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

PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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PETITION FOR REHEARING

I. INTRODUCTION AND STANDARD FOR GRANTING PANEL REHEARING.

On August 23, 2016, this Court issued an opinion affirming the District Court's granting of Judgment on the Pleadings to the State. Here, the Panel fashioned its own, highly selective narrative of the challenged legislation that is inaccurate but easier to defend than what was actually debated and accepted by lawmakers.

In similar fashion, the Opinion conspicuously omits any discussion of most of the leading precedents on which Appellants ("Welch") relied for the religious freedom and privacy claims. Instead, it sets up and knocks down arguments they did not make.

Pursuant to Federal Rule of Appellate Procedure 40 and 9th Cir. R. 40-1, rehearing should be granted to address these material omissions.

II. THE PANEL OPINION MISAPPREHENDED MATERIAL FACTS, STATUTORY TEXT, AND LEGISLATIVE HISTORY.

The Panel Opinion greatly misstates the material facts underlying this challenge. The Opinion makes several unsupported factual claims relative to the record and Welch's premises. It is proper for a court to dissect and disagree with premises presented by a party. But it is serious error to misstate or omit a party's position. Welch raises four clear factual errors in this Petition.

a. This case has never been about prayers offered during religious services.

The Opinion rests its legal analysis on the factual assertion that Welch "interprets SB 1172 to prohibit, for example, certain prayers during religious services." Op. at 6. The Opinion is unable to offer a citation for this assertion, because Welch made no such claim in his briefing or at oral argument. What Welch asserts is that the law prohibits certain prayers by a minister/therapist[1] during a counseling session within the four walls of a church. Welch has never taken the position that SB 1172 reaches any activity during worship services.

The Panel's error is both startling and significant. From this misapprehension of material fact, the Opinion avoids discussion of the authorities presented by Welch that protect religious counseling from state interference, irrespective of any religious service. Upon reconsideration, explaining why the arguments actually put forward by Welch are wrong will prove to be a much more daunting challenge than the straw man dispensed with in the Opinion.

b. The Panel's view of "ordinary religious conduct" is both mistaken in fact and misguided in law.

In footnote 2 of the Opinion, the Panel writes: "Nothing in the legislative history suggests that SB 1172 aimed to regulate *ordinary religious conduct*."

[1] For purposes of this Petition, the term "minister/therapist" refers to an ordained minister and a licensed mental health provider under section 865(a).

(Emphasis added). Likewise, the Opinion states that SB 1172 does not reach "religious practices." Op. at 8. With due respect, the legislative history is contrary.

i. The text and legislative record show that prohibited conduct includes that which is religious.

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[2] (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. The absolute prohibition on SOCE practices, circumstances, and efforts includes, *prayer*, *religious conversion*, and *spiritual interventions*.[3]

The Opinion has either made a significant factual error by misreading, or reading out of the text, the nine references to *prayer*, *religious conversion*, and *spiritual interventions* or has failed to explain why *prayer*, *religious conversion*, and *spiritual interventions* are **not** "ordinary religious conduct." In a related vein, the Court should explain how it has either the actual or legal capacity to evaluate

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[2] "SOCE" is an acronym for sexual orientation change effort.

[3] As cited in the briefs, in nine places the legislative history explains that prayer and religious conversion comprise SOCE practices (E.R. III:431, E.R. III:459, E.R. III:466, E.R. III:495) and that practitioners may also try to alter a patient's sexuality with spiritual interventions (E.R. III:47; E.R. III:438; E.R. III:477; E.R.

what constitutes "ordinary religious conduct" or practices. *Thomas v. Review Bd. of Ind. Employment Sec. Div*., 450 U.S. 707, 716 (1981).

ii. SB 1172 is not neutral for it links prohibited SOCE with religious conduct.

The Opinion fails to identify and thus apprehend what parts of SB 1172 that Welch is attacking as inconsistent with the Religion Clauses. Indeed, the Panel does not actually address the premise of the challenge so that it can evaluate its substance. Welch's position is that the law provides a blanket prohibition on any SOCE *practices*, *efforts* or *circumstances*. The legislature understands these to encompass *prayer*, *religious conversion*, and *spiritual interventions*. The plain language of the statutes prohibits these religious activities even when undertaken by a minister/therapist during a counseling session on a church campus. In other words, in that SB 1172 equates the described religious conduct with prohibited SOCE practices, the law is not neutral or of general applicability.

Because the Panel failed to apprehend the linkage between the universal statutory prohibition with the identified religious activities, the analysis never engaged the precise challenge presented. This is important in that Welch's position is that the law is not neutral because of the nexus between the statutory language (any practices or efforts) and things such as *prayer* and *spiritual*

III:482; E.R. III:488). Appellants' Opening Brief at 24 and Reply Brief at 17.

interventions. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993).

