No. 13-1281

# In The Supreme Court of the United States

DONALD WELCH, *et al.*,

*Petitioners,*

v.

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

*Respondents.*

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

## BRIEF OF *AMICUS CURIAE* AMERICAN COLLEGE OF PEDIATRICIANS IN SUPPORT OF PETITIONERS


CHRISTOPHER A. FERRARA, ESQ.
AMERICAN CATHOLIC LAWYERS ASSOCIATION, INC.
420 Route 46 E.
Suite 7
Fairfield, NJ 07004

JAMES M. BENDELL, ESQ.
*Counsel of Record*
BENDELL LAW FIRM, PLLC
WEST COAST LITIGATION
COUNSEL FOR AMERICAN CATHOLIC LAWYERS ASSOCIATION, INC.
1110 West Park Place,
Suite 302
Coeur d'Alene, Idaho 83814
(208) 215-2255
james@bendelllawfirm.com
*Counsel for Amicus Curiae American College of Pediatricians*



COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

## INTEREST OF *AMICUS CURIAE* AMERICAN COLLEGE OF PEDIATRICIANS[1]

*Amicus Curiae* American College of Pediatricians (hereafter "the College") is a federally tax-exempt, nonprofit national organization of pediatricians and other healthcare professionals dedicated to the health and well-being of children. Formed in 2002, the College is committed to fulfilling its mission by producing sound medical practice policies, based upon the best available research, to assist parents and influence society in the endeavor of childrearing. Membership is open to qualifying healthcare professionals who share the College's mission, vision, and values. The College currently has members in 44 states, and in several countries outside the United States.

The College is deeply concerned that the Ninth Circuit's decision in this case, upholding California's statutory ban on sexual orientation change efforts (SOCE) by pediatric psychotherapists working with minors, threatens to deprive psychotherapists throughout the nation of their First Amendment right to assist young people who, in keeping with values the College promotes, seek counseling to address

[1] The parties were timely notified of *Amicus Curiae*'s intent to file this brief. Counsel for the petitioner has filed a blanket consent for the filing of briefs by *amici curiae* and counsel for the respondents, California Deputy Attorney General Alexandra Robert Gordon, has consented to the filing of this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

unwanted feelings of same-sex attraction ("SSA"). Following California's lead, legislators in numerous states have introduced similar proposed bans on therapeutic expression, while New Jersey has already enacted a law virtually identical to the one at issue here, which has been upheld by the federal district court for that state.

The College believes that the California legislature widely overstepped its bounds by attempting to impose political orthodoxy on the content of the therapeutic process, a matter that could not be more private and sensitive. The College urges this Court to grant the Petition and subject the challenged law to strict scrutiny under the First Amendment, as this Court's precedents require, or, alternatively, to an intermediate scrutiny that adheres to this Court's precedents.

## SUMMARY OF ARGUMENT

The California legislature has attempted to prohibit sexual orientation change efforts (SOCE) by means of a statutory, content-based speech restriction, Senate Bill 1172 ("S.B. 1172"), which prohibits licensed psychotherapists from providing talk therapy to minors aimed at eliminating unwanted SSA, while permitting talk therapy that affirms and supports SSA. There is no such speech regulation as to patients aged eighteen or older, nor any restriction on SOCE talk therapy being provided even to minors by unlicensed and untrained counselors.

The Ninth Circuit has departed from this Court's controlling precedents by holding that this plainly content-based speech restriction does not restrict speech but only conduct, and that the law need not be shown actually to address any proven harm or actually to advance any legitimate state interest. The Ninth Circuit has thus avoided both the strict scrutiny required of content-based speech restrictions as well as the intermediate scrutiny required even for content-neutral laws that burden speech. Adherence to this Court's precedents requires review in order to prevent a distortion of long-settled First Amendment law throughout the nation.

