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 *Amicus Curiae* of**
**Americans for Truth About Homosexuality,**
**United States Justice Foundation, and**
**Conservative Legal Defense and Education**
**Fund in Support of Petitioners**

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## INTEREST OF THE *AMICI CURIAE*[1]

Americans for Truth About Homosexuality is an educational organization located in Illinois. United States Justice Foundation and Conservative Legal Defense and Education Fund are nonprofit educational and legal organizations, exempt from federal income tax under Internal Revenue Code section 501(c)(3). These organizations were established, *inter alia*, for purposes related to participation in the public policy process, including conducting research and to inform and educate the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

## STATEMENT OF THE CASE

Just 44 years ago, "homosexuality was removed from the Diagnostic and Statistical Manual of Mental Disorders." Pickup v. Brown, 740 F.3d 1208, 1222 (9th Cir. 2014). Soon thereafter, "the American Psychological Association declared that homosexuality is not an illness." *Id.* Then, like dominoes, "[o]ther major mental health associations" fell in line. *Id.* Yet, despite their "expert" pronouncements, these actions did not make homosexuals healthy in body, mind, or spirit, or homosexuality normal, proper, or moral.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Instead, they opened the door to a whole new discussion: how best to help persons troubled with homosexual attractions now that homosexuality has been declared to be normal.

Prior to this collective change of expert opinion, the dominant goal of mental health providers was to "chang[e] an individual's sexual orientation from homosexual to heterosexual" by means of "reparative or conversion therapy." *Id.* Engaging in a variety of "Sexual Orientation Change Efforts" ("SOCE"), mental health practitioners adopted a number of creative curative methods, all of which were designed to convert those with homosexual attractions to a new life of heterosexual attraction. *Id.*

"Questioning and rejecting the efficacy and appropriateness of SOCE therapy[,] mainstream mental health professional associations" moved from utilizing SOCE to employing "affirmative therapeutic approaches to sexual orientation that focus on coping with the effects of stress and stigma." *Id.* Only a small number of therapists continued to offer SOCE to their patients. *Id.* In an effort to discredit the remaining SOCE practitioners, the American Psychological Association ("APA")[2] and a bevy of

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[2] In a telling interview of Dr. Nicholas Andrew Cummings, former APA president (1979-80), D. Cummings, sponsor of the proposal declaring that homosexuality was not an illness, stated that at the same meeting that the motion was passed, there was an agreement to continue "unbiased open research, but that it was never done." While the APA had been committed to the "Leona Tyler principle" that all APA studies "had to be scientifically demonstrated," soon thereafter studies became "more political

mental health-related professional societies published "position statements, articles, and reports" that "SOCE has not been shown to be effective and that it creates a potential risk of serious harm to those who experience it."[3] *Id.* at 1223-24. Based upon the prevailing opinion, the California State Assembly enacted SB 1172, forbidding licensed mental health providers from employing SOCE therapy in persons under 18 years of age.

Two challenges to SB 1172 were filed in federal district court. The two groups of plaintiffs sought a declaratory judgment, and asked for injunctive relief on First Amendment grounds, including both the freedom of speech and freedom of religion. *See* Pickup at 1224. Initially, the district court ruled in favor of plaintiffs, granting preliminary relief on the ground of violation of the freedom of speech, and defendants appealed. The Ninth Circuit reversed, ruling that the California law "regulates conduct[,] ban[ning] a form of treatment for minors; it does nothing to prevent licensed therapists from discussing the pros and cons of SOCE with their patients." *Id.* at 1229. And, because "SB 1172 regulates a professional practice

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than scientific" because the "gay rights movement ... captured the APA." http://youtu.be/7NyX5CxGraE

[3] In evaluating risk of harm, there is no indication that the state legislature considered the much higher lifetime suicide rates for homosexuals (10-20 percent), and transgendered persons (41 percent), than the overall U.S. population (4.1 percent). *See* A. Haas and P. Rodgers, "Suicide Attempts among Transgender and Gender Non-Conforming Adults," The Williams Institute (Jan. 2014).

that is not inherently expressive," the court concluded, "it does not implicate the First Amendment." *Id.* at 1230.

