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Superior Court of California
County of Los Angeles

JUL 29 2015

Sherri R. Carter, Executive Officer/Clerk
By T. Barkley, Deputy

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT
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11 DON L. MATHEWS, M.C., MICHAEL L.
12 ALVAREZ, M.C., and WILLIAM OWEN,
13 CAD II,

14 Plaintiffs,

15 vs.

16 KAMALA D. HARRIS, in her official
17 capacity as Attorney General of California;
18 and JACKIE LACEY, in her official
19 capacity as the District Attorney of the
County of Los Angeles and representative
of the California's district attorneys,

20 Defendants.
21

Case No. BC573135

ORDER ON DEMURRERS BY
DEFENDANTS KAMALA D. HARRIS,
ATTORNEY GENERAL OF CALIFORNIA,
AND JACKIE LACEY, DISTRICT
ATTORNEY OF THE COUNTY OF
LOS ANGELES

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23 This matter came on regularly for hearing on June 8, 2015, in the above-entitled
24 Court on the demurrers to the Complaint by defendants Kamala D. Harris, Attorney
25 General of California, and Jackie Lacey, District Attorney of the County of Los Angeles,
26 the Honorable Michael L. Stern, Judge of the Superior Court, presiding. Attorneys Mark
27 S. Hardiman and Salvatore Zimmitti, Fenton Nelson, appeared for plaintiffs Don L.
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1 Mathews, Michael L. Alvarez and William Owen. Attorney S. Michele Inan, Office of the
2 Attorney General for the State of California, appeared for defendant Kamala D. Harris in
3 her official capacity as Attorney General of California. Attorney Maria Markova, Hurell
4 Cantrall, appeared for defendant Jackie Lacey in her official capacity as the District
5 Attorney of the County of Los Angeles.
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7 Having read and considered the moving papers and opposition, thereto, and
8 hearing argument of counsel, and, this matter having been taken under submission, the
9 Court rules as follows:
10

11 I. BACKGROUND OF AB 1775.

12 The Child Abuse and Neglect Reporting Act ("CANRA"), Penal Code 11165.1(c),
13 requires psychotherapists to report any known or suspected children being sexually
14 abused or exploited by others. CANRA is an exception to the psychotherapist/patient
15 privilege. Failure to report such conduct subjects psychotherapists to prosecution and
16 loss of license. Assembly Bill 1775, ("AB 1775"), a 2014 amendment to CANRA,
17 requires that psychotherapists to report to law enforcement any patient who has ever
18 downloaded or viewed child pornography on the internet or a cell phone.
19

20 Section 11165.1 defines "sexual abuse" as sexual assault or sexual exploitation.
21

22 This section, subdivision (c), defines "sexual exploitation" as any of the following:

23 (1) Conduct involving matter depicting a minor engaged in
24 obscene acts in violation of Section 311.2 (preparing, selling,
25 or distributing obscene matter) or subdivision (a) of Section
26 311.4 (employment of minor to perform obscene acts).

27 (2) A person who knowingly promotes, aids, or assists,
28 employs, uses, persuades, induces, or coerces a child, or a
person responsible for a child's welfare, who knowingly
permits or encourages a child to engage in, or assist others
to engage in, prostitution or live performance involving

1 obscene sexual conduct, or to either pose or model alone or
2 with others for purposes of preparing a film, photograph,
3 negative slide, drawing painting, or other pictorial depiction,
4 involving obscene sexual conduct. For the purposes of this
5 section, "person responsible for a child's welfare" means a
6 parent, guardian, foster parent, or a licensed administrator or
7 employee of a public or private residential home, residential
8 school, or other residential institution.

9 (3) A person who depicts a child in, or who knowingly
10 develops, duplicates, prints, downloads, streams, accesses
11 through any electronic or digital media, or exchanges, a film,
12 photograph, video tape, video recording, negative, or slide in
13 which a child is engaged in an act of obscene sexual
14 conduct, except for those activities by law enforcement and
15 prosecution agencies and other persons described in
16 subdivisions (c) (e) of Section 311.3.

