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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  
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 YAROSLAYSKY,  
In Their Official Capacities  
as Members of the Medical

NO. CIV. 2:12-2484 WBS KJN

MEMORANDUM AND ORDER RE:  
MOTION FOR PRELIMINARY  
INJUNCTION

1 Board of California,  
2 Defendants.

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5 Plaintiffs Donald Welch, Anthony Duk, and Aaron Bitzer  
6 seek to enjoin enforcement of Senate Bill 1172 ("SB 1172"), which  
7 if it goes into effect on January 1, 2013, will prohibit mental  
8 health providers from engaging in sexual orientation change  
9 efforts ("SOCE") with minors.

10 Because the court finds that SB 1172 is subject to  
11 strict scrutiny and is unlikely to satisfy this standard, the  
12 court finds that plaintiffs are likely to succeed on the merits  
13 of their 42 U.S.C. § 1983 claims based on violations of their  
14 rights to freedom of speech under the First Amendment. Because  
15 plaintiffs have also shown that they are likely to suffer  
16 irreparable harm in the absence of an injunction, that the  
17 balance of equities tips in their favor, and that an injunction  
18 is in the public interest, the court grants plaintiffs' motion  
19 for a preliminary injunction.<sup>1</sup>

20 I. Factual and Procedural Background

21 On September 29, 2013, defendant Governor Edmund G.  
22 Brown, Jr., signed SB 1172. SB 1172 prohibits a "mental health  
23 provider" from engaging in "sexual orientation change efforts  
24 with a patient under 18 years of age" under all circumstances.

25 \_\_\_\_\_  
26 <sup>1</sup> The court accordingly does not reach plaintiffs'  
27 remaining constitutional challenges, namely, that SB 1172  
28 violates any rights to privacy, violates the First Amendment Free  
Exercise and Establishment Clauses, or is unconstitutionally  
vague and overbroad under the First Amendment.

1 Cal. Stats. 2012, ch. 835, at 91 ("SB 1172") (to be codified at  
2 Cal. Bus. & Prof. Code §§ 865(a), 865.1). It further provides  
3 that "[a]ny sexual orientation change efforts attempted on a  
4 patient under 18 years of age by a mental health provider shall  
5 be considered unprofessional conduct and shall subject a mental  
6 health provider to discipline by the licensing entity for that  
7 mental health provider." Id. (to be codified at Cal. Bus. &  
8 Prof. Code § 865.2).

9 SB 1172 defines "sexual orientation change efforts" as  
10 "any practices by mental health providers that seek to change an  
11 individual's sexual orientation. This includes efforts to change  
12 behaviors or gender expressions, or to eliminate or reduce sexual  
13 or romantic attractions or feelings toward individuals of the  
14 same sex." Id. (to be codified at Cal. Bus. & Prof. Code §  
15 865(b)(1)). From this definition, SB 1172 excludes  
16 "psychotherapies that: (A) provide acceptance, support, and  
17 understanding of clients or the facilitation of clients' coping,  
18 social support, and identity exploration and development,  
19 including sexual orientation-neutral interventions to prevent or  
20 address unlawful conduct or unsafe sexual practices; and (B) do  
21 not seek to change sexual orientation." Id. (to be codified at  
22 Cal. Bus. & Prof. Code § 865(b)(2)). The bill defines "mental  
23 health provider" as:

24 a physician and surgeon specializing in the practice of  
25 psychiatry, a psychologist, a psychological assistant,  
26 intern, or trainee, a licensed marriage and family  
27 therapist, a registered marriage and family therapist,  
28 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

1 person designated as a mental health professional under  
2 California law or regulation.

3 Id. (to be codified at Cal. Bus. & Prof. Code § 865(a)).

4 Plaintiff Donald Welch is a licensed marriage and  
5 family therapist in California and an ordained minister. (Welch  
6 Decl. ¶ 1 (Docket No. 11).) He is currently the president of a  
7 non-profit professional counseling center, the owner and director  
8 of a for-profit counseling center, and an adjunct professor at  
9 two universities. (Id. ¶ 4.) Welch is also employed part-time  
10 as a Counseling Pastor for Skyline Wesleyan Church, which teaches  
11 that "human sexuality . . . is to be expressed only in a  
12 monogamous lifelong relationship between one man and one woman  
13 within the framework of marriage." (Id. ¶ 5, Ex. A at 3.) Welch  
14 provides treatment that qualifies as SOCE under SB 1172 and his  
15 "compliance with SB 1172 will jeopardize [his] employment" at  
16 Skyline Wesleyan Church. (Id. ¶¶ 5, 8-9, 11, 17.)

17 Plaintiff Anthony Duk is a medical doctor and board  
18 certified psychiatrist in full-time private practice who works  
19 with adults and children over the age of sixteen. (Duk Decl. ¶ 1  
20 (Docket No. 13).) His current patients include minors  
21 "struggling with" homosexuality and bisexuality. (Id. ¶ 6.) In  
22 his practice, Duk utilizes treatment that qualifies as SOCE under  
23 SB 1172. (Id.)

24 Plaintiff Aaron Bitzer is an adult who has had same-sex  
25 attractions beginning in his childhood and was "involved in  
26 sexual orientation efforts commonly called 'SOCE'" as an adult in  
27 2011 and 2012. (Bitzer Decl. ¶¶ 1-11, 15 (Docket No. 12).)  
28 Bitzer "had been planning on becoming a therapist specifically to

1 work" with individuals having same-sex attractions and to help  
2 men like himself. (Id. ¶ 26.) He explains that, "[b]ecause of  
3 SB 1172, [he has] had to reorder all of [his] career plans and  
4 [is] trying to pursue a doctorate so as to also contribute  
5 research to this field."<sup>2</sup> (Id.)

6 On October 1, 2012, plaintiffs initiated this action  
7 under 42 U.S.C. § 1983 against various state defendants to  
8 challenge the constitutionality of SB 1172. (See Docket No. 1.)  
9 In their Complaint, plaintiffs seek declaratory relief and  
10 preliminary and permanent injunctions. Presently before the  
11 court is plaintiffs' motion for a preliminary injunction in which  
12 they seek to enjoin enforcement of SB 1172 before the new law  
13 goes into effect on January 1, 2013.<sup>3</sup> The court granted Equality  
14 Justice permission to submit briefs and present oral argument as  
15 an amicus curiae in this case. (See Docket No. 30.)

16 II. Analysis

17 To succeed on a motion for a preliminary injunction,  
18 plaintiffs must establish that (1) they are likely to succeed on  
19 the merits; (2) they are likely to suffer irreparable harm in the  
20 absence of preliminary relief; (3) the balance of equities tips

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22 <sup>2</sup> Neither defendants nor amicus challenged whether Bitzer  
has Article III standing.

23  
24 <sup>3</sup> Defendants submitted numerous evidentiary objections to  
the declarations of Duk, Welch, and Bitzer "to the extent that  
25 they are offered as scientific opinion evidence on the efficacy  
or safety of [SOCE] generally, or on minors in particular, or on  
26 the nature and/or causes of homosexuality, bisexuality, or  
heterosexuality." (See Docket No. 37.) The court neither  
27 considers nor relies on these declarations for such purposes and  
discusses plaintiffs' statements in the declarations only to  
28 provide background information and to identify how Duk and Welch  
perform SOCE. The court therefore need not resolve defendants'  
evidentiary objections.

1 in their favor; and (4) an injunction is in the public interest.  
2 Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008);  
3 Perfect 10, Inc. v. Google, Inc., 653 F.3d 976, 979 (9th Cir.  
4 2011). The Supreme Court has repeatedly emphasized that  
5 "injunctive relief [i]s an extraordinary remedy that may only be  
6 awarded upon a clear showing that the plaintiff is entitled to  
7 such relief." Winter, 555 U.S. at 22.

8 "The purpose of a preliminary injunction is merely to  
9 preserve the relative positions of the parties until a trial on  
10 the merits can be held." Univ. of Tex. v. Camenisch, 451 U.S.  
11 390, 395 (1981). "'A preliminary injunction . . . is not a  
12 preliminary adjudication on the merits but rather a device for  
13 preserving the status quo and preventing the irreparable loss of  
14 rights before judgment.'" U.S. Philips Corp. v. KBC Bank N.V.,  
15 590 F.3d 1091, 1094 (9th Cir. 2010) (quoting Sierra On-Line, Inc.  
16 v. Phoenix Software, Inc., 739 F.2d 1415, 1422 (9th Cir. 1984))  
17 (omission in original).

