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,
Petitioners and Appellants,
vs.
KAMALA HARRIS, in her official capacity as Attorney General of California; and JACKIE LACEY in her official capacity as the District Attorney of the county of Los Angeles and representative of the California district attorneys,
Respondents and Appellees.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION TWO CASE NO. B265990
(LOS ANGELES COUNTY SUPERIOR COURT CASE NO. BC573135)

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

ISSUES PRESENTED AND NECESSITY FOR REVIEW 1

STATEMENT OF THE CASE 5

1. CANRA's Child Abuse Reporting Requirements..... 5

2. A.B. 1775's Amendment of CANRA to Mandate Reporting by Psychotherapists of Patients Who Have Viewed Child Pornography..... 8

3. The Superior Court's Ruling on Defendants' Demurrers to the Complaint..... 10

4. The Court of Appeal's Opinion Affirming the Superior Court's Dismissal of the Complaint With Prejudice..... 11

ARGUMENT 14

A. REVIEW SHOULD BE GRANTED TO RESOLVE THE IMPORTANT QUESTION OF WHETHER A PATIENT HAS NO RIGHT TO PRIVACY OR ANY REASONABLE EXPECTATION OF PRIVACY REGARDING PSYCHOTHERAPY COMMUNICATIONS ABOUT CONDUCT THAT CONSTITUTES A PAST CRIME..... 14

B. REVIEW SHOULD BE GRANTED TO RESOLVE THE IMPORTANT QUESTION OF WHETHER THE CALIFORNIA LEGISLATURE CAN REQUIRE PSYCHOTHERAPISTS TO REPORT ANY PATIENT CRIMINAL CONDUCT BECAUSE PATIENTS HAVE NO FUNDAMENTAL RIGHT TO ANY PARTICULAR FORM OF MEDICAL TREATMENT, INCLUDING PSYCHOTHERAPY. 24

C. REVIEW SHOULD BE GRANTED TO RESOLVE THE IMPORTANT QUESTION OF WHETHER THE LEGISLATURE CAN PERMISSIBLY AMEND CANRA, A STATUTORY SCHEME INTENDED TO PROTECT CHILDREN FROM ABUSE AND NEGLECT, TO ASSIST LAW ENFORCEMENT IN

CRIMINALLY PROSECUTING CHILD PORNOGRAPHY VIEWERS BECAUSE THIS PURPOSE TRUMPS PSYCHOTHERAPY PATIENTS' RIGHT TO PRIVACY EVEN THOUGH THIS NEW REPORTING REQUIREMENT IS NOT NARROWLY TAILORED TO ACHIEVE CANRA'S COMPELLING PURPOSE. 27

CONCLUSION 33

TABLE OF AUTHORITIES

Page

Cases

American Academy of Pediatrics v. Lungren
(1997) 16 Cal.4th 307 ..... 19, 22, 26

Caesar v. Mountanos
(9th Cir. 1976) 542 F.2d 1064, ... 21

Hill v. National Collegiate Athletic Ass'n
(1994) 7 Cal.4th 1 ..... *passim*

In re Christopher M.
(2005) 127 Cal.App.4th 684 ..... 14, 15

In re Grant
(2014) 58 Cal.4th 469 29

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

James W. v. Superior Court
(1993) 17 Cal.App.4th 246 30

Kirchmeyer v. Phillips
(Cal. App. 2016) 2016 WL 1183324 17

Menendez v. Superior Court
(1992) 3 Cal.4th 435, ... 23, 30

Oiye v. Fox
(2012) 211 Cal.App.4th 1036 17

People v Stritzinger
(1983) 34 Cal.3d 505 ..... *passim*

People v. Ebertowski
(2014) 228 Cal. App.4th 1170 14

People v. Felix
(2001) 92 Cal. App. 4th 905 33

People v. Gonzales
(2013) 56 Cal.4th 353 23

People v. Hammon
(1997) 15 Cal.4th 1117 16

People v. Haraszewski
(2012) 203 Cal. App. 4th 924 31

People v. Luera
(2001) 86 Cal.App.4th 513 18

People v. Martinez
(2001) 88 Cal.App.4th 465 17

People v. Privitera
(1979) 23 Cal.3d 697 25

People v. Younghanz
(1984) 156 Cal. App.3d 811 ..... 24, 25, 26

Pettus v. Cole
(1996) 49 Cal.App.4th 402, 440 16

Ruiz v. Podolsky
(2010) 50 Cal. 4th 838 ..... 16, 26

San Diego Trolley, Inc. v. Superior Court
(2001) 87 Cal. App. 4th 1083 17

Scull v. Superior Court
(1988) 206 Cal.App.3d 784 ..... *passim*

Smith v. Superior Court
(1981) 118 Cal.App.3d 136 21

Story v. Superior Court
(2003) 109 Cal.App.4th 1007 23

Susan S. v. Israels
(1997) 55 Cal.App.4th 1290 16

U.S. v. Chase
(9th Cir. 2003) 340 F.3d 978 20

U.S. v. Norris
(5th Cir. 1998) 159 F.3d 926 29

United States v. Apodaca,
641 F.3d 1077, 1083 (9th Cir. 2011) 29

Urbaniak v. Newton
(1991) 226 Cal.App.3d 1128 ..... 20, 23

Statutes

Bus. & Prof. Code
§4982 7

Penal Code
§261 8

§264 8
§285 8
§286 8
§288 8
§289 8
§311.11 ..... 8, 31
§647.6 8
§11165 ..... *passim*
§11166 7
§11167 7
§11170 7
§11171 6

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Respondents and Appellees.

