In the Supreme Court of the State of California

DON L. MATHEWS, M.F.T., et al,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Attorney General of California; et al,

Respondents,

Case No. S240156

Court of Appeal, Second District, Division Two, Case No. B265990
County Superior Court, Case No. BC573135
Hon. Michael L. Stern, Judge

ANSWERING BRIEF OF THE CALIFORNIA ATTORNEY GENERAL

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General
AIMEE FEINBERG (SBN 223309)
Deputy Solicitor General
MARC A. LEFORESTIER
Supervising Deputy Attorney General
S. MICHELE INAN
Deputy Attorney General
MAX CARTER-OBERSTONE
Associate Deputy Solicitor General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-6003
Fax: (916) 327-7154
Email: Aimee.Feinberg@doj.ca.gov
Attorneys for the Attorney General

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INTRODUCTION

For decades, mental health professionals in California have been required to notify authorities when they reasonably suspect that a patient has abused or exploited a child, including by copying or exchanging sexually exploitative photographs of children. In Assembly Bill 1775, the Legislature extended this reporting requirement to cover situations in which a mental health professional suspects a patient has downloaded, streamed, or accessed electronic child pornography. Plaintiffs appear to concede that the pre-existing reporting requirement does not violate the privacy rights of affected patients. But they claim that AB 1775's extension of state reporting requirements to the digital realm exceeds constitutional limits, based on what they perceive as the State's weaker interest in mandated reporting of Internet consumption of child pornography.

Plaintiffs' claim fails. Patients lack any legally protected privacy interest in information they reveal to therapists about electronically accessing images of child sexual abuse. Patients cannot reasonably expect that such information will be shielded from authorities in light of the longstanding and well-known norm that therapists are required to alert authorities when they suspect a patient has abused or exploited a child.

Even if plaintiffs had met these requirements to state a privacy claim under the state constitution, the State's paramount interest in protecting children from sexual exploitation is more than sufficient to justify

AB 1775's requirements. Identification of the electronic consumption of child pornography allows authorities to stop ongoing exploitation of the children depicted, bring perpetrators to justice, and ensure that those who possess child pornography are brought to the attention of agencies with responsibility for protecting children from future harms, including those overseeing licensed child-care facilities and conducting background checks of persons with direct access to children. Plaintiffs' contrary arguments are premised in substantial part on their contention that possession of digital child pornography is sufficiently different from the other forms of abuse defined in state reporting law that AB 1775's amendment crosses a constitutional line. This argument is directly contrary to decades of legislative judgments and case law recognizing that the mere possession of child pornography inflicts serious and ongoing harm on the minors depicted. Because AB 1775 substantively advances the State's critical interest in protecting children from this harm, plaintiffs' constitutional claim must fail.

BACKGROUND

I. STATUTORY BACKGROUND

A. Laws Criminalizing the Duplication and Possession of Child Pornography

It is illegal under both state and federal law to produce, distribute, duplicate, or possess images of child pornography. (See Pen. Code,

§§ 311.2 [sales or distribution], 311.3 [developing, duplicating, printing, or exchanging], 311.4 [using or coercing children to create images], 311.11 [possession]; 18 U.S.C. § 2252 [transporting, selling, or possessing].)[1] These laws reflect society's consensus that "'[c]hild pornography harms and debases the most defenseless of our citizens.'" (*In re Grant* (2014) 58 Cal.4th 469, 477, quoting *United States v. Williams* (2008) 553 U.S. 285, 307.)

California's statute banning the possession of child pornography, Penal Code section 311.11, "cover[s] both traditional means of displaying child pornography and the new era of Internet use in an effort to reduce the exploitation of children." (*Tecklenburg v. Appellate Div. of Superior Court* (2009) 169 Cal.App.4th 1402, 1418.) A defendant knowingly possesses or controls child pornography within the meaning of section 311.11 "by actively downloading and saving it to his or her computer," by printing or e-mailing it, or by intentionally using a computer "to find, access, and peruse" child pornography and "manipulating the display of such images" on a computer screen. (*Id.* at p. 1419 & 1419, fn. 16.)

The criminalization of possession recognizes that the victimization of the children depicted "'does not end when the pornographer's camera is put away.'" (*Grant, supra*, 58 Cal.4th at p. 477, quoting *United States v.*

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[1] All further statutory references are to the Penal Code unless specified.

Norris (5th Cir. 1998) 159 F.3d 926, 929.) Any image is a "'permanent record'" of a child's abuse, and the "simple fact that [it has] been disseminated perpetuates" the abuse. (*Ibid.*, quoting *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 249 and *Norris*, *supra*, at p. 929.) A consumer who "'merely' or 'passively' receives or possesses child pornography directly contributes to this continuing victimization," (*ibid.*, quoting *Norris*, *supra*, at p. 930), with each new publication of the image further invading the child's privacy and injuring her reputation and well-being (see *ibid*). At the same time, "'the consumer of child pornography instigates the original production of child pornography by providing an economic motive for creating and distributing the materials.'" (*Id.* at pp. 477-478, quoting *Norris*, *supra*, at p. 930.) In light of these harms, courts have recognized that "'there is no sense in distinguishing between ... the producers and the consumers of child pornography," as "'[n]either could exist without the other.'" (*Id.* at p. 478, quoting *Norris*, *supra*, at p. 930.)

In California, offenders convicted of child pornography crimes, including possession under section 311.11, are required to register as sex offenders for life. (§ 290, subd. (c); see *Grant*, *supra*, 58 Cal.4th at p. 478.)

B. The Child Abuse and Neglect Reporting Act

Since the 1960s, "California has used mandatory reporting obligations as a way to identify and protect child abuse victims." (*Stecks v. Young*

(1995) 38 Cal.App.4th 365, 370.) In 1963, the Legislature generally required physicians and surgeons to report to authorities when a minor under their care appeared to have been the victim of specified forms of abuse. (Stats. 1963, ch. 576, § 1; see also *Krikorian v. Berry* (1987) 196 Cal.App.3d 1211, 1216.) Psychologists and marriage, family, or child counselors were made mandatory reporters in 1977. (Stats. 1977, ch. 958, § 1.)

In 1980, the Legislature adopted a comprehensive new structure to expand and strengthen state reporting obligations. (Stats. 1980, ch. 1071, §§ 1-5.) The new law, the Child Abuse Reporting Act, required a broad range of professionals, including psychotherapists, to immediately report to child protective agencies any time they had "knowledge of or observe[d] a child in [their] professional capacity or within the scope of [their] employment whom [they] reasonably suspect[ed]" had been the victim of child abuse. (*Id.*, § 4, codified as former Pen. Code, § 11166, subd. (a).) The statute made it a crime to fail to make a mandated report, immunized mandated reporters from civil liability, and specifically excepted information reported under the law from the physician-patient and psychotherapist-patient privileges. (*Id.*, codified as former Pen. Code, §§ 11171, subd. (b), 11172; see *Krikorian*, *supra*, 196 Cal.App.3d at p. 1217.)

In adopting the new law, the Legislature recognized that identification of victims of child abuse "is often difficult due to the natural characteristics of the child and the private or special circumstances in which the abuse may occur." (*Storch v. Silverman* (1986) 186 Cal.App.3d 671, 676.) It also recognized the serious problem of under-reporting of abuse. (*Krikorian*, *supra*, 196 Cal.App.3d at p. 1217.) The comprehensive new statutory scheme was "designed to encourage the reporting of child abuse to the greatest extent possible to prevent further abuse." (*Storch*, *supra*, at p. 678; see also *B.H. v. County of San Bernadino* (2015) 62 Cal.4th 168, 183 [1980 legislative overhaul sought to increase likelihood that child abuse victims would be identified].)

