

CASE NO. 12-17681  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID PICKUP, CHRISTOPHER H. ROSIK, PH.D., *et. al.*

Plaintiffs-Appellants,

v.

EDMUND G. BROWN, Jr. Governor of the State of California, in his official capacity, *et. al.*

Defendants-Appellees.

and

EQUALITY CALIFORNIA,

Intervenor-Defendant-Appellee

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**On Appeal from the Eastern District of California**  
**Case No. 2:12-cv-02497-KJM-EFB Honorable Kimberly J. Mueller**

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**PLAINTIFFS-APPELLANTS' MOTION TO RECALL MANDATE**

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## INTRODUCTION

When the United States Supreme Court reversed this Court’s decision in *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018) (“*NIFLA*”), it also abrogated this Court’s decision in the case at bar upon which the *NIFLA* decision relied. *Id.* at 2371-75. In light of the Supreme Court’s explicit rejection of the panel’s analysis in this appeal, Plaintiffs are asking the Court to exercise its inherent power to recall the mandate issued on July 7, 2014 (Dkt. 135). *See Aerojet–General Corp. v. American Arbitration Association*, 478 F.2d 248, 254 (9th Cir. 1973) (affirming the Court’s inherent power to recall its mandate to prevent injustice). The *Pickup* analysis has been widely relied upon by panels of this Court,<sup>1</sup> other courts of appeal,<sup>2</sup> the California Legislature in seeking to expand the

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<sup>1</sup> *See e.g., NIFLA v. Harris*, 839 F.3d 823 (9th Cir. 2016), *rev’d and remanded sub nom NIFLA v. Becerra*, 138 S.Ct. 2361 (2018); *A Woman’s Friend Pregnancy Resource Clinic v. Harris*, 669 Fed. Appx. 495 (9th Cir. 2016), *cert. granted, vacated and remanded sub nom A Woman’s Fried Pregnancy Resource Clinic v. Becerra*, 2018 WL 3148264 (2018); *Livingwell Medical Clinic, Inc. v. Harris*, 669 Fed. Appx. 493 (9th Cir. 2016), *cert. granted, vacated and remanded sub nom Livingwell Medical Clinic, Inc., v. Becerra*, 2018 WL 3148264 (2018); *Mountain Right to Life v. Becerra*, 692 Fed. Appx. 807 (9th Cir. 2017), *cert. granted, vacated and remanded*, 2018 WL 3148273 (2018).

<sup>2</sup> *See e.g., King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014), *cert. denied*, 135 S.Ct. 2048 (2015), *abrogated by NIFLA v. Becerra*, 138 S.Ct. 2361 (2018); *Doe ex rel. Doe v. Governor of New Jersey*, 783 F.3d 150 (3d Cir. 2015), *cert. denied*, 136 S.Ct. 1155 (2016); *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), *cert. denied sub. nom. Walker-McGill v. Stuart*, 135 S.Ct. 2838 (2015).

prohibition on voluntary Sexual Orientation Change Efforts (“SOCE”),<sup>3</sup> and other states and municipalities in passing laws similar to SB1172.<sup>4</sup> Consequently, the Supreme Court’s explicit abrogation of the *Pickup* doctrine has far-ranging effects beyond the state law challenge at issue in this case.

The Supreme Court’s rejection of this Court’s analysis presents the kind of extraordinary circumstance that warrants use of the power to recall the mandate. *Calderon v. Thompson*, 523 U.S. 538, 550 (1998) (quoting 16 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3938, p. 712 (2d ed. 1996)). This Court should do so.

## **FACTUAL AND PROCEDURAL BACKGROUND**

In this action, Plaintiffs sought to enjoin California’s SB1172, which classified as professional misconduct voluntary talk-therapy known as SOCE counseling for minors who request and desire to receive it, and subjected licensed counselors to discipline up to loss of their licenses if they provided such speech-only

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<sup>3</sup> AB2943, California Legislature 2017-2018 Reg. Sess., Bill Analyses for the Assembly Privacy and Consumer Protection Committee March 29, 2018; Assembly Judiciary Committee April 7, 2018 and Senate Judiciary Committee June 11, 2018, available at [http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201720180AB2943](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180AB2943).

