No. 16-_____

In The
Supreme Court of the United States

DONALD WELCH, ANTHONY DUK, AARON BITZER,

Petitioners,

v.

EDMUND G. BROWN JR.,
Governor of the State of California, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of California now prohibits mental health providers from offering "sexual orientation change efforts" (SOCE) to minors. In so doing, the enacting legislation (Senate Bill 1172) and the legislative history made repeated references to the religious motivations of SOCE seekers and providers, and the Legislature noted that SOCE includes *religious conversion*, *prayer* and *spiritual intervention*. The text of the law does not explicitly refer to religion. Instead, the law states that "under no circumstances shall a mental health provider engage [in SOCE] with a patient under 18 years." The law broadly proscribes *any practice* or *any efforts* relating to SOCE.

The lead plaintiff in this action, Dr. Welch, is both an ordained minister and a licensed marriage and family therapist (LMFT). In those capacities, he oversees the counseling ministry at his church. During counseling, SB 1172 prohibits communication of certain religious tenets regarding sexuality within the four walls of Dr. Welch's church, because the Legislature regards those beliefs as harmful to minors. Notwithstanding these concerns, the Ninth Circuit waved off the plaintiffs' Religion Clause and privacy arguments.

The questions presented are:

1. May a State bar ministers from inculcating or encouraging certain religious values in youth, when those ministers are also licensed by the state as mental health providers?

QUESTIONS PRESENTED – Continued

2. Are repeated references by a Legislature to religious motivations, prayer, spiritual interventions, and religious conversion as a cause for governmental concern, of no Religion Clause significance, so long as the Legislature identifies an additional secular concern?

3. Does facial neutrality shield from strict scrutiny a regulation that directly or indirectly restricts religious practices?

4. Are minors' rights to privacy, autonomy, and self-definition violated by a State's determination that they may only seek to reduce same-sex attraction on their own or with the assistance of unlicensed individuals, and they may not seek professional help to do so?

PARTIES

The parties to this Petition are the three plaintiffs in *Welch v. Brown*, Donald Welch, Ph.D., Anthony Duk, M.D., and Aaron Bitzer. Collectively the Petitioners are referred to as "Welch."

Respondents are Edmund G. Brown, Jr., Governor of the State of California, Anna M. Caballero, Secretary of California State and Consumer Services, Denise Brown, Case Manager, Director of Consumer Affairs, 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, Barbara Yaroslavsky, in their official capacities as members of the Medical Board of California.

CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29.6, Petitioners make the following disclosures:

The petitioners are natural persons. None of the petitioners is a corporation, has no parent corporation, and no publicly held company owns 10% or more of their stock.

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OPINIONS BELOW

The opinion of the court of appeals is reported at No. 15-16598, 2016 U.S. App. LEXIS 17867 (9th Cir. Oct. 3, 2016) and is fully set forth in the Petitioners' Appendix (Pet. App.). The opinion of the district court is reported at (Pet. App. 16) No. 2:12-2484 WBS KJN, 2015 U.S. Dist. LEXIS 94985 (E.D. Cal. July 21, 2015).

STATEMENT OF JURISDICTION

This Petition is filed pursuant to Supreme Court Rule 11. The court of appeals issued a decision on August 23, 2016, and subsequently modified its opinion, at the same time denying panel rehearing and rehearing *en banc*, on October 3, 2016. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Constitution, Amendment XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Cal. Bus. & Prof. Code § 865

(a) "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, or trainee, or any other person designated as a mental health professional under California law or regulation.

(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.

Cal. Bus. & Prof. Code § 865.1

Under no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age.

Cal. Bus. & Prof. Code § 865.2

Any sexual orientation change efforts 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.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is rare to see religious motivations and practices playing a prominent role in professional regulations. It is rarer still to see not merely passing references, but

dozens of pages of legislative history discussing and disputing certain religious beliefs. Yet this is the path taken by the California Legislature in enacting SB 1172. Not surprisingly then, the restrictions have direct implications for religious congregations, such as the one employing Dr. Welch.

This Court has long held that choosing both the message and the messenger lie at the core of the church autonomy protected by the Religion Clause. Bypassing these principles, the Ninth Circuit held that the extraordinary degree to which the Legislature relied upon religiously laden arguments was of no constitutional concern. In so doing, the Court of Appeals ignored not only this Court's precedents, but the numerous authorities from other jurisdictions that have expressed strong reservations about legislative or judicial interference with church counseling.

In reaching its conclusion, the Ninth Circuit articulated formulations of both the Establishment and Free Exercise Clauses that depart from the holdings of this and other courts. The Ninth Circuit now overlooks unmistakable religious hostility in legislation, so long as the Legislature tacked on some secular justification as well. This could not be more incongruent with this Court's holdings in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), and *Employment Div. v. Smith*, 494 U.S. 880 (1990) (herein *Smith II*). Review is needed to prevent the West Coast from becoming a Free Exercise-free zone for those whose religious beliefs are not sanctioned by the State.

On privacy, the ramifications of the Ninth Circuit's decision are equally troubling. By holding that Welch's claims are no different than clamoring for unapproved medical treatment, the Court of Appeals has cordoned off a large segment of relational, sexuality and gender autonomy from minors. The decision below finds no privacy interests whatsoever in a minor's decision whether to seek professional help with same-sex attraction or gender identity. This is a significant aberration from the decisions of this and other courts.

The Petition should be granted to harmonize the lower courts on the fundamental precepts of religious freedom and sexual privacy.

STATEMENT OF THE CASE

A. Statutory Background

The full text of Senate Bill (SB) 1172 is reproduced in the Pet. App. at 19.

Following several months of spirited public debate, the Legislature passed SB 1172 on August 30, 2012. Gov. Edmund G. Brown, Jr., signed the bill on September 30, 2012, and it was scheduled to take effect on January 1, 2013.

To summarize, SB 1172 provides that "under no circumstances shall" mental health providers engage in "any practices" that "seek to change" a minor's sexual orientation, gender identity or gender expression, or to reduce sexual or romantic attractions or feelings

towards individuals of the same sex. Cal. Bus. & Prof. Code § 865(b)(1). These are referred to variously as sexual orientation change efforts (SOCE), reparative therapy, or conversion therapy. In condemning SOCE, the Legislature pointed to a number of religious practices such as *prayer*, *religious conversion*, and *spiritual interventions*. At the same time, SB 1172 permits psychotherapies that provide acceptance and support of sexual identity exploration and development so long as the treatment does not seek to change sexual orientation. *Id.* at (b)(2).

The prohibition applies regardless of whether a minor seeks such efforts to bring sexual desires into conformity with personal beliefs, practices and faith.

