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Getting it Straight: A First Amendment Analysis of California's Ban on Sexual Orientation Change Efforts and its Potential Effects on Abortion Regulations

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GETTING IT STRAIGHT: A FIRST AMENDMENT ANALYSIS OF CALIFORNIA'S BAN ON SEXUAL ORIENTATION CHANGE EFFORTS AND ITS POTENTIAL EFFECTS ON ABORTION REGULATIONS

ELIZABETH BOOKWALTER*

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I. INTRODUCTION

> I had AIDS. I was the only gay person left in the world [be]cause the government found all the other gays and killed them as children and if they found me, they would kill me. It's the perfect way to keep a child or a teen from coming out. We moved on to physical therapy. Physical therapy was my hands being tied down and blocks of ice being placed on my hands. Then pictures of men holding hands would be shown to me so that way I would associate the concept of the pain of ice with a man touching me. It worked really, really, really well. My dad could barely even hug me anymore [because] I would scream out in pain. Then we moved into heat. [C]oils would be placed around my hands and you'd be able to turn the heat on or off. So, now, if we had a picture of a guy and a girl hugging it was no pain. If we had a guy and a guy hugging, we had physical pain. We then went into the month of hell. The month of hell consisted of tiny needles being stuck into my fingers and then pictures of explicit acts between men would be shown and I would be electrocuted. At this point I was completely done. GOD did not want me on this Earth anymore.[1]

This is Sam Brinton's account of his experience with sexual orientation change efforts ("SOCE" or "conversion therapy").[2] The purpose of SOCE is to change the sexual orientation of individuals through therapy, though most, if not all, efforts seek to convert homosexual[3] persons to heterosexual persons.[4] While not all SOCE involves the drastic measures that Sam endured, it remains a controversial therapy and the American Psychological

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1. *See About*, I'M FROM DRIFTWOOD, http://www.imfromdriftwood.com/about-us (last visited on Sept. 15, 2013) (detailing the mission of I'm From Driftwood, an organization that promotes acceptance and understanding of the lesbian, gay, bisexual, transgendered, queer (LGBTQ) community through storytelling and sharing).

2. *See* Sam Brinton, *I'm From Perry, IA—Video Story*, I'M FROM DRIFTWOOD, http://www.imfromdriftwood.com/im-from-perry-ia-video-story (last visited on Sept. 15, 2013) (relaying how Sam Brinton's homosexual feelings resurfaced during college despite the "success" of conversion therapy). Although Sam's conversion therapy was conducted by a religious counselor, the treatments Sam endured are similar to those treatments used by SOCE therapists.

3. This paper uses the term "homosexual" to refer to all lesbian, gay, bisexual, transgender, and queer ("LGBTQ") persons to maintain consistency with the courts' terminology.

4. *See* AM. PSYCHOLOGICAL ASS'N, REPORT OF THE TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION 12 n.5 (2009) [hereinafter APA TASK FORCE] (defining sexual orientation change efforts ("SOCE") as methods that seek to change homosexual orientation through behavioral and psychoanalytical techniques).

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Association ("APA") encourages mental health providers to avoid it.[5] In response to the growing controversy regarding SOCE and concern about the potential harm that such therapy may cause, the California legislature banned mental health professionals from engaging in conversion therapy with individuals under the age of eighteen ("SB 1172").[6] Any mental health provider that engages in SOCE with a minor thereby engages in professional misconduct, and the licensing board may censure that therapist.[7] Within days of Governor Jerry Brown signing the ban against conversion therapy, SOCE therapists, advocates, and organizations filed two lawsuits challenging the constitutionality of the ban on First Amendment grounds and seeking preliminary and permanent injunctions to prevent the law from taking effect.[8] Following appeals from the losing parties in both district court decisions, the Ninth Circuit held that SB 1172 is not an infringement of First Amendment free speech rights.[9] The plaintiffs-appellants have since filed for a rehearing en banc.[10]

This Comment discusses why the Ninth Circuit correctly determined that SB 1172 does not implicate free speech rights, and analyzes why SB 1172 does not unduly burden the free exercise of religion.[11] This Comment shows that SB 1172 survives heightened scrutiny and discusses why the trial court that issued the preliminary injunction in *Welch v. Brown* erred by

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5. *See id.* at 66 (concluding that psychologists are currently unable to determine the efficacy or safety of SOCE, but research indicates it may cause harm and should be avoided).

