findings, other studies show that contact offenders lack the ordinary capacity for self-control. (E.g. Elliott, et al., *The*

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[7] Antisociality refers to a set of personality traits and attitudes indicating disregard for societal norms and the safety of others, a lack of remorse, impulsivity, and persistent rule breaking. (American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th ed., 2013) p. 659 {Ex. 8}.)

Psychological Profiles of Internet, Contact, and Mixed Internet/ Contact Sex Offenders (2012) 25 Sexual Abuse: J. of Res. & Treatment 3, 10 {Ex. 13}.) One study found that more than ten percent of a sample of male college undergraduates had sexual fantasies involving children, but that "pornography use was associated with deviant sexual behavior scores only for individuals scoring high in psychopathy." (Williams, et al., *Inferring sexually deviant behavior from corresponding fantasies: The role of personality and pornography consumption* (2009) 36 Crim. Just. & Behavior 198, 212 {Ex. 25}; *id.* at p. 206 ["The cardinal features of psychopathy include a deceptive and manipulative interpersonal style, shallow affect (e.g., lack of guilt and empathy), and an impulsive, irresponsible, and antisocial lifestyle"].)

A trained psychotherapist can tell whether a patient is a psychopath. But it is unlikely that many of those who seek therapeutic help will be. A person who looks at child pornography and also voluntarily seeks therapy to help him stop necessarily appreciates and acknowledges the wrongfulness of his conduct. His discomfort with his own conduct is entirely *inconsistent* with the antisocial personality traits associated with contact sex offenders. These patients are thus even more unlikely than typical viewers of child pornography to present a heightened risk of a contact offense, and more likely to gain a benefit from psychotherapeutic treatment

AB 1775 is thus carefully targeted to catch those least likely to commit contact offenses, and most likely to benefit from treatment, making it wholly irrational and counterproductive to CANRA's goal of protecting children. It is best explained as a politically expedient act imposing a punitive measure on an unpopular group, not one that meaningfully protects children. (See Cucolo, *They're Planting Stories in the Press: The Impact of*

Media Distortions on Sex Offender Law and Policy (2013) 3 U. Denv. Crim. L. Rev. 185 [describing "[i]ndividuals classified as sexual predators" as "the pariahs of the community" subject to a "constant push to enact even more restrictive legislation that breaches the boundaries of constitutional protections]".)

B. AB 1775 will not lead to the identification or rescue of abused children.

AB 1775 targets individuals who passively view child pornography over the internet. (Stats. 2014, ch. 264, § 1, subd. (c)(3), p. 2541 {Ex. 27}.) Therapists were already required, before AB 1775, to report a person with more active involvement in child pornography – such as producing it or distributing it. (*Ibid.*) Because AB 1775 only affects individuals who have accessed pictures on the internet — which are readily available to law enforcement — reporting these individuals does not result in the rescue of children. The state cannot rescue an abused child by arresting and prosecuting a person who has had no contact whatsoever with the child and does not know the child's identity or location.

Searching such an individual's computer may uncover the pictures the individual viewed or how he accessed them, but that information is unlikely to identify children otherwise unknown to law enforcement. The same pictures would likely be found on the computers of others arrested for child pornography and already catalogued in an exhaustive federal database. Indeed, a robust set of government-funded programs – the Child Victim Identification Program ("CVIP") and the CyberTipline – have handled more than a billion reports of internet child pornography. These programs continuously collect child pornography from numerous sources and analyze tens-of-millions of images per year in order to identify and help rescue child victims. As described by the United States Sentencing Commission:

> With regard to child pornography specifically, Congress has mandated that [the National Center for Missing and Exploited Children ("NCMEC")] operate both the CyberTipline and the Child Victim Identification Program ("CVIP"). The CyberTipline "serves as the national clearinghouse for online reporting of tips regarding child sexual exploitation including child pornography." Since its 1998 inception the CyberTipline has received over 1,300,000 reports, including a 69-percent increase between 2005 and 2009. Electronic communication service providers such as email systems and other websites that store online content are mandated to report child pornography that they find on their system to the CyberTipline.
>
> The CVIP program attempts to find identifiable children in child pornography images. CVIP relies on a variety of techniques including hash values to determine if the images they receive are known images of child pornography or if they are new images that have never before been encountered. CVIP had reviewed over 28.5 million child pornography images and videos by 2009, including a 432- percent increase in videos and images submitted for identification between 2005 and 2009.