B. Petitioners

The material facts below are undisputed.

Donald Welch is a licensed marriage and family therapist and an ordained minister. In addition to his private practice and teaching responsibilities as an adjunct professor, Dr. Welch works part-time heading the counseling ministry at Skyline Wesleyan Church ("Skyline" or "Church"). Skyline teaches that "human sexuality . . . is to be expressed only in a monogamous, lifelong marriage between one man and one woman." In his pastoral role, Dr. Welch is prohibited from encouraging, enabling or validating sexual beliefs or behaviors contrary to the teachings of the Church. Dr. Welch's clientele includes minors who identify as gay, lesbian, bisexual, heterosexual and questioning youth.

Some of these clients struggle with sexual attractions, and behaviors, as well as romantic feelings inconsistent with their moral convictions, and their family's values. He does not attempt to change a teenager's sexual orientation against their will. As a result of the restrictions on SOCE passed into law, Dr. Welch is subject to professional discipline by the California Board of Behavioral Sciences, whose board members are named as defendants.

Anthony Duk is a faithful Roman Catholic. Dr. Duk is a board certified psychiatrist in private practice who works with adults and minors over the age of 16. Some of these clients struggle with unwanted same-sex attractions. He believes that sexual orientation "touches on the most personal issues in the human condition, including sex, family relationships, religion, culture, and medical issues." In view of this, some families seek out Dr. Duk specifically because they share his Catholic beliefs which he integrates with psychiatric methods. With such patients, he discusses their common 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. In Dr. Duk's experience, many of his minor patients seek to alter or reduce same-sex attraction in accordance with their religious, cultural, and family values. As a result of the restrictions on SOCE passed into law, Dr. Duk is subject to professional discipline by the Medical Board of California, whose board members are named as defendants.

Aaron Bitzer began experiencing same-sex attractions in adolescence and participated in SOCE as an adult. He found his experience with SOCE helpful and began pursuing becoming a licensed practitioner of SOCE who could help other young people. The enactment of SB 1172 has halted his career plans.

Facing the imminent prospect of professional and legal liability, Welch filed suit to challenge the constitutionality of the statutory prohibitions.

C. Proceedings Below

After SB 1172 was signed into law on September 30, 2012, the Petitioners filed suit in the Eastern District of California on October 1, 2012. A few days later, a separate group of plaintiffs, headed by a licensed counselor named David Pickup, also filed suit in the Eastern District with different counsel.

The claims of the Welch Plaintiffs originally included violations of speech,[1] the Establishment and Free Exercise Clauses (collectively, the Religion Clause), association, privacy, and due process. Welch sought a preliminary injunction, which was granted on December 2, 2012. Judge Shubb only reached the speech claim. The very next day, Judge Mueller of the same court denied an injunction sought by the Pickup plaintiffs.

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[1] The Welch Plaintiff-Petitioners' free speech claims included content and viewpoint discrimination, vagueness, and overbreadth.

Both the State and the Pickup plaintiffs appealed from the respective injunction rulings. A panel of the Ninth Circuit then issued a stay which prevented SB 1172 from taking effect.[2]

On appeal, another Ninth Circuit panel[3] reversed Judge Shubb and affirmed Judge Mueller, agreeing with the State that the statute did not implicate free speech and thus was easily justifiable under rational basis review. In its first opinion, dated August 29, 2013, the panel undertook plenary review. The court of appeals determined the prohibition affected only conduct and not speech. Following combined Petitions for Rehearing and Rehearing *En Banc*, the Ninth Circuit withdrew its first opinion and issued an Amended Opinion and Order Denying Rehearing and Rehearing *En Banc*, on January 29, 2014. *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). The panel declined to address the religion claim stating the "District Court may do so in the first instance." Pet. App. 29. Judge O'Scannlain, joined by Judges Bea and Ikuta, issued a sharp dissent from the denial of rehearing *en banc*. Pet. App. 9-22. This Court then denied certiorari as to Welch's free speech claims.

On remand, the Welch plaintiffs again sought a preliminary injunction, reasserting their Religion Clause and privacy claims. This time, Judge Shubb

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[2] Circuit Judges Goodwin, Levy and M. Smith ordered the stay.

[3] The panel was comprised of Chief Judge Kozinski, and Circuit Judges Graber and Christen.

denied the motion, and then granted the State's motion for judgment on the pleadings. However, Judge Shubb did not issue a new opinion in granting judgment, thus treating the standards for preliminary injunction and judgment on the pleadings as one and the same. Welch then appealed this ruling to the Ninth Circuit. Following briefing and argument, the Ninth Circuit panel affirmed the District Court on August 23, 2016. The Ninth Circuit relied heavily on its prior opinion in *Pickup*, treating the Religion Clause standards as little different than rational basis review, and regarding the privacy interests as no different than the parental rights arguments it had previously rejected. Welch again filed Combined Petitions for Rehearing and Rehearing *En Banc*, pointing out the many arguments its opinion had left unaddressed. In response, the Ninth Circuit issued a modified opinion on October 3, 2016, while denying rehearing and rehearing *en banc*. This Petition timely follows.

REASONS FOR GRANTING THE PETITION

I. The Questions Presented Are Of Enormous And Recurring Importance, In That The Decision Below Retreats From Core Religion Clause Protections, In Conflict With The Holdings Of This Court And Other Courts Of Last Resort.

In the course of enacting SB 1172, the Legislature took an inordinate interest in religious values and practices related to sexuality and SOCE. The extent of

the religious discussions in the legislation and its history is striking. The Ninth Circuit therefore took an unusual route to uphold the legislation's constitutionality.

First, the Ninth Circuit decided not to follow this Court's lead in *Hosanna-Tabor*. Next, the Ninth Circuit recast the "primary effect" and "excessive entanglement" prongs of the *Lemon* test to the point of unrecognizability. Lastly, the Ninth Circuit constricted Free Exercise so sharply that it will be difficult for future litigants to maintain any such claim.

A. The Ninth Circuit has ensured that *Hosanna-Tabor* and this Court's other church autonomy precedents will have limited application in the Circuit.

Since at least the Reconstruction Era, this Court has acknowledged the unique First Amendment challenges presented when a state or local government restricts a church's ability to carry out its religious mission. *Watson v. Jones*, 80 U.S. 679 (1871); *see also*, *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in America*, 344 U.S. 94 (1952).

Most recently, in *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S.Ct. 694 (2012), this Court read the Establishment and Free Exercise Clauses as one Religion Clause[4] in upholding the

[4] Since the word *religion* appears just once in the First Amendment, the singular form will be used herein unless otherwise noted.

ministerial exception. At the heart of the Clause, there is a "spirit of freedom for religious organizations, an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of . . . faith and doctrine." *Id.* at 704.