18 A. Plaintiffs May Not Assert the Rights of Parents and  
19 Minors

20 "As a prudential matter, even when a plaintiff has  
21 Article III standing, [federal courts] do not allow third parties  
22 to litigate on the basis of the rights of others." Planned  
23 Parenthood of Idaho, Inc. v. Wasden, 376 F.3d 908, 917 (9th Cir.  
24 2004). The Supreme Court has "adhered to the rule that a party  
25 'generally must assert his own legal rights and interests, and  
26 cannot rest his claim to relief on the legal rights or interests  
27 of third parties.'" Kowalski v. Tesmer, 543 U.S. 125, 129 (2004)  
28 (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975)).

1           This limitation on prudential standing is not  
2 "absolute," and the Court has recognized "that there may be  
3 circumstances where it is necessary to grant a third party  
4 standing to assert the rights of another." Id. at 129-30.  
5 Specifically, a litigant may bring an action on behalf of a third  
6 party if "three important criteria are satisfied": "The litigant  
7 must have suffered an 'injury in fact,' thus giving him or her a  
8 'sufficiently concrete interest' in the outcome of the issue in  
9 dispute; the litigant must have a close relation to the third  
10 party; and there must exist some hindrance to the third party's  
11 ability to protect his or her own interests." Powers v. Ohio,  
12 499 U.S. 400, 410-11 (1991); accord Coalition of Clergy, Lawyers,  
13 & Professors v. Bush, 310 F.3d 1153, 1163 (9th Cir. 2002).

14           Third-party standing for physicians asserting the  
15 rights of their patients first developed in the abortion context.  
16 For example, in Singleton v. Wulff, 428 U.S. 106 (1976), the  
17 Supreme Court concluded that "it generally is appropriate to  
18 allow a physician to assert the rights of women patients as  
19 against governmental interference with the abortion decision."<sup>4</sup>

20 \_\_\_\_\_  
21           <sup>4</sup> Only three justices joined in Justice Blackmun's  
22 rationale as to why the physicians could assert the rights of  
23 their patients. Singleton, 428 U.S. at 108 (plurality opinion).  
24 Justice Stevens, the fifth vote in the outcome, concluded that  
25 the doctors had standing because they "have a financial stake in  
26 the outcome of the litigation" and "claim that the statute  
27 impairs their own constitutional rights." Singleton, 428 U.S. at  
28 121 (Stevens, J., concurring in part). Despite only three  
justices having joined Justice Blackmun's analysis, "[m]any cases  
nonetheless speak of the court in Singleton as having 'held' that  
the physician had third-party standing." Aid for Women v.  
Foulston, 441 F.3d 1101, 1113 n.13 (10th Cir. 2006); see also  
Singleton, 428 U.S. at 122 (Powell, J., dissenting) ("The Court  
further holds that . . . respondents may assert, in addition to  
their own rights, the constitutional rights of their patients . .  
. . I dissent from this holding.").

1 Singleton, 428 U.S. at 118 (plurality opinion); see also Planned  
2 Parenthood of Idaho, Inc., 376 F.3d at 917 ("Since at least  
3 Singleton v. Wulff, [] it has been held repeatedly that  
4 physicians may acquire jus tertii standing to assert their  
5 patients' due process rights in facial challenges to abortion  
6 laws.").

7           Even assuming plaintiffs can satisfy the first two  
8 criteria, plaintiffs cannot credibly suggest that parents of  
9 minor children who seek SOCE and minors who desire SOCE face a  
10 hindrance in asserting their own rights. Three days after  
11 plaintiffs initiated this action, a second case challenging SB  
12 1172 was filed in this court. The plaintiffs in that case  
13 include parents of minor children seeking SOCE for their minor  
14 children and minor children seeking SOCE, and the plaintiffs in  
15 that case have similarly sought a preliminary injunction. (See  
16 Pickup v. Brown, Civ. No. 2:12-2497 KJM EFB (E.D. Cal.) Compl. ¶¶  
17 2-6 (Docket No. 1).)

18           Not only is it clear that parents and minors do not  
19 face a hindrance in challenging SB 1172 as it relates to their  
20 rights, determining whether the statute will violate their rights  
21 is more appropriately addressed in the case in which they are  
22 plaintiffs. Accordingly, plaintiffs in this case may not assert  
23 the third-party rights of parents of minor children or minors and  
24 the court's analysis of SB 1172 will be limited to challenges

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26           In Singleton, the physicians had alleged that the  
27 statute at issue violated their "constitutional rights to  
28 practice medicine." Singleton, 428 U.S. at 113 (internal  
quotation marks and citation omitted). Justice Brennan stated  
that the Court had "no occasion to decide whether such a right  
exists." Id.



1 based on plaintiffs' own rights. Cf. Smith v. Jefferson Cnty.  
2 Bd. of Sch. Comm'rs, 641 F.3d 197, 208-09 (6th Cir. 2011)  
3 (finding that teachers lacked prudential standing to assert the  
4 rights of their students when, even though the teachers had a  
5 sufficiently close relationship to their students, "[t]here is no  
6 evidence that the students or their parents might be deterred  
7 from suing," "that the claims of the students would be imminently  
8 moot," or "that the students face systemic practical challenges  
9 to filing suit").

10 B. Plaintiffs' Right of Free Speech under the First  
11 Amendment

12 "The First Amendment applies to state laws and  
13 regulations through the Due Process Clause of the Fourteenth  
14 Amendment." Nat'l Ass'n for the Advancement of Psychoanalysis v.  
15 Cal. Bd. of Psychology, 228 F.3d 1043, 1053 (9th Cir. 2000)  
16 (hereinafter "NAAP"). "The Supreme Court has recognized that  
17 physician speech is entitled to First Amendment protection  
18 because of the significance of the doctor-patient relationship."  
19 Conant v. Walters, 309 F.3d 629, 636 (9th Cir. 2002) (citing  
20 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992)  
21 (plurality opinion); Rust v. Sullivan, 500 U.S. 173, 200 (1991)).  
22 The Ninth Circuit has also "recognized that communication that  
23 occurs during psychoanalysis is entitled to First Amendment  
24 protection." Conant, 309 F.3d at 637.

- 25 1. Because SB 1172 Would Restrict the Content of  
26 Speech and Prohibit the Expression of Particular  
27 Viewpoints It Is Subject to Strict Scrutiny Review  
28

1 a. The Fact that SB 1172 Is a Professional  
2 Regulation Does Not Exempt It from  
3 Strict Scrutiny

4 Defendants and amicus first argue that, even though  
5 physician speech receives First Amendment protection, SB 1172 is  
6 subject only to rational basis or a reasonableness level of  
7 review because it is a regulation of professional conduct. In a  
8 concurring opinion in Lowe v. SEC, 472 U.S. 181 (1985), Justice  
9 White, joined by two other justices, stated that "[r]egulations  
10 on entry into a profession, as a general matter, are  
11 constitutional if they 'have a rational connection with the  
12 applicant's fitness or capacity to practice' the profession."  
13 Lowe, 472 U.S. at 228 (White, J., concurring) (quoting Schwartz v.  
14 Bd. of Bar Examiners, 353 U.S. 232, 239 (1957)). Relying on  
15 Lowe, the Fourth Circuit held that "[a] statute that governs the  
16 practice of an occupation is not unconstitutional as an  
17 abridgment of the right to free speech, so long as any inhibition  
18 of that right is merely the incidental effect of observing an  
19 otherwise legitimate regulation." Accountant's Soc. of Va. v.  
20 Bowman, 860 F.2d 602, 604 (4th Cir. 1988) (internal quotation  
21 marks and citation omitted).<sup>5</sup>

22  
23 <sup>5</sup> In Dittman v. California, 191 F.3d 1020 (9th Cir.  
24 1999), the Ninth Circuit rejected the plaintiff's substantive due  
25 process challenge to a regulation requiring disclosure of his  
26 social security number to renew his acupuncturist license. In  
27 doing so, the court quoted Lowe for "the fundamental principle  
28 that '[r]egulations on entry into a profession, as a general  
matter, are constitutional if they "have a rational connection  
with the applicant's fitness or capacity to practice" the  
profession.'" Dittman, 191 F.3d at 1030 (quoting Lowe, 472 U.S.  
at 228). Unlike Lowe and Dittman, SB 1172 is not a regulation  
"on entry into a profession," Lowe, 472 U.S. at 228.