In 1987, the Legislature renamed the statute the Child Abuse and Neglect Reporting Act (CANRA) and affirmed the law's overarching purpose to "protect children from abuse and neglect." (§ 11164, subd. (b).) The statute's "fundamental premise" is that "reporting protects children." (*Stecks*, *supra*, 38 Cal.App.4th at p. 372.)

Under CANRA, more than forty categories of professionals are designated as mandated reporters. (§ 11165.7.) Physicians, psychiatrists, psychologists, clinical social workers, alcohol and drug counselors, and marriage and family therapists are classified as mandated reporters. (§ 11165.7, subds. (a)(21), (a)(38)); but see *Elijah W. v. Superior Court* (2013) 216 Cal.App.4th 140, 159 [psychotherapy expert assisting defense

counsel in criminal matter not subject to CANRA reporting obligation].) Attorneys are not mandatory reporters. (*Elijah W.*, *supra*, at p. 154.)

A mandated reporter must make a report whenever he or she "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 neglect." (§ 11166, subd. (a).) Reasonable suspicion arises when "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." (§ 11166, subd. (a)(1).)

The term "child abuse or neglect" is defined to encompass physical, sexual, and emotional abuse, including: sexual assault or molestation (§ 11165.1, subds. (a), (b)); neglect of a child, including in circumstances in which no physical injury occurs (§ 11165.2, subd. (b)); willful harming or endangering of a child, including the infliction of mental suffering (§ 11165.3); and unlawful corporal punishment (§ 11165.4). Reportable abuse also includes the sexual exploitation of a minor, which is defined as distributing child pornography in violation of section 311.2; employing children to perform obscene acts in violation of section 311.4; or knowingly inducing or permitting a child to pose for depictions of obscene sexual

conduct. (§ 11165.1, subd. (c)(2).) Before 2015, the definition of sexual exploitation also applied to:

> Any person who depicts a child in, or who knowingly develops, duplicates, prints, or exchanges, any film, photograph, video tape, negative, or slide in which a child is engaged in an act of obscene sexual conduct, except for those activities by law enforcement and prosecution agencies and other persons described in subdivisions (c) and (e) of Section 311.3.

(Stats. 1987, ch. 1459, § 5.)

Reports under the statute must be made immediately by telephone, then followed by a written report within 36 hours, to a police or sheriff's department, county welfare department, or in certain circumstances a county probation department. (§§ 11166, subd. (a), 11165.9.) A report must include the name and contact information of the reporter; the information that gave rise to the reasonable suspicion of abuse or neglect; the source of that information; and, if known, the child's name and location, and the name, contact information, and other relevant personal information about the person suspected of abusing or neglecting the child. (§ 11167, subd. (a); see also § 11166, subd. (a) [permitting reporter to include non-privileged documents as part of report].) A mandated reporter's failure to report an incident of known or reasonably suspected child abuse or neglect is a misdemeanor (§ 11166, subd. (c)), and may subject licensed health care professionals to discipline (see Bus. & Prof. Code § 4982, subd. (w); Cal. Code Regs., tit. 16, § 1397.1.)

Agencies receiving reports are required to share information about suspected abuse with other agencies responsible for protecting children. (§ 11166.3.) For example, law enforcement agencies and county welfare departments receiving mandated reports must report to one another, to agencies responsible for Welfare and Institutions Code section 300 investigations, and to district attorney's offices. (§ 11166, subds. (j), (k); see generally *B.H.*, *supra*, 62 Cal.4th at pp. 181, 185 [discussing cross-reporting requirements].) The statute contemplates that "an investigation be conducted on every report received." (*B.H.*, *supra*, at p. 183.)

Disclosure of a report to anyone other than those enumerated in the statute is illegal. (§ 11167.5, subd. (a).) Violations of this prohibition are subject to criminal misdemeanor penalties. (*Ibid.*; see generally *People v. Garcia* (2017) 2 Cal.5th 792, 810.)

Reports of abuse that are substantiated by an investigating agency must be reported to the state Department of Justice for inclusion in the State's Child Abuse Central Index. (§ 11170, subd. (a)(1)-(3).) Information in the database must be made available to prosecutors (§ 11170, subd. (b)(1)) and specified agencies responsible for regulating those with direct contact with children (e.g., § 11170, subds. (b)(4) [child care facility licensing], (b)(9) [peace officer applicants]; § 11170.5 [prospective adoptive parents].)

Information required to be reported by doctors and psychotherapists is not privileged. The statute provides: "[n]either the physician-patient privilege nor the psychotherapist-patient privilege applies to information reported pursuant to this article in any court proceeding or administrative hearing." (§ 11171.2, subd. (b).)

C. Assembly Bill 1775

In 2014, the Legislature unanimously adopted Assembly Bill 1775 to revise CANRA's definition of sexual exploitation. The bill, conceived by the California Association of Marriage and Family Therapists and supported by the California Psychological Association, amended CANRA to include downloading, streaming, and accessing of digital child pornography in the definition of reportable sexual exploitation. (Sen. Com. on Pub. Safety, Rep. on Assem. Bill No. 1775 (2013-2014 Reg. Sess.) as amended June 10, 2014, pp. 1, 3-4.) After AB 1775's enactment, CANRA's section 11165.1, subdivision (c)(3) applies to:

> 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, except for those activities by law enforcement and prosecution agencies and other persons described in subdivisions (c) and (e) of Section 311.3.

(§ 11165.1, subd. (c)(3).)

The Legislature adopted AB 1775 to ensure that "reporting requirements related to internet child pornography are defined to reflect modern technology." (Sen. Pub. Safety Com. Report, *supra*, at p. 4.) The bill's author explained that "many mandated reporters, psychotherapists included, are confused on whether they should report the downloading or streaming of child pornography, as they are required to do with the printing or copying of such materials." (*Ibid.*) The new legislation would "update[] a definition that would likely include this action even absent the update" (Assem. Com. on Appropriations, Analysis of Assem. Bill No. 1775 (2013-2014 Reg. Sess.) as amended May 13, 2014, p. 1) and make clear that such conduct must be reported. In so doing, the legislation would "further ensure the protection of children from the proliferation of sexual exploitation through internet child pornography as well as possibly other forms of sexual abuse." (Sen. Pub. Safety Com. Report, *supra*, at p. 4.)

II. PROCEDURAL HISTORY

A. Plaintiffs' Complaint

One month after AB 1775 took effect, plaintiffs, two marriage and family therapists and a certified alcohol and drug counselor, filed suit against the California Attorney General and the Los Angeles District Attorney, alleging that AB 1775's reporting requirements violate their patients' privacy rights under the federal and state constitutions. (Appellants' Appendix at pp. 1-29.) Their complaint acknowledged that

"child pornography is despicable, morally repugnant and the product of child sexual abuse." (AA at p. 2 (¶ 2).) The complaint did not challenge CANRA's pre-2015 reporting requirements and conceded that therapists' obligation to report the forms of child abuse and neglect defined under prior law furthered the State's legitimate interests in protecting children from abuse. (AA at pp. 2-3 (¶ 3).) Plaintiffs claimed, however, that the Legislature's extension of CANRA's reporting requirements to the downloading, streaming, or accessing of digital images of child pornography failed to promote that purpose. (AA at pp. 2-3.) The complaint asserted that, in light of the vast scale and international reach of the illegal market for images of child pornography, AB 1775 would not reliably assist state law enforcement authorities in rescuing depicted children. (AA at pp. 18-19 (¶¶ 42-43).) Plaintiffs also claimed that "there is no empirical evidence that a psychotherapy patient viewing child pornography has actually engaged in 'hands on' sexual abuse or exploitation of children." (AA at p. 24 (¶ 56).) Based on these allegations, the complaint alleged that requiring reports of electronic consumption of child pornography fails to serve the State's interest in protecting children from physical abuse. (AA at p. 26 (¶ 62).) Plaintiffs sought a declaration that AB 1775 violates the state and federal constitutions and requested an injunction barring the law's enforcement. (AA at p. 28 (¶¶ 69-73).)