<sup>4</sup> *See e.g.*, S.B. 270, 29th Leg. Sess. (Hawaii 2018), Report of Senate Committee on Commerce, Consumer Protection, and Health, available at: [https://www.capitol.hawaii.gov/session2018/CommReports/SB270\\_SD1\\_SSCR2550\\_.htm](https://www.capitol.hawaii.gov/session2018/CommReports/SB270_SD1_SSCR2550_.htm); S.B. 201, 79<sup>th</sup> Leg., 2017 Sess. (Nevada 2017), available at: [https://www.leg.state.nv.us/Session/79th2017/Bills/SB/SB201\\_EN.pdf](https://www.leg.state.nv.us/Session/79th2017/Bills/SB/SB201_EN.pdf).

counseling to their willing clients. In upholding the district court’s denial of the preliminary injunction, this Court adopted a “continuum” to analyze restrictions upon the speech and conduct of professionals differently from restrictions on non-professionals. *Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2014).

At one end of the continuum, where a professional is engaged in a public dialogue, First Amendment protection is at its greatest. Thus, for example, a doctor who publicly advocates a treatment that the medical establishment considers outside the mainstream, or even dangerous, is entitled to robust protection under the First Amendment—just as any person is—even though the state has the power to regulate medicine.

*Id.*

“At the midpoint of the continuum, within the confines of a professional relationship, First Amendment protection of a professional’s speech is somewhat diminished.” *Id.* at 1228. According to this Court, at that midpoint, a professional can be compelled to utter a state-mandated message containing truthful non-misleading information to patients or clients in the context of the professional relationship. *Id.* This is true, the Court said, even though “[o]utside the professional relationship, such a requirement would almost certainly be considered impermissible compelled speech.” *Id.*

Finally, at the lowest point of the continuum lies what this Court labeled “professional *conduct* where the state’s power is great, even though such regulation may have an incidental effect on speech.” *Id.* at 1229 (emphasis in original).

Pursuant to its police power, California has authority to regulate licensed mental health providers' administration of therapies that the legislature has deemed harmful. Under *Giboney [v. Empire Storage and Ice]*, 336 U.S. [490] at 502, 69 S.Ct. 684 [(1949)], the fact that speech may be used to carry out those therapies does not turn the regulation of conduct into a regulation of speech.

*Id.* “We further conclude that the First Amendment does not prevent a state from regulating treatment **even when that treatment is performed through speech alone.**” *Id.* at 1230 (emphasis added). Based upon that conclusion, this Court found that SB1172 fell at the lowest level of the continuum and did not implicate the First Amendment. *Id.* at 1231.

On January 29, 2014 this Court denied Plaintiffs' Petition for Rehearing and Rehearing en banc (Dkt. 128), and on February 3, 2014 this Court granted Plaintiffs' request to stay the mandate pending disposition of Plaintiffs' Petition for Writ of Certiorari to the United States Supreme Court. (Dkt. 130). On June 30, 2014, the Supreme Court denied Plaintiffs' Petition. *Pickup v. Brown*, 134 S.Ct. 2871 (2014). On July 7, 2014, this Court issued its mandate. (Dkt. 135).

## ARGUMENT

### I. THIS COURT HAS CLEAR AUTHORITY TO RECALL A MANDATE THAT HAS BEEN ABROGATED BY THE SUPREME COURT.

This Court's authority to recall its mandate exists as part of its power to protect the integrity of its own processes. *Perkins v. Standard Oil Co. of Cal.*, 487 F.2d 672, 674 (9th Cir. 1973). The authority is not explicitly provided for by statute, “but its

existence cannot be questioned.” *Aerojet General*, 478 F.2d at 254. “Broadly stated, this authority may be exercised for “‘good cause’ and to ‘prevent injustice’ ....” *Id.* (citations omitted).

Nevertheless, our authority to recall a mandate is limited. The decision whether to exercise the power “falls within the discretion of the court, but such discretion should be employed to recall a mandate only when good cause or unusual circumstances exist sufficient to justify modification or recall of a prior judgment.” *Id.* [*Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988)]. In general, we will recall a mandate only when we are animated by “an overpowering sense of fairness and a firm belief that this is the exceptional case requiring recall of the mandate in order to prevent an injustice.” *Verrilli v. City of Concord*, 557 F.2d 664, 665 (9th Cir. 1977).

