No. 12-17681

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID PICKUP; CHRISTOPHER H. ROSIK, PH.D.; JOSEPH NICOLOSI, PH.D.; ROBERT VAZZO; NATIONAL ASSOCIATION FOR RESEARCH AND THERAPY OF HOMOSEXUALITY, a Utah non-profit organization; AMERICAN ASSOCIATION OF CHRISTIAN COUNSELORS, a Virginia non-profit association; JOHN DOE 1, by and through JACK AND JANE DOE 1; JACK DOE 1, individually; JANE DOE 1, individually; JOHN DOE 2, by and through JACK AND JANE DOE 2; JACK DOE 2, individually; and JANE DOE 2, individually,

Plaintiffs-Appellants,

v.

EDMUND G. BROWN, Jr. Governor of the State of California, in his official capacity; ANNA M. CABALLERO, Secretary of the State and Consumer Services Agency of the State of California, in her official capacity; KIM MADSEN, Executive Officer of the California Board of Behavioral Sciences, in her official capacity; MICHAEL ERICKSON, PH.D., President of the California Board of Psychology, in his official capacity; and SHARON LEVINE, President of the Medical Board of California, in her official capacity,

Defendants-Appellees.

and

EQUALITY CALIFORNIA,

Intervenor-Defendant-Appellee

On Appeal from the United States District Court
For the Eastern District of California

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of *Plaintiffs-Appellants*
Urging Reversal

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FRAP RULE 26.1 DISCLOSURE STATEMENT

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INTEREST OF *AMICUS CURIAE*

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in California, desire to see religion treated as the Framers of the First Amendment intended. Although the current appeal involves only some of the claims at issue in this case, the case, on the merits, involves brought Free Exercise claims. Furthermore, many of the individual Plaintiffs and the members of the organizational Plaintiffs engage in or receive the type of counseling that they do due to religious beliefs.

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

This Brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties. No party's counsel authored this Brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the Brief; and no person other *Amicus Curiae*, The National Legal Foundation, its members, or its counsel contributed money that was intended to fund preparing or submitting the Brief.

SUMMARY OF THE ARGUMENT

The District Court erred in holding that the counseling at issue in this case ("sexual orientation change efforts" (SOCE)) is conduct, not speech, or to use the

District Court's words, not "expressive conduct entitled to First Amendment protection," and not "expressive speech." The same District court came to the opposite conclusion in *Welch v. Brown*, No. 12-cv-2484, 2012 WL 6020122 (E.D. Cal. Dec. 3, 2012), another case challenging the constitutionality of California Senate Bill 1172. This Brief will explain why the District Court erred in the instant case, demonstrating that the cases relied upon by the District Court here are inapposite, while the District Court's analysis in *Welch* is correctly reasoned. The Brief will also demonstrate that SB 1172 is content-based. Thus, under a proper analysis, SB 1172 is subject to strict scrutiny analysis and cannot withstand it.

Relatedly, this Brief will compare the analyses of the District Court in the instant case and in *Welch* on the issue of whether SB 1172 is exempt from strict scrutiny analysis because it regulates the counseling profession. Once again, the District Court's holding in the instant case that SB 1172 is exempt from such analysis (and subject only to rational basis review) is incorrect and its opposite conclusion in *Welch*—that, even as a professional regulatory statute, SB 1172 is subject to strict scrutiny analysis—is correct.

ARGUMENT

I. THE COURT BELOW ERRED WHEN IT HELD THAT SB 1172 IS NOT SUBJECT TO STRICT SCRUTINY BECAUSE COUNSELING IS ENTITLED TO FIRST AMENDMENT PROTECTION, SB 1172 IMPOSES CONTENT-BASED DISCRIMINATION, AND THE FACT THAT SB 1172 REGULATES A PROFESSION DOES NOT OVERRIDE THESE PRINCIPLES.