B. Trial Court and Court of Appeal

The trial court granted defendants' demurrer and dismissed plaintiffs' complaint with prejudice. (AA at pp. 157-172.) The Court of Appeal unanimously affirmed. As an initial matter, the Court of Appeal construed plaintiffs' claim as a facial challenge to AB 1775's requirement that mental health professionals report the downloading, accessing, or streaming of digital images of child pornography. (Opn. at pp. 13-14.) The court explained that plaintiffs did not plead an as-applied claim, because they did not allege a pattern or any instances of enforcement. (*Ibid.*)

Turning to the merits, the court concluded that plaintiffs had failed to allege a legally protected interest or a reasonable expectation of privacy, the first two threshold elements for demonstrating a constitutional privacy violation under *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, 39-40. The court recognized that plaintiffs' complaint alleged an informational privacy interest in confidential communications between therapist and patient, but held that patients lack any legally protected interest in precluding disclosure of communications suggesting they had engaged in the behaviors specified in AB 1775. (Opn. at pp. 15-23.) The court explained that possession of child pornography is a crime and that, by statute, the psychotherapist-patient privilege does not apply to information required to be reported under CANRA. (*Id.* at pp. 17-18, 21-22.) The court

likewise rejected plaintiffs' argument that AB 1775 implicated a fundamental right to seek treatment for sexual disorders. (*Id.* at p. 22.)

The court further held that plaintiffs' patients lacked any reasonable expectation of privacy that revelations giving rise to a suspicion that they had downloaded child pornography would be withheld from authorities, in light of the longstanding requirement of mandatory reporting. (Opn. at pp. 23-25.) The court declined to address *Hill*'s third element, which asks whether a challenged measure reflects a serious intrusion into protected privacy interests. (*Id.* at p. 25.)

The court next concluded that, even if plaintiffs had adequately pleaded the threshold elements of the *Hill* framework, the State's critical interest in protecting children outweighed any burden on patients' privacy interests. (Opn. at pp. 25-33.) The court explained that AB 1775 furthered the State's interest in protecting children because reports to authorities "may disrupt the proliferation of child pornography and deter the underlying conduct of viewing children who have already been sexually exploited." (*Id.* at pp. 28-29.) Plaintiffs' claim, moreover, that the "mere[]" possession of electronic child pornography does not harm children "completely lacks merit." (*Id.* at p. 31.) "The consumption of child pornography is not distinguishable from production and distribution in terms of harm to the victims of child pornography." (*Ibid.*)

Finally, the court rejected plaintiffs' contention that AB 1775 violated a federal constitutional right to privacy. It noted this Court's observation that the United States Supreme Court has not definitively determined whether the federal constitution embodies a general right to privacy. (Opn. at pp. 33-35.) Even if the federal constitution protected such a right, California's interests in identifying and protecting sexually exploited children were sufficient to justify the claimed intrusion. (*Id.* at pp. 34-35.)

This Court granted plaintiffs' petition for review.

ARGUMENT

I. AB 1775 IS CONSISTENT WITH THE STATE CONSTITUTIONAL RIGHT TO PRIVACY

A. Standard of Review

Whether a demurrer was correctly sustained is a question of law that is reviewed de novo. (See *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Plaintiffs' complaint alleged that AB 1775 is unconstitutional as to all psychotherapy patients and requested an injunction preventing its enforcement against all therapists. (See AA at pp. 26-27 (¶¶ 62, 66); AA at p. 29 [Prayer for Relief ¶¶ 1-2].) The Court of Appeal properly construed these allegations as presenting a facial challenge to AB 1775, because plaintiffs did not allege specific instances of enforcement and sought to enjoin any enforcement of the law. (Opn. at pp. 13-14, discussing *Tobe v. City of Santa Ana* (1995) 9 Cal. 4th 1069, 1089.) Plaintiffs do not

challenge that holding here. Accordingly, to state a valid claim, plaintiffs must allege "that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." (*Tobe, supra*, at p. 1084, internal quotation marks omitted.) That means that, at a minimum, they must demonstrate that the law is invalid in the "'vast majority'" of potential applications or the "generality of cases." (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 502.)[2] The Court considers "only the text of the [law] itself, not its application to the particular circumstances of an individual." (*Tobe, supra*, at p. 1084.) Further, it is not sufficient to allege that, "in some future hypothetical situation constitutional problems may possibly arise as to [a] particular application of the statute.'" (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 278.)

B. Plaintiffs' Complaint Fails to Allege a Legally Protected Interest or a Reasonable Expectation of Privacy

The Court of Appeal correctly upheld the demurrer of plaintiffs' complaint because plaintiffs failed to allege an actionable claim under the state constitution.

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[2] This Court has alternatively articulated this standard as requiring a challenger to "'establish that no set of circumstances exists under which the Act would be valid.'" (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 278.) The Court need not resolve which standard applies because plaintiffs' claim fails under either. (See *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 218.)

As an initial matter, plaintiffs focus their challenge to AB 1775 on their assertion that it makes reportable the "possession" or "viewing" of child pornography. (See OB at p. 26.) As explained above, AB 1775 added to the definition of reportable "sexual exploitation" conduct in which a person "downloads, streams, [or] accesses through any electronic or digital media" pornographic images of children. These terms focus on acts of copying or otherwise obtaining digital images from the Internet. (See *infra* at p. 34 [discussing downloading]; Barron's Dictionary of Computer and Internet Terms (9th ed. 2008) p. 482 [defining "streaming" as "delivering audio or video signals in real time, without waiting for a whole file to download before playing it"].) But at least in certain circumstances, a revelation that a patient has viewed or possessed child pornography (for example, by navigating to websites advertising illicit images of children, watching an on-line video, or storing pornographic images on a computer hard drive) will trigger a reasonable suspicion that a patient has downloaded, streamed, or accessed child pornography within the meaning of section 11165.1, subdivision (c)(3). With regard to all of the conduct covered by AB 1775, plaintiffs' constitutional challenge fails as a matter of law.

A cognizable invasion-of-privacy claim requires three elements: "(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*, *supra*, 7 Cal.4th at pp. 39-40.) If a claimant satisfies each of these elements, the defendant still prevails if the privacy intrusion "substantively furthers one or more countervailing interests." (*Id.* at p. 40.)

Here, the facts alleged in plaintiffs' complaint do not establish that AB 1775 intrudes upon a legally protected privacy interest or that patients can reasonably expect that information indicating that they possessed sexually exploitative images of children will not be reported. This Court has recognized that a patient's communications with her therapist generally implicate informational privacy interests protected by the state constitution. (*People v. Stritzinger* (1983) 34 Cal.3d 505, 511; *People v. Hammon* (1997) 15 Cal.4th 1117, 1127.) It has also concluded that precluding the dissemination of sensitive and confidential information is a legally recognized privacy interest. (See *County of Los Angeles v. Los Angeles County Employee Relations Comm'n* (2013) 56 Cal.4th 905, 927.) But the question in this case is whether patients have a legally protected privacy interest in confidentially communicating to a mental health professional that they have downloaded, streamed, or accessed digital child pornography. Patients have no such legally protected interest in light of the established "law and social custom" (*Hill*, *supra*, 7 Cal.4th at pp. 40-41) regarding such behavior. As explained above, possession of child pornography is a crime (see *supra* at pp. 13-14), and it often occurs with the

knowledge of others (see, e.g., *United States v. Stinefast* (7th Cir. 2013) 724 F.3d 925, 928 [child pornography consumer met with others on Internet to view and trade images]; *United States v. Laney* (9th Cir. 1999) 189 F.3d 954, 957 [discussing Internet chat room in which users traded sexually exploitative videos and photos].) In addition, information giving rise to suspicion that a patient has downloaded electronic child pornography is expressly excepted from the psychotherapist-patient privilege. (§ 11171.2, subd. (b); see also *infra* at pp. 31-33 [discussing exceptions to psychotherapist-patient privilege and longstanding legal norms requiring disclosures of therapeutic communications in certain settings].) Therapeutic revelations that a patient has sexually exploited children by accessing pornographic images on the Internet is not the kind of private information that article 1, section 1 was intended to protect.