6. *See Ca. Bans Therapy Meant to Turn Gay Kids Straight*, NPR (Oct. 4, 2012, 12:00 PM), http://www.npr.org/2012/10/04/162294049/ca-bans-therapy-meant-to-turn-gay-kids-straight (explaining that the impetus for SB 1172 was a documentary about a man who committed suicide after years of conversion therapy).

7. *See* CAL. BUS. & PROF. CODE § 4982 (West 2013) (declaring that professional censure of therapists includes denial, revocation, or suspension of professional licensure).

8. *See* Pickup v. Brown, No. 2:12-CV-02497-KJM-EFB, 2012 WL 6021465, at *1 (E.D. Cal. Dec. 4, 2012) (indicating SB 1172 was signed on September 29, 2012, and the action was filed October 4, 2012); Welch v. Brown, 907 F.2d 1102, 1106-07 (E.D. Cal. Dec. 4, 2012) (noting a filing date of October 1, 2012).

9. Pickup v. Brown, 728 F.3d 1042, 1056 (9th Cir. 2013) (finding that SB 1172 regulates professional conduct, and that any infringement on speech is merely incidental).

10. Petition for Rehearing and Rehearing En Banc at 6-7, Pickup v. Brown, 728 F.3d 1042 (9th Cir. 2013) (claiming that the Ninth Circuit mistakenly used plenary review and ignored controlling precedent that favored the plaintiffs).

11. *See infra* Part III (specifying that the California and federal constitutions protect against laws that infringe on speech or those that burden religious belief, but do not protect against generally applicable, neutral laws or mere conduct).

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reviewing SB 1172 under strict scrutiny.[12] Part II provides an overview of SB 1172, addressing the law as well as the legislative intent behind the law.[13] Part II also discusses the original lawsuits challenging SB 1172 and the judges' differing decisions on the free speech challenges.[14] Finally, Part II presents an overview of the law under the First Amendment, specifically with regard to free speech and the free exercise of religion.[15] Part III provides a legal analysis of constitutional challenges to the ban on conversion therapy—the therapists' right to free speech and the minors' and parents' right to the free exercise of religion.[16] This section discusses why SOCE is not protected free speech and shows how SB 1172 meets the rational basis test.[17] Part III also shows that even if the Ninth Circuit vacated its decision on rehearing and held that SOCE is a form of protected speech, the Court should still only apply intermediate scrutiny—which SB 1172 survives—because SOCE constitutes fraud. While the United States and California constitutions afford free speech their highest protections, neither protects fraud at that same level.[18] Part IV discusses the implications for other free speech challenges to medical regulations, such as compelled speech challenges by physicians who provide abortions and are required to make certain statements prior to providing services, that might arise if the Court were to strike down SB 1172 on rehearing.[19] Part IV also suggests ways in which the legislature could protect against future challenges to SB 1172, should the Ninth Circuit en banc find that the ban is unconstitutional as it stands.[20] Finally, Part V concludes that because SB

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12. *See infra* Part III (characterizing SOCE as conduct, not speech, and arguing that if it is speech, it is fraud and unprotected).

13. *See infra* Part II (outlining the limitations SB 1172 places on mental health professionals providing SOCE for minors).

14. *See infra* Part II (explaining the arguments in *Pickup* and *Welch* and the differing decisions).

15. *See infra* Part II (discussing free speech and minors' right to the free exercise of religion).

16. *See infra* Part III (analyzing the ban on SOCE through the lens of free speech and the free exercise of religion).

17. *See infra* Part III (showing that rational basis review is appropriate for a ban on treatments such as electroshock therapy, effigy-beating, and encouragement to shower with one's father).