On remand, the district court turned to plaintiffs' claims that SB 1172 "violates the Free Exercise and Establishment Clauses and privacy rights." Welch v. Brown, 58 F. Supp. 3d 1079, 1082 (E.D. Cal. 2014). This time, the district court ruled against Plaintiffs, who then again appealed to the Ninth Circuit. Welch v. Brown, 2016 U.S. App. LEXIS 17867 at *4. Largely relying on previous findings upon which it had dispensed with plaintiffs' free speech claims, the court of appeals ruled against the plaintiffs' claims to freedom of religion.

## REVISED QUESTION PRESENTED

The Ninth Circuit panel stated that "SB 1172 survives rational basis review because 'SB 1172 is rationally related to the legitimate government interest of protecting the well-being of minors.'" *Id.* at *4. Additionally, applying the traditional Lemon test[4] to the Establishment claim (*id* at *7-*13) and the Lukumi neutrality test[5] to the Free Exercise claim (*id.* at *13-*14), the court of appeals ruled against the Plaintiffs. However, the panel's ruling on the religion claims conflicts with the textual meaning of "religion" as it appears in the First Amendment, as this Court

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[4] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[5] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

(i) recognized in Reynolds v. United States, 98 U.S. 145 (1879); (ii) implied in Employment Div. v. Smith, 494 U.S. 872 (1990); and (iii) applied in Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission (E.E.O.C.), 132 S.Ct. 694 (2012), and thereby presents an important federal question that can only be settled by this Court.

Plaintiffs proposed that four questions be addressed by the Court, none of which are grounded in the constitutional text. The first question presupposes that the religion clause protects an individual because of his religious office, when those protections apply equally to religious and nonreligious persons. The second question incorrectly presupposes that a statute must have a dominant secular purpose. The third question asks the Court to apply an interest-balancing test, when the religion clauses provide a jurisdictional barrier which cannot be balanced away. The fourth question relies on the atextual right of "privacy," wholly inconsistent with the constitutional text. Accordingly, these *amici* urge this Court to grant certiorari, but to address:

> Does SB 1172's banning and sanctioning licensed mental health professionals who utilize therapies to assist minors in their effort to resist homosexual attractions violate the Free Exercise guarantee?

## SUMMARY OF ARGUMENT

For too long this Court's free exercise of religion jurisprudence has wallowed in sea of doubt. The root cause is its failure to define and apply a fixed definition of religion consistent with the original text and 18th century historical context .

In Reynolds v. United States, the Court acknowledged that "religion" was a jurisdictional term dividing those duties that are owed to the Creator enforceable by human "reason and conviction," from those duties enforceable by "force or violence." Thus, it rejected the claim that the free exercise of "religion" guarantee conferred upon a person a special religious privilege to disobey a law that was properly within the coercive power of the State.

In Employment Div. v. Smith, this Court reiterated its holding in Reynolds that the free exercise guarantee did not create a special religious privilege to disobey a law within the coercive jurisdiction of the State, and reaffirmed that the free exercise guarantee protected from the state's coercive powers only those duties governed only by reason and conviction.

In Hosanna-Tabor Evangelical Lutheran Church v. EEOC, the Court applied the free exercise guarantee to a religious organization excusing it from compliance with an otherwise generally applicable law governing the terms and conditions of employment of persons with disabilities, leaving the distinct impression that the free exercise guarantee grants a special privilege

that only religious people and organizations have, in apparent contradiction to Reynolds and Smith.