17 Penal Code section 11165.1(c).

18 Plaintiffs contend that AB 1775 violates their patients' right to privacy. They
19 seek a declaration of the unconstitutionality of this amendment to CANRA under the
20 California Constitution (First Cause of Action) and the Due Process Clause of the
21 Fourteenth Amendment to the United States Constitution (Second Cause of Action).
22 Plaintiffs also request injunctive relief enjoining the enforcement of AB 1775 (Third
23 Cause of Action).

24 A. Plaintiffs' Standing.

25 Plaintiff Don L. Mathews, M.F.T. (Marriage and Family Therapist) is the founder
26 of Impulse Treatment Center, the largest outpatient treatment center for sexual
27 compulsion/addiction in the United States. He alleges that, as an M.F.T., he is caught
28 between the mandated reporting of child pornography viewing imposed by AB 1775 and
his obligation to provide confidential psychotherapy services and, at the same time, his
patients' rights to privacy regarding their confidential communications to him. Plaintiff
Michael Alvarez, M.F.T., is in private practice and an expert on sexual addiction. He

1 brings this action for the same reasons as Mathews. Plaintiff William Owen, CADC II,
2 (Certified Alcohol and Drug Counselor), is an alcohol and drug abuse counselor and
3 director of treatment programs that work with sex addiction issues. He brings this action
4 as a citizen concerned for the proper performance of public duty and as a taxpayer
5 seeking to enjoin the expenditure of public monies in the enforcement of what he
6 alleges is an invalid and unconstitutional law.
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8 **B. COMPLAINT.**
9

10 The Complaint alleges, through extensive facts, statutory citation, case authority
11 and argument, that the reporting requirements of AB 1775 impact the privacy right of
12 plaintiffs' patients (as embodied in the psychotherapist/patient privilege of Evidence
13 Code 1014) and is unconstitutional because it does not substantially further CANRA's
14 stated purpose of identifying and protecting children from abuse.
15

16 Plaintiffs argue that the State's interest in protecting children from sexual
17 exploitation cannot be met by AB 1775 because children seen on the internet cannot be
18 properly identified, let alone rescued. They posit that, given the global reach of the
19 internet, there is no reasonable probability that children depicted on the internet are
20 from California and there is no evidence that those who view child pornography on the
21 internet have or will engage in actual abuse.
22

23 Plaintiffs allege that there is a large difference between identifying/protecting a
24 child and identifying/reporting persons. Before AB 1775, CANRA did not require
25 psychotherapists report a person who presented a possible danger of abusing a child
26 through viewing child pornography on the internet. The psychotherapist's duty to report
27 was triggered only when a therapist had knowledge of or observed a child whom the
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1 reporter knew or reasonably suspected had been the victim of abuse of neglect. In
2 other words, it was not a predictive standard as to person, but a standard of knowing.
3 Under the plaintiffs' interpretation, the language of AB 1775 transforms CANRA and
4 turns the statute into one of a "predictive" standard based upon a theory that those who
5 view child pornography will be those who abuse children. Plaintiffs do not accept the
6 validity of such a theory.
7

8 The Complaint asserts that the purpose of protecting children is not furthered by
9 the reporting persons who have streamed or downloaded child pornography since there
10 is no evidence that such viewers have or will be engaged in actual abuse or that the
11 depicted children realistically can be identified and protected.
12

13 Plaintiffs allege that they have treated numerous patients who have admitted to
14 downloading or viewing child pornography. Based on their experience, these patients
15 have not presented a danger of actual child abuse, are not prone to exploitation of
16 children or have not engaged in the distribution of child pornography as a result of such
17 viewing. Such patients have no prior criminal history, no expressed sexual preference
18 for children and are active in their therapy. Plaintiffs contend that reporting these
19 patients under AB 1775 would not further the stated goal of protecting children from
20 abuse and could interfere with patient treatment.
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23 Plaintiffs state that they have treated numerous patients who have admitted a
24 sexual attraction to children. Plaintiffs do not believe that these patients present a
25 danger of actual abuse, exploitation of children or distribution of child pornography.
26 These patients are active in their treatment, have no prior criminal history, no access to
27 children and express disgust and shame about such attraction. Reporting such patients
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1 for viewing child pornography on the internet under AB 1775 therefore would not, in
2 their opinion, further the stated goal of protecting children from abuse, and, at the same
3 time, would defeat the purposes of psychotherapy and treatment.
4

5 Plaintiffs believe that the overly broad nature of AB 1775, including reporting
6 minors who view sexually explicit photos sent to them by their peers (“sexting”), would
7 not further the stated goal of protecting children from abuse.

