Docket No. 15-16598

In the

United States Court of Appeals

for the

Ninth Circuit

DONALD WELCH, ANTHONY DUK and AARON BITZER,

Plaintiffs-Appellants,

v.

EDMUND G. BROWN, JR., DENISE BROWN, HARRY DOUGLAS, JULIA JOHNSON, SARITA KOHLI, RENEE LONNER, KAREN PINES, CHRISTINA WONG, SHARON LEVINE, MICHAEL BISHOP, REGINALD LOW, DENISE PINES, SILVIA DIEGO, DEV GNANADEV, JANET SALOMONSON, GERRIE SCHIPSKE, DAVID SERRANO SEWELL, BARBARA YAROSLAVSKY, ANNA M. CABALLERO, CHRISTINE WIETLISBACH, PATRICIA LOCK-DAWSON and SAMARA ASHLEY,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Eastern District of California, Case No. 2:12-cv-02484-WBS-KJN · Honorable William B. Shubb

APPELLANTS' OPENING BRIEF

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INTRODUCTION

This case returns to the Court to answer pressing questions about the limits of mental health regulation, especially when it prevents even clergy from inculcating religious values to minors in a church setting.

In this brief, the Plaintiffs[1] will argue that the challenged regulations have the primary effect of inhibiting religion, and cause excessive entanglement in violation of the Establishment Clause; that the statute is not a neutral law of general applicability under the Free Exercise Clause; that the restriction intrudes on fundamental privacy rights, for which third party standing should have been granted; and that, while the statute claims a broad compelling interest, it lacks a genuine compelling interest achieved by the least restrictive means.

STATEMENT OF JURISDICTION

In accordance with 9th Cir. R. 28-2.2, the U.S. District Court for the Eastern District of California has original jurisdiction over this case under 28 U.S.C. §1331, in that the Complaint alleges violations of the United States Constitution actionable under 42 U.S.C. §1983.

[1] Plaintiffs will be collectively referenced in this brief as "Welch." Where appropriate, references to individual plaintiffs will be so identified.

This appeal is taken from a final decision of the District Court in the form of an order granting judgment on the pleadings. This Court therefore has jurisdiction under 28 U.S.C. § 1291. The District Court's order granting judgment on the pleadings was entered on July 21, 2015. Excerpts of Record ("E.R.") I:1-2. Plaintiffs timely filed a notice of appeal on August 10, 2015. E.R. II:4-5.

STATEMENT OF THE ISSUES

The California Legislature and Governor enacted a statute which prohibits mental health providers from engaging in "any practices" involving sexual orientation change efforts ("SOCE") on minors. As the Legislature knew, these "practices" are primarily sought by religiously conscientious youth, involve religious teaching, and are carried out by religious adherents. In the present case, the lead plaintiff, Dr. Donald Welch, is an ordained minister and Licensed Marriage and Family Therapist (LMFT) who oversees the counseling ministry at Skyline Church. The specter of the State disciplining a minister for expounding the teachings of his church raises serious Establishment and Free Exercise conflicts. The statute further implicates fundamental privacy concerns, and the novel approach of the District Court of transforming a ruling on preliminary injunction into judgment on the pleadings also constituted prejudicial error.

The issues for review are:

1. Whether the District Court committed reversible error by basing judgment on the pleadings on the same standard as the motion for preliminary injunction;

2. Whether the prohibition on SOCE has the primary effect of inhibiting religion or causes excessive entanglement in violation of the First Amendment's Establishment Clause;

3. Whether SB 1172 restricts the Free Exercise of religion in violation of the Free Exercise Clause;

4. Whether the District Court erred by denying third-party standing to the Plaintiffs, thereby foreclosing the fundamental privacy concerns triggered by the statute; and

5. Whether the statute is justified by a true compelling interest, achieved by the least restrictive means.

STATEMENT OF THE CASE

Governor Edmund G. Brown, Jr., signed into law Senate Bill 1172 on September 30, 2012. SB 1172 prohibits "sexual orientation change efforts" by mental health providers on patients under 18 years of age under all circumstances. CA Business & Professions Code §865.1 (E.R. III:438). Two mental health professionals and an individual who successfully underwent SOCE filed suit on

October 1, 2012. E.R. IV:557. Welch then sought and was granted a preliminary injunction. *Welch v. Brown*, 907 F. Supp. 2d 1102 (E.D. Cal. 2012).

Exercising plenary review, this Court reversed the grant of preliminary injunction, and affirmed the denial of a preliminary injunction in a contemporaneous case, *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). The Supreme Court then denied certiorari.

After returning to the District Court, Welch sought a renewed preliminary injunction on his remaining claims. This time, the District Court denied the preliminary injunction. While discovery was still pending, the State then filed a Motion for Judgment on the Pleadings. The District Court granted the State's motion without hearing oral argument and without offering any further analysis beyond citing to the Court's prior denial of the second motion for preliminary injunction. E.R. I:3. This appeal followed.

STATEMENT OF FACTS

Some of the pertinent facts, such as selected text and rationales of the challenged statute, were set forth by this Court in *Pickup v. Brown*. However, since the Court addressed only Welch's and Pickup's free speech claims, and additional claims by Pickup such as vagueness and substantial due process, the Court limited its focus on SOCE as *treatment*. Consequently, the significant facts unique to the Welch Plaintiffs, particularly those facts bearing on religious

freedom, have yet to be considered. To this end, the Court noted that on remand the District Court could consider the religion claims "in the first instance." *Id.* At 1051, n. 3.

Donald Welch ("Dr. Welch") is a licensed marriage and family therapist and ordained minister. Welch decl. ¶1 (E.R. III:392). Combining both vocation and ministry, Dr. Welch serves part-time as a Counseling Pastor at Skyline Wesleyan Church ("Skyline Church"). Welch decl. ¶5 (E.R. III:394-95). Skyline Church is bound by the tenets of faith of its denomination, The Wesleyan Church. Welch decl. ¶17 (E.R. III:399). Indeed, holding to the theological and doctrinal views of Skyline Church, by both confession and conduct, serves as a precondition and continual condition for employment. Welch decl. ¶5 (E.R. III:394-95). The Wesleyan Church teaches that "God's plan for human sexuality is that it is to be expressed only in a monogamous lifelong relationship between one man and one woman within the framework of marriage." *The Discipline Of The Wesleyan Church 2008*, (E.R. III:403).[2] In like manner, the Church teaches as follows: "We affirm that sexual relationships outside of marriage and sexual relationships between persons of the same sex are immoral and sinful." *Id.*, 405.

[2] For further explanation on the Church's view on homosexuality, see, *Position Statements Of The Wesleyan Church*: Homosexuality, (May 19, 2011), Welch decl. Exh. 14 at E.R. III:410-14.

In addition to the negative spiritual ramifications for beliefs and behaviors inconsistent with the Church's doctrine, there are ecclesiastical consequences as well. Under the provisions for Church Discipline, "[a]ny covenant member, minister, special worker…shall be liable to disciplinary proceedings and trial for…1. Holding or teaching any doctrine contrary to the doctrine of The Wesleyan Church as stated in *The Discipline*." *The Discipline Of The Wesleyan Church 2008*, Part 9 Judiciary, Chapter 1 §5004 (E.R. III:406). The wages of such a transgression are severe. Unless the behavior has ceased, "anyone declared guilty…shall be punished with dismissal." *Id.*, §5120 (E.R. III:408).

That is not all. Skyline Church faces ecclesiastical liability.

> Any local church, district, official body or other agency of The Wesleyan Church shall be liable to disciplinary proceedings and trial for any of the following offenses:
>
> 1. Disseminating or tolerating the teaching of any doctrine contrary to the doctrines of The Wesleyan Church as stated in *The Discipline*. (See 2 Thess. 3:6, 14-15; 1 Tim. 6:3-5; 2 John 9-11)
> 2. Disobedience to the provisions of *The Discipline* or tolerating such disobedience. *Id.*, §5006 (E.R. III:407).

Therefore, as a minister on staff at Skyline Church, Dr. Welch is prohibited from encouraging, enabling or validating beliefs or behaviors in others contrary to the teachings of the denomination, including human sexuality. "That is a position that cannot even be entertained as a subject for negotiation." Welch decl. ¶17 (E.R. III:399).

