No. 00-16411

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant,
V.
OAKLAND CANNABIS BUYERS' COOPERATIVE

and JEFFREY JONES,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR APPELLANT UNITED STATES OF AMERICA

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REPLY BRIEF FOR APPELLANT UNITED STATES OF AMERICA

The United States demonstrated in its opening brief that the district court's modification of its preliminary injunction order to permit defendants to distribute marijuana to persons with an asserted medical need is fundamentally inconsistent with the explicit terms of the Controlled Substances Act and with the clearly-expressed intent of Congress. We therefore asked this Court to reconsider its prior ruling that medical necessity is a "legally cognizable defense that would likely pertain in the circumstances" and reverse the district court's order. See United States V. Oakland Cannabis Buyers' Cooperative, 190 F.3d 1109, 1114 (9th Cir. 1999) (per curiam) ("Oakland Cannabis")
In their brief, defendants contend that the Controlled Substances Act does not foreclose a medical necessity defense. Defendants' arguments fail to come to grips with the text and

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structure of the Controlled Substances Act, which plainly bans the manufacture and distribution of marijuana, including for medical purposes, "[e]xcept as authorized" by the Act itself. 21 U.S.C. § 841(a).

Defendants contend that enforcement of the criminal prohibition on distribution of marijuana is unconstitutional, advancing theories that are wholly irrelevant or that have been uniformly - and correctly - rejected by other courts. Finally, defendants assert that it would not be manifestly unjust for this Court to refrain from reconsidering its problematic decision in Oakland Cannabis, an argument that cannot be squared with the clear statutory prohibition on their conduct.

I. THE CONTROLLED SUBSTANCES ACT PRECLUDES A "MEDICAL NECESSITY" DEFENSE TO A CHARGE OF UNLAWFUL DISTRIBUTION OF MARIJUANA

A. In the Controlled Substances Act, Congress created a highly regulated, "'closed' system of drug distribution for legitimate handlers of such drugs," H.R. Rep. No. 91-1444 (1970), reprinted in 1970 U.S.C.C.A.N. 4566, 4571-72, and made it a federal crime to manufacture or distribute controlled substances outside of this closed system. 21 U.S.C. § 841(a).

For thirty years, marijuana has been classified as a schedule I controlled substance, because Congress determined that marijuana has a "high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a

lack of accepted safety for use * * * under medical supervision. 21 U.S.C. §§ 812(b) (1) & (c) . The Act prohibits the distribution of marijuana for any purpose outside the strict confines of the statute, 21 U.S.C. §§ 841(a), 812(c), and specifically prohibits medical practitioners from distributing schedule I controlled substances unless they are registered with the DEA and conducting research approved by the FDA. See 21 U.S.C. § 823(f); 21 C.F.R. §§ 5.10 (a) (9), 1301.18 and 1301.32; 28 C.F.R. § 0.100(b). Even for controlled substances in schedules II through V (i.e., those drugs determined to have a "currently accepted medical use in treatment in the United States," 21 U.S.C. § 812(b) (2)-(5)), the Act mandates stringent controls and requires anyone who dispenses a controlled substance to register with the DEA, establish security controls, and comply with record-keeping, reporting, order-form, and prescription requirements. See 21 U.S.C. §§ 821-29; 21 C.F.R. §§ 1301-06.

B. 1. The premise of defendants' brief is that a court must be free to read a "medical necessity" exception into the statutory scheme because such a defense is "universally available." Def. Br. 17, 18. But such a defense is not available when it clashes with the language, structure and purpose of a federal statute, and contrary to defendants' suggestion (Def. Br. 16), the statute need not expressly state that the defense is unavailable. Rather, both this Court and the

Supreme Court have recognized that necessity may be asserted as a defense to a statutory crime only to the extent that recognition of the defense is consistent with the will of Congress. See United States V. Bailey, 444 U.S. 394, 415-16 & n.1l (1980) (declining to apply the necessity defense in a manner that would render a Congressional judgment "wholly nugatory")1; United States V. Schoon, 971 F.2d 193, 196 (9th Cir.) ("the necessity defense allows us to act as individual legislatures, amending a particular criminal provision or crafting a one-time exception to it, subject to court review, when a real legislature would formally do the same under those circumstances") (emphasis added) cert. denied, 504 U.S. 990 (1992). Accord Model Penal Code § 3.02(1) (c) (1962) (choice of evils defense available only where "a legislative purpose to exclude the justification claimed does not otherwise plainly appear") ; Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 5.4, at 442 (2d ed. 1986) (necessity defense available "only in situations wherein the legislature has

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Thus, in Bailey, 444 U.S. at 415-16 n.h, the Supreme Court recognized that Congress "legislates against a background of Anglo-Saxon common law," but did not find that factor to be determinative of whether and the extent to which a necessity defense would be available under the statute prohibiting escape from federal prison. Rather, noting that it was "construing an Act of Congress, not drafting it," ibid., the Court concluded that the necessity defense would be available only in the very limited circumstance where defendants provided "evidence of a bone fide effort to surrender or return to custody as soon the claimed duress or necessity had lost its coercive force," id. at
415. A broader application of the defense was impermissible because it was incompatible with the "congressional judgment that escape from prison is a crime." Id. at 416 n.h.

not itself, in its criminal statute, made a determination of values. If it has done so, its decision governs") (footnote omitted)

Insisting that a "medical necessity" defense must be available regardless of the clear congressional judgment and explicit terms of the Controlled Substances Act, defendants make the further leap of contending that the "rule of lenity" requires recognition of the defense here. In other words, since a court might (in defendants' view) recognize a "medical necessity" defense, the rule of lenity insures that defendants will not be penalized for engaging in conduct that a court might conclude would fall within the implied exception to the statute.

Neither the defense of necessity nor the rule of lenity provide a license to create exceptions to comprehensive statutory schemes in the face of a clear congressional judgment. The rule of lenity applies only when it is unclear what conduct is prohibited under a federal statute. Liparota v. United States, 471 U.S. 419, 427 (1985) ("'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'"); United States V. Apex Oil Co Inc 132 F.3d 1287, 1291 (9th Cir. 1997) (applying rule of lenity "[i]n the face of uncertainty as to the meaning of what is forbidden"). There is no doubt whatsoever that the Controlled Substances Act prohibits distribution of marijuana for medical purposes unless the distributor is registered with the DEA and conducting research

approved by the FDA. See 21 U.S.C. §§ 822, 823(f), 829, 841 (a) (1). The rule of lenity has no application in the face of this clear statutory prohibition. And, as the Supreme Court has repeatedly recognized, courts simply are not free to infer case-by-case exceptions into statutes. Brogan v. United States, 522 U.S. 398, 408 (1998) (rejecting "exculpatory no" exception to 18 U.S.C. § 1001 despite "the many Court of Appeals decisions that have embraced it"); Rutherford, 442 U.S. at 559 ("[w]hether, as a policy matter, an exemption should be created is a question for legislative judgment, not judicial inference") ; cf. City of Milwaukee V. Illinois, 451 U.S. 304, 325 (1981) (courts should not invoke a common law doctrine "in the face of congressional legislation supplanting it")2. Defendants suggest that Congress never really determined the medical utility (or lack thereof) of marijuana. Def. Br. at
13. But placement of a substance in schedule I requires a

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2 In contrast, the cases relied on by defendants concerned criminal statutes of ambiguous scope. See, ~, United States V. Granderson, 511 U.S 39, 41, 56 (1994) (applying rule of lenity where

statutory provision is "susceptible to at least three interpretations"); id. at 60 (Scalia, J., concurring) (describing statute as "wretchedly drafted"); Apex Oil Co., 132 F.3d at 1291; United States V. Nguyen, 73 F.3d 887, 890 (9th Cir. 1995) (applying rule where statute was ambiguous as to requisite level of criminal intent) . Compare United States v. Terrence, 132 F. 3d 1291, 1292 (9th Cir. 1997) (reversing district court's dismissal of indictment under 8 U.S.C: § 1326(a) where plain language of statute precluded finding that defendant was exempt from statutory prohibition)

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judgment as to its medical efficacy and potential for abuse. 3 Congress provided an administrative mechanism for reclassification in light of changes in scientific knowledge. See 21 U.S.C. § 811. That mechanism is an integral part of the regulatory regime; it does not sanction a de facto reclassification through the medium of a "medical necessity" exception.

In an attempt to address the plain language of the statute, defendants seek to interpret it out of existence. Defendants recognize that in placing marijuana in schedule I Congress found that it has "no currently accepted medical use in treatment in the United States," 21 U.S.C. § 812(b) (1). They contend that this merely implies that marijuana is not appropriate for medical use by the general public; it suggests no congressional judgment about the medical value of marijuana for any particular individual. Def. Br. at 20-24.

But Congress did not conclude that marijuana should be unavailable except in those cases in which a physician determines

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3 Defendants' discussion of the "Shafer Commission" report of 1972 (Def. Br. at 14-16), never acted upon by Congress, can provide no assistance in interpreting the statute. Congress placed marijuana in schedule I and no canon of interpretation permits a court to ignore that judgment. In any event, at least one Senator specifically referenced the placement of marijuana in schedule I during the Senate debates. See 116 Cong. Rec. 1664 (Jan. 28, 1970) (statement of Sen. Hruska) (noting that marijuana was placed in schedule I because it "comes squarely within the criteria of that schedule," i.e., "highest abuse potential" and "little or no accepted medical use in this country")

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that it has medical value. Placement in schedule I means that a drug is unavailable except in narrowly defined circumstances, which are not claimed to be present here. By contrast, Congress created a detailed scheme that allows for case-by-case determinations by physicians as to

whether an individual has a medical need for the controlled substances in schedules II through V. See 21 U.S.C. § 829; see also 21 U.S.C. §§ 823(9),

827. Defendants' effort at statutory interpretation offers nothing but an invitation to judicial reclassification.

As noted in our opening brief (at 6-7, 25), Congress has recently reaffirmed its judgment that asserted medical need does not provide a basis for circumventing the prohibitions and requirements of the federal drug laws. Pub. L. 105-277, 112 Stat 2681 (Oct. 21, 1998). Defendants attempt to discount this legislation, entitled "NOT LEGALIZING MARIJUANA FOR MEDICINAL USE," by asserting that it constitutes only "non-binding, legislative dicta" that should be given no weight. Def. Opp. at 18. This argument is based on a fundamental misreading of Yang V. California Dept. of Soc. Servs., 183 F.3d 953 (9th Cir. 1999). In Yang, this Court held that a particular "sense of Congress" resolution was "merely a precatory sense of Congress provision, not amounting to positive, enforceable law" because the statute couples the phrase 'sense of the Congress' with the term should,' yielding the conclusion that this provision is