## ARGUMENT

### I. THE NINTH CIRCUIT HAS DEPARTED FROM THIS COURT'S PRECEDENTS REQUIRING STRICT SCRUTINY OF CONTENT-BASED SPEECH RESTRICTIONS, UNDER WHICH SCRUTINY S.B. 1172 CANNOT SURVIVE BECAUSE THE LAW'S UNDER-INCLUSIVENESS DEMONSTRATES THAT CALIFORNIA IS NOT PURSUING THE INTEREST IT INVOKES BUT RATHER IS DISFAVORING A PARTICULAR VIEWPOINT.

As the Ninth Circuit itself has observed, "[t]he Supreme Court has recognized that physician speech is entitled to First Amendment protection because of the significance of the doctor-patient relationship." *Conant v. Walters*, 309 F.3d 629, 636 (9th Cir. 2002),

citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion) (physician's First Amendment right not to speak); *Rust v. Sullivan*, 500 U.S. 173, 200, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991) (regulations on physician speech may not "impinge upon the doctor-patient relationship").

Further, quoth the Ninth Circuit before this case: "Being a member of a regulated profession does not . . . result in a surrender of First Amendment rights" and "professional speech may be entitled to *the strongest protection our Constitution has to offer*." *Conant*, 309 F.3d at 637, citing *Thomas v. Collins*, 323 U.S. 516, 531 (1945) and *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995) (emphasis added; internal quotation and citation omitted).

That the challenged statutory provisions infringe on professional speech hardly requires a demonstration. S.B. 1172 prohibits psychotherapists from engaging in any talk therapy that involves "sexual orientation change efforts [SOCE]" for minors which aim to "change behaviors or gender expression, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex," while permitting "psychotherapies that . . . provide acceptance, support, and understanding" of those feelings and "do not seek to change sexual orientation." Cal. Bus. & Prof. Code §§ 865(b)(1), (2); 865.1, 865.2 (hereafter collectively "S.B. 1172"). Any licensed therapist who defies this audacious legislative attempt to

dictate what a therapist may and may not say to a young patient struggling with unwanted SSA faces discipline for "unprofessional conduct." *Id.* § 865.2.

In attempting to show that this patently content-based restriction on professional speech "regulates only treatment itself," not speech as such, and is thus not subject to strict scrutiny under the First Amendment, Pet. App. 28, the Ninth Circuit adumbrated what S.B. 1172 "does *not* do," namely:

- Prevent mental health providers from expressing their views to patients, whether children or adults, about SOCE, homosexuality, or any other topic
- Prevent mental health providers from recommending SOCE to patients, whether children or adults
- Prevent mental health providers from administering SOCE to any person who is 18 years of age or older
- Prevent mental health providers from *referring minors to unlicensed counselors*, such as religious leaders
- Prevent *unlicensed providers*, such as religious leaders, from administering SOCE to children or adults
- Prevent minors from seeking SOCE from mental health providers in other states

Pet. App. 8-9 (emphasis added).

In other words, S.B. 1172 permits anyone in the world to administer SOCE "talk therapy" to minors in California *except* those who are trained and licensed to provide SOCE talk therapy! The Ninth Circuit inexplicably defends S.B. 1172 against a First Amendment challenge precisely because it allows "unlicensed providers . . . [to] administer[ ] SOCE to *children* or adults," and even allows licensed providers to refer minors to unlicensed providers in order to receive the same therapeutic speech the licensed provider is statutorily forbidden to utter because it is supposedly harmful.

Under the strict scrutiny standard applicable to content-based speech restrictions S.B. 1172 would be invalid unless California could demonstrate that it serves a "*compelling* government interest and is narrowly drawn to serve that interest." *Brown v. Entm't Merchants Ass'n*, ___ U.S. ___, 131 S. Ct. 2729, 2738, 180 L. Ed. 2d 708 (2011) (emphasis added). Under this "demanding standard . . . [i]t is rare that a regulation . . . will *ever* be permissible." *Id.* (*quoting United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000)) (emphasis added).