Dr. Welch's clientele includes minors who are gay, lesbian, bisexual, heterosexual and questioning youth. Some of these clients struggle with sexual attractions and behaviors, which are inconsistent with their moral convictions, faith, and family's values. Welch decl. ¶13 (E.R. III:397). Dr. Welch does not attempt to change a minor's sexual orientation against their will, believing it would be "folly" to do so. Welch decl. ¶10 (E.R. III:396).

It is Dr. Welch's position that counseling necessarily requires a significant level of trust between the therapist and the client because highly personal matters are revealed to the therapist. Welch decl. ¶12 (E.R. III:397). When matters of sex are at issue, the privacy concerns are heightened, Dr. Welch explains. *Id.*

> Sexuality touches on religious tenets, philosophical understandings, morality, emotional and mental issues, medical matters, relationships with family, and cultural norms. SB 1172 will interfere with honest communications between me and minor clients when the young person wants to share concerns about their sexual orientation. *Id.*

Anthony Duk, M.D., ("Dr. Duk") is a board certified psychiatrist in private practice who works with adults and children over the age of sixteen. Duk decl. ¶2 (E.R. III:500). Dr. Duk assists patients "dealing with unwanted sexual desires and behaviors. These unwanted sexual desires or behaviors encompass persons struggling with heterosexual, homosexual, bisexual, and gender identity issues."

Duk decl. ¶5 (E.R. III:501). His patients "include minors struggling with homosexuality and bisexuality." Duk decl. ¶6 (E.R. III:501).

Dr. Duk is a Christian who expresses his faith through the Roman Catholic Church. Duk decl. ¶10 (E.R. III:502-03). The Church teaches that "sexuality is ordered to the conjugal love of man and woman." Duk decl. ¶10 quoting *Catechism of the Catholic Church*, 2360 (E.R. III:503). Some families specifically seek his counsel because they share his faith. Duk decl. ¶12 (E.R. III:504). With patients of like faith, he discusses the tenants of the Catholic Church, including the view that "homosexuality is not a natural variant of human sexuality, it is changeable, and it is not predominantly determined by genetics." Duk decl. ¶11 citing *Catechism of the Catholic Church*, 2358 and 1 Corinthians 6:9-11 (other citations omitted) (E.R. III:502-03). The Church teaches that being a homosexual is not in and of itself sinful, but rather it is the acting out on the sexual conduct which is a sin. Duk decl. ¶12 citing *Catechism of the Catholic Church*, 2357.

Teens from traditional family backgrounds often have objectives of bringing their sexual attractions and behaviors in line with their faith, cultural traditions, and family's values. Duk decl. ¶17 (E.R. III:505-06). Providing counseling which either validates or enables behaviors contrary to the tenets of the Catholic Church violates Dr. Duk's conscience and the practice of his faith. Duk decl. ¶13 (E.R. III:504). Such would also violate the conscience and faith of the minor patients

and their parents. *Id.* Dr. Duk declares that the law serves to interfere with the objectives of his minor patients who wish to bring their sexual desires into conformity with their religious traditions, cultural norms, and moral standards. Duk decl. ¶17 (E.R. III:505).

Dr. Duk's experience is that a minor's sexual orientation is an extremely private matter. Duk decl. ¶15 (E.R. III:505). Such touches on the most personal issues in the human condition, including sex, family relationships, religion, culture and medical issues. *Id.*

Aaron Bitzer is an adult who has experienced same-sex attractions beginning in high school (Bitzer decl. ¶3 (E.R. III:511)) and participated in SOCE as an adult. Bitzer decl. ¶¶9-11 (E.R. III:513). He found his experience with SOCE helpful, primarily through Christian-based sources. See, generally Bitzer decl. ¶¶4-24 (E.R. III:511-18).[3]

LGBT lobbyists[4] drafted and submitted to lawmakers a bill that prevents mental health professionals from any efforts to use SOCE in treating persons under the age of 18. The language of SB 1172 restricts *any practices* (Sec. 865(b)(1)) by

[3] SB 1172 has caused Mr. Bitzer to change his career plans. Prior to the enactment, he had intended to become a therapist to help others who, like himself, could benefit from SOCE. Bitzer decl ¶26 (E.R. III:518).

[4] "LGBT" is an acronym commonly used in place of "lesbian, gay, bisexual and transgender." The referenced LGBT groups include Equality California, the

a mental health provider that seeks to change a minor's sexual orientation. *Under no circumstances* can a mental health provider engage in SOCE (Sec. 865.1). [*A*]*ny efforts attempted* (Sec. 865.2) on a minor by a mental health provider are deemed unprofessional conduct subjecting the provider to discipline. This broad language includes spiritual interventions such as the utilization of prayer, religious conversion, and individual and group counseling to change a person's sexual orientation.[5]

In its prior opinion, this Court noted the importance of the *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* ("APA Report") to the Legislature's decision-making. *Pickup v. Brown*, 728 F.3d 1042, 1049 (9th Cir. 2014). "In particular," the Legislature relied on the APA Report. *Id.* at 1050. Since the Court was looking at the APA Report solely through the lens of professional regulation and treatment, it did not consider the remarkable degree to which the APA Report wrestled with religion. That level of reliance now becomes crucial to the Religion Clause claims. For this reason, the APA Report will receive in-depth examination

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National Center for Lesbian Rights, and Coming Out Into Light. E.R. III:434, 443, 446, 451.

[5] E.R. III:431(Exh. 2 at p. 7, ¶1); E.R. III:459 (Exh. 5 at p. 7, ¶3); E.R. III:466 (Exh. 6 at p. 6, ¶2); E.R. III:495 (Exh. 12 at p. 5, ¶2). Unless otherwise indicated, references to exhibits are to the legislative record filed in the District Court and found at E.R. III:415-498.

in the section of the Argument dealing with the Establishment and Free Exercise Clauses.

SUMMARY OF THE ARGUMENT

Under SB 1172 it is illegal for Dr. Welch to sit in his office at Skyline Church, wearing both of his hats as ordained minister and LMFT, and in those dual capacities to tell a conflicted young person questioning their gender identity, "Male and female He created them." Genesis 1:27. It is illegal for Dr. Welch to tell a 15-year-old boy struggling with gay erotic fantasies to "walk by the Spirit, and you will not carry out the desire of the flesh." Galatians 5:16. It is also illegal for Dr. Duk to tell a young practicing Roman Catholic with similar struggles that their common faith teaches that homosexuality and gender dysphoria are not natural variants of human nature as created by God and taught by the Church.

The principal source on which the Legislature relied summarized the conflict this way: "[D]ifficulties arise because the professional psychological community considers same-sex sexual attractions and behaviors to be a positive variant of human sexuality, while some traditional faiths continue to consider it a sin, moral failing, or disorder that needs to be changed." APA Report, at 17-18 (E.R. II:62).

The Plaintiffs-Appellants maintain that the resulting prohibitions of SB 1172 are fundamentally irreconcilable with the First Amendment's Religion Clauses. Moreover, the straitjacketing of a minor's self-definition mandated by the statute is

an egregious violation of privacy rights, which these Plaintiffs must be allowed to advance on their young clients' behalf.

As a threshold matter, the Court is also presented with an unusual procedural problem. The District Court granted the State judgment on the pleadings, but the Court applied the quite different preliminary injunction standard. Thus, there is a strong basis for reversing the District Court and remanding for application of the correct standard.

ARGUMENT

I. THE STANDARD OF REVIEW IS STRAIGHTFORWARD ON APPEAL, BUT THE STANDARD APPLIED BELOW WAS ERRONEOUS.

The standard of review to be applied by this Court is straightforward. The District Court granted the State judgment on the pleadings. E.R. I:1-2. "This court reviews de novo an order granting a motion for judgment on the pleadings." *Rose v. Chase Bank USA, N.A.*, 513 F.3d 1032, 1036 (9th Cir. 2008).

As routine as is the application of this rule, the standard applied below was anything but, and presents a threshold issue in resolving this appeal.

The standard for Judgment on the Pleadings under FRCP 12(c) is functionally equivalent to a Motion to Dismiss under FRCP 12(b), but it is not equivalent to the standard for a Motion for Preliminary Injunction. "Decisions on preliminary injunctions require the District Court to assess the plaintiff's likelihood of success on the merits, not whether the plaintiff has actually succeeded on the

merits." *S. Oregon Barter Fair v. Jackson County*, 372 F.3d 1128, 1136 (9th Cir. 2004).