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precatory." Id. at 955, 958-59. The Court also noted that the heading 'Congressional Statement' described the resolution "as a policy statement that does not create positive, enforceable law." Id. at 959.[4]

By contrast, the Yang court expressly acknowledged that courts properly rely on "sense of Congress" provisions "to buttress interpretations of other mandatory provisions" rather than "interpret [mg] them as creating any rights or duties by themselves." Id. at 959 (citing Accardi v. Pennsylvania R Co 383 U.S. 225, 228-29 (1966); and State Highway Comm'n V. Volpe, 479 F.2d 1099 1116 (8th Cir. 1973)). Thus, in Accardi, the Supreme Court found that a "sense of Congress" provision demonstrated a "continuing purpose of Congress already established in another law." 383 U.S. at 959. Similarly, in Volpe, the Eighth Circuit held that a provision which began "it is the sense of Congress that under existing law" had the effect of corroborating what the statute as a whole already provided, and cited the Supreme Court's statement that "' [s]ubsequent

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4 The other cases relied upon by the Yang court (and cited by defendants) also involved statutes which coupled the terms "should" and "the sense of Congress." See Monahan v. Dorchester Counseling Center, Inc., 961 F.2d 987, 994-95 (1st Cir. 1992) ("use of the terms 'should' and 'the sense of Congress' indicate that the statute is merely precatory") ; Trojan Technologies, Inc V. Pennsylvania, 916 F.2d 903, 909 (3d Cir. 1990) (statute which provides "[i]t is the sense of Congress that no state agency and no private person should engage in any standards-related

activity that creates unnecessary obstacles to the foreign commerce of the United States" is "persuasive appeal[]" rather than a mandatory preemption).

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legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction.'" 479 F.2d at 1116 (quoting Red Lion Broadcasting Co. V. FCC, 395 U.S. 367 380-81 (1969)) .[5]

In contrast to the provision at issue in Yang, the 1998 enactment does not use the precatory term "should" with "sense of Congress," and does not purport to create new, positive law. Rather, like the provisions at issue in Accardi and Volpe, the statute reaffirms what the Controlled Substances Act and the Food, Drug and Cosmetic Act already provide -- that, unless marijuana is approved for medical use by the FDA based on valid scientific evidence, federal law prohibits its distribution for medicinal purposes. See Pub. L. No. 105-277, Div. F, 112 Stat. 2681, 760-61 (1998); 21 U.S.C. § 841(a); 21 U.S.C. § 355. By reaffirming Congress' continuing understanding that existing law proscribes the use of marijuana for medicinal purposes, the 1998 enactment is entitled to "great weight" in construction, see Red Lion Broadcasting, 395 U.S. at 380-81, and compels the conclusion that the statutory scheme of the Controlled Substances Act forecloses recognition of a medical necessity defense.

The Supreme Court has repeatedly reaffirmed this principle.

See, e.g., Loving V. United States, 517 U.S. 748, 770 (1996); Consumer Product Safety Comm'n V. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980); NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974).

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3. Defendants suggest that the enactment by several states of the "Controlled Substances Therapeutic Research Act" permits recognition of a medical necessity exception to the federal Controlled Substances Act. See Def. Br. at 24-26. These state enactments, which purport to authorize the distribution of marijuana for medical purposes under state law, provide no basis for judicially implied exceptions to federal law.[6] The federal government's own Investigative New Drug exemption, see 21 U.S.C. § 355i, likewise provides no support for defendants' argument.

The authorizing statute expressly provides for the distribution of marijuana pursuant to research programs registered by DEA and approved by FDA. 21 U.S.C. § 823(f). The program forms part of a comprehensive federal regulatory scheme which leaves no room for defendants' proposed interpolations.

In arguing for a necessity defense unbounded by the scheme of the relevant criminal statute, defendants suggest that the medical necessity exception in this case derives support from the concept of jury nullification. See Def. Br. at 13 ("[t]he common

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6 In any event, we note that courts in a majority of states have rejected the necessity defense in drug prosecutions under state law. See State V. Poling, 531 S.E.2d 678, 685 (W. Va. 2000); State V. Ownbey, 996 P.2d 510, 511-12 (Or. Ct. App. 2000); Murphy V. Commonwealth, 521 S.E.2d 301, 303 (Va. Ct. App. 1999); State V. Tate, 505 A.2d 941, 945-46 (N.J. 1986); State V. Cramer, 851P.2d 147, 149 (Ariz. Ct. App. 1992); Commonwealth V. Hutchins; 575 N.E.2d 741, 745 (Mass. 1991); State V. Hanson, 468 N.W.2d 77, 79 (Minn. Ct. App. 1991); Kauffman V. State, 620 So.2d 90, 93 (Ala. Crim. App. 1992); State V. Williams, 968 P.2d 26, 30 (Wash. Ct. App. 1998), review denied, 984 P.2d 1034 (1999).

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law defense of medical necessity allows the assessment of the moral culpability of these choices to rest in the hands and hearts of an American jury") . Defendants argue, in effect, that a jury might substitute its own judgment for that of Congress and refuse to convict persons who violate the Controlled Substances Act; the courts should enforce the statute in the same way as their hypothetical jury.

The Supreme Court expressly rejected such an approach in United States V. Rutherford, 442 U.S. 544 (1979), in ruling that a court in equity could not craft an exception to the Food, Drug and Cosmetic Act's proscription on the use of Laetrile for a class of terminally ill cancer patients. In pertinent part, the Supreme Court held that, " [w] hen construing a statute so explicit in scope," it is "incumbent upon the courts to give it effect," and that " [u]nder our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy." Id. at 551, 555. The Court emphasized the same concept recently in the criminal context, instructing that "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread." Brogan, 522 U.S. at 408. These principles are controlling here. [7]

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7 Defendants' argument (Def. Br. 44) that the Court should I construe the statute to "avoid constitutional questions" has no

II. THE DISTRICT COURT'S EQUITABLE DISCRETION IS LIMITED BY THE TERMS OF THE CONTROLLED SUBSTANCES ACT.

Defendants argue at length (Def. Br. 34-41) that because the government has chosen to enforce the Controlled Substances Act by civil injunction pursuant to 21 U.S.C. § 882(a), the district court was free, in its "equitable discretion," to decline to enforce the Act.

As we noted in our opening brief, a court has no equitable discretion to exempt statutorily proscribed conduct on the basis of a defense that is unavailable under the statutory scheme. See Tennessee Valley Auth V. Hill, 437 U.S. 153, 194 (1978) (affirming injunction to enforce federal law and noting that "[o]nce Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when asked") . See also Miller V. French, 120 5. Ct. 2246, 2253 (2000) (although it would "not lightly assume" that Congress intended to restrict the equitable powers of the federal courts, "where Congress has made its intent clear, ' [courts] must give effect to that intent.'"); Virginian Railway Co V. System Federation No. 40, 300 U.S. 515, 551 (1937) (court sitting in equity cannot

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application where, as here, the proposed saving construction is plainly contrary to the intent of Congress and the constitutional issues lack merit. See Section III, infra.

"ignore the judgment of Congress, deliberately expressed in legislation") [8]

The cases relied upon by defendants are not to the contrary. Indeed, they consistently affirm that while a district court retains discretion to determine whether, and to what extent, equitable relief is appropriate in a given statutory case, that discretion must be exercised in the interest of assuring compliance with the statute. They provide no support for the notion that courts have the discretion to exempt classes of persons from statutory requirements and permit them to violate the law.

Thus, in Weinberger V. Romero-Barcelo, 456 U.S. 305, 307 (1982) , the Supreme Court held that under the Federal Water Pollution Control Act, the district court retained discretion to order relief other than an immediate injunction that would "achieve compliance" with the statute. The district court found the Navy had committed "technical violations" of the statute, without "causing any 'appreciable harm' to the environment," by occasionally discharging into the water near Puerto Rico without a permit. Id. at 310. The district court ordered the Navy to apply for the requisite permit, but declined to enjoin naval

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8 As one commentator has noted, the Supreme Court's decision in Tennessee Valley Authority V. Hill "established that a court cannot use equitable discretion as a pretext for reordering priorities

that Congress has already set." Daniel A. Farber, Equitable Discretion, Legal Duties, and Environmental Injunctions, 45 U. Pitt. L. Rev. 513, 519 (1984).

operations, concluding that an injunction was not necessary to ensure compliance. Ibid.

The Supreme Court found that the discharge had not polluted the waters the statute was enacted to protect, and that "although the District Court declined to enjoin the discharges, it neither ignored the statutory violation nor undercut the purpose and function of the permit system." Id. at 315. The Court concluded that the district court's equitable discretion had to be exercised in a manner that was consistent with the enforcement obligation established by the statute: "Rather than requiring a district court to issue an injunction for any and all statutory violations, the FWPCA permits the district court to order that relief it considers necessary to secure prompt compliance with the Act." Id. at 320 (emphasis added) . Accord Hecht Co. V. Bowles, 321 U.S. 321, 325, 331 (1944) (observing that where there was "no doubt" of the defendants "good faith and diligence" in attempting to comply with statute, other remedial orders short of injunction might have been appropriate and consistent with the statute, but expressly reaffirming the courts' responsibility to enforce the statute and instructing that "their discretion * * * must be exercised in light of the large objectives of the Act) (emphasis added); Amoco Production Co. V. Village of Gambell, 480 U.S. 531, 544 (1987) (holding that district court retained their traditional equitable discretion in enforcing the Alaska National Interest Lands Conservation Act) ; Miller V. California Pacific

Medical Center, 19 F.3d 449, 459 (9th Cir. 1994) (en banc) (district court's equitable discretion to award injunctive relief under the National Labor Relations Act must be exercised "through the prism of the underlying purpose" of the statute); United States V. Marine Shale Processors, 81 F.3d 1329, 1360 (5th Cir. 1996) (in enforcement action, "a court of equity must exercise its discretion with an eye to the congressional policy as expressed in the relevant statute"). See also Albemarle Paper Co. V. Moody, 422 U.S. 405, 417 (1975) ("when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not 'equity [which] varies like the Chancellor's foot'")

As discussed in Section I, the text, structure, and purposes of the Controlled Substances Act all demonstrate that Congress expressly rejected the notion that an individual who claims a medical necessity for marijuana is exempted from the Act's prohibitions on the possession, manufacture, or distribution of marijuana. See 21 U.S.C. § 841 (a) (1). The district court had no discretion to issue an order purporting to exempt defendants from their obligation to comply with the statute.