Here, Welch urged the Ninth Circuit to follow this Court's lead in light of the implications for inculcation of church teaching. The Ninth Circuit, without a passing glance toward *Hosanna-Tabor*, went its own way. The Panel's belief that *Hosanna-Tabor* has nothing to say in Welch's dilemma makes clear that the appellate court regards this Court's pronouncement as having no impact beyond its immediate facts.

B. The Ninth Circuit's holding that a minister can easily bifurcate his spiritual and secular counseling roles conflicts directly with the Texas Supreme Court, the Seventh Circuit, the Sixth Circuit, and more broadly with the Utah and California Supreme Courts.

The Ninth Circuit justified its avoidance of church autonomy authorities by insisting that clergy like Dr. Welch must separate his roles between minister of the Gospel and licensee of the State – even though he is in both cases employed by the church and operating within its walls. The Panel Opinion attempted to delineate that if ministers engage in pastoral counseling the law does not apply, "as long as they don't hold

themselves out as operating pursuant to their [counseling] license." Op. at 8.

In holding that ministers should parse out their spiritual and secular roles, the Ninth Circuit has aligned itself with a dissent from the Seventh Circuit – and against the law of that Circuit. *Dausch v. Ryke*, 52 F.3d 1425 (7th Cir. 1994). The *Dausch* court affirmed dismissal of a complaint without leave to amend, finding that the counselee and congregant failed to adequately allege that the minister's "psychological counseling was not part of the church's religious beliefs and practices." *Id.* at 1428. Like the Ninth Circuit, the dissent argued that a claim will lie if a church's psychological services were "secular in nature" or the "provider held himself out to be providing services of a psychological counselor." *Id.* at 1433 (Ripple, J., dissenting). The dissenting judge likened professional counseling within the church to services performed by medical doctors and attorneys. *Id.* at 1433. The Ninth Circuit's holding is also irreconcilable with the decision of the Texas Supreme Court in *Westbrook v. Penley*, 231 S.W.3d 389 (2007). In *Westbrook*, a woman sued a marriage counselor, who subsequently became her pastor, after he disclosed her infidelity to the church and church discipline was instituted against her. She argued that the counselor/pastor could be held liable for his breach of confidentiality rules. The Texas Supreme Court set forth the issue and its conclusion succinctly:

> For purposes of our review, we presume the counseling at issue was purely secular in nature as Penley claims. Even so, we cannot ignore Westbrook's role as Penley's pastor. In his dual capacity, Westbrook owed Penley conflicting duties. As Penley's counselor, he owed her a duty of confidentiality, and as her pastor, he owed Penley and the church an obligation to disclose her conduct. We conclude that parsing those roles for purposes of determining civil liability in this case, where health or safety are not at issue, would unconstitutionally entangle the court in matters of church governance and impinge on the core religious function of church discipline. Accordingly, we reverse the Court of Appeals judgment and dismiss the case for want of jurisdiction. *Id.* at 391-92.

The Ninth Circuit's contrary holding that ministers can indeed parse their counseling duties between the secular and sacred ensures that the Religion Clause will present very different levels of protection in these two jurisdictions for nearly identical conduct.

Further, the Ninth Circuit's approach clashes with that of the Sixth Circuit, which just prior to its own decision in *Hosanna-Tabor* applied the ministerial exception to counseling known as clinical pastoral education in a religiously-affiliated hospital. *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007). The Ninth Circuit's view that a church, or its ministers, can easily separate their clerical and professional roles clashes with *Hollins*.

In similar fashion, a number of state courts have relied on either or both halves of the Religion Clause to bar tort liability for religious counseling. Among these jurisdictions are the Supreme Court of Utah, *Franco v. Church of Jesus Christ of Latter-Day Saints*, 21 P.3d 198 (Utah 2001); the California Supreme Court, *Nally v. Grace Community Church*, 47 Cal.3d 278 (1988); the Connecticut Court of Appeals, *DeCorso v. Watchtower Bible & Tract Soc'y*, 829 A.2d 38 (Conn. Ct. App. 2003). A number of other state courts have limited liability for clergy counseling to instances where the minister's actions are clearly disavowed by his church, as in cases of sexual abuse. *See*, *e.g.*, *Malicki v. Doe*, 814 So. 2d 347 (Fla. 2002). As this Court did in *Hosannas-Tabor*, these courts have often combined both Establishment and Free Exercise principles in reaching their decisions, occasionally disagreeing amongst themselves as to which half of the Clause should predominate.

Instead of following the lead of this and the many other appellate courts that have grappled with religious counseling, the Panel retreated on the Religion Clause and restricted both the Establishment and Free Exercise clauses to a degree not previously seen. Remarkably, the Ninth Circuit now offers religious counseling far less protection than this Court affords job counseling and other professional consultation. *Bd. of Trustees v. Fox*, 492 U.S. 469, 473 (1989) (noting that job counseling, tutoring, legal advice, and medical consultation would be protected noncommercial speech).

The Petition should be granted to reassert the symbiotic nature of the Religion Clause when church autonomy and religious counseling are at stake. The federal courts of appeals and the state courts of last resort lack clarity as to how such cases should be approached, though nearly all have expressed greater sensitivity to the delicate balance that must be struck than did the Ninth Circuit.

C. The decision below renders excessive entanglement and primary effect as meaningless prongs of the *Lemon* test.

In keeping with *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the essence of Welch's Establishment Clause claim is that the primary effect of SB 1172 is to inhibit certain religious beliefs and practices, and that the legislation excessively entangles the State in church doctrine.

i. The Ninth Circuit turned constitutional avoidance into a means of undermining *Lemon*.

One of the surprising tools selected by the Ninth Circuit to avoid dealing with the Legislature's repeated disparagement of religious practices was the doctrine of constitutional avoidance. In doing so, the court invented a new device for circumventing this Court's repeated refrain that "context matters" in the Establishment Clause. The Ninth Circuit now holds that context matters very little, whenever the court

chooses to invoke constitutional avoidance and ignore inconvenient legislative history evincing hostility toward religion.

The doctrine is that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems *unless such construction is plainly contrary to the intent*" of the legislature. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). (Emphasis added).

However, this Court will not take that route when to do so would jeopardize First Amendment rights. *Citizens United v. FEC*, 558 U.S. 310, 329 (2010); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 17 (2010).

The Legislature, in several committee analyses, stated that SOCE included *prayer*, *religious conversion* and *spiritual intervention*. The Ninth Circuit, recognizing the glaring Religion Clause problem with such a clear prohibition of religious practices, rejected the Legislature's description of the single most important term in the legislation.

