No. 16-845

In The Supreme Court of the United States

DONALD WELCH, *et al.*,

Petitioners,

v.

EDMUND G. BROWN JR., GOVERNOR OF CALIFORNIA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state law prohibiting state-licensed mental health professionals from subjecting patients under the age of 18 to a form of treatment the State has reasonably determined to be harmful and ineffective, while imposing no restriction on individuals acting in a pastoral, religious, or other capacity outside of the state-licensed counselor-patient relationship, violates the Establishment Clause, the Free Exercise Clause, or the privacy rights of minors.

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STATEMENT

California's Senate Bill 1172 prohibits state-licensed mental health professionals from treating children or teenagers with a form of therapy known as "sexual orientation change efforts" (SOCE), which the State has reasonably determined to be ineffective and potentially harmful. The law does not apply to clergy or religious counselors acting in their religious capacity, or otherwise affect religious belief, expression, or practice. Rather, SB 1172 "does just one thing: it requires persons acting in their capacity as licensed mental health providers in California who wish to engage in 'practices . . . that seek to change a [minor's] sexual orientation' either to wait until the minor turns 18 or be subject to professional discipline." *Pickup v. Brown*, 740 F.3d 1208, 1223 (9th Cir.), *cert. denied*, 134 S. Ct. 2871 (2014), *and cert. denied sub nom. Welch v. Brown*, 134 S. Ct. 2881 (2014). The law is neutral and generally applicable, has a secular legislative purpose, and does not advance, inhibit, or foster entanglement with religion. It is also rationally related to the State's undeniable interest in protecting the physical and psychological health of its children. The court of appeals' decision rejecting petitioners' Religion Clause and privacy claims is consistent with this Court's precedents and the decisions of other courts. There is no reason for further review.

1. SOCE, also commonly referred to as "reparative" or "conversion" therapy, encompasses a variety of mental health treatments that "share the common goal of changing an individual's sexual orientation from

homosexual to heterosexual." *Pickup*, 740 F.3d at 1222. These treatments stem from the belief that homosexuality is a mental illness or disorder – a view rejected by mainstream mental health professionals more than forty years ago. *Id.*; *see also* S. Comm. on Bus., Professions & Econ. Dev., Comm. Analysis of SB 1172, at 6 (Apr. 16, 2012). SOCE generally falls into two categories: "nonaversive" or "aversive." Nonaversive therapies include "talk therapy," hypnosis, and behavioral therapies targeted towards dating skills, assertiveness, and affection training. *Id*. (citing American Psychological Association, Appropriate Therapeutic Responses to Sexual Orientation 22 (2009) (APA Report)). Aversive therapies include providing negative feedback upon arousal by same-sex erotic images or thoughts, using means such as having an individual snap an elastic band around the wrist, providing electric shocks, or inducing nausea, vomiting, or temporary paralysis. *Id*.

Based on the professional consensus that SOCE is ineffective, unsafe, and harmful, the California Legislature enacted SB 1172 to "protect[ ] the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and [to] protect[ ] [the State's] minors against exposure to serious harms caused by sexual orientation change efforts." Cal. Stats. 2012, ch. 835 § 1(n); *see also id*. §§ 1(b)-(m). SB 1172 is codified in sections 865, 865.1, and 865.2 of the California Business and Professions Code. Section 865.1 states, "Under no circumstances shall a mental health provider engage in sexual orientation change

efforts with a patient under 18 years of age."[1] Section 865.2 provides that any SOCE "attempted on a patient under 18 years of age by a mental health provider shall be considered unprofessional conduct and shall subject a mental health provider to discipline by the licensing entity for that mental health provider."

SB 1172 does not apply to ordained members of the clergy, or to pastoral or other religious counselors, who do not hold themselves out as licensed mental health professionals. Only state-licensed professionals acting as such are governed by the State's regulatory scheme. *See* Cal. Bus. & Prof. Code §§ 2063, 2908, 4980.01(b), 4996.13; *see also Pickup*, 740 F.3d at 1223; *Nally v. Grace Community Church*, 47 Cal.3d 278, 298 (Cal. 1988).