Nor could the modification of the injunction be justified on the theory that equitable relief is unnecessary to prevent irreparable harm. This Court has repeatedly recognized that when the government is seeking to enforce a statute in its capacity as

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the sovereign and demonstrates that a statutory violation has occurred, irreparable harm in the absence of injunctive relief is presumed. Miller v. California Pacific Medical Ctr., 19 F. 3d at 459 (irreparable harm presumed when the government has demonstrated probability of success on the merits "' because the statute is itself an implied finding by Congress that violations will harm the public'"); United States v. Odessa Union Warehouse Co-Op. 833 F. 2d 172, 174-175 (9th Cir. 1087); Naval Orange Admin Comm. v. Exeter Orange Co. 733 F. 2d, 449, 453 (9th Cir. 1983). Modification of the injunction to permit violations of the statute can thus be presumed to irreparably harm the public interest.[9]

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9 Nor does the fact that the government has chosen to proceed by obtaining a civil injunction rather than criminal prosecutions change the analysis. The Controlled Substances Act authorizes the government to enforce it either by seeking criminal penalties, see 21 U.S.C. s. 481, or by obtaining a civil injunction under 21 U.S.C. s. 882 (a) that "enjoin[s] violations" of the Act. Issuing an injunction that exempts defendants from the prohibitions of the statute is clearly contrary to Congressional intent in providing courts with the equitable power to enjoin statutory violations. In any event, given the proliferation of marijuana dispensaries in the wake of Proposition 215, the government rationally and legitimately exercised its prosecutorial discretion to bring civil enforcement proceedings under 21 U.S.C. s 882 (a), and we doubt that the defendants truly would have preferred that the government pursue a criminal prosecution as a means of preventing future violations of the law.

III. DEFENDANTS' CONSTITUTIONAL ARGUMENTS ARE MERITLESS.

Defendants contend that enforcement of the Controlled Substances Act with respect to distribution of marijuana for medical purposes would violate the constitutional rights of the individuals who assert a medical need for the dru9. Plaintiffs do not explain why or how they have standing to assert the constitutional rights of the individuals to whom they distribute marijuana. See generally Wasson v. Sonoma County Junior College, 203 F.3d 659, 663 (9th Cir. 2000) (noting that "[p]arties ordinarily are not permitted to assert constitutional rights other than their own" and setting forth test for third-party standing), citing NAACP v. Alabama, 357 US 4491 459 (1958) and Powers V. Ohio, 499 U.S. 400, 410-11 (1991) .[10]

Assuming arguendo that this Court has jurisdiction to consider defendants constitutional arguments, they must be rejected as baseless.

1. Defendants argue that the prohibition against medical use of marijuana violates patients substantive due process

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10 Indeed, individuals seeking to obtain marijuana intervened in the litigation below and filed a counterclaim asserting that enforcement of the Controlled Substances Act here violated their constitutional rights. They appealed the dismissal of their counterclaim, and this Court remanded the issue to the district court for further proceedings in light of its Oakland Cannabis decision. See United States v. Oakland Cannabis Buyers' Cooperative and Brundridge et al., No. 99-15838 (9th Cir. May 10, 2000). The individual intervenors are not participating in this appeal

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rights by interfering with "a liberty interest in being free from pain and in preserving their lives." Def. Br. at 41. As discussed at length in the United States' Brief for Appellee in the intervenors' appeal (9th Cir. No. 15858), this argument is groundless. A host of decisions, including this Court's binding precedent, establish that there is no constitutional right to obtain a medical treatment free of the state's regulatory authority. Most recently, in the context of mental health care, this Court held that "substantive due process rights do not extend to the choice of type of treatment or of a particular health care provider." Nat'l Ass'n for the Advancement of Psychoanalysis V. California Board of Psychology, No. 99-15243, F.3d -, 2000 WL 1434626 at *4 (9th Cir. Sept. 29, 2000) (attached)

Moreover, in Carnohan V. United States, 616 F.2d 1120 (9th Cir. 1980) , this Court affirmed the dismissal of a declaratory judgment action in which the plaintiff had sought to secure the right to obtain and use Laetrile for the prevention of cancer. The plaintiff had contended that "the state and federal regulatory schemes [requiring administrative approval of new drugs] are so burdensome when applied to private individuals as to infringe upon constitutional rights." Id. at 1122. The Court rejected the plaintiff's claim, holding that "[c]onstitutional rights of privacy and personal liberty do not give individuals

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the right to obtain laetrile free of the lawful exercise of government police power." Ibid.

Carnohan was decided against the background of the Tenth Circuit's decision in Rutherford v. United States, 616 F.2d A55 (10th Cir.), cert denied, 449 U.S. 937 (1980), which this Court cited with approval in support of its constitutional holding. In holding that terminally ill cancer patients had no fundamental right to obtain Laetrile, the Tenth Circuit declared that "the decision by the patient whether to have a treatment or not is a protected right, but his selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health. 11 Rutherford, 616 F.2d at 457.

Every other court of appeals to consider the question has held that individuals do not have a fundamental right to obtain particular medical treatments. See, e.g., Sammon V. New Jersey Ed. of Med Examiners, 66 F.3d 639, 645 n.l0 (3d Cir. 1995) (" [i]n the absence of extraordinary circumstances, state restrictions on a patient's choice of a particular treatment also have been found to warrant only rational basis review") ; Mitchell V. Clayton, 995 F.2d 772, 775-76 (7th Cir. 1993) ("[a] patient does not have a constitutional right to obtain a particular type of treatment or to obtain treatment from a particular provider if the government has reasonably prohibited that type of treatment or provider") ; United States V. Burzynski, 819 F.2d 1301, 1313-14

(5th Cir. 1987) (rejecting cancer patients' claim of constitutional right to obtain antineoplastin drugs)[11] The correctness of these decisions is underscored by the Supreme Court's decision in State of Washington v. Glucksberg, 521 U.S. 702, 723, 728 (1997), in which the Court held that there is no fundamental due process right to obtain medical treatment which would relieve suffering by causing death.

Defendants attempt to distinguish Carnohan and Rutherford, urging that those decisions do not specifically state that the plaintiffs had claimed that Laetrile was the only effective

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11 See also United States V. Vital Health Prods Ltd~, 786 F. Supp. 761, 777 (E.D. Wis. 1992) ("a claim that American citizens have the freedom to choose whatever medication or treatment they desire is not grounded in the Fifth, Ninth or Fourteenth Amendment"), aff'd, 985 F.2d 563 (7th Cir. 1993); Kuromiya V. United States, 37 F. Supp. 2d 717, 726 (E.D. Pa. 1999) (rejecting constitutional challenge to Controlled Substances Act by individuals seeking to use marijuana for medical purposes, finding "no fundamental right of privacy to select one's medical treatment without regard to criminal laws") ; Smith V. Shalala, 954 F. Supp. 1, 3 (D.D.C. 1996) (quoting Carnohan, finding no substantive due process right "'to obtain [unapproved drugs] free of the lawful exercise of government police power'" and rejecting contention that "the government has an affirmative obligation to set aside its regulations in order to provide dying patients access to experimental medical treatments") . We are aware of only one district court decision to the contrary, Andrews v. Ballard, 498 F. Supp. 1038 (S.D. Tex. 1980) (finding decision to obtain acupuncture treatment encompassed by the right of privacy) , a case that did not involve the use of any drug, and the continued viability of which is questionable after the Fifth Circuit's decision in Burzynski, su~ra, 819 F.2d at 1313-14.

treatment available to them. Defendants stress their claim that marijuana is the only effective drug for treating their pain. [12]

Defendants' purported distinctions are unavailing. In Rutherford, all of the plaintiffs were terminally-ill cancer patients who had found no effective lawful treatment for their illness, and the court found no fundamental right to use Laetrile as a cancer treatment even "with a doctor's recommendation." Rutherford, 616 F.2d at 455-57. Nor did Laetrile's status as an allegedly promising treatment for terminally ill patients alter the Supreme Court's analysis in a related regulatory challenge. The Court described the case as one brought by "terminally ill

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12 Contrary to defendants' assertion (Def. Br. at 1), the United States does not concede that marijuana is a safe and effective treatment for their illnesses. See generally 57 Fed. Reg. 10,499 (1992) (DEA decision not to reschedule marijuana), aff'd, Alliance for Cannabis Therapeutics V. DEA, 15 F.3d 1131, 1137 (D.C. Cir. 1994). But, as a matter of law, the medical usefulness of marijuana is an issue that cannot be resolved in the first instance by this Court, or the district court, or the defendants, and so we have not challenged the specific evidence provided by defendants in this litigation. For the same reason, the City of Oakland's amicus curiae brief providing its own assessment of the medical utility of marijuana is wholly irrelevant to this appeal, as are the exhibits accompanying its brief. As demonstrated above and in our opening brief (at 22-24) , Congress devised an administrative process for making these scientific and factual determinations on a national basis, specifying the factors that should be considered and the entities that should be consulted. See 21 U.S.C. § 811. These determinations are subject to judicial review, 21 U.S.C. § 877, but the courts otherwise have no role in determining the medical value, if any, of a controlled substance. It is contrary to the entire statutory scheme for individual courts to make their own determinations on this question on the basis of whatever individualized or anecdotal evidence a given defendant might offer. This is a scientific and medical determination that Congress has assigned to the Executive Branch.

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cancer patients and their spouses" to "enjoin the Government from interfering with the interstate shipment and sale of Laetrile." United States V. Rutherford, 442 U.S. 544, 548 (1979). The Supreme Court also noted that the district court had found Laetrile to be "nontoxic and effective" in the proper dosages. Ibid. Nevertheless, the Supreme Court held that the Food, Drug, and Cosmetic Act precluded the terminally ill cancer patients from obtaining Laetrile, finding no implied exemption in the statute for drugs sought for use by the terminally ill. Id. at 551, 559.

