Docket No. 13-15023

In the

United States Court of Appeals

For the

Ninth Circuit

DONALD WELCH, ANTHONY DUK and AARON BITZER,

Plaintiffs-Appellees,

v.

EDMUND G. BROWN, Jr., Governor of the State of California, in His Official Capacity, ANNA M. CABALLERO, Secretary of California State and Consumer Services Agency, in Her Official Capacity, DENISE BROWN, Case Manager, Director of Consumer Affairs, in Her Official Capacity, CHRISTINE WIETLISBACH, PATRICIA LOCK-DAWSON, SAMARA ASHLEY, 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, SILVIA DIEGO, DEV GNANADEV, REGINALD LOW, DENISE PINES, JANET SALOMONSON, GERRIE SCHIPSKE, DAVID SERRANO SEWELL and BARBARA YAROSLAVSKY, in Their Official Capacities as Members of The Medical Board of California,

Defendants-Appellants.

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

BRIEF OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. Proc. 26.1, there is no parent corporation or other entity owning 10% relative to Plaintiffs-Appellees.

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INTRODUCTION

This case raises fundamental questions about the limits on government power to restrict speech in the name of professional regulation. On appeal, the Defendants[1] claim a power untethered from traditional restraints. The State seeks exemption from orthodox First Amendment analysis when it declares speech harmful, and when it decides that communication does not merit constitutionally protected. The District Court could not agree, and preliminarily enjoined a statute that broadly prohibits "sexual orientation change efforts" that may consist entirely of speech between a minor patient and his or her mental health professional. In this brief, the Plaintiffs[2] will demonstrate that the prohibition is unquestionably subject to First Amendment scrutiny; that the State's prohibition is thoroughly content- and viewpoint-based; and that the statute's asserted compelling interests are unfocused, inadequate, and anything but narrowly tailored.

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.

[1] Defendants are collectively referred to as "State."
[2] Plaintiffs are collectively referred to as "Welch." Reference to individual plaintiffs will be so identified.

§1331, in that the Complaint alleges violations of the United States Constitution actionable under 42 U.S.C. §1983.

This appeal is from an order granting a preliminary injunction, and therefore this Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). The District Court's order granting the preliminary injunction was entered on December 3, 2012. Excerpts of Record ("ER") 38. Defendants filed a notice of appeal on January 2, 2013. ER 39.

STATEMENT OF THE ISSUES

The California Legislature passed a law which prohibits mental health professionals from engaging in "any practices" related to sexual orientation change efforts ("SOCE") on minors. This includes any "efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex." Any SOCE efforts subjects a mental health professional to discipline by the appropriate licensing entity. A psychiatrist and a licensed marriage and family therapist, the latter of whom works for a church, counsel teenagers who have unwanted same-sex attractions. The issues for review are:

1. Whether the complete ban on SOCE practices reaches expressive conduct which comes within the ambit of the First Amendment?

2. If SB 1172 restricts speech, does the bill constitute a content and viewpoint based restriction?

3. In implementing the absolute ban on SOCE for minors, has the State satisfied strict scrutiny review by offering a compelling interest, narrowly tailored, which uses the least restrictive means, to justify the all-inclusive prohibition?

STATEMENT OF THE CASE

On the last weekend of September, 2012, Defendant, Governor Edmund G. Brown, Jr., signed into law Senate Bill 1172. SB 1172 prohibits "sexual orientation change efforts" by mental health providers on patients under 18 years of age under all circumstances. ER 253. Two mental health professionals and an individual who successfully underwent SOCE filed suit on October 1, 2012. ER 335. Welch filed a motion for the issuance of a preliminary injunction on October 29, 2012. Supplemental Excerpts of Record ("SER") 360. A LGBT advocacy organization, Equality California, which was a cosponsor of the bill and led the lobbying efforts for its passage (SER 187), filed a motion to intervene on November 5, 2012. SER 180-181. Said motion was opposed by Welch. SER 157-176. The District Court denied the motion on November 7, 2012, with leave to submit points and authorities and declarations as *amicus curiae.* SER 155-56. The motion and opposition for preliminary injunction was fully briefed (SER 63-154;

215-363; ER 56-334; 368-454). Oral argument was heard on December 3, 2012 (SER 1-62). That same day, the Honorable William B. Shubb issued a preliminary injunction against the State. ER 1-38. The State filed a notice of appeal on January 2, 2013. ER 39.

STATEMENT OF FACTS

Donald Welch ("Dr. Welch") is a licensed marriage and family therapist and an ordained minister. ER 316. He is currently the president of a non-profit professional counseling center, the owner and director of a for-profit counseling center, and an adjunct professor at two universities. ER 317. Dr. Welch is also employed part-time as a Counseling Pastor for Skyline Wesleyan Church ("Skyline" or "Church"). *Id*. Skyline teaches that "human sexuality . . . is to be expressed only in a monogamous lifelong relationship between one man and one woman within the framework of marriage." ER 325. As such, he is prohibited from encouraging, enabling or validating beliefs or behaviors in others which is contrary to the teachings of the Church, including human sexuality. ER 317.

Part of 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, as well as romantic feelings which are inconsistent with their moral convictions, faith, and family's values. ER 319-320. He does not attempt to change a minor's sexual orientation against their will. In a declaration,

he explains, "If the client is unwilling, attempts at changing a belief or behavior -- of any kind -- is folly. This is particularly true of a teenager." ER 319.

Anthony Duk ("Dr. Duk") is a medical doctor and board certified psychiatrist in private practice who works with adults and children over the age of sixteen. ER 295. Dr. Duk is a Christian who expresses his faith through the Roman Catholic Church. ER 296. As such, there are families that seek his counsel because they share his faith. ER 298. With patients with like faith, he discusses the tenants of the Catholic faith, including the view that "homosexuality is not a natural variant of human sexuality, it is changeable, and it is not predominantly determined by genetics." ER 297.

Like Dr. Welch, Dr. Duk's current patients include minors "struggling with" homosexuality and bisexuality. ER 295. His patients come from various races, religions, nationalities and cultures. ER 299. Teenagers from traditional family backgrounds will have objectives of bringing their sexual attractions and behaviors in line with their faith, cultural traditions, and family's values. ER 298-300. As such, they seek information through counseling that assists with these personal goals. ER 295.

Aaron Bitzer ("Mr. Bitzer") is an adult who has had same-sex attractions beginning in junior high school (ER 305) and was involved in SOCE as an adult. *Id.* Despite having same-sex attractions, Mr. Bitzer never bought into "the

message of the Gay Community, which states that we are born this way and should just live accordingly" because such an opinion did not "really accurately described all of the dynamics" that he was aware of in his own life experience. ER 306. The undisputed evidence is that he found his experience with SOCE, in dealing with his same-sex attractions, helpful. ER 305-313.[3]

But the views held by the Plaintiffs have collided with the official ideology of the State. LGBT lobbyists[4] drafted and submitted to lawmakers (SER 265, 274, 282) a bill which prevents mental health professionals from any efforts to use SOCE in treating persons under the age of 18.[5] The Legislative findings and declarations provide the government view "that [b]eing lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming." In condemning SOCE, the Legislature pointed to a number of expressive practices such as prayer, religious conversion, individual and group counseling (ER 282) and "spiritual interventions." ER 269. Not surprisingly, no exemptions appear in the text of SB 1172 which exempts mental health providers, such as Dr. Welch, who work for

[3] Mr. Bitzer "had been planning on becoming a therapist specifically to work" with individuals having same-sex attractions and to help men like himself. ER 313. He explains that, "[b]ecause of SB 1172, [he has] had to reorder all of [his] career plans. *Id.*

[4] These include Equality California, the National Center for Lesbian Rights, Coming Out Into Light. SER 265, 274, 282.

churches and are clergy. Over the protests of scores of persons like Mr. Bitzer and mental health providers (ER 340), the Legislature passed SB 1172 on August 30, 2012.