The District Court chose not to offer any explanation for its dispositive ruling, beyond reference to the denial of a preliminary injunction. In so doing, the Court rendered meaningless the distinction between these two quite different types of decisions.

In *Univ. of Tex. v. Camenisch*, 451 U.S. 390 (1981), the Supreme Court drew a distinction between preliminary injunctions and trial on the merits. A deaf student filed suit under Section 504 of the Rehabilitation Act and obtained a preliminary injunction. On appeal, the question became whether the injunction was mooted by the student's graduation, where questions still remained about who was responsible for paying his interpreter. The unanimous Court rebuked the lower courts for conflating the injunction standard with trial on the merits. "This reasoning fails, however, because it improperly equates likelihood of success with success, and what is more important, because it ignores the significant procedural differences between preliminary and permanent injunctions." *Id.* at 394.

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose …. [a] party thus is not required to prove his case in full at a preliminary injunction hearing [citation omitted], and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits. [Citations omitted.] In light of these considerations, it is generally

> inappropriate for a federal court at the preliminary injunction stage to give a final judgment on the merits. *Id.* at 395.

Relying on *Camenisch*, the lower courts have noted the differences between the preliminary injunction standard and dispositive motions on numerous occasions. The Third Circuit was presented with this issue in *Brown v. City of Pittsburg*, 586 F.3d 263 (3d Cir. 2009). The District Court denied a preliminary injunction and at the same time, without additional analysis, dismissed some of the claims. The Third Circuit, noting that the combination of appealable and non-appealable orders presented a difficult question, ultimately affirmed in part and reversed in part the preliminary injunction, while dismissing the appeal from the partial dismissal of claims.

Here, the District Court erroneously granted judgment on the pleadings with no explanation as to how the State met that standard. Instead, the District Court relied entirely on its prior ruling regarding the quite different preliminary injunction standard. As a result, the District Court has blurred the lines between these two procedural mechanisms to the point that parties requesting or opposing a preliminary injunction cannot know whether their arguments should instead be directed toward judgment. The Plaintiffs here were prejudiced by the District Court's issuance of a dispositive ruling that did not explain why the State was entitled to judgment.

II. THE DISTRICT COURT ERRED BY FAILING TO RECOGNIZE THE UNIQUE RELIGION CLAUSE CONFLICTS CREATED BY SB 1172.

By restricting the inculcation of religious beliefs and values even within the four walls of a church, SB 1172 raises serious and unique conflicts under both halves of the Religion Clauses. It also resists easy categorization. Plaintiffs below urged the District Court to eschew rote application of traditional tests and follow the path taken by the Supreme Court and many lower courts that acknowledges the interdependence of the Establishment and Free Exercise Clauses when regulation reaches church doctrine and autonomy.

A. The Supreme Court Has Charted A Course That Relies On Both Of The Religion Clauses To Resist State Intrusion Into Church Doctrine And Choice Of Ministers.

At least as far back as *Watson v. Jones*, 80 U.S. 679 (1871), the Supreme Court has tread very carefully in ecclesiastical matters. The preeminence of the Religion Clauses in the Bill of Rights deserves no less.

Relying on *Watson*, in *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in America*, 344 U.S. 94 (1952), the Court combined both Free Exercise and Establishment Clause principles to strike down a New York statute that attempted to take sides in a dispute over control of the Russian Orthodox Church, at a time when it was feared that the mother church in Moscow was under Communist and therefore atheistic influence. In interweaving the two sides of the Religion Clauses, the Court held that the government must not dictate who speaks

for the church. SB 1172 contradicts this central premise by insisting that, when the church counsels youth about sexual orientation and gender identity, it cannot speak through ordained ministers like Dr. Welch who are also mental health professionals.

More recently, the high court traced this history, outlining a "spirit of freedom for religious organizations, an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of … faith and doctrine." *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 132 S.Ct. 694, 704 (2012). While giving a brief nod to *Employment Div. v. Smith*, 494 U.S. 872 (1990) (*Smith II*), the Court refused to impinge on a religious institution's freedom to choose for itself who would be its voice to the faithful and the next generation.

B. Other Jurisdictions Have Employed Both Halves Of The Religion Clauses Simultaneously To Protect Religious Institutional Autonomy.

Courts across the country have also tended to combine, and occasionally disagreed among themselves over, the role of Free Exercise and Establishment Clause principles in church counseling cases.

In *Franco v. Church of Jesus Christ of Latter-Day Saints*, 21 P.3d 198 (Utah 2001), the Utah Supreme Court rejected claims for allegedly tortious church counseling based primarily on excessive entanglement concerns. A concurrence,

though, insisted the majority would have been better served to ground its analysis in the Free Exercise Clause.

Reaching a similar result on similar facts, *DeCorso v. Watchtower Bible & Tract Soc'y*, 829 A.2d 38 (Conn. Ct. App. 2003), based its analysis primarily on excessive entanglement but invoked and relied on Free Exercise principles as well. And in *Malicki v. Doe*, 814 So. 2d 347 (Fla. 2002), the Florida Supreme Court took the reverse approach to clergy abuse claims, relying primarily on Free Exercise but invoking excessive entanglement without clearly delineating the two.

Welch will here conduct traditional Establishment Clause and Free Exercise analyses. Of note, the word *religion* appears but once in the religion clauses. Hence, the Court would be well served to adapt principles from both into a single analysis that recognizes the overriding importance of separating church and state where, as here, a statute has impermissibly sought to restrict who the church may employ to communicate its beliefs, and what values that minister may communicate to young people struggling with their sexual orientation and gender identity.

III. THE COMPLAINT STATES A CLAIM, AND WELCH SHOULD HAVE PREVAILED, UNDER THE ESTABLISHMENT CLAUSE.

A. SB 1172 Flunks The *Lemon* Test.

Although the *Lemon* test is an imperfect fit for statutes directly bearing on a church's ability to communicate its values to young congregants, the claims here

nevertheless prevail under that standard. In keeping with *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the essence of Welch's Establishment Clause claim is that the primary effect of SB 1172 is to inhibit certain religious beliefs and practices, and that the legislation excessively entangles the State in church doctrine.

At least in theory, the law knows no heresy, and it is committed to the support of no dogma. *Watson*, 80 U.S. at 728. Yet the State could not avoid crossing this line when it adopted SB 1172. On its face, and in the single most important document on which it relies, SB 1172 does exactly that.

The primary purpose and effect of SB 1172 is to inhibit certain religious beliefs and motivations. It is necessary here to refer to the legislative record in detail.[6] References to *religion* were not stray comments made by individual legislators at committee hearings. Rather the record is permeated with analysis and commentary on religion.[7] Understanding the pervasiveness of the focus on religious beliefs establishes several foundational facts: (1) the primary authority

[6] Papers filed with the District Court included a request for judicial notice of the Bill's legislative record. E.R. III:415-498. The request was without objection and the District Court referenced these documents in its two orders on the motions for preliminary injunction. *Welch v. Brown*, 907 F. Supp. 2d 1102, 1112, 1119 (E.D. Cal. 2012) and *Welch v. Brown*, 58 F. Supp. 3d 1079 (E.D. Cal. 2014).

[7] Because the record is saturated with references to religion, regrettably this requires the use of string cites rather than solitary examples with lone citations or using the term *passim*. Thus, for ease of reading, string cites will be confined to footnotes.

adopted by lawmakers, i.e., APA Report,[8] (2) the underlying rationale for the authors of the APA Report to oppose SOCE; (3) who tends to seek to reduce unwanted same-sex attractions through SOCE;[9] and (4) the main reasons, known to the Legislature, why such individuals seek SOCE. While all of these facts are relevant to both halves of the Religion Clauses, the first two will be emphasized in this section, and the latter two in the context of the Free Exercise Clause in Section III.

1. The Legislature found it impossible to separate religious motivation from the regulated counseling.

Subsections b and c, of the preamble to SB 1172 relies on the APA Report. "The American Psychological Association convened a Task Force on Appropriate Therapeutic Responses to Sexual Orientation. The task force conducted a systematic review of peer-reviewed journal literature on sexual orientation change efforts, and issued a report in 2009… ." E.R. III:422.