Similarly, the Fifth Circuit in United States V. Burzynski, 819 F.2d at 1314, rejected a claim that patients had a Fifth Amendment right to obtain unapproved drugs from their doctor because of the 'unavailability of any other treatment that would be effective in treating their cancer.'" The court recognized that it "must not allow sympathy for the plight of persons suffering from cancer to cause us to interfere hastily with the mission of FDA or to distract us from our duty to uphold the law." Id. at 1315.

The intervenors claimed right to obtain marijuana is even more dubious than the asserted right to obtain Laetrile at issue in Carnohan. Laetrile had not been approved for marketing in interstate commerce under the Food, Drug and Cosmetic Act, but it had not been criminally prohibited as a controlled substance. See Carnohan, 616 F.2d at 1121-22. By contrast, Congress has

criminalized marijuana in the Controlled Substances Act and included it in schedule I.

Finally, to the extent intervenors could be deemed to have asserted a fundamental right to smoke marijuana or are attempting to launch a more general attack upon the constitutionality of the Controlled Substances Act or the rationality of the classification of marijuana in schedule I, such claims have been uniformly and repeatedly rejected by the courts of appeals.[13]

2. Defendants further suggest that the ban on distribution of marijuana for medical purposes violates the Ninth Amendment, Tenth Amendment, Commerce Clause, and the First Amendment.

Contrary to defendants' contention, the Ninth Amendment "has not been interpreted as independently securing any constitutional rights for purposes of making out a constitutional violation." Schowengerdt V. United States, 944 F.2d 483, 490 (9th Cir. 1991)

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13 See, United States V. Rodriguez-Camacho, 468 F.2d 1220, 1222 (9th Cir. 1972) , cert. denied, 410 U.S. 985 (1973); United States V. Greene, 892 F.2d 453, 455 (6th Cir. 1989), cert. denied, 495 U.S. 935 (1990); United States V. Fry, 787 F.2d 903, 905 (4th Cir.) , cert. denied, 479 U.S. 861 (1986); United States V. Rush, 738 F.2d 497, 512-13 (1st Cir. 1984), cert. denied, 470 U.S. 1004 (1985); United States V. Fogarty, 692 F.2d 542, 547-48 & n.4 (8th Cir. 1982) , cert. denied, 460 U.S. 1040 (1983); United States V. Middleton, 690 F.2d 820, 823 (11th Cir. 1982), cert. denied, 460 U.S. 1051 (1983); United States V. Horsley, 519 F.2d 1264, 1265 (5th Cir. 1975) , cert. denied, 424 U.S. 944 (1976); United States V. Kiffer, 477 F.2d 349, 356-57 (2d Cir.), cert. denied, 414 U.S. 831 (1973). See also Nat'l Org. for the Reform of Marijuana Laws V. Bell, 488 F. Supp. 123, 132, 134 n.28 (D.D.C. 1980) (three-judge court) (holding that "[s]moking marijuana does not qualify as a fundamental right" and citing numerous cases rejecting contention that private possession of marijuana is a fundamental or constitutional right)

cert. denied, 503 U.S. 951 (1992); accord San Diego Cty. Gun Rights Comm. V. Reno, 98 F.3d 1121, 1125 (9th Cir. 1996). As explained above, there are no cases in which the "right" to use marijuana for medical purposes has been deemed fundamental.

Nor is there any basis for resurrecting defendants' Commerce Clause argument. As the district court below correctly concluded in 1998, applying this Court's rulings, the Controlled Substances Act is a proper exercise of Congress' Commerce Clause powers, even insofar as it restricts intrastate conduct. See United States V. Cannabis Cultivators Club, 5 F. Supp. 2d 1086, 1097 (ND. Cal. 1998), citing, inter alia, United States v. Bramble, 103 F.3d 1475, 1479-80 (9th Cir. 1996); United States v. Tisor, 96 F.3d 370, 373-75 (9th Cir. 1996), cert. denied, 117 5. Ct. 1012 (1997); see also 21 U.S.C. § 801(3) (noting that local distribution of marijuana has a "substantial and direct effect upon interstate commerce")

Defendants' Tenth Amendment claim is likewise baseless, and their citation to New York V. United States, 505 U.S. 144 (1992) is wholly misplaced. That decision condemned a federal

statute that required states to enforce a federal regulatory program. The Controlled Substances Act imposes no such requirement. It simply bars the manufacture and sale of controlled substances. That a state might wish to legalize conduct prohibited by federal law does not implicate the rule against commandeering established by New York.

For the first time in this litigation, see ER 12-16, defendants also raise the First Amendment as an issue, citing a recent district court decision regarding a DEA policy that is not at issue in this case. Def. Br. at 43-44, citing Conant v. McCaffrey, 172 F.R.D 681, 694-98 (N.D. Cal. 1997); 2000 WL 1281174 (N.D. Cal. 2000). Conant has no relevance here, and even if it did, it provides no support for the notion that Controlled Substances Act's prohibition on the distribution of marijuana implicates the First Amendment. See also, Planned Parenthood V. Casey, 505 U.S. 833, 884 (1992) (rejecting First Amendment challenge to requirement that physicians inform patients about risks of abortion and noting that practice of medicine is "subject to reasonable licensing and regulation by the S~ate"); Natl'l Ass'n for the Advancement of Psychoanalysis, 2000 WL 1434626 at *8~*11 (rejecting First Amendment challenge to state psychologist licensing laws) ; Daly V. Sprague, 742 F.2d 896, 898 (5th Cir. 1984) ("[l]imitations on professional conduct necessarily affect the use of language and association; accordingly, reasonable restraints on the practice of medicine and professional actions cannot be defeated by pointing to the fact that communication is involved") ; United States v. Meyers, 95 F.3d 1475, 1481 (10th Cir. 1996) (rejecting freedom of religion challenge to Controlled Substances Act), cert. denied, 118 5. Ct. 583 (1997); Rush, 738 F.2d at 512-13 (same)

IV. PERMITTING DEFENDANTS TO DISTRIBUTE MARIJUANA IN VIOLATION OF THE STATUTE WOULD BE MANIFESTLY UNJUST.

As we explained in our opening brief (at 14-17), this Court should reconsider its Oakland Cannabis decision because as applied by the district court in its Amended Preliminary Injunction Order, the decision works a manifest injustice by giving judicial approval to violations of the nation's drug laws and permitting the distribution of marijuana outside of the closed distribution system established by Congress and without any of the statutory and regulatory controls that Congress deemed necessary to protect the public health and safety even for controlled substances listed in schedules II through V. The decision threatens the government's ability to enforce the Controlled Substances Act and creates incentives for illicit drug manufacturers and distributors to invoke the asserted needs of others as a justification for their drug trafficking. It also unfairly allows defendants to violate criminal prohibitions that Congress imposed on all persons on a nationwide basis.

Defendants' arguments to the contrary are premised on their erroneous contention that the modification of the preliminary injunction was consistent with the statute and with the public interest. As the discussion above demonstrates, these premises are incorrect. Defendants' fervent arguments, therefore, cannot

carry the day. It is not in the interests of justice to permit a select group of persons violate the criminal law.

CONCLUSION

For all of the reasons set forth herein and in the United States' opening brief, this Court should reconsider its Oakland Cannabis decision and reverse the district court's July 17, 2000 modification of its preliminary injunction order.

Respectfully submitted,

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OCTOBER 2000

CERTIFICATE OF COMPLIANCE PURSUANT TO
FED. R. APP. 32(a)(7)(C) AND CIRCUIT
RULE 32-1 FOR CASE NUMBER 00-16411

I certify that:

Pursuant to Fed. R. App. P. 32 (a) (7) (C) and Ninth Circuit Rule 32-1, the attached Reply Brief for Appellant United States of America is monospaced (in Courier New, 12 point font), has 10.5 or fewer characters per inch and contains 6929 words (excluding cover, tables, and certificates of service and compliance) according to the count of Corel Wordperfect 9.

DANA J. MARTIN
Attorney

October 10, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October, 2000, I filed and served the foregoing REPLY BRIEF FOR APPELLANT UNITED STATES OF AMERICA by causing and the original and fifteen copies to be sent to this Court by Federal Express, and by causing two copies to be served upon the following counsel by Federal

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ADDENDUM

2000 WL 1434626
(Cite as: 2000 WL 1434626 (9th Cir.(Cal.)))

Only the Westlaw citation is currently available.

United States Court of Appeals,
Ninth Circuit.

NATIONAL ASSOCIATION FOR THE
ADVANCEMENT OF
PSYCHOANALYSIS, a Delaware
corporation; Cedrus Monte; Allan D.
Sowers; Lionel Corbett, Plaintiffs
Appellants,
V.

CALIFORNIA BOARD OF
PSYCHOLOGY, a state board (Board); Bill
Lockyer, California
State Attorney General; State of California; Thomas O'Connor, the Board's executive officer in his official capacity only; Bruce Ebert; Judith Janaro Fabian; Lilli Friedland; Martin Greenberg; Linda Hee; Mary MeMillan; Marilyn Palarea; Mary Ellen Early; Emil Rodolfa, PhD, Defendants-Appellees.

No.99-15243.

Argued and Submitted April 13, 2000
Filed Sept.29, 2000

National association and individual psychoanalysts brought civil rights action for determination that California licensing scheme for mental health professionals violated their First Amendment and due process rights. From order of the United States District Court for the Northern District of California, William H. Orrick, J., dismissing their complaint as failing to state cause of action upon which relief could be granted, plaintiffs appealed. The Court of Appeals, Tashima, Circuit Judge, held that:

(1) California's mental health licensing laws did not implicate any fundamental rights, and could be upheld from due process challenge as long as they bore rational relationship to legitimate state interest; (2) California licensing scheme for mental health professionals was rationally related to California's interest in protecting mental health and safety of its citizens; and (3) scheme was valid, content- neutral exercise of California's police power which, even if speech interest was implicated, did not violate First Amendment.

Affrrmed.

[1] Federal Courts ~ 776

170Bk776

Court of Appeals reviews de novo district court's dismissal for failure to state claim. Fed. Rules Civ. Proc., Rule 12(b)(6), 28 U.S.C.A.