On or about September 30, 2012, Governor Brown signed into law this sweeping restriction on mental health providers. The bill provides that SOCE includes "any practices" by a mental health provider "to change behaviors or reduce sexual or romantic attractions or feelings toward individuals of the same sex." Supplemental Excerpt of Record ("SER") 255. The prohibition is absolute. "Any sexual orientation change efforts attempted on a patient under 18 years of age" subjects a mental health professional to discipline by the respective licensing entity. *Id.*

Dr. Welch provides treatment regarded as SOCE under SB 1172 and his "compliance with SB 1172 will jeopardize [his] employment" at Skyline. ER 317, 319. This treatment consists of counseling, i.e. listening and talking to clients. ER 318. Likewise, in his practice, Dr. Duk utilizes treatment which includes counseling that qualifies as SOCE under SB 1172. ER 295. Both Drs. Welch and Duk's current counseling, that is consistent with their religious and professional convictions, put them in peril of professional discipline by the State.

[5] It should be noted that prior versions of the bill would have required consent for adults and provided for civil liability against mental health professionals. SER

Because of the imminent harm to their constitutional rights, as well as, exposure to financial and professional liability, Welch filed suit. ER 335-363. Welch's claims include violations of speech[6], free exercise of religion, separation of church and state, association, privacy, and due process. *Id.* The lower Court issued an injunction against the State, but only reached the speech claim. ER 2.

SUMMARY OF THE ARGUMENT

- The expansive language of SB 1172, which bans "any practices" by mental health professionals, restricts expressive conduct protected by the First Amendment. Because the bill prohibits a message disfavored by the State, it follows that the Legislature has targeted speech.
- A "speech vs. conduct" analysis presents a false dichotomy. The underlying premise is that conduct is distinct from speech. Thus, if the Court finds a governmental regulation of conduct, the Free Speech Clause is not implicated. This is incorrect. Welch will demonstrate that a restriction on speech occurs when the regulation of conduct targets the communication of a message. Hence, even if counseling is deemed conduct, it does not follow that it is not also speech.

268.

- The State has broad authority to regulate licensure (i.e. entry into a profession), practices involving physical effects (e.g. medications or assisted suicide), and, usage of terminology within professions (e.g. use of the word *audit* by a non-CPA). But, communications within the practice of a profession, such as during therapy, receive First Amendment protection.
- SOCE, at least according to the State, incorporates procedures including: lobotomy, castration, electroshock therapy, psychosurgery, and snapping an elastic band on the wrist. The Legislature also found that SOCE includes expressive conduct such as: prayer, religious conversion, individual and group counseling. The undisputed facts show that the mental health professionals who have brought suit use counseling in their SOCE treatment. Because SB 1172 prevents "any practices" and "any efforts," it runs afoul of the prohibitions placed on the Government to pass no law abridging freedom of speech.
- The District Court did not clearly err in its findings of fact or conclusions of law when it determined that SB 1172 is not content neutral. Because the bill penalizes a disfavored idea, the bill comprises content and viewpoint restrictions.

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[6] In conjunction with Welch's legal theory relative to the Free Speech Clause, the Complaint alleges content and viewpoint discrimination (ER 347), vagueness (ER 349), and overbreadth (ER 350).

- Because the bill restricts speech, the standard of review requires strict scrutiny. Under strict scrutiny, the State must demonstrate a compelling interest, narrowly tailored using the least restrictive means. The Legislature recognized this to be the standard of review, for it claims a compelling interest. Notwithstanding the clear language in the bill's declaration, the Attorney General's Office has abandoned that level of scrutiny entirely. Instead, the State's Opening Brief presents only a rational basis standard.
- The State asserts that this matter involves review for error of law. Instead it challenges the District Court's finding of facts for clear error. Nevertheless, the State frequently points to how it believes the evidence from the American Psychological Association Report proves its case. But the District Court was quite correct in finding the APA Report equivocal. Evidence which points to what "may" or "might" occur falls short under strict scrutiny review as a matter of law.

ARGUMENT

I. STANDARD OF REVIEW

This matter comes before the Court as an interlocutory appeal. An abuse of discretion standard comprises the measurement for an order granting a preliminary injunction. Abuse of discretion arises under two conditions as follows: (1) a

clearly erroneous finding of fact, or, (2) an erroneous legal standard. *Regents of University of California v. American Broadcasting Cos*., 747 F.2d 511, 522 (9th Cir. 1984). The State does not challenge the findings of fact. Instead, the State concedes that SB 1172 involves "the protected status of speech, not fact." Appellants' Opening Brief ("AOB") at 21, quoting *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983). Despite this, the State spills much ink on its version of the evidence. But its failure to point to any clear factual errors by the District Court, makes its protestations relative to the evidence all for naught.

II. THE DISTRICT COURT CAREFULLY NAVIGATED THE NUANCES OF CONDUCT AND SPEECH REGULATIONS.

A. SB 1172 Restricts Speech.

While it might seem redundant to refer to "counseling speech" the connection is utterly lost on the State. In defense of SB 1172, the Court is offered the remarkable proposition that the counseling associated with SOCE is not speech at all for First Amendment purposes. AOB 19-20.

Instead of explaining why SB 1172 should survive First Amendment scrutiny, the State expends most of its brief arguing that SB 1172 merely touches on conduct rather than speech. *Id*. Because conduct and speech are not mutually exclusive, this major premise assumes a false dichotomy between conduct and speech. *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,*

425 U.S. 748 (1976) (applying commercial speech analysis to "unprofessional conduct" regulation).

The statutory text is sweeping and striking. It provides that SOCE "means *any practices* by mental health providers that seek to change an individual's sexual orientation." California Business and Professions Code §865(b)(1) (emphasis added).[7] "Under no circumstances shall a mental health provider engage" in SOCE "with a patient under 18." Section 865.1. Doing so subjects "a mental health provider to discipline by the licensing entity for that mental health provider." Section 865.2 "[A]ny practices" is, of course, an expansive term.

The State asserts that SOCE includes inducing "nausea, vomiting, or paralysis; providing electric shocks" or having the individual snap an elastic band on the wrist when sexually aroused (AOB 9), lobotomy, and castration (AOB 49). But the facts at issue for the District Court's consideration were properly limited to the evidence regarding these Plaintiffs. *See,* Statement of Facts, *supra.* The lower court found that Dr. Duk states that the SOCE treatment that he provides includes counseling. ER 25:1-3. Dr. Duk is Roman Catholic. With patients that share his faith, Dr. Duk discusses the tenants of the Catholic Church, including the beliefs that "homosexuality is not a natural variant of human sexuality, it is changeable,

[7] Unless otherwise indicated, all sections referenced herein are to the Business and Professions Code.

and it is not predominantly determined by genetics." ER 25:4-7. In like manner, Dr. "Welch has explained that he shares the views of his church that homosexual behavior is a sin." ER 25:8-9. Dr. Welch is an ordained member of the clergy who heads the counseling ministry at his Church. ER 316-17. In sum, these Plaintiffs' practice of SOCE involves oral communication about a specific idea.

The State does not dispute these facts. Indeed, the State does not raise a claim that the District Court made any clearly erroneous findings of fact. AOB 21. In addition to not challenging the evidence below, the State concedes at one point that the present appeal "turns on a pure question of law" and that said law is the "status of speech." *Id.* In sum, the SOCE practiced by Drs. Welch and Duk involves counseling, including listening and sharing religious views.