As a result of this clear connection between the terms used in the statute and what the Legislature identified as religious conduct, the "doctrine of constitutional avoidance" cannot apply. Op. at 6.

c. The Panel seems unaware that *social stigmatization* is not separate from, but is actually attributed to, religion and transformational ministries.

The Opinion acknowledges, as it must, that "religion is a motivating factor for some persons who seek to change sexual orientation." Op. at 9. But for reasons that are not clear from the Opinion, the Panel greatly understates the significance of religion as the motivating force for seeking SOCE. The Opinion asserts that there are "secular reasons" for seeking SOCE and cites to section 1(h) of the legislative declarations which in turn quotes the National Association of Social Workers (NASW) as follows: "[s]ocial stigmatization of lesbian, gay and bisexual people is widespread and is a primary motivating factor in leading some people to seek sexual orientation changes."

A closer examination of the source of the stigmatization reveals that it is based in religion. Unfortunately, the legislative history simply provides the NASW's conclusory statement but has omitted the NASW's explanation for

stigmatization. In its Position Statement on "Reparative" and "Conversion" Therapies for Lesbians and Gay men, the NASW states: "Specifically, transformational ministries are fueled by stigmatization of lesbians and gay men, which in turn produces the social climate that pressures some people to seek change in sexual orientation (Haldeman, 1994)."[4]

Likewise, the APA Report explains that those who "promote the idea that homosexuality as a developmental defect or spiritual or moral failing" appear to be "imbedded within conservative political and religious movements that supported the stigmatization of homosexuality." E.R. 56.

In addition to the NASW statement, the Opinion cites section 1(c)-(l) which includes a number of mental health organizations that "do not characterize the main motivation of persons seeking SOCE as being religious." Op. at 10. But this is a misstatement of the plain text of section 1(c)-(l). The organizational statements found in section 1(c)-(l) simply do not address the underlying *motivation* for seeking SOCE. Only the NASW statement speaks to *motivation*.

The Opinion has attempted to speak into existence a secular motivation for seeking SOCE that is factually wanting. It is of interest to note that the State did not cite or raise the notion of *stigmatization* as a secular motivation for SOCE. Rather, the State's position is that the religious motivations of those seeking SOCE

[4] Archived at: http://www.naswdc.org/diversity/lgb/reparative.asp

are not relevant. State's Brief at 20 (note 7) and 30.

d. The Panel's attribution of an extreme position to Welch – namely, that the APA Report and Legislature focused "exclusively" on religious reasons for SOCE – is fictitious.

The Opinion states that "Plaintiffs characterize the report as focusing *exclusively* on persons who seek SOCE for religious reasons[]" and that the "legislature, too, focused exclusively" on the faithful. Op. at 10. Welch neither wrote in the briefs nor stated in oral argument that his position was that SOCE is sought "exclusively" for religious reasons. The brief actually reads: "the prohibition falls primarily, if not exclusively, on those motivated by religion." Reply Brief at 19. Welch's position has been stated in numerous places that the Legislature knew that religion was the primary motivating reason for persons to seek SOCE. Moreover, in oral argument counsel addressed this issue by quoting the APA Report which provides that the research on SOCE "includes *almost exclusively* individuals who have strong religious beliefs." ER:69 (emphasis added).

As the Legislature knew, religious conservatives are not one demographic among many who may seek to resolve conflicts with their sexual orientation or

gender identity through SOCE – they are those who *typically* seek it out.[5]

The Legislature repeatedly and explicitly recognized that religious conservatives were the predominant population of those wanting to diminish same-sex attractions. The bill's analysis reads: "the task force concluded that the population that undergoes SOCE tends to have strongly conservative religious views that lead them to seek to change their sexual orientation."[6] This was taken verbatim from the APA Report's Abstract. As this Court recognized in *Pickup*, "in particular, the legislature relied on" the APA Report. *Pickup v. Brown*, 740 F.3d 1208, 1224 (9th Cir. 2014). Although one can sift for fragments in the Report that indicate a reason for seeking SOCE other than religion, the Abstract reflects the APA Task Force's conclusion that religious conservatives are the population that seeks SOCE. The Panel committed error by not accepting the APA Report's conclusion, which was acknowledged by the Legislature.

These distinctions matter. The descriptions adopted by the Legislature and employed by Welch bring the claims squarely within the primary effect prong of the Establishment Clause and render it other than "incidental" under the Free

[5] APA Report at ER II:43, 47, 64, 69, 89-90 and 100). Although the APA Report is lengthy, these sections were cited in the briefs and yellow-highlighted in the Excerpts of Record for easy review.
[6] E.R. III:472; E.R. III:482.