[2] Federal Civil Procedure ~ 1829
170Ak1829

[2] Federal Civil Procedure ~ 1835
170Ak1835

On motion to dismiss for failure to state claim, court must accept all factual allegations of complaint as true and draw all reasonable inferences in favor of nonmoving party. Fed. Rules Civ. Proc., Rule 12O,X6), 28 U.S.C.A.

[3] Federal Civil Procedure ~ 1772
170Ak1772

Conclusory allegations of law and unwarranted inferences are insufficient to defeat motion to dismiss for failure to state claim. Fed. Rules Civ. Proc., Rule 12(b)(6), 28 U.S.C.A.

[4] Federal Civil Procedure ;~ 1832
170Ak1832

In determining, on motion to dismiss for failure to state claim, whether plaintiffs can prove facts in support of their claim that would entitle them to relief, court may consider facts contained in documents attached to complaint. Fed. Rules Civ. Proc., Rule 12(b)(6), 28 U.S.C.A.

[5] Constitutional Law ~ 213.1(2)
92~13. 1(2)

[5] Constitutional Law ~ 251.3

92~51.3

In order to withstand Fourteenth Amendment scrutiny, statute is required to bear only a rational relationship to legitimate state interest, unless it makes suspect classification or implicates flindamental right. U.S.C.A. Const.Amend. 14.

[6] Constitutional Law . 287.2(5)
92~87.2(5)

California's mental health licensing laws did not implicate any fandamental rights, and could be upheld from due process challenge as long as they bore rational relationship to legitimate state interest; even if bond between psychoanalysts and clients involves regular meetings and disclosure of secrets and emotional thojights, these relationships do not rise to level of flindamental right, such as that which attends creation and sustenance of family. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Bus. & Prof.Code §§ 2900- 2996.6.

[7] Constitutional Law ~ 274(1)
92~74(l)

[7] Constitutional Law ~ 274(5)
92~74(5)

Due Process Clause protects some personal relationships, such as relationships that attend creation and sustenance of family. U.S.C.A. Const.Amend. 14.

[8] Constitutional Law ~ 274(2)
92~74(2)

Substantive due process rights do not extend to the choice of type of treatment or of particular health care provider; patient has no fundamental right to choose mental health professional with specific training. U.S.C.A. Const.Amend. 14.

[9] Constitutional Law ~ 48(6)
92k48(6)

[9] Constitutional Law ~ 213.1(2)
92~13.1(2)

[9] Constitutional Law ~ 253.2(3)
92~53.2(3)

On Fourteenth Amendment challenge to statute as not being rationally related to legitimate state interest, court presumes constitutionality of legislative classification, and those challenging legislative judgment must convince court that legislative facts on which classification is apparently based could not reasonably be conceived to be true by
governmental decisionmaker. U.S.C.A.
Const.Amend. 14.

[10] Constitutional Law ~ 251.3
921:251.3

On due process challenge to statute as not being rationally related to legitimate state interest, court does not require that government's action actually advance its stated purposes but merely looks to whether government could have had legitimate reason for acting as it did. U.S.C.A. Const.Amend. 14.

[11] Constitutional Law ~251.3
92~51.3

On due process challenge to statute as not being rationally related to legitimate state interest, court need determine only whether legislative scheme has conceivable basis on which it might survive rational basis scrutiny. U.S.C.A. Const.Amend. 14.

[12] Constitutional Law ~ 287.2(5)
92~87.2(5)

California licensing scheme for mental health professionals was rationally related to California's interest in protecting mental health and safety of its citizens, and did not violate health care professionals' due process rights, whether by requiring professionals already trained in psychoanalysis to have two years of supervised on-site training in order to obtain license or by excepting research psychoanalysts from its requirements; it did not matter that other professions, such as family counselors, were not regulated as stringently, since it was not irrational for legislature to progress one step, or one

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(Cite as: 2000 WL 1434626 (9th Cir.(Cal.)))

profession, at time. U.S.C.A. Const.Amend.
14; West's Ann.Cal.Bus. & Prof.Code §§ 2900-
2996.6.

[12] Physicians and Surgeons ~ 2
2991:2

California licensing scheme for mental health professionals was rationally related to California's interest in protecting mental health and safety of its citizens, and did not violate health care professionals' due process rights, whether by requiring professionals already trained in psychoanalysis to have two years of supervised on-site training in order to obtain license or by excepting research psychoanalysts from its requirements; it did not matter that other professions,

such as family counselors, were not regulated as stringently, since it was not irrational for legislature to progress one step, or one profession, at time. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Bus. & Prof.Code §§ 2900-
2996.6.

~3] Constitutional Law ~ 251.3
921:251.3

It is not irrational, for due process purposes, for legislature to progress one step at a time. U.S.C.A. Const.Amend. 14.

[141 Constitutional Law ~ 274(2)
921:274(2)

First Amendment applies to state laws and
regulations through Due Process Clause of
Fourteenth Amendment. U.S.C.A.
Const.Amends. 1, 14.

[15] Constitutional Law ~ 90.1(4)
92k90. 1(4)
Permits.

California licensing scheme for mental health professionals was valid, content- neutral exercise of California's police power which, even if speech interest was implicated, did not
violate First Amendment. U.S.C.A.
Const.Amend. 1; West's Ann.Cal.Bus. & Prof.Code ~§ 2900-2996.6.

[15] Physicians and Surgeons ~ 2
2991:2

California licensing scheme for mental health professionals was valid, content- neutral exercise of California's police power which, even if speech interest was implicated, did not
violate First Amendment. U.S.C.A.
Const.Amend. 1; West's Ann.Cal.Bus. & Prof.Code §§ 2900-2996.6.

(16] Constitutional Law ~ 90.1(1)
92k90. 1(1)

That psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection. U.S.C.A. Const.Amend. 1.

(17] Constitutional Law ~90.1(1)
92k90. 1(1)

Communication that occurs during psychoanalysis is entitled to constitutional protection, but it is not immune from regulation. U.S.C.A. Const.Amend. 1.

[18] Licenses ~5
238k5

It is properly within state's police power to regulate and license professions, especially when public health concerns are affected.

[19] Constitutional Law ~ 90(3)
92k90(3)

Appropriate level of First Amendment scrutiny is tied to whether statute distinguishes between prohibited and permitted speech based on content. U.S.C.A. Const.Amend. 1.

[20] Constitutional Law ~ 90(3)
92k90(3)

Principal inquiry, in deciding whether regulation is content-neutral or content-based for purposes of First Amendment challenge, is whether government has adopted regulation because of agreement or disagreement with message it conveys. U.S.C.A. Const.Amend. 1.

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(Cite as: 2000 WL 1434626 (gth Cir.(Cal.)))

[21] Constitutional Law ~ 90.1(4) 92k90. 1(4)

California licensing scheme for mental health professionals was not prior restraint on speech, where scheme was designed to protect mental health of California residents, and there was no allegation that state was revoking or denying licenses for any arbitrary or constitutionally suspect reasons. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Bus. & Prof.Code §§ 2900-2996.6.

[21] Physicians and Surgeons ~ 2
2991:2

California licensing scheme for mental health professionals was not prior restraint on speech, where scheme was designed to protect mental health of California residents, and there was no allegation that state was revoking or denying licenses for any arbitrary or constitutionally suspect reasons. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Bus. & Prof.Code §§ 2900-2996.6.
Jeffrey S. Love, Lane Powell Spears Lubersky LLP, Portland, Oregon, for the plaintiffs-appellants.

Kerry Weisel, Deputy Attorney General, Oakland, California, for the defendants appellees.

Appeal from the United States District Court for the Northern District of California; William H. Orrick, District Judge, Presiding, D.C. No. CV 97-3913 WHO.

Before: A. Wallace Tashima and Susan P.
Graber, Circuit Judges, and Robert J.
Kelleher, [FN*] Senior District Judge. TASHIMA, Circuit Judge:

*1 Plaintiff psychoanalysts Lionel Corbett, Cedrus Monte, and Allan Sowers, and the National Association for the Advancement of
Psychoanalysis ("NAAP") (collectively

"plaintiffs") sued defendants, members of the California Board of Psychology ("Board"), and the Attorney General of California, for declaratory and injunctive relief under 42

U.S.C. § 1983. Plaintiffs allege that California's mental health licensing laws, which regulate the practice of psychology and other professions, restrict their First and Fourteenth Amendment rights. Specifically, they assert that the licensing scheme prohibits them from practicing psychoanalysis in California. The district court held that plaintiffs failed to state a claim under Federal Rule of Civil Procedure 12~X6), and dismissed their complaint and the action. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND
A. Psychoanalysis and Psychology

"Psychoanalysis" is defined in Stedman' s Medical Dictionary (25th ed.1990) as:
[A] method of psychotherapy, originated by Freud, designed to bring preconscious and unconscious material to consciousness primarily though the analysis of transference and resistance.... A method of investigating the human mind and psychological functioning, especially through free association and dream analysis in the psychoanalytic situation.
Id. at 1284; see also American Medical Association Encyclopedia of Medicine 831 (1989) ("The psychoanalyst is usually a doctor of medicine."). [FN1]

"Psychology" has been defined as:
The scientific study of mental processes. Psychology deals with all internal aspects of the mind, such as memory, feelings, thought, and perception, as well as external manifestations, such as speech and behavior. It also addresses intelligence, learning and the development of personality. Methods employed in psychology include direct experiments, observations, surveys, study of personal histories, and special tests (such as intelligence tests and personality tests).
Id. at 832 (emphasis omitted). Psychology includes various approaches, including "psychoanalytic psychology," which "stresses the role of the unconscious and childhood experiences." Id.

B. Licensing Scheme

The profession of psychology has been regulated in California since 1958, when the Legislature enacted the Psychology Certification Act, Cal. Bus. & Prof. Code §§2900-2980 (1958), which "served only to protect the title 'psychologist,' " but did not define the practice of psychology. Executive Summary, California Board of Psychology, Sunset Review Report, at 1 (October 1, 1997) ("Sunset Report "). In 1967, the Legislature recognized the actual and potential consumer harm that can result from the unlicensed, unqualified or incompetent practice of psychology" and enacted the Psychology Licensing Law, Cal. Bus. & Prof. Code §§2900-2996.6 (1968). Sunset Report at 1. That law includes a legislative finding that the practice of psychology in California affects the public health, safety, and welfare and is to be subject to regulation and control in the public interest to protect the public from the unauthorized and unqualified practice of psychology." Cal. Bus. & Prof. Code § 2900.