*Nevius v. Sumner*, 105 F.3d 453, 460–61 (9th Cir. 1996).

This Court has made it clear that “an exceptional case” justifying the recall of a mandate exists when the Supreme Court abrogates, in whole or in part, a decision or rationale of this court: “Thus we have recalled a mandate when a subsequent ‘decision of the Supreme Court departs in some pivotal aspects from a decision of’ this court.” *Id.* at 461 (quoting *Zipfel*, 861 F.2d at 567). In *Zipfel*, this Court recalled its mandate after a Supreme Court decision resolved a conflict between the Fifth Circuit and this Circuit on a procedural issue in favor of the Fifth Circuit’s view. 861 F. 2d at 569-70. “*Chick Kam Choo [v. Exxon]*, 486 U.S. 140 (1988)] teaches us that we applied the wrong analysis to the injunction as it applied to the claims of the foreign seamen.” *Zipfel*, 861 F.2d at 570. “When a decision of the Supreme Court ‘departs in some pivotal aspects’ from a decision of a federal appeals court, recall of

a mandate may be warranted to the extent necessary ‘to protect the integrity’ of the court of appeals’ prior judgment.” *Id.* at 567 (quoting *American Iron and Steel Institute v. EPA*, 560 F.2d 589, 596 (3d Cir.1977)). “Modification of a prior judgment also promotes uniformity in judicial decisionmaking and in the treatment of litigants.” *Id.*

The recent Supreme Court decision in *Chick Kam Choo* departs in a pivotal aspect from our decision of the injunction issue in this case. The effect of this departure is to overrule our resolution of the injunction issue, at least in part. We, therefore, exercise our power to recall the mandate and amend the opinion “[b]ecause of an overpowering sense of fairness and a firm belief that this is the exceptional case requiring recall of the mandate in order to prevent an injustice....”

*Id.* at 567-68 (quoting *Verrilli*, 557 F.2d at 665). Similarly, when a subsequent unrelated Supreme Court decision contradicted the reasoning underlying this Court’s determination regarding criminal sentencing, this Court recalled its mandate and withdrew its opinion. *United States v. Davis*, 36 F.3d 1424, 1429–30 (9th Cir. 1994).

Importantly, neither the passage of time (even several years), nor the conclusion of a case to final judgment, deprives this Court of the inherent authority to recall its mandate. *See e.g.*, *Zipfel*, 861 F.2d at 567 (Motion to recall mandate granted 15 months after mandate issued); *United States v. Skandier*, 125 F.3d 178, 183 (3d Cir. 1997) (Motion to recall mandate granted 19 months after initial determination, immediately following a Supreme Court decision affecting the plaintiff’s claims); *American Iron & Steel Institute v. EPA*, 560 F.2d 589, 590-91

(3d Cir. 1977) (Motion to recall mandate granted 21 months after mandate issued); *United States v. Emeary*, 794 F.3d 526, 529 (5th Cir. 2015) (Motion to recall mandate granted five years after mandate issued); *United States v. Davila*, 890 F.3d 583, 585 (5th Cir. 2018) (Motion to recall mandate granted one year after mandate issued due to intervening appellate court decision); *United States v. Smith*, 685 F. App'x 270, 271 (4th Cir. 2017) (Motion to recall mandate granted 16 months after mandate issued); *Mars, Inc. v. Coin Acceptors, Inc.*, 557 F.3d 1377, 1378 (Fed. Cir. 2009) (Motion to recall mandate granted 8 months after mandate issued).