2. Petitioners are two SOCE practitioners and an aspiring SOCE practitioner. (Pet. 6-8.) They challenged SB 1172 on numerous constitutional grounds. The district court preliminarily enjoined the statute based on petitioners' claims under the Free Speech Clause of the First Amendment. *Welch v. Brown*, 907

[1] The term "mental health provider" means a "physician and surgeon specializing in the practice of psychiatry, a psychologist, a psychological assistant, intern, or trainee, a licensed marriage and family therapist, a registered marriage and family therapist, intern, or trainee, a licensed educational psychologist, a credentialed school psychologist, a licensed clinical social worker, an associate clinical social worker, a licensed professional clinical counselor, a registered clinical counselor, intern, trainee, or any other person designated as a mental health professional under California law or regulation." Cal. Bus. & Prof. Code § 865(a).

F. Supp. 2d 1102 (E.D. Cal. Dec. 3, 2012).[2] The Ninth Circuit reversed, and this Court denied review. *Pickup v. Brown*, 740 F.3d 1208, 1225-1236 (9th Cir.), *cert. denied*, 134 S. Ct. 2871 (2014) (No. 13-949), *and cert. denied sub nom*. *Welch v. Brown*, 134 S. Ct. 2881 (2014) (No. 13-1281).

The matter then proceeded in the district court on petitioners' remaining claims. The district court denied a second preliminary injunction motion and granted defendants' motion for judgment on the pleadings. *See* Pet. App. 16-18; *Welch v. Brown*, 58 F. Supp. 3d 1079, 1084-1091 (E.D. Cal. 2014), *aff'd*, 834 F.3d 1041 (9th Cir. 2016), *as amended on denial of reh'g and reh'g en banc* (Oct. 3, 2016). The Ninth Circuit affirmed. *Id*. at 1-15.

The court of appeals rejected the Establishment Clause claim, concluding that petitioners' argument that the statute "excessively entangles" the State with religion "rests on a misconception of the scope of SB 1172." Pet. App. 6. The court recognized that contrary to petitioners' characterization, SB 1172 regulates therapeutic treatment exclusively within the confines of the relationship between a state-licensed professional and his or her client. *Id*. at 7 ("The premise of this Establishment Clause argument is mistaken, and

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[2] Another judge in the same district court denied a preliminary injunction in a different case involving similar claims. *Pickup v. Brown*, 2012 WL 6021465 (E.D. Cal. Dec. 4, 2012). Both cases were consolidated before the Ninth Circuit. *Welch v. Brown*, No. 13-15023, and *Pickup v. Brown*, No. 12-17681. The current petitioners are only the *Welch* plaintiffs.

the argument fails, because SB 1172 regulates conduct only *within the confines of the counselor-client relationship*.").

The court stated that the text of SB 1172 limited the prohibition to providers performing SOCE on a patient under 18 years of age. Pet. App. 7 (citing Cal. Bus. & Prof. Code § 865.1). Further, the legislative history showed that the law was aimed at practices that occur in the course of acting as a licensed professional. *Id*., n.2 (noting that the purpose of SB 1172 was to protect children from dangerous therapies performed by licensed therapists: "Nothing in the legislative history suggests that SB 1172 aimed to regulate ordinary religious conduct.").[3]

The court further held that SB 1172 did not have the primary effect of advancing or inhibiting religion. Pet. App. 9-13. It reiterated that SB 1172 regulates only state-licensed mental health providers. *Id.* at 9. Anyone who is not acting as a licensed mental health provider, including religious leaders, is unaffected by the law. *Id.* Moreover, "even the conduct of state-licensed mental health providers is regulated *only* within the confines of the counselor-client relationship; in all other areas of life, such as religious practices, the law simply does not apply." *Id*.

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[3] The court of appeals also noted that petitioners "are in no practical danger of enforcement outside the confines of the counselor-client relationship," as the "State repeatedly and expressly has disavowed Plaintiffs' expansive interpretation of the law." Pet. App. 8.

The court of appeals also noted that the prohibition against SOCE "applies without regard to the nature of the minor's motivation for seeking treatment." Pet. App. 9. And it leaves open many paths to obtain SOCE, as long as SOCE occurs outside the confines of a counselor-client relationship with a state-licensed mental health treatment provider. *Id*. at 9-10.

The court recognized that, consistent with this Court's holding in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), a law that is neutral on its face may be invalid if it targets only people with religious motivations. Pet. App. 10. However, it determined that the text and history of SB 1172 indicate that while some individuals seek SOCE for religious reasons, many do so for secular reasons, such as social stigma, family rejection, and societal prejudice against sexual minorities. *Id.* at 10-13. Thus, the law was not tailored to reach only religious conduct. *Id*. at 10-12.