The California Business and Professions Code defines a "psychologist" as a person so representing himself or herself "to the public by any title or description," including "psychoanalysis" and "psychoanalyst." Cal. Bus. & Prof. Code § 2902(c). The practice of psychology in California requires a license and is defined as rendering any psychological service to the public "for a fee." Id. § 2903 (stating that "[n]o person may engage in the practice of psychology, or represent himself to be a psychologist, without a license" unless otherwise specified by statute).

*2 To qualify for a license to practice psychology in California, an applicant must possess a doctorate, or a degree deemed equivalent, in psychology or a related field such as education psychology. See id. §2914~). An applicant must have at least two years of supervised professional experience under the direction of a licensed psychologist. See id. § 2914(c). In addition, an applicant must pass the Board's examination, complete training in substance dependency, and fulfill course-work requirements in partner abuse and human sexuality. See id. § 2914(d)-(f). Any violation of the laws regulating psychologists
can be punished as a misdemeanor.

Section 2529 of the Business and Professions Code, relating to research psychoanalysts, is the only part of the statute that specifically addresses the qualifications of psychoanalysts. Under § 2529, graduates of four, specific, California psychoanalytic institutes, or institutes deemed equivalent, "may engage in psychoanalysis as an adjunct to teaching, training, or research and hold themselves out to the public as psychoanalysts...." Id. § 2529. Under the regulations, a research psychoanalyst may render psychoanalytic services for a fee for only a third (or less) of his or her professional time. See Cal. Code Regs. ("C.C.R."), tit. 16 § 1371. If they register with the state, students and graduates also "may engage in psychoanalysis under supervision, provided" that they do not imply in any way that they are licensed to practice psychology. Cal. Bus. & Prof.Code § 2529. "Physicians and surgeons, psychologists, clinical social workers, and marriage, family and child counselors, licensed in this state" need not register to engage in research psychoanalysis. See 16 C.C.R. § 1369.

The licensing laws do not prevent "qualified members of other recognized professional groups," including physicians, clinical social workers, family and child counselors, attorneys and ordained members of recognized clergy, from doing work of a psychological nature consistent with the laws governing their respective professions, provided that they do not hold themselves out to the public as psychologists or use terms that imply they are licensed to practice psychology. Cal. Bus. & Prof.Code § 2908.

C. Plaintiffs

The NAAP is a membership association of professional psychoanalysts dedicated to encouraging the study of; and improving the practice of; psychoanalysis in the United States and other countries. Its membership includes more than 1,000 certified psychoanalysts and more than 400 psychoanalyst candidates-in- training. The NAAP alleges that it has lost income from

membership dues as a result of California's licensing scheme. According to the complaint, the NAAP filed suit "on its own behalf, as a representative of its members whose practice of psychoanalysis in California allegedly has been unreasonably restricted by California law, and on behalf of California residents who are prevented from retaining those NAAP members for professional psychoanalysis."

Plaintiff Corbett is a physician licensed to practice in three states and England, but not in California, because he lacks a one-year medical residency in the United States or Canada. He has been certified as a Diplomate Jungian Analyst by the C.G. Jung Institute of Chicago, which does not award a doctorate degree. [FN2] Dr. Corbett is currently a professor at the Pacifica Graduate Institute in Santa Barbara, California, where he trains psychology Ph.D. candidates in the theory and practice of psychoanalytic psychotherapy. He has held academic appointments in departments of psychiatry at four United States medical schools.

*3 Plaintiff Monte, who lives in California, has a master's degree in psychology from California State University at Sonoma and a diploma in analytical psychology from the C.G. Jung Institute in Zurich, Switzerland. Monte undertook clinical training in psychoanalysis in Switzerland, where she paid her supervisors and saw clients at a different site from her supervisors. Monte has been ordained as a Diplomate Jungian Analyst by the Association for the Integration of the Whole Person, a religious organization chartered in California. Monte would be eligible for a psychology license in California only if she completed additional courses and acquired supervised professional experience.

Plaintiff Sowers holds a master's degree in divinity and a certificate in psychoanalysis from the National Psychological Association for Psychoanalysis in New York City. Sowers is certified as a pastoral counselor in the Presbyterian Church and certified as a psychoanalyst in the State of Vermont. He is a resident of New York, but intends to travel to California to establish a psychoanalytic
practice. He wishes to hold himself out professionally to the public, using the title

D. Procedural History

The district court dismissed plaintiffs' first amended complaint under Federal Rule of Civil Procedure 12~X1) because no plaintiff had properly alleged standing. Also, based on Eleventh Amendment immunity, the court dismissed with prejudice two defendants, the State of California and the Board. Plaintiffs were granted farther leave to amend "to allege farther facts" demonstrating standing. The district court thereafter dismissed the second amended complaint, ruling that plaintiffs lacked standing because the complaint was "conclusory" on standing issues. Plaintiffs, however, were granted leave to amend "one more time."

Plaintiffs then filed their third amended and supplemental complaint ("complaint"), which was dismissed with prejudice for failure to state a claim. The district court concluded that, although standing was adequately alleged, the complaint failed to state claims under the First or Fourteenth Amendment. Plaintiffs filed a timely notice of appeal.

II. JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291.

ifi. STANDARD OF REVIEW

[1][2J[3)[4] We review de novo the district court's dismissal for failure to state a claim pursuant to Rule 12~X6). See Two Rivers v. Lewis, 174 F.3d 987, 991 (9th Cir.1999). We must "accept all

factual allegations of the complaint as true and draw all reasonable inferences in favor of the nonmoving party." Id. "Conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." Halkin v. VeriFone, Inc. (In re Verifone Sec. Litig.), 11 F.3d 865, 868 (9th Cir.1993). In determining whether plaintiffs

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can prove facts in support of their claim that would entitle them to relief, we may consider facts contained in documents attached to the complaint. See Roth v. Garcia Marquez, 942 F.2d 617, 625 n. 1 (9th Cir.1991) (citing Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir.1987)).

Iv. DISCUSSION

*4 Plaintiffs allege that California's mental health licensing laws abridge their Fourteenth Amendment substantive due process and equal protection rights and their First Amendment rights of speech and association. [FN3] We affirm the district court's dismissal because we hold that plaintiffs have failed to state any claim for constitutional relief. [FN4]

A. Fourteenth Amendment

[5] To withstand Fourteenth Amendment scrutiny, a statute is required to bear only a rational relationship to a legitimate state interest, unless it makes a suspect classification or implicates a fundamental right. See City of New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (per curiam) (equal protection); Richardson v. City & County of Honolulu, 124 F.3d 1150, 1162 (9th Cir.1997), cert. denied, 525 U.S. 871, 119 S.Ct. 168, 142 L.Ed.2d 137 (1998) (substantive due process).

1. Fundamental Right
[6] Because psychoanalysts are not a suspect class entitled to heightened scrutiny, we must examine whether the licensing scheme implicates any fundamental right. We hold that it does not.

[7] Plaintiffs contend that California's mental health licensing laws are subject to strict scrutiny under the Due Process Clause of the Fourteenth Amendment because they implicate the fundamental rights associated with the close-knit relationships between analysts and analysands. It is true that the Fourteenth Amendment protects some personal relationships, such as "those that attend the creation and sustenance of a family" and other "highly personal relationships." IDK, Inc. v. Clark County, 836 F.2d 1185, 1193 (9th Cir.1988) (internal quotation marks and citation omitted).

At the other end of the relationship spectrum, we have held that the relationship between an escort and a client paying for escort services is not an intimate association implicating substantive due process rights. See id. Although we do not imply that the relationship between a client and an escort is similar in nature to the relationship between a patient and a psychoanalyst, we do find some of our analysis in IDK to be instructive. The relationship between a client and a psychoanalyst lasts "only as long as the client is willing to pay the fee." Id. Even if analysts and clients meet regularly and clients reveal secrets and emotional thoughts to their analysts, these

relationships simply do not rise to the level of a fundamental right. See Zablocki v. Redhail, 434 U.S. 374, 383-86, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978) (right to marry); Moore v. City of East Cleveland, 431 U.S. 494, 503-06, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (right to live with family); Griswold v. Connecticut, 381 U.S. 479, 482-86, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (right to marital privacy); Pierce v. Society of Sisters, 268 U.S. 510, 534-35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925)
(right of parents to direct children 5 upbringing and education). "These are not the ties that 'have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.' " IDK, 836 F.2d at 1193 (quoting Roberts V. United States Jaycees, 468 U.S. 609, 618-19, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984)).

[8] We farther conclude that substantive due process rights do not extend to the choice of type of treatment or of a particular health care provider. The Seventh Circuit has noted that "most federal courts have held that a patient does not have a constitutional right to obtain a particular type of treatment or to obtain treatment from a particular provider if the government has reasonably prohibited that type of treatment or provider." Mitchell v. Clayton, 995 F.2d 772, 775 (7th Cir.1993) (citations omitted). We agree, and hold that

unnecessary and ineffective; and (d) the licensing scheme is irrational because it is more stringent than similar schemes regulating other counseling professions. We do not find any of those arguments persuasive and conclude that the licensing scheme is rationally related to California's interest in protecting the mental health and safety of its citizens.

First, plaintiffs argue that there is no rational basis for requiring professionals already trained in psychoanalysis to have certain other training in order to obtain a license. Because the Lochner [FN5] era has long passed, this argument must fail. See Armendariz v. Penman, 75 F.3d 1311, 1318 (9th Cir. 1996) (stating that Lochner "symbolizes an era in which the Court, invalidating economic legislation, engaged in a level of judicial activism which was unprecedented in its time and unmatched since"). As the Supreme Court stated in
Williamson:
*6 It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. 348 U.S. at 488 (citation omitted).