Here, the Supreme Court's opinion in *NIFLA* does not merely "depart in a pivotal aspect" from this Court's decision in *Pickup*, but actually explicitly abrogates the decision. Consequently, this is an even more exceptional case than were *Zipfel* and *Davis*, requiring recall of the mandate. Recalling the mandate is also particularly critical in this case because of the far-ranging effects that the incorrect, now-abrogated *Pickup* opinion has had and continues to have across the country, as the *NIFLA* decision attests. *Pickup* has not only been used by this Court to deny injunctive relief in *NIFLA* and the companion cases, but also by the Third Circuit to uphold a law similar to SB1172 in New Jersey, *King*, 767 F.3d at 232-33 and by the

Eleventh Circuit to uphold physician speech restrictions. *Wollschlaeger v. Governor of Fla.*, 760 F.3d 1195, 1217 (11th Cir. 2014).<sup>5</sup>

## **II. NIFLA ABROGATED PICKUP BY NAME, EVISCERATED ITS RATIONALE, AND PROHIBITED DISPARATE TREATMENT OF SO-CALLED “PROFESSIONAL SPEECH.”**

### **A. NIFLA Abrogated Pickup By Name and Made Clear That This Court’s Decision Was Incorrect.**

On June 26, 2018, the Supreme Court issued its opinion in *NIFLA*, one of four cases<sup>6</sup> challenging the constitutionality of California’s Reproductive FACT Act. The Supreme Court reversed this Court’s opinion, which had applied the *Pickup* precedent to find that the FACT Act did not violate the First Amendment. *NIFLA*, 839 F.3d at 842. In reversing the *NIFLA* decision, the Supreme Court discussed the *Pickup* analysis in detail and rejected it as contrary to Supreme Court jurisprudence. *NIFLA*, 138 S.Ct. at 2371-75.

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<sup>5</sup> The *Wollschlaeger* opinion was vacated and superseded on rehearing, 797 F.3d 859 (11th Cir. 2015), vacated and superseded on rehearing *sub nom. Wollschlaeger v. Governor of the State of Fla.*, 814 F.3d 1159 (11th Cir. 2015), rehearing en banc was granted and the opinion vacated *sub nom. Wollschlaeger v. Governor of Fla.*, 649 F. App’x 647 (11th Cir. 2016), and was finally decided on rehearing en banc *sub nom. Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293 (11th Cir. 2017). In that final decision, the Eleventh Circuit questioned the reasoning in *Pickup* and did not rely upon it for its determination. However, the fact that the Eleventh Circuit relied upon *Pickup* in its initial determination illustrates the far-reaching effects of the decision and the need for this Court’s re-examination in light of *NIFLA*.

<sup>6</sup> See note 1, *supra*.

In analyzing the free speech challenge to the FACT Act, this Court decided to “apply our precedent in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013). . . .” *NIFLA*, 839 F.3d at 834. “We conclude that the Licensed Notice regulates speech that falls at the midpoint of the *Pickup* continuum, and that intermediate scrutiny should apply.” *Id.* at 839. “Because the speech here falls at the midpoint of the *Pickup* continuum, it is not afforded the ‘greatest’ First Amendment protection, nor the least.” *Id.* at 840. This Court thus applied intermediate scrutiny to the FACT Act and found that it met the standard, and on that basis upheld the district court’s denial of a preliminary injunction. *Id.* at 842, 844. This Court then summarily affirmed the district courts’ denials of preliminary injunctive relief in the companion cases by referencing its *Pickup*-based *NIFLA* decision. *A Woman’s Friend*, 669 Fed. Appx. at 496; *Livingwell Medical Clinic*, 669 Fed. Appx. at 495; *Mountain Right to Life*, 692 Fed. Appx. at 807.

The Supreme Court, however, disagreed. In reversing this Court’s decision in *NIFLA*, the Supreme Court acknowledged this Court’s reliance on the *Pickup* continuum and rejected that continuum analysis as contrary to Supreme Court precedent. *NIFLA*, 138 S.Ct. at 2371-72.