The Ninth Circuit's approach ignores not only the directives of this Court, but an earlier admonition from Justice Cardozo: "[Avoidance] of a difficulty will not be pressed to the point of disingenuous evasion. . . . The problem must be faced and answered. *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933).

ii. The Ninth Circuit has turned primary effect under *Lemon* into an unscalable wall for hostility toward religion claims.

Having erased inconvenient legislative history about the religious scope of the banned practice, the Ninth Circuit set about rewriting this Court's *Lemon* test. Instead of examining the primary effect of the legislation, the Ninth Circuit asked whether SB 1172 was "a law aimed *only* at religious persons." Op. at 9 (emphasis in original).

Since few statutes are utterly devoid of any positive, permissible effects, this Court has assiduously avoided such an approach. Taking the opposite path, the Ninth Circuit believed that setting an impossibly high bar for hostility toward religion allowed it to ignore the startling amount of anti-religious rhetoric in the legislative history.

The primary purpose and effect of SB 1172 is to inhibit certain religious beliefs and motivations.[5] References to *religion* were not stray comments made by loose-tongued legislators veering off script. Rather the record is permeated with analysis and commentary on religion.

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[5] Papers filed with the District Court included a request for judicial notice of the Bill's legislative record. The request was without objection and the District Court referenced these documents in its two orders on the motions for preliminary injunction. *Welch v. Brown*, 907 F. Supp. 2d 1102, 1112, 1119 (E.D. Cal. 2012) and *Welch v. Brown*, 58 F. Supp. 3d 1079 (E.D. Cal. 2014).

The experts on whom the Legislature heavily relied simply disagree with the notion that a person of faith should choose values over sexual desires. Lawmakers leaned heavily on the Report of the American Psychological Association Task Force on Appropriate Therapeutic Response to Sexual Orientation ("APA Report").[6] The Task Force wrote: "[A]lthough many religious individuals desired to live their lives consistently with their values, primarily their religious values, we concluded that telic congruence grounded in self-stigma and shame was unlikely to result in psychological well-being."[7] Instead, the mental health worker should focus on therapy which includes "acceptance and support, active coping . . . and identity exploration and development."[8] This passage mirrors section 865(b)(2)(A) of the Act.[9]

Going even further, the APA Report recognizes the essential conflict between a conservative religious

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[6] The APA Report is in the record, having been filed by both parties, and is accessible online at http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf. For ease of reference and access, this brief will cite to the pages from the version of the Report, an exact copy of which appears in the record.

[7] APA Report at 55.

[8] APA Report at v. Nearly identical language is also found at APA Report at 4-6, 55, 63 and 86.

[9] SOCE does not include psychotherapies that: "provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development. . . ." This provision of the statute is cut and pasted from the abstract of the APA Report at v.

philosophy and a psychology-based philosophy.[10] "[R]eligious fundamentalism is correlated with negative views of homosexuality, whereas a quest orientation is associated with decreased discriminatory or prejudicial attitudes."[11]

On the subject of religion, the APA Report is much lengthier than can be recounted here. The Legislature's extensive reliance on the APA Report, including the verbatim use of language from the Report in the statute (865(b)(2)(A)), makes it evident that they adopted the thinking of the authors of the APA Report. A side-by-side reading of the legislative record and the language on the face of the text of the statutes, and the APA Report shows that the primary purpose and effect of SB 1172 is to inhibit certain religious beliefs and motivations, while bolstering opposing beliefs. The Ninth Circuit's attempted revision of this legislative history is disingenuous; where the Ninth Circuit mentions "some" religious people affected by the statute, the legislative history much more candidly acknowledges that most of the targets of the legislation are religious. The difference is crucial for primary effect under *Lemon*.

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[10] APA Report at 17-20.

[11] APA Report at 18.

iii. The Ninth Circuit's approach to excessive entanglement is markedly different from other appellate courts.

Besides taking aim at particular religious motivations and beliefs, thereby ensuring a primary effect of inhibiting religion, the Legislature further ensured excessive entanglement by acknowledging and embracing intrusion into core religious practices. Other appellate courts have been unwilling to trespass into this territory in religious counseling cases. *Nally*, *supra; Franco*, *supra; DeCorso*, *supra*.

The Panel opinion below is diametrically opposed to these state appellate courts on excessive entanglement arising from government regulation of religious counseling.

This is not the first, though it may be the worst, of the Ninth Circuit's decisions condoning open legislative hostility toward religion. In *American Family Ass'n v. City and County of San Francisco*, 277 F.3d 1114 (9th Cir. 2002) the Ninth Circuit approved actions by the Board of Supervisors urging local media not to accept advertising from certain religious groups. And in *Catholic League for Religious and Civ. Rights v. City and County of San Francisco*, 624 F.3d 1043 (9th Cir. 2010), only a handful of the judges on the *en banc* panel recognized the excessive entanglement problems with the Board of Supervisors' unrestrained verbal assaults on the Roman Catholic Church.

Here, the Ninth Circuit has taken a large step beyond its earlier holdings by approving unabashed legislative hostility toward religion that goes beyond diatribes and turns hostility into punishment. The Petition should be granted to preserve fidelity to this prong of *Lemon* in this Circuit.

D. The Ninth Circuit has fundamentally altered this Court's careful approach in *Smith* and *Church of the Lukumi Babalu Aye*.

Religious liberty "occupies a preferred position" and . . . the Court will not permit encroachments upon this liberty, whether direct or indirect." *Smith II*, 494 U.S. at 896 (O'Connor, J., concurring).

The Ninth Circuit disagrees. In the present case, and most recently *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015), the Circuit has constricted religious challenges to the lowest level of constitutional review if the text of a law passes formal neutrality. As explained below, that position stems from a misreading of *Smith II* and *Lukumi*.

Welch delineated in briefs filed with the Circuit's Panel that the record unquestionably showed that those who seek SOCE are primarily religious conservatives. The bill's analysis reads: "the task force concluded that the population that undergoes SOCE tends to have strongly conservative religious views that lead

them to seek to change their sexual orientation."[12] This language is taken directly from the APA Report.[13]

California's lawmakers saturated the analyses with references, summations and quotes (at times without attribution) taken directly from the APA Report. Further, a review of the APA Report leaves no doubt that religious conservatives are those typically seeking SOCE[14] – and those whose beliefs the Legislature seeks to change. The evidence reflected in the APA Report shows that those wanting to diminish same-sex attractions do so because of religious convictions, desirous of living their lives in a manner consistent with their values.[15] These "consider religion to be an extremely important part of their lives and participate in traditional conservative faiths."[16] They "experience psychological distress and conflict due to . . . [the] irreconcilability of their sexual orientation and religious beliefs.[17] Beliefs about sexual behavior and orientation are rooted in interpretations of traditional religious doctrine.[18] Consistent with this, in four separate places

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[12] Excerpts of Record ("E.R.") III:472; E.R. III:482. The legislative history is found in full in the record filed in the Circuit Court. The official cite is found at 2011 Legis. Bill Hist. CA S.B. 1172. For purposes of this brief, citations to the legislative history will be to the record.