1 In a brief paragraph of the plurality decision in  
2 Casey, Justice O'Connor, with little analysis and joined by only  
3 two justices, addressed plaintiffs' "asserted First Amendment  
4 right of a physician not to provide information about the risks  
5 of abortion, and childbirth, in a manner mandated by the State."  
6 Casey, 505 U.S. at 884 (plurality opinion). Justice O'Connor  
7 rejected this claim, stating, "To be sure, the physician's First  
8 Amendment rights not to speak are implicated, but only as part of  
9 the practice of medicine, subject to reasonable licensing and  
10 regulation by the State." Id. (internal citation omitted).

11 In Lowe, Justice White recognized that, "[a]t some  
12 point, a measure is no longer a regulation of a profession but a  
13 regulation of speech or of the press; beyond that point, the  
14 statute must survive the level of scrutiny demanded by the First  
15 Amendment." Lowe, 472 U.S. at 230 (White, J., concurring). The  
16 Ninth Circuit has also stated that the plurality opinion in Casey  
17 "did not uphold restrictions on speech itself." Conant, 309 F.3d  
18 at 638. The lower levels of review contemplated in Lowe and  
19 Casey thus do not appear to apply if a law imposes restrictions  
20 on a professional's speech. Some courts have nonetheless applied  
21 a lower level of review to professional regulations addressing  
22 the speech of a professional. See, e.g., Shultz v. Wells, Civ.  
23 No. 2:09-646, 2010 WL 1141452, at \*9-10 (M.D. Ala. Mar. 3, 2010)  
24 (upholding discipline of licensed chiropractor who advised  
25 patient to stop taking prescriptions as a reasonable regulation  
26 of speech in the doctor-patient relationship); see generally  
27 Wollschlaeger v. Farmer, --- F. Supp. 2d ----, 2012 WL 3064336,

28

1 at \*9 (S.D. Fla. June 29, 2012).<sup>6</sup>

2 The Ninth Circuit, however, has explained that a  
3 content- or viewpoint-based professional regulation is subject to  
4 strict scrutiny. In NAAP, the Ninth Circuit held that  
5 California's mental health licensing laws, which prohibited the  
6 plaintiffs from practicing psychoanalysis in California, did not  
7 violate the First Amendment. NAAP, 228 F.3d at 1056. Assuming  
8 that the licensing scheme implicated speech,<sup>7</sup> the Ninth Circuit

9 \_\_\_\_\_  
10 <sup>6</sup> In Wollschlaeger, the Southern District of Florida  
11 cites Conant as requiring that professional regulations "must  
12 have the requisite 'narrow specificity.'" Wollschlaeger, 2012 WL  
13 3064336, at \*9 (quoting Conant, 309 F.3d at 639). The Ninth  
14 Circuit's reference to "narrow specificity" derives from Supreme  
15 Court jurisprudence addressing vagueness, and the court  
16 ultimately upheld the injunction against the federal policy  
17 because "the government has been unable to articulate exactly  
18 what speech is proscribed, describing it only in terms of speech  
19 the patient believes to be a recommendation of marijuana."  
20 Conant, 309 F.3d at 639.

21 In NAACP v. Button, 371 U.S. 415, 433 (1963), which the  
22 Ninth Circuit cited as authority for the "narrow specificity"  
23 standard, the Supreme Court addressed an allegedly vague statute  
24 and concluded, "Because First Amendment freedoms need breathing  
25 space to survive, government may regulate in the area only with  
26 narrow specificity." Button, 371 U.S. at 433 (citing Cantwell v.  
27 Connecticut, 310 U.S. 296, 311 (1940)); see also Cantwell, 310  
28 U.S. at 311 ("[I]n the absence of a statute narrowly drawn to  
define and punish specific conduct as constituting a clear and  
present danger to a substantial interest of the State, the  
petitioner's communication, considered in the light of the  
constitutional guarantees, raised no such clear and present  
menace to public peace and order as to render him liable to  
conviction of the common law offense in question.").

23 <sup>7</sup> The Ninth Circuit did not determine whether First  
24 Amendment rights to speech were in fact implicated by the  
25 challenged licensing scheme. See NAAP, 228 F.3d at 1053 ("We  
26 conclude that, even if a speech interest is implicated,  
27 California's licensing scheme passes First Amendment scrutiny.")  
28 (emphasis added); id. at 1056 ("Although some speech interest may  
be implicated, California's content-neutral mental health  
licensing scheme is a valid exercise of its police power to  
protect the health and safety of its citizens and does not offend  
the First Amendment.") (emphasis added). Two years later in  
Conant, however, the Ninth Circuit stated that, in NAAP, "we  
recognized that communication that occurs during psychoanalysis

1 rejected the plaintiffs' argument that psychoanalysis deserved  
2 unique First Amendment protection because it is the "talking  
3 cure." Id. at 1054. The court agreed with the district court's  
4 conclusion that "the key component of psychoanalysis is the  
5 treatment of emotional suffering and depression, not speech. . .  
6 . That psychoanalysts employ speech to treat their clients does  
7 not entitle them, or their profession, to special First Amendment  
8 protection." Id. (internal quotation marks omitted). The Ninth  
9 Circuit then explained that "[t]he communication that occurs  
10 during psychoanalysis is entitled to constitutional protection,  
11 but it is not immune from regulation." Id. at 1054-55.

12           After concluding that "the licensing scheme is a valid  
13 exercise of California's police power," the Ninth Circuit held  
14 that it was not subject to strict scrutiny because it was  
15 content- and viewpoint-neutral. Id. at 1055. The court  
16 specifically stated, "We have held that "[t]he appropriate level  
17 of scrutiny is tied to whether the statute distinguishes between  
18 prohibited and permitted speech on the basis of content."" Id.  
19 (quoting Black v. Arthur, 201 F.3d 1120, 1123 (9th Cir. 2000))  
20 (alteration in original). The court neither suggested nor held  
21 that a lower standard governed California's mental health  
22 licensing laws regardless of content simply because they were  
23 professional regulations. See id. at 1055 (emphasizing that,  
24 "[a]lthough the California laws and regulations may require  
25 certain training, speech is not being suppressed based on its  
26 message"). It therefore follows under NAAP that a professional  
27 \_\_\_\_\_  
28 is entitled to First Amendment protection." Conant, 309 F.3d at  
637.

1 regulation would be subject to strict scrutiny if it is not  
2 content- and viewpoint-neutral.

3           Since NAAP, the Ninth Circuit has continued to adhere  
4 to the traditional standards governing content- or viewpoint-  
5 based regulations. In finding that a federal policy prohibiting  
6 physicians from recommending marijuana to patients violated the  
7 First Amendment, the Ninth Circuit recognized that “[b]eing a  
8 member of a regulated profession does not, as the government  
9 suggests, result in a surrender of First Amendment rights” and  
10 found that the federal policy was content- and viewpoint-based.  
11 Conant, 309 F.3d at 637. The Conant court explained how the  
12 constitutional regulations in NAAP were content-neutral, id. at  
13 637, and emphasized that “content-based restrictions on speech  
14 are ‘presumptively invalid.’” Id. at 637-38. In 2008, the Ninth  
15 Circuit cited NAAP as authority for the rule that “both  
16 viewpoint-based and content-based speech restrictions trigger  
17 strict scrutiny.” Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d  
18 419, 431 (9th Cir. 2008). Accordingly, even if SB 1172 is viewed  
19 as a professional regulation, it is subject to strict scrutiny if  
20 it is content- or viewpoint-based.

