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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.

3 _____/
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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.¹

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 ¹ 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."² (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, 2013.³ 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

21
22 ² Neither defendants nor amicus challenged whether Bitzer
has Article III standing.

23
24 ³ 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."⁴

20
21 ⁴ 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

25 _____
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).⁵

22
23 ⁵ 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).⁶

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,⁷ the Ninth Circuit

9 _____
10 ⁶ 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 ⁷ 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.⁸ 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

26
27 ⁸ 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)).⁹

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

24 ⁹ 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.¹⁰

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 ¹⁰ 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.¹¹ (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

25
26 ¹¹ 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.¹² (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

24 ¹² 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.¹³ 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 ¹³ 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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