The court rejected petitioners' claim that SB 1172 was not "neutral" under the Free Exercise Clause for substantially the same reasons. Pet. App. 13-14. The object of SB 1172 is to prevent harm to minors, not to infringe on religious practices. *Id*. (citing *Lukumi*, 508 U.S. at 533). The court thus held that it is a neutral law of general applicability. *Id.*

Because SB 1172 was neutral, did not excessively entangle the state in religion, and did not have a primary effect of advancing or inhibiting religion, the court of appeals applied a rational basis analysis to petitioners' Establishment Clause and Free Exercise

claims. *See* Pet. App. 6. The court determined – as it had before – that SB 1172 "is rationally related to the legitimate government interest of protecting the well-being of minors." *Id*. (quoting *Pickup*, 740 F.3d at 1232.).

Finally, the court rejected petitioners' privacy claim, which essentially asserted a substantive due process right to receive a particular treatment. Pet. App. 14-15. This claim was foreclosed by the court's prior decision, which held that there is no constitutional right to a treatment that the state has reasonably prohibited as harmful. *Id*. at 15 (quoting *Pickup*, 740 F.3d at 1235-1236 ("[W]e have held that 'substantive due process rights do not extend to the choice of a type of treatment or of a particular health care provider.'")).

ARGUMENT

The decision below correctly applies this Court's precedents, rejecting a facial challenge to a state statute regulating the provision of care by state-licensed professionals in the context of the therapeutic relationship. There is no conflict in authority and no reason for further review.

1. As a threshold matter, petitioners exaggerate the scope of SB 1172. Their claim that the law interferes with their ability to "carry out [their] religious mission," "decide for themselves . . . matters of faith and doctrine," and "inculcat[e]" "church teaching," (Pet.

11-12), overstates the statute's reach. As the court of appeals stated, "SB 1172 regulates conduct only *within the confines of the counselor-client relationship*." *Id.* at 7.

This conclusion is rooted in both the statutory text of SB 1172 and its legislative history. On its face, SB 1172 does not apply to religious counseling. The licensing scheme of which it is a part expressly exempts religious counselors and clergy, so long as they are not holding themselves out as licensed mental health providers. *See Pickup*, 740 F.3d at 1223; *Welch v. Brown*, 58 F. Supp. 3d at 1083-1084; *Nally*, 47 Cal.3d at 298. SB 1172 does not inhibit religious belief or the expression of religious belief, or impose any particular orthodoxy.

Specifically, and in contrast to petitioners' characterization (*see*, *e.g.*, Pet. 4, 6-7, 11-12), SB 1172 does not restrict what religious leaders, or anyone else, may communicate, outside a state-licensed therapeutic relationship, to minors who are struggling with their sexual orientation. *Pickup*, 740 F.3d at 1223. It does not prevent petitioners from communicating any opinion, idea, or value to the public at large. *Id.* Petitioners may discuss with patients or others, whether children or adults, religious doctrine regarding SOCE, homosexuality, or any other topic. *Id*. They may recommend SOCE to patients, whether children or adults. *Id*. And they may refer minors to counselors not licensed by the State, including religious leaders, for SOCE counseling. *Id*. SB 1172 does not prohibit minors from learning

about SOCE, or prevent them – or anyone else – from determining their own views on religion, homosexuality, or any other topic. SB 1172 does "one thing": it prohibits a state-licensed mental health professional, while holding herself out as such, from treating a minor with SOCE. *Id.*

2. The court of appeals faithfully applied the precedent of this Court in holding that petitioners' Establishment and Free Exercise claims fail. Pet. App. 6-14.

a. The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. This Court has held that a statute or regulation does not violate the Establishment Clause so long as (1) it has a secular legislative purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not foster excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). The court of appeals properly determined that SB 1172 satisfies all of these criteria.