Exercise Clause. The Opinion's substituted description is more extreme and thus more easily dismissed in the analysis.

III. THE OPINION IGNORES APPELLANTS' CORE ARGUMENTS AND AUTHORITIES ON RELIGIOUS FREEDOM.

The Opinion's dearth of cited authority makes it difficult to ascertain what analytical approach is the basis for rejecting Appellants' claims under the Establishment and Free Exercise Clauses. Welch pointed to *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S.Ct. 694, 704 (2012), urging this Court to read the Religion Clauses together. Alternatively, Welch explained how the claims comported with both the *Lemon* test for the Establishment Clause, and the *Smith* approach to Free Exercise. *Lemon v. Kurtzman*, 411 U.S. 192 (1972); *Employment Div. Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990) (*Smith II*).

In response, the Panel chose not to follow or discuss any of these tests. Welch also identified a number of authorities from other jurisdictions that have resisted state interference with religious counseling. See, e.g., *Franco v. Church of Jesus Christ of Latter-Day Saints*, 21 P.3d 198 (Utah 2001); *DeCorso v. Watchtower Bible & Tract Soc'y*, 829 A.2d 38 (Conn. Ct. App. 2003); *Malicki v. Doe*, 814 So. 2d 347 (Fla. 2002); *Gulbraa v. Corp. of Presiding Bishops*, 159 P.3d 392 (Utah Ct. App. 2007); and *Nally v. Grace Community Church*, 47 Cal.3d 278

(1988). It is baffling that the Opinion avoids distinguishing – or acknowledging – these courts' constitutional concerns.

IV. THE PANEL OPINION MISPERCEIVED THE PRIVACY CLAIM.

On the contested issue of third-party standing, the Opinion properly accepts the Appellants' position that they do, in fact, have standing to present the privacy claims. *See, e.g., Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004); *Singleton v. Wulff*, 428 U.S. 106, 114-15 (1976). But the panel then commits an egregious error by cabining the previously expansive concept of sexual autonomy to the confines of the fundamental parental rights discussed in *Pickup*.

Stated succinctly, Welch's argument has always been that there is no principled distinction between the self-determination, dignity and autonomy restricted by SB 1172 and restrictions that have long triggered heightened scrutiny in related contexts of sexuality, procreation, abortion and "intimate choices that define personal identity and beliefs." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015). *See also*, *Roe v. Wade*, 410 U.S. 113 (1973). In view of this fundamental right to privacy, just last year the Obergefell Court further explained that "[l]iberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Id*., 2589. The Opinion simply omits an explanation as to why the decision as to the biological sex of the person one would have romantic or sexual relations, or the

choice as to whether one will maintain gender conformity, falls outside of the scope of the precept explained in *Obergefell*. This Court must address that discrepancy.

SB 1172 violates the fundamental constitutional right to privacy in that it prohibits minors from defining their own existence. Complaint ¶69 (E.R. IV:568). This is not remotely the same as the parental rights raised and rejected in *Pickup,* 740 f.3d at 1235-36. The plaintiffs in *Pickup* steadfastly avoided relying on the *Roe-Lawrence-Obergefell* line of cases; Welch has done nearly the opposite. Absent rehearing, the Panel's decision in concert with *Pickup* can be cited for the untenable notion that *Roe* and its progeny may be limited in the same ways that the concept of fundamental parental rights has been.

For the foregoing reasons, and the additional reasons discussed in the accompanying Petition for Rehearing En Banc, this Panel should rehear the case.

PETITION FOR REHEARING EN BANC

V. INTRODUCTION AND SUMMARY OF THE ARGUMENT.

In the foregoing Petition for Rehearing, Welch details the serious factual omissions and discrepancies that make the Opinion indefensible. Here, Welch will focus more on the legal errors that draw the Opinion into conflict with prior decisions of this Court, the Supreme Court, and appellate courts in other jurisdictions. Pursuant to FRAP 35, rehearing en banc is necessary both to

maintain uniformity within this Circuit, and to avoid a direct clash with Supreme Court authority on religious freedom and privacy. Welch also posits that this decision, restricting fundamental rights in realms that are among the most hotly-debated of our time, is exceptionally important. The Panel's approach to conflicting authority from this and other jurisdictions was to simply pretend those authorities did not exist and avoid discussion of them. This approach will only exacerbate the conflicts.