(Federal Child Pornography Offenses, *supra*, at p. 64 {Ex. 23}.) Once NCMEC obtains such information concerning child pornography, it is required to forward the information to appropriate federal law enforcement agencies and is permitted to forward it to appropriate state agencies. (18 U.S.C. § 2258A(c).) As of 2009, NCMEC had identified more than 1,600 children through this process. (United Nations Human Rights Council, *Report of the Special Rapporteur on the sale of children, child prostitution and child pornography* (July 13, 2009) pp. 15-16 {Ex. 22}.)

Thus, any pictures of identifiable children found by law enforcement on the computer of an individual reported under CANRA are very likely already catalogued in the NCMEC database, with one exception: the individual involved in producing new pornography, rather than just looking

at pictures already available on the internet. But the therapist was already required to report such individuals prior to enactment of AB 1775, and will continue to be if AB 1775 is invalidated as applied to therapists.

While rescuing abused children is a compelling purpose, AB 1775 is not narrowly drawn to that goal. To the contrary, AB 1775 destroys the privacy rights of individuals seeking treatment from psychotherapists, even though the impingement on that constitutional right is exceedingly unlikely to lead to the discovery of information that law enforcement can use to rescue a child.

C. AB 1775 does not prevent harm caused by the viewing of child pornography.

Respondents argue that "[a]cessing child pornography is not a victimless crime" (D.A. Br. at p. 62) and that "[t]he State's interest in protecting children from the abuse perpetrated when sexually exploitative images of them are downloaded or accessed from the Internet is sufficient in itself to outweigh patients' asserted privacy interests" (A.G. Br. at 48-49). Respondents do not explain how AB 1775 advances this interest. Indeed, it does not.

Harm to the victim occurs as a result of her "knowledge that her images were circulated far and wide," which she is "powerless to stop," as the images of her abuse are circulated over and over. (*Paroline v. United States* (2014) 134 S.Ct. 1710, 1717.) Halting such distribution would be a laudable achievement. Unfortunately, AB 1775 does nothing to advance this goal.

Child pornography "is available through virtually every Internet technology." (Federal Child Pornography Offenses, *supra*, at p. 47 {Ex. 23}.) Sharing technology includes peer to peer software that operates without any centralized servers. Once an individual shares pornography over peer to peer software "he usually exercises no control over to whom

the files are shared or how many times they are shared. He is, in effect, leaving a virtual door open on his computer and permitting individuals to copy any files they wish any time the software is running." (*Id.* at p. 51.) Illustrating the vast scope of distribution, a 2006 study found that every single day there were approximately 116,000 requests on just one network for the term "child pornography." (*Id.* at 52. [citing O'Donnell & Milner, *Child Pornography: Crime, Computers and Society*, at p. 40 (2007)] {Ex. 23}.) A tabulation of post-2014 federal pornography cases found that the average number of images in a single defendant's possession was about 62,000, while the median was about 5,700. (Bhatty, *Navigating Paroline's Wake* (2016) 63 UCLA L. Rev. 1, 38.)

The sad reality is that law enforcement currently has no tool enabling it to "unpost" any image or prevent its continued dissemination. Requiring therapists to report clients who seek their help to stop looking at these images is certainly no such tool. Denying psychotherapeutic treatment to individuals who seek to change their behavior, and whose individual contribution to the substantial harm suffered by the victim is "very minor" (*Paroline*, *supra*, 134 S.Ct. at p. 1725) is an arbitrary, unbalanced, and irrational impingement on the right of privacy.

D. It is wildly implausible to suggest that AB 1775 would reduce the demand for child pornography and thereby reduce its production.

Respondents argue that AB 1775 advances the state's interest in "drying up the market for images of children's sexual abuse." (A.G. Br. at 43, D.A. Br. at 58.) The state does not explain how discouraging individuals from seeking treatment for their interest in child pornography will reduce the demand for it. But logic requires that such a claim must assume (1) that AB 1775 will result in additional convictions for possession of child pornography; (2) that the additional convictions and any additional

general deterrence result in a reduction in demand for images of children; (3) that the reduction resulting from additional convictions exceeds the reduction that would have resulted had the convicted individuals instead been allowed to seek therapy with traditional privacy guarantees; and (4) that this net additional reduction will affect the worldwide demand and discourage production.