[13] *See*, the APA Abstract at p. v.

[14] APA Report at v, 3, 17, 20, 25, 45, 52, 56, 66.

[15] APA Report at 4, 46, 82-83.

[16] APA Report at 3.

[17] APA Report at 5, 46.

[18] APA Report at 17.

the legislative record cites to the World Health Organization who describe this phenomena as a "conflict between sexual urges and religious belief systems."[19] Homosexuality is viewed as sinful and immoral.[20] "Some report difficulty coping with intense guilt over the failure to live a virtuous life and inability to stop committing unforgiveable sins, as defined by their religion."[21]

It is indisputable that religion played a prominent role in the Legislature's adoption of SB 1172. It was repeatedly and explicitly recognized that religious conservatives were not a subset but rather the predominant population of those wanting to diminish same-sex attractions.[22]

In short, the Legislature's focus on religious motivations was extraordinary – but the Ninth Circuit held it was not enough. In so doing, the appellate court has unilaterally transformed this Court's First Amendment jurisprudence. In rejecting Welch's claim that SB 1172 is not neutral relative to religion, the Panel's opinion explains,

> Moreover, even if we assume that persons with certain religious beliefs are more likely to seek SOCE, the "Free Exercise Clause is not violated even if a particular group, motivated by religion, may be more likely to

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[19] E.R. II:450; E.R. II:458; E.R. II:465; E.R. II:495.

[20] APA Report at 12, 18, 20, 82.

[21] APA Report at 46.

[22] E.R. III:472; E.R. III:482; E.R. III:489.

> engage in the proscribed conduct." Op. at 13-14, quoting *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1077 (9th Cir. 2015).

The rationale from *Stormans* quoted by the Panel in this case emanates from the position that the absence of direct "reference to any religious practice, conduct, belief, or motivation" makes the law *ipso facto* "facially neutral." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015). The problem with the Ninth Circuit's approach is that it provides a safe harbor for religious discrimination so long as the legislative drafter is not dimwitted enough to specifically mention religion on the face of the text. This case demonstrates why such a rule is problematic.

The Ninth Circuit's jurisprudence on the Religion Clause has strayed far afield, even from *Smith II*.[23] In *Smith II* it was noted that there was "no contention that Oregon's drug law represents an attempt to regulate religious beliefs." *Smith II*, 494 U.S. at 888. Likewise, in a case involving a religious objection to Social Security Numbers, this Court noted "[t]here is no claim that there is any attempt by Congress to discriminate invidiously or any covert suppression of particular religious beliefs. *Bowen v. Roy*, 476 U.S. 693, 703 (1986). This Court further noted, "there is nothing whatever suggesting antagonism by Congress towards religion

[23] A number of Justices have called into question the viability of *Smith II*. *See*, *Lukumi*, 508 U.S. at 559 (Souter, J., concurring); *Id.* at 578 (Blackmum, J., concurring joined by O'Connor, J.).

generally or towards any particular religious beliefs." *Id.* at 708.

After this Court's decision in *Smith II* this Court rejected the notion that "our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative." *Lukumi*, 508 U.S. at 534 (1993). The Religion Clauses "forbid[] subtle departures from neutrality," *Gillette v. United States*, 401 U.S. 437, 452, (1971), and "covert suppression of particular religious beliefs," *Bowen*, 476 U.S. at 703. Hence, "even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices" subject laws to strict scrutiny review. *Lukumi*, 508 U.S. at 547.

It is beyond cavil that the Ninth Circuit's test for claims under the Religion Clauses cannot be squared with this Court's holdings. But being in error is not enough. Although the Ninth Circuit's standard for measuring religious claims remains untenable, the opinions emanating from this Court make uniformity in the Circuits highly improbable. As such, the granting of this Petition is of enormous importance.

Although this is not a merits brief, Welch advocates for the substantial burden test articulated in the dissent in *Smith II* as the standard. A middle position is also viable wherein any evidence that a law seeks in part to hinder religious belief or practice should require a legal review under the crucible of strict scrutiny. In either event, clarity from this Court is needed.

The 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. *Smith II*, 494 U.S. at 877. Thus, the First Amendment "obviously excludes all governmental regulation of religious beliefs as such." *Id.* (*citing Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963). Nor can the government "punish the expression of religious doctrines it believes to be false." *Id.* (*citing United States v. Ballard*, 322 U.S. 78, 86, 88 (1944)).

In the seminal case on same-sex marriage handed down by this Court, writing for the majority, Justice Kennedy sought to assuage fears by putting forward the following assurance.

> [I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious *organizations* and *persons* are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (emphasis added).

This case presents an early opportunity to determine if the federal courts remain committed to the protection of religious freedom by the faithful – and within

the four walls of houses of worship – or whether this was a "weak gesture towards religious liberty." *Id*. at 2638 (Scalia, J., dissenting).

II. The Ninth Circuit Has Gone Backwards On Privacy.

Lastly, the Opinion's misapplication of *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), to foreclose the privacy claims cordons off some of this Court's most promising pronouncements on privacy and renders them fleeting breaths.

Importantly, this Petition does not pose a clash between religious and LGBTQ rights. It indeed exposes a clash of ideologies – but not rights. As discussed in the previous sections, the statutory prohibition falls heavily on the Petitioners who serve as mental health professionals facing legal liability because of the integration of their faith and practice. But the law also burdens gay youth.[24] As religious conservatives, these young people struggle with unwanted same-sex attractions and seek counseling so that they can bring their conduct in line with their convictions. Though championed as a gay rights bill, ironically the law only

[24] The District Court did not reach the privacy claim based on third party standing. However, the Petitioners raised *jus tertii* standing in the Ninth Circuit for the minors who seek counseling from Drs. Duk and Welch. The Panel did not follow the District Court by dismissing the privacy claim for lack of standing, though it affirmed on other grounds.

burdens the privacy rights of minors who are gay and questioning.

The United States Constitution is recognized to contain a fundamental right to privacy that has been extended by this Court to include personal, marital, familial, and sexual privacy, as protected by the Bill of Rights and its penumbras.

The level of government intrusion and invasion of privacy introduced by SB 1172 is irreconcilable with constitutional privacy rights. "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)) ("intimate choices that define personal identity and beliefs.").