But the protection afforded by the free exercise guarantee to the Hosanna-Tabor school is not because its message is a religious one, but because "religion" poses a jurisdictional barrier, protecting the propagation of all "opinions," religious or nonreligious, from the coercive power of the State. Applying this jurisdictional principle here, SB1172 mistakenly secures to religious persons a special privilege to propagate their views on homosexuality while denying the same right to others, both in violation of the free exercise guarantee.

As three circuit court judges explained in their dissent from a denial of rehearing, California does not have unfettered authority under its police power to ban and sanction well established medical therapies under the "guise of a professional regulation." This law's suppression "of politically unpopular expression" was imposed not because those therapies have been demonstrated to be harmful, but rather because they were deemed to be politically incorrect.

## ARGUMENT

### I. RELIGION IS A JURISDICTIONAL TERM LIMITING THE POWER OF THE STATE.

In 1879, this Court addressed the question of whether under the Free Exercise Clause a person could be prosecuted and convicted of bigamy if that person entertained the religious belief that it was

lawful to marry a second wife while the first wife is still living. Reynolds at 162. Acknowledging that the First Amendment forbade any law prohibiting "the free exercise of religion," the Court realized that the answer to the question required it to define "religion." Not finding the word defined by the Constitution itself, the Court commenced to "ascertain its meaning [by] the history of the times in the midst of which the provision was adopted." *Id.* That historical search led the Court to the 1784 Virginia fight over a bill to support Christian teachers. *Id.* at 163. The Court took particular notice of James Madison's opposition to this bill expressed in his "Memorial and Remonstrance" in which he defined religion as a jurisdictional term that identified certain duties "'owe[d] the Creator' ... not within the **cognizance of civil government**." *Id.* (emphasis added).

Affirming Madison's position, the Court adopted the full jurisdictional meaning of "religion," as it was more clearly expressed in Article 16 of the 1776 Virginia Declaration of Rights: "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed **only** by reason and conviction, **not** by force or violence," the latter method referring to the coercive power of the State. *See* Madison's Memorial and Remonstrance, reprinted in 5 The Founders' Constitution, at 82, item 43 (P. Kurland & R. Lerner, eds., Univ. Chi.: 1987) (emphasis added).

### A. The Reynolds Precedent Applied.

Having discovered that "religion," as it appears in the First Amendment, imposes a jurisdictional divide, this Court conducted a search to determine on which side of that divide the law of marriage lies — the ecclesiastical or the civil. Conducting a brief historical survey, it discovered that "[a]t common law, the second marriage was always void, and from the earliest history of England polygamy has been treated as an offense against society." Reynolds at 164. "We think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity." *Id.* at 165.

### B. The Reynolds Precedent Explained.

Having demonstrated that marriage falls on the civil side of religion's jurisdictional line, the Court addressed the remaining question of whether the free exercise clause may be read, as urged by the Mormon polygamist, to exempt those whose religious beliefs embrace polygamy. *Id.* at 166. Registering its strong objection to this claim, the Court rejected the notion that the free exercise guarantee created a special religious privilege in that "those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free." Thus, the Court concluded:

> To permit this would be to make the professed doctrines of religious belief superior to the law

> of the land, and in effect to permit every citizen to become a law unto himself. [*Id.* 167.]

**C. The Reynolds Precedent Reaffirmed.**

111 years after Reynolds, this Court once again faced the question of whether an individual's free exercise rights had been denied where his personal religious beliefs dictated disobedience of a law, this time of a law prohibiting the ingestion of peyote. *See* Employment Div. v. Smith, at 879 (1990). The Court reaffirmed the Reynolds rule, that the free exercise guarantee does not create a special privilege enjoyed only by a religious believer, "excus[ing] [them] from compliance with an **otherwise valid law** prohibiting conduct that **the State is free to regulate**." *Id.* at 878-79 (emphasis added).

Unlike Reynolds, however, the Smith Court did not determine whether the State was "free," under the free exercise clause to prohibit the ingestion of peyote, as it had been "free" under that same guarantee to prohibit polygamy. In other words, the Smith Court assumed that the free exercise guarantee posed no jurisdictional barrier to the State prohibition of the use of mind-altering drugs.