This case is nearly identical to Maguire v. Thompson, 957 F.2d 374 (7th Cir.1992), in which the Seventh Circuit held that the Illinois General Assembly had a rational basis for requiring certain training for health care professionals to obtain a medical license, even though naprapaths, who treat human ailments through manipulation of tissue, were excluded from practicing. The Maguire court observed that:
[Tihe General Assembly could have concluded that [certain] level[s] of education provide[better training in theories of disease. Logically, better training leads to better diagnosis and better treatment.... [I]t is within the legislative prerogative to limit the
(Cite as: 2000 WL 1434626, *4 (~h Cir.(Cal.)))

there is no fundamental right to choose a mental health professional with specific training.

2. Rational Basis
*5 [9][10][11] Because we conclude that the licensing scheme neither utilizes a suspect classification nor implicates a fundamental right, we now examine whether it is "rationally related

to a legitimate state interest." Dukes, 427 U.S. at 303. In applying the rational basis test, we presume the constitutionality of the classification. See id. "[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker." Vance V. Bradley, 440 U.S. 93, 111, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979); see also Williamson v. Lee Optical, 348 U.S. 483, 488, 75 S.Ct. 461, 99 L.Ed. 563 (1955) holding under a Fifth Amendment due process analysis that a statute should be upheld if "it might be thought that the particular legislative measure was a rational way to correct" a problem). "[W]e do not require that the government's action actually advance its stated purposes, but merely look to see whether the government could have had a legitimate reason for acting as it did." Dittman v. California, 191 F.3d 1020, 1031 (9th Cir. 1999) (quoting Halverson v. Skagit County, 42 F.3d 1257, 1262 (9th Cir.1995) (citation and internal quotation marks omitted)), cert. denied, 120 S.Ct. 2717 (2000). We need only determine whether the licensing scheme has a "conceivable basis" on which it might survive rational basis scrutiny. Id. (quoting Lupert v. California State Bar, 761 F.2d 1325, 1328 (9th Cir.1985)).

[12] Plaintiffs advance numerous arguments about why the licensing scheme should fail rational basis review. Primarily, they contend that: (a) there is no rational basis for requiring professionals who already are trained in psychoanalysis to obtain additional training in order to qualif~ for a license; (1)) the licensing scheme irrationally exempts research psychoanalysts from its requirements; (c) the licensing scheme is irrational because it is

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practice of medicine to those who provide the safest service.
It would even be rational for a legislature to conclude that the training offered in a school of naturopathy would in fact be inadequate for proper medical diagnosis and treatment and therefore people seeking treatment from those who hold only a degree in naturopathy run a serious risk of either misdiagnosis or non-diagnosis of their ailment.
Id. at 377-78 (citation omitted). The Seventh Circuit again utilized the reasoning of Maguire in holding that the illinois legislature could regulate acupuncture by requiring a degree from a chiropractic school. See Mitchell, 995 F.2d at 774-76. We agree with the reasoning of these cases.

Based on the health and welfare of its citizens, California certainly has a "conceivable rational basis" for regulating the licensing of psychologists, and therefore, psychoanalysts. Dittman, 191 F.3d at 1031. According to the Supreme Court, "health
includes psychological as well as physical wellbeing." United States v. Vuitch, 402 U.S. 62, 72, 91 S.Ct. 1294, 28 L.Ed.2d 601 (1971). The California Legislature first regulated psychology because it "recognized the actual and potential consumer harm that can result from the unlicensed, unqualified or incompetent practice of psychology." Sunset Report at 1. The Psychology Licensing Law includes a legislative finding that the "practice of psychology in California affects the public health, safety, and welfare and is to be subject to regulation and control in the public interest to protect the public from the unauthorized and unqualified practice of psychology." Cal. Bus. & Prof.Code § 2900. Plaintiffs Monte and Corbett even concede in their declarations that psychoanalytic methods cannot effectively be used to treat people with major mental illness. According to Dr. Corbett, the adverse effects of incompetent psychotherapy could include sexual activity between a client and therapist, deteriorating mental health, family, job, and relationships of the patient, and even suicide. Regulating psychology, and through it psychoanalysis, is rational because it is within the state's police

power to regulate mental health treatment. See Maguire, 957 F.2d at 377.

Next, plaintiffs assert that the licensing scheme is irrational because it exempts research psychoanalysts from its requirements. As the district court noted, the exemption for research psychoanalyst is valid because it is not unusual or irrational to provide exemptions in a licensure statute. See Cal. Bus. & Prof.Code § 2529 (allowing the practice of psychoanalysis "as an adjunct to teaching, training or research"). The licensing scheme also contains exemptions for employees of schools and governmental agencies, psychologists licensed in other jurisdictions, and graduate students. See id. § §
2909-12. Certainly it is rational for the Legislature to allow academics to engage in psychoanalysis on a limited basis to enhance teaching and research. Further, it is not improper for the Legislature to single out research psychoanalysts. The Supreme Court has held that a state legislature addressing health and safety reform "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others." Williamson, 348 U.S. at 489 (citations omitted). The California Legislature enacted a certification law regulating psychology in the 1950s, substituted a licensing scheme in the 1960s, and enacted a limited exception for academic research psychoanalysis in the 1970s.

*7 Plaintiffs argue additionally that the licensing scheme is not rationally related to a legitimate state interest because it is ineffective and unnecessary. In support of their argument, they observe that a committee had recommended to the California Medical Board that the laws regulating psychoanalysts were unnecessary and ineffective. As additional evidence that the scheme is unnecessary, plaintiffs point to the facts that research psychoanalysts are allowed to practice without meeting all of the requirements of the licensing scheme and that, in four years, only one complaint has been filed against a research psychoanalyst.

Research psychoanalysts, however, are a small and discrete group. That they appear to be able to practice satisfactorily without having met all licensing requirements does not compel the Legislature to infer that all psychoanalysts could practice satisfactorily without having met the educational and expedience requirements of the licensing scheme. We thus perceive no legal basis for interfering with the Legislature's judgment regarding the training needed for mental health professionals.

[13] Plaintiffs next argue that the psychology licensing laws have no rational basis because the California licensing schemes for other, similar counseling professions are less stringent. Plaintiffs highlight the differences between the licensing schemes for family counselors and social workers, as opposed to psychologists, in an attempt to show that the exclusion of psycho analy sts is irrational, when other professionals are permitted to engage in counseling. See Cal. Bus. & Prof.Code §§4996, 4996.12, 4980, 4980.02. To qualify for a license, a social worker must have a master's degree from an accredited school of social work, two years of supervised experience, and chemical dependency training. See id. §4996.2. For licensure, a marriage, family, and child counselor must have a master's or doctorate degree from an accredited school, certain course work, a supervised clinical placement, and two years of supervised experience. See id. § 4980.40. The stated purpose of the marriage and family therapy law is to regulate the provision of "wise, competent, caring, compassionate, and effective counseling in order to enable [people] to improve and maintain healthy family relationships. Healthy individuals and healthy families and

healthy relationships are inherently beneficial and crucial to a healthy society, and are our most precious and valuable natural resource." See id. § 4980(a). The question is not whether we would choose to implement the same scheme, but whether it was rational for the California Legislature to implement different licensing schemes for psychologists, and for social workers and family counselors. It is not irrational for the Legislature to progress one step, or one profession, at a time. See Williamson, 348 U.S. at 489.

Finally, plaintiffs attack the psychologist licensing scheme on several other grounds, all of which we reject. They suggest that the scheme is irrational because other states, such as Vermont, Washington and Colorado, have less restrictive licensing schemes for psychoanalysts. This does not mean, however, that it is irrational for California to have its existing scheme. It simply is not the function of the courts to tell California how to craft its legislation.

*8 Plaintiffs also argue that there is no rational basis for the Legislature to require two years of supervised on-site training and to credit only non-paid supervision for psychologists. See 16 C.C.R. § 1387(r). Plaintiffs claim that psychoanalysts practice at sites separate from their supervisors' locations and sometimes pay for this supervision. See 16 C.C.R. § 1387. Specifically, Dr. Corbett paid for her supervision in England. It is certainly rational, however, for the Legislature to require on-site supervision for the training of mental health professionals. See Maguire, 957 F.2d at 377 (11olding that it is rational for a legislature to require certain levels of education for health care professionals). It is also rational to be suspicious of paid-for supervision.

We conclude that the psychologist licensing scheme is rationally related to legitimate government interests; therefore, the district court properly dismissed plaintiffs' Fourteenth Amendment claims.

B. First Amendment
[14][15] Plaintiffs further contend that California's psychologist licensing laws violate their First Amendment rights to freedom of speech. [FN6] The First Amendment applies to state laws and regulations through the Due Process Clause of the Fourteenth Amendment. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 n. 1, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). We conclude that, even if a speech interest is implicated, California's

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licensing scheme passes First Amendment scrutiny.

1. Extent to Which Speech is implicated

The Supreme Court has held that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of langnage, either spoken, written, or printed." Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502, 69 S.Ct. 684, 93 L.Ed. 834 (1949); see also Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (11olding that "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity").

[16][17] Plaintiffs contend that, because psychoanalysis is the "talking cure," it deserves special First Amendment protection because it is "pure speech." As the district court noted, however, "the key component of psychoanalysis is the treatment of emotional suffering and depression, not speech.... That psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection." [FN7] The Supreme Court has noted that "[w]hile it is possible to find some kernel of expression in almost every activity a person undertakes ... such a kernel is not sufficient to bring the activity within the protection of the First Amendment." City of Dallas v. Stanglin, 490 U.S. 19, 25, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989), quoted in Las Vegas Nightlife, Inc. v. Clark County, 38 F.3d 1100, 1102 (9th Cir.1994). The communication that occurs during psychoanalysis is entitled to constitutional protection, but it is not immune from regulation. See IDK, 836 F.2d at 1191 (noting that simply because speech may be implicated, an activity is not "excluded from the safeguards of the first amendment").

The Supreme Court noted that an attorney's in-person solicitation of clients is "entitled to some constitutional protection," but "is subject to regulation in furtherance of important state

interests." Ohralik, 436 U.S. at 459. The Ohralik Court also noted "numerous" examples of communications "that are regulated without offending the First Amendment." Id. at 456 (highlighting the exchange of securities information, corporate proxy statements, exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees). The Supreme Court held that the regulation of solicitation within the legal profession "falls within the State's proper sphere of economic and professional regulation." Id. at 459.