The preamble to SB 1172 is hardly an incidental reference to the APA Report. California's lawmakers saturated the analyses with references, summations and quotes (sometimes without attribution) taken directly from the APA Report. *See*, *generally*, legislative documents filed in Plaintiffs' Request For

[8] For ease of reference, this brief will use parallel citations to the APA Report, i.e., page numbering from the Excerpts of Record and from the APA Report itself.

Judicial Notice In Support Of Plaintiffs' Motion For Preliminary Injunction (Exhibits 1-12).[10]

2. What motivates the APA to oppose SOCE?

Because the Legislature leans heavily on the APA Report, an understanding of the rationale of the APA authors of the Report is crucial to discern legislative intent.[11] As reflected in the legislative documents filed with the Court, the APA Report identifies religious conservatives[12] as those typically seeking SOCE.[13]

The APA Report describes a clash of worldviews. APA Report at 17-18 (E.R. II:61-62). The clash pits transcendent values against inner appetites, referred to in the APA Report as *telic* versus *organismic congruence.* *Id*.

The APA Report describes the choice as follows:

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[9] "SOCE is also sometimes called reparative therapy or conversion therapy." E.R. III:471 (Exh. 7, p. 2, ¶8); E.R. III:471 (Exh. 8, p. 2, ¶2).

[10] E.R. III:422 (Exh. 1, at p. 2); E.R. III:427 (Exh. 2, at p. 3); E.R. III:439-40 (Exh. 3, at p. 3-4); E.R. III:472 (Exh. 7 at p. 4); E.R. III:482-83(Exh. 9 at p. 3-4).

[11] For ease of reading, the APA Report's pertinent sections related to religion, though by no means all such references, were highlighted in the lower court and remain that way in the record.

[12] The legislative record provides the same findings relative to identifying religious conservatives. E.R. III:431 (Exh. 2 at p. 7, ¶1); E.R. III:459 (Exh. 5 at p. 7, ¶3); E.R. III:464 (Exh. 6 at p. 6, ¶2); E.R. III:496 (Exh. 12 at p. 5, ¶2). Interestingly, said record does not provide attribution for the findings.

[13] APA Report at p. v, 3, 17, 20, 25, 45, 52, 56, 66 (ER II:43, 47, 61, 69, 89, 96, 100, 110).

> This difference in worldviews can impact psychotherapy. For instance, individuals can experience tensions and conflicts between their ideal self and beliefs and their sexual and affectational needs and desires. The different worldviews would approach psychotherapy for these individuals from dissimilar perspectives: The telic strategy would prioritize values whereas the organismic approach would give priority to the development of self-awareness and identity. APA Report at 18 (E.R. II:62) Inner citations omitted.

The heart of the matter is that the authors of the APA Report simply disagree with the notion that a person of faith should choose values over sexual yearnings. "[A]lthough many religious individuals' desired to live their lives consistently with their values, primarily their religious values, we concluded that telic congruence grounded in self-stigma and shame was unlikely to result in psychological well-being." APA Report at 55 (E.R. II:99). Instead, the mental health worker should focus on therapy which includes "acceptance and support, active coping…and identity exploration and development."[14] This passage mirrors section 865(b)(2)(A) of the Act.[15]

Going even further, the APA Report recognizes the essential conflict between a conservative religious philosophy and a psychology-based philosophy.[16]

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[14] APA Report at v (E.R. II:43). Nearly identical language is also found at APA Report 4-6, 55, 63 and 86 (E.R. II:48-50, 99, 107, 130).

[15] SOCE does not include psychotherapies that: "provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development… ." This provision of the statute is cut and pasted from the abstract of the APA Report at v (E.R. II:43).

[16] APA Report at 17-20 (E.R. II:61-64).

"[R]eligious fundamentalism is correlated with negative views of homosexuality, whereas a quest orientation is associated with decreased discriminatory or prejudicial attitudes."[17] The distinction is so sharp that at one point the Report analogizes this to the dispute between "Intelligent Design…and Evolutionary Theory." APA Report at 19 (E.R. II:63).[18]

On the subject of religion, the APA Report is much lengthier than can be reprinted here, and the foregoing excerpts must suffice. The Legislature's extensive reliance on the APA Report, including the verbatim use of language from the Report in the statute (865(b)(2)(A)), makes it quite evident that they adopted the thinking of the authors of the APA Report. A side-by-side reading of the legislative record and the language on the face of the text of the statutes, and the APA Report shows that the primary purpose and effect of SB 1172 is to inhibit certain religious beliefs and motivations, while bolstering opposing beliefs. Put simply, the Legislature knew and intended that the primary effect of banning SOCE would be the inhibition of religiously-motivated young people seeking to live in accordance with their values. The Legislature, like the authors of the APA

[17] APA Report at 18 (E.R. II:62).

[18] Consistent with the APA Report, in four places the legislative record cites to the World Health Organization as follows: "Sexual orientation by itself is not to be regarded as a disorder? it [*sic*] is often a result of unfavorable and intolerant attitudes of the society or a conflict between sexual urges and religious belief

Report, simply disagreed with the notion that faith should cause individuals to curb their sexual feelings.

This is nothing short of the legislature picking winners and losers in a theological and philosophical debate. By enacting SB 1172, lawmakers codified state orthodoxy.

B. The Legislature's Cognizance Of The Sweep Of Its Prohibition, Directly Implicating Religious Practices, Creates Excessive Entanglement.

Besides taking aim at particular religious motivations and beliefs, thereby ensuring a primary effect of inhibiting religion, the Legislature further ensured excessive entanglement by acknowledging and embracing intrusion into core religious practices.

To understand how religion, psychology, and public policy are intertwined in SB 1172, it is necessary to consider what SOCE includes. The language of SB 1172 restricts *any practices* (Sec. 865(b)(1)) by a mental health provider that seeks to change a minor's sexual orientation. *Under no circumstances* can a mental health provider engage in SOCE (Sec. 865.1). [*A*]*ny efforts attempted* (Sec. 865.2) on a minor by a mental health provider are deemed unprofessional conduct subjecting the provider to discipline.

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systems." E.R. III:450 (Exh. 4 at p. 6, ¶6); E.R. III:458 (Exh. 5 at p. 6, ¶6); E.R. 466 (Exh. 6 at p. 5, ¶5); E.R. II:495 (Exh. 12 at p. 5, ¶4).

The Legislature has identified specific examples as to what constitute *practices*, *efforts*, or *circumstances* related to SOCE. These include prayer and religious conversion. "[C]onservative Christian transformational ministries[,] use the term conversion therapy to refer to the utilization of prayer, religious conversion, individual and group counseling to change a person's sexual orientation."[19] Additionally, the author of SB 1172 states that SOCE includes *spiritual interventions*. "According to the author, 'this bill establishes first-in-the-nation protections for youths from dangerous so-called therapies that aim to change a person's sexual orientation… Practitioners may also try to alter a patient's sexuality with…spiritual interventions."[20]

In at least nine separate places, the legislative record makes clear that prayer, religious conversion, and spiritual interventions fall within SOCE.[21] Thus, these activities by a mental health provider are forbidden *efforts*, *practices*, and *circumstances* under SB 1172.

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[19] E.R. III:431(Exh. 2 at p. 7, ¶1); E.R. III:459 (Exh. 5 at p. 7, ¶3); E.R. III:466 (Exh. 6 at p. 6, ¶2); E.R. III:495 (Exh. 12 at p. 5, ¶2).

[20] E.R. III:471(Exh. 7 at p. 3, ¶7); E.R. III:438 (Exh. 3 at p. 3, ¶1); E.R. III:477 (Exh. 8 at p. 3, ¶1); E.R. III:482 (Exh. 9 at p. 3, ¶1); E.R. III:488 (Exh. 11 at p. 3, ¶4).

[21] E.R. III:431(Exh. 2 at p. 7, ¶1); E.R. III:438 (Exh. 3 at p. 3, ¶1); E.R. III:459 (Exh. 5 at p. 7, ¶3); E.R. III:466 (Exh. 6 at p. 6, ¶2); E.R. III:471 (Exh. 7 at p. 3, ¶7); E.R. III:477 (Exh. 8 at p. 3, ¶1); E.R. III:482 (Exh. 9 at p. 3, ¶1); E.R. III:488 (Exh. 11 at p. 3, ¶4); E.R. III:495 (Exh. 12 at p. 5, ¶2).