**D. The Smith Precedent Clarified.**

Just five years ago, this Court decided Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., *supra*. At issue was the constitutionality of E.E.O.C.'s attempt to apply the Americans with Disabilities Act to the employment of a general subject

matter teacher in a religious school. By unanimous opinion, the Court ruled in favor of Hosanna-Tabor's claim that applying the E.E.O.C. employment discrimination laws violated the church's free exercise rights. Purporting to act in accordance with a long-standing "ministerial exception," the Court rejected the E.E.O.C.'s contention that its decision in Smith "preclude[d] recognition of the exception."

Like the Reynolds Court, the Hosanna-Tabor Court rested its decision on the principle that the civil authorities were not free to regulate "an internal church decision that affects [its] faith and mission." Hosanna-Tabor at 703. Drawing on the actions of James Madison, as the Reynolds Court did more than a century before, Chief Justice Roberts concluded that the religion clauses of the First Amendment "ensured that the new Federal Government — unlike the English Crown — would have no role in filling ecclesiastical offices." *Id.*

**E. The Hosanna-Tabor Precedent Extended.**

Entirely missing from Hosanna-Tabor, however, was any analysis of the First Amendment's Establishment and Free Exercise text. Indeed, it appears that the Court assumed that "religious" means the same thing as "religion," and that therefore, "ministerial exception" could be enjoyed only by a person or entity whose actions are grounded in religious belief and faith. If so, then Hosanna-Tabor is on a collision course with not only Smith, but also Reynolds, both of which rejected the very notion that the freedom of religion clauses conferred special

privileges on religious persons and entities to the exclusion of the nonreligious. Had the Court engaged in an analysis of the meaning of religion as it originally appeared in the First Amendment text, it would have discovered that the two religion clauses do not discriminate between "religious" and "nonreligious" (or secular), but proclaim a certain universal freedom from the jurisdiction of civil government in those matters that by the law of the Creator, are enforceable by individual "reason and conviction," as contrasted with those matters that by the same law are enforceable by the coercive powers of civil government — "force and violence." Foremost among those matters that are absolutely outside the realm of civil government is the propagation of one's "opinions":

> [B]ecause the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men... [Madison's Memorial and Remonstrance, reprinted in 5 Founders at 82, item 43.]

Neither Madison nor Jefferson limited the right of freedom of religion to only "religious" opinions. Rather, both understood the constitutional safeguard to extend to the holding and expressing of all opinions without qualification. Had the Hosanna-Tabor Court paid attention to this textual legacy, it would have forgone the search as to whether a teacher of secular subjects was a "minister"; and thereby, within an "exception." *See* 132 S.Ct. at 715 (Alito, J., concurring). However, the ruling in Hosanna-Tabor is

well within the historic rule, not an exception to it, the church being engaged in "the expression and inculcation of religious doctrine, [wherein] there can be no doubt that the messenger matters":

> a religious body's right to self-governance must include the ability to select, and to be selective about, those who will serve as the very "embodiment of its message" and "its voice to the faithful...." A religious body's control over such "employees" is an essential component of its freedom to speak in its own voice, both to its own members and to the outside world. [*Id.* at 713].

The religious freedom principles that Justice Alito discussed in this concurrence do not grant a special privilege for religious Americans but, rather, apply just as strongly to any nonreligious school or organization as they do to a Lutheran school. Both religious and nonreligious entities are protected in the same way because both are engaged in "proselytizing"[6] — an activity which appears on Justice Scalia's list of "free exercise" categories which the civil government is not free to regulate. *See* Smith at 877.

Having failed to apply the First Amendment's jurisdictional test, the court of appeals erred in deciding that SB 1172 did not violate the free exercise guarantee.

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[6] While proselytizing is usually associated with religious speech, it is not always the case. *See* Webster's Third New International Dictionary at 1821.