There is good reason to doubt each of these four assumptions, but the chance that all four are true seems vanishingly small. Indeed, the connection between the production and the demand for child pornography is not even clear, because the widespread internet availability of free images has reduced any role for a commercial market. "[T]he typical offender today receives images without providing financial support to the commercial child pornography industry." (Federal Child Pornography Offenses, *supra*, at p. 329 {Ex. 23}; see also Urban Institute Research Report, *Estimating the Size and Structure of the Underground Commercial Sex Economy in Eight Major U.S. Cities* (March 2014) p. 259 [finding that only five percent of those imprisoned for possession report having paid for the images]{Ex. 24}.)

Further, AB 1775 can yield additional convictions only if individuals tell their therapist that they have looked at illicit pictures of juveniles. It seems doubtful many will, if they know the police will be told what they said. And they likely will know. That is because professional ethics require psychotherapists to disclose the limits of confidentiality at the outset of the relationship. (E.g. American Psychological Association, Ethical Principles of Psychologists and Code of Conduct (2017) § 4.02 ["Psychologists discuss with persons ... (1) the relevant limits of confidentiality and (2) the foreseeable uses of the information generated through their psychological activities.... (b) Unless it is not feasible or is contraindicated, the discussion

of confidentiality occurs at the outset of the relationship and thereafter as new circumstances may warrant]" {Ex. 10}.)

Respondents have not provided a single example of an arrest resulting from AB 1775's requirements. But even if a small number of clients will confide in the therapist and thereby put themselves in legal jeopardy, surely a larger number would decline therapy rather than subject themselves to arrest. If only half or even a quarter of those deterred from seeking therapy by the mandatory report would have found it effective to help them cease their behavior, they might well outnumber those who confided in their therapist despite the absence of confidentiality, and were then arrested when their therapist reported their confidences to the police. In that case, the net effect of AB 1775 would be an *increase* in demand, not a reduction.

In short, the state's claim that AB 1775 will protect children from contact abuse because it will reduce the production of child pornography is implausible and unsupported by any data.

E. The possibility of prosecuting those who seek treatment for viewing child pornography does not justify invading the patient-psychotherapist relationship.

Respondents argue AB 1775's invasion of privacy is justified by "bringing .... to justice" those who confess to viewing child pornography to their therapists. (A.G. Br. at p. 43; see also D.A Br. at p. 59.) But the desire to prosecute even serious crimes such as rape or murder has never been enough to justify invasion of the private relationship between a psychotherapist and a patient, and psychotherapists cannot be compelled to disclose their patients' confidences to aid in the prosecution of such crimes. (*Story*, *supra*, 109 Cal.App.4th at p. 1010.)

The Evidence Code is instructive as to the scope of permissible intrusions into the relationship. (See *Hill*, *supra*, 7 Cal.4th at p. 1 ["Whether

established social norms safeguard a particular type of information … is to be determined from the usual sources of positive law"].) The Evidence Code creates no exception to the privilege for the therapist's communications that aid in the apprehension or prosecution of someone who committed a crime. It does create an exception "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 the person or property of another and that disclosure of the communication is *necessary to prevent the threatened danger*." (Evid. Code, § 1024 [emphasis added].) This "'dangerous patient' exception to the privilege … only permits disclosure [where the psychotherapist concludes] disclosure of a communication was needed to prevent harm." (*People v. Gonzales* (2013) 56 Cal.4th 353, 383 [quoting with approval *San Diego Trolley, Inc. v. Superior Court* (2001) 87 Cal.App.4th 1083, 1091].)