Another telltale sign that SB 1172 sweeps in speech is that the State has unabashedly attacked the ideas behind SOCE. An unmistakable indicator that speech has been targeted is official disagreement with the underlying views and perspectives being communicated. *Rosenberger v. Rector of the University of Virginia*, 515 U.S. 819, 829 (1995). Here, the manner of communication (i.e. counseling) unquestionably involves—and is inseparable from—protected speech. The Legislature does not like the message that change is possible or desirable. Yet, labeling counseling as mere conduct does not save the State because here the Legislature has impermissibly targeted ideology. "There must be no realistic

possibility that official suppression of ideas is afoot." *R.A.V. v. St. Paul*, 5050 U.S. 377, 390. (1992).

Welch does not dispute that the Legislature can ban all electroshock, lobotomies, castration and rubber band snapping for all purposes. However, the State has also prohibited oral communications, intertwined with viewpoints, in the counseling room. Indeed, no plausible assertion can be made that SB 1172 does not chill—and outright censure—a large amount of disfavored speech.

By concentrating its attack on the application of *any* First Amendment analysis, the State implicitly acknowledges that a traditional speech analysis does not bode well for SB 1172. In order to be believed, though, the State seeks to persuade the Court that communication in the counseling room is not really speech at all—at least not speech deserving even a First Amendment glance. This proves too much. Unlike the State, the Plaintiffs do not pretend that the First Amendment analysis is simple, or that SB 1172 is susceptible to only one possible interpretation. In the balance, though, the District Court's approach was careful, restrained, and crafted to avoid the irreparable harm threatened by the statute.[8]

[8] In an *amicus* brief, the ACLU seeks to bail out the State by proposing a novel intermediate-level test that would lead to the same result sought by the State. Brief for the ACLU as *Amicus Curiae*, pp. 20-26. While this approach does not quite have the shock value of the State's proposal, it nevertheless serves only to highlight the uncharted waters the State and its *amicus* invite the Court to enter. Certainly, the District Court did not err by rejecting that invitation.

B. The State's Dismissal of First Amendment Implications is Astounding.

The State stumbles out of the starting gate by running into the Supreme Court's most recent rejection of its claimed conduct versus speech distinction. In *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), the Supreme Court addressed the constitutionality of barring material aid to terrorist groups. The plaintiffs protested that the "aid" they provided to terror groups like the Tamil Tigers of Sri Lanka and the Kurds of Kurdistan were directed toward teaching the groups to peacefully advocate for themselves in forums like the United Nations. *Id.* at 2720. Although the Supreme Court eventually sided with the government as to compelling interest, *see infra,* Section IV, the Court was having none of the government's claim that a lower level of scrutiny should apply because it had supposedly targeted conduct and, not speech. "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." *Id.* at 2724. The holding in *Humanitarian Law Project* is controlling. As with SB 1172, the plaintiffs' ability to speak to these groups depended on what they wanted to say, and therefore could not escape First Amendment scrutiny. *Id.* at 2723-24.

Even were the State somehow able to argue its way around *Humanitarian Law Project,* its position is a *non sequitur*. The State claims, correctly, that its general police power gives it the authority to regulate the professions. While true to some degree, it does not follow that the State's police powers are unlimited, or that the First Amendment is not implicated at all by anything the State designates as a professional regulation.

The Supreme Court spoke to the limits of professional regulation in *Lowe v. S.E.C.*, 472 U.S. 181(1985), where Justice White explained that "[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 (White, J., concurring). These "limits" seem utterly lost on the State. As a result, the State acknowledges no real First Amendment boundaries to regulatory power over the professions, even in highly sensitive areas such as sexual orientation-related counseling and therapy that implicate additional constitutional spheres such as privacy, personal autonomy, religion, and parental authority. Duk Decl. ¶15, ER 299.

The State relies on a bevy of professional regulation cases that do not quite say what it needs them to say. Perhaps most importantly, at least for the threshold conduct and speech issue, few of the cases do what the State insists the District Court should have done—avoid the First Amendment entirely. *See, e.g. Conant v.*

Walters, 309 F.3d 629, 637 (9th Cir. 2002) ("Being a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment rights.")

While Welch will not attempt to distinguish every case and regulation offered by the State, a few representative cases will be explored, since the State has made this the major thrust of its argument. As will be seen, most are understandable either as involving tangible, physical, effects (like medications); entry into a profession; usage of terminology within professions; or speech restrictions unique to members of the Bar.

i. Regulations of tangible products and services within the medical profession do not support the speech restrictions found in SB 1172.

The two Ninth Circuit authorities on which this case most depends are *National Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043 (9th Cir. 2000) ("*NAAP*") and *Conant*. Because of the centrality of these cases, they will be discussed in-depth below in Section III-A. For the present, it must be noted, though, that neither case comes close to supporting the State's remarkable premise that the First Amendment is somehow irrelevant or not implicated simply because a statute appears in the Business and Professions Code. To the contrary, both cases carefully and consistently *applied* First Amendment principles in reaching their respective conclusions. "Although some speech

interest may be implicated, California's *content-neutral* mental health licensing scheme is a valid exercise of its police power to protect the health and safety of its citizens and does not offend the First Amendment." *NAAP*, 228 F.3d at 1056 (emphasis added). See also *Conant*, 309 F.3d at 637, "[P]rofessional speech may be entitled to 'the strongest protection our Constitution has to offer.'" (internal citations omitted).

Other cases upholding regulation of the medical field and relied on by the State are also instructive. Glaringly, the vast majority of the medical cases, including malpractice cases, focus on physical, tangible effects on patients that are not directly comparable to "talk therapy." For instance, drug trial cases such as *Carnohan v. United States*, 616 F.2d 1129 (9th Cir. 1980), affirm state interests in protecting patients from unproven drugs. In this same vein are decisions such as *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007) (no constitutional right to non-FDA-approved drugs); *Lambert v. Yellowley*, 272 U.S. 581 (1926) (upholding, during prohibition era, federal limits on prescriptions of alcohol).

Washington v. Glucksberg, 521 U.S. 702 (1997), declined to announce a constitutional right to assisted suicide—the administration of drugs intended to cause the ultimate physical reaction, death. Claims by the State and *amici* that the injunction against SB 1172 will jeopardize a host of other statutes restricting

physical acts—from sexual abuse to female circumcision—are overblown at best. Valid prohibitions on medical and other conduct do not give the State an open-ended prerogative to declare the communication of ideology to be either "harmful" or "conduct."

The considerable problem for the State is that it has not shown that aversive therapies are utilized either predominantly or at all by the Plaintiffs. Since the statute draws no distinctions between aversive and non-aversive therapies, it sweeps in a wide swath of speech and ideology inherent to SOCE. *See*, Duk Decl. ¶15, ER 299.

Some statements lifted out of cases like *Shea v. Bd. of Medical Examiners*, 81 Cal.App.3d 564 (Cal. Ct. App. 3d Dist. 1978), and *Coggeshall v. Massachusetts Bd. of Registration of Psychologists*, 604 F.3d 658 (1st Cir. 2010) generally support limits on free speech in the medical context. However, they cannot be properly understood apart from their facts. In *Shea,* the comment that the First Amendment does not protect the "verbal charlatan," 81 Cal.App.3d at 577, was directed at a physician whose sexually explicit language was aimed at patients (and later, undercover investigators) who had sought treatment of unrelated ailments and were taken aback by graphic sexual suggestions that had nothing to do with the treatment they requested. *Id.* By contrast, SB 1172 seeks to ban "change efforts" even when *sought* by patients. Moreover, the Plaintiffs' uncontroverted testimony

is that it would be pointless for them to seek to change individuals who did not first seek out that change. Welch Decl. 5:14-21, ER 317. Moreover, the statement from *Shea,* while memorable, was *dicta* since the court ruled that the physician's First Amendment claims were untimely raised and could not be considered. 81 Cal.App.3d at 577.

ii. Restrictions on entry into a profession do not support the speech restrictions in SB 1172.