## II. SB 1172 VIOLATES THE FREE EXERCISE GUARANTEE BECAUSE IT CONSTRAINS THE FREE EXCHANGE OF OPINIONS.

Petitioners assert that "[t]he Ninth Circuit's decision calls into question the continued vitality of the longstanding principle that free Exercise 'first and foremost,' allows believers to believe '*and profess*' whatever doctrines one desires," citing Smith. Pet. at 27. Petitioners base this claim upon the evidence that the legislative process revealed that SB 1172 proponents were motivated to oppose the bill because they were "the predominant population of those wanting to diminish same-sex attractions." *Id.* at 24. *See also* Welch, 2016 U.S. App. LEXIS 17867 at *10-11. However, as the court of appeals below recounted, defendants' brief stressed that "'SB 1172 does not apply to members of the clergy who are acting in their roles as clergy or pastoral counselors and providing religious counseling to congregants.'" *Id.* at *7. Indeed, at oral argument the California State defendants stressed "that the law 'does not actually apply to members of the clergy or religious counselors who are acting in their pastoral or religious capacity.'" *Id.* Thus, defendants claim that "the law does not excessively entangle the State with religion." *Id.* However, the question is not one of State entanglement under the Establishment Clause, but of State proselytizing together with restricting individual proselytizing under the Free Exercise Clause.

SB 1172 was prompted by a series of position papers, articles, and reports published by a number of mental health professional associations, and designed

to settle a dispute within the profession as to whether any licensed mental health provider should seek to change a minor individual's sexual orientation from homosexual to heterosexual. As such, SB 1172 constitutes a proselytizing measure, encouraging and sanctioning only those practices that promote and protect those young persons who desire to live a homosexual lifestyle, and prohibiting countering SOCE therapeutic measures to counteract that desire. To be sure, SB 1172 "leaves mental health providers free to discuss or recommend treatment and to express their views on any topic" (Pickup at *1223), but the Act destroys the pre-existing level playing field. It emphatically puts the State on the side of one school of thought and its modality of treatment against another, threatening the disfavored school with sanctions, including the revocation of state licensure. And because SB 1172 purports to be based upon current "scientific literature," it closes off opportunity to test scientifically alternative approaches to the homosexual lifestyle and the problems that accompany it.

Just 44 years ago, the prevailing **opinion** was that the homosexual lifestyle was a mental illness, a diagnosis that is diametrically opposed to the current conventional wisdom that it can be healthy. So long as homosexuality was labeled a mental illness, the predominant means of treatment was to change a person's sexual orientation from homosexual to heterosexual. Soon thereafter, the collective **opinion** of a large majority changed so that those professionals whose opinion was that homosexual orientation was deviant found themselves in the minority. By enforcing the prevailing opinion, and relying solely

upon that opinion, the California legislature's "stated purpose in enacting SB 1172 was to 'protect[] the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and [to] protect[] its minors against exposure to serious harms caused by sexual orientation change efforts." Pickup at *1223. Having sidelined the opposition, SB 1172 has vested the established order with civil power to discipline all the licensed mental health professionals, should they get out of line, leaving only a small cadre of unlicensed religious counselors to operate in a small corner of the marketplace.

SB 1172 is a classic example of the kind of law that is forbidden by the Free Exercise Clause, as that clause was originally understood in principle by both Jefferson and Madison. Jefferson proclaimed:

> Whereas Almighty God hath created the mind free; that **all** attempts to influence it by temporal punishments or burthens, or by **civil incapacitations,** tend only to beget habits of hypocrisy and meanness[;] that the impious presumption of legislators and rulers, civil as well as ecclesiastical ... have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavouring to impose them on others .... [Founders at 84 (emphasis added).]

Jefferson further contended "that to suffer the civil magistrate to intrude his powers into the field of

opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy." *Id.* Thus, Jefferson concluded:

> that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order; and finally, that **truth** is great and **will prevail if left to herself**.... [*Id.* (emphasis added).]