PETITION FOR REVIEW

ISSUES PRESENTED AND NECESSITY FOR REVIEW

Effective January 1, 2015, Assembly Bill ("A.B.") 1775 amended the Child Abuse and Neglect Reporting Act ("CANRA"), Penal Code section 11165.1, subdivision (c)(3) (2015), to require psychotherapists to report any patient who has viewed child pornography to law enforcement. Petitioners, two therapists and a tax payer, filed a complaint for declaratory and injunctive relief in Los Angeles Superior Court claiming that A.B. 1775 violated psychotherapy patients' constitutional right to privacy under article 1, section 1 of the California Constitution and the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. The

Superior Court dismissed the lawsuit on the ground that A.B. 1775 was constitutional.

In a published and unprecedented opinion, the Court of Appeal affirmed that A.B. 1775 was constitutionally valid because (1) under *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1 (*Hill*), the seminal case in which this Court set forth the necessary elements of a claim for violation of the California Constitution's right to privacy, a psychotherapy patient has no right of privacy or any reasonable expectation privacy regarding communications with a psychotherapist about viewing child pornography since such conduct is a crime, (2) the California Legislature can require psychotherapists to report any patient conduct to law enforcement that it decides will help prosecute and deter crime because California citizens have no fundamental right to any particular form of medical treatment, including psychotherapy; and (3) the California Legislature can permissibly amend CANRA, a statutory scheme intended to protect children from abuse and neglect, to assist law enforcement in criminally prosecuting child pornography viewers because this purpose trumps the patients' constitutional right to privacy in their psychotherapy communications even if this new mandated reporting requirement does not substantially further and is not narrowly tailored to achieve CANRA's compelling purpose. A copy of the Court of Appeal opinion is attached to this petition as an appendix.

The Court of Appeal's opinion imposes a significant limitation on a psychotherapy patient's constitutional right to privacy with respect to communications with a psychotherapist, long since recognized by this Court in *In re Lifschutz* (1970) 2 Cal.3d 415 and *People v Stritzinger* (1983) 34 Cal.3d 505, by ruling that a patient has no right of privacy or a reasonable expectation of privacy if he discusses any conduct constituting a crime with his psychotherapist. In addition, the Court of Appeal's opinion that CANRA's compelling purpose of protecting children from abuse and neglect permits the California Legislature to assist the prosecution of child pornography viewers by requiring psychotherapists to report patients who engage in such conduct to law enforcement extends CANRA's exemption from the statutory psychotherapist-patient privilege (Evidence Code section 1014) to child pornography viewing even though CANRA did not previously include child pornography as reportable conduct and this new reporting requirement does not substantially further and is not narrowly tailored to justify CANRA's purpose.

As a result, this Court's review is necessary to ensure that the Court of Appeal properly defined the scope of a psychotherapy patient's right to privacy and CANRA's exemption from the statutory psychotherapist-patient privilege, both important issues of law given California's interest in assuring and encouraging its citizens to obtain psychotherapy for mental

health issues, including those involving morally repugnant or criminal conduct.

The Court of Appeal decision presents the following questions for review by this Court:

1. Whether, under *Hill*, a psychotherapy patient has no constitutional right of privacy and no reasonable expectation of privacy regarding his communications with a psychotherapist under article 1, section 1 of the California Constitution and the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution if such communications involve conduct that constitutes a past crime.

2. Whether the California Legislature can require psychotherapists to report any patient conduct to law enforcement that it decides will help prosecute and deter crime because California citizens have no fundamental right to any particular form of medical treatment, including psychotherapy.

3. Whether the California Legislature can permissibly amend CANRA, a statutory scheme intended to protect children from abuse and neglect, to assist law enforcement in criminally prosecuting child pornography viewers because this purpose trumps the patients' constitutional right to privacy in their psychotherapy communications even though this new reporting requirement does not substantially further and is not narrowly tailored to achieve CANRA's laudatory purpose.

STATEMENT OF THE CASE

On February 20, 2015, Petitioners Don Mathews, M.F.T. and Michael Alvarez, M.F.T., on behalf of their patients, and Petitioner William Owen, CADC II, as a taxpayer, filed a complaint for declaratory and injunctive relief seeking an order enjoining and prohibiting the Attorney General of California and the district attorneys of California from enforcing Assembly Bill ("A.B.") 1775, which amended the Child Abuse and Neglect Reporting Act ("CANRA"), Penal Code section 11165.1, subdivision (c)(3) (2015), to require psychotherapists to report any patients who have viewed child pornography to law enforcement, on the ground that this law violates the patients' constitutional right to privacy regarding their confidential communications with a psychotherapist under article I, section 1, of the California Constitution and the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution, and subjects psychotherapists to criminal prosecution and loss of their licenses if they fail to comply with this illegal reporting requirement. (*See* Appellants' Appeal Appendix ["AA"], 1-2, ¶¶1-3; 13, ¶32.)

1. CANRA's Child Abuse Reporting Requirements

As licensed psychotherapists, Petitioners Mathews and Alvarez are subject to CANRA, which requires them to report suspected child abuse and neglect to law enforcement authorities. This statutory duty is an

exception to the psychotherapist-patient privilege set forth in Evidence Code section 1014 which broadly prevents psychotherapists from disclosing confidential psychotherapy communications without their patients' consent. (*See* Pen. Code§ 11171, subd. (b).)

Under CANRA, Petitioners Mathews and Alvarez and other mandated reporters[1] must immediately make a report to law enforcement of known or suspected child abuse or neglect involving physical abuse (Pen. Code § 11165.6), sexual abuse (Pen. Code § 11165.1), willful harming or endangerment (Pen. Code § 11165.3), general or severe neglect (Pen. Code § 11165.2), and unlawful corporal punishment or injury. (Pen. Code § 11165.4.)[2] This duty to report is triggered "whenever the mandated reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or

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[1] CANRA has 44 categories of mandated reporters including psychiatrists, psychologists, social workers, and MFTs. (Pen. Code § 11165.7, subd. (a)(l)-(44).)