As the District Court noted, professional regulations governing entry into a profession are distinguishable from the present ideologically-driven attempt to suppress communication by Plaintiffs whose education, training and credentials have not been questioned by the State. ER at 22; *see also, NAAP, supra* (psychoanalysts unsuccessfully challenged entry requirements into profession); *Dent v. West Virginia,* 129 U.S. 114 (1889) (upholding indictment for practicing medicine without a license, and rejecting due process claims when applicant was denied licensing because he did not graduate from a "reputable" medical school); *Lowe*, 472 U.S. at 228 (stating "[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."); *Giannini v. Real*, 911 F.2d 354 (9th Cir. 1990) (attorney admission requirements of passing the Bar Examination and being in good standing with the bar are constitutional). Even entry into a profession cannot be ideologically constrained,

however. *Schware v. Bd. of Bar Exmnrs.,* 353 U.S. 232 (1957) (State Bar violated applicant's constitutional rights by excluding him for "bad moral character" based on his labor-related arrests and past membership in the Communist Party).

In short, neutral regulations governing entry into a profession—such as exams or certification requirements—do not speak to suppression of specific communications by professionals whose qualifications are not at issue.

iii. Restrictions on the use of terminology in a profession do not support the sweep of SB 1172.

In the same vein as entry into a profession, a number of authorities have upheld protectionist regulations that differentiate between services that may be offered by professionals with advanced training or certification. *See, e.g., Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483 (1955) (upholding, against due process challenge, statute that permitted ophthalmologists and optometrists but not opticians to perform certain types of eye care); *Accountant's Soc. of Va. v. Bowman*, 860 F.2d 602 (4th Cir. 1988) (restricting use of certain terms such as "audit" to CPA's). By contrast, SB 1172 disregards professional qualifications and flatly bans "change efforts" equally for lowly interns and highly-educated psychiatrists like Dr. Duk and multi-disciplinarians like Dr. Welch. In some ways, SB 1172 is the opposite of the statutes at issue in these types of cases, as it only allows SOCE to be offered by those with little or no professional training.

These cases would be a better fit if SB 1172 had sought to prevent *unlicensed* mental health professionals from offering "reparative therapy," "conversion therapy," or "SOCE." Instead, the Legislature sought to ban *licensed* professionals ranging from interns to M.D.'s from even talking to their patients in ways that the State might arbitrarily construe as "change efforts." These cases are therefore poor platforms from which to launch attacks on SOCE.

iv. Speech restrictions on members of the Bar are inapt.

The attorney malpractice cases relied on by the State are no better. Prominent among them is *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). In *Ohralik,* the Court turned back an attorney's challenge to "ambulance chasing" – in person solicitation of accident victims in a hospital. *Id.* at 468. The context is crucial. There, the Court sought to protect traumatized, heavily medicated patients from being pressured to make "snap" decisions about their legal claims with an aggressive attorney hovering over their hospital bed. *Id.* at 1917-1918. What the Court did *not* do is follow the path presented by the State of dismissing First Amendment concerns out of hand.

More recently, in *Florida Bar v. Went For It Inc.*, 515 U.S. 618 (1995) the U.S. Supreme Court upheld restrictions on attorney mail advertisements directed at accident victims within thirty days of the accident. Yet again, the Court conducted

a commercial speech analysis and found that the state had an interest in protecting vulnerable victims from *unsolicited* advertisements which invaded their privacy.

In sum, the army of authorities marshaled by the State for its first major proposition turn out to be wooden soldiers. They certainly do not defeat the District Court's well-reasoned, careful application of First Amendment principles. It is necessary, though, to separately consider two other realms that bear on the State's conduct versus speech distinction: its unique interpretation of the statute, and its reliance on other types of statutes.

C. The State's Attempts to Rehabilitate the Statute Do Not Save It.

The State further supports its claimed conduct versus speech distinction with an artful reading of SB 1172's prohibitions. This reading—an attempt to rehabilitate or even rewrite the statute—is unavailing for at least two reasons. First, it is far from evident in the text. Second, the State's artificial and arbitrary line-drawing is written with invisible ink. Neither the State nor the Welch Plaintiffs have any idea where the protections end and the prohibitions begin.

First, the key prohibitions are evolving as the litigation progresses. The State now claims that SB 1172 exempts several categories of speech. We are told mental health providers can talk *about* SOCE, make referrals to unlicensed SOCE providers, and even advise and opine as to the morality of homosexuality and the changeability of same-sex attraction. AOB 36-41.

The State's current position is baffling. Scarcely a word was spoken of these newfound exemptions during the legislative process. *See*, *generally*, the eleven different Legislative Analyses, SER 257-329. Rather, it appears the State's attorneys realized that the broad textual prohibition was inconsistent with *Conant.* 309 F.3d at 639. The State's gyrations, though, only serve to confuse. They do not serve to pluck the statute entirely out of the realm of the First Amendment.

Even could one assume (which Welch does not) that the State's reading is correct, it creates more problems than it solves. The First Amendment protects more than just information—it protects advocacy. "In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the communicant in these circumstances wholly at the mercy of the varied understandings of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Thomas v. Collins,* 323 U.S. 516, 535 (1945). Perplexingly, the State insists telling a young person they can or should alter their same-sex attraction is permitted by SB 1172, while "any practices" that "seek to change" or even "reduce" those attractions is clearly prohibited. This imaginary fence is impossible to police and would, if accepted, ensure arbitrary enforcement. The Supreme Court has opined that, "[w]e would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *U.S. v. Stevens*, 130 S.Ct. 1577, 1591 (2010).

Oddly, the State's *post hoc* amendment of the statute also creates, rather than eliminates, conflict with *Conant.* While the State seems to think it has reached a grand compromise by allowing professionals to refer patients to unlicensed quacks for SOCE, this is exactly the type of rationale that troubled Judge Kozinski.

> Enforcement of the federal policy will cut such patients off from competent medical advice and leave them to decide on their own whether to use marijuana to alleviate excruciating pain, nausea, anorexia or similar symptoms. But word-of-mouth and the Internet are poor substitutes for a medical doctor; information obtained from chat rooms and tabloids cannot make up for the loss of individualized advice from a physician with many years of training and experience.

Conant, 309 F.3d at 644 (Kozinski, concurring)

On the whole, the State's suggested interpretation of SB 1172 is implausible and unpersuasive. Ultimately, the State's attempted narrowing construction of the statute cannot take it out of the First Amendment's purview. See, e.g., *Nunez by Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997), (narrowing construction of juvenile curfew ordinance not enough to remedy its unconstitutionality).

D. The State's Hyperbolic Predictions of Harm to Other Statutes Are Unpersuasive.

The State's last desperation heave to take this case out of the First Amendment framework is characterized by hyperbole and histrionics. Because the State believes SB 1172 is no different than other professional regulations, it asserts that they rise and fall together. In the process, the State strains credulity.

The first set of comparators the State likens to SB 1172 is statutes preventing sexual abuse. The State goes so far as to claim that SB 1172 restricts conduct "[s]imilarly" to prohibitions on sexual abuse and therapists having sex with their clients. AOB 11. Of course, this conduct would be considered statutory rape—which has never come close to getting First Amendment protection—for any of the mental health providers covered by SB 1172. It is not at all apparent how the State finds this to be similar to SOCE, particularly non-aversive SOCE.

An *amicus* seeks to take the analogy even further, claiming that doubts as to SB 1172's constitutionality would somehow jeopardize laws against female circumcision (also called genital mutilation). Brief for California Faith for Equality et al. as *Amici Curiae*, p.14. This type of argument only evinces some desperation on the part of SB 1172's proponents. It bears repeating that, were SB 1172 directed at physical or surgical attempts to "cure" same-sex attraction (e.g. castration), it would not likely have been enjoined by the District Court.