VI. REHEARING EN BANC IS NEEDED TO PREVENT A CIRCUIT RETREAT ON PRIVACY AND RELIGIOUS FREEDOM PROTECTIONS UNDER THE GUISE OF *PICKUP V. BROWN*.

This litigation first reached this Court in *Pickup*. There, the Court focused primarily on the free speech claims and to a lesser extent on claims not brought by Welch for freedom of association and fundamental parental rights. Dissenting from the denial of rehearing en banc, Judge O'Scannlain expressed concerns about the Court's restriction of speech rights. The Panel now seeks to extend *Pickup* two rather large steps further, raising even greater conflicts with Supreme Court precedent.

First, as to the Religion Clauses, the Panel saw little difference between the speech rights previously adjudicated and the Free Exercise and Establishment Clause rights that had not been. As a result, the Panel skipped the usual route laid out by the Supreme Court and charted its own course. Where *Pickup* invited the

plaintiffs to fully litigate their religious freedom claims, *Welch* now says, "Never mind." This does not at all seem to be the Circuit's intent. Rehearing en banc is needed to maintain the separate vitality of the Religion Clauses as independent avenues of First Amendment redress.

On privacy, the Panel also read *Pickup* as foreclosing such claims. The considerable problem with this holding is that the Pickup plaintiffs carefully avoided making any privacy claims. Unlike Welch, they skirted *Roe*, *Lawrence*, and their progeny, instead focusing on fundamental parental rights as expressed in *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The Panel's collapsing of these two sharply distinct aspects of privacy represents a large step backwards for this Circuit that could hardly have been contemplated by the judges who chose not to rehear *Pickup* en banc.

VII. THE PANEL CANNOT AVOID CONFLICT WITH THE SUPREME COURT BY ACTING AS THOUGH ITS LANDMARK DECISIONS DO NOT EXIST.

Besides its re-writing of the legislative record and the parties' positions, detailed in the foregoing Petition for Rehearing, perhaps the most remarkable aspect of the panel Opinion is the degree to which it fails to mention, let alone rebut, the Supreme Court and other authorities on which Welch based his claims. Welch urged the Court to read the Religion Clauses together, much as the Supreme Court did in *Hosanna-Tabor*, 132 S. Ct. at 712. In response to this significant and

serious argument, the Opinion offered no rebuttal or response. It simply acted as though this holding did not exist.

Welch further reasoned that a central premise of the church autonomy cases, relevant to the present, is that the State must not control who speaks for the church as its voice to the faithful and the next generation. *Watson v. Jones*, 80 U.S. 679 (1871); *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in America*, 344 U.S. 94 (1952). Again, the Panel so badly mischaracterized Welch's argument that it felt no need to address his church autonomy authorities.

From there, the Opinion pulled off the remarkable feat of rejecting Welch's alternative arguments under the Lemon test without actually citing *Lemon v. Kurtzman*. Indeed, the Panel did not see the need to cite or discuss *any* leading precedents on excessive entanglement, including the several pertinent authorities from other jurisdictions (noted below in the discussion about exceptional importance).

The Opinion then moved to Free Exercise claims. Here again, the Panel did not see a need to conduct any of the analysis one might expect for such a claim. Law students learn that *Employment Div. v. Smith*, has been the starting point for Free Exercise analysis for the past quarter-century. One therefore finds an extensive discussion in Welch's briefs of not only *Smith II*, but also *Smith I*,

Employment Div. Dept. of Human Resources v. Smith, 485 U.S. 660 (1988). Yet one searches the Opinion in vain for any such reference or discussion.

Lastly, the Opinion's misapplication of *Pickup* to foreclose the privacy claims cordons off some of the Supreme Court's most soaring pronouncements on privacy and renders them wasted breath. Just one example will suffice here: "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*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

SB 1172 prohibits minors from defining their own existence. As discussed above in the Petition for Rehearing, the Opinion fails to articulate why personal choices about the sex of the person with whom one will have intimate relations falls outside of the individual autonomy and privacy precept set forth in *Obergefell.*

The Opinion assumes that the heightened privacy rights at stake here are no different than the parental rights at issue in *Pickup* – even though the claims, arguments and plaintiffs themselves bear little resemblance to each other. In so doing, the Opinion takes this Circuit backwards on privacy and undercuts the

Supreme Court to an unacceptable degree.

The fundamental error is that the Opinion conflates substantive due process claims for parental rights with those of privacy. This Court has explained that parental rights come from the *Meyer-Pierce* right. *Fields v. Palmdale*, 427 F.3d 1197, 1204 (9th Cir. 2005). However, privacy rights related to procreation and intimate choices of a sexual nature fall under the *Roe-Lawrence* line of cases. *Id. at* 1207-08. The Opinion cannot be squared with the established law in this Circuit.