18. *See infra* Part III (comparing SOCE to fraud because the therapists knowingly make false or misleading statements with the intention of eliciting compensation).

19. *See infra* Part IV (identifying abortion laws that, if SB 1172 were held unconstitutional, could also be held unconstitutional as free speech violations because they require physicians to convey information they do not believe).

20. *See infra* Part IV (suggesting that the California legislature commission studies to demonstrate the harmful effects of SOCE).

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1172 does not infringe on free speech or the free exercise of religion under either the federal or California constitutions, the Ninth Circuit should affirm its decision to uphold the ban on SOCE in the interest of protecting lesbian, gay, bisexual, transgendered, and queer (LGBTQ) youth, as well as preventing an onslaught of challenges to other medical regulations.[21]

II. BACKGROUND

A. Sexual Orientation Change Efforts

Sexual orientation change efforts are therapies that aim to alter an individual's sexual orientation.[22] Although therapists differ widely on their techniques, conversion therapy is generally categorized as either aversion therapy, focusing on physical treatments, or non-aversion therapy, utilizing techniques that focus on the mind and changing behavior patterns.[23]

The controversial nature of SOCE has gained national attention over the past few years.[24] In light of this attention and society's changing views on, and understanding of homosexuality, every major medical and mental health organization has rejected SOCE as a legitimate therapeutic treatment.[25] Despite those positions, SOCE therapists claim that conversion therapy is effective, profess that homosexuality is only a temporary condition, and tell patients that if they put in enough effort, then the patient can successfully reduce or eliminate homosexual feelings.[26] These therapists also focus on teaching homosexuals how to not act on

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21. *See infra* Part V (concluding that striking down SB 1172 will limit the State's power to regulate the medical field and will lead to mass disobedience of laws on religious grounds).

22. *See* APA TASK FORCE, *supra* note 4, at 12 (stating SOCE arose in response to the idea that homosexuality is a mental disorder).

23. *See* Chuck Bright, *Deconstructing Reparative Therapy: An Examination of the Processes Involved When Attempting to Change Sexual Orientation*, 32 CLINICAL SOC. WORK J. 471, 473-77 (2004) (noting that techniques include telling patients that homosexuality does not exist and results from childhood sexual molestation).

24. *See, e.g.*, *Criminal Minds: Broken* (CBS television broadcast Feb. 20, 2013) (portraying a former SOCE patient who killed his lovers because his therapy filled him with shame and hatred).

25. *See The Lies and Dangers of Reparative Therapy*, HUM. RTS. CAMPAIGN, http://www.hrc.org/resources/entry/the-lies-and-dangers-of-reparative-therapy (last visited Sept. 15, 2013) (recognizing that the limited research on SOCE has disproven its efficacy and discussing a therapist's disavowal of his studies claiming SOCE is effective).

26. *See Quick Facts*, FACTS ABOUT YOUTH, http://factsaboutyouth.com/getthefacts/quickfacts (last visited Sept. 15, 2013) (offering "facts" and resources, compiled by SOCE therapists, for youths wrestling with their sexuality).

their sexual feelings, even if same-sex attraction is still present.[27]

B. Senate Bill 1172

Senate Bill 1172 is an amendment to California's current regulatory scheme for state-licensed mental health providers.[28] As part of this regulatory scheme, California prohibits treatments that it deems to constitute unprofessional conduct for mental health providers.[29] California passed SB 1172, specifying that "under no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age."[30] As defined by SB 1172, SOCE includes efforts to change behaviors or gender expressions or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex.[31] SB 1172 does not, however, target any therapies that promote acceptance of, or support for, one's sexual identity or those therapies that do not seek to change sexual orientation.[32] Because the California legislature's aim was to protect LGBTQ minors from harmful therapies, SB 1172 targets only conversion therapies—those therapies that purport to change the sexual orientation of homosexuals but often only succeed in inflicting psychological harm.[33]

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27. *See* THOMAS AQUINAS PSYCHOLOGICAL CLINIC, http://josephnicolosi.com (last visited on Sept. 15, 2013) (claiming to help patients reduce homosexual tendencies and explore heterosexual potential).