A third set of comparators that must be examined are professional regulations bearing little if any resemblance to SB 1172. In this category, the State claims that everything from the Rules of Evidence and lawyers' advice, to doctors' prescriptions and certification and continuing education requirements would necessarily fall if SOCE is subjected to a First Amendment analysis. Not so. Acknowledging counseling and related aspects of therapist-patient communication

to be expressive is simply the first step in the analysis. Many if not all of these types of communications pointed out by the State are easily justified as content-neutral. Other regulations—such as prohibitions on lawyers advising their clients to break the law, are justified by "especially great" interests such as the integrity of the judicial process, where lawyers are deemed "officers of the courts." *Ohralik*, 436 U.S. at 460 (internal citations omitted).

At bottom, the State's attempt to steer the Court away from a traditional First Amendment analysis is little different from the State's attempts to create a new category of unprotected speech in *Brown v. Entertainment. Merchants' Ass'n*, 131 S.Ct. 2729 (2011). There, the Supreme Court affirmed this Court in rejecting California's efforts to ban the sale of violent video games to minors. As the next major section will show, under a traditional speech analysis, SB 1172 is content- and viewpoint based, and it cannot survive strict scrutiny.

III. THE DISTRICT COURT CORRECTLY DISCERNED THE CONTENT AND VIEWPOINT DISCRIMINATION INHERENT IN THE LEGISLATION.

In a First Amendment analysis, one of the first questions to be asked is whether a given restriction is content- or viewpoint-based, or whether it is content-neutral. "[I]t is a cardinal principle of the First Amendment that 'government has no power to restrict expression because of its message, its ideas, its subject matter, or its content…'" *Va. Bd. of Pharmacy,* 425 U.S. at 776 (Stewart, J., concurring) (internal citation omitted). In contrast, "'content-neutral' speech regulations are

those that are *justified* without reference to the content of the regulated speech." *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2664 (2011) (emphasis in original, inner quotation marks omitted) citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986).

Content-based restrictions are presumptively invalid. *Conant,*309 F.3d at 637-638. While content and viewpoint are at times conflated by courts weighing speech restrictions, it is commonly noted that viewpoint is an especially blatant and egregious form of content discrimination. *Id*. at 637.

In the present case, "change efforts" could conceivably be designated as either content-based (excluding a category of speech) or viewpoint-based (targeting the particular ideology and messages underlying SOCE). Because the State has used the terminology of both content-and viewpoint to suppress SOCE, Welch believes that both designations are appropriate here. Since both content and viewpoint based restrictions trigger strict scrutiny, the State lumps together and gives short shrift to both. AOB 45-46. Yet it is clear that the alternative designation sought by the State—content and viewpoint neutrality—cannot be reconciled with a plain reading of the statute, subsequent defenses of the statute, and controlling precedents of this Court. We begin with the latter.

A. The State Offers a False Choice Between *NAAP* and *Conant,* Which Both Point to Heightened Scrutiny in This Case.

Invariably, the decision below—and the arguments here—revolve around this Court's decisions in *NAAP* and *Conant.* The factual similarities in both cases and the present are striking. Thus, a thorough examination is appropriate.

In *NAAP*, psychoanalysts challenged the State's authority to regulate them at all. *NAAP,* 228 F.3d at 1046. This Court first addressed the substantive due process claim before evaluating the First Amendment claims. In light of the State's general police power to regulate professions, it is unsurprising that this Court held the plaintiffs did not have a substantive due process right to be free of regulation. *Id.* at 1049.

But Welch has not asserted—and would not assert—that their professions must be free of all state regulation. To the contrary, Plaintiffs are challenging an unprecedented attempt to extend such regulation far beyond its ordinary confines into the realm of viewpoint-laden speech. The *NAAP* Court foresaw the possibility of future overreaches like SB 1172, clarifying that its affirmation of professional regulations in general was not a blanket grant of authority that would allow the State to proscribe specific speech in the therapy context. The Court stated, "California does not dictate the content of what is said in therapy; the state merely determines who is qualified as a mental health professional." *Id.* at 1056.

The Court's caution proved foundational to *Conant*. In *Conant*, this Court considered federal regulations that subjected physicians to censure for recommending controlled substances, particularly medical marijuana to their patients. This Court determined that the regulations were content- and viewpoint-based because they punished professional speech based on the government's disagreement with the view that marijuana might be helpful to some patients in some situations. *Conant*, 309 F.3d at 637-638. As a result, the Court invalidated the regulation and took the extra precaution of enjoining the federal government from even investigating doctors based on recommendations of marijuana. *Id*. at 636. This Court also rejected an argument, nearly identical to the position taken by the State in this case, that the licensed professionals could simply refer their patients to less educated, unlicensed providers. *Id*.

The State dismisses *Conant* because it insists that mental health providers are free to recommend SOCE—they just can't offer it. AOB 40. The State, of course, *must* distinguish *Conant,* because a close comparison dooms its defense of SB 1172. Yet the State's argument is unavailing. First, the State's narrowing construction of the statute is spun from whole cloth appearing nowhere in the actual text or legislative history of SB 1172. Second, even assuming the State's proffered exemption were accepted, it has no idea where the disciplinarian line would be drawn between professional opinions about the morality or changeability

of same-sex attraction—which it concedes to be protected—and "change efforts" which are not.

The regulations at issue in *Conant* did not present the same artificial distinctions. There, this Court noted that the government could continue to punish conspiracy or aiding and abetting, where the physician intentionally facilitated the commission of a criminal act, such as possession, distribution, or cultivation of marijuana. *Conant,* 309 F.3d at 635. Here, SOCE is inseparable from speech—with some banned "treatment" involving solely the communication of opinions and ideology. Indeed, the State has not even attempted to limit itself to punishing physical acts such as aversive treatments that might be more comparable to possession, cultivation, or distribution of a controlled substance. As a result, SB 1172 is arguably even more problematic than the regulations invalidated in *Conant.*

Both *NAAP* and *Conant* stand for the propositions that strict scrutiny applies when the government seeks to suppress or dictate speech in the sacrosanct physician-patient or psychotherapist-patient relationships based on disagreement with content, message or viewpoint. A general scheme of professional regulations was found to be neutral in *NAAP*; a ban on making specific recommendations was found not to be neutral in *Conant.* The cases are not in conflict, and both bear directly on the case at bar. The State's avoidance of *Conant* as "inapposite" is

unpersuasive. AOB 33. Moreover, the statute's undisguised assault on particular, disfavored messages inherent in SOCE will be considered next.

B. The Text and Record Amply Disclose the Lack of Content or Viewpoint Neutrality in the Statute.

The State conspicuously avoids delving into the actual text of SB 1172, for good reason. It is difficult to argue with a straight face that the text—much less the legislative history and supporting expert witnesses—convey neutrality.

i. The central prohibition in the statute is not neutral.

The primary prohibition in the statute goes out of its way to clarify that it is targeting only one side of the debate. It reads:

> (b)(1) "Sexual orientation change efforts" means any practices by mental health providers that seek to change an individual's sexual orientation. This includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex.
>
> (2) "Sexual orientation change efforts" does not include psychotherapies that: (A) provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and (B) do not seek to change sexual orientation. Section 865(b)

Scarcely does the Legislature so unmistakably put its stamp on the "pro" side of an issue, to the exclusion of the "con" side. In the face of this text, it is remarkable that the State maintains that "affirmative" practices, including pure speech, have no expressive significance. The ordinary meaning of these words, by contrast, could

hardly be more straightforward as to the ideology and messages the State approves and disapproves. Were this the sole expression of one-sidedness in the statute, it would be more than adequate to establish content and viewpoint bias. It is not. As will be seen next, the themes of message and ideology run throughout the statute, its history, and the State's attempts to justify it.

ii. The State's proffered bases for the statute are not neutral.

