No. 15-16598

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD WELCH, et al.,
Plaintiffs-Appellants,

v.

EDMUND G. BROWN, Jr., et al.,
Defendants-Appellees

On Appeal From The United States District Court
For The Eastern District Of California
No. 2:12-CV-02484-WBS-KJN (Honorable William B. Shubb)

BRIEF OF AMICUS CURIAE EQUALITY CALIFORNIA IN SUPPORT OF DEFENDANTS-APPELLEES

SHANNON P. MINTER (SBN 168907)
CHRISTOPHER F. STOLL (SBN 179046)
NATIONAL CENTER FOR LESBIAN RIGHTS
870 MARKET STREET, SUITE 370
SAN FRANCISCO, CA 94102
TELEPHONE: (415) 392-6257
FACSIMILE: (415) 392-8442

WILLIAM D. TEMKO (SBN 98858)
KATHERINE M. FORSTER (SBN 217609)
THOMAS PAUL CLANCY (SBN 295195)
MUNGER, TOLLES & OLSON LLP
355 SOUTH GRAND AVE, 35TH FLOOR
LOS ANGELES, CA 90071-1560
TELEPHONE: (213) 683-9100
FACSIMILE: (213) 687-3702

Counsel for Amicus Curiae Equality California

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CORPORATE DISCLOSURE STATEMENT

This Corporate Disclosure Statement is filed on behalf of Equality California in compliance with the provisions of Federal Rule of Appellate Procedure 26.1 requiring a nongovernmental party to a proceeding in a court of appeals to file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or state that there is no such corporation.

Equality California states that it is a nonprofit corporation with no such parent corporation, and no publicly held corporation owns 10% or more of its stock. Additionally, Equality California is unaware of any publicly held entity with a direct financial interest in the outcome of the instant litigation. A supplemental disclosure statement will be filed upon any change in the information provided herein.

Dated: March 28, 2016

/s/ Christopher F. Stoll

CHRISTOPHER F. STOLL
NATIONAL CENTER FOR
LESBIAN RIGHTS

MUNGER, TOLLES & OLSON LLP

Attorneys for EQUALITY
CALIFORNIA

IDENTITY AND INTEREST OF AMICUS CURIAE AND SOURCE OF AUTHORITY TO FILE

Amicus Equality California is a statewide civil rights advocacy group protecting the needs and interests of lesbian, gay, bisexual, and transgender Californians and their families. Equality California was the lead organizational sponsor of SB 1172 in the California Legislature and has been actively involved in defending SB 1172 against the pending legal challenges to the law, including filing briefs in both appeals previously heard by this Court. Equality California moved to intervene in both cases, and was granted party status in the case assigned to the Honorable Kimberly J. Mueller, District Judge of the U.S. District Court for the Eastern District of California (the "*Pickup* case"). In the previous appeal related to that case, No. 12-17681, Equality California filed an Answering Brief explaining why SB 1172 falls well within the California Legislature's power to regulate medical practice to protect the health and safety of patients, and therefore does not violate the First Amendment. In the present case, the Honorable William B. Shubb denied Equality California's motion to intervene without prejudice but permitted Equality California to participate as an *amicus* and to offer briefing, argument, and evidence in conjunction with the District Court proceedings.

This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties. No party or party's counsel

authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except *amicus curiae* and its counsel contributed money to fund the preparation or submission of this brief.

ARGUMENT

I. INTRODUCTION

A central inquiry in determining whether a state law violates the Constitution's religion clauses is whether the government enacted the challenged provision for an improper purpose of either impeding or advancing religious belief or practice. Under the Free Exercise Clause, "a law that is neutral and of general applicability need not be justified by a compelling interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). However, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, . . . and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id.* at 533 (citation omitted). Accordingly, courts consider not only whether a statute targets religious practice on its face, but also whether the government has attempted to "target[] religious conduct for distinctive treatment." *Id.* at 534.

Similarly, two relevant considerations in determining whether a law violates the Establishment Clause are (1) whether the law "has a secular legislative purpose" and (2) whether "its primary effect neither advances nor inhibits religion." *Williams v. California*, 764 F.3d 1002, 1014 (9th Cir. 2014) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)). The existence of a legitimate secular purpose is a significant factor demonstrating that the government is not improperly attempting to advance religious belief in general, or to favor one set of religious beliefs over others.