28. *See* Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1047 (9th Cir. 2000) (acknowledging that the state has long regulated healthcare providers because of the harm resulting from incompetent practice).

29. *See, e.g.*, CAL. BUS. & PROF. CODE § 728 (West 2013) (censuring therapists who do not follow proper procedure upon learning of a sexual relationship between a patient and a therapist).

30. CAL. BUS. & PROF. CODE § 865 (West 2013); *See* Wyatt Buchanan, *State Bans Gay-Repair Therapy for Minors*, S.F. CHRON. (Sept. 29, 2012, 11:07 PM), http://www.sfgate.com/news/article/State-bans-gay-repair-therapy-for-minors-3906032.php (reporting that Governor Brown signed SB 1172 because SOCE is "quackery," with no basis in science or medicine).

31. *See* BUS. & PROF. § 865 (relying on the APA's opposition to a medical practice that is based on the outdated notion that homosexuality is a mental disorder or dysfunction).

32. *See id.* (adopting the position that although homosexuality is not a disease requiring treatment, minors may need support programs to help with social stigmatization, familial rejection, and LGBTQ community adaption).

33. *See* S. FLOOR ANALYSIS OF S.B. 1172, 2011-12 Leg. Sess., at 8 (Cal. 2012) (relying, in part, on reports from the American Psychiatric Association claiming SOCE may reinforce patient self-hatred, and anecdotal accounts indicating resulting psychological harms).

C. Lawsuits Seeking Preliminary Injunctions Against Senate Bill 1172 and Challenging the Constitutionality of the Ban

1. Pickup v. Brown

The plaintiffs in *Pickup v. Brown* sought to enjoin SB 1172 on the grounds that it violated, *inter alia*, the therapists' right to free speech and the parents' and minors' right to the free exercise of religion under the United States and California constitutions.[34] The plaintiffs alleged that the ban is a viewpoint-based and content-based restriction on speech that fails to serve a compelling interest and, therefore, cannot withstand judicial scrutiny.[35] The plaintiffs further claimed that SB 1172 conflicts with the APA's Ethical Principles of Psychologists and Code of Conduct as the ban requires therapists to comply with state law rather than follow the ethical principle of promoting patient self-determination.[36]

Judge Kimberly Mueller disagreed with the plaintiffs' characterization of SB 1172 and denied their motion for a preliminary injunction.[37] She concluded that SB 1172 was a permissible regulation on medical treatment and did not implicate free speech rights.[38] She noted that the statute regulates only the behavior, not the speech, of mental health professionals, because it does not prohibit a mental health professional from sharing information about SOCE with a minor and permits the minor to seek out a non-licensed individual, such as a religious counselor, to provide the actual therapy.[39]

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34. *See* Pickup v. Brown, No. 2:12-CV-02497-KJM-EFB, 2012 WL 6021465, at *1 (E.D. Cal. Dec. 4, 2012) (noting plaintiffs included therapists of the National Association for Research and Therapy of Homosexuality (NARTH), a professional organization that encourages individuals with unwanted sexual attractions to seek therapeutic change).

35. *See id.* at *7 (alleging that SB 1172 applies only to therapy aimed at changing sexual orientation, not affirming it).

36. *See* APA, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT 4 (2010) (identifying the tenet that therapists must respect patient rights, such as self-determination).

37. *See* Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 381 (2008) (indicating that an injunction is inappropriate when the plaintiff is unlikely to succeed on the merits of the claim).

38. *See Pickup*, 2012 WL 6021465, at *9 (stating that SB 1172 regulates conduct because it only targets techniques aimed at affecting a change and does not impede therapists from conveying an opinion).

39. *Cf.* Conant v. Walters, 309 F.3d 629, 634, 637 (9th Cir. 2002) (invalidating a law prohibiting physicians from discussing medical marijuana with their patients because it prevented the physicians from even espousing a viewpoint).