As the Plaintiffs correctly point out in their Brief, one of multiple ways in which the District Court erred was in holding that the counseling at issue in this case ("sexual orientation change efforts" (SOCE)) is conduct, not speech, (Appellants' Opening Br. 26-31); or to use the District Court's words, SOCE does not constitute "expressive conduct entitled to First Amendment protection," (Excerpts of Record (hereinafter, "ER") at 00019), or "expressive speech," (*id.*). Specifically, the District Court opined that under *United States v. O'Brien*, 391 U.S. 367 (1968), not all conduct with a speech component constitutes expressive conduct/expressive speech. (ER at 00018.) This Brief will demonstrate how the District Court in the instant case misunderstood this teaching of *O'Brien* when it held that California Senate Bill 1172 was not "within First Amendment purview," (ER at 00019), while that same court correctly understood *O'Brien* and its inapplicability to SB 1172 in *Welch v. Brown*, No. 12-cv-2484, 2012 WL 6020122 (E.D. Cal. Dec. 3, 2012), another case challenging this Bill's constitutionality. Since this is true, SB 1172 is subject to strict scrutiny analysis unless it is content-neutral or unless the fact that it regulates a profession exempts it from strict

scrutiny. After demonstrating the District Court's basic error in misunderstanding *O'Brien*, it will show that SB is not content neutral and that it is not exempt from strict scrutiny by virtue of regulating a profession.

A. SOCE Counseling is entitled to First Amendment protection because its speech component constitutes expressive speech/expressive conduct.

The District Court did not analyze SB 1172 under the *O'Brien* test for evaluating restrictions on expressive speech/conduct because it concluded that, in line with the teaching referred to above from *O'Brien*, SOCE is not expressive speech/conduct at all: "Courts reaching the question have found that the provision of healthcare and other forms of treatment is not expressive conduct." (ER at 00018.) However, the cases cited in support of this proposition are problematic.

First it cited *O'Brien v. United States Department. Of Health & Human Services*, No. 12–cv–476, 2012 WL 4481208, at *12 (E.D. Mo. Sep. 28, 2012). This case involves a challenges to the mandatory contraception coverage by health insurance plans under the Patient Protection and Affordable Care Act, *id.* at *1. The two sentences quoted by the District Court below constitute the entire analysis of the *O'Brien v. Department of HHS* court (not including statements of rules) on this point: "Neither the doctor's conduct in prescribing nor the patient's conduct in receiving contraceptives is inherently expressive. Giving or receiving health care is not a statement in the same sense as wearing a black armband or burning a flag."

(*O'Brien v. Department of HHS*, 2012 WL 4481208, at *12 (citations omitted) (*quoted in* ER at 00018).) Although your *Amicus* does not believe *O'Brien v. Department of HHS* was rightly decided and although that case is currently being appealed, there is a world of difference between prescribing and receiving a prescription, on the one hand, and SOCE, on the other hand. As David Pickup, one of the Plaintiffs, in the instant case has explained, his "counseling consists solely of speech, which is the only tool he has to engage a client, and it is the main tool that has been employed in psychotherapy since at least 1900 when Sigmund Freud introduced this practice. There is no other conduct that takes place in [his] counseling sessions." (Appellants'' Opening Br. 12 (citations and internal quotation marks omitted).)

> The other Counselor-Plaintiffs are all in accord. Dr. Rosik has explained he
>
> > helps clients with their unwanted same-sex sexual attractions by talking to them about root causes of their unwanted feelings, talking to them about general roles and identities, and talking to them about their anxiety and confusion concerning these unwanted same-sex sexual attractions. Speech is the only tool he has to engage his clients.

(*Id.* 13 (citation omitted).) Similarly, a third Plaintiff, Dr. Nicolosi, has explained "[p]sychotherapy is speech. The therapeutic relationship is talking and communication; verbal and non-verbal communication is the essential element of the therapeutic process." (*Id.* 14 (citations and internal quotation marks omitted).) Finally, Robert Vazzo "testified that [a] therapist's speech is the only tool he has to

engage a client, and it is the main tool [Mr. Vazzo] utilize[s] in [his] practice [and] that the only psychotherapists that have additional tools other than speech are psychiatrists who can prescribe medicine …" (*Id.* 15 (citations and internal quotation marks omitted).) Thus, the simply equation of the acts of prescribing and receiving contraception with SOCE is unavailing. *O'Brien v. Department of HHS* is simply inapposite.