The Ninth Circuit's attempt to uphold a content-based restriction on professional speech under a rational basis analysis, *see* Point II, must be seen as an implicit concession that S.B. 1172 could not possibly survive the strict scrutiny plainly required here. To reach the desired result, the Ninth Circuit not only defied this Court's longstanding First Amendment

precedents, but in the process misapplied its own precedent when it held that "we need not decide whether SOCE actually causes 'serious harms'; it is enough that it could 'reasonably be conceived to be true by the governmental decision maker.'" Pet. App. 29-30, *quoting Nat'l Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1050 (9th Cir. 2000) (*NAAP*).

That is, the Ninth Circuit held that it was not even necessary for the California Legislature to demonstrate that S.B. 1172 addresses an actual harm, so long as it could reasonably "conceive" that harm exists. But the phrase "reasonably conceived to be true" in the *NAAP* opinion related to facts supporting the legislative classification of psychotherapists as a profession for which bare licensure could be required under the Fourteenth Amendment, not a legislative attempt to dictate the particular *content* of their therapeutic speech under the First Amendment. Indeed, in *NAAP* the Ninth Circuit upheld California's regime of health licensing laws as applied to psychotherapists precisely because those laws did not dictate the content or mode of therapy:

> [T]hey [the licensure laws] *do not dictate what can be said between psychologists and patients during treatment*. Nothing in the statutes *prevents licensed therapists from utilizing psychoanalytical methods* . . . speech is *not being suppressed based on its message*.

*Id.* at 1055 (emphasis added).

Now that California has done precisely what the Ninth Circuit, in *NAAP*, clearly implied it may not do, the court has expediently backpedalled, stating that in *NAAP* "we neither decided how *much* [court's emphasis] protection that *communication* should receive nor considered whether the level of protection might vary depending on the function of *the communication*." Pet. App. 16-17 (emphasis added). The Ninth Circuit now holds that the California Legislature *can* dictate the content of the *communication* involved in psychotherapy, thus belying its own contention that S.B. 1172 merely regulates conduct in the form of treatment, not speech.

Continuing to backpedal, the Ninth Circuit has also retreated from its reasoning in *NAAP* that California's then existing licensure laws were content-neutral as they were "not adopted because of any disagreement with psychoanalytical theories." *NAAP*, 228 F.3d at 1055-56. But disagreement with the analytical theory behind SOCE is precisely the rationale for S.B. 1172.

The Ninth Circuit further defended S.B. 1172 on the ground that it "does nothing to prevent licensed therapists from discussing *the pros and cons of SOCE* with their patients." Pet. App. 24. But what if the pros outweigh the cons in the therapist's professional judgment? The California Legislature has usurped that professional judgment and forbidden SOCE as to minors. What, then, of the Ninth Circuit's earlier observation in *NAAP*, quoted above, that California's licensure laws do not offend the Constitution because

"nothing in the statutes prevents licensed therapists from utilizing psychoanalytical methods"?

What is presented here is the classic case of a result in search of a rationale. But there is no rationale that can avoid this Court's requirement of strict scrutiny of a law that targets particular speech for official punishment and even prescribes what speech is permissible: *only* "acceptance, support, and understanding" of homosexual inclinations in minors. Cal. Bus. & Prof. Code §§ 865(b)(1), (2).

Moreover, to survive the required strict scrutiny, S.B. 1172 "must specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be actually necessary to the solution." *Brown*, 131 S. Ct. at 2738. The Ninth Circuit implicitly concedes that the California Legislature has not identified an actual problem for which the narrowly tailored solution would be curtailment of SOCE talk therapy. Quite the contrary, the court below defends S.B. 1172 precisely because it allows *everyone but licensed therapists to engage in SOCE* with minors for the very purpose of attempting to change their sexual orientation – the very "problem" the California Legislature purported to address.

In *Brown*, this Court, applying strict scrutiny to a California statute banning the sale or rental of violent video games to minors, noted that California

> has (wisely) declined to restrict Saturday morning cartoons, the sale of games rated for young children, or the distribution of

> pictures of guns. The consequence is that its regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. *Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint*.