The court of appeals below completely missed this jurisdictional principle, concentrating instead upon the question advanced by petitioners as to whether SB 1172 was the product of an anti-religious motivation in the California legislature, as reflected in the reports and position statements of various mental health professional associations. *See* Welch at *9-*14. But the issue under the Free Exercise Clause, as originally understood, is not the religious or nonreligious sentiments spurring the California legislators to enact SB 1172, but whether SB 1172 encroaches on matters of opinion, the truth or falsity of which is outside the civil jurisdiction.

## III. THE STATE'S POLICE POWER DOES NOT EXTEND TO SUPPRESSING POLITICALLY INCORRECT AND MORALLY UNPOPULAR MEDICAL TREATMENTS IN THE GUISE OF PROFESSIONAL REGULATION.

Although the Ninth Circuit addressed the scope of the First Amendment's protection of regulated mental health professionals — it neglected entirely to define

the scope of that government power to condition the issuance of licenses. Indeed, the panel's opinion never even mentioned, much less analyzed, the State's police power to regulate mental health professionals. The panel did reference Pickup v. Brown, 740 F.3d 1208, 1222 (9th Cir. 2014) as a source of "background information" to the litigation. Welch, 2016 U.S. App. LEXIS 17867, *4. But the panel in Pickup did little better, addressing the police power only briefly before concluding:

> Pursuant to its **police power**, California has authority to regulate licensed mental health providers' administration of therapies that the legislature has deemed harmful. [Pickup at 1229 (emphasis added).]

However, neither panel addressed the concerns later raised by Judges O'Scannlain, Bea, and Ikuta in dissenting from the denial of rehearing *en banc*. Those three judges characterized SB 1172 as a suppression "of politically unpopular expression" in the "**guise of a professional regulation.**" *Id.* at 1215 (emphasis added). Indeed, these judges expressed their concern that:

> [e]mpowered by this ruling of our court, government will have a new and powerful tool to silence expression **based on a political or moral judgment** about the content and purpose of the communications. [*Id.* (emphasis added).]

Just last month, the Eleventh Circuit considered a challenge to a Florida law which restricted speech by medical professionals on the subject of firearm ownership. Striking down the statute, the circuit court ruled that even the state's interest "to regulate the medical profession in order to protect the public" was "not enough" there. Wollschlaeger v. Governor, 2017 U.S. App. LEXIS 2747 at *44 (11th Cir. Feb. 16, 2017). The court quoted circuit judge Wilson's earlier statement that "a state's authority to regulate a profession does not extend to the entirety of a professional's existence." *Id.* That court expressed its "serious doubts about whether *Pickup* was correctly decided." *Id.* at *29.

Indeed, SB 1172 was an effort by California to prevent licensed mental health providers from using their best professional judgment to help minors. All licensed "mental health providers" are prohibited from engaging in "[s]exual orientation change efforts" to benefit a minor (Cal. Bus. & Prof. Code § 865.1). Any "mental health provider" who "attempt[s]" "any sexual orientation change efforts" with a minor "shall subject" the provider "to discipline by the licensing entity...." These new rules changed the professional and ethical standards applicable to a dozen "mental health providers" currently licensed by California.

Occupational licensure is supposed to be designed to protect the public from incompetent practitioners, but it has limits. "If ... a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of

rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." Mugler v. Kansas, 123 U.S. 623, 661 (1887). *See also* Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905).