[2] With the exception of certain types of sexual abuse, CANRA generally only requires the mandated reporting of known or suspected physical abuse or neglect of children. (*See* Pen. Code § 11165.6 [physical injury or death]; Pen. Code § 11165.6 [failure to provide food, shelter and care]; Pen. Code § 11165.3 [physical pain and endangerment]; Pen. Code § 11165.4 [cruel corporal punishment]).

neglect." (Pen. Code § 11166, subd. (a).)[3] The mandatory report to law enforcement must include, if known, the names and present locations of the minor and the suspected child abuser. (Penal Code §§ 11165.9, 11167, subd. (a).)

Upon receipt of a CANRA report, law enforcement authorities must investigate the reported child abuse or neglect and send a report of any substantiated child abuse or severe neglect to the California Department of Justice so that the child abuser can be listed in the state's Child Abuse Central Index ("CACI"), a statewide data base. (*See* Pen. Code §§ 11165.9, 11166.3, 11170; AA 6-8, ¶¶ 12-18.) The child abuse reports in CACI are not public documents, but may be released to a number of individuals and government agencies. (Pen. Code § 11167.5, subd. (b).)

The failure of Petitioners Mathews and Alvarez to report child abuse or neglect is a misdemeanor crime punishable by up to six months in prison, a fine of $1,000, or both. (*See* Pen. Code § 11166, subd. (c).) In addition, their failure to comply with CANRA constitutes unprofessional conduct that could result in the suspension or revocation of their licenses. (*See* Bus. & Prof. Code § 4982, subd. (w); AA 9, ¶ 20.)

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[3] Under CANRA, a reasonable suspicion means "that it is objectively reasonable for a person to entertain a suspicion, based upon facts that could cause a reasonable person in a like position, drawing, when appropriate, on his or her training and experience, to suspect child abuse or neglect." (*See* Pen. Code § 11166, subd. (b).)

2. A.B. 1775's Amendment of CANRA to Mandate Reporting by Psychotherapists of Patients Who Have Viewed Child Pornography

Under CANRA, Petitioners Mathews and Alvarez must report known or suspected child sexual abuse, which is defined to include "sexual assault" or "sexual exploitation" of a child. "Sexual assault" is defined as various sexual crimes against the person of a child, including rape, statutory rape, incest, sodomy, lewd and lascivious acts, oral copulation, sexual penetration, and molestation. (Pen. Code § 11165.1, subds. (a), (b); *see* Pen. Code §§ 261, 261.5, subd. (d), 264.1, 285, 286, 288, subds. (a), (b), or (c)(1), 288a, 289, 647.6.) "Sexual exploitation" is defined to include the crimes of possession of child pornography with intent to sell, distribute or exhibit to others, employing a child to assist with such criminal activity, and knowingly employing a child to participate in prostitution, the live performance of obscene sexual acts, or child pornography. (Pen. Code §§ 311.2, 311.4, subd. (a),11165.1, subd. (c)(1), (2).) CANRA's definition of "sexual exploitation" does not include any statutory reference to child pornography possession, set forth in Penal Code section 311.11. (AA, 9-10, ¶¶ 22-23.)

Up until December 31, 2014, Penal Code section 11165.1, subdivision (c)(3) provided that "sexual exploitation" also included:

> (3) A person who depicts a child in, or who knowingly develops, duplicates, prints, or exchanges, a film, photograph,

> videotape, video recording, negative, or slide in which a child is engaged in an act of obscene sexual conduct.

Effective January 1, 2015, the California Legislature enacted A.B. 1775 which amended Penal Code section 11165.1, subdivision (c)(3) to now require Appellants and other mandated reporters to report any person who has simply downloaded or looked at child pornography from the Internet. The amended provision provides, in relevant part:

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

(Pen. Code § 11165.1, subd. (c) [emphasis added].)

According to Petitioners Mathews and Alvarez, A.B. 1775's amendment of CANRA to now require them to report patients who have viewed child pornography will necessarily destroy the patient trust that communications during therapy will be kept confidential. Once current patients who have admitted viewing child pornography during therapy learn that Petitioners must now report such activity to law enforcement for investigation, they will either cease therapy because Petitioners have exposed them to criminal prosecution and public disgrace or, if they

continue, are unlikely to continue providing the full disclosure of intimate details that their psychotherapists need to provide effective therapy.

Similarly, Petitioners allege that persons who are seeking psychotherapy for serious sexual disorders may refuse such therapy once Petitioners inform them during intake screening that they are required to report any viewing of child pornography or, if the persons have already described such child pornography viewing as a reason for seeking treatment, that Petitioners are now obligated to report them before any therapy even begins. Finally, existing or potential patients who have serious sexual disorders - including sexual attraction to children – will be predictably deterred from obtaining needed psychotherapy, despite the lack of any evidence that they have actually sexually abused children. (AA 14, ¶ 33.)

3. The Superior Court's Ruling on Defendants' Demurrers to the Complaint

On May 7, 2015, Attorney General Kamala Harris and Los Angeles District Attorney Jackie Lacey (on behalf of the district attorneys of California) filed demurrers to the Complaint. (*See* AA 6-61, 30-110).

On July 29, 2015, the Superior Court entered an order sustaining the demurrers of Attorney General Harris and District Attorney Lacey demurrers without leave to amend and dismissed Appellants' Complaint with prejudice. (*See* AA 157-174.) The Superior Court ruled that the issue

of whether A.B. 1775 was constitutional was appropriately decided by demurrer or the functional equivalent of a motion for judgment on the pleadings because there were no material facts in dispute (*see* AA 163-164), and that A.B. 1775 did not violate psychotherapy patients' constitutional right to privacy under the California Constitution or U.S. Constitution as a matter of law. (*See* AA 165-171.)

4. The Court of Appeal's Opinion Affirming the Superior Court's Dismissal of the Complaint With Prejudice

On August 5, 2015, Petitioners filed a timely notice of appeal. (AA 175-176). On January 9, 2017, the Court of Appeal issued a published opinion affirming the dismissal of Petitioners' Complaint, largely on the same grounds as the Superior Court. (*See* Appendix at 12-36).