The court properly held that the law was not intended to advance or prohibit religion. *See* Pet. App. 9-10. Rather, the purpose of the law is to protect minors from a type of treatment that every mainstream mental health professional organization has declared should not be practiced on children, because it has no documented benefit and poses serious risks of harm. *See* Pet. App 9; Cal. Stats. § 2012, ch. 835, §§ 1(b)-(m),

Pet. App. 19-26.[4] That is a valid secular purpose. *See Bowen v. Kendrick*, 487 U.S. 589, 602 (1988) (applying *Lemon* test and concluding that statute had valid purpose, as it "was motivated primarily, if not entirely, by a legitimate secular purpose – the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood"); *Mueller v. Allen*, 463 U.S. 388, 394-395 (1983) (noting Court's "reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose . . . may be discerned from the face of the statute.").

The intended and corresponding effect of SB 1172 is to prevent state-licensed mental health professionals from treating minors with a form of "therapy" that the State has reasonably determined to be professionally incompetent. That some people may seek or wish to perform SOCE because of their religious beliefs, or that the Legislature may have been aware of this, does

[4] *See also* American Psychological Association, Appropriate Therapeutic Responses to Sexual Orientation 22 (2009). The purpose of this APA Report was not to prove or disprove that SOCE is effective or harmful, but to systematically review and evaluate all the studies undertaken by proponents of SOCE. APA Report at 2-3, http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf (last visited February 16, 2017). The Report noted both that SOCE practitioners provided inadequate proof of its safety, and the considerable indications of serious harm caused by SOCE, and concluded that SOCE should "be avoided." APA Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts (August 5, 2009). The legislative findings cited more recent studies, peer reviewed research, and the reports of every leading mental health organization document the serious risks of harm caused by SOCE. Pet. App. 19-26.

not change the fact that the primary effect of SB 1172 is neither an endorsement nor a disapproval of religion, but rather protection of minors from the use of harmful practices under the authority – and thus with the apparent public imprimatur – of a state professional license.

Petitioners contend that the Legislature enacted SB 1172 out of religious hostility (Pet. 3,4, 18-20, 23-24), but they cannot substantiate that claim. Petitioners point to selected portions of the legislative record recognizing that some people are motivated to seek or perform SOCE because of their religious beliefs. As the court of appeals determined, however, the "bill's text and its legislative history make clear that the legislature understood the problem of SOCE to encompass not only those who seek SOCE for religious reasons, but also those who do so for secular reasons of social stigma, family rejection, and societal intolerance for sexual minorities." Pet. App. 10-11.[5] General references to religion in explaining the background for the

[5] For example, in its findings, the legislature quoted a policy statement that found that "[s]ocial stigmatization of lesbian, gay and bisexual people is widespread and is a primary motivating factor in leading some people to seek sexual orientation changes." Pet. App. 10-11 (citing 2012 Cal. Legis. Serv. ch. 835, §§ 1(h), (m) ("Minors who experience family rejection based on their sexual orientation face especially serious health risks.")). The legislative history recognized that religion is a motivating factor for some persons who seek to change their sexual orientation; but it also repeatedly listed "social stigmatization," "unfavorable and intolerant attitudes of the society," and "family rejection" as common causes of distress that might motivate people to seek counseling. *Id*.

law are not evidence of governmental hostility to religion, or that SB 1172 was "enacted because of, not merely in spite of" any impact it could have on religious activities. *Lukumi*, 508 U.S. at 540 (citation and internal quotation marks omitted).Objectively, the principal effect of the statute is neither to advance nor to inhibit religion. *See Lemon*, 403 U.S. at 612.

The court of appeals also correctly held that the limited scope of SB 1172 refutes petitioners' claim that it creates any appreciable, let alone excessive, entanglement between the State and religion. Pet. App. 7; *see Jimmy Swaggart Ministries v. Bd. of Equalization of California*, 493 U.S. 378, 394-397 (1990); *Lemon*, 403 U.S. at 615. Petitioners rely on this Court's decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012). (Pet. 11-12.) There, this Court recognized that a "ministerial exception" "precludes application of [employment discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers." 565 U.S. at 705. Because selection of a minister is paramount in shaping a church's faith and mission, churches must have complete freedom in making those decisions, free of any governmental interference. *Id*. at 706.