VIII. THIS CASE IS OF EXCEPTIONAL IMPORTANCE.

Sexuality, gender identity, privacy, and religious freedom are among the most hotly debated national issues of our time. Into this arena, the California Legislature injected itself with unabashed preference for the notion that changing sexual orientation is harmful and even proscribable.

For the last four years, these cases have been closely watched around the nation. Other states and jurisdictions have enacted copycat legislation. While reaching a similar conclusion, the Third Circuit Court of Appeals criticized this Court's approach to free speech in *Pickup. King v. Gov. of N.J.*, 767 F.3d 216 (3d Cir. 2014). The dearth of precedential discussion and baffling aversion to analysis in the Opinion will only invite further criticism.

FRAP 35 highlights conflict with other appellate courts as one indication of exceptional importance. Here, Welch identified a number of decisions from other jurisdictions that validate his concerns on free exercise and excessive entanglement in contexts much like the present. These cases have largely resisted legislative and judicial interference with religious counseling. Among these authorities cited in the Petition for Rehearing are *Franco v. Church of Jesus Christ of Latter-Day Saints*; *DeCorso v. Watchtower Bible*; *Malicki v. Doe*; *Gulbraa v. Presiding Bishops*; and *Nally v. Grace Community Church*.

In response, the Opinion's silence was revealing. It refused to acknowledge or discuss them in any way. The demeaning of relevant decisions from other jurisdictions by failing to acknowledge their existence does not reflect well on the Circuit and invites justifiable criticism.

CONCLUSION

It is not especially surprising that the Panel found a way to uphold a statute purporting to advance LGBT rights at the expense of religious individuals and institutions. What is surprising – shocking, even – is the degree to which the Panel could not be bothered to discuss or distinguish the many precedents upon which Welch relied. This dearth of reasoning does not take this Court in the right direction. In some ways, it might have been better for the Circuit as a whole had

the Panel issued a terse affirmance without explanation, rather than the explanation that was attempted.

Appellants anticipate that, in response to these Petitions, the Panel will gloss over its most glaring errors with string cites and perhaps a stray paragraph or two. This will not suffice. The serious issues raised in these Petitions call for the measured judgment of this Court sitting en banc. Religious freedom must not become a relic of a bygone era. And privacy must not become the sole province of the politically correct.

Date: September 2, 2016.

_/s/_Kevin T. Snider_____

_/s/_Matthew B. McReynolds

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STATEMENT OF RELATED CASES

Pickup v. Brown, 740 F.3d 1208 at 1224 (9th Cir. 2014), challenges the same law. In an order, the District Court determined that the cases are unrelated.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is composed in 14-point Times New Roman type.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains no more than 4,200 words. According to Microsoft Word's "Statistics," this document contains 3,864 words.

September 2, 2016 /s/ Kevin Snider
Kevin T. Snider

OPINION

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD WELCH; ANTHONY DUK; AARON BITZER, *Plaintiffs-Appellants*, v. EDMUND G. BROWN, JR., Governor of the State of California, in his official capacity; DENISE BROWN, Case Manager, Director of Consumer Affairs, in her official capacity; HARRY DOUGLAS; JULIA JOHNSON; SARITA KOHLI; RENEE LONNER; KAREN PINES; CHRISTINA WONG, in their official capacities as members of the California Board of Behavioral Sciences; 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; SAMARA ASHLEY, in their official capacities as members of The Medical Board of California, *Defendants-Appellees.*	No. 15-16598 D.C. No. 2:12-cv-02484-WBS-KJN OPINION

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted June 22, 2016
San Francisco, California

Filed August 23, 2016

Before: Alex Kozinski, Susan P. Graber, and Morgan B. Christen, Circuit Judges.

Opinion by Judge Graber

SUMMARY*

Civil Rights

The panel affirmed the district court's judgment on the pleadings, entered in favor of the State of California, on remand from a preliminary injunction appeal, in an action challenging California's Senate Bill 1172, which prohibits state-licensed mental health providers from engaging in "sexual orientation change efforts" with minor patients.

The panel held that plaintiffs' claims under the Free Exercise and Establishment Clauses of the First Amendment failed. The panel rejected plaintiffs' Establishment Clause claim that Senate Bill 1172 excessively entangled the State

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

with religion and would prohibit, for example, certain prayers during religious services. The panel held that the scope of the law regulates conduct only within the confines of the counselor-client relationship.