Second, the District Court cited *Abigail Alliance For Better Access v. von Eschenbach*, 495 F.3d 695 (D. D.C. 2007) which it described as "collecting cases finding no constitutional right of access to particular medical treatments reasonably prohibited by the government." However, the constitutional claim in *Abigail Alliance* was that denying terminally ill patients access to unapproved medicines violated the *Due Process Clause*. *Id.* at 701. No free expression case was among the collected cases, much less analyzed, even by analogy.

Third, the District Court cited *Martin v. Campbell*, No. 09-cv-4077, 2010 WL 1692074 (W.D. Ark. Apr. 23, 2010). In this case, an acupuncturist sued to have a state statute that regulated his profession declared unconstitutional. Specifically, the law prohibited acupuncturists from prescribing certain drugs, from administering injections, and from calling themselves "doctor." *Id.* at *1. None of these activities are at all similar to SOCE counseling. Furthermore, the *Martin* court did not engage in an expressive conduct analysis, since the acupuncturist

brought only a commercial speech claim. While one might have expected there to have been an expressive conduct claim, there was no such claim. Indeed, one wonders why the District Court below relied upon this case, given the arguments made by the acupuncturist. For example, as noted by the *Martin* court, one of the acupuncturist's complaints against the anti-prescription provision was that it was "obnoxious." *Id.* at *2. This is representative of the "flavor" of this lawsuit; it is not surprising that the opinion is not helpful in analyzing the instant case.

Fourth, the District Court cited *People v. Privitera*, 23 Cal. 3d 697, 703-04 (1979) for the proposition that "'the selection of a particular procedure is a medical matter' to which privacy status does not attach." (ER 00018-19.) *Privitera* involved *only* a claim that a ban on unapproved drugs violated privacy rights under the United States and California constitutions. 23 Cal. 3d at 701. This case, like the others, is inapposite.

Fifth, the District Court cited *Sharrer v. Zettel*, No. C 04-00042 SI, 2005 WL 885129, at *7 (N.D. Cal. Mar. 7, 2005). However, this case, too, involved only a right-to-privacy claim, *id.* at *1, and the plaintiffs' efforts to compel the state of California to allow them to obtain dentures from non-dentists, *id.*

Sixth and finally, the District Court cited *State Department of Health v. Hinze*, 441 N.W.2d 593, 597 (Neb. 1989) for the black-letter-law proposition that the "practice of medicine itself is not protected by the First Amendment." (ER

00019.) The issue in *Hinze* was whether Nebraska could prevent unlicensed individuals from practicing medicine, not whether the state had violated the expressive conduct rights of licensed individuals.

In sum, in support of its conclusion that, under *United States v. O'Brien*, SOCE is not entitled to First Amendment protection, the District Court cited six cases, only one of which contained an expressive conduct analysis. That analysis was two sentences long and involved the writing of prescriptions. On the "strength" of these inapposite cases, the District Court in the instant case concluded that it did not even need to apply *O'Brien's* intermediate scrutiny test because SOCE is not expressive conduct/expressive speech in the first place.

In contrast, the District Court in *Welch v. Brown*, noted that *O'Brien* is inapplicable to the SB 1172/SOCE analysis for a completely different reason. In fact, the reasoning of the *Welch* court is the exact opposite of the court below. Rather than impose a one-size-fits-all "healthcare and other forms of treatment" rubric on SOCE, (ER 00018), the *Welch* court examined what SOCE actually is:

> From the myriad of explanations about the various SOCE treatments, it is clear that there is not a single method for a mental health provider to engage in SOCE. The Ninth Circuit has also recognized that "the key component of psychoanalysis is the treatment of emotional suffering and depression, *not* speech. Nonetheless, at least some forms of SOCE, such as "talk therapy," involve speech and the Ninth Circuit has stated that the "communication that occurs during psychoanalysis is entitled to First Amendment protection." Therefore, even if SB 1172 is characterized as primarily aimed at regulating conduct, it also extends to forms of SOCE that utilize speech and, at a minimum,

regulates conduct that has an incidental effect on speech.