Patients also lack a reasonable expectation that information indicating that they have downloaded or accessed child pornography will not be reported under CANRA. A reasonable expectation of privacy is "an objective entitlement founded on broadly based and widely accepted community norms." (*Hill*, *supra*, 7 Cal.4th at p. 37.) Custom and practice, including background legal norms, "may create or inhibit reasonable expectations of privacy." (See *id.* at p. 36; *Intern. Fed'n of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 331-332, 338; *County of Los Angeles*, *supra*, 56 Cal.4th at

p. 929.) In addition, advance notice of the possibility of disclosure diminishes privacy expectations. (See *Hill, supra*, at pp. 36, 42; *Lewis v. Superior Court* (2017) 3 Cal.5th 561, 575.)

Here, the overwhelming background norm not only permits but requires reporting of the possible abuse or exploitation of children. California law has required some form of mandatory reporting since 1963. The Legislature classified certain mental health professionals as mandatory reporters in 1977. And in 1987, it required the reporting of information suggesting that a patient had exchanged or duplicated photos of child pornography. Thus, it has been established for at least three decades that therapists must report revelations made by a patient about copying or obtaining child pornography.

It is also long-established that information subject to mandatory-reporting duties enjoys no protection under the psychotherapist-patient privilege. The Legislature established the current psychotherapist-privilege in 1965 (*People v. Gonzales* (2013) 56 Cal.4th 353, 371), and in 1980, specifically exempted information communicated pursuant to mandatory-reporting duties (*supra* at p. 16). As this Court observed nearly thirty-five years ago, "[l]est there be any doubt that the Legislature intended the child abuse reporting obligation to take precedence over the physician-patient or psychotherapist-patient privilege, [the child-abuse reporting law] explicitly

provides an exception to these very privileges." (*Stritzinger*, *supra*, 34 Cal.3d at p. 512.)

When it established the psychotherapist-patient privilege, moreover, the Legislature "at the same time adopted numerous explicit statutory exceptions to the privilege that limit the circumstances in which the privilege is applicable." (*Gonzales*, *supra*, 56 Cal.4th at p. 372; see also Evid. Code §§ 1016-1026 [enumerating exceptions].) Among these, the psychotherapist-patient privilege does not apply if the therapist has reasonable cause to believe that a patient is a danger to himself or others and that disclosure is necessary to prevent the threatened harm. (Evid. Code, § 1024, enacted by Stats. 1965, ch. 299, § 2, operative Jan. 1, 1967.) Such communications are unprivileged not only for the purpose of warning a potential victim of the threatened harm but also when no warning is issued or after the threatened harm has occurred. (*People v. Wharton* (1991) 53 Cal.3d 522, 556-557; *Menendez v. Superior Court* (1992) 3 Cal.4th 435, 451.)

At the same time, in 1976, this Court held in *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425 that a therapist owes a duty to warn if he determines that a patient poses a serious danger of violence to others. The Court recognized the important interest in confidentiality of therapy communications (*id.* at p. 440), but concluded that such an interest "must yield to the extent to which disclosure is essential to avert danger to

others" (*id.* at p. 442 ["protective privilege ends where the public peril begins"].) All of these longstanding authorities demonstrate that a patient cannot reasonably expect that information communicated during therapy giving rise to a reasonable suspicion that he is sexually exploiting children, including by downloading or streaming pornographic images of them, will be withheld from authorities.[3]

Patients are also on notice of therapists' reporting obligations. Professional standards governing certain mental health professionals require them to inform patients of the relevant limits of confidentiality. (See Am. Psychological Assn Ethical Principles of Psychologists and Code of Conduct §§ 4.02, 10.01; Bus. & Prof. Code, § 2936 [adopting APA ethics code as standard of care for licensed psychologists].)[4] Plaintiffs themselves acknowledge that they advise their patients that information

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[3] As plaintiffs note (OB at p. 28), this Court observed in *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 338-339 that "it 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." At the same time, the Court has made clear that the reasonableness of privacy expectations is shaped by background legal principles. (*IFPTE*, *supra*, 42 Cal.4th at pp. 331-332, 338; *County of Los Angeles*, *supra*, 56 Cal.4th at p. 929.) And in *American Academy of Pediatrics*, longstanding law in California supported minors' expectation that they could make medical decisions regarding pregnancy without parental approval. (*Supra*, 16 Cal.4th at pp. 319-320.)

[4] The code of ethics for the APA may be found at: http://www.apa.org/ethics/code/.

conveyed in therapy can be revealed to authorities in compliance with legal mandates like CANRA. (AA at p. 14 (¶ 33) [plaintiffs inform their patients of reporting requirement during intake screening].) Such notice underscores the unreasonableness of any expectation that information about consumption of digital child pornography will not be reported. (See *Hill*, *supra*, 7 Cal.4th at pp. 36, 42; *Lewis*, *supra*, 3 Cal.5th at p. 575.)

Plaintiffs argue that patients reasonably expect that information about their possession of child pornography will remain confidential because no law required the reporting of such conduct before AB 1775's recent enactment. (OB at pp. 24-27.) This overlooks that the prior version of the law, adopted thirty years ago, required therapists to report to authorities when they had a reasonable suspicion that their patients (or even anyone else whose conduct was discussed in a therapy session) had developed, duplicated, exchanged, or printed photos or videos of child pornography—activities that would, in many cases, be the necessary precursor (or likely successor) to a patient's own viewing or possession of child pornography. Plaintiffs' argument also ignores that the behavior covered by AB 1775 will often involve the "duplication" or "exchange" of exploitative images. (Barron's Dictionary of Computer and Internet Terms (9th ed. 2008) p. 154 [defining "download" as meaning "to transmit a file or program from a central computer to a smaller computer or a computer at a remote site"]; see

also Appropriations Com. Rep., *supra*, at p. 1 [AB 1775 "simply updates a definition that would likely include this action even absent the update"].)