Prior to AB 1775, CANRA's disclosure requirements had a close fit to the traditional dangerous patient exception. For example, in a scenario in which a patient confesses to "sexual assault" of a child as defined in CANRA (Pen. Code, § 11165.1, subd. (a)), the psychotherapist undoubtedly would have reason to believe the patient posed a threat of danger to a child. Likewise, prior to AB 1775, the particular statutory provision at issue here bore a reasonably close fit to the dangerous patient exception. It covered a "person who depicts a child in, or who knowingly develops, duplicates, prints, or exchanges film, photograph, video, negative, or slide in which a child is engaged in an act of obscene sexual conduct …." (See Stats. 2014, ch. 264, § 1, subd. (c)(3), p. 2541 {Ex. 27}.) It thus covered individuals engaged in production and distribution of child pornography (see Section IV, *infra*), individuals who sexually abuse children by producing pornography or individuals in the chain of

distribution that provide direct commercial support to such abusers. By requiring psychotherapists to report patients whom they believe pose no threat of harm to children and who do not create or distribute child pornography, AB 1775 goes far beyond traditional exceptions to the constitutional right of privacy that underpins the therapist-patient privilege. (*Strtzinger, supra*, 34 Cal.3d at 511).

Citing the United States Supreme Court's decision in *Paroline*, Respondents argue that viewing child pornography causes harm.[8] But the potential harm of that conduct attributable to any individual viewer is a different order of magnitude from the kinds of harms that traditional exceptions to psychotherapeutic privacy are intended to forestall. As the Supreme Court cautioned in *Paroline*, courts should be wary of adopting a view that "would treat each possessor as the cause in fact of all trauma and attendant losses incurred as a result of all the ongoing traffic in the victim's image." (*Paroline*, *supra*, 134 S.Ct. at p. 1714.) This is particularly true given that today's internet distribution of the images (unlike earlier decades in which pornography was distributed in physical copies or film) has produced an environment in which most individuals who download child pornography receive the images free, without any payment, casting doubt on the likelihood their viewing plays any significant role in encouraging their production. (Urban Institute, *supra*, at p. 277 [noting "child pornography represents a large, but commonly noncommercial economy in

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[8] Respondents slide over the fact that the individuals whose images were at issue in *Paroline* were adults at the time the government sought restitution for the harm, an apparently common situation because these images, once posted, can remain in circulation indefinitely. While the harm they cause is no less real, it is *not*, at that point, a harm to *children*, and thus not a harm that CANRA is even intended to address.

the United States"] {Ex. 24}; see also Federal Child Pornography Offenses, *supra*, at p. 329 [making same point] {Ex. 23}.)

Further, CANRA has never been intended to encourage state actors to implement "traditional crime and punishment approaches," regardless of context. (*B.H*, *supra*, 62 Cal.4th at p. 190 [quoting Assem. Com. on Criminal Justice, transcript of hearing, "Child Abuse Reporting" (Nov. 21, 1978) p. 33 {Ex. 1}].) Rather, "immediate protection of the child is the paramount concern" of CANRA. (*Ibid.*) Thus, CANRA was enacted because children needed rescue from ongoing abusive situations. For example, the State Bar argued for passage of CANRA's predecessor on the grounds that

> Repeated instances of abuse of the same child tend to lead to progressively more severe results, including death, brain damage, and disabling emotional handicaps. It's not a tiny fraction of the child population we're talking about, either. Approximately 10% of all trauma seen in emergency rooms affecting children under three years of age is inflicted. [Fn. omitted.] Of all fractures in children under two years of age, 25% are inflicted. [Fn. omitted.] Studies show reinjury rates after initial abuse run as high as 50% to 60%.

(*Krikorian v. Barry* (1987) 196 Cal.App.3d 1211, 1217 [quoting State Bar of California, Report on Assem. Bill No 2497 (1979-1980 Reg. Sess.) p. 2] {Ex. 5}.) Rescuing children from such immediate and significant harm is the kind of compelling interest that may justify invading the privacy of psychotherapeutic communications. Merely prosecuting lawbreakers who have no contact with children is not.

Even if facilitating prosecution were a compelling purpose in this case, AB 1775 is not narrowly drawn to that purpose. As noted in Section III.D, *supra*, it is wildly implausible to believe AB 1775 will lead to a significant number of new prosecutions. What AB 1775 will do instead is deter individuals from seeking treatment. Effectively denying people

medical and professional treatment "dehumanizes and demonizes" them but does not make children any safer. (Cucolo, 3 U. Denv. Crim. L. Rev. *supra*, at p. 208 [quoting Haney & Greene, *Media Criminology and the Death Penalty* (2009) 58 DePaul L. Rev. 689, 729].)