21           b. SB 1172 Is Not Exempt from Strict Scrutiny  
22                           Review as a Statute Regulating Conduct

23           Defendants and amicus next contend that 1) SB 1172 is  
24 not subject to review under the First Amendment because it  
25 regulates conduct, not speech; and 2) even if SB 1172 is subject  
26 to First Amendment review, it is reviewed under intermediate  
27 scrutiny. Under Supreme Court First Amendment jurisprudence,  
28 “it has never been deemed an abridgment of freedom of speech or

1 press to make a course of conduct illegal merely because the  
2 conduct was in part initiated, evidenced, or carried out by means  
3 of language, either spoken, written, or printed.'" Ohralik v.  
4 Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (quoting Giboney  
5 v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)); see also  
6 Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 604 (2001)  
7 (Stevens, J., concurring) ("This Court has long recognized the  
8 need to differentiate between legislation that targets expression  
9 and legislation that targets conduct for legitimate  
10 non-speech-related reasons but imposes an incidental burden on  
11 expression.").

12 SB 1172 defines SOCE as "any practices by mental health  
13 providers that seek to change an individual's sexual orientation.  
14 This includes efforts to change behaviors or gender expressions,  
15 or to eliminate or reduce sexual or romantic attractions or  
16 feelings toward individuals of the same sex." SB 1172 (to be  
17 codified at Cal. Bus. & Prof. Code § 865(b)(1)). A review of the  
18 bill analyses leading up to the passage of SB 1172 illustrates  
19 that there is not a single method of performing SOCE. For  
20 example, a Senate Judiciary Committee bill analysis explains that  
21 "SOCE techniques may include aversive treatments such as electric  
22 shock or nausea inducing drugs administered simultaneously with  
23 the presentation of homoerotic stimuli. Practitioners may also  
24 try to alter a patient's sexuality with visualization, social  
25 skills training, psychoanalytic therapy, and spiritual  
26 interventions." S. Judiciary Comm., Comm. Analysis of SB 1172,  
27 at 3 (May 8, 2012). Joseph Nicolosi, "one of the founders of  
28 modern reparative therapy," promotes SOCE intervention plans that

1 "involve conditioning a man to a traditional masculine gender  
2 role via participation in sports activities, avoidance of the  
3 other sex unless for romantic contact, avoiding contact with  
4 homosexuals, increasing time spent with heterosexuals, engaging  
5 in group therapy, marrying a person of the opposite sex and  
6 fathering children." S. Comm. on Bus., Professions & Econ. Dev.,  
7 Comm. Analysis of SB 1172, at 8 (Apr. 19, 2012). "Others,  
8 particularly conservative Christian transformational ministries,  
9 use the term conversion therapy to refer to the utilization of  
10 prayer, religious conversion, individual and group counseling to  
11 change a person's sexual orientation." Id.

12 In the 2009 "Report of the American Psychological  
13 Association Task Force on Appropriate Therapeutic Responses to  
14 Sexual Orientation" ("2009 APA Report"), the array of treatments  
15 used in SOCE, many of which do not include speech, are described  
16 as follows:

17 Behavior therapists tried a variety of aversion  
18 treatments, such as inducing nausea, vomiting, or  
19 paralysis; providing electric shocks; or having the  
20 individual snap an elastic band around the wrist when the  
21 individual became aroused to same-sex erotic images or  
22 thoughts. Other examples of aversive behavioral  
23 treatments included covert sensitization, shame aversion,  
24 systematic desensitization, orgasmic reconditioning, and  
25 satiation therapy. Some nonaversive treatments used an  
26 educational process of dating skills, assertiveness, and  
27 affection training with physical and social reinforcement  
28 to increase other-sex sexual behaviors. Cognitive  
29 therapists attempted to change gay men's and lesbians'  
30 thought patterns by reframing desires, redirecting  
31 thoughts, or using hypnosis, with the goal of changing  
32 sexual arousal, behavior, and orientation.

33 (Stein Decl. Ex. 1 ("2009 APA Report") at 22 (Docket No. 34-1).)

34 From the myriad of explanations about the various SOCE  
35 treatments, it is clear that there is not a single method for a



1 mental health provider to engage in SOCE. The Ninth Circuit has  
2 also recognized that "the key component of psychoanalysis is the  
3 treatment of emotional suffering and depression, not speech."  
4 NAAP, 228 F.3d at 1054 (internal quotation marks omitted).  
5 Nonetheless, at least some forms of SOCE, such as "talk therapy,"  
6 involve speech and the Ninth Circuit has stated that the  
7 "communication that occurs during psychoanalysis is entitled to  
8 First Amendment protection." Conant, 309 F.3d at 637.  
9 Therefore, even if SB 1172 is characterized as primarily aimed at  
10 regulating conduct, it also extends to forms of SOCE that utilize  
11 speech and, at a minimum, regulates conduct that has an  
12 incidental effect on speech.

13 In United States v. O'Brien, 391 U.S. 367 (1968), the  
14 Supreme Court explained that, "when 'speech' and 'nonspeech'  
15 elements are combined in the same course of conduct, a  
16 sufficiently important governmental interest in regulating the  
17 nonspeech element can justify incidental limitations on First  
18 Amendment freedoms." O'Brien, 391 U.S. at 376. In such  
19 circumstances, "a government regulation is sufficiently justified  
20 [1] if it is within the constitutional power of the Government;  
21 [2] if it furthers an important or substantial governmental  
22 interest; [3] if the governmental interest is unrelated to the  
23 suppression of free expression; and [4] if the incidental  
24 restriction on alleged First Amendment freedoms is no greater  
25 than is essential to the furtherance of that interest." Id. at  
26 377.

27 In O'Brien, the Court rejected a First Amendment free  
28 speech challenge to a law criminalizing the knowing destruction

1 of draft registration certificates when O'Brien claimed he burned  
2 his certificate as a demonstration against the war. After  
3 concluding that the law satisfied the four-part test, the Court  
4 reasoned that "[t]he case at bar is therefore unlike one where  
5 the alleged governmental interest in regulating conduct arises in  
6 some measure because the communication allegedly integral to the  
7 conduct is itself thought to be harmful." Id. at 382. The  
8 intermediate scrutiny standard from O'Brien therefore "does not  
9 provide the applicable standard for reviewing a content-based  
10 regulation of speech." Holder v. Humanitarian Law Project, ---  
11 U.S. ----, 130 S. Ct. 2705, 2723 (2010).

12 In Humanitarian Law Project, the Supreme Court  
13 addressed a preenforcement challenge to the federal material-  
14 support statute and held that it could not be assessed under the  
15 O'Brien test. The material-support statute "makes it a federal  
16 crime to 'knowingly provid[e] material support or resources to a  
17 foreign terrorist organization.'" Id. at 2713 (quoting 18 U.S.C.  
18 § 2339B). The Court recognized that the "material support" the  
19 statute prohibited "most often does not take the form of speech  
20 at all," but that the plaintiffs in the case intended to provide  
21 material support through speech. Id. at 2723. After concluding  
22 that the statute was content-based and therefore subject to  
23 strict scrutiny, the Court rejected the government's argument  
24 that it should nonetheless be subject to intermediate scrutiny  
25 "because it generally functions as a regulation of conduct." Id.  
26 at 2724. In rejecting the government's position, the Court  
27 emphasized, "The law here may be described as directed at  
28 conduct, . . . but as applied to plaintiffs the conduct

1 triggering coverage under the statute consists of communicating a  
2 message" because the plaintiffs intended to "provide material  
3 support to the PKK and LTTE in the form of speech." Id.

4           Similar to Humanitarian Law Project, plaintiffs in this  
5 case have indicated that they wish to engage in SOCE through  
6 speech. Moreover, even if the court assumes that most SOCE is  
7 performed through conduct and that SOCE generally functions to  
8 regulate conduct, it is not automatically subject to review under  
9 the O'Brien test. As the Court made clear in O'Brien and has  
10 repeatedly confirmed since that decision, a law regulating  
11 conduct that incidentally affects speech is subject to strict  
12 scrutiny if it is content or viewpoint-based. Accordingly, even  
13 assuming SB 1172 is properly characterized as a statute regulating  
14 conduct, because it has at least an incidental effect on speech  
15 and plaintiffs intend to engage in SOCE through speech,  
16 intermediate scrutiny applies only if SB 1172 is content- and  
17 viewpoint-neutral.