In upholding the constitutionality of A.B. 1775, the Court of Appeal first ruled that a psychotherapy patient has no right of privacy in psychotherapy communications regarding child pornography viewing because child pornography possession is a crime that is not protected by the constitutional right to privacy and, therefore, 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." (Appendix at 17-21.) According to the Court of Appeal, a patient also has no constitutional right to privacy regarding such psychotherapy communications because CANRA

exempts child pornography viewing from Evidence Code 1014's statutory psychotherapist-patient privilege and "[n]o fundamental privacy interest guarantees treatment for a sexual disorder that causes a patient to indulge in the criminal conduct of viewing Internet child pornography" or gives minors "a fundamental right to produce or possess child pornography, including viewing sexually explicit images of other minors." (Appendix at 21-23). In sum, the Court of Appeal concluded that "[w]hen patients seek medical treatment for their sexual disorders, they have no legally protected privacy interest in communicating that they have downloaded, streamed or accessed child pornography from the Internet" and the "disclosures of patients within the psychotherapy relationship that they have viewed illegal child pornography on the Internet are neither protected by the privacy provisions of our Constitution nor privileged under Evidence Code section 1014." (Appendix at 23).

Second, the Court of Appeal ruled that a psychotherapy patient also has no reasonable expectation of privacy regarding his communications to a psychotherapist about viewing child pornography. According to the Court of Appeal, a patient could not reasonably expect that a psychotherapist would not report his child pornography viewing to law enforcement because such conduct is a crime and is "reprehensible, shameful and abhorred by any decent and normal standards of society" and because, in enacting CANRA, the California Legislature has "long ago determined that

child abuse, including the sexual exploitation of children, should be reported to appropriate law enforcement and child welfare agencies." (Appendix at 23-24).

In addition, the Court of Appeal ruled that even if a psychotherapy patient had some expectation of privacy regarding his communications about child pornography viewing to a psychotherapist, the State's interest under CANRA in protecting children from child sexual abuse was sufficient to justify A.B. 1775's invasion of such privacy. According to the Court of Appeal, the Legislature's decision to include child pornography viewing as conduct reportable by psychotherapists was sufficient to outweigh any patient right of privacy because such viewing constitutes child sexual exploitation within the meaning of CANRA, is "proximately linked to the sexual abuse of children" and "is a most serious crime and an act repugnant to the moral instincts of a decent people." (Appendix at 26).

Further, the Court of Appeal ruled that requiring psychotherapists to report patients who view child pornography was a permissible invasion of any patient right of privacy even if most patients present no danger to children because such reporting would assist in the criminal prosecution of child pornography viewers and thereby "disrupt the proliferation of child pornography and deter the underlying conduct of viewing children who have already been sexually exploited," and because the "consumption of child pornography is not distinguishable from production and distribution

in terms of harm to the victims of child pornography." (Appendix at 28-29, 31). Similarly, even assuming that the reporting of child pornography viewers would not put law enforcement officers in a better position to protect and rescue children from sexual exploitation than if they identified the Internet images themselves, the Court of Appeals concluded that this reporting requirement was still narrowly tailored to CANRA's purpose to be valid under the California and U.S. Constitutions because of "the strong public policies favoring disclosure of parties engaging in the illegal conduct of viewing Internet child pornography" in order to generically protect "children from sexual exploitation on the Internet." (Appendix at 25-35).

ARGUMENT

A. REVIEW SHOULD BE GRANTED TO RESOLVE THE IMPORTANT QUESTION OF WHETHER A PATIENT HAS NO RIGHT TO PRIVACY OR ANY REASONABLE EXPECTATION OF PRIVACY REGARDING PSYCHOTHERAPY COMMUNICATIONS ABOUT CONDUCT THAT CONSTITUTES A PAST CRIME

Under *Hill v. National Collegiate Athletic Ass'n* (1994) 7 Cal.4th 1), a plaintiff alleging an invasion of privacy in violation of the Article 1, Section 1 of the California Constitution must establish (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy. (*Hill*, 7 Cal.4th 1 at 39-40; *People v. Ebertowski* (2014) 228 Cal. App.4th 1170, 1176, quoting *In re Christopher M.* (2005) 127

Cal.App.4th 684, 695.)[4] Relying on *Hill*, the Court of Appeal ruled that patients do not have a constitutional right to privacy or a reasonable expectation of privacy if their psychotherapy communications involve child pornography viewing because this conduct is a crime and socially repugnant. The Court of Appeal was wrong on both counts.

1. Psychotherapy Patients Have a Legally Protected Privacy Interest in the Confidentiality of Their Communications to Their Psychotherapists That Implicates Both Informational and Autonomy Privacy Interests

Prior to *Hill,* the California Supreme Court in *In re Lifschutz* (1970) 2 Cal.3d 415 recognized that the statutory psychotherapist-patient privilege (then Evidence Code section 1012) implicated the patient's right to privacy under the U.S. Constitution. (2 Cal.3d at 431-432). Likewise, in *People v Stritzinger* (1983) 34 Cal.3d 505, 511, the Supreme Court also acknowledged that the "psychotherapist-patient privilege has been recognized as an aspect of the patient's constitutional right to privacy" under the California Constitution. (4 Cal.3d at 511, citing Cal. Const., art. I, § 1; *see also Scull v. Superior Court* (1988) 206 Cal.App.3d 784, 790 [communications between patient and psychotherapist protected by state

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[4] Under Article 1, Section 1 of the California Constitution, "[l]egally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')." (*Hill,* 7 Cal.4th at 35.)

constitutional right of privacy.])[5]