F. Additional fact-finding is not warranted.

Amici Curiae California Medical Association, California Dental Association, and California Hospital Association ("Professional Association Amici") argue that AB 1775 impinges the right to privacy but that further fact-finding is required. (Prof. Ass. Br. at p. 42.) Professional Association Amici reach this conclusion by misstating the issue before the Court. They assert that "[t]he three psychotherapist Plaintiffs seek a rule that AB 1775 is totally unenforceable, even to protect identifiable victims of child abuse." (*Ibid.*) Thus, they frame the issue as not only whether psychotherapists must reveal to law enforcement "patients who are sincerely seeking psychotherapy for the purpose of overcoming their impulses to watch child pornography," but also whether they must reveal patients seeking therapy "to actually engage themselves in child abuse." (*Id.* at p. 28.)

Scholar Amici agree, of course, that the record before the Court is inadequate to support a ruling that the Constitution bars disclosure of a patient's intent to sexually abuse a child. But that is not remotely the issue here. If AB 1775 were completely excised from the statute, a psychotherapist would still be required to report when he or she "has knowledge of or observes a child whom the mandated report knows or reasonably suspects has been the victim of child abuse or neglect." (Pen. Code, § 11166, subd. (a).) "Child abuse" includes "sexual abuse." (Pen. Code, § 11165.6.) Because Petitioners do not challenge anything about

CANRA other than the changes made to it by AB 1775, the fact-finding Professional Association Amici request is unnecessary.

Indeed, AB 1775 is plainly unconstitutional under the test Professional Association Amici ask the Court to adopt. They state communications about a crime to a psychotherapist are private and that "[t]he 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." (Prof. Ass. Br. at p. 42.) Prior to AB 1775, CANRA was broad enough to capture information falling under the second proposed exception. AB 1775 thus only has a practical effect to the extent it captures information about patients who *do not* have an intent to harm an identifiable victim. As to those patients, the evidence that AB 1775 arbitrarily invades the right of privacy is stacked against the state.

IV. The Legislative Process Failed to Rationally Evaluate AB 1775's Unprecedented Impingement of the Privacy Right.

Regardless of the adequacy of the legislative process, this Court has an independent duty to critically scrutinize any law that impinges on the right to privacy in communications between patient and psychotherapist. (*American Academy of Pediatrics*, *supra*, 16 Cal.4th at p. 349.) The legislative history in this case, however, calls for even closer scrutiny because it suggests the Legislature lacked any awareness it was imposing a serious, new impingement on the constitutional right of privacy.

In passing AB 1775, the Legislature believed it was engaging in a technical revision to the law by clarifying it to mandatory reporters who were "confused on whether they should report the downloading or streaming of child pornography, as they are required to with the printing or copying of such materials." (Sen. Com. On Public Safety, Bill Analysis of Assem. Bill No. 1775 (2013-2014 Reg. Sess.) as amended May 13, 2014

{Ex. 4}.) Thus, the Legislature was under the impression it was not making any new substantive policy choices. In its ignorance, the Legislature could not have considered the fact that AB 1775 for the first time required psychotherapists to report individuals who simply viewed child pornography.

Seeking to support the mistaken belief that AB 1775 is merely a technical update of prior law, Respondents note that prior to AB 1775's passage, CANRA required reporting of someone "who knowingly develops, duplicates, prints, or exchanges" child pornography. (See Stats. 2014, ch. 264, § 1, subd. (c)(3), p. 2541 {Ex. 27}.) Respondents conflate this old language with AB 1775's new requirement to report individuals who only view pornography. (AG Br. at p. 47; DA Br. at p. 39.) As Plaintiffs correctly argue, the pre-AB 1775 language did not cover possession of child pornography. (Pl. Op. Br. at pp. 24-25.) Indeed, the Legislature understood such language to require "'intent to distribute or exhibit" child pornography. (Legis. Counsel's Dig., Assem. Bill No. 2233 (1989-1990 Reg. Sess.), 1989 Cal. Legis. Serv. 1180 {Ex. 3}.)