18           c.    SB 1172 Lacks Content and Viewpoint  
19                    Neutrality

20           Because SB 1172 cannot be reviewed under a lower level  
21 of review as a professional regulation or a regulation of conduct  
22 if it is content- or viewpoint-based, the court must assess its  
23 neutrality to determine the appropriate level of review. "The  
24 principal inquiry in determining whether a regulation is  
25 content-neutral or content-based is whether the government has  
26 adopted [the] regulation . . . because of [agreement or]  
27 disagreement with the message it conveys." NAAP, 228 F.3d at  
28 1055 (internal quotation marks omitted) (alterations and omission

1 in original); accord Fla. Bar v. Went For It, Inc., 515 U.S. 618,  
2 642 (1994); see also Berger v. City of Seattle, 569 F.3d 1029,  
3 1051 (9th Cir. 2009) (“A regulation is content-based if either  
4 the underlying purpose of the regulation is to suppress  
5 particular ideas or if the regulation, by its very terms, singles  
6 out particular content for differential treatment.”). “Viewpoint  
7 discrimination is [] an egregious form of content discrimination”  
8 and occurs “when the specific motivating ideology or the opinion  
9 or perspective of the speaker is the rationale for the  
10 restriction.” Rosenberger v. Rector & Visitors of Univ. of Va.,  
11 515 U.S. 819, 829 (1995).

12 In Conant, the Ninth Circuit relied on the First  
13 Amendment to uphold a permanent injunction enjoining the federal  
14 government from revoking a physician’s license to prescribe  
15 controlled substances or initiating an investigation of the  
16 physician on the sole ground that the physician recommended  
17 medical marijuana to a patient. Conant, 309 F.3d at 631. The  
18 Ninth Circuit emphasized that “[t]he government’s policy . . .  
19 seeks to punish physicians on the basis of the content of  
20 doctor-patient communications” because “[o]nly doctor-patient  
21 conversations that include discussions of the medical use of  
22 marijuana trigger the policy.” Id. at 637. The court further  
23 explained that “the policy does not merely prohibit the  
24 discussion of marijuana; it condemns expression of a particular  
25 viewpoint, i.e., that medical marijuana would likely help a  
26 specific patient.” Id. at 639; cf. Rust, 500 U.S. at 200  
27 (explaining that the challenged regulations “do not significantly  
28 impinge upon the doctor-patient relationship” in violation of the

1 First Amendment because they do not "require[] a doctor to  
2 represent as his own any opinion that he does not in fact hold").

3 Defendants argue that SB 1172 is distinguishable from  
4 Conant because it does not extend as far as the challenged  
5 federal policy against a physician recommending marijuana for a  
6 patient. SB 1172's ban is limited to prohibiting mental health  
7 providers from engaging in SOCE with minor patients. SB 1172 (to  
8 be codified at Cal Bus. & Prof. Code § 865.1). The bill defines  
9 SOCE as "any practices by mental health providers that seek to  
10 change an individual's sexual orientation[, including] . . .  
11 efforts to change behaviors or gender expressions, or to  
12 eliminate or reduce sexual or romantic attractions or feelings  
13 toward individuals of the same sex." Id. (to be codified at Cal.  
14 Bus. & Prof. Code § 865(b)(1)).

15 Based on SB 1172's definition of SOCE, defendants argue  
16 that the new law would not preclude a mental health provider from  
17 expressing his or her views to a minor patient that the minor's  
18 sexual orientation could be changed, informing a minor about  
19 SOCE, recommending that a minor pursue SOCE, providing a minor  
20 with contact information for an individual who could perform  
21 SOCE, or sharing his or her views about the morality of  
22 homosexuality.<sup>8</sup> Assuming defendants' interpretation is correct,  
23 SB 1172 would still allow mental health providers to exercise  
24 their medical judgment to recommend SOCE, see Conant, 309 F.3d at  
25 638, and would preclude them only from providing a minor with

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26  
27 <sup>8</sup> Plaintiffs disagree, arguing that such statements would  
28 come with SB 1172's prohibition because such statements could be  
viewed as seeking to change a patient's sexual orientation.

1 SOCE.

2 This distinction, however, addresses only whether SB  
3 1172 is viewpoint-based. The Ninth Circuit's analysis in NAAP  
4 and Supreme Court precedent render it difficult to conclude that  
5 SB 1172 is content-neutral simply because it is limited to  
6 prohibiting SOCE. In NAAP, the Ninth Circuit concluded that the  
7 challenged licensing laws were content-neutral because "they do  
8 not dictate what can be said between psychologists and patients  
9 during treatment" or "the content of what is said in therapy" and  
10 "[n]othing in the statutes prevents licensed therapists from  
11 utilizing psychoanalytical methods." NAAP, 228 F.3d at 1055-56.  
12 The court emphasized that "speech is not being suppressed based  
13 on its message" and that the scheme "was not adopted because of  
14 any disagreement with psychoanalytical theories." Id.

15 Humanitarian Law Project, in which the Supreme Court  
16 held that the material support statute was content-based and  
17 therefore subject to strict scrutiny, provides further guidance.  
18 In that case, the Court recognized that the statute did not  
19 "suppress ideas or opinions in the form of 'pure political  
20 speech'" because plaintiffs could "say anything they wish on any  
21 topic" and independently advocate for or join one of the  
22 terrorists organizations. Humanitarian Law Project, 130 S. Ct.  
23 at 2722-23. Nonetheless, the court concluded that the statute  
24 "regulates speech on the basis of its content" because whether  
25 the plaintiffs' speech to a foreign terrorist organization would  
26 be barred by the statute depended on what the plaintiffs said.  
27 See id. at 2723-24.

28 Under NAAP and Humanitarian Law Project, the fact that

1 SB 1172 may allow mental health providers to "say anything they  
2 wish" about the value or benefits of SOCE or advocate for it does  
3 not render SB 1172 content-neutral. SB 1172 draws a line in the  
4 sand governing a therapy session and the moment that the mental  
5 health provider's speech "seek[s] to change an individual's  
6 sexual orientation," including a patient's behavior, gender  
7 expression, or sexual or romantic attractions or feelings toward  
8 individuals of the same sex, the mental health provider can no  
9 longer speak. Regardless of the breathing room SB 1172 may leave  
10 for speech about SOCE, when applied to SOCE performed through  
11 "talk therapy," SB 1172 will give rise to disciplinary action  
12 solely on the basis of what the mental health provider says or  
13 the message he or she conveys.

14 There is also little question that the Legislature  
15 enacted SB 1172 at least in part because it found that SOCE was  
16 harmful to minors and disagreed with the practice. For example,  
17 in SB 1172, the Legislature enacted findings and declarations  
18 based on the conclusions of numerous studies about the purported  
19 harmful effects and ineffectiveness of SOCE:

20 The [American Psychological Association] task force  
21 concluded that sexual orientation change efforts can pose  
22 critical health risks to lesbian, gay, and bisexual  
23 people, including confusion, depression, guilt,  
24 helplessness, hopelessness, shame, social withdrawal,  
25 suicidality, substance abuse, stress, disappointment,  
26 self-blame, decreased self-esteem and authenticity to  
27 others, increased self-hatred, hostility and blame toward  
28 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. . . . 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

1 theories whose scientific validity is questionable." . . .  
2 . The National Association of Social Workers prepared a  
3 1997 policy statement in which it stated: . . . "No data  
4 demonstrates that reparative or conversion therapies are  
5 effective, and, in fact, they may be harmful." . . . The  
6 American Academy of Child and Adolescent Psychiatry in  
7 2012 published an article . . . stating: "Clinicians  
8 should be aware that there is no evidence that sexual  
9 orientation can be altered through therapy, and that  
10 attempts to do so may be harmful." . . . The Pan American  
11 Health Organization . . . noted that reparative therapies  
12 "lack medical justification and represent a serious  
13 threat to the health and well-being of affected people."

14 SB 1172 (Findings & Decls. §§ 1(b), 1(d), 1(h), 1(k), 1(l)).<sup>9</sup>

15 The Legislature's findings and declarations convey a consistent  
16 and unequivocal message that the Legislature found that SOCE is  
17 ineffective and harmful. Such findings bring SB 1172 within the  
18 content-based exception in O'Brien when intermediate scrutiny  
19 does not apply because "the alleged governmental interest in  
20 regulating conduct arises in some measure because the  
21 communication allegedly integral to the conduct is itself thought  
22 to be harmful." O'Brien, 391 U.S. at 382; see NAAP, 228 F.3d at  
23 1055-56 (explaining that the challenged regulations were content-  
24 neutral because they were "not adopted because of any  
25 disagreement with psychoanalytical theories").