Subsequent to *Hill*, courts have also uniformly held that the right to privacy under Article 1, Section 1 of the California Constitution includes a legally protected privacy interest in maintaining the confidentiality of a patient's communications with a psychotherapist. (*See People v. Hammon* (1997) 15 Cal.4th 1117, 1127 [pretrial disclosure of victim's psychotherapy records to criminal defendant would be serious and unnecessary invasion of victim's state constitutional right to privacy]; *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 440, 458 [psychotherapy patient has legally protected informational and autonomy privacy interests under California Constitution in keeping such medical treatment private and confidential]; *Ruiz v. Podolsky* (2010) 50 Cal. 4th 838, 851 [disclosure of "sensitive medical information is at the core of the protected informational privacy interest]; *Susan S. v. Israels* (1997) 55 Cal.App.4th 1290, 1295, 1298 [patient has

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[5] As explained by the California Supreme Court, the "contemporary value of the psychiatric profession, and its potential for the relief of emotional disturbances and of the inevitable tensions produced in our modern, complex society . . . . is bottomed on a confidential relationship; but the doctor can be of assistance only if the patient may freely relate his thoughts and actions, his fears and fantasies, his strengths and weaknesses, in a completely uninhibited manner." (*Stritzinger*, 34 Cal.3d at 514 [internal citations omitted].) In recognition of "the growing importance of the psychiatric profession in our modern, ultracomplex society," (*In re Lifschutz*, 2 Cal.3d at 421), California courts have broadly construed the psychotherapist-patient privilege in favor of the patient. (*See Stritzinger*, 34 Cal.3d at 511; *Roberts v. Superior Court* (1973) 9 Cal.3d 330, 337.)

legally protected interest in maintaining confidentiality of mental health treatment records because "'disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace'"]; *Kirchmeyer v. Phillips* (Cal. App. 2016) 2016 WL 1183324, *4 ["psychotherapist-patient privilege is based on the constitutional right of privacy and therefore is accorded constitutional protection"]); *Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1068 [a person's medical history, including psychological records, falls within the zone of informational privacy protected by the state constitution]; *People v. Martinez* (2001) 88 Cal.App.4th 465, 475 ["it is beyond reasonable dispute that the disclosure and examination of defendant's medical and psychological records implicates a legally recognized privacy interest"]; *San Diego Trolley, Inc. v. Superior Court* (2001) 87 Cal. App. 4th 1083, 1092, 1094-1095 [confidential communications with psychiatrist protected from disclosure by California constitutional right to privacy.])

Notwithstanding the overwhelming authority confirming that a patient has legally protected privacy interest under Article 1, Section 1 of the California in maintaining the confidentiality of communications with a psychotherapist, the Court of Appeal erroneously concluded that psychotherapy patients have no legally protected privacy interest in communications with psychotherapists about the viewing of child pornography because child pornography possession is a crime unprotected

by a right to privacy. (*See* Appendix at 17-23, citing *People v. Luera* (2001) 86 Cal.App.4th 513, 522.)

However, Petitioners do not contend that anyone has a privacy interest in possessing child pornography. Rather, they argue that patients have a well-recognized privacy interest in maintaining the confidentiality of their psychotherapy communications, including with respect to child pornography viewing, and that the State's invasion of that privacy must substantially further its undisputed interest in detecting and protecting children from sexual abuse. Contrary to the Court of Appeal's reasoning, the patients' right to privacy does not evaporate simply because they discuss conduct with a psychotherapist that is criminal.

Similarly, while CANRA creates an exception to Evidence Code section 1024's psychotherapist-patient privilege, this does not mean that a patient no longer has a legally protected privacy interest in his communications with a psychotherapist or that CANRA is thereby insulated from constitutional review. (*See In re Lifschutz*, 2 Cal.3d at 432 [examining whether patient-litigant exception to the psychotherapist-patient privilege impermissibly invaded psychotherapy patient's right to privacy].) Under the Court of Appeal's circular reasoning, however, any statute requiring medical information to be disclosed would be constitutional by virtue of its enactment. As pointed out by this Court, that is not the law: "[I]t plainly would defeat the voters' fundamental purpose in establishing a

constitutional right of privacy if a defendant could defeat a constitutional claim simply by maintaining that statutory provisions or past practices that are inconsistent with the constitutionally protected right eliminate any 'reasonable expectation of privacy' with regard to the constitutionally protected right." (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 339.)

California courts have uniformly held that a patient's medical information, including all communications with a psychotherapist, are a class of information protected by the patient's informational privacy right under the California constitution. The fact that the psychotherapy patient may discuss viewing child pornography with his psychotherapist is therefore legally irrelevant to the existence of a patient's legally protected informational and autonomy privacy interests in the confidentiality of his psychotherapy communications. The Court of Appeal's conclusion that a patient's right to privacy no longer exists if the psychotherapy communication involves past criminal conduct (including child pornography viewing) is therefore contrary to law.

2. Psychotherapy Patients Have a Reasonable Expectation of Privacy Regarding Their Communications With a Psychoptherapist

With the exception of communications to one's attorney, clergymen or spouse, there is arguably no more widely accepted expectation of privacy than that which attaches to the setting of psychotherapy, the reasonableness

of which is evidenced by the fact that "[a]ll 50 states and the District of Columbia have enacted laws protecting psychotherapist-patient confidentiality." (*U.S. v. Chase* (9th Cir. 2003) 340 F.3d 978, 982.) This Court has also recognized "the justifiable expectations of confidentiality that most individuals seeking psychotherapeutic treatment harbor." (*In re Lifschutz*, 2 Cal.3d at 431; *see also Pettus,* 49 Cal.App.4th at 442 [employee had reasonable expectation that details of psychiatric evaluations would be kept private even though he put his mental condition at issue by requesting stress leave.]) This reasonable expectation of privacy is founded on "the notion that certain forms of antisocial behavior may be prevented by encouraging those in need of treatment for emotional problems to secure the services of a psychotherapist." (*Scull*, 206 Cal.App.3d at 788; *Urbaniak v. Newton* (1991) 226 Cal.App.3d 1128, 1139 ["The significance of the patient's reasonable expectations . . . lies in the public interest in encouraging confidential communications within a proper professional framework."])