In addition to the central prohibition in SB 1172, the Legislature's findings and declarations further confirm a basic lack of viewpoint neutrality. Section 1 of the statute includes the following statements:

> (d) The American Psychiatric Association published a position statement in March of 2000 in which it stated: . . .
>
> [S]ince therapist alignment with societal prejudices against homosexuality may reinforce self-hatred already experienced by the patient. Many patients who have undergone reparative therapy relate that they were inaccurately told that homosexuals are lonely, unhappy individuals who never achieve acceptance or satisfaction. The possibility that the person might achieve happiness and satisfying interpersonal relationships as a gay man or lesbian is not presented, nor are alternative approaches to dealing with the effects of societal stigmatization discussed.
>
> (g) …Through psychotherapy, gay men and lesbians can become comfortable with their sexual orientation and understand the societal response to it. (quoting a 1994 report of an American Medical Association)
>
> (h) The National Association of Social Workers prepared a 1997 policy statement in which it stated: "Social stigmatization of lesbian, gay and bisexual people is widespread and is a primary motivating factor in leading some people to seek sexual orientation changes.

> Sexual orientation conversion therapies assume that homosexual orientation is both pathological and freely chosen. No data demonstrates that reparative or conversion therapies are effective, and, in fact, they may be harmful."
>
> (j) The American Psychoanalytic Association issued a position statement in June 2012 on attempts to change sexual orientation, gender, identity, or gender expression, and in it the association states: As with any societal prejudice, bias against individuals based on actual or perceived sexual orientation, gender identity or gender expression negatively affects mental health, contributing to an enduring sense of stigma and pervasive self-criticism through the internalization of such prejudice.

S.B. 1172(d)-(j). ER 254. The Legislature's repeated targeting of societal prejudice, stigmatization, and the underlying cultural and religious values opposing homosexuality as the roots of SOCE are unmistakably the language of viewpoint suppression. It is also clear that the State's claimed scientific basis for suppressing SOCE is inseparable from the overarching public debate on homosexuality. The State is permitted to espouse and promulgate its own views on this debate, and even to restrict its own funding in ways that support its viewpoints. But "a State's failure to persuade does not allow it to hamstring the opposition. The State may not burden the speech of others in order to tilt public debate in a preferred direction." *Sorrell*, 131 S.Ct. at 2671. *See, also, Rust. v. Sullivan*, 500 U.S. 173 (1991); *Harris v. McRae*, 448 U.S. 297 (1980).

The Legislature's content and viewpoint discrimination is also evident from its singling out of SOCE as a mental health arena minors cannot access.

Concerned that SB 1172 might be interpreted to more generally—and neutrally—limit minors' ability to discuss other sexual issues with mental health professionals, the Legislature added subsection (o) to Section 1, to clarify that only SOCE was being excluded from the vast array of mental health options opened to minors through Section 124260 of the Health & Safety Code.[9]

iii. Expert declarations submitted in support of SB 1172 further entrench its inability to be neutral.

While the State has backed away from some aspects of SB 1172's sweeping prohibition since litigation commenced, it has done the opposite as to the lack of neutrality in the statute. In effect, the State has hit the accelerator by submitting (and having *amicus* Equality California submit) expert declarations that continue the attacks on the messages and viewpoints of SOCE.

Representative of these proffered expert declarants is Dr. Beckstead, who opines that a major premise underlying SOCE is that homosexuality is contrary to some practitioners' religious and personal beliefs. ER 422, ¶8. He further opines that "the false assumptions embedded in homophobia, heterosexism and sexism" cause LGBT people anxiety and other negative effects, thus turning them to SOCE. ER 424, ¶15. He also says SOCE can harm even patients who seek it out

[9] Subsection (o) reads: "Nothing in this act is intended to prevent a minor who is 12 years of age or older from consenting to any mental health treatment or

voluntarily because of its "failure to correct prejudices." ER 425, ¶17. As an antidote to SOCE, Dr. Beckstead recommends that therapists help clients make "changes in personal beliefs, values and norms, e.g. reevaluating what is necessary, true and important for the individual, including religious and sexual beliefs, behaviors, self-expression, and motivations." ER 426, ¶20. Dr. Beckstead elaborates that a "major problem" with SOCE literature is that it does not seek to harmonize religious beliefs with same-sex attraction (ER 430, ¶33) and that, at its core, SOCE reinforces a "message" that same-sex attraction is wrong. ER 431, ¶36. Dr. Beckstead concludes by declaring that it is reasonable for the State to bar SOCE based on "the psychology of sexual orientation, the psychology of gender, and the psychology of religion." ER 432, ¶38.

This is neither the language of science nor the language of neutrality; it is the language of censorship. It is also a concession that the State finds it impossible to stay on the sidelines in the ideological debate over change efforts. Yet, "[u]nder the First Amendment, there is no such thing as a false idea." *Gertz v. Robert Welch Inc.* 418 U.S 323, 339 (1974).

The District Court correctly perceived that the statute was aimed at ideas, ideologies, and messages. Order Re: Motion for Preliminary Injunction, ER 23.

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counseling services, consistent with Section 124260 of the Health and Safety Code, other than sexual orientation change efforts as defined in this act."

The State cannot insulate itself from strict scrutiny by slapping a "conduct" label on this regulation that seeks to suppress particular views. *Humanitarian Law Project*, 130 S. Ct. at 2723. ("For its part, the Government takes the foregoing too far, claiming that the only thing truly at issue in this litigation is conduct, not speech.")

Because SB 1172 is content- and viewpoint-based, it is subject to strict scrutiny. As will be next discussed, it cannot survive that exacting standard.

IV. THE DISTRICT COURT DID NOT ERR IN DETERMINING THAT THE STANDARD FOR EVALUATING A RESTRICTION ON SPEECH IS STRICT SCRUTINY.

When a statute or regulation is found to be content or viewpoint based, it is subjected to strict scrutiny, otherwise known as the compelling interest test. SB 1172 "is designed to impose a specific, content-based burden on protected expression. It follows that heightened judicial scrutiny is warranted. *See*, *Sorrell*, 131 S.Ct. at 2663-64 (2011) (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418 (1993)).

The State is so overconfident in its theory of First Amendment irrelevance that it does not even offer a compelling interest analysis, effectively conceding the point. The closest the State comes to addressing compelling interest is a reference, citing a century-old case, for the proposition that mental health is a compelling interest. AOB 31 (citing *Watson v. Maryland*, 218 U.S. 173 (1910)). Not only

does the State make no attempt to demonstrate narrow tailoring in the statute, but *Watson* is of doubtful validity since it was decided in an era where the First Amendment had not yet been applied to the states, the compelling interest test did not exist as such, and the ever-expanding scope of mental health treatment and regulation were unrecognizable from what they are today.

Although the State has waived any defense that SB 1172 satisfies strict scrutiny, out of an abundance of caution a thorough examination of the District Court's conclusion is warranted. As will be seen, the State's litigation posture of focusing exclusively on rational basis is remarkable in light of the statutory text.

A. The State Wrongly Seeks a Re-writing of the Statute.

The State's insistence on a highly deferential standard of review is expected, but it requires the Court to rewrite the statute. Not only does the text of SB 1172 eliminate the possibility of content neutrality, as discussed in Section III, *supra*, but the text also declares an exceedingly broad—and indefensible—compelling interest.

The State pretends as though subsection (n) of Section I of the statute does not exist. This provision 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 State's argument that it does not need a compelling interest would render this portion of the act superfluous and meaningless. Principles of statutory construction strongly counsel against such a result. "Just as the 'inevitable effect of a statute on its face may render it unconstitutional,' a statute's stated purposes may also be considered." *Sorrell*, 131 S.Ct. at 2663, quoting *U.S.* v. *O'Brien*, 391 U.S. 367, 384 (1968). At the very least, this statutory text should carry more weight than the State's *post hoc* interpretation of the statute that is flatly inconsistent with it. Certainly, the State cannot credibly assert the District Court erred by refusing to rewrite the statute. *Reno v. ACLU*, 521 U.S. 844, 884 (1997). The combination of the plain text of the statute and its lack of content neutrality render strict scrutiny unavoidable.