To be sure, the precise statutory definition of reportable abuse and neglect has varied over time. But the fact remains that information suggesting conduct that harms children—including certain acts of obtaining child pornography—has been reportable and expressly exempted from the psychotherapist-patient privilege for thirty years. Against that legal and cultural backdrop, patients could not reasonably expect that therapists would shield from authorities information indicating that a patient has used new technological means to obtain precisely the same sort of exploitative images of children.[5]

Finally, plaintiffs' extended criticism of the Court of Appeal's short discussion of *People v. Younghanz* (1984) 156 Cal.App.3d 811 is not well-

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[5] Plaintiffs' reliance on cases upholding claims of privilege for therapy communications revealing past crimes is misplaced. (See OB at pp. 28-29.) Those cases involved situations in which the psychotherapist-patient privilege applied. (See *People v. Gonzales* (2013) 56 Cal.4th 353, 381-382 [dangerous-patient exception to privilege did not apply where patient's communications did not lead therapist to believe patient posed danger to others]; *Story v. Superior Court* (2003) 109 Cal.App.4th 1007, 1015-1016 [holding defendant's psychiatric treatment records privileged and rejecting prosecutor's argument that defendant did not qualify as a "patient"].) As explained above, information reported under CANRA is not privileged. (§ 11171.2, subd. (b).) The Court of Appeal's decision in *Scull v. Superior Court* (1988) 206 Cal.App.3d 784 is even farther afield, as that case involved a request to review therapy records of patients who might have been victimized by a therapist—not communications revealing suspicions that a patient was engaging in sexual exploitation of children.

taken. (See OB at pp. 32-34.) In *Younghanz*, the Court of Appeal rejected a patient's claim that state mandatory-reporting laws violated his due process rights by interfering with his "fundamental right to seek a cure for his illness." (*Supra*, 156 Cal.App.3d at p. 815.) The Court of Appeal here primarily cited that holding in support of its rejection of plaintiffs' claim that AB 1775 interfered with an alleged right of patients to seek treatment for sexual disorders involving the consumption of electronic child pornography. (Opn. at p. 22.) Plaintiffs appear to have abandoned that claim. (OB at pp. 32-33.) Their discussion of the Court of Appeal's treatment of *Younghanz* is thus not relevant.[6]

For all these reasons, a patient has no legally protected privacy interest in communications giving rise to a reasonable suspicion that the patient has exploited children by downloading, streaming, or accessing Internet child pornography, and no reasonable expectation that a mental health professional will withhold any such information from authorities. The courts below therefore correctly concluded that the plaintiffs in this

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[6] Plaintiffs also mis-read the Court of Appeal's decision as holding that patients can never have a reasonable expectation of privacy in therapy communications revealing any kind of past crime. (OB at pp. 28-31.) The court simply rejected *plaintiffs'* contention that the psychotherapist-patient privilege applies as a matter of law whenever a patient admits to having broken the law. (Opn. at pp. 24-25, discussing *Gonzales*, *supra*, 56 Cal.4th 353 and *Story*, *supra*, 109 Cal.App.4th 1007.)

case have not stated an actionable claim under article 1, section 1 of the state constitution.

C. The State's Critical Interest in Protecting Children Outweighs Any Recognized Privacy Interest

Even if plaintiffs could establish *Hill*'s three threshold requirements, their claim would fail because the State's powerful interest in protecting children from sexual exploitation outweighs any privacy interest patients may have in preventing the mandated reporting of digital child pornography consumption.

1. An Alleged Invasion of Privacy Does Not Violate the State Constitution If It Is Justified by Competing State Interests

This Court has recognized that an "[i]nvasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest." (*Hill*, *supra*, 7 Cal.4th at p. 38.) A defendant will prevail in a state constitutional privacy case if the claimed intrusion "substantively furthers one or more countervailing interests." (*Id.* at p. 40.) Conversely, an alleged interference with privacy interests may be unjustified if the claimant can point to "feasible and effective alternatives" with "a lesser impact on privacy interests." (*Ibid.*)

Plaintiffs ignore this established balancing test and argue instead that the State bears the burden of establishing that AB 1775 is narrowly tailored to advance a compelling interest. (OB at pp. 35-37.) That is not correct.

"[E]xcept in the rare case in which a 'fundamental' right of personal autonomy is involved," the defendant "need not present a 'compelling' countervailing interest; only 'general balancing tests are employed.'" (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 288, quoting *Hill*, *supra*, 7 Cal.4th at p. 34.)

Two recent decisions of this Court, issued after plaintiffs' opening brief was filed, confirm that *Hill*'s general balancing test applies in this case. In *Williams v. Superior Court* (2017) 3 Cal.5th 531 and *Lewis v. Superior Court*, *supra*, 3 Cal.5th 561, the Court specifically rejected application of a compelling-interest standard, affirming that only "obvious invasions of interests fundamental to personal autonomy must be supported by a compelling interest." (*Williams*, *supra*, at pp. 556-557; see also *Lewis*, *supra*, at pp. 572-573 [rejecting heightened standard of scrutiny in challenge to medical regulator's receipt of controlled substances prescription records because alleged privacy invasion did "not intrude on a fundamental autonomy right"].) *Lewis* also made clear that when a state measure does not infringe on fundamental autonomy rights, the State need not demonstrate that its chosen approach is the least intrusive means of addressing the problem. (*Supra*, 3 Cal.5th at p. 574.)

Here, CANRA reporting duties do not implicate any fundamental autonomy right. Plaintiffs claim in passing that AB 1775 interferes with autonomy interests (OB at pp. 17, 20), but never explain how CANRA's

reporting requirements impair patients' ability to make centrally important health care decisions such as the decision whether to bear a child. (See *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 340 (plur. opn. of George, C.J.) [fundamental right of minors to obtain abortion services]; *Lewis*, *supra*, 3 Cal.5th at p. 573 [*American Academy of Pediatrics* only decision of this Court to require compelling state interest].) This Court, moreover, has rejected suggestions that information-disclosure requirements infringe on constitutionally protected rights to personal medical decision-making. (See *Lewis*, *supra*, 3 Cal.5th at p. 573 [disclosure of prescription information may "be one consideration affecting a patient's choice to pursue treatment" but does not deprive patients of the right to make independent decisions about their medical care]; *Wharton*, *supra*, 53 Cal.3d at p. 558 [concern that allowing disclosures will discourage patients from seeking mental health counseling "'entirely speculative," quoting *Tarasoff*, *supra*, 17 Cal.3d at p. 440, fn. 12].)

Nor do CANRA's reporting requirements involve the kind of "extremely grave" or "egregious" invasion, akin to intrusions into bodily autonomy rights, that would justify a heightened level of scrutiny. (See *Williams*, *supra*, 3 Cal.5th at p. 557.) As explained above, patients lack any reasonable, legally sanctioned expectation that communications to mental health professionals revealing that they have sexually exploited children by accessing Internet child pornography will not be disclosed to authorities.

(*Supra* at pp. 29-33.) Moreover, CANRA requires only that mandated reporters inform authorities of information giving rise to a suspicion that a child has been abused or exploited. (*Supra* at p. 19.) The report does not include family history, medical records, or information about therapeutic communications unrelated to child exploitation. Mandated reports, moreover, are confidential and may be shared only with specified officials responsible for the protection of children. (§ 11167.5, subds. (a), (b); *supra* at p. 20.) Given the absence of a reasonable expectation of privacy, the limited nature of CANRA mandatory reporting, and safeguards against public disclosure, there is no basis to depart from *Hill*'s legitimate-interest balancing test here. (See *Hill*, *supra*, 7 Cal.4th at p. 38.)

This Court's decisions in *In re Lifschutz* (1970) 2 Cal.3d 415 and *People v. Stritzinger* (1983) 34 Cal.3d 505 do not support application of a different standard of scrutiny. (Compare OB at p. 37.) *Lifschutz* was decided before an express right to privacy was added to the state constitution, and thus could not have addressed the proper standard for evaluating article 1, section 1 privacy claims. (See *Hill*, *supra*, 7 Cal.4th at p. 31, fn. 10 ["While at least two of our cases decided before the Privacy Initiative," including *Lifschutz*, "referred in part to a constitutional right of privacy, a closer examination of those cases reveals a grounding in statutory or constitutional provisions not creating a 'privacy' right."].)