*Brown*, 131 S. Ct. at 2740 (emphasis added).

California is once again caught in the act of adopting a "wildly underinclusive" law that patently fails to address the interest it invokes: alleged harm to minors. Yet, although in *Brown* this Court observed that the underinclusiveness of the challenged statute "in our view is *alone* enough to defeat it," *id.* at 2740 (emphasis added), here the California Legislature's blatant underinclusivness is not only acknowledged but cited approvingly by the Ninth Circuit as the very basis for upholding the challenged law.

Tellingly, the California Legislature has made no attempt to address "harm" to minors from SOCE as administered by religious ministers and other unlicensed and untrained persons, no matter how incompetent. It is easy to see why: any such attempt would involve a widespread deprivation of the First Amendment right to freedom of speech respecting the immorality of homosexual conduct and the legitimacy of aspiring to avoid such conduct or the inclination toward it. The California Legislature apparently concluded, however, that it could get away with punishing these disfavored opinions at least as to those who

are subject to its licensing authority: the same medical professionals whose training in psychotherapy would tend to *prevent* any alleged harm from SOCE. Thus, S.B. 1172 actually provokes the alleged harm it purports to address by forcing minors with unwanted SSA to seek assistance from the untrained and the incompetent.

As S.B. 1172's underinclusiveness would suggest, the legislative record of S.B. 1172 contains no evidence of actual harm to minors from SOCE. Like the California Legislature itself, the Ninth Circuit decision places heavy reliance on a 2009 report by a Task Force of the American Psychological Association. Pet. App. 11. But that report virtually compels the conclusion that S.B. 1172 cannot survive strict scrutiny. As the report admits:

> We conclude there is a dearth of scientifically sound research on the safety of SOCE. *Early and recent research studies provide no clear indication of the prevalence of harmful outcomes* among people who have undergone efforts to change their sexual orientation or the frequency of occurrence of harm because *no study to date of adequate scientific rigor has been explicitly designed to do so*. Thus, *we cannot conclude how likely it is that harm will occur from SOCE*. . . .

Pet. App. 78.

In other words, there is no scientific evidence that SOCE causes harm to anyone, including minors. The most the APA report could assert is

that "[a]lthough the recent 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." *Id.* That is, the APA could cite only anecdotes, not scientific evidence, and there is no indication that any of these anecdotes involved minors.[2] In fact, as the district court noted, "the studies discussed and criticized as incomplete in the 2009 APA Report do not appear to have focused on harms to minors, and the 2009 APA Report indicates that '[t]here is a lack of published research on SOCE among children.'" Pet. App. 79, *quoting* APA Report at 41-43, 72.

The evidence in the legislative record here is of an even lower quality than that deemed insufficient to withstand strict scrutiny in *Brown*, where California relied on studies showing, at most, a mere correlation "between exposure to violent entertainment and minuscule real-world effects, such as children's feeling more aggressive or making louder noises in the few minutes after playing a violent game than after playing a nonviolent game." *Brown*, 131 S. Ct. at 2739. Here there is not even scientific evidence of correlation between SOCE and harm to minors. There is no scientific evidence at all, but only anecdotes. As this Court held in *Brown*, under First

[2] There is no shortage of anecdotal evidence of people who "perceive" that SOCE has helped them. *See, e.g.*, personal accounts at Men and Women Who Have Experienced Authentic Change in Sexual Orientation Through Therapy that Works!, http://www.voices-of-change.org/.

Amendment strict scrutiny "California's burden is much higher, and because it bears the risk of uncertainty, *ambiguous proof will not suffice*." *Id*. (emphasis added). Nor should it suffice here, where there is not even ambiguous proof that SOCE has caused actual harm to actual minors.