Although the licensed notice is content based, the Ninth Circuit did not apply strict scrutiny because it concluded that the notice regulates “professional speech.” 839 F.3d, at 839. Some Courts of Appeals have recognized “professional speech” as a separate category of speech that is subject to different rules. *See, e.g., King v. Governor of New Jersey*, 767 F.3d 216, 232 (C.A.3 2014); *Pickup v. Brown*, 740

F.3d 1208, 1227–1229 (C.A.9 2014); *Moore–King v. County of Chesterfield*, 708 F.3d 560, 568–570 (C.A.4 2013). These courts define “professionals” as individuals who provide personalized services to clients and who are subject to “a generally applicable licensing and regulatory regime.” *Id.*, at 569; *see also, King, supra*, at 232; *Pickup, supra*, at 1230. “Professional speech” is then defined as any speech by these individuals that is based on “[their] expert knowledge and judgment,” *King, supra*, at 232, or that is “within the confines of [the] professional relationship,” *Pickup, supra*, at 1228. So defined, these courts except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny. *See King, supra*, at 232; *Pickup, supra*, at 1253–1256; *Moore–King, supra*, at 569.

**But this Court has not recognized “professional speech” as a separate category of speech. Speech is not unprotected merely because it is uttered by “professionals.”** This Court has “been reluctant to mark off new categories of speech for diminished constitutional protection.” *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 804, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996) (KENNEDY, J., concurring in part, concurring in judgment in part, and dissenting in part). And it has been especially reluctant to “exemp[t] a category of speech from the normal prohibition on content-based restrictions.” *United States v. Alvarez*, 567 U.S. 709, 722, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012) (plurality opinion). This Court’s precedents do not permit governments to impose content-based restrictions on speech without “‘persuasive evidence ... of a long (if heretofore unrecognized) tradition’” to that effect. *Ibid.* (quoting *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 792, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011)).

**This Court’s precedents do not recognize such a tradition for a category called “professional speech.”**

*Id.* (emphasis added). Further explaining the reason for rejecting this Court’s *Pickup* continuum and rationale specifically in the context of health care professionals, the Supreme Court said:

The dangers associated with content-based regulations of speech are

also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals' speech "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Turner Broadcasting [v. FCC]*, 512 U.S.[622], at 641, 114 S.Ct. 2445 [(1994)]. Take medicine, for example. "Doctors help patients make deeply personal decisions, and their candor is crucial." *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1328 (C.A.11 2017) (en banc) (W. Pryor, J. concurring). **Throughout history, governments have "manipulat[ed] the content of doctor-patient discourse" to increase state power and suppress minorities:**

For example, during the Cultural Revolution, Chinese physicians were dispatched to the countryside to convince peasants to use contraception. In the 1930s, the Soviet government expedited completion of a construction project on the Siberian railroad by ordering doctors to both reject requests for medical leave from work and conceal this government order from their patients. In Nazi Germany, the Third Reich systematically violated the separation between state ideology and medical discourse. German physicians were taught that they owed a higher duty to the 'health of the Volk' than to the health of individual patients. Recently, Nicolae Ceausescu's strategy to increase the Romanian birth rate included prohibitions against giving advice to patients about the use of birth control devices and disseminating information about the use of condoms as a means of preventing the transmission of AIDS. Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right To Receive Unbiased Medical Advice*, 74 B.U.L. REV. 201, 201-202 (1994) (footnotes omitted).

Further, when the government polices the content of professional speech, it can fail to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *McCullen v. Coakley*, 573 U.S. —, —, —, 134 S.Ct. 2518, 2529, 189 L.Ed.2d 502 (2014). **Professionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields.** Doctors and nurses might disagree about the ethics

of assisted suicide or the benefits of medical marijuana; lawyers and marriage counselors might disagree about the prudence of prenuptial agreements or the wisdom of divorce; bankers and accountants might disagree about the amount of money that should be devoted to savings or the benefits of tax reform. “[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market,” *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting), **and the people lose when the government is the one deciding which ideas should prevail.**

*Id.* at 2374-75 (emphasis added). “In sum, neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles.” *Id.* at 2375.

**B. Recalling This Court’s Mandate Is Necessary To Prevent Ongoing Injury To Appellants’ Constitutional Rights.**

As mentioned above, state legislatures and municipal councils have relied and continue to rely upon this Court’s now-abrogated *Pickup* decision, either explicitly or implicitly, to adopt or justify laws similar to SB1172 that ban voluntary, speech-only SOCE counseling for minors who request and wish to receive it. Legislators in Hawaii and Nevada explicitly cited this Court’s decision in *Pickup* when introducing their similar laws.<sup>7</sup> Other jurisdictions have likewise adopted and justified such bans, including Oregon, Washington, Connecticut, Illinois, Maryland, New Hampshire, Vermont, New Mexico, Rhode Island and the District of Columbia<sup>8</sup> as well as in 42

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<sup>7</sup> See footnote 4, *infra*.