B. The Breadth of the Legislature's Claimed Compelling Interest is Breathtaking.

Although the Attorney General's Office has abandoned a compelling interest defense, it is nonetheless appropriate to review the Legislature's position. Subsection (n) of the statute, quoted above, says California's compelling interest is the protection of the physical and psychological well-being of youth, including LGB youth. On the surface, this might seem to be consistent with the statements in *Nunez* that identified a compelling interest in protecting youth. *Nunez*, 114 F.3d at 952. However, the statute further clarifies what it includes in the definition of "critical health risks." Subsection (b) of Section I of the statute reads in part:

> [S]exual orientation change efforts can pose critical health risks to lesbian, gay, and bisexual people, 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 this laundry list of "critical health risks" that the State says it has a compelling interest to protect its citizens against, few have ever been deemed compelling.

In the related Free Exercise context, 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).

One of the few compelling interests in recent years that the High Court has allowed to justify content-based restrictions is combating terrorism. *Humanitarian Law Project*, 130 S.Ct. at 2724. By contrast, even in the wake of horrific mass shootings, the Supreme Court has rejected the State's attempts to restrict the sale of violent video games to minors, noting that the State cannot assert a naked interest in protecting children from messages it deems harmful to them. "Even where the protection of children is the object, the constitutional limits on governmental action apply." *Brown*, 131 S. Ct. at 2741. "No doubt a State possesses legitimate power to protect children from harm…, but that does not include a free-floating power to

restrict the ideas to which children may be exposed." *Id*. at 2735-36 (citing *Prince* v. *Massachusetts*, 321 U.S. 158, 165 (1944) and *Ginsberg v. New York*, 390 U.S. 629, 640-41 (1968)). The Supreme Court has further cautioned that "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *Sorrell*, 131 S.Ct. at 2671 (2011) (citing *Liquormart*, *Inc. v. Rhode Island*, 517 U.S. 484 503 (1996) (opinion of Stevens, J.)); *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 97, (1977).

Against this backdrop, many of the "critical health risks" identified by the State as part of its compelling interest pale in comparison. Most glaringly, 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 heartache—yet the State claims an open-ended compelling interest to protect the psychological well-being of youth, and then parrots 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 unlimited authority to identify "problems," (AOB 14) and declare virtually anything a health crisis, with only a passing glance from the judicial branch. Fortunately, this is not the law—at least, not yet. Whatever the outer limits of a compelling interest may be, they surely do not extend to these types of interests. The State may well protest that the statute does not really mean what it says—yet again, it cannot be rewritten in order to save it.

In addition to some of the more anomalous "critical health risks," another section of the statute merits more sobering attention. Having declared its compelling interest to protect the physical and psychological well-being of youth, the Legislature declares in subsection (m) of Section 1 that it deems parents a potential health hazard as well. This subsection states, "(m) Minors who experience family rejection based on their sexual orientation face especially serious health risks."

Since the Legislature did not define "family rejection," and since most of the statute is addressed to professionals, not parents, it is far from clear what warning shot the statute intends to send. What is clear, though, is that the State has asserted a compelling interest so cavalierly that it could be used to interfere directly with parental authority in the name of preventing "family rejection." Of course, the highlighting of "family rejection" as leading to "especially serious health risks"

does not establish a compelling basis for a statute that ostensibly does not bar parents or family members from doing anything.

C. The State's Shotgun Approach is Anything But Narrowly Tailored.

To the extent the State might be able to salvage some compelling interest from among the hodgepodge interests noted in the foregoing subsections, the statute nevertheless fails strict scrutiny for lack of narrow tailoring. Identifying a compelling interest is not enough in and of itself; the regulation must be narrowly tailored, or the least restrictive means, to achieve that interest. "We have no business passing judgment on the view of the California Legislature that violent video games (or, for that matter, any other forms of speech) corrupt the young or harm their moral development. Our task is only to say whether or not such works constitute a 'well-defined and narrowly limited clas[s] of speech.'" *Brown*, 131 S. Ct. at 2738 quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). This comports with the well-established principle that restrictions on speech must be a last resort, not a first resort. *Conant*, 309 F.3d at 637.

The State relies on *Nunez*, which notes a general compelling interest in protecting youth, yet it fails to mention that the regulation at issue there flunked the second half of strict scrutiny and the plaintiffs prevailed. *Nunez,* 114 F.3d at 946 at 949. The facts are worth considering. In *Nunez,* San Diego offered some data to support narrow tailoring, much as the State offers studies, statements from

professional organizations and expert declarations here. Yet this Court questioned those studies and found they did not quite support the State's position, and were not narrowly tailored. The Court opined, "[o]verall, the statistical evidence provides some, but not overwhelming, support for the proposition that a curfew will help reduce crime.

In the case at hand, Judge Shubb found the State's evidence was equivocating (ER 30) -- certainly not narrowly tailored or the least restrictive means. Moreover, the State does not challenge this or any other factual determination made by the District Court. AOB 20-21. The record strongly supports the District Court's findings. While the State cherry-picked a few statements from various organizations for its findings and declarations, statements they ignored from those same documents are revealing. Chief among the State's evidence is the 2009 APA Task Force Report. ER at 143. Unlike state legislators, the District Court realized that it did not come close to supporting a compelling, narrowly tailored government interest. Among its more illuminating passages in this regard, the 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. ER 192

In summarizing itself, the 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." ER at 240 (emphasis added).

As with the disturbing lack of neutrality discussed in Section III, *supra*, this equivocation is far from conclusive. The Legislature is entitled to 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 fundamental rights. *NAAP,* 228 F.3d at 1050; *Nunez,* 114 F.3d at 948.

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

Brown, Stevens and *Humanitarian Law Project* are instructive. In *Brown,* the State of California urged, as they do here, that minors must be protected from the harms of extremely violent video games. The Supreme Court sharply rebuked the State's "highly paternalistic" approach. *Brown,*131 S.Ct. at 2741. There, as here, the State offered psychological studies from leading organizations like the APA, but the Court was unpersuaded. "Psychological studies purporting to show a connection between exposure to violent video games and harmful effects on children do not prove that such exposure causes minors to act aggressively." *Brown*, 131 S. Ct. at 2731-32. Indeed, predictive judgments by the Legislature

about potential harm does not satisfy the strict scrutiny standard as a matter of law. *Id*. at 2739.

If anything, stronger rationales for protecting speech inhere in this case, where minors are being prohibited not just from accessing a form of entertainment, but from discussing with professionals how they can maintain heterosexual identity in the face of same-sex attraction. *See*, Duk Decl. ¶18, ER 300. These core identity issues could not be more basic to both free speech and privacy—and could not be less amenable to government intermeddling.

In *Stevens,* the High Court again scoffed at the State's claimed need to ban depictions of animal cruelty. *Stevens*, 130 S.Ct. at 1588. Even though the government had a strong interest in banning animal cruelty, it did not follow that the ban on depictions was narrowly tailored to achieve that interest. *Id*. Not even the government's promise to enforce the statute more narrowly than it was written—much as the State attempts to do with SB 1172, see *supra* at II-C—could save it. *Stevens*, 130 S.Ct. at 1591. Rather, the Court chided the state for thinking that benevolent "prosecutorial discretion" could satisfy narrow tailoring.

As a counterbalance, the Supreme Court did find a rare narrowly tailored compelling interest in *Humanitarian Law Project.* That interest—counter-terrorism—is so much stronger than the presently asserted interests that the State backpedals from any analogy to the case. AOB 46.

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." ER 253, Section 1(b) (emphasis added); its underlying theory is deemed "questionable." ER 254 at (d); its risks are "potential," ER 254 at (d); it is "contraindicated since it can provoke guilt and anxiety," ER 254 at (f); it "may be harmful" and "may encourage family rejection" and "undermine self-esteem, connectedness and caring." ER 255 at (k). 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." ER 255 at (l).