Stritzinger pre-dates *Hill*, and did not address a constitutional privacy claim. (*Stritzinger*, *supra*, 34 Cal.3d at p. 512.) The Court there held that particular testimony by a psychologist did not fall within the statutory exemption from the psychotherapist-patient privilege for mandatory reports under the State's child abuse reporting law. (*Id.* at pp. 513-514.) The Court acknowledged that the "psychotherapist-patient privilege has been recognized as an aspect of the patient's constitutional right to privacy" and that the right "may yield in the furtherance of compelling state interests." (*Id.* at p. 511; see also *Hill*, *supra*, 7 Cal.4th at p. 34, fn. 11 [*Stritzinger* provided that "patient's privacy interest in psychotherapy must yield to compelling state interests"].) But the Court did not hold that statutorily required disclosures of therapist-patient communications could survive constitutional scrutiny only if supported by a compelling interest.

This Court's decision in *Williams*, moreover, undermines plaintiffs' contrary reading of *Stritzinger*. In confirming that only invasions of autonomy rights require the State to demonstrate a compelling interest, *Williams* disapproved cases demanding that the State come forward with a "compelling interest" without examination of the nature of privacy rights at stake, including the two Court of Appeal cases *Stritzinger* cited in using the compelling-interest language. (Compare *Stritzinger*, *supra*, 34 Cal.3d at p. 511, citing *Britt v. Superior Court* (1978) 20 Cal.3d 844, 855; *Jones v. Superior Court* (1981) 119 Cal.App.3d 534, 550; *Board of Medical Quality*

Assurance v. Gherardini (1979) 93 Cal.App.3d 669, 680, with *Williams*, 3 Cal.5th at p. 557, fn. 8 [disapproving *Jones* and *Gherardini*].)

Hill's legitimate-interest balancing test applies to plaintiffs' claim.

2. Mandating Reports of Information Concerning Downloading or Accessing Sexually Exploitative Images of Children Advances the State's Vital Interest in Protecting Children

Hill's balancing test tips decisively in the State's favor. AB 1775's requirement that mental health professionals report reasonable suspicions that patients are accessing child pornography over the Internet furthers vital—indeed, compelling—state interests. "It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling." (*New York v. Ferber* (1982) 458 U.S. 747, 756-757, internal quotation marks omitted; *Am. Acad. of Pediatrics*, *supra*, 16 Cal.4th at p. 342 [State has "particularly compelling interest" in protecting children].) In particular, the "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." (*Ferber*, *supra*, 458 U.S. at 757.) Plaintiffs do not contend otherwise. (See OB at p. 39.)

AB 1775 substantively furthers this critical interest. As this Court has recognized, "[o]ftentimes, reporting by third parties is the only way the proper authorities become aware of an incident of child abuse." (*B.H.*, *supra*, 62 Cal.4th at p. 190.) Information about suspected downloading or

accessing of Internet child pornography advances the State's interest in stopping ongoing exploitation of the children depicted. As explained above, images of child pornography are a "permanent record" of the child's sexual abuse, and each new viewing exploits and victimizes the child pictured. (See *Grant*, *supra*, 58 Cal.4th at p. 477, internal quotation marks omitted; *Paroline v. United States* (2014) __ U.S. __ 134 S.Ct. 1710, 1727 ["In a sense, every viewing of child pornography is a repetition of the victim's abuse."].) Each new viewing invades the child's privacy and harms her reputation and well-being. (*Grant*, *supra*, at p. 477; see also *Paroline*, *supra*, at p. 1727 [victim's declaration explaining degradation and humiliation caused by repeat viewing of images of her sexual abuse].) Mandated reporting of Internet child pornography consumption assists authorities in locating and confiscating these exploitative images. (See § 1524, subd. (a)(5) [warrants for evidence tending to show possession of child pornography]; § 312.3 [authorizing forfeiture and destruction of child pornography].)

Mandated reporting of digital child pornography consumption also advances the State's interest in bringing perpetrators to justice and drying up the market for images of children's sexual abuse. Contrary to plaintiffs' suggestion (OB at p. 39), one of CANRA's goals is to facilitate the criminal prosecution of those who abuse and exploit children. CANRA specifically requires child welfare and law enforcement agencies to cross-report

information about suspected child abuse to district attorney offices, and mandates that data in the Department of Justice's Child Abuse Central Index be provided to prosecutors. (§ 11166, subds. (j), (k); § 11170, subd. (b)(1).) These provisions (among others) demonstrate that bringing "child abuser[s] to justice" is a central purpose of CANRA. (*Planned Parenthood Affiliates v. Van De Kamp* (1986) 181 Cal.App.3d 245, 258; see also *People v. Battaglia* (1984) 156 Cal.App.3d 1058, 1063 ["Prosecution is one of [reporting law's] legislative purposes."]; *Stritzinger*, *supra*, 34 Cal.3d at p. 512 [reporting law exempts from any attempted invocation of the psychotherapist-patient privilege in subsequent judicial proceedings, "so that incidents of child abuse might be promptly investigated and *prosecuted*," italics added]. Reporting of electronic child pornography consumption to law enforcement authorities promotes the State's interest in bringing to justice those who exploit children by downloading images of their sexual abuse.

In this way, mandated reporting of electronic child pornography consumption also promotes the important objective of drying up the market for sexually exploitative images of children. As the high court explained, it is "surely reasonable for [a] State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand." (*Osborne v. Ohio* (1990) 495 U.S. 103, 109-110; see also *Shoemaker*, *supra*, 214 Cal.App.4th at p. 1230

[penalizing those who possess and view child pornography advances State's interest in "destroying the market for the exploitative use of children"].)

Mandated reporting of child pornography consumption also advances the State's interest in ensuring that those with direct access to children do not threaten them with harm. As explained above, agencies investigating information received from mandated reporters are required to submit substantiated reports of abuse to the Department of Justice's Child Abuse Central Index. That index, in turn, provides information not only to law enforcement agencies but also to agencies with regulatory authority to oversee licensed child-care facilities and other persons with direct access to children. (See *supra* at p. 20 [agencies conducting background checks on prospective adoptive parents and peace officers, among others].)

All of these critical interests in protecting children from exploitation outweigh any intrusion into patients' asserted privacy interests in the information at issue here. The scope of information provided in a mandated report is limited to that pertaining to the suspicion of child abuse and does not extend into other matters such as family history or unrelated therapeutic communications. In addition, mandated reports are non-public and may be shared only with specified officials responsible for the protection of children. (*Supra* at p. 20; see *Lewis*, *supra*, 3 Cal.5th at pp. 576-577 [protective measures considered when balancing interests].)

Because the claimed intrusion here is "limited and confidential information is carefully shielded from disclosure except to those who have a legitimate need to know, privacy concerns are assuaged." (*Lewis*, *supra*, at p. 576, internal quotation marks omitted.)

This Court's decision in *People v. Wharton*, *supra*, 53 Cal.3d 522, supports the conclusion that the State's interests here justify the claimed intrusion into patients' asserted privacy interests. There, this Court concluded that allowing psychotherapists to testify about therapeutic communications falling within the dangerous-patient exception to the psychotherapist-patient privilege did not violate a patient's constitutional right to privacy. (*Id.* at p. 563.) The Court recognized "the relationship between the psychotherapist-patient privilege and a patient's constitutional right to privacy," but deemed "the state's interest in seeking to redress wrongs committed against its citizens" sufficient to justify the disclosure. (*Ibid.*, internal quotation marks and ellipses omitted.) The State's paramount interest in protecting children likewise justifies the disclosures required here. (See also *Planned Parenthood Affiliates*, *supra*, 181 Cal.App.3d at p. 280 ["no quarrel" with proposition that "the child abuse reporting law is of sufficient importance to the fight against child abuse that it may override an accused abuser's constitutional rights"]; cf. *Conley v. Roman Catholic Archbishop of San Francisco* (2000) 85 Cal.App.4th 1126

[State's interest in enforcing reporting obligations with respect to clergy mandatory reporters overrides Free Exercise concerns].)[7]

3. Plaintiffs' Contrary Arguments Lack Merit

Plaintiffs' arguments challenging the interests served by AB 1775 have no merit. Significantly, plaintiffs appear to concede that the State may constitutionally compel therapists to report the forms of abuse and exploitation defined in CANRA before AB 1775's enactment. (Opn. at p. 27; AA at p. 2 (¶ 3); OB at pp. 4-5.) Thus, their challenge to AB 1775 turns on their contention that downloading or accessing electronic child pornography is sufficiently different from, and less harmful to children than, other forms of reportable abuse that a different constitutional balance is required here. (OB at pp 38-40.) This argument cannot be sustained.