The panel rejected plaintiffs' assertion that Senate Bill 1172 has the principal or primary effect of advancing or inhibiting religion because some minors who seek sexual orientation change efforts have religious motivations. The panel held that the prohibition against sexual change efforts applies without regard to the nature of the minor's motivation for seeking treatment. The panel concluded that the operative provisions of SB 1172 were fully consistent with the secular purpose of preventing harm to minors and the evidence fell far short of demonstrating that the primary intended effect of SB 1172 was to inhibit religion. The panel further concluded that although the evidence considered by the legislature noted that some persons seek sexual orientation change efforts for religious reasons, the documents also stressed that persons seek change efforts for many secular reasons. The panel held that an informed and reasonable observer would conclude that the primary effect of SB 1172 is not the inhibition (or endorsement) of religion. For substantially the same reasons, the panel rejected plaintiffs' argument that under the Free Exercise Clause, SB 1172 was not neutral.

Finally, the panel held that plaintiffs' privacy claim was foreclosed by the panel's previous opinion which held that substantive due process rights do not extend to the choice of type of treatment or of a particular health care provider.

COUNSEL

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OPINION

GRABER, Circuit Judge:

Once again, we consider facial constitutional challenges to California's law prohibiting state-licensed mental health providers from engaging in "sexual orientation change efforts' ("SOCE") with minor patients. The law is known as Senate Bill 1172, or SB 1172, and is codified in California's Business and Professions Code sections 865, 865.1, and 865.2. Plaintiffs are two state-licensed mental health providers and one aspiring state-licensed mental health provider who seek to engage in SOCE with minor patients.

Defendants are the Governor of California and other state officials, to whom we refer collectively as "the State."

Our earlier opinion in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), contains further background information. In that appeal, we undertook plenary review of the claims raised at the preliminary injunction stage. We held that "SB 1172, as a regulation of professional conduct, does not violate the free speech rights of SOCE practitioners or minor patients, is neither vague nor overbroad, and does not violate parents' fundamental rights"; and we remanded for further proceedings on any additional claims. *Id.* at 1222. On remand, Plaintiffs claimed that SB 1172 violates the Free Exercise and Establishment Clauses of the First Amendment and that SB 1172 violates the privacy rights of their minor clients. The district court granted judgment on the pleadings to the State. Reviewing de novo, *Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877, 883 (9th Cir. 2011), we affirm.

Plaintiffs' claims under the Religion Clauses[1] fail. We earlier held that SB 1172 survives rational basis review because "SB 1172 is rationally related to the legitimate government interest of protecting the well-being of minors." *Pickup*, 740 F.3d at 1232. But Plaintiffs argue that, under the Religion Clauses, we must apply strict scrutiny. We are not persuaded.

[1] "The First Amendment provides in pertinent part that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' The Free Exercise and Establishment Clauses apply to the States through the Due Process Clause of the Fourteenth Amendment." *California v. Grace Brethren Church*, 457 U.S. 393, 396 n.1 (1982).

Plaintiffs first argue that, under the Establishment Clause, SB 1172 excessively entangles the State with religion. This argument rests on a misconception of the scope of SB 1172. Plaintiffs interpret SB 1172 to prohibit, for example, certain prayers during religious services. Plaintiffs are mistaken about the scope of SB 1172, because that law regulates conduct only *within the confines of the counselor-client relationship*.

We held as much in our earlier opinion: "As we have explained, SB 1172 regulates only (1) therapeutic treatment, not expressive speech, by (2) licensed mental health professionals acting *within the confines of the counselor-client relationship*." *Id.* at 1229–30 (emphasis added). That conclusion flows primarily from the text of the law. For example, SB 1172 prohibits SOCE "with a *patient* under 18 years of age." Cal. Bus. & Prof. Code § 865.1 (emphasis added). Legislative history, too, strongly suggests that the law was aimed at practices that occur in the course of acting as a licensed professional.[2] Finally, the doctrine of constitutional avoidance requires us not to interpret SB 1172 as applying in the manner suggested by Plaintiffs. *See, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the

[2] The record contains legislative reports submitted by Plaintiffs. Those reports note repeatedly that "the intent of this bill is to limit deceptive *therapies* that are harmful to minors by mental health providers." (Emphasis added.) Similarly, some reports describe the "[p]urpose of this bill" as "protections for youths [from] dangerous so-called *therapies* that aim to change a person's sexual orientation." (Emphasis added.) Nothing in the legislative history suggests that SB 1172 aimed to regulate ordinary religious conduct.

statute to avoid such problems unless such construction is plainly contrary to the intent of [the legislature].").