Welch, 2012 WL 6020122, at *7 (citations omitted). And this is certainly true of the practices of the Plaintiffs in the instant case.

Thus, SOCE clearly requires some sort of speech analysis. And at this point in its analysis, the *Welch* court noted that this fact raised the *possibility* that *O'Brien* was implicated. *Id.* However, the *Welch* court correctly turned to *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), to determine whether *O'Brien* should *actually* control. *Welch*, 2012 WL 6020122, at *7. In *Humanitarian Law Project*, Congress had prohibited the provision of "material support or resources" to foreign terrorist organizations. 130 S. Ct. at 2712. Various individuals and organizations, desiring to aid the non-terrorist activities of two groups that had been designated as terrorist organizations, challenged the prohibition. *Id.* at 1713-14. Among the challenges to the prohibition was a Free Speech challenge. *Id*. at 2712.

In defending the prohibition, the government argued that *O'Brien* controlled. *Id.* at 2723. As described by the *Welch* court, the *Humanitarian Law Project* Court rejected this argument:

> The Court recognized that the "material support" the statute prohibited "most often does not take the form of speech at all," but that the plaintiffs in the case intended to provide material support through speech. After concluding that the statute was content-based and therefore subject to strict scrutiny, the Court rejected the government's argument that it should nonetheless be subject to

> intermediate scrutiny "because it *generally* functions as a regulation of conduct." In rejecting the government's position, the Court emphasized, "The law here may be described as directed at conduct, ... but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message" because the plaintiffs intended to "provide material support to the [two organizations] in the form of speech."

Welch at *8 (citations omitted; emphasis original).

The *Welch* court than noted the clear parallel between its case and *Humanitarian Law Project*: "Similar to *Humanitarian Law Project*, plaintiffs in this case have indicated that they wish to engage in SOCE through speech." *Id.* Thus, SB 1172 is subject to strict scrutiny analysis, unless, as noted in the last quotation from *Welch*, it is content-neutral. And, as will be demonstrated in the next section, it is not content neutral.

B. SOCE is entitled to First Amendment protection because SB 1172 is not content-neutral since it was enacted specifically to target SOCE.

As one would suspect from the prior quotation from *Welch*, the District Court there was careful to make sure that SOCE is not, nevertheless, covered by *O'Brien*:

> Moreover, even if the court assumes that most SOCE is performed through conduct and that SOCE generally functions to regulate conduct, it is not automatically subject to review under the *O'Brien* test. As the Court made clear in *O'Brien* and has repeatedly confirmed since that decision, a law regulating conduct that incidentally affects speech is subject to strict scrutiny if it is content or viewpoint-based. Accordingly, even assuming SB 1172 is properly characterized as a statue regulating conduct, because it has at least an

> incidental effect on speech and plaintiffs intend to engage in SOCE through speech, intermediate scrutiny applies only if SB 1172 is content- and viewpoint-neutral.

Id.

The *Welch* court, quoting this Court, noted that "'[a] regulation is content-based if either the underlying purpose of the regulation is to suppress particular ideas or if the regulation, by its very terms, singles out particular content for differential treatment.'" *Id.* (quoting *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009)). Citing illustrative legislative history, the *Welch* court documented the fact that "there is little [read "no"] question that the Legislature enacted SB 1172 at least in part because it found that SOCE was harmful to minors and disagreed with the practice." *Id.* at 10. And lest there be any mistake, the *Welch* court "connected the dots":

> The Legislature's findings and declarations convey a consistent and unequivocal message that the Legislature found that SOCE is ineffective and harmful. Such findings bring SB 1172 within the content-based exception in *O'Brien* when intermediate scrutiny does not apply because "the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful."

Id. (citation omitted).

Thus, in sum, the District Court was correct in *Welch* that SB 1172 is subject to strict scrutiny analysis and was incorrect in the instant case that it is subject only to rational basis scrutiny.