26 Especially with plaintiffs in this case, it is also  
27 difficult to conclude that just because SOCE utilizing speech is  
28 a type of treatment, that the treatment can be separated from a

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24 <sup>9</sup> The court is relying only on findings and declarations  
25 that the Legislature enacted in SB 1172, not statements in the  
26 legislative history or bill analyses. Cf. O'Brien, 391 U.S. at  
27 383 ("[The] Court will not strike down an otherwise  
28 constitutional statute on the basis of an alleged illicit  
legislative motive."); see generally Stormans, Inc. v. Selecky,  
586 F.3d 1109, 1127 (9th Cir. 2009) (explaining why, in the  
context of Free Exercise claims, whether a court can consider  
legislative history is an "unsettled" area of law).



1 mental health provider's viewpoint or message. Duk has explained  
2 that the SOCE treatment he provides to his minor patients  
3 includes counseling. (Duk Decl. ¶ 6.) Duk is a Catholic and,  
4 with patients that share his faith, he discusses tenants of the  
5 Catholic faith, including that "homosexuality is not a natural  
6 variant of human sexuality, it is changeable, and it is not  
7 predominantly determined by genetics." (Id. ¶¶ 11-13.)  
8 Similarly, Welch has explained that he shares the views of his  
9 church that homosexual behavior is a sin and that SB 1172 will  
10 "disallow [his] clients from choosing to execute biblical truths  
11 as a foundation for their beliefs about their sexual  
12 orientation." (Welch Decl. ¶¶ 5, 8, Ex. 14.)

13           When a mental health provider's pursuit of SOCE is  
14 guided by the provider's or patient's views of homosexuality, it  
15 is difficult, if not impossible, to view the conduct of  
16 performing SOCE as anything but integrally intertwined with  
17 viewpoints, messages, and expression about homosexuality. Expert  
18 declarations defendants submitted in opposition to plaintiffs'  
19 motion are consistent with this conclusion. (See Haldeman Decl.  
20 ¶ 8 (Docket No. 40) ("A review of the literature relating to SOCE  
21 reflects that the premise underlying treatments designed to  
22 change homosexual orientation is that homosexuality is a mental  
23 disorder that needs to be 'cured.'"); Beckstead Decl. ¶ 8 (Docket  
24 No. 36) ("A review of the literature in the field of [SOCE]  
25 reveals that the premise underlying SOCE is that homosexuality is  
26 a mental disorder, and that it is counter to some practitioners'  
27 religious and/or personal beliefs.").

28           Although it does not appear that the Legislature

1 intended to suppress the spectrum of messages that may be  
2 intertwined with SOCE, such as whether homosexuality is innate or  
3 immutable, its enacted finding "that [b]eing lesbian, gay, or  
4 bisexual is not a disease, disorder, illness, deficiency, or  
5 shortcoming" strongly suggests that the Legislature at least  
6 sought to suppress the performance of SOCE that contained a  
7 message contrary to this finding. SB 1172 (Findings & Decls. §  
8 1(a)); see Rosenberger, 515 U.S. at 829 ("The government must  
9 abstain from regulating speech when the specific motivating  
10 ideology or the opinion or perspective of the speaker is the  
11 rationale for the restriction."). That messages about  
12 homosexuality can be inextricably intertwined with SOCE renders  
13 it likely that, along with SOCE treatment, SB 1172 bans a mental  
14 health provider from expressing his or her viewpoints about  
15 homosexuality as part of SOCE treatment. Cf. City of Erie v.  
16 Pap's A.M., 529 U.S. 277, 293 (2000) (plurality opinion)  
17 ("[T]here may be cases in which banning the means of expression  
18 so interferes with the message that it essentially bans the  
19 message.").

20           Against the backdrop of NAAP, Conant, and Humanitarian  
21 Law Project, this court would be hard-pressed to conclude that SB  
22 1172 is content- and viewpoint-neutral. Accordingly, because it  
23 appears that SB 1172 lacks content and viewpoint neutrality, it  
24 is likely that it must ultimately be assessed under strict  
25 scrutiny.

26           2.     SB 1172 Is Unlikely to Withstand Strict Scrutiny

27           If a statute "imposes a restriction on the content of  
28 protected speech, it is invalid unless California can demonstrate

1 that it passes strict scrutiny--that is, unless it is justified  
2 by a compelling government interest and is narrowly drawn to  
3 serve that interest." Brown v. Entm't Merchants Ass'n, --- U.S.  
4 ----, 131 S. Ct. 2729, 2738 (2011). Strict scrutiny is a  
5 "demanding standard" and "[i]t is rare that a regulation  
6 restricting speech because of its content will ever be  
7 permissible.'" Id. (quoting United States v. Playboy Entm't  
8 Grp., Inc., 529 U.S. 803, 818 (2000)).

9 To overcome strict scrutiny, "[t]he State must  
10 specifically identify an 'actual problem' in need of solving, and  
11 the curtailment of free speech must be actually necessary to the  
12 solution." Brown, 131 S. Ct. at 2738. The state's burden on  
13 strict scrutiny is substantial, especially when contrasted to the  
14 lowest level of review, which does "not require that the  
15 government's action actually advance its stated purposes, but  
16 merely look[s] to see whether the government could have had a  
17 legitimate reason for acting as it did." Dittman v. California,  
18 191 F.3d 1020, 1031 (9th Cir. 1999).

19 In Brown, the Supreme Court held that California's law  
20 banning the sale of violent video games to minors without  
21 parental consent did not pass strict scrutiny. The state  
22 recognized that it could not "show a direct causal link between  
23 violent video games and harm to minors," but argued that strict  
24 scrutiny could be satisfied based on the Legislature's  
25 "predictive judgment that such a link exists, based on competing  
26 psychological studies." Brown, 131 S. Ct. at 2738-39. The Court  
27 rejected this argument, explaining that, under strict scrutiny,  
28 the state "bears the risk of uncertainty" and "ambiguous proof

1 will not suffice." Id. at 2739. Although the state submitted  
2 studies of research psychologists "purport[ing] to show a  
3 connection between exposure to violent video games and harmful  
4 effects on children," the Court held that the studies did not  
5 satisfy strict scrutiny because the studies had "been rejected by  
6 every court to consider them" and did not "prove that violent  
7 video games cause minors to act aggressively." Id.<sup>10</sup>

8           The Court similarly criticized evidence of harm that  
9 the government submitted in support of a regulation that sought  
10 to prevent children from seeing "signal bleed" on sexually-  
11 oriented programming in Playboy Entertainment Group, Inc. In  
12 that case, the Court explained,

13           There is little hard evidence of how widespread or how  
14 serious the problem of signal bleed is. Indeed, there is  
15 no proof as to how likely any child is to view a  
16 discernible explicit image, and no proof of the duration  
of the bleed or the quality of the pictures or sound. To  
say that millions of children are subject to a risk of  
viewing signal bleed is one thing; to avoid articulating

17  
18           <sup>10</sup> For the first time at oral argument, counsel for amicus  
19 cited three cases for the proposition that the court must defer  
to the Legislature's determination in matters of "uncertain  
20 science." The Supreme Court, however, does not appear to have  
been applying strict scrutiny in any of those cases. See  
21 Gonzales v. Carhart, 550 U.S. 124, 146, 161-64 (2007) ("[W]e must  
determine whether the [challenged abortion] Act furthers the  
22 legitimate interest of the Government in protecting the life of  
the fetus that may become a child," which was resolved, in part,  
by determining "whether the Act creates significant health risks  
23 for women"); Kansas v. Hendricks, 521 U.S. 346, 357-60 (1997)  
(upholding a civil commitment statute because it was not contrary  
24 to "our understanding of ordered liberty"); Jones v. United  
States, 463 U.S. 354, 364-66 (1983) (holding that a civil  
25 commitment statute was not unconstitutional under the Due Process  
Clause because Congress's determination was not "unreasonable").  
26 Amicus's argument is also inconsistent with Brown, which applied  
strict scrutiny, was decided after the three cited cases, and  
27 specifically rejected the state's argument that strict scrutiny  
could be satisfied based on the Legislature's "predictive  
28 judgment . . . based on competing psychological studies." Brown,  
131 S. Ct. at 2738-39.