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

The Opinion assumes that the heightened privacy rights at stake here are no different than the rights at issue in *Pickup* – even though the claims, arguments and plaintiffs themselves bear little resemblance to each other. The fundamental error is that the Opinion conflates claims for parental rights to seek unapproved

medical treatment for their children with fundamental privacy claims to self-definition and identity of the minors themselves. Op. at 14.

Minors have a liberty interest, free from government interference, to decide the gender and orientation of the person they may wish to sleep with – or for that matter whether they will be abstinent. "[L]iberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015).

The government has very limited authority to restrict citizens' ability to access information and services related to their personal autonomy, identity, and sexuality.

SB 1172 directly violates the fundamental constitutional right to privacy in that it prohibits minors from defining their own existence. The law prevents minors from accessing mental health services and spiritual mentoring that would assist them in diminishing same-sex attraction in accordance with self-defined religious, moral, cultural, and philosophical beliefs.

Addressing principles common to both religious freedom and privacy, Justice Kennedy emphasized that such freedoms stretch beyond mere belief and essentially protect self-definition. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 at 2785 (2014) (Kennedy, J., concurring). This type of self-definition is precisely what the State seeks to restrict minors from freely developing and the Plaintiffs from assisting.

The Petition should be granted to prevent a catastrophic Circuit retreat on privacy, autonomy and self-definition.

III. The Spread Of Prohibitions On SOCE In Various Jurisdictions Demonstrates The Importance Of Setting Constitutional Parameters.

In addition to California, five states have passed legislation placing restrictions or outright bans on SOCE for minors.[25] In addition, a number of municipalities have also prohibited SOCE for young people.[26] Many state legislatures are considering such bills.

This case presents an early opportunity to decide whether such laws are consistent with the First Amendment's expressive rights as well as privacy. The record is fully developed, containing numerous declarations submitted by the parties, experts and the full text of the APA Report and Legislative history.

In light of the great public importance of this issue, this Petition merits the granting of certiorari.

[25] These are Illinois (2015 Ill. Laws 411), New Jersey (N.J. Stat. § 45:1-54), New York (2016-29 N.Y. St. Reg. 16, prohibiting insurance coverage for "gay conversion" of a minor), Oregon (OR H.B. 2307) and Vermont (2015 Vt. S. 132).

[26] Cincinnati (Ord. No. 373-2015), District of Columbia (62 D.C. REG. 7), Miami (Ord. No. 2016-4018, § 1, 6-8-16), Pittsburgh (Title VI, Art. 1, § 628), and Seattle (Ord. 125100, § 1, 2016).

CONCLUSION

The Ninth Circuit's opinion fundamentally alters its approach to the Religion Clause as a unit, and the Establishment and Free Exercise Clauses separately. In so doing, the Ninth Circuit has rendered the First Amendment much less vibrant than it is in the rest of the country. The Ninth Circuit's decision also rolls back basic privacy protections by holding that minors have no right to obtain professional help in the process of defining their gender and sexuality when the government believes they are making the wrong choices. The Petition should be granted to prevent a major regression of these constitutional rights in a wide swath of the country.

Date: January 3, 2017

Respectfully submitted,

KEVIN T. SNIDER
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Attorneys for Petitioners

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD WELCH; ANTHONY DUK; AARON BITZER,

Plaintiffs-Appellants,

v.

EDMUND G. BROWN, JR., Governor of the State of California, in his official capacity; DENISE BROWN, Case Manager, Director of Consumer Affairs, in her official capacity; HARRY DOUGLAS; JULIA JOHNSON; SARITA KOHLI; RENEE LONNER; KAREN PINES; CHRISTINA WONG, in their official capacities as members of the California Board of Behavioral Sciences; SHARON LEVINE; MICHAEL BISHOP; REGINALD LOW; DENISE PINES; SILVIA DIEGO; DEV GNANADEV; JANET SALOMONSON; GERRIE SCHIPSKE; DAVID SERRANO SEWELL; BARBARA YAROSLAVSKY; ANNA M. CABALLERO; CHRISTINE WIETLISBACH; PATRICIA LOCKDAWSON; SAMARA ASHLEY, in their official capacities as members of The Medical Board of California,

Defendants-Appellees.

No. 15-16598

D.C. No. 2:12-cv-02484-WBS-KJN

ORDER AND AMENDED OPINION

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

Argued and Submitted June 22, 2016
San Francisco, California

Filed August 23, 2016
Amended October 3, 2016

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

Order;
Opinion by Judge Graber

SUMMARY*

Civil Rights

The panel amended the opinion filed on August 23, 2016; affirmed the district court's judgment on the pleadings, entered in favor of the State of California, on remand from a preliminary injunction appeal, in an action challenging California's Senate Bill 1172, which prohibits state-licensed mental health providers from engaging in "sexual orientation change efforts" with minor patients; denied the petition for panel rehearing; and denied on behalf of the court the petition for panel rehearing en banc.

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

The panel held that plaintiffs' claims under the Free Exercise and Establishment Clauses of the First Amendment failed. The panel rejected plaintiffs' Establishment Clause claim that Senate Bill 1172 excessively entangled the State with religion. The panel held that the scope of the law regulates conduct only within the confines of the counselor-client relationship.

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

Finally, the panel held that plaintiffs' privacy claim was foreclosed by *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), which held that substantive due process rights do not extend to the choice of type of treatment or of a particular health care provider.

COUNSEL

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William D. Temko, Katherine M. Forster, and Thomas Paul Clancy, Munger, Tolles & Olson LLP, Los Angeles, California; Shannon P. Minter and Christopher F. Stoll, National Center for Lesbian Rights, San Francisco, California; for Amicus Curiae Equality California.

ORDER

The opinion filed August 23, 2016, and published at 2016 WL 4437617, is amended by the opinion filed concurrently with this order.

With this amendment, the panel has voted to deny Appellants' petition for panel rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellants' petition for panel rehearing and petition for rehearing en banc are **DENIED**. No further petitions for panel rehearing or petitions for rehearing en banc may be filed.

OPINION

GRABER, Circuit Judge:

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

Our earlier opinion in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), contains further background information. In that appeal, we undertook plenary

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

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

Plaintiffs first argue that, under the Establishment Clause, SB 1172 excessively entangles the State with religion. Their argument rests on a misconception of the scope of SB 1172. For example, Plaintiffs assert

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

that Dr. Welch may not "offer certain prayers or quote certain Scriptures to young people" even "while working as a minister for Skyline Church" within "the four walls of the church . . . , while engaging in those religious activities." The premise of this Establishment Clause argument is mistaken, and the argument fails, because SB 1172 regulates conduct only *within the confines of the counselor-client relationship.*

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

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

& Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of [the legislature].").