In particular, "[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*, 34 Cal.3d at 511.) "'The patient's innermost thoughts may be so frightening, embarrassing, shameful or morbid that the patient in therapy will struggle

to remain sick, rather than to reveal those thoughts even to himself. The possibility that the psychotherapist could be compelled to reveal those communications to anyone . . . can deter persons from seeking needed treatment and destroy treatment in progress." (*Id*., quoting *Caesar v. Mountanos* (9th Cir. 1976) 542 F.2d 1064, 1072 [Hufstedler, J, dissenting.])

Against this backdrop, it would seem self-evident that a psychotherapy patient who tells a psychotherapist that he has accessed or viewed child pornography on the Internet in the course of therapy, including for sexual disorders such sex addiction or pedophilia, would have a reasonable expectation that such a communication would be kept private. Disclosure of such information would not only reveal that the patient was in therapy, (*see Smith v. Superior Court* (1981) 118 Cal.App.3d 136, 141-142 ["Public knowledge of treatment by a psychotherapist reveals the existence and, in a general sense, the nature of the malady"]), but also expose the patient to public shame and disgrace with respect to conduct that is generally viewed by society as deviant, repugnant and criminal. It is precisely this type of candid communication by a psychotherapy patient of extremely sensitive mental health information that the constitutional right of privacy is intended to protect from public disclosure, especially when coerced by the State. (*Hill*, 7 Cal.4th at 38 ["pervasive presence of coercive government power in basic areas of human life typically poses greater dangers to freedoms of the citizenry than actions by private persons."])

Nevertheless, the Court of Appeals ruled that a psychotherapy patient does not have a reasonable expectation of privacy that a communication about viewing child pornography will not be reported to law enforcement because such conduct is a crime and is "reprehensible, shameful and abhorred by any decent and normal standards of society" and because, in enacting CANRA, the California Legislature has "long ago determined that child abuse, including the sexual exploitation of children, should be reported to appropriate law enforcement and child welfare agencies." (Appendix at 23-24).

However, A.B. 1775's very recent addition of child pornography viewing to the list of reportable conduct under CANRA supports the conclusion that a psychotherapy patient had a reasonable expectation that such conduct would not be disclosed by his psychotherapist until this recent statutory amendment. Further, as previously noted, the State cannot defeat a constitutional claim by essentially arguing that A.B. 1775's enactment eliminated any "reasonable expectation of privacy" with regard to a patient's constitutionally protected privacy interest. (*American Academy of Pediatrics*, 16 Cal. 4th at 339.)

More importantly, the Court of Appeal cites no authority for its remarkable proposition that a patient's legally protected privacy interest in communications with a psychotherapist does not protect the patient's admission of a crime or conduct that society considers morally

reprehensible. In particular, this ruling ignores that a psychotherapy patient's reasonable expectation "lies in the public interest in encouraging confidential communications within a proper professional framework," (*Urbaniak*, 226 Cal.App.3d at 1139), including communications about various "social disorders" that may be prevented through psychotherapy. (*Scull*, 206 Cal.App.3d at 788.) Consistent with this principle, the California Supreme Court has ruled that Evidence Code section 1024's psychotherapist-patient privilege applies in criminal cases and outweighs the State's interest in successful criminal prosecutions. (*Menendez v. Superior Court* (1992) 3 Cal.4th 435, 456 n.18; *see also Scull*, 206 Cal.App.3d at 790-794 [State's interest in identifying other possible victims of sex offender was insufficient to justify violation of the psychotherapist-patient privilege.])

Likewise, California courts have routinely enforced the psychotherapist-patient privilege with respect to patient communications that involve admissions of past crimes and "morally reprehensible" conduct. (*See e.g., People v. Gonzales* (2013) 56 Cal.4th 353, 364, 372-382 [psychotherapy patient's statements that he was very attracted to small children and had molested 16 children]; *Story v. Superior Court* (2003) 109 Cal.App.4th 1007, 1010-1012, 1014-1019 [psychotherapy patient's alleged statements that he had committed a prior sexual assault and had "urges to force himself sexually upon non-consenting females by means of violence

including choking or strangulation"]).

By contrast, the Court of Appeal's unprecedented limitation on a patient's reasonable expectation of privacy regarding psychotherapy communications would eviscerate the confidentiality universally viewed as essential to successful therapy by turning psychotherapists into law enforcement agents with respect to any crime that the State decides is reportable, or, more broadly yet, any conduct deemed "morally repugnant" by the State. Such unfettered State intrusion into the realm of psychotherapy is precisely the type of informational snooping regarding its citizens' most intimate thoughts and mental processes that the right of privacy under Article 1, Section 1 of the California Constitution was intended to prevent. As a result, the Court of Appeal's proposed limitation on a psychotherapy patient's reasonable expectation of privacy finds no support in existing law.

B. REVIEW SHOULD BE GRANTED TO RESOLVE THE IMPORTANT QUESTION OF WHETHER THE CALIFORNIA LEGISLATURE CAN REQUIRE PSYCHOTHERAPISTS TO REPORT ANY PATIENT CRIMINAL CONDUCT BECAUSE PATIENTS HAVE NO FUNDAMENTAL RIGHT TO ANY PARTICULAR FORM OF MEDICAL TREATMENT, INCLUDING PSYCHOTHERAPY.

In ruling that a patient has no right of privacy regarding psychotherapy communications that involve child pornography viewing, or presumably any other crime, the Court of Appeal also relied on *People v. Younghanz* (1984) 156 Cal. App.3d 811, for its holding that"[n]o

fundamental privacy interest guarantees treatment for a sexual disorder that causes a patient to indulge in the criminal conduct of viewing Internet child pornography" or gives minors "a fundamental right to produce or possess child pornography, including viewing sexually explicit images of other minors." (Appendix at 21-23). While far from clear, the Court of Appeal appears to be suggesting that the State can constitutionally require psychotherapists to report any patient communications that involve a crime without violating the patients' right to privacy because patients have no "fundamental" constitutional right to any particular form of medical treatment, including psychotherapy. This chilling and expansive interpretation of the State's right to invade the privacy rights of psychotherapy patients is legally unsupportable and needs to be corrected.