These organizations are entitled to their opinions, and those opinions are not without weight. But this is hardly the overwhelming evidence the State claims and needs it to be in order to suppress constitutional rights. Rather, it is much more akin to the professional opinions discounted by the Supreme Court in *Brown*—some of which were generated by the same organizations now before this Court. When the purported problem is uncertain and ill-defined, it is not surprising that the supposed solution will be uncertain and ill-defined. While this level of ambiguity might suffice for the rational basis test, it cannot support either a compelling interest or narrow tailoring.

ii. Less restrictive means were available to the Legislature.

Finally, it is undeniable that much less restrictive means were available to the Legislature to address SOCE. The State could have banned SOCE within its own agencies and institutions. *See, e.g., Daily v. Sprague*, 742 F.2d at 899 (noting that government has greater leeway to restrict the speech of doctors who are its own employees). The State offered as a major rationale for SB 1172 allegations of discrimination within state government involving SOCE. AOB 13. In fact, Equality California highlighted alleged past abuse within state government as a basis for its intervention motion. SER 197.

Yet, the State went far beyond restricting SOCE by its own employees. SB 1172, Section 2(a) (broadly defining "mental health provider"). The State also had the option of going further and restricting SOCE by employees of local governments (e.g. county social workers) and school districts. *Coggeshall v. Massachusetts Bd. of Registration of Psychologists*, 604 F.3d 658 (1st Cir. 2010) (upholding disciplinary action against school psychologist who exceeded her role by making child custody recommendation).

Instead, it swept in school psychologists working exclusively for parochial schools, psychiatrists in private practice like Dr. Duk who may be sought out by patients specifically because of his Catholic faith, and therapists like Dr. Welch who is both an ordained minister working for a church and also operating a private

Christian counseling practice. Duk Decl. at ¶12, ER 293; Welch Decl. at ¶ 1, ER 316.

The failure to craft provisions which ensure that protected speech is not swallowed up by the bill's restrictions is illustrated by the fact that SB1172 contains no exemptions for churches or clergy. Ministers like Dr. Welch who are also licensed marriage and family therapists exercise their religion *and* speech rights during counseling in a church. SB 1172 raises significant separation of church and state issues when someone like Dr. Welch can be subject to professional discipline for what he says during counseling within the four walls of a church.[10] Thus, SB 1172 also violates the Religion Clauses of the First Amendment.

The State also had the option of taking an "informed consent" approach (and included it for adults in early versions of the bill). SER 257. While this approach would not have been without its own First Amendment problems, it certainly would have been less restrictive than an outright ban on SOCE. Lastly, the Legislature could have restricted what it deemed to be the most atrocious

[10] The State claims there exists an exemption for clergy based on sections 2063, 2908, 4980.01 and 4996.13. AOB 18-19. These statutes explicitly do not reach SB 1172. Sections 2063, 2908 and 4980.01 state, "nothing in *this chapter*" or "*this chapter* shall not apply…." (Emphasis added). Likewise, Section 4996.13 refers to psychosocial work and is chaptered at 14. However, SB 1172 is found not in those chapters but rather in Chapter 1.

aspects of SOCE—"aversive" treatments like lobotomies, castration, psychosurgery, nausea-inducing drugs, and electroshock. AOB 8. Instead, the Legislature took the shotgun approach of banning anything that might be called SOCE, including pure speech between patient and mental health provider.

The State's broad sweep is anything but narrowly tailored or least restrictive. The State suppressed speech as a "first resort." *See Conant*, 309 F.3d at 637 *supra*. The State's otherwise inexplicable over-inclusiveness with SB 1172 makes sense, somewhat ironically, only in light of the State's content and viewpoint discrimination discussed in Section III. The State did not restrain itself—could not bring itself to pursue a balanced approach—because it is so ideologically opposed to the Plaintiffs. It sought to drive them out of the marketplace of ideas, but in the process, it sacrificed all semblance of neutrality and narrow tailoring.

V. THE DISTRICT COURT CORRECTLY FOUND THAT WELCH WOULD BE IRREPARABLY HARMED AND THAT THE BALANCE OF HARM WEIGHED IN FAVOR OF AN INJUNCTION.

This Court has determined that in order "to warrant injunctive relief, a plaintiff 'must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Klein v. City of San Clemente*, 584 F.3d 1196, 1200 (9th Cir. 2009) quoting *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). Where a motion for a

preliminary injunction is based on allegations of First Amendment infringements, the government must justify the infringement. *Klein*, 584 F.3d at 1201.

The District Court correctly determined that Welch would likely succeed on the speech claim stating "the most significant hardship to Welch and Duk is that SB 1172 will likely infringe on their First Amendment rights because it will restrict them from engaging in SOCE with their minor patients." ER 34-35. The lower court's position is not unorthodox. "[T]he fact that a case raises serious First Amendment questions compels a finding that there exists the potential for irreparable injury, or that at the very least the balance of hardships tips sharply in [favor of the party alleging First Amendment injury]." *Sammartano v. First Judicial Dist. Court,*303 F.3d 959, 973 (9th Cir. 2002).

In response to this well established legal precedent, the State asserts that it is the one harmed if enjoined. The reasoning essentially boils down to the view that the Legislature has passed a law and any enjoining of that law creates a hardship. AOB 51-52. Relying on this Court's decision in *Fed. Trade Comm'n v. Affordable Media, LLC*, 179 F.3d 1228 (9th Cir. 1999), the State asserts that when a court balances the hardships of the public interest against a private interest, "the public interest should receive greater weight." *Id*. at 1236. But, that case involved an attempt by federal officials to recover funds for victims duped in a Ponzi scheme. No rights secured under the First Amendment were implicated.

Finally, the State speculates that an injunction "*could* cause…minors irreparable harm." AOB 52 (emphasis added). But the District Court wisely observed that "California has arguably survived 150 years without this law and it would be a stretch of reason to conclude that it would suffer significant harm having to wait a few more months to know whether the law is enforceable as against the three plaintiffs in this case." ER 36.

The State's position mirrors the sobering premise of the federal government in an animal cruelty depictions case before the Supreme Court. The United States proffered that a claim of categorical exclusion should be considered under a simple balancing test. In its brief, lawyers for the Government wrote: "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs." The High Court hit the brakes hard. "As a free-floating test for First Amendment coverage, that sentence is startling and dangerous." *Stevens*, 130 S.Ct. at 1585.

In view of the above, the lower court did not err and committed no abuse of discretion in determining that Welch met the requisites for a preliminary injunction.

CONCLUSION

The State's Opening Brief underscores the wisdom of the District Court's issuance of a preliminary injunction against the enforcement of SB 1172. Rather

than allaying concerns of constitutional overreach, the State has confirmed those fears with its dismissiveness of First Amendment values. The State's central argument that the District Court erred by even conducting a thorough free speech analysis of the Plaintiffs' free speech claims is completely untenable. Further, the State's notion that it can remove sacrosanct counseling speech and therapist-patient communication from First Amendment protection simply by labeling it conduct is both disingenuous and dangerous. The State compounds its error by glossing over the text of the statute, the Legislature's findings and declarations, and its own expert declarants, all of which are unabashedly content- and viewpoint-centric. Finally, the State does not make a serious effort to defend the compelling interest asserted in the statute. The breadth and shallowness of those stated interests, as the District Court recognized, do not come close to being either narrowly tailored or compelling.

For all of these reasons set forth above, the District Court's decision should be affirmed.

Date: February 19, 2013.

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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 14,000 words. According to Microsoft Word's "Statistics," this document contains 12,470 words.

February 19, 2013

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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. ER 364-65. Both *Pickup* and this present case are calendared for oral argument on the same day and before the same panel.

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2013, 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 Largent