8 In sum, plaintiffs view the reporting requirements of AB 1775 to be inimical and
9 detrimental to their treating functions.
10

11 C. Legislative Intent of AB 1775.

12 The defendants submit that AB 1775 is based on the belief that these reporting
13 requirements protect children from abuse. Unlike some other California statutes that
14 may provide little legislative language regarding their intent, the Legislature went to
15 great lengths to make its intent clear in the enactment of AB 1775.
16

17 The Legislature’s ultimate intent in enacting was protection of children from
18 sexual abuse and exploitation. To accomplish these objectives, AB 1775 explicitly
19 states a legislative intent for child abuse reporting requirements to take priority over the
20 “traditional” physician–patient or psychotherapist-patient privilege under Evidence Code
21 section 1014: “Neither a physician-patient privilege nor the psychotherapist-patient
22 privilege applies to information reported pursuant to the article in any court proceeding
23 or administrative hearing.”
24

25 The defendants assert that Legislature anticipated the concerns presented by the
26 psychotherapist’s plaintiffs in this case. Assemblywoman Melissa A. Melendez stated in
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1 legislative proceedings that:

2 “This bill will amend the child abuse and neglect reporting
3 act to include ‘downloading’ and ‘streaming’ as part of its
4 definition of “sexual exploitation” to ensure the reporting
5 requirements related to internet child pornography are
6 defined to reflect modern technology. This will further
7 ensure the protection of children from the proliferation of
8 sexual exploitation through the internet pornography as well
9 as possibly others forms of abuse.”

10 Senate Committee on Public Safety Report, June 10, 2014.

11 Furthermore, the bill’s Senate floor analysis adds the
12 following clarifications: “Currently, many mandated reporters,
13 psychotherapists included, are confused on whether they
14 should report the downloading or streaming of child
15 pornography, as they are required to with the printing and
16 copying of such material. . . . In the absence of specific
17 language allowing mandatory reports to be made for the
18 ‘downloading’ or ‘streaming’ of child pornography, the child
19 abuse and neglect report act, as it reads, may be inadequate
20 to protect against sexual exploitation of children. . .”

21 Senate Rules Committee report, June 23, 2014.

22 Thus, the defendants contend that the amendment of Penal Code section
23 11165.1 (c) is specifically targeted to ensure that psychotherapists monitor the activity
24 of their patients sexually explicit matter and report internet downloading or streaming to
25 law enforcement. Such a duty is intended to deal with the social problems caused by
26 such conduct, including sexting. The defendants strongly advocate that the ends of
27 eradicating child pornography through the reporting requirements of AB 1775 justify the
28 means employed.

29 II. DETERMINATION OF DECLARATORY RELIEF BY DEMURRER.

30 Plaintiffs contend that the demurrers to the first and second causes of action for
31 declaratory relief must be overruled because a demurrer cannot be used to challenge
32 the merits of these claims for declaratory relief regarding the constitutionality of AB

1 1775. citing, Qualified Patients Ass'n. v. City of Anaheim, 187 Cal.App.4th 734, 756
2 (2010). The defendants counter that a general demurrer to a declaratory relief cause of
3 action is proper when a plaintiff does not allege facts sufficient to state a derivative
4 claim. citing, Ball v. Fleet Boston Financial Corp., 164 Cal.App.4th 794, 800 (2008);
5 Silver v. City of Los Angeles, 217 Cal.App.2nd 134, 138 (1963).
6

7 While there are significant legal and philosophical differences between the
8 plaintiffs and defendants regarding the reach and consequences of AB 1775, there are
9 virtually no factual disputes for the Court to resolve in ruling on the demurrers regarding
10 the claims for declaratory relief. The relief requested involves matters of law. A failure
11 to make a declaration through a ruling on the demurrers would be an idle act in this
12 case. See, Newby v. Alto Rivera Apartments, 60 Cal.App.3d 288, 304 (1976). So a
13 general demurrer is an appropriate way to determine this a controversy where the
14 issues can be determined as a matter of law. See, State Farm Fire & Gas Co. v.
15 Superior Court, 191 Cal.App.3d 74, 76 (1987). Thus, the defendants' demurrers are
16 appropriate for resolution of the legal issues in this instance.
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19 III. ANALYSIS OF CONSTITUTIONAL ISSUES.