Here, the licensing power is being used in a politically correct fashion to suppress well established and professional treatments — any attempt "to change an individual's sexual orientation [including] efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the **same sex**." Cal. Bus. & Prof. Code § 865(b) (emphasis added). Instead, the statute flatly demands that licensed professionals prefer homosexuality to heterosexuality, as specifically exempted from the regulation are "psychotherapies that ... provide **acceptance**, support, and understanding of ... clients' coping, social support, and identity exploration and development." *Id.* § 865(b)(2) (emphasis added). Thus, where a minor is confused in feeling attractions to persons of both sexes, the statute bars counseling to reinforce heterosexual attraction, while sanctioning counseling reinforcing homosexual attraction. Therefore, it is clear that the California legislature has taken sides on a controversial matter of great public importance, giving special protection to those feeling homosexual attractions, while disciplining those who would encourage heterosexual attraction.[7]

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[7] *See* Tinker v. Des Moines School Dist., 393 U.S. 503, 511 (1969) ("In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.").

Further, the statute is internally inconsistent. SB 1172 specifically exempts from its definition of SOCE such psychotherapies that "includ[e] sexual orientation-neutral interventions to prevent or address [i] unlawful conduct or [ii] unsafe sexual practices." *Id*. at § 865(b)(2) (emphasis added). In other words, SOCE is designed to "prevent or address" either "unlawful conduct" or "unsafe sexual practices." The effect of these exceptions — which can be read to completely undermine the stated purpose of the statute — was not addressed by the panel.

- As to the first exemption, since California criminalizes minors having sex with other minors,[8] the "unlawful conduct" exception could be read to sanction SOCE which attempts to dissuade minors from having sex with a minor of the same sex — although if read in this way, this exemption would undercut the stated purpose of the law.

- The second exemption for "unsafe sexual practices" presupposes that at least some homosexual behaviors can be unsafe when really most are "unsafe" for many reasons, including those set out below. However, if read in this way, this exemption would swallow up the rule, as homosexual sex is known to have dangerous consequences. *See e.g.*:

  - Disproportionately, same-sex coupling invites the Human Immunodeficiency Virus ("HIV"),

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[8] *See* Cal. Penal Code Sec. 261-5(a).

which is already at epidemic proportions, weakening the immune system of men engaged in same-sex activity.[9]

- All-cause morbidity and mortality of gay men shows that homosexual men may lose an average up to 20 years of life expectancy.[10]

Additionally, the supposedly "scientific" basis for the statutory prohibition is weak at best. It was drawn primarily from a publication of the "American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation" — a "systematic review of the peer-reviewed journal literature" on SOCE. Exclusive reliance on such supposedly "scientific" research should be viewed as inherently suspect by judges and legislatures, as even

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[9] *See* R. Peabody, "HIV transmission risk during anal sex 18 times higher than during vaginal sex," (June 28, 2010); CDC, "HIV in the United States: At a Glance," (last updated Dec. 2, 2016).

[10] "In a major Canadian centre, life expectancy at age 20 years for gay and bisexual men is 8 to 20 years less than for all men. If the same pattern of mortality were to continue, we estimate that nearly half of gay and bisexual men currently aged 20 years will not reach their 65th birthday." R.S. Hogg, *et al.* "Modelling the impact of HIV disease on mortality in gay and bisexual men." INT'L J. OF EPIDEMIOLOGY (1997) 26(3) 657-61. The authors of this study published a subsequent report speculating that if the study were repeated, that the numbers would be improved, and expressing resentment for those would use of the study to demonstrate that homosexuality was an unhealthy lifestyle. R.S. Hogg, *et al,* "Gay Life Expectancy Revisited," INT'L J. OF EPIDEMIOLOGY (2001) 30 (6) 1499.

scientists have been admitting with increasing frequency the unreliability of such studies.[11] Moreover, the Task Force report revealed its bias as well as the bias in the psychological literature when it stated: "the research and clinical literature demonstrate that same-sex sexual and romantic attractions, feelings, and behaviors are normal and positive variations of human sexuality...." Task Force Report, Abstract. The Task Force never addressed matters outside its supposed expertise such as Biblical morality,[12] and seemed to wholly ignore the many