In *Younghanz*, the defendant argued that CANRA's mandated reporting of his sexual abuse of his daughter violated his rights to due process and equal protection under the U.S. and California Constitutions by interfering with his fundamental right to seek a cure for his illness. (156 Cal. App.3d at 815.) The Court of Appeal ruled that the defendant did not have such a fundamental right and also noted that the right to make decisions regarding medical treatment had been held not to be a fundamental right within the concept of a right to privacy. (*Id*. at 816, citing *People v. Privitera* (1979) 23 Cal.3d 697, 702.)

The Court of Appeal's reliance on *Younghanz* is inapposite because the court in that case did not consider any challenge to CANRA based on a patient's privacy interest in his communications with a psychotherapist under Article 1, Section 1 of the California constitution. Further, whether a patient has a fundamental constitutional right to medical treatment is an entirely different question from whether a patient has a legally protected privacy interest in his medical information, including psychotherapy communications, once such treatment is obtained. As detailed above, numerous other cases have uniformly held that psychotherapy patients have such a legally protected privacy interest under the California Constitution.

Further, the *Younghanz* court's observation about the right of privacy not encompassing medical decisions is not only dicta, but has been abrogated by later Supreme Court decisions expressly recognizing that the right of privacy includes an autonomy privacy interest in making medical decisions free from state interference. (*See Ruiz*, 50 Cal.4th at 851; *American Academy of Pediatrics*, 16 Cal.4th at 332-333; *see also Pettus*, 49 Cal. App. 4th at 458.) Accordingly, the Court of Appeal's broad and confusing pronouncement that a patient has no right to privacy regarding psychotherapy communications because he or she has no constitutional right to any particular form of medical treatment should not be allowed to stand.

C. REVIEW SHOULD BE GRANTED TO RESOLVE THE IMPORTANT QUESTION OF WHETHER THE LEGISLATURE CAN PERMISSIBLY AMEND CANRA, A STATUTORY SCHEME INTENDED TO PROTECT CHILDREN FROM ABUSE AND NEGLECT, TO ASSIST LAW ENFORCEMENT IN CRIMINALLY PROSECUTING CHILD PORNOGRAPHY VIEWERS BECAUSE THIS PURPOSE TRUMPS PSYCHOTHERAPY PATIENTS' RIGHT TO PRIVACY EVEN THOUGH THIS NEW REPORTING REQUIREMENT IS NOT NARROWLY TAILORED TO ACHIEVE CANRA'S COMPELLING PURPOSE.

Even if psychotherapy patients have legally protected informational and autonomy privacy interests in their professional relationship and communications with psychotherapists and a reasonable expectation of privacy, the Court of Appeal ruled that A.B. 1775's serious invasion of this privacy right through mandated reporting by psychotherapists of patients who view child pornography substantially furthered CANRA's compelling purpose of protecting children from sexual exploitation and was "narrowly drawn" to further that interest. (*See Stritzinger*, 34 Cal.3d at 511; *In re Lifschutz*, 2 Cal.3d at 432; *see also Pettus,* 49 Cal.App.4th at 461 [medical and psychiatric records implicate a privacy interest "fundamental to personal autonomy."])

According to the Court of Appeal, the mandated reporting of psychotherapy patients who view child pornography substantially furthers CANRA's compelling purpose because the prosecution of child pornography viewers protects children from the serious emotional harm and victimization that each viewing of the depicted child causes and reduces the

sexual exploitation of children by deterring consumption of child pornography, and because the children depicted in the illegal images could possibly be located and rescued. (Appendix at 25-35.) In so ruling, the Court of Appeal found that A.B. 1775 was constitutional even if most psychotherapy patients who view child pornography have never abused live children and pose little danger of doing so and the identification of child pornography viewers puts law enforcement agents in no better position to identify children depicted in child pornography than if they accessed the illegal images on the Internet themselves. (*Id.*)[6]

Thus, the Court of Appeal's Opinion concludes that the criminal prosecution of child pornography viewers permissibly falls within CANRA's purpose and exemption from Evidence Code section 1024's psychotherapist-patient privilege without any evidence that the psychotherapy patients who have viewed the illegal images and are seeking mental health treatment have abused live children or pose any danger of doing so. The Court of Appeal's ruling that A.B. 1775's new reporting requirement substantially furthers CANRA's purpose again boils down to its view that the patients' right to privacy can be invaded because child

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[6] The Court of Appeal's Opinion did not dispute Petitioners' claim that the likelihood that law enforcement will be able to identify and rescue children (assuming they are still children) based solely on a report that a psychotherapy patient has viewed child pornography is exceedingly remote given the well documented explosion of accessible child pornography on the Internet.

pornography viewing is a reprehensible and morally repugnant crime that should always be criminally prosecuted. Indeed, all of the cases cited by the Court of Appeal involve courts commenting on the evils of child pornography possession in the context of criminal prosecutions, (*see e.g.*, *In re Grant* (2014) 58 Cal.4th 469; *U.S. v. Norris* (5th Cir. 1998) 159 F.3d 926), where the courts had no reason to address the issue of whether child pornography viewing by a psychotherapy patient was a sufficient basis for the State's invasion of the patient's right to privacy absent any reliable empirical research establishing a causal connection between the mere viewing of Internet child pornography by men and their "hands-on" sexual abuse of children. (*See e.g., United States v. Apodaca*, 641 F.3d 1077, 1083 (9th Cir. 2011); *C.R.*, 792 F. Supp. at 376 ["Scientifically acceptable empirical analyses have thus far failed to establish a causal link between the mere passive viewing of child pornography . . . and the likelihood of future contact offenses"]; United States Sentencing Commission, *Federal Child Pornography Offenses, Executive Summary*, 102 (2012) ["most current social science research suggests that viewing child pornography, in the absence of other risk factors, does not 'cause' individuals to commit sex offenses."]) Notably, even the Attorney General did not argue that A.B. 1775's invasion of psychotherapy patients' right to privacy could be justified by the fact that child pornography viewers **might** pose a future danger of sexually abusing live children

The fatal flaw in the Court of Appeal's analysis is that the compelling state interest furthered by CANRA is the detection and prevention of actual child abuse, not the prosecution of child pornography viewers. CANRA's reporting scheme is "directed toward discovering suspected child abuse . . . so that independent governmental agencies can remove the child from immediate danger and investigate." (*James W. v. Superior Court* (1993) 17 Cal.App.4th 246, 254.) "Identification of abuse – not identification of the perpetrator – is the chief concern" of CANRA's reporting scheme and any criminal prosecution of a child abuser is the separate responsibility of the law enforcement "authorities investigating the abuse and the criminal justice system." (*Id*. at 255.)