The Court expressly limited its holding in *Hosanna-Tabor* to "an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her." 565 U.S. at 705. It determined that judicial review of a minister's

discrimination claims would interfere impermissibly "with an internal church decision that affects the faith and mission of the church itself." *Id.* at 707. SB 1172 does not implicate employment decisions, or "depriv[e] the church of control over the selection of those who [would] personify its beliefs." *Id.* at 706. Nothing in *Hosanna-Tabor* is inconsistent with the court of appeals' decision here.

b. The Free Exercise Clause of the First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]. . . ." U.S. Const. amend I. It prevents "governmental regulation of religious *beliefs* as such." *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877 (1990). However, while the Free Exercise Clause immunizes religious beliefs from government interference, it does not bar regulation of all conduct related to the practice of religion. *See Cantwell v. State of Connecticut*, 310 U.S. 296, 303-304 (1940). The right to freely exercise one's chosen religion "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith*, 494 U.S. at 879 (internal quotations omitted). Thus, a neutral law of general application need not be justified by a compelling interest, even if it has the incidental effect of burdening a particular religious practice. *Lukumi*, 508 U.S. at 531.

A law is neutral for these purposes so long as its object is something other than the infringement or

restriction of religious practice. *Lukumi*, 508 U.S. at 532-533. The object is determined by looking at the text of the law and its effect in operation. *See id.* at 535. To be generally applicable, the law must not "impose special disabilities on the basis of religious views or religious status." *Smith*, 494 U.S. at 877.

In keeping with these principles, the court of appeals correctly determined that SB 1172 is both neutral and generally applicable. Pet. App. 13-14. It reasoned that "[t]he object of SB 1172 is the prevention of harm to minors, regardless of their motivations for seeking SOCE," Pet. App. 14, and that the statute bars all licensed mental health professionals from engaging in SOCE with minors, *id.* at 9. As discussed above, there is no evidence that the law was animated by anything other than a desire to protect youth from having a discredited practice used as a form of "treatment" in the context of state-licensed professional relationships. Pet. App. 11, 19-26; *supra* 8-11.

For these reasons, among others, petitioners' reliance on *Lukumi* is misplaced. There, the Court considered the constitutionality of four city ordinances that interfered with the practice of Santeria, a religion that sacrifices animals in its rituals. 508 U.S. at 526. The ordinances outlawed killing animals in Santeria rituals, but permitted most other kinds of other animal killings in hunting, fishing, meat production, pest extermination, euthanasia, and the use of rabbits to train greyhounds. *Id*. at 536-537. In effect, the ordinances applied only to the Santeria Church. *Id.* at 537-538. The Court held that these "gerrymandered" ordinances

were not neutral or generally applicable. *Id*. at 542.[6] SB 1172, by contrast, governs the professional conduct of all state-licensed mental health professionals. It bears no similarity to the ordinances that were intended to, and did, target particular religious practices in *Lukumi*.

c. SB 1172 is a neutral and generally applicable statute with a secular legislative purpose, its primary effect is neither to advance nor to inhibit religion, and it does not foster excessive state entanglement with religion. It is thus subject to rational basis review. *See Lukumi*, 508 U.S. at 533; *Smith*, 494 U.S. at 885-889; *see also King v. Governor of the State of New Jersey*, 767 F.3d 216, 242-243 (3d Cir. 2014), *cert. denied sub nom. King v. Christie*, 135 S. Ct. 2048 (2015) (No. 14-672) (New Jersey statute banning SOCE "is neutral and generally applicable, and therefore triggers only rational basis review"). Petitioners do not contest the court of appeals' conclusion that SB 1172 is rationally related to the State's legitimate interest in protecting the well being of minors. Pet. App. 6; *see*, *e.g.*, *Heller v. Doe*, 509 U.S. 312, 319-321 (1993).

2. The court of appeals also properly rejected petitioners' privacy claim. Even if petitioners had standing to assert such a claim on behalf of third-party minors, it would fail as a matter of law.

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[6] Not only was the challenged statute in *Lukumi* not neutral or generally applicable, but, unlike here, the amount of direct and circumstantial evidence of discriminatory animus was overwhelming. *See* 508 U.S. at 541-546.

Petitioners argue (Pet. 29) that SB 1172 "prohibits minors from defining their own existence" in a way that is inconsistent with *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015), and *Lawrence v. Texas*, 539 U.S. 558, 574 (2003). This argument lacks both factual and legal support. As a factual matter, lack of access to an ineffective (and harmful) treatment within the context of state-licensed professional counseling does not affect the ability of minors to define their own existence or intrude on their intimate relationships. As a legal matter, there is no fundamental or privacy right to receive, from a state-licensed professional, a treatment that the State has reasonably prohibited as ineffective and dangerous. *See*, *e.g.*, *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975) (per curiam) (stating that there is no constitutional right to an abortion by a non-physician); *Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993) ("[M]ost federal courts have held that a patient does not have a constitutional right to obtain a particular type of treatment or to obtain treatment from a particular provider if the government has reasonably prohibited that type of treatment or provider.") (collecting cases).