20 A. AB 1775 Does Not Violate Patients' Privacy Rights

21 Under the California Constitution.

22
23 The First Cause of Action for Declaratory Relief of the Complaint seeks a
24 declaratory judgment that section 11165.1(c) (3) as applied to "mandated reporters
25 including psychotherapist" is unconstitutional under Article 1, section 1 of the California
26 Constitution. This section of the Constitution provides that "all people as by nature free
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1 and independent and have inalienable rights. Among these are enjoying and obtaining
2 safety, happiness, and privacy.”

3
4 Plaintiffs contend that the reporting requirement of AB 1775 violates the
5 reasonable expectation of privacy of their patients to have legally protected
6 communications with psychotherapists without fear of disclosure of their private
7 communications to law enforcement if there communications contain reference to
8 viewing child pornography. Defendants argue that the State’s interest in the protection
9 of children justifies access to such information and validates any invasion of privacy.
10

11 Both plaintiffs and defendants acknowledge that the right to privacy is not
12 absolute. In order to prove a violation of a right to privacy, an individual must establish:
13 1) a legally protected privacy interest; 2) a reasonable expectation of privacy in the
14 subject communications; and 3) a serious invasion of privacy. See, Hill v. National
15 Collegiate Athletic Ass’n, 7 Cal.4th 1, 27 (1994). Legally protected privacy interests
16 include preventing disclosure or misuse of sensitive information (informed privacy), and
17 making personal decisions or conducting personal activities without intervention or
18 interference (authorizing privacy). Id., 7 Cal.4th at 35. “A defendant may prevail in a
19 state constitutional privacy case by negating any of the three elements. . . or by
20 pleading and proving, as an affirmative defense, that the invasion of privacy is justified
21 because it substantially furthers one a more countervailing interest.” Id., 7 Cal.4th at
22 40.
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24

25 Since the conduct sought to be prohibited by AB 1775 is strictly governed by
26 penal statutes, whether a psychotherapist’s patient has a reasonable expectation of
27 privacy in the circumstances is a question of law since the factual allegations of the
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1 Complaint are admitted for purposes of a demurrer. Moreover, the existence of a
2 sufficient countervailing interest is a question of law. Id.

3
4 1. There is No Legally Protected Privacy Right.

5 There is no recognized absolute fundamental privacy right to possess or view
6 child pornography. See, People v. Younghanz, 156 Cal.App.3d 811, 815-816 (1984).
7 Contrary to any suggestion by plaintiffs, the possession of child pornography does not
8 involve a fundamental constitutional or other privacy right. No party provides any
9 authority holding that such conduct entails an applicable right of constitutional privacy.
10
11 The plaintiffs' attempt to fashion such a legal construct is not convincing.

12 Such conduct has no constitutional protection and is criminal in California. See,
13 e.g., Penal Code sections 311.11 and 11164 et seq.; People v. Luera, 86 Cal.App.4th
14 515, 522 (2001). Even plaintiffs concede that viewing child pornography is
15 reprehensible conduct beyond the bounds of morally acceptable behavior and forbidden
16 under the law. Simply stated, there is no fundamental right to possess or view child
17 pornography.
18

19 The demurrers to the First Cause of Action for violation of Article I, Section 1 of
20 the California Constitution are sustained without leave to amend.
21

22 2. There is No Reasonable Absolute Expectation
23 of Privacy in Psychotherapeutic Treatment.