Notably, Plaintiffs are in no practical danger of enforcement outside the confines of the counselor-client relationship. The State repeatedly and expressly has disavowed Plaintiffs' expansive interpretation of the law. For example, in its brief to this court, the State asserts that "SB 1172 does not apply to members of the clergy who are acting in their roles as clergy or pastoral counselors and providing religious counseling to congregants." At oral argument, the State's lawyer reiterated that the law "does not actually apply to members of the clergy or religious counselors who are acting in their pastoral or religious capacity." Oral Argument at 15:12–15:22, *available at* http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000009871. Similarly, the State's lawyer emphasized that the law "exempts pastoral counselors, clergy, etc., as long as they don't hold themselves out as operating pursuant to their license." *Id.* at 15:32–15:41. In sum, because SB 1172 does not regulate conduct outside the scope of the counselor-client relationship, the law does not excessively entangle the State with religion.

Plaintiffs next argue that, under the Establishment Clause, SB 1172 "has the principal or primary effect of advancing or inhibiting religion." *Am. Family Ass'n, Inc. v. City of San Francisco*, 277 F.3d 1114, 1122 (9th Cir. 2002). "We conduct this inquiry from the perspective of a 'reasonable observer' who is both informed and reasonable." *Id.* (quoting *Kreisner v. City of San Diego*, 1 F.3d 775, 784 (9th Cir. 1993).

"The legislature's stated purpose in enacting SB 1172 was to 'protect the physical and psychological well-being of

minors, including lesbian, gay, bisexual, and transgender youth, and to protect its minors against exposure to serious harms caused by sexual orientation change efforts.' 2012 Cal. Legis. Serv. ch. 835, § 1(n)." *Pickup*, 740 F.3d at 1223 (brackets omitted). The operative provisions of SB 1172 are fully consistent with that secular purpose. The law regulates the conduct of state-licensed mental health providers *only*; the conduct of all other persons, such as religious leaders not acting as state-licensed mental health providers, is unaffected. As explained in detail above, even the conduct of state-licensed mental health providers is regulated *only* within the confines of the counselor-client relationship; in all other areas of life, such as religious practices, the law simply does not apply.

The prohibition against SOCE applies without regard to the nature of the minor's motivations for seeking treatment. That is, whether or not the minor has a religious motivation, SB 1172 prohibits SOCE by state-licensed mental health providers. And, of course, the law leaves open many alternative paths. Minors who seek to change their sexual orientation—for religious or secular reasons—are free to do so on their own and with the help of friends, family, and religious leaders. If they prefer to obtain such assistance from a state-licensed mental health provider acting within the confines of a counselor-client relationship, they can do so when they turn 18.

Plaintiffs nevertheless argue that SB 1172 has the effect of inhibiting religion because some minors who seek SOCE have religious motivations. We acknowledge that a law aimed *only* at persons with religious motivations may raise constitutional concerns. *See, e.g.*, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)

(invalidating under the Free Exercise Clause the prohibition of ritual animal slaughter, tailored to reach only religiously motivated conduct); *Cent. Rabbinical Congress of U.S. & Can. v. N.Y. City Dep't of Health & Mental Hygiene*, 763 F.3d 183 (2d Cir. 2014) (holding that strict scrutiny applies under the Free Exercise Clause to health regulations targeting metzitzah b'peh, an Orthodox Jewish ritual during circumcision). But SB 1172 falls well outside that category.

The bill's text and its legislative history make clear that the legislature understood the problem of SOCE to encompass not only those who seek SOCE for religious reasons, but also those who do so for secular reasons of social stigma, family rejection, and societal intolerance for sexual minorities. For example, in its express legislative findings, the legislature quoted a policy statement that found that "*[s]ocial stigmatization* of lesbian, gay and bisexual people is widespread and is a primary motivating factor in leading some people to seek sexual orientation changes." 2012 Cal. Legis. Serv. ch. 835, § 1(h) (emphasis added); *see also id.* § 1(m) ("Minors who experience *family rejection* based on their sexual orientation face especially serious health risks." (emphasis added)). The documents in the legislative history recognized that religion is a motivating factor for some persons who seek to change their sexual orientation; but it also repeatedly listed "social stigmatization," "unfavorable and intolerant attitudes of the society," and "family rejection" as common causes of distress that might motivate people to seek counseling.

The legislative findings of SB 1172 cited a 2009 report from a Task Force convened by the American Psychological Association ("APA"). 2012 Cal. Legis. Serv. ch. 835, § 1(b). Plaintiffs note that the APA Task Force's report concluded

that "the population that undergoes SOCE tends to have strongly conservative religious views that lead them to seek to change their sexual orientation." Extrapolating from that statement, Plaintiffs characterize the report as focusing *exclusively* on persons who seek SOCE for religious reasons. Plaintiffs further conclude that the legislature, too, focused exclusively on persons who seek SOCE for religious reasons.