One additional point is worth mentioning. In *Welch* and the instant case, the District Court also came to differing conclusions on the related question of whether SB 1172 is subject to rational basis or strict scrutiny analysis by virtue of regulating a profession. Here again, the *Welch* court has the better of it, and that point is discussed in the next section.

C. SOCE is entitled to First Amendment protection because the fact that SB 1172 regulates a profession does not override SOCE's status as expressive speech/conduct nor SB 1172's content discriminatory nature.

The Plaintiffs have documented the problems with the District Court's professional regulatory analysis in the instant case: relying on a portion of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) that garnered only three votes, relying on non-precedential cases (as it had for its earlier expressive speech/conduct analysis), and ignoring this Court's analysis of *Casey* in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002). (Appellants' Opening Br 30-31.)

However, a few comments are warranted, addressing the better analysis of this point by the *Welch* court. First, the *Welch* court, like Plaintiffs here, note that the fact that the relevant portion of *Casey* garnered only three votes. Second, the *Welch* court addressed the view of the Fourth Circuit in *Accountant's Society of Virginia. v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988), and of two federal district courts that a lower level of scrutiny is sometimes appropriate when professions are regulated. *Welch*, 2012 WL 6020122 at *5.

Once again, the *Welch* court dug deeper than the District Court did in the instant case. The *Welch* court noted that the *Accountant's Society* court based its analysis on Justice White's concurring opinion in *Lowe v. SEC*, 472 U.S. 181, 211 (1985) (White, J., concurring). In that opinion, Justice White opined that "[r]egulations on entry into a profession, as a general matter, are constitutional if they have a rational connection with the applicant's fitness or capacity to practice the profession." *Id.* at 228. Your *Amicus* points out, parenthetically, that SB 1172 does not regulate the *entry* into the counseling profession. But, equally or more importantly, the *Welch* court also noted that there is more to Justice White's concurrence. He went on to opine that "the principle that the government may restrict entry into professions and vocations through licensing schemes has never been extended to encompass the licensing of speech *per se* or of the press." *Id.* at 229-30. And as the *Welch* court quoted, "[a]t some point, a measure is no longer a regulation of a profession but a regulation of speech or of the press; beyond that point, the statute must survive the level of scrutiny demanded by the First Amendment." *Id.* at 230 (*quoted in Welch*, 2012 WL 6020122 at *5). And in its usual thorough manner, the *Welch* court demonstrated that in *Conant*, as well as in two additional cases, *National Association for the Advancement of Psychoanalysis v. California Board of Psychology*, 228 F.3d 1043 (9th Cir. 2000); and *Jacobs v. Clark County School District*, 526 F.3d 419, 431 (9th Cir. 2008) (citing *National*

Assoc. for the Advancement of Psychoanalysis, 228 F.3d at 1055), this Court has clearly articulated the proposition that "content- or viewpoint-based professional regulation is subject to strict scrutiny." *Welch*, 2012 WL 6020122 at *5.

In light of all of the above, SB 1172 is subject to strict scrutiny on Plaintiffs' Free Speech claims. Neither the fact that it arguably regulates expressive conduct/expressive speech, rather than pure speech, nor the fact that it regulates the counseling profession, exempt it from strict scrutiny review. And for all the reasons stated by the *Welch* court, 2012 WL 6020122 at *12-15, and argued by the Plaintiffs, (Appellants' Opening Br. 26-39) SB 1172 cannot withstand such scrutiny.

CONCLUSION

For the foregoing reasons and for other reasons stated in the Plaintiffs-Appellants' Opening Brief, this Court should reverse the judgment of the District Court and remand with instructions to issue a preliminary injunction in favor of the Plaintiffs.

Respectfully submitted,
This 9th day of January 2013

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief *Amicus Curiae* has been produced using 14 point Times New Roman font which is proportionately spaced. This brief contains 3,397 words as calculated by Microsoft Word 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2013, I have electronically filed the foregoing Brief *Amicus Curiae* of The National Legal Foundation in the case of *Pickup, et al. v. Brown, et al.*, No. 12-17681, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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