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[11] *See, e.g.,* J. Ioannidis, "Why Most Published Research Findings are False," PLOS (Aug. 30, 2005); D. Fanelli, "How Many Scientists Fabricate and Falsify Research? A Systematic Review and Meta-Analysis of Survey Data," PLOS (May 29, 2009); M. Munafò and J. Flint, "How reliable are scientific studies?" The British Journal of Psychiatry (Sept. 2010); J. Ioannidis, "An Epidemic of False Claims," Scientific American (June 1, 2011); R. Horton, "Offline: What is medicine's 5 sigma?" The Lancet, vol. 385 (Apr. 11, 2015); D. Sarewitz, "Saving Science: Science isn't self-correcting, it's self-destructing," The New Atlantis (Spring/Summer 2016); M. Kirsch, M.D., "Watch out for sleight of hand in deceptive medical statistics," MedCityNews (June 13, 2016); P. Smaldino and R. McElreath, "The natural selection of bad science," MedCityNews (Sept. 21, 2016); T. Feilden, "Most scientists 'can't replicate studies by their peers'," The BBC (Feb. 22, 2017).

[12] *See, e.g.,* Leviticus 18:22 (to lie with mankind is abomination); Romans 1 ("dishonour their own bodies between themselves"; "vile affections"; "men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly, and receiving in themselves that recompence of their error which was meet").

indications that homosexuality is neither "normal" nor "positive."[13]

Moreover, the Task Force report was, at best, tepid in its cautioning against SOCE, concluding only that SOCE was (i) "unlikely to be successful," and (ii) "involve some risk of harm" based only on "anecdotal" information. Pickup at 1232. Of course, these same criticisms could be levied against innumerable, well-accepted medical procedures.[14]

The licensure of professions — particularly the medical profession — has a checkered past. The earliest licensing sought to impose minimum standards, but later were used to exclude competing schools of thought such as homeopathy.[15] For example,

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[13] The public health risk is exacerbated by the existence of a subculture within the homosexual community which actively attempts to spread HIV infections, both those who seek to become infected, and those who are infected seeking to spread it among others. *See* C. Joseph, "An Undercover Look Inside the World of HIV Bug Chasers and Gift Givers," SF Weekly (Nov. 30, 2016).

[14] *See*, *e.g.*, A. Carroll & A. Frakt, "How to Measure a Medical Treatment's Potential for Harm," *N.Y. Times* (Feb. 2, 2015) (the number of people who would need to receive a given medical therapy in order for one person to benefit is often as high as 100 and can be much higher – often higher than the number of people required for one person to be harmed).

[15] "It was this problem of [homoeopathy] and the apparently declining standard of medical education — viewed as the cause of the conversions of physicians to homoeopathy — that prompted the formation of the American Medical Association." H.L. Coulter, Divided Legacy, Vol. III, pp. 181, 179-84 (N. Atlantic Books: 1983).

the American Medical Association was founded to improve: (i) medical education; (ii) education of the public; and (iii) the reeducation of homoeopathic physicians. *See id.* at 184-99. The AMA relied on "ethics" rules in order to push its agenda for the elimination of homeopathy, which they described as "irregular" practitioners. "[O]ne New York allopath stated that the ban on consultation with homoeopaths was virtually the only Code provision ever enforced." *Id.* at 207-08. From such efforts to employ licensing to exclude competing health care schools, we have transitioned to the current effort to impose standards of political correctness on those mental health professionals who do not embrace homosexuality as a normal lifestyle. SB 1172 was not designed to protect minors,[16] but rather to grant a special right for homosexuals, to make homosexuality normative, to silence those who take a different position for secular or moral reasons, and to allow the number of young people experiencing gender confusion to choose a homosexual lifestyle. *See* Petition at 6, 10.

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[16] SB 1172 impairs not just the right of the practitioner, but also the right of the minor patient, guided by his parents, to have access to a variety of treatments from which to choose, unhampered by constraint on his doctor imposed in the "guise" of professional regulation. Indeed, "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891); *see also* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269 (1990).

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari to address the revised question presented in this *amicus* brief.

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