1 the true nature and extent of the risk is quite another.  
2 Playboy Entm't Grp., Inc., 529 U.S. at 819. The Court concluded  
3 that the "First Amendment requires a more careful assessment and  
4 characterization of an evil in order to justify a regulation as  
5 sweeping" as the one at issue in the case. Id. at 819, 822-23.  
6 It further emphasized that the government was required to present  
7 more than "anecdote and supposition" to prove an "actual  
8 problem." Id.

9 In the findings and declarations of SB 1172, the  
10 California Legislature found that "California has a compelling  
11 interest in protecting the physical and psychological well-being  
12 of minors, including lesbian, gay, bisexual, and transgender  
13 youth, and in protecting its minors against exposure to serious  
14 harms caused by sexual orientation change efforts." SB 1172  
15 (Findings & Decls. § 1(n)). The court does not doubt that the  
16 state has a compelling interest in "protecting the physical and  
17 psychological well-being of minors." See Nunez by Nunez v. City  
18 of San Diego, 114 F.3d 935, 946 (9th Cir. 1997) ("The City's  
19 interest in protecting the safety and welfare of its minors is []  
20 a compelling interest."). In its opposition brief, defendants  
21 also identified a compelling interest in "protecting all of  
22 society from harmful, risky, or unproven, medical health  
23 treatments." (Defs.' Opp'n at 28:14-15); cf. NAAP, 228 F.3d at  
24 1054 ("Given the health and safety implications, California's  
25 interest in regulating mental health is even more compelling than  
26 a state's interest in regulating in-person solicitation by  
27 attorneys."); see Nunez, 114 F.3d at 947 (recognizing the  
28 "ostensible purposes of the ordinance identified by the City in

1 its brief" when determining whether it demonstrated a compelling  
2 interest).

3 As the Brown Court explained, SB 1172 cannot withstand  
4 strict scrutiny unless the state demonstrates an "'actual  
5 problem' in need of solving" and "a direct causal link" between  
6 SOCE and harm to minors. Brown, 131 S. Ct. at 2738-39. At most,  
7 however, defendants have shown that SOCE may cause harm to  
8 minors. For example in the 2009 APA Report, the APA states:

9 We conclude that there is a dearth of scientifically  
10 sound research on the safety of SOCE. Early and recent  
11 research studies provide no clear indication of the  
12 prevalence of harmful outcomes among people who have  
13 undergone efforts to change their sexual orientation or  
14 the frequency of occurrence of harm because no study to  
15 date of adequate scientific rigor has been explicitly  
designed to do so. Thus, we cannot conclude how likely  
it is that harm will occur from SOCE. However, studies  
from both periods indicate that attempts to change sexual  
orientation may cause or exacerbate distress and poor  
mental health in some individuals, including depression  
and suicidal thoughts.

16 (2009 APA Report at 42.) The report further explains:

17 A central issue in the debates regarding efforts to  
18 change same-sex sexual attractions concerns the risk of  
19 harm to people that may result from attempts to change  
20 their sexual orientation. . . . Although the recent  
21 studies do not provide valid causal evidence of the  
efficacy of SOCE or of its harm, some recent studies  
document that there are people who perceive that they  
have been harmed through SOCE.

22 (Id. at 41-42; see also Herek Decl. ¶¶ 39, 45 ("[E]vidence exists  
23 that [SOCE] may cause harm . . . [and] such interventions may be  
24 psychologically harmful in an unknown number of cases.")  
25 (emphasis added).)

26 Additionally, the studies discussed and criticized as  
27 incomplete in the 2009 APA Report do not appear to have focused  
28 on harms to minors, and the 2009 APA Report indicates that

1 "[t]here is a lack of published research on SOCE among children."  
2 (See 2009 APA Report at 41-43, 72.) It is therefore unclear  
3 whether the reports of harm referenced in the 2009 APA Report  
4 were made exclusively by adults. In Nunez, the Ninth Circuit  
5 similarly criticized reliance on national statistics regarding a  
6 rising juvenile crime rate to demonstrate that a juvenile curfew  
7 was a narrowly tailored solution for a particular city. Nunez,  
8 114 F.3d at 947.

9 In expert declarations defendants and amicus submitted,  
10 individuals opined that SOCE causes harm.<sup>11</sup> (See Beckstead Decl.  
11 ¶ 16; Haldeman Decl. ¶ 7; Ryan Decl. ¶ 21 (Docket No. 41).) None  
12 of the experts, however, identify or rely on comprehensive  
13 studies that adhere to scientific principles or address the  
14 inadequacies of the studies discussed in the 2009 APA Report.  
15 For example, Ryan's opinion primarily relies on analysis  
16 performed of "LGBT young adults, ages 21-25" and her personal  
17 interviews with LGTB youth who underwent SOCE. (Ryan Decl. ¶¶  
18 14-16.) "Although the Constitution does not require the  
19 government to produce 'scientifically certain criteria of  
20 legislation,'" Nunez, 114 F.3d at 947 (quoting Ginsberg v. New  
21 York, 390 U.S. 629, 642-43 (1968)), the Brown Court rejected  
22 "research [] based on correlation, not evidence of causation"  
23 that "suffer[ed] from significant, admitted flaws in  
24 methodology," Brown, 131 S. Ct. at 2739 (internal quotation marks

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25  
26 <sup>11</sup> Plaintiffs submitted lengthy evidentiary objections to  
27 the declarations defendants and amicus submitted. (See Dockets  
28 Nos. 50, 51.) The court cites to these declarations only to  
demonstrate the insufficiency of the evidence defendants  
submitted and therefore need not resolve plaintiffs' evidentiary  
objections.

1 omitted). Here, evidence that SOCE "may" cause harm to minors  
2 based on questionable and scientifically incomplete studies that  
3 may not have included minors is unlikely to satisfy the demands  
4 of strict scrutiny.

5 The Brown Court was also concerned with the state's  
6 inability to prove that harm to minors was caused by video games  
7 as opposed to other sources of media. See Brown, 131 S. Ct. at  
8 2739-40. Here, defendants face a similar inability to  
9 distinguish between harm caused by SOCE versus other factors.  
10 For example, in his declaration, Herek details the harms  
11 homosexual individuals experience as a result of societal  
12 stigmas, harassment and bullying, discrimination, and  
13 rejection.<sup>12</sup> (See Herek Decl. ¶¶ 18-21; see also Ryan Decl. ¶¶  
14 12-14, 20 (describing the harms that her research shows are  
15 caused by parents' and caregivers' "rejecting behaviors" to LGBT  
16 youth).) The few and arguably incomplete studies addressing  
17 harms of SOCE do not appear to have assessed whether the harms  
18 reported after undergoing SOCE were caused by SOCE as opposed to  
19 other internal or external factors and thus would have been  
20 sustained regardless of SOCE.

21 Lastly, the Brown Court also explained that, even when  
22 statutes pursue legitimate interests, "when they affect First  
23

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24 <sup>12</sup> In its findings and declarations, it appears that the  
25 California Legislature sought to help end some of that stigma,  
26 finding, "Being lesbian, gay, or bisexual is not a disease,  
27 disorder, illness, deficiency, or shortcoming." No matter how  
28 worthy this effort may be, it cannot override First Amendment  
protections. Cf. Brown, 131 S. Ct. at 2739 n.8 ("But there are  
all sorts of 'problems'--some of them surely more serious than  
this one--that cannot be addressed by governmental restriction of  
free expression: for example, the problem of encouraging  
anti-Semitism.").



1 Amendment rights they must be pursued by means that are neither  
2 seriously underinclusive nor seriously overinclusive." Brown,  
3 131 S. Ct. at 2741-42. In Brown, the Court found California's  
4 legislation to be "seriously underinclusive, not only because it  
5 excludes portrayals other than video games, but also because it  
6 permits a parental or avuncular veto." Id. at 2742. At the same  
7 time, "as a means of assisting concerned parents it is seriously  
8 overinclusive because it abridges the First Amendment rights of  
9 young people whose parents (and aunts and uncles) think violent  
10 video games are a harmless pastime." Id.