This presents a serious constitutional problem. Under SB 1172 a licensed mental health provider, who *also* is an ordained minister cannot incorporate prayer, religious conversion or spiritual intervention when assisting a youth with unwanted same-sex attraction. But such comprise the very activities that clergy perform. The assertion that the pastor/counselor Plaintiff (Dr. Welch) can provide counsel and comfort to a minor with unwanted same-sex attraction that includes prayer, religious conversion, and spiritual interventions, so long as he does not practice SOCE, turns a blind eye to the legislative analysis and the face of the statutes. The law forbids *any efforts* or *practices* related to SOCE, which include the above. As the Complaint alleges (E.R. IV:575, ¶¶ 128-133), the four walls of Skyline Church would provide Dr. Welch no protection, while engaging in those religious activities, from the reach of the State under SB 1172.

The Legislature's adoption of the APA's lucid explanation of its intent to eliminate certain religious views on sexuality that it believed to be inherently harmful implicates both primary effect and entanglement prongs of *Lemon*. In crossing the threshold of the church and attacking particular religious beliefs, the State has rushed in where other lawmakers and courts have feared to tread. Courts have been unwilling to venture into this territory in other counseling cases. *Nally v. Grace Community Church*, 47 Cal.3d 278 (1988); *Franco v. Church of Jesus Christ of Latter-Day Saints*, 21 P.3d 198 (Utah 2001).

To be sure, religious counseling and even prayer are not without their hazards. See, e.g., *Kubala v. Hartford Roman Catholic Diocese*, 38 A.3d 1252 (Conn. Ct. App. 2012) (injuries sustained while receiving prayer). Yet most jurisdictions have steadfastly refused to create civil or professional liability in ways that could impede the church's mission. *Id.* (affirming dismissal of claims).

In *Franco*, the Utah Supreme Court rejected claims against the church and its personnel for alleged breach of duty in referring a teen sexual assault victim to an unlicensed counselor. The court was primarily concerned about excessive entanglement implications of allowing the claims to go forward. While one could easily second-guess the church leaders' approach of counseling the victim to "forgive and forget" the sexual abuse she had suffered, the court was not about to venture into the minefield of identifying acceptable and unacceptable counseling methods.

In *DeCorso*, the court rejected emotional distress claims against a church by a woman who alleged she had been counseled to endure abuse by her husband. Again, the court found it impossible to adjudicate the claims without running afoul of excessive entanglement. Because the church defendants had given marital counseling that incorporated Jehovah's Witness teaching, any analysis of the claims would require the court to delve into the propriety of religious teaching, which would violate the First Amendment. *DeCorso*, 829 A.2d at 879-80.

In *Gulbraa v. Corp. of Presiding Bishops*, 159 P.3d 392 (Utah Ct. App. 2007), Plaintiff sued the Mormon church for performing priesthood ordinances on his children without his consent or participation. The appellate court affirmed dismissal of all but one count on First Amendment grounds. The court dismissed most of the claims, such as fraud and breach of implied contract, because they would necessarily require the court to interpret church doctrine and ecclesiastical questions such as eligibility for ordination. This, the court could not do while remaining true to the First Amendment.

In undeniably important areas of public policy such as workplace anti-discrimination laws, Congress avoided Establishment Clause entanglements by creating a religious exception, *see, Corp. of Pres. Bishops v. Amos*, 483 U.S. 327 (1987). And the Supreme Court more recently recognized the necessity of a ministerial exception, derived from both of the Religion Clauses, which would apply to ordained clergy such as Welch. *Hosanna Tabor Ev. Luth. Church & Sch. v. EEOC*, 132 S.Ct. 694 (2012).

Several judges of this Court perceived impermissible entanglement where the San Francisco Board of Supervisors adopted a resolution denouncing the Catholic Church for its teachings on homosexuality. *Catholic League for Religious and Civ. Rights v. City and County of San Francisco*, 624 F.3d 1043 (9th Cir. 2010). While the Catholic League did not prevail because five members

of the en banc panel believed the organization lacked standing, and three additional judges believed the non-punitive resolution was permissible government speech, the reasoning of the three who identified entanglement is highly relevant here, where the Defendants are empowered to punish Plaintiffs for putting their faith into action.

Even without the completion of discovery (which was cut short by the State's motion for judgment on the pleadings), it has become evident that the statute, birthed and developed out of opposition to the Plaintiffs' religious beliefs, finds it impossible to avoid the entanglement and hostility that the Establishment Clause forbids. For these reasons, the State's Motion should not have been granted on this claim.

IV. THE PLAINTIFFS PRESENTED ROBUST FREE EXERCISE CLAIMS.

The State further sought and was granted judgment on the pleadings for Welch's Free Exercise claim. Free Exercise "first and foremost," allows believers to believe "*and profess*" whatever doctrines one desires. *Smith II*, 494 U.S. at 877. Thus, the First Amendment "obviously excludes all governmental regulation of religious beliefs as such." *Id.* (*citing Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963). Nor can the government "punish the expression of religious doctrines it believes to be false." *Id.* (citing *United States v. Ballard*, 322 U.S. 78, 86, 88 (1944)).

With the notable exception of *Hosanna-Tabor*, the Supreme Court's jurisprudence of the last quarter-century has most often asked first whether a challenged statute is a valid and neutral law of general applicability. At the outset, it must be noted that merely classifying a prohibition as involving medical treatment or promoting health and safety does not mean a regulation will survive. In *Cent. Rabbinical Cong. Of the United States v. New York City Dept. of Health and Mental Hygiene*, 763 F.3d 183 (2d Cir. 2014), the Second Circuit looked beyond attempts to cast a restriction on circumcision as simply a medical regulation. In light of the religious significance of circumcision, the court viewed the regulation skeptically and ultimately struck it down as not being truly neutral and generally applicable as required by Free Exercise.

The Texas Supreme Court has also looked beyond the typical neutral and generally applicable standard when assessing impact on religious institutions. In *HEB Ministries, Inc. v. Tex. Higher Educ. Coord. Bd.*, 235 S.W.3d 627 (Tex. 2007), the Texas Supreme Court, while acknowledging the State's interest in combating diploma mills and prevent fraud against students by educational institutions, could not abide the State's restriction of how religious institutions used terms like *seminary*. The overriding importance of State non-interference with how religious institutions described themselves and inculcated their values trumped the State's argument that the overall educational regulatory scheme was

valid and not targeted at religion. Nor was it any consolation to the court that the institution could avoid the regulatory reach by not using the restricted terminology – much as the State here says Welch can avoid regulation by not holding himself out as a professional. The Texas Supreme Court zealously guarded the doors of the self-described seminary from oversight by the higher education authorities, just as the Court here should guard the doors of the church from the overreach of the state mental health authorities.

To the extent the Court here chooses to apply the ensuing *Smith-Lukumi* framework to SB 1172 at all, it should do so with due regard for the unique impact on religious institutions and religiously-motivated practices.

A. Welch Should Prevail Under The *Smith-Lukumi* Framework.

From its inception, SB 1172 was intended to restrict a religious practice.

The two gateposts of the Free Exercise avenue are generally regarded as *Smith II* and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). Crucial to understanding the two ends of the Free Exercise spectrum is assessing whether the challenged regulation responds to a perceived evil that is religious in nature, or whether a religious practitioner is complaining about a restriction that was enacted for wholly separate reasons and likely did not even contemplate his conflict.

In *Smith II*, the criminal statute at issue was so broad, and so disconnected from religious motivation, that the Court at first was unsure the prohibition even applied to the religious conduct in question. The Court thus remanded the case to the Oregon Supreme Court to determine whether the statute had been applied erroneously to the Petitioners. *Employment Div., Dept. of Human Res. v. Smith*, 485 U.S. 660, 673-74 (1988) (*Smith I*). After the Oregon Supreme Court confirmed that there was no statutory exemption, sweeping in sacramental peyote use with the broader criminal prohibition, the Supreme Court articulated its doctrine that neutral laws of general applicability need not be justified by a compelling state interest.

Unlike SB 1172, in these cases and *Smith II* it was not even contended that the challenged law was an attempt to regulate religious beliefs or the communication of those beliefs. *Smith II*, 494 U.S. at 882. Even facial neutrality, much less actual neutrality, is missing in the statute challenged here.