2. Welch v. Brown

Conversely, Judge William Shubb, presiding over *Welch v. Brown*, found that the ban on SOCE is a content-based regulation and is therefore unlikely to withstand strict scrutiny.[40] Although he agreed with the defendants that SB 1172 is a medical regulation, the judge found that the ban nonetheless implicates free speech.[41] Relying on *Holder v. Humanitarian Law Project*, the judge found that strict scrutiny is the appropriate standard for all content-based regulations that, regardless of their purpose, infringe on fundamental rights.[42] Accordingly, Judge Shubb granted the preliminary injunction.[43]

3. The Ninth Circuit's Decision

On August 29, 2013, the Ninth Circuit agreed with Judge Mueller and opined that SB 1172 is constitutional.[44] Because the district court opinions rested on interpretation of law, not fact, the Ninth Circuit undertook a *de novo* review of both district court decisions.[45] It concluded that SB 1172 only regulates the provision of a mental health treatment to minors, while still allowing mental health professionals to discuss their viewpoints on SOCE, recommend the treatment to anyone, or provide the treatment to consenting adults.[46] The Court concluded that mental health professionals do not receive more First Amendment protection than other healthcare professionals just because their treatments are conducted through speech.[47]

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40. *See* Welch v. Brown, 907 F.2d 1102, 1105 (E.D. Cal. 2012) (determining that the plaintiffs would suffer irreparable harm if the injunction were denied because any infringement on free speech is considered to be irreparable harm).

41. *See id.* at 1111 (asserting that, since SOCE involves both speech and non-speech elements, it implicates free speech rights).

42. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2723 (2010) (rejecting intermediate scrutiny for a statute prohibiting knowingly providing material support to a foreign terrorist organization because the statute is content-based).

43. *See Welch*, 907 F.2d at 1105 (deciding the balance of equities tipped in favor of injunction as the plaintiffs would otherwise be irreparably harmed and the injunction best served the public interest).

44. Pickup v. Brown, 728 F.3d 1042, 1056 (9th Cir. 2013) (finding that any infringement on speech by SB 1172 is merely incidental and therefore the law is subject only to rational basis review).

45. *Id.* at 1048 (noting that abuse of discretion is generally the appropriate standard for an appellate court's review of a district court's determination on a preliminary injunction).

46. *Id.* at 1053 (holding that doctor-patient communications are entitled to robust First Amendment protection but the state still maintains authority to regulate medical treatment).

47. *See id.* at 1055 (noting that when a drug is banned, the physician does not have

Specifically, the Ninth Circuit concluded that mental health professionals who perform SOCE are engaged in professional conduct, not speech.[48] Professional conduct is subject only to rational basis review, which it passes easily.[49] The Court declined to decide whether SB 1172 is a violation of the plaintiffs' freedom of religion rights.[50]

D. Protections Under the United States and California Constitutions

The First Amendment of the United States Constitution prohibits federal regulations from infringing upon an individual's free exercise of religion and freedom of speech.[51] These freedoms extends to the states through the Fourteenth Amendment to the United States Constitution.[52] The California Constitution offers similar protections to its citizens.[53]

1. The Right to Free Speech

While both the California and United States constitutions protect the right to free speech, that right is not absolute and the state may permissibly regulate certain speech.[54] Depending on the nature of the infringement, the courts assess the validity of a law under varying degrees of scrutiny.[55] This scrutiny, however, applies only when the regulation infringes on speech or its equivalent.[56] While some conduct is so expressive that the courts afford

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a right to prescribe the drug).

48. *Id.* (comparing the therapist's treatment to a lawyer's disclosure of confidential information, which is carried out through speech but still subject to professional discipline).

49. *Id.* (noting that to provide First Amendment protection to any incidental infringement on speech would unduly burden the state's ability to regulate medical treatments).

50. *Id.* at 1051 n.3 (declining to address the plaintiffs' religious rights violation argument since the plaintiffs did not "distinctly and specifically" argue the issue to the district court).