11 Here, SB 1172 prohibits only mental health providers  
12 from engaging in SOCE and, as defendants have pointed out,  
13 unlicensed individuals who do not qualify as "mental health  
14 providers" under the bill can engage in SOCE. If SOCE is harmful  
15 and ineffective, the harm minors will endure at the hands of  
16 unlicensed individuals performing SOCE is equal, if not greater,  
17 than the harm they would endure from mental health providers  
18 performing SOCE. In fact, the California Legislature has  
19 previously "recognized the actual and potential consumer harm  
20 that can result from the unlicensed, unqualified or incompetent  
21 practice of psychology." NAAP, 228 F.3d at 1047. The limited  
22 scope of SB 1172 therefore suggests that it is likely  
23 underinclusive in its application only to mental health  
24 providers.

25 The Ninth Circuit has observed that regulations subject  
26 to strict scrutiny "almost always violate the First Amendment."  
27 DISH Network Corp. v. FCC, 653 F.3d 771, 778 (9th Cir. 2011). In  
28 light of the heavy burden strict scrutiny imposes on defendants,

1 the lack of evidence demonstrating "actual harm" and a causal  
2 relationship between SOCE and harm to minors, and the  
3 underinclusiveness of SB 1172, the court finds at this  
4 preliminary stage that SB 1172 is not likely to withstand strict  
5 scrutiny. Accordingly, because it appears that SB 1172 is  
6 content- and viewpoint-based and unlikely to withstand strict  
7 scrutiny, plaintiffs have established that they are likely to  
8 prevail on the merits of their claim that SB 1172 violates their  
9 rights to freedom of speech under the First Amendment.

10 C. Remaining Preliminary Injunction Considerations

11 The Ninth Circuit "and the Supreme Court have  
12 repeatedly held that '[t]he loss of First Amendment freedoms, for  
13 even minimal periods of time, unquestionably constitutes  
14 irreparable injury.'" Klein v. City of San Clemente, 584 F.3d  
15 1196, 1207-08 (9th Cir. 2009) (quoting Elrod v. Burns, 427 U.S.  
16 347, 373 (1976)). Plaintiffs have therefore shown that they are  
17 likely to suffer irreparable harm in the absence of an  
18 injunction.

19 In determining whether plaintiffs have shown that the  
20 balance of equities tips in their favor, "the district court has  
21 a 'duty . . . to balance the interests of all parties and weigh  
22 the damage to each.'" Stormans, Inc. v. Selecky, 586 F.3d 1109,  
23 1138 (9th Cir. 2009) (quoting L.A. Mem'l Coliseum Comm'n v. Nat'l  
24 Football League, 634 F.2d 1197, 1203 (9th Cir. 1980)). Having  
25 proven that they are likely to succeed on their First Amendment  
26 free speech challenge to SB 1172, the most significant hardship  
27 to Welch and Duk is that SB 1172 will likely infringe on their  
28 First Amendment rights because it will restrict them from

1 engaging in SOCE with their minor patients. Any harm to Bitzer  
2 is more remote and less significant because he is not currently a  
3 "mental health provider" and thus his speech would not be  
4 governed by SB 1172. Although he has explained that SB 1172  
5 would require him to change his career plans, even if SB 1172 is  
6 not enjoined, he could engage in SOCE with the various religious  
7 groups he has described because SB 1172 would not extend to him.

8 If defendants are enjoined from enforcing SB 1172  
9 against plaintiffs, a law that the California Legislature enacted  
10 would be, at least until this case is resolved on the merits,  
11 unenforceable as against these three plaintiffs.<sup>13</sup> The Supreme  
12 Court has recognized that, "any time a State is enjoined by a  
13 court from effectuating statutes enacted by representatives of  
14 its people, it suffers a form of irreparable injury." Maryland  
15 v. King, --- U.S. ----, 133 S. Ct. 1, 3 (2012) (internal  
16 quotation marks and citation omitted). The state also has an  
17 interest in protecting the health and welfare of minor children,  
18 and the Legislature found that SOCE causes harm to minor  
19 children. Cf. Brown, 131 S. Ct. at 2736 ("No doubt a State  
20 possesses legitimate power to protect children from harm, but  
21 that does not include a free-floating power to restrict the ideas  
22 to which children may be exposed.") (internal citation omitted).

23 The harm to the state in being unable to enforce SB  
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25 <sup>13</sup> A preliminary injunction in this case would be limited  
26 to plaintiffs. See generally Zepeda v. INS, 753 F.2d 719, 727-28  
27 (9th Cir. 1984) ("A federal court may issue an injunction if it  
28 has personal jurisdiction over the parties and subject matter  
jurisdiction over the claim; it may not attempt to determine the  
rights of persons not before the court. . . . The district court  
must, therefore, tailor the injunction to affect only those  
persons over which it has power.").

1 1172 against plaintiffs is not as substantial as it may initially  
2 appear. California has arguably survived 150 years without this  
3 law and it would be a stretch of reason to conclude that it would  
4 suffer significant harm having to wait a few more months to know  
5 whether the law is enforceable as against the three plaintiffs in  
6 this case. When balanced against the risk of infringing on  
7 plaintiffs' First Amendment rights, forcing the state to preserve  
8 the long-standing status quo so that the case can be resolved on  
9 the merits and through the appellate process confirms that any  
10 harm the state faces is de minimis.

11           The final consideration in determining whether to grant  
12 a preliminary injunction is the public interest. Although the  
13 Ninth Circuit has "at times subsumed this inquiry into the  
14 balancing of the hardships, it is better seen as an element that  
15 deserves separate attention in cases where the public interest  
16 may be affected." Sammartano v. First Judicial Dist. Ct., in &  
17 for Cnty. of Carson, 303 F.3d 959, 974 (9th Cir. 2002) (internal  
18 citation omitted). "The public interest inquiry primarily  
19 addresses impact on non-parties rather than parties" and  
20 "[c]ourts considering requests for preliminary injunctions have  
21 consistently recognized the significant public interest in  
22 upholding First Amendment principles." Id.; see, e.g., Homans v.  
23 Albuquerque, 264 F.3d 1240, 1244 (10th Cir. 2001) ("[W]e believe  
24 that the public interest is better served by following binding  
25 Supreme Court precedent and protecting the core First Amendment  
26 right of political expression."). "The public interest in  
27 maintaining a free exchange of ideas, though great, has in some  
28 cases been found to be overcome by a strong showing of other

1 competing public interests, especially where the First Amendment  
2 activities of the public are only limited, rather than entirely  
3 eliminated." Sammartano, 303 F.3d at 974.

4 Here, the public has an interest in the protection and  
5 mental well-being of minors, and the court does not take lightly  
6 the possible harm SOCE may cause minors, especially when forced  
7 on minors who did not choose to undergo SOCE. See Stormans,  
8 Inc., 586 F.3d at 1139 ("The 'general public has an interest in  
9 the health' of state residents."). Countered against this is the  
10 public's interest in preserving First Amendment rights. Given  
11 the limited scope and duration of a preliminary injunction in  
12 this case, the court has no difficulty in concluding that  
13 protecting an individual's First Amendment rights outweighs the  
14 public's interest in rushing to enforce an unprecedented law.

15 That public perception in favor of this law may be  
16 heightened because "it appears that homosexuality has gained  
17 greater societal acceptance . . . is scarcely an argument for  
18 denying First Amendment protection to those who refuse to accept  
19 these views. The First Amendment protects expression, be it of  
20 the popular variety or not." Boy Scouts of Am. v. Dale, 530 U.S.  
21 640, 660 (2000). Accordingly, because plaintiffs have made an  
22 adequate showing under each of the four factors discussed in  
23 Winter, the court will grant their motion for a preliminary  
24 injunction.

25 IT IS THEREFORE ORDERED that plaintiffs' motion for a  
26 preliminary injunction be, and the same hereby is, GRANTED.  
27 Pending final resolution of this action, defendants are hereby  
28 enjoined from enforcing the provisions of SB 1172 (to be codified

1 at Cal. Bus. & Prof. Code §§ 865-865.2) as against plaintiffs  
2 Donald Welch, Anthony Duk, and Aaron Bitzer.

3 DATED: December 3, 2012

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5 WILLIAM B. SHUBB  
6 UNITED STATES DISTRICT JUDGE

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