Absent the State's compelling interest in identifying and protecting children from actual abuse, a psychotherapy patient's right to privacy outweighs the State's interest in prosecuting crime of any sort. (*Menendez*, 3 Cal.4th at 456 n.18). As such, the Court of Appeals erred in justifying the State's invasion of a psychotherapy patient's right to privacy on the ground that mandated reporting of child pornography viewers will facilitate their prosecution and thereby generally deter the consumption of child pornography. While prosecution of child abusers may certainly be an incidental result of CANRA's mandated reported scheme, the State's interest in prosecuting child pornography viewers (assuming that such conduct is actually a crime in California) by itself cannot justify the State's

serious invasion of psychotherapy patients' privacy rights nor permit its end-run around Evidence Code section 1024's psychotherapist-patient privilege which otherwise applies in all criminal cases, including those involving child pornography possession, production and distribution.

Similarly, the Court of Appeal's conclusion that child pornography viewing is indistinguishable from the production and distribution of child prosecution already reportable under CANRA does not comport with the scope or history of the statute, even assuming that mandated reporting of psychotherapy patients engaged in child pornography distribution is constitutional.[7] In particular, the Penal Code does not consider possession of child pornography to be sexual exploitation of children. (*See People v. Haraszewski* (2012) 203 Cal. App. 4th 924, 942 ["illegal acts of mere possession of child pornography . . . did not constitute acts of abusive or exploitive use of children in the production and distribution of child pornography"]). Likewise, until A.B. 1775 was passed, CANRA did not consider possession or viewing of child pornography (whether in electronic or print form) to be sexual exploitation because such conduct (prohibited by Penal Code § 311.11) was not included in the list of reportable sexual

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

exploitation offenses. The Court of Appeal's attempt to equate child pornography possession or viewing with the sexual exploitation of minors previously reportable under CANRA is therefore unsupportable as a matter of statutory interpretation.

In summary, the Court of Appeal's Opinion upholds A.B. 1775's without any acceptable explanation for how the State's mandated reporting of psychotherapy patients who view child pornography substantially furthers CANRA's compelling interest in protecting children from sexual exploitation and does so in a narrowly tailored way. Certainly, the Court of Appeal's acceptance of the slim possibility that law enforcement might be able to identify a child depicted in a child pornography image viewed by a psychotherapy patient is precisely the type of attenuated and speculative justification that is insufficient to show that mandated reporting of such viewing substantially furthers a State's interest in detecting and preventing child abuse at the expense of the patients' right to privacy. (*See Scull,* 206 Cal.App.3d at 792-794.) Likewise, the Court of Appeal's conclusion that A.B. 1775 can constitutionally require psychotherapists to report teenage patients who engage in entirely consensual minor-to-minor sexting of sexually explicit images to each other is unpersuasive when CANRA is obviously inapplicable to conduct that does not constitute child sexual abuse or exploitation under any conceivable definition.

The Court of Appeals therefore incorrectly ruled that a

psychotherapy patient's right to privacy can be overridden based on the State's interest in criminally prosecuting child pornography viewers or its speculative hope that the confidential information disclosed might be useful to law enforcement in rescuing the children depicted in the illegal images or determining whether minor-to-minor sexting is truly consensual. This is especially true when the mandated reporting of child pornography viewing by psychotherapy patients will discourage patients actually seeking treatment for mental or sexual disorders involving the possession of child pornography. Stated differently, by exposing psychotherapy patients who view child pornography to possible criminal prosecution, A.B. 1775 actually increases the likelihood of sexual abuse of children because "[i]nstead of exposing their thoughts for treatment, [such patients] might repress them and act on them. Such a result would not further the interests of victims, psychotherapy, or the criminal justice system." (*People v. Felix* (2001) 92 Cal. App. 4th 905, 915.)

CONCLUSION

For the foregoing reasons, the petition for review should be granted.

Dated: February 17, 2017

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rules 8.504(d)(1).)

I, the undersigned appellate counsel, certify that this brief consists of 7,148 words exclusive of those portions of the brief specified in California Rules of Court, rule 8.505(d)(3), relying on the word count of the Microsoft Word 2010 computer program used to prepare the brief.

Dated: February 17, 2017

Respectfully submitted,

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APPENDIX

PROOF OF SERVICE

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

On February 17, 2017, I served on the interested parties the document(s) described as Petitioners' **PETITION FOR REVIEW** by transmitting a true and correct copy thereof in sealed envelopes addressed as follows:

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☒ **(BY OVERNIGHT DELIVERY)** I placed said documents in envelope(s) for collection following ordinary business practices, at the business offices of NELSON HARDIMAN, LLP, and addressed as shown on the attached service list, for collection and delivery to a courier authorized by Federal Express to receive said documents, with delivery fees provided for. I am readily familiar with the practices of NELSON HARDIMAN, LLP for collection and processing of documents for overnight delivery, and said envelope(s) will be deposited for receipt by Federal Express on said date in the ordinary course of business.

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

Executed this 17th day of February 2017, at Los Angeles, California.

Adriana Medina

Type or Print Name

Signature