Equality California submits this brief in order to highlight the overwhelming evidence that in enacting SB 1172, the California Legislature did not act with an improper purpose to target religious belief or practice, but instead acted with the legitimate, and indeed compelling, secular purpose of protecting the state's youth from discredited practices that it reasonably found to pose an unacceptable risk of harm, based on a broad consensus of medical and mental health professionals. That consensus was amply demonstrated in the Legislature's findings at the time the statute was enacted, and it is a professional consensus that has only grown and been reinforced by many additional policy statements and reports that have been released since the law's enactment.

II. DISCUSSION

A. SB 1172 Was Enacted for the Neutral, Secular Purpose of Protecting Youth from Harm Based on a Broad Medical Consensus, Not for the Purpose of Targeting Religious Belief or Practice

California enacted SB 1172 in order to "protect[] its minors against exposure to serious harms caused by sexual orientation change efforts." 2012 Cal. Stat. Ch. 835 (S.B. 1172) § 1(m). The Legislature relied on the conclusions of the nation's leading mental health associations, including the American Psychological Association (the "APA") and the American Psychiatric Association, as well as empirical research, in determining that SOCE poses serious health risks to youth. *See id.* §§ 1(b)-(l). Nothing within the legislative history suggests that SB 1172 was intended to target religious beliefs, as Plaintiffs suggest. Indeed, the legislative history demonstrates precisely the opposite.

For example, the Legislature relied on the APA's warning that sexual orientation change efforts "can pose critical health risks" to lesbian, gay, bisexual, and transgender ("LGBT") people, including "confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, [and] suicidality," among other negative consequences. *Id.* § 1(b). Likewise, the American Psychiatric association determined that "the potential risks of reparative therapy are great, including depression, anxiety, and self-destructive behavior." *Id.* § 1(d). And the American Academy of Child and Adolescent Psychiatry found that "there is

[neither] evidence that sexual orientation can be altered through therapy," "no[r] any medically valid basis for attempting to prevent homosexuality, which is not an illness." *Id.* § 1(k).

In enacting SB 1172, the California Legislature considered and relied upon each of these professional organizations' conclusions, as well as similar statements from the American School Counselor Association, American Academy of Pediatrics, American Medical Association, National Association of Social Workers, American Counseling Association, American Psychoanalytic Association, and Pan American Health Organization (a regional office of the World Health Organization). *Id.* §§ 1(b)-(l). These organizations have stated that sexual orientation change efforts (1) are unnecessary and offer no therapeutic benefit because they attempt to "cure" something that is not an illness and requires no treatment, (2) are contrary to the modern scientific understanding of sexual orientation, (3) are ineffective, and (4) carry a risk of serious harm to patients. *Id.*

The Legislature also relied on research demonstrating that the risks of harm are especially great for minors. It cited research concluding that gay, lesbian, and bisexual young adults who experienced high levels of family rejection in adolescence based on their sexual orientation were 8.4 times more likely to report having attempted suicide and 5.9 times more likely to report high levels of depression than peers from families reporting no or low levels of rejection. *Id.*

§ 1(m). In short, nothing in the legislative history suggests that SB 1172 was enacted for the improper purpose of suppressing religious belief or practice. The sole purpose of the law was to protect youth from the serious potential for harm caused by therapists' efforts to change sexual orientation, regardless of the motivations of practitioners seeking to engage in those practices.

B. Since the Enactment of SB 1172, the Scientific Consensus that Therapeutic Efforts to Change Sexual Orientation and Gender Expression Pose a Risk of Serious Harm Has Grown

Since 2012, when SB 1172 was enacted, many other professional associations, government agencies, and international organizations have issued reports or policy statements recognizing the potential harm of therapists' attempts to change an individual's sexual orientation or gender expression. The conclusions of these organizations that sexual orientation change efforts pose a serious risk of harm further underscore the legitimacy of the purpose for which SB 1172 was enacted: to protect youth from a real and significant threat to their physical and mental well-being. Several recent findings and policy statements are summarized below.

In October 2015, the Substance Abuse and Mental Health Services Administration (SAMHSA) of the United States Department of Health and Human Services issued a major report on sexual orientation change efforts. SAMHSA concluded that "[i]nterventions aimed at a fixed outcome, such as gender

conformity or heterosexual orientation, including those aimed at changing gender identity, gender expression, and sexual orientation are coercive, can be harmful, and should not be part of behavioral health treatment." Substance Abuse and Mental Health Services Administration, *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth* 1 (2015), *available at* http://store.samhsa.gov/shin/content/SMA15-4928/SMA15-4928.pdf. The SAMHSA report recommends: "Given that conversion therapy is not an appropriate therapeutic intervention; efforts should be taken to end the practice of conversion therapy." *Id.* at 4.