<sup>8</sup> Oregon Rev. Stat. §§ 675.070, 675.300, 675.336, 675.540, 675.745 (2016); H.B. 2753, 65th Leg., 2018 Regular Session (Wash. 2018); 2017 Conn. Pub. Acts 5;

cities and counties.<sup>9</sup> The validity of those laws is in question in light of *NIFLA*'s abrogation of the *Pickup* decision.

More recently, California has been relying upon the *Pickup* decision to expand restrictions on SOCE counseling to include any person or organization offering goods or services related to such counseling to any other person, including adults. Although it failed to pass in the 2018 legislative session,<sup>10</sup> AB 2943 would define offering goods or services related to voluntary, speech-only SOCE counseling as an unfair and fraudulent business practice. Legislators have explicitly stated that the *Pickup* decision enables them to enact such a law without concern that it would be

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Ill. Comp. Stat. 48/1 (2017); S.B. 1028, 2018 Reg. Session (Md. 2018); H.B. 587-FN, 2018 Session (NH 2018); VT. Stat. Ann. title 18, §8351, title 26, §§ 1354(a), 1842(b), 3016, 3210(a), 3271(a), 4042(a), 4062(a), 4132(a); N.M. Stat. Ann. §61-1-3.3; R.I. Gen. Laws Ann. §§23-94-1 to 23-94-5; D.C. Code §7-1231.14 (2017).

<sup>9</sup> Pima County, AZ; Bay Harbor Islands, FL; Boca Raton, FL; Broward County, FL; Boynton Beach, FL; Delray Beach, FL; El Portal, FL; Greenacres, FL; Key West, FL; Lake Worth, FL; Miami, FL; Miami Beach, FL; North Bay Village, FL; Oakland Park, FL; Palm Beach County, FL; Riviera Beach, FL; Tampa, FL; Wellington, FL; West Palm Beach, FL; Wilton Manors, FL; Albany County, NY; Erie County, NY; New York City, NY; Athens, OH; Cincinnati, OH; Columbus, OH; Dayton, OH; Toledo, OH; Allentown, PA; Bethlehem, PA; Doylestown, PA; Philadelphia, PA; Pittsburgh, PA; Reading, PA; State College, PA; Yardley Borough, PA; Madison, WI; Milwaukee, WI. See <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Conversion-Therapy-LGBT-Youth-Jan-2018.pdf>.

<sup>10</sup> [http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill\\_id=201720180AB2943](http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201720180AB2943).

regarded as unconstitutional.<sup>11</sup> Given the abrogation of *Pickup* in *NIFLA*, AB 2943 would compel individuals and organizations, including the Appellants, to self-censor in a way that the Supreme Court has explicitly disavowed.

More importantly, scores of children, parents and clinicians in California are being deprived of their freedom to choose voluntary SOCE counseling to meet their therapeutic goals, based upon a legislative scheme that is of questionable constitutionality. These far-reaching effects of the Supreme Court's abrogation of *Pickup* are extraordinary circumstances that militate in favor of recalling the mandate.

### CONCLUSION

The Supreme Court's abrogation of *Pickup* in *NIFLA* "is the exceptional case requiring recall of the mandate in order to prevent an injustice." *Verrilli*, 557 F.2d at 665. The continuing ripple effect of the *Pickup* decision is an unusual circumstance that makes its abrogation an extraordinary circumstance justifying recall of the mandate. *Zipfel*, 861 F.2d at 567.

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<sup>11</sup> See footnote 3, *supra*.

For these reasons, Plaintiffs' motion to recall the mandate should be granted.

Dated: September 10, 2018.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of September, 2018, I filed the foregoing Motion electronically through the CM/ECF system, which caused the following counsel to be served by electronic means, as more fully reflected in the Notice of Electronic Filing.

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