As an initial matter, it is difficult to understand why mandating reports of electronic downloading of child pornography should be treated differently for constitutional purposes from mandating reports of the exchange or duplication of materials such as physical photographs, which CANRA has long required. Moreover, plaintiffs are wrong in contending

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[7] Plaintiffs err in relying on this Court's decision in *Menendez v. Superior Court*, *supra*, 3 Cal.4th 435. (OB at pp. 40-41.) There, the Court held that a recording of a therapy session relevant to a criminal proceeding was covered by the statutory psychotherapist-patient privilege, notwithstanding the People's interest in successful criminal prosecutions. (*Menendez*, *supra*, at pp. 455-456 & 456, fn. 18.) The case did not address a claim that a statute permitting limited reporting to authorities of unprivileged information violated the state constitution.

that protecting children from the "mere" possession of digital images of child pornography is an inadequate state interest. Such conduct exploits the child victim, invades her privacy, and creates economic incentives for the sexual abuse of children. (*Supra*, at pp. 14-15.) As this Court has explained, there is "'no sense in distinguishing ... between the producers and the consumers of child pornography,'" as "'[n]either could exist without the other.'" (*Grant*, *supra*, 58 Cal.4th at p. 478, quoting *Norris*, *supra*, 159 F.3d at p. 930.) "[E]ven simple possession" of child pornography "affect[s] real victims." (*Paroline*, *supra*, 134 S.Ct. at p. 1727.)[8]

For similar reasons, plaintiffs' repeated claim that AB 1775 will not reliably prevent "hands on" abuse or lead to the rescue of children depicted in pornographic images (OB at pp. 44-46) does not advance their cause. The 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

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[8] Plaintiffs misread *People v. Haraszewski* (2012) 203 Cal.App.4th 924 as supporting their effort to minimize the harm caused by possession of child pornography. (OB at p. 42.) The court there distinguished the offense of duplicating child pornography with the intent to distribute it to a minor (§ 311.2) from the offense of possession (§ 311.11), but did not suggest that possession is not itself a form of child exploitation that the State has an interest in stamping out. (See *Haraszewski*, *supra*, at p. 942 [possession not an act "of abusive or exploitative use of children *in the production and distribution* of child pornography," italics added].)

interests. In any event, plaintiffs do not explain how their assurance that those who possess child pornography pose no risk to public safety can be reconciled with the legislative judgment that offenders convicted of possessing child pornography pose risks of harm necessitating lifetime registration as sex offenders. (*Supra* at p. 15.)

Plaintiffs' brief argues that it is only "speculation" that seizing images of child pornography will assist law enforcement in identifying and rescuing the children depicted. (See OB at p. 44, bolding omitted; *id.* at p. 45 [arguing only a "slim possibilit[y]" that AB 1775 will assist in identifying and rescuing children].) But their complaint specifically alleged that the Child Victim Identification Program of the National Center for Missing and Exploited Children, a congressionally authorized clearinghouse for information about child victims of sexual and other forms of exploitation (see 34 U.S.C. § 11293, subd. (b)), reviewed and analyzed 15 million child pornography images between 2003 and 2009 and identified 1,600 child victims. (AA at p. 18 (¶ 42) [INTERPOL Child Abuse Image Database assisted authorities in rescuing 870 children worldwide as of 2009].) Thus, plaintiffs' own allegations demonstrate that the state interest in rescuing children from sexual abuse is furthered by review of images of child pornography.

Plaintiffs' further assertion that AB 1775 is unconstitutionally overbroad is not correct. (OB at pp. 47-49.) Plaintiffs claim that

mandating reporting when minors text or email sexually explicit images to each other does not serve the State's interest in protecting children from abuse and neglect. (OB at pp. 47-49.) But even if plaintiffs were correct that the narrow application of the statute that they target—reporting of information relating only to entirely consensual "sexting" between minors—infringed protected privacy rights, that would provide no basis for invalidating AB 1775 as to all therapy patients and therapists, the sole remedy plaintiffs seek. (See *Kasler*, *supra*, 23 Cal.4th at 502 [facial challenge must demonstrate that law is invalid in the "'vast majority'" of applications or "generality of cases"]; *Matosantos*, *supra*, 53 Cal.4th at p. 278 ["future hypothetical" harm will not facially invalidate statute].)

In any event, plaintiffs' constitutional arguments are unpersuasive. No court has addressed whether section 11165.1, subdivision (c)(3), as amended by AB 1775, requires reporting of consensual "sexting" between minors. But assuming that it does, that would pose no constitutional concern. Plaintiffs primarily contend that the State could have no interest in the reporting of such conduct because it does not involve child abuse. (OB at p. 47.) That contention ignores that, even in the case of "self-produced" pornography, where a minor creates it and consents to another person receiving it, she "can never be sure who else will ultimately possess it, precisely because it can be reproduced and transmitted indefinitely." (*People v. Gonzalez* (2012) 211 Cal.App.4th 132, 139; see also Opn. at

p. 35 [noting State's interest in investigating whether minor-to-minor exchange of images is truly consensual].)

The sole case on which plaintiffs rely, *Planned Parenthood Affiliates v. Van de Kamp*, *supra*, 181 Cal.App.3d 245 is inapposite. There the court concluded that certain minors had constitutional privacy rights to avoid mandated reporting when they obtained reproductive health services, including contraceptive or abortion services or treatment for sexually transmitted diseases. Plaintiffs do not, and cannot, establish that any privacy interest regarding minor-to-minor texting—which involves at least two parties who bear no legal duties of confidentiality to each other—merits the same kind of protection as intimate, confidential decision-making when a minor seeks reproductive health services from her physician.

Finally, plaintiffs claim that AB 1775 will undermine, rather than promote, the State's interest in public safety by discouraging patients with serious mental health disorders from obtaining needed mental health services. (OB at pp. 4-5, 11, 51.) This Court has dismissed as "'entirely speculative'" predictions that allowing defined disclosures of therapeutic communications will lead patients to forgo necessary treatment. (See *Wharton*, *supra*, 53 Cal.3d at p. 558, quoting *Tarasoff*, *supra*, 17 Cal.3d at p. 440, fn. 12.) In any event, whether expanded reporting obligations or greater therapist-patient confidentiality will better protect children's safety

is a policy matter for the Legislature to decide. In light of the absence of any reasonable, legally protected interest in shielding therapeutic communications concerning the consumption of child pornography from a CANRA report and the State's paramount interest in protecting children from sexual exploitation, nothing in the state constitution prohibits the weighing of these interests reflected in the Legislature's adoption of AB 1775.