The College cannot fail to note, however, that there is ample clinical evidence that during adolescence – precisely the period targeted for a statutory therapeutic ban by S.B. 1172 – the developing adult personality exhibits considerable fluidity and instability respecting SSA, indicating that adolescents would indeed respond to talk therapy aimed at ameliorating or eliminating unwanted SSA. The authors of one such study were so impressed by the evidence of instability in SSA among adolescents that they questioned whether the term "sexual orientation" has any meaning for this age group.[3] Another study, involving 13,840 youth, demonstrated a dramatic shift away from homosexual attraction to fixed, heterosexual attraction.[4] Even the APA task force report,

---

[3] R.C. Savin-Williams and G.L. Ream, "Prevalence and Stability of Sexual Orientation Components During Adolescence and Young Adulthood," 36 ARCHIVES OF SEXUAL BEHAVIOR (2007), 385-394. The study showed that 75% of adolescents who had some initial homosexual attraction between the ages of 17-21 ultimately fixed upon heterosexual attraction alone. By comparison, the same study showed marked stability in heterosexual attraction: fully 98% of this cohort retained their heterosexual-only attraction into adulthood.

[4] M.Q. Ott, H.L. Corliss, et al., "Stability and Change in Self-Reported Sexual Orientation Identity in Young People: Application

(Continued on following page)

on which California and the Ninth Circuit rely, readily acknowledges that "the recent research on sexual orientation identity diversity illustrates that sexual behavior, sexual attraction, and sexual orientation identity are labeled and expressed in many different ways, *some of which are fluid*."[5]

While no studies have examined the success rates of SOCE among adolescents, the evident fluidity of SSA among adolescents would indicate that therapeutic intervention could help at least some minors struggling with SSA to overcome it if they wish to do so in keeping with their moral or religious values. If anything, there is a compelling state interest in allowing therapists like the Petitioners here to provide competent and licensed therapeutic assistance to minors seeking to understand and master their own sexual feelings, one way or the other. It is most ironic that at a time when political advocates on both sides of the question are debating the right of adolescents to "explore" their own "sexual orientation" and "gender identity" as an aspect of the Fourteenth Amendment "right to privacy,"[6] the California Legislature

---

of Mobility Metrics," 40(3) ARCHIVES OF SEXUAL BEHAVIOR (2011), 519-532. Published online December 2, 2010, doi: 10.1007/s10508-010-9691-3. Of those initially "unsure" of their sexual orientation, 66% became exclusively heterosexual.

[5] APA Report, http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf at 14. Last visited May 5, 2014 (emphasis added).

[6] *Compare*, Adam J. Kretz, *The Right to Sexual Orientation Privacy: Strengthening Protections for Minors who are "Outed" in Schools*, 42 J.L. & EDUC. 381 (2013) *and* Christopher A.

(Continued on following page)

has decided to butt into the privacy of the therapist-patient relationship and effectively dictate that a homosexual orientation is the preferred outcome, to which a licensed therapist may provide only "acceptance, support, and understanding" but "not seek to change. . . ." Cal. Bus. & Prof. Code §§ 865(b)(1), (2).

Finally, to allege that SOCE "may" cause harm to minors – which is all the record before the California Legislature really alleges – is merely to utter a truism that applies to all forms of psychotherapy. No form of psychotherapy is without some risk of harm to the patient; and there is, accordingly, a standard range of acceptable harm to be expected from therapy. Regarding all forms of psychotherapy for any given condition, a surprisingly high 14-24% of children deteriorate during therapy.[7] There is not one study demonstrating that SOCE causes harm greater than or even equal to this baseline level.[8] On the contrary, a study frequently cited as evidence of harm from SOCE states that it does "*not* provide information

---

Ferrara, *Customizable 'Sexual Orientation Privacy' for Minor Schoolchildren: A Law School Invention in Search of a Constitutional Mandate*, 43 J.L. & EDUC. 65 (2014).

[7] *See, e.g.,* Michael J. Lambert, "Psychotherapy research and its achievements," in J.C. Norcross, G.R. VandenBos, and D.K. Freedheim (eds.), *History of Psychotherapy: Continuity and Change* (2d ed., 2011), 299-332.