B. Religion Is Anything But Incidental To Those Seeking, And Those Seeking To Regulate, SOCE.

"Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Church of Lukumi Babalu Aye*, 508 U.S. at 534.

The conflict between the mandates of SB 1172 and religious values was not an afterthought, nor was it an unintended consequence, as has been the case with

most other laws deemed to be neutral and generally applicable. Rather, lawmakers in Sacramento suffered from no confusion as to the rationale for many individuals to seek help with unwanted same-sex attractions.

The Legislature repeatedly and explicitly recognized that religious conservatives were not a subset but rather the predominant population of those wanting to diminish same-sex attractions.[22] The bill's analysis reads: "the task force concluded that the population that undergoes SOCE tends to have strongly religious views that lead them to seek to change their sexual orientation."[23] This language is taken directly from the APA Report.[24] A review of the APA Report leaves no doubt that religious conservatives are those typically seeking SOCE – and those whose beliefs the Legislature seeks to change.[25]

The evidence reflected in the APA Report shows that those wanting to diminish same-sex attractions do so because of religious convictions, desirous of living their lives in a manner consistent with their values.[26] These "consider

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[22] E.R. III:431 (Exh. 2 at p. 7); E.R. III:459 (Exh. 5 at p. 7); E.R. III:467 (Exh. 6 at p. 6); E.R. III:495 (Exh. 12 at p. 5).

[23] E.R. III:472 (Exh. 7 at p. 4); E.R. III:482 (Exh. 9 at p. 3).

[24] APA Report at v (E.R. II:43).

[25] APA Report at p. v, 3, 17, 20, 25, 45, 52, 56, 66 (E.R. II:43, 47, 61, 64, 69, 89, 96, 100, 110). In addition to the significant commentary on this population, the Report cites to numerous articles along this line in the *References* at p. 93-117 (E.R. II:137-161).

[26] APA Report at p. 4, 46, 82-83 (E.R. II:48, 90, 126-27).

religion to be an extremely important part of their lives and participate in traditional conservative faiths."[27] They "experience psychological distress and conflict due to… [the] irreconcilability of their sexual orientation and religious beliefs.[28] Beliefs about sexual behavior and orientation are rooted in interpretations of traditional religious doctrine.[29] Homosexuality is viewed as sinful and immoral.[30] "Some report difficulty coping with intense guilt over the failure to live a virtuous life and inability to stop committing unforgiveable sins, as defined by their religion."[31]

C. Other Free Exercise Authorities Do Not Lead To Different Conclusions.

This Court's most recent foray into Free Exercise illustrates the limits of the traditional approach to the present case. In *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), this Court followed *Smith II* and resisted a challenge to pharmacy rules in Washington State. The Court, however, emphasized the

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[27] APA Report at 3 (E.R. II:47).

[28] APA Report at p. 5, 46 (E.R. II:49, 90). Additionally, in four separate places the legislative record cites the World Health Organization who describe this phenomena as a "conflict between sexual urges and religious belief systems." E.R. II:450 (Exh. 4 at p. 6, ¶6); E.R. II:458 (Exh. 5 at p. 6, ¶6); E.R. II:465 (Exh. 6 at p. 5, ¶4); E.R. II:495 (Exh. 12 at p. 5, ¶4).

[29] APA Report at 17 (E.R. II:61).

[30] APA Report at p. 12, 18, 20, 82 (ER II: 56, 62, 64, 126)

[31] APA Report at p. 46 (E.R. II:90).

accommodations available to individual pharmacists and the onus of the rule being on the businesses themselves. In the present case, there is no such safe harbor for these Plaintiffs. Dr. Welch is a minister overseeing the counseling ministry at Skyline Church. Churches are far removed from the pharmacies burdened in *Stormans*. Clients are specifically coming to both Drs. Welch and Duk because of their religious beliefs, not in spite of them. Neither Dr. Welch or Dr. Duk are being asked to hand a packaged product manufactured by someone else across a counter; both are being required to either adopt beliefs about human nature and theology they do not possess, or refrain from their calling. Two other observations are noteworthy.

Washington State was able to cite decades of statutes that required pharmacies to carry a broad range of medicines. The State here cannot cite decades of laws prohibiting SOCE. Rather, the prohibition arose precisely because of the religiously-motivated practices condemned by the APA Report.

Further, the insistence of Washington State that its rules were necessary to ensure access is the opposite of California's attempt to ban access. Quite simply, the State here does not want minors to be exposed to religious beliefs that it believes are not good for them. The State's hostility to these religious beliefs is barely masked and is more akin to the political hostility against animal sacrifice

that prompted – and ultimately doomed – the restrictions in *Church of the Lukumi Babalu Aye*.

Stormans relied in part on older polygamy cases, which are worth examining. On the surface, the polygamy cases might seem to present a closer analogy to the present. After all, there was little doubt that anti-polygamy restrictions imposed on Utah both as a Territory and a State were responsive to concerns about the outgrowth of the Church of Jesus Christ of Latter Day Saints.

The analogy breaks down, though, because prohibitions on polygamy and bigamy had their genesis in the common law and colonial statutes, well before the Mormon religion came into existence. *Reynolds v. United States*, 98 U.S. 145 (1879). Fast-forwarding more than half a century, in *Cleveland v. United States*, 329 U.S. 14 (1946), the Court considered Free Exercise claims again involving polygamy but this time being prosecuted under the Mann Act. Created to combat interstate prostitution, the Mann Act was so tangentially related to polygamy that there was a significant question as to whether it applied at all.

Nor does *King v. Gov. of N.J.*, 767 F.3d 216 (3d Cir. 2014), offer much insight into the present case. *King* addressed a law very similar to SB 1172, upholding it primarily against a free speech challenge similar to that of the Plaintiffs here, but taking a different analytical approach than did this Court in *Pickup*. The Third Circuit in *King* also rejected Free Exercise claims, but it

appears to have been presented with different rationales than are explained here. The plaintiffs in *King* argued that the law impermissibly created a "religious gerrymander" in violation of the First Amendment. Since the Welch Plaintiffs do not think the problems posed by SB 1172 are much like drawing political boundaries, they have taken a different approach. The Third Circuit also does not appear to have had before it the thorough exposition of the APA Report that places religion at the heart of the legislation. Nor did the *King* plaintiffs include an interdisciplinary minister/therapist. These factors render *King* unhelpful.

The prohibition on SOCE poses a direct challenge to religious institutions and believers who have integrated faith into their profession. Undeniably, the conflict arises between the LGBT and faith communities. In the seminal case on same-sex marriage handed down by the Supreme Court, writing for the majority, Justice Kennedy sought to calm fears by putting forward the following assurance.

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015)

This case presents an early occasion to determine if the federal courts remain committed to the protection of religious freedom by the faithful – and within the

four walls of houses of worship – or whether Justice Kennedy merely made a "weak gesture towards religious liberty." *Id*., at 2638 (Scalia, J., dissenting).

V. THE COMPLAINT PRESENTS A STRONG PRIVACY CLAIM THAT SHOULD NOT HAVE BEEN GIVEN SHORT SHRIFT.

A. Third-Party Standing Is Appropriate.

The District Court's treatment of the privacy claims failed to recognize the importance of these interests.

Surprisingly, the District Court did not even acknowledge a declaration submitted by Dr. Welch that explains the hindrances to having minor clients join this suit to assert their own interests. E.R. II:30-33. These roadblocks are exactly why third-party standing is crucial in privacy claims, and why it has been granted in so many other cases indistinguishable from the present.

Third-party or *jus tertii* standing should be granted where there exists: (1) a close relationship with the party holding the right and (2) a hindrance to the possessor's ability to protect his or her own interests. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004).

A physician-patient relationship is sufficient to meet the *jus tertii* standing requirement. *Compassion in Dying v. Washington*, 79 F.3d 790, 842 (9th Cir. 1996), *rev'd on other grounds*, *Washington v. Glucksberg*, 521 U.S. 702 (1997). Here, relationships of minor patients and clients with the two professional

Plaintiffs – a licensed therapist/ordained minister and a physician – match this criteria. Moreover, when the enjoyment of the third party's right is inextricably bound up with the activity the litigant wishes to pursue, the *closeness* factor is met. *Singleton v. Wulff*, 428 U.S. 106, 114-15 (1976). Indeed, courts have "allowed standing to litigate the rights of third parties when enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third party rights." *Warth v. Seldin*, 422 U.S. 490, 510 (1975) (emphasis added). Such is the case here. Enforcement of SB 1172 against Drs. Duk and Welch will directly prevent minors not before the Court from accessing SOCE and related relational help that has previously been available to them.