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

Plaintiffs next argue that, under the Establishment Clause, SB 1172 "has the principal or primary effect of advancing or inhibiting religion." *Am. Family Ass'n, Inc. v. City of San Francisco*, 277 F.3d 1114, 1122

(9th Cir. 2002). "We conduct this inquiry from the perspective of a 'reasonable observer' who is both informed and reasonable." *Id.* (quoting *Kreisner v. City of San Diego*, 1 F.3d 775, 784 (9th Cir. 1993)).

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

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

state-licensed mental health provider acting within the confines of a counselor-client relationship, they can do so when they turn 18.

Plaintiffs nevertheless argue that SB 1172 has the effect of inhibiting religion because some minors who seek SOCE have religious motivations. We acknowledge that a law aimed *only* at persons with religious motivations may raise constitutional concerns. *See, e.g.*, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (invalidating under the Free Exercise Clause the prohibition of ritual animal slaughter, tailored to reach only religiously motivated conduct); *Cent. Rabbinical Congress of U.S. & Can. v. N.Y. City Dep't of Health & Mental Hygiene*, 763 F.3d 183 (2d Cir. 2014) (holding that strict scrutiny applies under the Free Exercise Clause to health regulations targeting metzitzah b'peh, an Orthodox Jewish ritual during circumcision). But SB 1172 falls well outside that category.

The bill's text and its legislative history make clear that the legislature understood the problem of SOCE to encompass not only those who seek SOCE for religious reasons, but also those who do so for secular reasons of social stigma, family rejection, and societal intolerance for sexual minorities. For example, in its express legislative findings, the legislature quoted a policy statement that found that "[*s*]*ocial stigmatization* of lesbian, gay and bisexual people is widespread and is a primary motivating factor in leading some people to seek sexual orientation changes." 2012 Cal. Legis. Serv. ch. 835, § 1(h) (emphasis added); *see also*

id. § 1(m) ("Minors who experience *family rejection* based on their sexual orientation face especially serious health risks." (emphasis added)). The documents in the legislative history recognized that religion is a motivating factor for some persons who seek to change their sexual orientation; but it also repeatedly listed "social stigmatization," "unfavorable and intolerant attitudes of the society," and "family rejection" as common causes of distress that might motivate people to seek counseling.

The legislative findings of SB 1172 cited a 2009 report from a Task Force convened by the American Psychological Association ("APA"). 2012 Cal. Legis. Serv. ch. 835, § 1(b). Plaintiffs note that the APA Task Force's report concluded that "the population that undergoes SOCE tends to have strongly conservative religious views that lead them to seek to change their sexual orientation." Extrapolating from that statement, Plaintiffs characterize the report as focusing *exclusively* on persons who seek SOCE for religious reasons. Plaintiffs further conclude that the legislature, too, focused exclusively on persons who seek SOCE for religious reasons.

We disagree. The evidence falls far short of demonstrating that the primary intended effect of SB 1172 was to inhibit religion. The legislative findings cite – in addition to the APA Task Force report – many other sources, including a 2009 resolution by the APA; a 2000 position statement by the American Psychiatric Association; a position statement by the American School Counselor Association; a 1993 article by the American

Academy of Pediatrics; a 1994 report by the American Medical Association Council on Scientific Affairs; a 1997 policy statement by the National Association of Social Workers; a 1999 position statement by the American Counseling Association Governing Council; a 2012 position statement by the American Psychoanalytic Association; a 2012 article by the American Academy of Child and Adolescent Psychiatry; and a 2012 statement by the Pan American Health Organization. 2012 Cal. Legis. Serv. ch. 835, § 1(c)-(*l*). Those additional sources do not characterize the main motivation of persons seeking SOCE as being religious.

Even viewing the APA Task Force's report in isolation does not support a conclusion that only those with religious views sought SOCE. Although the report concluded that those who seek SOCE "tend" to have strong religious views, the report is replete with references to non-religious motivations, such as social stigma and the desire to live in accordance with "personal" values. The report noted that "sexual stigma, manifested as prejudice and discrimination directed at non-heterosexual sexual orientations and identities, is a major source of stress for sexual minorities," which the report termed "minority stress." "Homosexuality and bisexuality are stigmatized, and this stigma can have a variety of negative consequences (e.g., minority stress) throughout the life span." "Some individuals choose to live their lives in accordance with *personal or* religious values. . . ." (Emphasis added.) The following illustrates the report's general approach:

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

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

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

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

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

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

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

Finally, Plaintiffs' privacy claim fails. Plaintiffs characterize their claim as relying on the principles found in cases such as *Lawrence v. Texas*, 539 U.S. 558 (2003). *Lawrence* rests on a substantive due process analysis. *Id.* at 564. Accordingly, we understand Plaintiffs to be asserting that their clients have a substantive due process right to receive a particular form of

treatment – SOCE – from a particular class of persons – mental health providers licensed by the State of California. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) ("[W]e have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest." (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993))). Our previous opinion forecloses that argument. *See Pickup*, 740 F.3d at 1235-36 ("[W]e have held that 'substantive due process rights do not extend to the choice of type of treatment or of a particular health care provider.'" (quoting *Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1050 (9th Cir. 2000))).

AFFIRMED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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DONALD WELCH, ANTHONY DUK, AARON BITZER,

Plaintiffs,

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, Director of Consumer Affairs, In Her Official Capacity, CHRISTINE WIETLISBACH, PATRICIA LOCKDAWSON, 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

CIV. NO. 2:12-2484 WBS KJN

ORDER RE: MOTION FOR JUDGMENT ON THE PLEADINGS

SCHIPSKE, DAVID SERRANO SEWELL, BARBARA YAROSLAYSKY, In Their Official Capacities as Members of the Medical Board of California,

Defendants.

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Defendants move for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) on the ground that plaintiffs' Complaint fails to state a claim as a matter of law.[1] Plaintiffs appear to recognize that the Ninth Circuit's decision in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), forecloses plaintiffs' challenges to SB 1172 based on free speech rights under the First Amendment and substantive due process protections. For the reasons the court previously concluded that plaintiffs were unlikely to prevail on their remaining challenges under the Free Exercise and Establishment Clauses and privacy rights of third parties, the court now finds that those claims fail as a matter of law. *See Welch v. Brown*, 58 F. Supp. 3d 1079, 1084-91 (E.D. Cal. 2014).

IT IS THEREFORE ORDERED that defendants' motion for judgment on the pleadings be, and the same hereby is, GRANTED. The clerk is instructed to enter

[1] Because oral argument is unnecessary, the hearing on July 27, 2015 is vacated and the motion is taken under submission pursuant to Local Rule 230(g).

judgment in favor of defendants on all claims and close the case.