We disagree. The evidence falls far short of demonstrating that the primary intended effect of SB 1172 was to inhibit religion. The legislative findings cite—in addition to the APA Task Force report—many other sources, including a 2009 resolution by the APA; a 2000 position statement by the American Psychiatric Association; a position statement by the American School Counselor Association; a 1993 article by the American Academy of Pediatrics; a 1994 report by the American Medical Association Council on Scientific Affairs; a 1997 policy statement by the National Association of Social Workers; a 1999 position statement by the American Counseling Association Governing Council; a 2012 position statement by the American Psychoanalytic Association; a 2012 article by the American Academy of Child and Adolescent Psychiatry; and a 2012 statement by the Pan American Health Organization. 2012 Cal. Legis. Serv. ch. 835, § 1(c)–(*l*). Those additional sources do not characterize the main motivation of persons seeking SOCE as being religious.

Even viewing the APA Task Force's report in isolation does not support a conclusion that only those with religious views sought SOCE. Although the report concluded that those who seek SOCE "tend" to have strong religious views, the report is replete with references to non-religious motivations, such as social stigma and the desire to live in

accordance with "personal" values. The report noted that "sexual stigma, manifested as prejudice and discrimination directed at non-heterosexual sexual orientations and identities, is a major source of stress for sexual minorities," which the report termed "minority stress." "Homosexuality and bisexuality are stigmatized, and this stigma can have a variety of negative consequences (e.g., minority stress) throughout the life span." "Some individuals choose to live their lives in accordance with *personal or* religious values . . . ." (Emphasis added.) The following illustrates the report's general approach:

> [E]xperiences of felt stigma—such as self-stigma, shame, isolation and rejection from relationships and valued communities, lack of emotional support and accurate information, and conflicts between multiple identities and between values and attractions—played a role in creating distress in individuals. Many religious individuals desired to live their lives in a manner consistent with their values . . . .

That passage first identifies *many* non-religious sources of distress that might cause a person to seek counseling and only then notes that, for many religious individuals, an *additional* source of distress may be present.

In sum, although the scientific evidence considered by the legislature noted that some persons seek SOCE for religious reasons, the documents also stressed that persons seek SOCE for many secular reasons. Accordingly, an informed and reasonable observer would conclude that the "primary effect" of SB 1172 is not the inhibition (or endorsement) of religion.

Plaintiffs next argue that, under the Free Exercise Clause, SB 1172 is not "neutral." *Church of Lukumi*, 508 U.S. at 531. This argument fails for substantially the same reasons as discussed above. *See also King v. Governor of N.J.*, 767 F.3d 216, 241–43 (3d Cir. 2014) (rejecting the plaintiffs' free exercise challenge to New Jersey's law prohibiting state-licensed counselors from engaging in SOCE with minors), *cert. denied*, 135 S. Ct. 2048 (2015).

"[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . ." *Church of Lukumi*, 508 U.S. at 533. The object of SB 1172 is the prevention of harm to minors, regardless of the motivations for seeking SOCE. As we have explained, many persons seek SOCE for secular reasons. Moreover, even if we assume that persons with certain religious beliefs are more likely to seek SOCE, the

> Free Exercise Clause is not violated even if a particular group, motivated by religion, may be more likely to engage in the proscribed conduct. *See Reynolds v. United States*, 98 U.S. 145, 166–67 (1878) (upholding a ban on polygamy despite the fact that polygamy was practiced primarily by members of the Mormon Church); *cf. United States v. O'Brien*, 391 U.S. 367, 378–86 (1968) (rejecting a First Amendment challenge to a statutory prohibition of the destruction of draft cards even though most violators likely would be opponents of war).

Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1077 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2433 (2016).

Finally, Plaintiffs' privacy claim fails. Plaintiffs characterize their claim as relying on the principles found in cases such as *Lawrence v. Texas*, 539 U.S. 558 (2003). *Lawrence* rests on a substantive due process analysis. *Id.* at 564. Accordingly, we understand Plaintiffs to be asserting that their clients have a substantive due process right to receive a particular form of treatment—SOCE—from a particular class of persons—mental health providers licensed by the State of California. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) ("[W]e have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest." (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993))). Our previous opinion forecloses that argument. *See Pickup*, 740 F.3d at 1235–36 ("[W]e have held that 'substantive due process rights do not extend to the choice of type of treatment or of a particular health care provider.'" (quoting *Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1050 (9th Cir. 2000))).

AFFIRMED.

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2016, 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.

s/ Kirstin E. Largent