In the medical realm, "[a]side from the woman herself…the physician is uniquely qualified to litigate the constitutionality of the State's interference with, or discrimination against, that decision." *Singleton*, 428 U.S. at 117.

The licensed therapist and psychiatrist Plaintiffs are closely involved with the thought processes of minors deciding whether they will live according to their values or enter into homosexual relationships.[32] Drs. Welch and Duk meet the test that "the party asserting the right has a 'close' relationship with the person who possesses the right." *Kowalski*, 543 U.S. at 130.

[32] Welch decl. ¶¶ 7, 12 (E.R. III: 395, 397); Duk decl. ¶¶ 14-15, 17818 (E.R. III: 504-06).

The very nature of the privacy right also weighs in favor of third-party standing. "Choices concerning contraception, family relationships, procreation, and childbearing" are all "protected by the Constitution." *Obergefell*, 135 S.Ct. at 2599. The gender and orientation of the person or persons with whom a minor will seek sexual intimacy lies at the inner sanctum of the constitutional right to privacy. "[A]dolescents seeking health care related to sexuality or mental health care counseling 'may be chilled from asserting their own rights by a desire to protect the very privacy of the care they seek… .'" *Aid for Women v. Foulston*, 441 F.3d 1101, 1114 (10th Cir. 2006) quoting *Singleton*, 428 U.S. at 117.

Another significant obstacle to minors asserting their own rights is the fluidity of the membership of the *jus tertii*. In a challenge to a statute, the Supreme Court has found that the third party would essentially serve in a representative capacity if the class is fluid. *Singleton*, 428 U.S. at 117-18. In the abortion context, the plaintiff-women will not be with child long enough to get through discovery, much less complete litigation in the lower court. A statute dealing with adolescents poses similar problems. The teens will have reached the age of majority before the case concludes.

The present litigation commenced more than three years ago, with another two years or so easily remaining. It would have been pointless for the Welch Plaintiffs to have included a 15-year-old, 16-year-old or 17-year-old plaintiff who

would have reached the age of majority by now and no longer be affected by the statute. Even a 13 or 14-year-old could easily attain the age of majority during the pendency of this litigation. While the District Court faulted Welch for not mimicking the Pickup plaintiffs, which included two minors, at least John Doe I of those plaintiffs has now reached the age of majority, and John Doe II will likely do so sometime in the next few months. Only the professional Plaintiffs will continue to be affected by SB 1172 throughout and beyond the pendency of this litigation. This reality seemed lost on the Third Circuit in its contrary holding in *King*. "[I]f the assertion of the right is to be 'representative'…there seems little loss in terms of effective advocacy from allowing its assertion by a physician." *Singleton*, 428 U.S. at 118. Plaintiffs submit that the same reasoning applies in the counseling relationship with minors.

The second factual element is that "there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski*, 543 U.S. at 130. In the present case Dr. Welch counsels minors with unwanted same-sex attraction. He submitted a Declaration to the District Court explaining the professional ethical obstacles that prevented him from inviting one of his affected minor clients to join the case.[33]

[33] Welch decl, ¶¶ 7-8 (E.R. II:32).

B. SB 1172 Intrudes On Intimate Decisions.

Minors have a liberty interest, free from government interference, to decide the gender and orientation of the person they may wish to sleep with – or for that matter whether they will be abstinent. "[L]iberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015).

The United States Constitution is recognized to contain a fundamental right to privacy that has been extended by the Supreme Court to include personal, marital, familial, and sexual privacy, as protected by the Bill of Rights and its penumbras. The right to privacy in a doctor-patient relationship was also recognized by the Court. *See generally*, *Roe v. Wade*, 410 U.S. 113 (1973). This right to privacy in doctor-patient relationships has been extended by the Ninth Circuit to include a right to privacy in psychotherapist-patient relationships. *See generally*, *Caesar v. Mountanos*, 542 F.2d 1064 (9th Cir. 1976). "The Supreme Court has severely restricted state intrusion into zones of privacy that have one or more of these elements that inhere in the treatment relationship between the patient and his psychotherapist." *Id.* at 1072 (Hufstedler, J., concurring and dissenting).

The reason for the protection of privacy as a fundamental constitutional right in psychotherapist-patient relationships is straightforward: the communications

between a patient and a psychotherapist are often intimate in nature, as they frequently involve discussions of the moral, religious, and philosophical views of the patient, in addition to "medical problems of family, marriage, motherhood and fatherhood, human sexuality, and almost always... [the] strong emotional needs of the patient." *Id.* at 1072 (Hufstedler, J., concurring and dissenting).[34] It is therefore one of the most highly sensitive and intimate zones of privacy. Although this fundamental right to privacy is not absolute, it "enters the combat zone heavily armed"; it will only yield to a compelling state interest, and only to the extent necessary to protect that interest. *Caesar*, 542 F.2d at 1072 (Hufstedler, J., concurring and dissenting).

The level of government intrusion and invasion of privacy introduced by SB 1172 is irreconcilable with constitutional privacy rights. Because of the fundamental right to privacy, the government has very limited authority to restrict citizens' ability to access information and services related to their personal autonomy, identity, and sexuality. "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Lawrence v. Texas*,

[34] This is explained in the declarations of the Plaintiff-mental health providers. Welch decl. ¶¶ 7-10 (E.R. III: 395-96); Duk decl. ¶ 15 (E.R. III: 505).*See*, also

539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

SB 1172 directly violates the fundamental constitutional right to privacy in that it prohibits minors from defining their own existence. Complaint ¶69 (E.R. IV:568). The law prevents minors from accessing mental health services and spiritual mentoring that would assist them in diminishing same-sex attraction in accordance with self-defined religious, moral, cultural, and philosophical beliefs.

Addressing principles common to both religious freedom and privacy, Justice Kennedy emphasized that such freedoms stretch beyond mere belief and essentially protect self-definition. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct 2751 at 2785 (2014) (Kennedy, J. concurring). This type of self-definition is precisely what the State seeks to restrict minors from freely developing and the Plaintiffs from assisting.

SB 1172 instead seeks to induce a minor to accept the State's orthodoxy about the teenager's sexuality, regardless of the religious, moral, cultural, and philosophical beliefs of the minor. Such governmental heavy-handedness demonstrates a callous disregard of the harm to the conscience of the young person.[35]

Complaint ¶¶54, 59, 67, 69 (E.R. IV:566-68).

[35] Complaint ¶¶57, 59 (E.R. IV:566-67).

SB 1172 ignores psychotherapist-patient privilege. It also provides no exception allowing a mental health provider to exercise his or her professional judgment that the prohibited therapy is necessary to protect the life and health of the client or patient, such as when a minor is seeking to escape unwanted same-sex attraction sparked by sexual abuse.[36]

As explained more fully below, the claimed interest in SB 1172 is not compelling, either on its face or in fact. Further, the law is not narrowly tailored and fails to use the least restrictive means to shackle the sacrosanct privacy rights at stake.

VI. THE DISTRICT COURT ERRED BY NOT WEIGHING THE FREE EXERCISE AND PRIVACY CLAIMS AGAINST COMPELLING INTEREST.

A. Application Of A Lower Standard To The Speech Claims Is Not Dispositive Of The Remaining Claims.

The State's essential posture on remand was that this Court's prior decision on Welch and Pickup's speech claims, and Pickup's additional claims, sets the standard for all claims. This approach, however, quickly breaks down. For one thing, it would not have made sense for this Court to encourage the adjudication of Welch's remaining claims, if they turned on the same lower-level scrutiny as the

[36] Welch decl. ¶15 (E.R. III:398); Duk decl. ¶7 (E.R. III:501-02).

speech, substantive due process, and similar claims. *Pickup*, at 1057 (analyzing SB 1172 under rational basis scrutiny). A brief survey of these remaining claims demonstrates why this is so.