II. AB 1775 DOES NOT VIOLATE ANY FEDERALLY PROTECTED RIGHT TO PRIVACY

Plaintiffs' additional claim that AB 1775 violates the Fourteenth Amendment's due process clause fails. As an initial matter, it is not clear that plaintiffs' challenge based on the federal constitution is properly presented. Although their petition for review mentioned the Fourteenth Amendment in passing (Pet. for Review at pp. 4, 5), it is otherwise focused on the state constitution, and the relevant federal authorities are not discussed. (See Cal. Rules of Court, rule 8.516, subd. (b)(1) [Court "may decide any issues that are raised or fairly included in the petition or answer"].)[9]

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[9] Plaintiffs' opening brief states the third "Issue Presented" as whether AB 1775 violates the California and U.S. Constitutions. (OB at p. 2.) That recitation of the issue presented is not the same as set forth in plaintiffs' petition for review. (Pet for Review at p. 4 [issue 3].)

In any event, any claim based on the federal constitution fails. Even assuming that the federal constitution encompasses a right to informational privacy, the State's critical interest in protecting children from abuse and exploitation outweighs any intrusion into protected privacy interests. The United States Supreme Court has not expressly recognized a federal constitutional right to informational privacy. (See *Gonzales*, *supra*, 56 Cal.4th at pp. 384-386.) In addressing informational privacy claims under the Fourteenth Amendment, the high court has assumed without deciding that the federal constitution contains such a right, and then concluded that the challenged measure complies with the constitution. (See *ibid.*, discussing *National Aeronautics and Space Admin. v. Nelson* (2011) 562 U.S. 134, 147-159 and *Whalen v. Roe* (1977) 429 U.S. 589, 600-606; see also *Nixon v. Administrator of General Services* (1977) 433 U.S. 425, 457.)[10] This Court has also recognized that the high court's adoption of a

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[10] Plaintiffs do not address these cases, but instead cite decisions of the United States Court of Appeals for the Ninth Circuit to support their assertion that the federal constitution protects a right to informational privacy. (OB at pp. 51-54; see *Coons v. Lew* (9th Cir. 2014) 762 F.3d 891, 900 ["The Supreme Court has recognized a fundamental privacy right in non-disclosure of personal medical information," citing *Whalen*, *supra*, 429 U.S. at p. 599].) Those circuit court authorities are not controlling (*People v. Williams* (2013) 56 Cal.4th 630, 668) and in any event depart from this Court's recognition that the high court has not definitively determined that the federal constitution establishes such a right (see *Gonzales*, *supra*, 56 Cal.4th at p. 384.) For similar reasons, plaintiffs' reliance on *Planned Parenthood of Southern Arizona v. Lawall* (9th Cir. 2002) 307 F.3d 783, 790, is misplaced. Plaintiffs cite *Lawall* for the proposition that the State (continued...)

psychotherapist-patient privilege in *Jaffee v. Redmond* (1996) 518 U.S. 1, on which plaintiffs here rely, was grounded in the Federal Rules of Evidence and not the federal constitution. (*Gonzales*, *supra*, at p. 384.)

When confronted with an informational privacy claim under the federal constitution, this Court has followed the high court's practice of assuming, without deciding, that such a right exists and then determining whether the challenged measure would infringe any such right. (*Gonzales*, *supra*, 56 Cal.4th at p. 385; *People v. Garcia* (2017) 2 Cal.5th 792, 809-810.) The Court examines "the specific nature and extent of the federal constitutional privacy interests" and the "permissible state law interests" (*Gonzales*, *supra*, 56 Cal.4th at p. 386), and then "balance[s] the particular intrusion on defendant's privacy against the [State's] justification" (*Garcia*, *supra*, 2 Cal.5th at p. 810.) To prevail, the State need not show that the alleged intrusion is "'necessary' or the least restrictive means of furthering its interests." (*Nelson*, *supra*, 562 U.S. at p. 153; see also *Whalen*, *supra*, 429 U.S. at p. 597.) Rather, the Court looks at whether the challenged measure is "supported by a legitimate and substantial state interest." (*Gonzales*, *supra*, 56 Cal.4th at p. 388.)

(...continued)
bears the burden of demonstrating that its actions are "narrowly tailored" to achieve legitimate state interests. (OB at p. 53.) But as explained above, neither the high court nor this Court has imposed such a burden on state defendants in cases alleging violations of any federal informational privacy right.

Protecting children from abuse is such an interest. As noted above, the high court has recognized that possession of child pornography inflicts serious harm on child victims. (*Supra*, at pp. 14-15.) And it has made clear that the "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." (*Ferber*, *supra*, 458 U.S. at pp. 757-758.)

On the other side of the scale, the claimed intrusion here is limited. Patients have no legally protected privacy interest and no reasonable expectation of privacy over therapeutic communications suggesting that they have sexually exploited children, and CANRA circumscribes both the information that must be reported and the entities entitled to receive information contained in CANRA reports. (*Supra* at p. 20; see also *Nelson*, *supra*, 562 U.S. at p. 155 [statutory restrictions against unwarranted disclosure relevant in evaluating statute's constitutionality].) The high court has also declined to assign constitutional significance to the purported harms of deterrence from seeking treatment and stigmatization that plaintiffs now advance. (See *Whalen*, *supra*, 429 U.S. at pp. 595, 602.) Plaintiffs have accordingly failed to point to any recognized federal privacy

interest that could outweigh California's critically important interest in protecting children from abuse and exploitation.[11]

The United States Supreme Court has uniformly rejected informational privacy claims pleaded under the federal constitution. Given the State's critical interest in protecting children from sexual exploitation, there is nothing about the present case that warrants a different result.

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[11] *Tucson Woman's Clinic v. Eden* (9th Cir. 2004) 379 F.3d 531, on which plaintiffs rely (OB at pp. 51, 53), is inapposite. The court there upheld the statute's requirement that incidents of injury, including the patients' name, had to be reported to the State because the State's interest in investigating abortion-related deaths or injuries outweighed patients' informational privacy interest. (*Tucson Woman's Clinic*, *supra*, at pp. 553-554.) The court struck down other provisions of the law that gave state employees and private contractors nearly unfettered access to women's medical records and ultrasound images without any legitimate need for the information or adequate controls over its dissemination. (*Id.* at p. 553 [State's need for ultrasound images "hard to fathom"].) The opposite is true here.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Dated: September 5, 2017 Respectfully submitted,

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General

Aimee Feinberg /M.C.O

AIMEE FEINBERG
Deputy Solicitor General
MARC A. LEFORESTIER
Supervising Deputy Attorney General
S. MICHELE INAN
Deputy Attorney General
MAX CARTER-OBERSTONE
Associate Deputy Solicitor General
Attorneys for the California Attorney General

CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWERING BRIEF OF THE CALIFORNIA ATTORNEY GENERAL uses a 13-point Times New Roman font and contains 10,293 words.

Dated: September 5, 2017

XAVIER BECERRA
Attorney General of California

MAX CARTER-OBERSTONE
Associate Deputy Solicitor General
Attorneys for the California Attorney General

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Mathews, Don L., et al. v. Xavier Becerra, et al. (SUPREME COURT)**
Case No.: **S240156**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On September 5, 2017, I served the attached **ANSWERING BRIEF OF THE CALIFORNIA ATTORNEY GENERAL** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Salvatore Zimmitti
Mark Hardiman
Nelson Hardiman LLP
11835 West Olympic Boulevard, Suite 900
Los Angeles, CA 90064

Superior Court of California
County of Los Angeles
Stanley Mosk Courthouse
111 North Hill Street
Los Angeles, CA 90012-3014

Thomas C. Hurrell
Roderick Sasis
Maria Markova
Hurrell Cantrall, LLP
300 South Grand Avenue, Suite 1300
Los Angeles, CA 90071

Court of Appeal of the State of California
Second Appellate District
Division Two
300 South Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 5, 2017, at San Francisco, California.

M. Campos
Declarant

M. Campos
Signature

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