Legislative history confirms that the "develops, duplicates, prints, or exchanges" language was not added to require reports of people who viewed child pornography and subsequently sought psychotherapy. The Legislature added this language in 1984 to conform with federal regulations implementing the Child Abuse Prevention and Treatment and Adoption Reform Act of 1978.[9] (Assem. Com. On Public Law and Safety, Concurrence in Senate Amendments AB 2709 (Aug. 30, 1984) p. 2 {Ex. 2}.) These regulations required states to include "Sexual exploitation" in

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[9] Pub. L. 95-266 (April 24, 1978) 92 Stat. 204.

their reporting laws and to define "Sexual exploitation" to include "allowing, permitting, encouraging or engaging in the obscene or pornographic filming or depicting of a child under state law." (48 Fed. Reg. 3698-01 (Jan. 26, 1983) [codifying 45 C.F.R. §§ 1340.2(d)(2), 1340.13(a)(1)].)

Representative Kildee, a supporter of the federal law, and a sponsor of companion legislation criminalizing sexual exploitation of children for the first time at the federal level,[10] explained that these laws were targeted at individuals engaged in commercial exploitation of children, "whose motivation for abusing a child is greed and profit." (Remarks of Rep. Kildee, 123 Cong. Rec. 29886 (Sept. 19, 1977) {Ex. 6}.) Consistent with Congressional intent, the California Legislature in 1984 defined reportable "sexual exploitation" using terms targeted to commercial distribution prohibited under California law – "develops, duplicates, prints, or exchanges" – and not terms that would capture individuals who merely possessed or viewed child pornography. (Stats. 1984, ch. 1613, § 2.2, subd. (b)(2)(C), p. 5721 {Ex. 26}.)

By contrast, the supporters of the federal legislation praised a California program that encouraged parents who engaged in incest to voluntarily "come forward" to seek help. (Sexual Exploitation of Children, Hearings before House Subcom. on the Judiciary, 95th Cong. 1st Sess. (June 10, 1977) at p. 196, remarks of Rep. Miller {Ex. 7}.) Representative Mikulski testified in this vein that "we need to create a national climate for abusers to be able to come out of the closet, if you will, and face up to their

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[10] See An Act to amend title 18 of the United States Code relating to the sexual exploitation of minors, and for other purposes, Pub. L. 95-225 (Feb. 6, 1978) 92 Stat 7.

problems, because you can't participate in a help program unless that occurs." (*Id.* at p.196, testimony of Rep. Mikulski.) Thus, Respondents are using legislation originally intended to create a climate where individuals who sexually assaulted their own children felt free to seek help as justification for AB 1775, a law whose practical effect is to deter individuals who commit no contact offenses from seeking treatment for the urge to view child pornography. Respondents' attempts to characterize AB 1775 as reflecting long-standing norms regarding access to psychotherapeutic treatment are nothing short of Orwellian.

The state's interest in protecting children and the interest of individuals and the state in granting people who view child pornography meaningful access to psychotherapy are not in tension here. In passing AB 1775, the Legislature thought it was making technical revisions to CANRA, but it was, in fact, sacrificing the benefits of confidential psychotherapy without obtaining any meaningful countervailing increase in the safety of children. This Court should fulfill its constitutional mandate and rule that AB 1775's invasion of communication between patients and psychotherapists violates the constitutional right to privacy.

CONCLUSION

For the foregoing reasons, the Court of Appeal's decision should be reversed.

Dated: October 23, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Amici Curiae Brief uses a 13-point Times New Roman font and, relying on the word count of the computer program used to prepare the brief, contains 8,746 words.

Dated: October 23, 2017

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
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I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is ARNOLD & PORTER KAYE SCHOLER LLP, 777 South Figueroa Street, 44th Floor, Los Angeles, California 90017.

On **October 23, 2017**, I served the foregoing document described as follows:

APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* SCHOLARS IN SUPPORT OF PLAINTIFFS AND PETITIONERS; BRIEF OF *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS AND PETITIONERS

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

Executed on October 23, 2017, at Los Angeles, California.

Diana Hernandez
Printed Name

Signature

SERVICE LIST

Mathews v. Becerra, et al.

California Supreme Court, Case No. S240156

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