24 Plaintiffs assert that the reporting requirements of AB 1775 interfere with their
25 ability to effectively treat their patients and violate their patients' rights to "effective
26 psychotherapy." However, they can cite to no legal authority holding that their patients
27 are entitled to any particular form of therapy or any research or other authority
28

1 supporting such a position. For that matter, the allegations of the Complaint and
2 plaintiffs' arguments in this regard thereon are, for the most part, based on their own
3 personal experiences or conclusory.
4

5 Moreover, the reporting requirement of AB 1775 does not transform
6 psychotherapists into quasi-law enforcement officers. See, People v. Younghanz.
7 supra, 156 Cal.App.3d at 817-818. Even though a patient may seek psychotherapist
8 help for an addiction related to the downloading of child pornography from the internet,
9 such patients do so knowing that the conduct is alleged and with a realization that their
10 conduct may be reported. This "statute does not inhibit the psychologist in treating the
11 patient and the overriding purpose of obtaining information from the patient is to provide
12 treatment rather than to enforce the law." Id., 156 Cal.App.3d at 818, see, Penal Code
13 section 11164 et seq.
14

15 It is implicit, and conceded by the plaintiffs, that persons who view child
16 pornography know that it is socially unacceptable and illegal. Such viewing is done by
17 persons with knowledge that their conduct may be disclosed and can be prosecuted.
18 This statute provides society with some assurance that persons who view child
19 pornography cannot escape detection for this criminal activity.
20

21 Our legal system allows no "zones of privacy" for illegal conduct, particularly
22 because there is no expectation of privacy where the subject conduct is criminal by its
23 very nature. People v. Luera, supra, 86 Cal.App.4th at 522 ("as a matter of law there
24 can be no reasonable expectation of privacy in circumstances involving the distribution
25 of obscene matter," quoting, People v. Weiner, 29 Cal.App.4th 1300, 1306- 1307
26 (1994)).
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28

1 3. Disclosure of Viewing Child Pornography

2 Does Not Entail A Serious Invasion of Privacy.

3 “An invasion of privacy interest is not a violation of the state constitutional right to
4 privacy if the invasion is justified by a competing interest.” Hill v. National Collegiate
5 Athletic Ass’n., supra, 7 Cal.4th at 38. The California Supreme Court in Hill established
6 a well-articulated standard to determine whether the State has a “legitimate public
7 interest” in prohibiting certain conduct. Such “[c] onduct alleged to be an invasion of
8 privacy is to be evaluated based on the extent to which it further legitimate and
9 important compelling interest.” Id.

10 In this situation, the reporting requirements of AB 1775 recognize the State’s
11 compelling and legitimate public interest in exposing and prosecuting child pornography.
12 The legislative history of this enactment (see above discussion) underscores the
13 Legislature’s specific intension that such reporting predominates over the patient
14 privilege interest in a physician or psychotherapists’ relationship and is a permissible
15 intrusion into a psychotherapist-patient relationship.

16 AB 1775 may not be the only approach to combat child abuse and child
17 pornography but it is a justifiable, permissible means that, on the balance, promotes
18 society’s interest in outlawing child pornography that outweighs the psychotherapist’s
19 treatment interests. See, People v. Younghanz, supra, 156 Cal.App.3d at 816 (“The
20 right to seek a particular form of medical treatment as a cure for one’s illness, however,
21 has not been recognized as a fundamental right in California.”).

1 B. AB 1775 Does Not Violate Patients' Right to Privacy Under the
2 Fourteenth Amendment to the United States Constitution.

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4 Plaintiffs' Second Cause of Action for Declaratory Relief contends that AB 1775
5 is unconstitutional and an overbroad violation of their patients' rights to privacy
6 guaranteed by the Due Process Clause of the Fourteenth Amendment of the United
7 States Constitution. Specifically, plaintiffs argue that the amended statute is
8 unconstitutional because: 1) there is no reasonable likelihood that the child victims
9 depicted in child pornography are in California and can be identified and protected by
10 the State; 2) there is no evidence that patients who have viewed child pornography
11 have engaged in "hands on" sexual abuse of children; and 3) the amended CANRA is
12 intended to protect children who are victims of abuse, not to identify persons who may
13 pose a danger to children.
14

15
16 The Court does not find these arguments to be persuasive. The authorities cited
17 by the plaintiffs for these propositions do not support such conclusions.