[8] C. Rosik, "The (Complete) Lack of a Scientific Basis for Banning Sexual-Orientation Change Efforts with Minors," available at http://www.narth.com/#!narth-analysis-of-soce-ban/c1q8f [accessed February 13, 2014].

on the incidence and prevalence of failure, success, harm, help or ethical violations in conversion therapy [i.e., SOCE]."[9] (emphasis added) Moreover, there is no scientific proof that "gay-affirmative" therapy – the only therapeutic choice for minors permitted by S.B. 1172 – is not harmful to minors distressed by SSA, whereas there are numerous surveys of individuals who have experienced positive outcomes from SOCE.[10]

On the other hand, there are serious health reasons for adolescents, especially males, to seek therapy for unwanted SSA. According to statistics compiled by the Centers for Disease Control for the period 2006-2009, young males who engaged in homosexual activity with males aged 13-24 had the highest percentage increase in diagnosed HIV infections of all age groups.[11] Among all adolescent males aged 13-24 years, approximately 91% of all diagnosed HIV infections were from male-to-male sexual contact.[12]

---

[9] A. Shidlo and M. Schroeder, "Changing sexual orientation: A consumers' report," 33(3) PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE (2002), 249-259.

[10] *See, e.g.,* E.Y. Karten and J.C. Wade, "Sexual Orientation Change Efforts in Men: A Client Perspective," 18 JOURNAL OF MEN'S STUDIES (2010), 84-102; J. Nicolosi, A.D. Byrd and R.W. Potts, "Retrospective Self-reports of Changes in Homosexual Orientation: A Consumer Survey of Conversion Therapy Clients," 86 PSYCHOLOGICAL REPORTS (2000), 1071-1088.

[11] Cf. "HIV and Young Men Who Have Sex with Men," http://www.cdc.gov/healthyyouth/sexualbehaviors/pdf/hiv_factsheet_ymsm.pdf. Last visited May 14, 2014.

[12] *Id.*

And compared with heterosexual youth, non-heterosexual youth are at increased risk (by a median of 76% if bisexual; 63.8% if homosexual) for contracting other sexually transmitted diseases, drug and substance abuse, violent behavior, depression and suicide.[13] Thus, if anything, the State would have a compelling interest in facilitating, not prohibiting by law, therapeutic interventions that may result in a minor deciding against a homosexual "orientation."

## II. THE NINTH CIRCUIT HAS ALSO DEPARTED FROM THIS COURT'S PRECEDENTS ON INTERMEDIATE SCRUTINY OF LAWS RESTRICTING SPEECH, UNDER WHICH S.B. 1172 LIKEWISE CANNOT SURVIVE BECAUSE IT FURTHERS NO SUBSTANTIAL GOVERNMENT INTEREST AND PLACES AN UNNECESSARY BURDEN ON PHYSICIAN SPEECH.

As shown above, the Ninth Circuit has attempted to evade this Court's requirement of strict scrutiny of content-based speech restrictions by stressing that S.B. 1172 permits everyone in the State of California *except* licensed psychotherapists to administer SOCE therapy to minors, and that even licensed therapists

---

[13] L. Kann, E. Olsen, et al., "Sexual Identity, Sex of Sexual Contacts, and Health-Risk Behaviors Among Students in Grades 9-12 – Youth Risk Behavior Surveillance, Selected Sites, United States, 2001-2009," Centers for Disease Control, 60 MORTALITY AND MORBIDITY WEEKLY REPORT (June 6, 2011).

are permitted to advocate SOCE to minors and to refer them to unlicensed and untrained SOCE counselors such as religious ministers. Pet. App. 8-9. But in its flight from strict scrutiny, which S.B. 1172 cannot possibly survive, the Ninth Circuit dooms its own rational basis analysis, for nothing could be more irrational than a law that forbids licensed psychotherapists to administer a form of therapy deemed "harmful," while permitting them to *recommend* the same "harmful" therapy to minors and even to *refer* them to untrained and unlicensed counselors in order to receive it.