Dated: July 21, 2015

/s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES
DISTRICT JUDGE

[LOGO] *California*
LEGISLATIVE INFORMATION

SB-1172 Sexual orientation change efforts.
(2011-2012)

Date Published:

Senate Bill No. 1172

CHAPTER 835

An act to add Article 15 (commencing with Section 865) to Chapter 1 of Division 2 of the Business and Professions Code, relating to healing arts.

[Approved by Governor September 30, 2012. Filed with Secretary of State September 30, 2012.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1172, Lieu. Sexual orientation change efforts.

Existing law provides for licensing and regulation of various professions in the healing arts, including physicians and surgeons, psychologists, marriage and family therapists, educational psychologists, clinical social workers, and licensed professional clinical counselors.

This bill would prohibit a mental health provider, as defined, from engaging in sexual orientation change efforts, as defined, with a patient under 18 years of age. The bill would provide that any sexual orientation change efforts attempted on a patient under 18 years of age by a mental health provider shall be considered unprofessional conduct and shall subject the provider to discipline by the provider's licensing entity.

The bill would also declare the intent of the Legislature in this regard.

Vote: majority Appropriation: no
Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares all of the following:

(a) Being lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming. The major professional associations of mental health practitioners and researchers in the United States have recognized this fact for nearly 40 years.

(b) The American Psychological Association convened a Task Force on Appropriate Therapeutic Responses to Sexual Orientation. The task force conducted a systematic review of peer-reviewed journal literature on sexual orientation change efforts, and issued a report in 2009. The task force concluded that sexual orientation change efforts can pose critical health risks to lesbian, gay, and bisexual people, including 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.

(c) The American Psychological Association issued a resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts in 2009, which states: "[T]he [American Psychological Association] advises parents, guardians, young people, and their families to avoid sexual orientation change efforts that portray homosexuality as a mental illness or developmental disorder and to seek psychotherapy, social support, and educational services that provide accurate information on sexual orientation and sexuality, increase family and school support, and reduce rejection of sexual minority youth."

(d) The American Psychiatric Association published a position statement in March of 2000 in which it stated:

"Psychotherapeutic modalities to convert or 'repair' homosexuality are based on developmental theories whose scientific validity is questionable. Furthermore, anecdotal reports of 'cures' are counterbalanced by anecdotal claims of psychological harm. In the last four decades, 'reparative' therapists have not produced any rigorous scientific research to substantiate their claims of cure. Until there is such research available, [the American Psychiatric Association] recommends that ethical practitioners refrain from attempts to change individuals' sexual orientation, keeping in mind the medical dictum to first, do no harm.

The potential risks of reparative therapy are great, including depression, anxiety and self-destructive behavior, since 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.

Therefore, the American Psychiatric Association opposes any psychiatric treatment such as reparative or conversion therapy which is based upon the assumption that homosexuality per se is a mental disorder or based upon the a priori assumption that a patient should change his/her sexual homosexual orientation."

(e) The American School Counselor Association's position statement on professional school counselors and lesbian, gay, bisexual, transgendered, and questioning (LGBTQ) youth states: "It is not the role of the professional school counselor to attempt to change a student's sexual orientation/gender identity but instead to provide support to LGBTQ students to promote student achievement and personal well-being. Recognizing that sexual orientation is not an illness and does not require treatment, professional school counselors may provide individual student planning or responsive services to LGBTQ students to promote self-acceptance,

deal with social acceptance, understand issues related to coming out, including issues that families may face when a student goes through this process and identify appropriate community resources."

(f) The American Academy of Pediatrics in 1993 published an article in its journal, Pediatrics, stating: "Therapy directed at specifically changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation."

(g) The American Medical Association Council on Scientific Affairs prepared a report in 1994 in which it stated: "Aversion therapy (a behavioral or medical intervention which pairs unwanted behavior, in this case, homosexual behavior, with unpleasant sensations or aversive consequences) is no longer recommended for gay men and lesbians. Through psychotherapy, gay men and lesbians can become comfortable with their sexual orientation and understand the societal response to it."

(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."

(i) The American Counseling Association Governing Council issued a position statement in April of 1999, and in it the council states: "We oppose 'the promotion of "reparative therapy" as a "cure" for individuals who are homosexual.' "

(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.

Psychoanalytic technique does not encompass purposeful attempts to 'convert,' 'repair,' change or shift an individual's sexual orientation, gender identity or gender expression. Such directed efforts are against fundamental principles of psychoanalytic treatment and often result in substantial psychological pain by reinforcing damaging internalized attitudes."

(k) The American Academy of Child and Adolescent Psychiatry in 2012 published an article in its journal, Journal of the American Academy of Child and Adolescent Psychiatry, stating: "Clinicians should be aware that there is no evidence that sexual orientation can be altered through therapy, and that attempts to do so may be harmful. There is no empirical evidence adult homosexuality can be prevented if gender nonconforming children are influenced to be more gender

conforming. Indeed, there is no medically valid basis for attempting to prevent homosexuality, which is not an illness. On the contrary, such efforts may encourage family rejection and undermine self-esteem, connectedness and caring, important protective factors against suicidal ideation and attempts. Given that there is no evidence that efforts to alter sexual orientation are effective, beneficial or necessary, and the possibility that they carry the risk of significant harm, such interventions are contraindicated."

(l) The Pan American Health Organization, a regional office of the World Health Organization, issued a statement in May of 2012 and in it the organization states: "These supposed conversion therapies constitute a violation of the ethical principles of health care and violate human rights that are protected by international and regional agreements." The organization also noted that reparative therapies "lack medical justification and represent a serious threat to the health and well-being of affected people."

(m) Minors who experience family rejection based on their sexual orientation face especially serious health risks. In one study, lesbian, gay, and bisexual young adults who reported higher levels of family rejection during adolescence were 8.4 times more likely to report having attempted suicide, 5.9 times more likely to report high levels of depression, 3.4 times more likely to use illegal drugs, and 3.4 times more likely to report having engaged in unprotected sexual intercourse compared with peers from families that reported no or low levels of family rejection. This is documented

by Caitlin Ryan et al. in their article entitled Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults (2009) 123 Pediatrics 346.

(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.

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

SEC. 2. Article 15 (commencing with Section 865) is added to Chapter 1 of Division 2 of the Business and Professions Code, to read:

Article 15. Sexual Orientation Change Efforts

865. For the purposes of this article, the following terms shall have the following meanings:

(a) "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, or trainee, or any other person designated as a mental health professional under California law or regulation.

(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.

865.1. Under no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age.

865.2. Any sexual orientation change efforts 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.