18 First, neither the United States Constitution nor any United States Supreme
19 Court holding or other federal authority acknowledges that there is a fundamental
20 federal constitutional right to informational privacy. The United States Supreme Court
21 has held that the Due Process Clause of the Fourteenth Amendment protects "the rights
22 to marry, to have children, to direct the education and upbringing of one's children, to
23 marital privacy, to use contraception, to bodily integrity, and to abortion." Washington v.
24 Glucksberg, 521 U.S. 702, 720-721 (1997). Such rights have not been extended to
25 include a constitutional right to information privacy under federal law. Whalen v. Roe,
26 429 U.S. 589, 605 (1997); see also, Obergefell v. Hodges, 576 U.S. _____ (2015).
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1 Plaintiffs' argument that there is a "zone of privacy" that forms a band of
2 constitutional protection for psychotherapists' patients is not a proposition supported by
3 constitutional or other precedent. See, People v. Strizenger, 34 Cal.3d 505, 513 (1983)
4 (the provisions of Penal Code section 11165 et seq. "impose on psychotherapists the
5 affirmative duty to report to a child protective agency all known and suspected instances
6 of child abuse. Lest there be any doubt that the Legislature intended the child abuse
7 reporting obligation to take precedence over the physician-patient or psychotherapist-
8 parties privilege [it made certain exceptions only applicable to the Evidence Code].").
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11 Moreover, where no fundamental right is at issue, federal courts have utilized a
12 rational basis test of scrutiny to determine the validity of legislative policy decisions.
13 This standard customarily accords "a strong presumption of validity" to uphold
14 legislation "if there is any reasonably conceivable state of facts that could provide a
15 rational basis for the clarification." Heller v. Doe, 509 U.S. 312, 319-320 (1993). In
16 such circumstances, the burden is placed on the plaintiff "to negate every conceivable
17 basis which might support it, whether or not the basis has a foundation in the record."
18 Id. Plaintiffs have not done so here.
19

20
21 The Legislature had various legitimate and rational concerns to consider before it
22 legislated mandatory reporting of known or suspected child abuse or exploitation
23 involving the downloading or streaming of child pornography. These include protection
24 of children's health, safety and morals, protection and prevention of children against
25 abuse and minimizing child abuse and sexual exploitation of children. Plaintiffs'
26 argument that the ability of psychotherapists to treat their patients without fear does not
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1 overcome this important law enforcement function invoked for legitimate purposes.

2 See, People v. Younghanz, supra, 156 Cal.App.4th at 817-818.

3
4 Thus, the Legislature had constitutional authority to enact AB 1775 to address
5 these legitimate concerns involving children's welfare. See, Whalen v. Roe, supra, 429
6 U.S. at 597 (states have broad latitude to legislate possible solutions to social criminal
7 problems). People v. Ramos, 34 Cal.4th 494, 513 (2004) (the Legislative is empowered
8 to enact statutes that are rationally related to legitimate purposes). In this regard, AB
9 1775 is a proper enactment designed to assist the State's efforts to prevent and
10 eradicate the criminal possession and distribution of child pornography. As a penal
11 statute, AB 1775 is an appropriate means to accomplish valid purposes that prevail over
12 contentions by psychotherapists that their individual patients' constitutional rights of
13 privacy are infringed by or from reporting and possible identification as child
14 pornography abusers. See, People v. Stritzenger, supra, 34 Cal.3d at 512.

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17 The demurrers to the Second Cause of Action for violation of the Due Process
18 Clause to the Fourteenth Amendment to the United States Constitution are sustained
19 without leave to amend.

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21 **IV. INJUNCTIVE RELIEF IS NOT A CAUSE OF ACTION.**

22 It long has been held in California that an injunction is a remedy and not a cause
23 of action. See, Connerly v. Shwarzenegger, 146 Cal.App.4th 739, 748-751 (2007) (an
24 injunction is an equitable remedy afforded to a person aggrieved by certain torts or
25 other wrongful acts and does not lie against state officials who are presumed to conduct
26 themselves in conformity with the law). For this reason, the demurrer to the Third
27 Cause of Action is sustained without leave to amend.
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V. FINDINGS AND ORDER.

The Court finds and concludes that Penal Code section 11165.1(c), as amended, is constitutional under the California and United States constitutions and that its enforcement should not be enjoined . The demurrers by defendant Kamala D. Harris, in her official capacity as Attorney General of California, and Jackie Lacy, in her official capacity as the District Attorney of the County of Los Angeles, are sustained without leave to amend. The case is dismissed with prejudice.

IT IS SO ORDERED.

Dated: July 29, 2015

MICHAEL L. STERN

Michael L. Stern
Judge of the Superior Court