*9 [18] It is properly within the state's police power to regulate and license professions, especially when public health concerns are affected. See Watson v. Maryland, 218 U.S. 173, 176, 30 S.Ct. 644, 54 L.Ed. 987 (1910) (
"It is too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health."). Justice Jackson eloquently summarized the state's interest in licensing certain professions:
The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money. When one does so through the practice of a calling, the state may have an interest in shielding the public from the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency. A usual method of performing this f~inction is through a licensing system.
Thomas v. Collins, 323 U.S. 516, 544, 65 S.Ct. 315, 89 L.Ed. 430 (1945) (Jackson, J., concurring). Given the health and safety implications, California's interest in regulating mental health is even more compelling than a state's interest in regulating in-person solicitation by attorneys. We conclude that the licensing scheme is a valid exercise of California's police power.

2. Content and Viewpoint Neutrality

[19][20] We further conclude that California's licensing scheme is content and viewpoint

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neutral; therefore, it does not trigger strict scrutiny. We have held that " '[tihe appropriate level of scrutiny is tied to whether the statute distingulshes between prohibited and permitted speech on the basis of content.'
Black V. Arthur, 201 F.3d 1120, 1123 (9th Cir.2000) (quoting Foti v. City of Menlo Park, 146 F.3d 629, 635 (9th Cir.1998)). "The principal inquiry' in determining whether a regulation is content-neutral or content-based 'is whether the government has adopted [the] regulation ... because of [agreement or] disagreement with the message it conveys.'
Crawford v. Lungren, 96 F.3d 380, 384 (9th Cir.1996) (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994)).

California's mental health licensing laws are content-neutral; they do not dictate what can be said between psychologists and patients during treatment. Nothing in the statutes prevents licensed therapists from utilizing psychoanalytical methods or prevents unlicensed people from engaging in psychoanalysis if no fee is charged. [FN8] This reasoning mirrors Justice Jackson's concurrence in Thomas, 323 U.S. at 545, in which he stated:
*10 A state may forbid one without its license to practice law as a vocation, but I think it could not stop an unlicensed person making a speech about the rights of man or the rights of labor.~.. Likewise, the state may prohibit the pursuit of medicine as an occupation without its license, but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought.
Id. (Jackson, J., concurring).

Although the California laws and regulations may require certain training, speech is not being suppressed based on its message. Plaintiffs argue that the licensing scheme regulates the content of speech because the Board's psychological examination tests only certain areas, including the biological bases of behavior, research methods, and assessment and diagnosis. Plaintiffs contend that psychoanalysts, on the other hand, are trained in such areas as Jungian understanding of
personality, techniques for the activation and interpretation of the unconscious, and archetypal material, including mythology and fairy tales. Plaintiffs also allege that the Board uses the content of an institution's curriculum to determine which institutions provide "equivalent" training under California Business and Professions Code §§2914 and 2529. The licensing scheme, however, was not adopted because of any disagreement with psychoanalytical theories. See Crawford, 96 F.3d at 384. It was adopted for the important purpose of protecting "public health, safety, and welfare." Cal. Bus. & Prof. Code § 2900.

This case is different from Riley v. National Fed'n of the Blind, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). In Riley, the Supreme Court held that North Carolina's licensing laws for professional fundraisers violated the First Amendment because the state had "the power directly and substantially to affect the speech they utter." Id. at 801. California does not dictate the content of what is said in therapy; the state merely determines who is qualified as a mental health professional. Mental health professionals, unlike fundraisers, safeguard public health interests by monitoring the care and safety of their patients. [FN9]

Although some speech interest may be implicated, California's content-neutral mental health licensing scheme is a valid exercise of its police power to protect the health and safety of its citizens and does not offend the First Amendment. [FN1O]

3. Prior Restraint

*11 [21] In addition, we hold that the psychology licensing laws are not a prior restraint on speech. See Baby Tam & Co., Inc. v. City of Las Vegas, 154 F.3d 1097, 1100(9th Cir. 1998) ("A prior restraint exists when the enjoyment of protected expression is contingent upon the approval of government officials."). Because this is a valid licensing scheme designed to protect the mental

health of Californians, the state "may exercise some discretion in granting licenses." IDK, 836 F.2d

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at 1196. Because there is no allegation that the state is revoking or denying licenses "for arbitrary or constitutionally suspect reasons," there is no problem of prior restraint. Id.; see also City of Lakewood v. Plain Dealer Publ'g
Co., 486 U.S. 750, 755-56, 108 S. Ct. 2138, 100 L.Ed.2d 771 (1988) (fearing "unbridled discretion" in state officials could result in censorship); Young v. City of Simi Valley, 216 F.3d 807, 819 (9th Cir.2000) ("When an
approval process ... is completely
discretionary, there is a danger that protected speech will be suppressed impermissibly because of the government official's... distaste for the content of the speech.") (citation omitted).

V. CONCLUSION

In sum, we hold that California's psychology licensing laws do not violate either the First or the Fourteenth Amendment. We thus affirm the district court's dismissal of this action. As the district court noted, plaintiffs' concerns about the licensing of psycho analysts are "best addressed to the state legislature."

AFFIRMED.

FN* The Honorable Robert J. Kelleher, Senior United States District Judge for the Central District of California, sitting by designation.

FNI. Plaintiffs allege that psychoanalysis:
is a treatment based on verbal communication between the analyst and client. Its aim is to promote emotional growth through insight, character change. personal integration. and a lessening of symptoms that originate in the client's mind or emotions. It is based on extensive scientific research into human behavior and inner experience. The term psychoanalyst identifies practitioners from various schools of thought including Adierian, Existential, Eclectic, Ego-Psychology, Freudian, Jungian, Modern Freudian, Object Relations, and Self-Psychology. Plaintiffs further claim that "[the association between the analyst and the analysand is deep, intimate, personal and lengthy. The analysand typically sees the analyst two to five hours a week for two to five years or more.... Strong emotional bonds develop between the analysand and analyst, and are an expected part of the therapeutic

FN2. The research psychoanalyst laws do not recognize the psychoanalytic institute from which he graduated as substantially equivalent to California institutes

FN3. Plaintiffs alleged right to travel and freedom of religion claims below, but on appeal rnade no arguments relating to them. Plaintiffs also do not challenge the Eleventh Amendment dismissal of the State and the Board. We deem all of these arguments waived. See Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir.1999). There is some hint in plaintiffs' briefs of an overbreadth challenge: however, it is never explicitly argued. and thus is also waived. See Retlaw Broad. Co. v. NLRB, 53 F.3d 1002, 1005 n. 1 (9th Cir.1995) (holding that an issue is waived if the briefs fail to contain appellant's contentions, and citations to authorities, statutes, and the record).

FN4. We agree with the district court that there is no problem of standing for either the individual plaintiffs or the NAAP. as an organization. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130. 119 L.Ed.2d 351 (1992)
(holding that to satisfy constitutional standing, plaintiffs must show that: (1) they suffered an "injury in fact:" (2) the injury is fairly traceable to the challenged action of defendants: and (3) it is "likely," as opposed to "speculative." that the injury will be redressed by a favorable decision) (citations and internal quotation marks omitted): Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)
(holding that an organization has standing to sue on behalf of its members where: (1) the individual members would otherwise have standing to sue on their own: (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) the lawsuit does not require the participation of individual members).

FNS. Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539.49 L.Bd. 937 (1905).

FN6. Our discussion of highly personal relationships under Fourteenth Amendment substantive due process, see Part IV.A.1, supra, also disposes of

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plaintiffs' freedom of association claims under the First Amendment. See IDK, 836 F.2d at 1192-96.

FN7. This discussion relates as well to plaintiffs' claim that the First Amendment extends to the rights of clients to receive information from their psychoanalysts. See Monteiro V. Tempe Union High Sch. Dist., 158 F.3d 1022, 1027 n. 5 (9th Cir.1998) (aclmowledging "the well- established rule that the right to receive information is an inherent corollary of the rights of free speech and press, because the right to distribute information necessarily protects the right to receive it ... the right to receive ideas is a necessary predicate to the recipient's meaninglul exercise of his own rights of speech, press, and political freedom") (internal quotation marks and citation omitted).

FN8. We agree with the district court that the statutory scheme does not prevent plaintiffs from engaging in psychoanalysis if they do not charge a fee. Under the "psychologists" licensing law, the practice of psychology explicitly includes charging a fee. See Cal. Bus. & Prof.Code § 2903. Under the "medicine" licensing law, however, a physician's or surgeon's certificate is needed for someone to treat any disease, including mental conditions, regardless of whether a fee is charged. See id. § 2051. "Any person who practices or attempts to practice, or who advertises or holds himself or herself out as practicing, any system or mode of treating the sick or afflicted in this state
is guilty of a misdemeanor." Id. § 2052. In 1941, however, then California Attorney General Earl Warren interpreted the "medicine" licensing law to prohibit the unlicensed practice of psychoanalysis regardless of whether any fee was charged. See Cal. Op. Atty. Gen. N835334 (May 22, 1941). Under the most logical reading of California's current statutory scheme, however, psychoanalysis is no longer included in the medical licensing scheme because it is explicitly referenced in the psychology licensing statute. "Psychoanalyst" is included as an inappropriate title for an unlicensed person under Cal. Bus. & Prof. Code § 2902(c), which was amended as recently as 1989. The Legislature could have made clear that psychoanalysis was prohibited by the medical licensing laws, but it did not do so, instead, it

explicitly referenced psychoanalysis in the psychology licensing laws. Cf. Russello v. United States, 464 U.S. 16, 23-24, 104 S. Ct. 296, 78 L.Ed.2d 17 (1983) ("[W]here Congress includes language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation and internal quotation marks omitted).

FN9. This case is also different from Spiritual Psychic Science Church of Truth, Inc. v. City of Azusa, 39 Cal.3d 501, 217 Cal.Rptr. 225, 703 P.2d 1119, 1123-29 (Cal.1985), in which the California Supreme Court relied on federal case law to invalidate, under Article I, Section 2 of the California Constitution, a city ordinance that completely prohibited the practice of fortune telling and palm reading for a fee. Here, California's licensing scheme does not prohibit psychoanalysis, but merely regulates who can engage in it for a fee.

FN1O. Plaintiffs concede that, if the licensing scheme is otherwise valid, they have no viable commercial speech claim for the right to use professional titles, such as 'psychoanalyst~' and "analytical psychologist."

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