3. Finally, the decision below does not create any conflict in the lower courts. (*See* Pet. 12-16.) The Third Circuit, the only other court that has addressed the specific question at issue here, has agreed that a law practically identical to SB 1172 is a neutral law of general applicability that is subject to, and passes, rational basis review. *King v. Governor of the State of New Jersey*, 767 F.3d at 242-243 (upholding New Jersey statute

banning SOCE). This Court denied review in *King*, *see* 135 S. Ct 2048 (No. 14-672), and there is no reason for a different result here.

The decisions petitioners cite from the Sixth and Seventh Circuits and the Supreme Courts of Texas, Utah, and California do not conflict with the decision below. Some of these cases addressed whether civil courts have jurisdiction to hear certain claims brought against clergy and religious institutions under the "ministerial exception" or "ecclesiastical abstention doctrine." *See*, *e.g.*, *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 227 (6th Cir. 2007), *abrogated by Hosanna-Tabor*, 565 U.S. 171; *Dausch v. Ryke*, 52 F.3d 1425, 1432 (7th Cir. 1994); *Westbrook v. Penley*, 231 S.W.3d 389, 400-402 (Tex. 2007).[7] SB 1172 does not involve the employment relationship between a religious

[7] These cases do not, as petitioners suggest (Pet. 12-13), indicate that different regulatory schemes may, or may not, apply to individuals employed in more than one profession. Although petitioners argue that they cannot be expected to "parse" their ministerial and secular roles, it is a professional's responsibility to know when one is acting as clergy and when one is acting as a licensed mental health practitioner, and to understand and adhere to the laws applicable to each. For example, petitioner Welch is a licensed marriage and family therapist and a minister. When Welch tells clients that he is a licensed mental health professional and is acting as such, *see* Cal. Bus. & Prof. Code § 4980.10, he is subject to the same regulations as every other licensed marriage and family therapist, and must comply with SB 1172. *See id.* §§ 865, 865.1, 865.2, 4980-4980.90. When Welch is acting in his ministerial capacity and is "performing counseling services as part of his [] pastoral or professional duties," SB 1172 does not apply to him. *See id.* § 4980.01(b).

institution and its ministerial employees, church discipline, or internal management. There is thus no credible argument that the ministerial exception or ecclesiastical abstention doctrine applies here. *See generally Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713-714 (1976).

Similarly, cases involving tort liability for religious counseling, such as *DeCorso v. Watchtower Bible & Tract Soc'y*, 829 A.2d 38 (Conn. Ct. App. 2003), *Franco v. Church of Jesus Christ of Latter-Day Saints*, 21 P.3d 198 (Utah 2001), and *Nally v. Grace Community Church*, 47 Cal.3d 278, 298 (1988), stand for the unremarkable proposition that "civil tort claims against clerics that require the courts to review and interpret church law, policies, or practices in the determination of the claims are barred by the First Amendment under the entanglement doctrine." *Franco*, 21 P.3d at 203. Unlike in these cases, determining whether a provider has violated SB 1172 does not require interpretation of church law, policies, or practices. Whether a mental health provider operating under a state professional license has practiced SOCE on a minor is an entirely secular question. There is accordingly no conflict in authority, and no reason for further review in this case.[8]

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[8] The Eleventh Circuit, in dicta in a recent en banc decision striking down a state law that prohibited physicians and medical professionals from asking questions or collecting information about firearm ownership as an impermissible content-based restriction on speech, criticized the Ninth Circuit's treatment of the speech claims previously decided in this case. *See Wollschlaeger v. Governor of Florida*, No. 12-14009, 2017 WL 632740, at *8-9 (11th

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: March 2, 2017

Respectfully submitted,

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Cir. Feb. 16, 2017) (en banc). *Wollschlaeger* does not involve claims under the Religion Clause or the right to privacy and is not relevant to the questions presented here. Moreover, and even with respect to speech, *Wollschlaeger* is, as the court noted, "distinguishable on its facts and does not speak to the issues before us." *Id.* at *8. There is thus no conflict between *Wollschlaeger* and the decision below.