Having little choice but to confront, if only glancingly, the evident irrationality of the challenged statutory regime, the Ninth Circuit held that "we do not require that the government's action *actually advance its stated purposes*, but merely look to see whether the government *could* have had a legitimate reason for acting as it did." *NAAP*, 228 F.3d at 1050-51, *quoting Dittman v. California*, 191 F.3d 1020, 1031 (9th Cir. 1999) (emphasis added). In other words, the Ninth Circuit did not even bother to determine whether S.B. 1172 actually served a legitimate government purpose, just as it did not bother to determine whether the law rectified any proven harm to minors from SOCE therapy. Under the Ninth Circuit's novel *ad hoc* approach to this law, S.B. 1172 would be sustainable even if is perfectly useless, despite its patently content-based restrictions on physician speech. The result was that an unprecedented, speech-restricting law was subjected to *no* scrutiny under this Court's controlling precedents.

As *Dittman* itself makes clear, however, the principle that a reviewing court will look only at "whether the government *could* have had a legitimate reason" for enacting a challenged law relates only to "a substantive due process to challenge a legislative act that does not infringe on a fundamental right." *Dittman*, 191 F.3d at 1031. Here, however, the challenged law undeniably infringes the fundamental First Amendment right to freedom of speech. Even the Ninth Circuit concedes that "communication that occurs during psychotherapy does receive *some* constitutional protection, but it is not immune from regulation." Pet. App. 18-19. Because protected speech is indubitably swept up by the prohibitions of S.B. 1172, the law must at least satisfy the rational basis analysis requiring "intermediate scrutiny" of content-neutral speech restrictions, rather than the intermediate scrutiny applied to laws that do not infringe fundamental rights.

This Court has affirmed time and again that even a content-neutral regulation of speech can be sustained only "if it furthers an *important or substantial* governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968) (emphasis added); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994). Stated otherwise, even a content-neutral regulation of speech must "promote[ ] a *substantial* government interest that would be achieved less effectively absent

the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (emphasis added).

Moreover, even if it is assumed that S.B. 1172 regulates purely commercial speech, its clear targeting of the content of that speech would still require

> at least that the statute *directly advances a substantial governmental interest* and that the measure is drawn to achieve that interest. *There must be a fit between the legislature's ends and the means chosen to accomplish those ends*. As in other contexts, these standards ensure not only that the State's interests are proportional to the resulting burdens placed on speech but also that the law does not seek *to suppress a disfavored message.*

*Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667-68 (2011) (striking down statutory ban on commercial use of data on the prescription patterns of physicians).

Contrary to this Court's controlling precedents, however, the Ninth Circuit declares that S.B. 1172 need not be shown to have achieved *any* government interest at all, but only that the legislature *could* have thought that it did. The Ninth Circuit was able to reach this conclusion only via the judicial pretense that S.B. 1172 regulates only "conduct" in the form of treatment. *See* Pet. App. 24. But because S.B. 1172 attempts to regulate the speech involved in therapeutic conversations, it fails intermediate scrutiny just as surely as it fails strict scrutiny, even if it is

assumed – contrary to the plain terms of the law – that its regulation of speech is content-neutral.

First of all, the required "substantial government interest" simply does not exist: There was not a scintilla of real evidence before the California Legislature that SOCE has harmed anyone, much less minors in particular. And there was certainly no evidence to support the California Legislature's arbitrary determination that SOCE is harmful to seventeen-year-olds but not eighteen-year-olds.