First, the Establishment Clause does not utilize any rational basis framework. Instead, the courts most often apply the *Lemon* test, which looks to secular purpose, primary effect, and excessive entanglement. And under the *Hosanna-Tabor* approach advocated by Plaintiffs here, the Court would not even entertain a compelling interest, much less a rational one.

Free Exercise comes closer, applying a low level of scrutiny to a valid and neutral law of general applicability. Yet, while more similar to free speech than the Establishment Clause, no court of which Plaintiff is aware has ever held that content neutrality in the free speech arena establishes neutrality and general applicability for purposes of Free Exercise as well. Rather, a separate inquiry is warranted.

Finally, the establishment of a fundamental right to privacy triggers strict scrutiny. The restriction of a fundamental privacy right and the application of rational basis are mutually exclusive. *See, e.g., Planned Parenthood of Se. Pa. v. Casey.*

The application of strict scrutiny to the Free Exercise and privacy claims is not foreclosed by this Court's prior decision in *Pickup.* For the reasons set forth in

Sections II-IV, Plaintiffs identified claims that should have triggered strict scrutiny and should not have been dismissed in a one-page judgment on the pleadings. Since the Welch Plaintiffs have previously briefed compelling interest and narrow tailoring in reference to their speech claims, a condensed summation of the essential elements will be offered here.

1. Compelling interest cannot be excised from SB 1172.

Free Exercise and privacy offer opportunities to render meaningful the Legislature's assertion of a compelling interest.

Subsection (n) of Section I of the statute reads:

> (n) California has a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by sexual orientation change efforts.

The Legislature correctly believed it needed a compelling interest to justify its unprecedented restrictions, and its interest should be evaluated as such.

2. The Legislature's claimed compelling interest is as expansive as an ocean yet as shallow as a tide pool.

Subsection (n) of the statute, quoted above, says California's compelling interest is the protection of the physical and psychological well-being of LGBT and other youth from the "serious harm" of SOCE.

The statute explains what it means by the serious harms of SOCE in Subsection (b) of Section I of the statute, which reads in part:

> [S]exual orientation change efforts can pose critical health risks to lesbian, gay, and bisexual people, including confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, suicidality, substance abuse, stress, disappointment, self-blame, decreased self-esteem and authenticity to others, increased self-hatred, hostility and blame toward parents, feelings of anger and betrayal, loss of friends and potential romantic partners, problems in sexual and emotional intimacy, sexual dysfunction, high-risk sexual behaviors, a feeling of being dehumanized and untrue to self, a loss of faith, and a sense of having wasted time and resources.

Of these "critical health risks" that the State says it has a compelling interest to prevent, few have ever been deemed compelling.

The Supreme Court has explained that, in order to be deemed compelling, interests must be "of the highest order." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993).

Many of the "critical health risks" identified by the State as part of its compelling interest simply do not rise to this level. Most notably, the State's purported compelling interest in protecting its youth against "loss of faith" as a "critical health risk" is impossible to square with the Establishment Clause. Other claimed "critical health risks" cannot be reconciled with the right to privacy. It is inconceivable, for instance that the State would be permitted to interfere in private romantic relationships that might lead to disappointment and heartache – yet the State claims an open-ended compelling interest to protect the psychological well-being of youth, and then repeats the APA Report's conclusion that "critical health risks" include everything from confusion and conflict with parents, to

relationship problems, and a sense of having wasted time and resources. SB 1172, Section 1(b).

The State seeks unfettered authority to declare virtually anything a health crisis, with only a passing nod from the courts. By contrast, in *NAAP*, this Court held that the State's general licensing scheme for psychoanalysts was supported by a rational basis. *NAAP*, 228 F.3d at 1052-53. The Court has not yet found such generalized interest in regulating mental health to be supported by a compelling interest. Whatever the outer limits of a compelling interest may be, they surely are not this wide and shallow.

3. The State's approach is anything but narrowly tailored.

Among its more startling admissions, the APA Report states:

> [T]here is a dearth of scientifically sound research on the safety of SOCE. Early and recent research studies provide no clear indication of the prevalence of harmful outcomes among people who have undergone efforts to change their sexual orientation or the frequency of occurrence of harm because no study to date of adequate scientific rigor has been explicitly designed to do so. Thus, we cannot conclude how likely it is that harm will occur from SOCE. APA Report at 42 (E.R. II:86)

In summarizing itself, the APA Report concludes, "We concluded that research on SOCE (psychotherapy, mutual self-help groups, religious techniques) *has not answered basic questions of whether it is safe or effective and for whom*.... [R]esearch into harm and safety is essential." APA Report at 90 (E.R. II:90 (emphasis added)).

This equivocation is hardly reassuring when the Legislature is intruding on First Amendment freedoms and fundamental rights. The Legislature may choose among conflicting evidence when establishing laws that do not impinge on constitutional rights. The Legislature is not entitled to use shaky, unstable evidence as a basis for restricting free speech and core liberties. *NAAP*, 228 F.3d 1043, 1050 (9th Cir. 2000); *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 948 (9th Cir. 1997).

i. The Supreme Court's most recent look at narrow tailoring contrasts with the State's theory.

The Supreme Court did find a rare narrowly tailored compelling interest in *Humanitarian Law Project v. Holder*, 561 U.S. 1 (2010). That interest – counter-terrorism – is so much stronger than the presently asserted interests that the State seems allergic to any analogy to the case.

The statute itself is fraught with equivocation. According to the findings and declarations drawn by the Legislature from various mental health groups, SOCE "*can* pose critical health risks." Preamble, Section 1(b) (E.R. III:422 (emphasis added)); its underlying theory is deemed "questionable." *Id.*, at (d) (E.R. III:423); its risks are "potential," *Id.*; it is "contraindicated since it can provoke guilt and anxiety," *Id.*, at (f) (E.R. III:423); it "may be harmful" and "may encourage family rejection" and "undermine self-esteem, connectedness and caring." *Id.*, at (k) (E.R. III:424). Moreover, the alleged risks of SOCE are described as a

"possibility." *Id*. Veering even further out of the realm of science or certainty, the Pan-American Health Organization says SOCE is bad because it is a "violation of … human rights." *Id.*, at (l) (E.R. III:424).

These organizations are entitled to their opinions, but this is hardly the overwhelming evidence the State needs it to be in order to suppress constitutional rights. Indeed, it is much more akin to the professional opinions discounted by the Supreme Court in *Brown v. Entertainment Merchants Ass'n*, 132 S.Ct. 81 (2011). While this level of ambiguity might suffice under the rational basis test, it cannot support either a compelling interest or narrow tailoring.

CONCLUSION

The District Court erred by confusing the standards for judgment on the pleadings with preliminary injunction. Substantively, the District Court should not have granted the State judgment on the pleadings on the three remaining claims. The history and basis for the statute thoroughly demonstrate that its primary effect was to inhibit a particularly religious practice and excessively entangle the State with religion. In a related vein, the statute was not a neutral law of general applicability. Further, the District Court should not have denied third-party standing to these Plaintiffs on the privacy claims, because the infringement of those interests is a strong independent ground for invalidating the statute. While the statute can be invalidated under the Establishment Clause without applying a

further test, it is invalid under the Free Exercise Clause and privacy because it lacks a compelling interest achieved by the least restrictive means.

For these reasons, the decision of the lower court was in error and should be reversed.

Date: December 15, 2015

/s/ Kevin T. Snider

/s/ Matthew B. McReynolds
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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached Appellants' Opening Brief is proportionately spaced, has a typeface of 14-point or more, Times New Roman. According to Microsoft Word's "Statistics," this document contains 11,671 words.

Date: December 15, 2015

/s/ Kevin Snider

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STATEMENT OF RELATED CASES

Pickup v. Brown, 12-17681 challenges the same law. In an order, the District Court determined that the cases are unrelated. While the parties' free speech claims were considered together by this Court, the remaining claims are quite distinct. Pickup has never asserted privacy or Establishment Clause claims, and the Pickup plaintiffs do not include an ordained minister, which amplifies the Religion Clause claims here. Currently, the Pickup case is still in the District Court where the Plaintiffs filed a First Amended Complaint on October 28, 2015. Court Doc. 126.

CERTIFICATE OF SERVICE

CASE NO. 15-16598

I hereby certify that on December 15, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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