In 2014, the American School Counselor Association released a position statement opposing sexual orientation change efforts:

> It is not the role of the professional school counselor to attempt to change a student's sexual orientation or gender identity. Professional school counselors do not support efforts by licensed mental health professionals to change a student's sexual orientation or gender as these practices have been proven ineffective and harmful (APA, 2009).

American School Counselor Association (ASCA), *The Professional School Counselor and LGBTQ Youth* (2014), *available at* www.SchoolCounselor.org/School-Counselors-Members/About-ASCA-%281%29/Position-Statements.

In 2015, the American Academy of Nursing concluded "that reparative therapies aimed at 'curing' or changing same-sex orientation to heterosexual orientation are pseudo-scientific, ineffective, unethical, abusive and harmful practices that pose serious threats to the dignity, autonomy and human rights as

well as to the physical and mental health of individuals exposed to them." American Academy of Nursing, *Position Statement on Reparative Therapy* (2015), available at http://www.nursingoutlook.org/article/S0029-6554(15)00125-6/pdf.

The American College of Physicians "opposes the use of 'conversion,' 'reorientation,' or 'reparative' therapy for the treatment of LGBT persons." American College of Physicians, *Lesbian, Gay, Bisexual, and Transgender Health Disparities: Executive Summary of a Policy Position Paper from the American College of Physicians* (2015), *available at* http://annals.org/article.aspx?articleid=2292051#ACPPositionStatementsandRecommendations.

The National Association of Social Workers has issued an updated position statement providing: "[N]o data demonstrate that SOCE or reparative therapy or conversion therapy is effective, rather [these therapies] have succeeded only in short term reduction of same-sex sexual behavior and negatively impact the mental health and self-esteem of the individual . . . ." National Association of Social Workers, *Position Statement* (2015), *available at* http://www.socialworkers.org/diversity/new/documents/HRIA_PRO_18315_SOCE_June_2015.pdf.

Most recently, the World Psychiatric Association (WPA) has opposed therapeutic attempts to change sexual orientation: "WPA considers same-sex attraction, orientation, and behaviour as normal variants of human sexuality. It recognises the multi-factorial causation of human sexuality, orientation, behaviour,

and lifestyle. It acknowledges the lack of scientific efficacy of treatments that attempt to change sexual orientation and highlights the harm and adverse effects of such 'therapies'". World Psychiatric Association, *WPA Position Statement on Gender Identity and Same-Sex Orientation, Attraction, and Behaviours* (2016), *available at* http://www.wpanet.org/detail.php?section_id=7&content_id=1807.

The recent conclusions of professional organizations and government agencies are fully consistent with and reinforce the legitimacy of the medical and mental health consensus on which the Legislature relied in enacting SB 1172. Nothing in the legislative record suggests that SB 1172 was intended to suppress religious belief or otherwise advance any improper purpose. In sum, the record demonstrates that SB 1172 is "neutral and generally applicable, and therefore triggers only rational basis review," which it readily passes. *King v. Governor of the State of New Jersey*, 767 F.3d 216, 243 (3d Cir. 2014) *cert. denied sub nom. King v. Christie*, 135 S. Ct. 2048 (2015).

III. CONCLUSION

For the reasons set forth above as well as those set forth in Defendants-Appellees' Answering Brief, Equality California respectfully urges this Court to

affirm the District Court's order.

Dated: March 28, 2016

Respectfully submitted,

/s/ Christopher F. Stoll
CHRISTOPHER F. STOLL

NATIONAL CENTER FOR LESBIAN RIGHTS

MUNGER, TOLLES & OLSON LLP

Attorneys for EQUALITY CALIFORNIA

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Federal Rule of Appellate Procedure 29. This brief's type size and type face comply with Federal Rule of Appellate Procedure 32(a)(5) and (6). This brief contains 1887 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated: March 28, 2016

/s/ Christopher F. Stoll
CHRISTOPHER F. STOLL

NATIONAL CENTER FOR LESBIAN RIGHTS

MUNGER, TOLLES & OLSON LLP

Attorneys for EQUALITY CALIFORNIA

CERTIFICATE OF SERVICE

I hereby certify that 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 on March 28, 2016.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Executed on March 28, 2016, at San Francisco, California.

Dated: March 28, 2016

/s/ Christopher F. Stoll
CHRISTOPHER F. STOLL

NATIONAL CENTER FOR LESBIAN RIGHTS

MUNGER, TOLLES & OLSON LLP

Attorneys for EQUALITY CALIFORNIA