Secondly, even assuming the existence of an important or substantial government interesting in "protecting" minors from SOCE therapy, S.B. 1172 clearly does not further that interest. Quite the contrary, it undermines it by disqualifying *only* trained and licensed professionals from rendering the very therapy it deems harmful, leaving minors with unwanted SSA to obtain this "harmful" therapy wherever they can. That the California Legislature is not legitimately concerned with the "harm" it purports to remedy with this law is shown by its willingness to allow licensed therapists to recommend SOCE to minors and even to arrange for referrals of minors to unlicensed and untrained SOCE therapists. There is, accordingly, no "fit between the legislature's ends and the means chosen to accomplish those ends," but rather only a legislative attempt "to suppress a disfavored message," *Sorrell*, 131 S. Ct. at 2667-68, when it is conveyed by trained therapists.

Thirdly, for these reasons, S.B. 1172 does not involve a permissible "incidental restriction on alleged First Amendment freedoms . . . no greater than is essential to the furtherance of that [government] interest." *O'Brien*, 391 U.S. at 377. The speech restriction this law imposes is massive, implicating not only pure speech under the First Amendment but religious and moral convictions that may be shared by therapists and patients who present with unwanted SSA. That the Ninth Circuit defended S.B. 1172 on the ground that it does not "[p]revent mental health providers from referring minors to unlicensed counselors, such as religious leaders" to receive SOCE counseling, Pet. App. 10, shows that SOCE therapy is inextricably bound up with speech that aims to further a minor patient's religious belief that SSA is disordered and that a so-called homosexual "orientation" should be changed if possible. S.B. 1172, however, permits psychotherapists to use their training and experience only to further the belief that homosexuality is *not* disordered and should receive acceptance, support and understanding. Yet, quite irrationally, the California Legislature has decreed that at the moment a minor patient turns 18 the supposed threat of harm from SOCE therapy expires and the therapist is suddenly enabled to accommodate the same patient's religious and moral beliefs against homosexuality by administering the therapy. That absurd result indicates not only the utter lack of an important or substantial government interest actually furthered by this law, but also the utter gratuity of its speech restrictions.

In another context, the Ninth Circuit recognized the wisdom of this Court's admonition that "If the First Amendment means anything, it means that regulating speech must be a last – not first – resort. Yet here it seems to have been the first strategy the Government thought to try." *Conant*, 309 F.3d at 637, *quoting Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) (striking down ban on physician promotion of certain compound drugs). Here too it seems that content-based speech restrictions were the first strategy the government thought to try – in fact, the only strategy. This Court's precedents mandate this Court's intervention lest the Ninth Circuit's disregard of fundamental First Amendment principles becomes endemic in the drive to adopt anti-SOCE laws in state after state.

## CONCLUSION

The Ninth Circuit has flagrantly disregarded this Court's controlling precedents by holding that a plainly content-based statutory restriction on physician speech regulates only conduct, and that the challenged law need not actually address a proven harm or actually achieve the advancement of a legitimate government interest. This unprecedented law was thus subjected to no scrutiny whatsoever. As Petitioner rightly notes, the Ninth Circuit could not have reached this result without inventing a new category of *per se* forbidden speech. Because this decision is not a mere outlier, but has already been

cited by a New Jersey federal court in upholding a virtually identical law, while virtually identical laws have been introduced in numerous other states, respect for this Court's First Amendment precedents requires this Court's review of the Ninth Circuit's decision in order to prevent a result-oriented distortion of First Amendment law throughout the nation adverse to the Constitutional rights of psychotherapists, including those affiliated with the College.

Respectfully submitted,

CHRISTOPHER A. FERRARA, ESQ.
AMERICAN CATHOLIC LAWYERS ASSOCIATION, INC.
420 Route 46 E.
Suite 7
Fairfield, NJ 07004

JAMES M. BENDELL, ESQ.
*Counsel of Record*
BENDELL LAW FIRM, PLLC
WEST COAST LITIGATION
COUNSEL FOR AMERICAN CATHOLIC LAWYERS ASSOCIATION, INC.
1110 West Park Place, Suite 302
Coeur d'Alene, Idaho 83814
(208) 215-2255
james@bendelllawfirm.com
*Counsel for Amicus Curiae American College of Pediatricians*

Date: May 20, 2014