51. *See* U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion]; or abridging the freedom of speech . . . .").

52. *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925) (acknowledging that the Due Process Clause of the Fourteenth Amendment requires states to respect First Amendment rights).

53. *See* CAL. CONST. art. 1, §§ 2, 4 (guaranteeing the right to speak freely and worship without fear of discrimination).

54. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 717-18 (2000) (recognizing that free speech does not always extend to offensive speech that is unwelcome and unavoidable by the audience).

55. *See* Welch v. Brown, 907 F.2d 1102, 1113-14 (E.D. Cal. 2012) (concluding that the court must assess the neutrality of the statute before it can identify the appropriate level of review).

56. *See, e.g.*, Concerned Dog Owners of Cal. v. City of L.A., 123 Cal. Rptr. 3d

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it the same protection as words, the courts have deemed some words as so worthless that they do not warrant protection at all.[57]

i. Standards of Review

Courts use three main standards of review to assess the validity of state action: rational basis, intermediate scrutiny, and strict scrutiny.[58] When a state action, such as a law or professional regulation, does not implicate any constitutional rights, then the court applies the rational basis test as the standard of review.[59] As a matter of law, the state action is valid unless the challenger shows either that the state does not have a legitimate basis for taking that action or that the specific action does not rationally relate to a state interest.[60]

When state action implicates a fundamental right, such as the right to free speech, the appropriate standard of review for those actions is generally either intermediate or strict scrutiny.[61] Intermediate scrutiny is applicable to those actions that do not discriminate on the basis of viewpoint or content.[62] To pass intermediate scrutiny, the state must show that the action is narrowly tailored to serve a significant government interest and that it leaves open alternative avenues for communication of the information that is otherwise regulated or controlled.[63]

774, 785 (Ct. App. 2011) (upholding a statute requiring owners to spay certain pets since the law furthered state health interests and did not implicate fundamental rights).

57. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518, 528 (1972) (invalidating a statute as overbroad because it did not limit its prohibition to only "fighting words" that breach the peace).

58. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985) (overruling the application of intermediate scrutiny and applying rational basis review because mental retardation is not a trait that is a quasi-suspect classification).

59. *See, e.g.*, Hodel v. Indiana, 452 U.S. 314, 317 (1981) (upholding, under rational basis review, the Surface Mining Control and Reclamation Act after finding no infringement on constitutional rights).

60. *See id.* at 326 (acknowledging that the Court cannot substitute its own judgment if Congress shows a reasonable relationship between the means and the end of a neutral regulation).

61. *Compare* United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (applying intermediate scrutiny to a law criminalizing the destruction of a draft card), *with* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2710 (2010) (employing strict scrutiny for a statute prohibiting support of terrorist organizations).

62. *See, e.g.*, City of Erie v. Pap's A.M., 529 U.S. 277, 278 (2000) (finding that while nude dancing is expressive conduct, its regulation is content-neutral and unrelated to the suppression of the speech, and, therefore, it is reviewed under intermediate scrutiny).

63. *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2739 (2011) (striking down a ban on the sale of violent video games since the state did not show a

The Supreme Court has set forth a four-pronged test for determining whether a regulation passes an intermediate level of scrutiny.[64] A regulation is constitutional if (1) it is within the power of the Government; (2) it furthers an important or substantial governmental interest; (3) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest; and (4) the interest is unrelated to the suppression of free expression.[65]

The court reviews those regulations that are content-based or viewpoint-based restrictions on free speech under strict scrutiny, which is the most demanding level of review.[66] These regulations are presumptively invalid unless the state can show that the action addresses a compelling interest, that the state narrowly tailored the regulation to further its interest, and that the regulation is the least restrictive means of achieving that end.[67]

ii. Free Speech "Defined"

While the standards of review for free speech are fairly straightforward, exactly what constitutes protected speech is a more difficult question.[68] Words alone are not always sufficient to implicate the First Amendment; yet, silent actions that convey a message may be enough to trigger First Amendment protections.[69] In *Spence v. Washington*, the Supreme Court set forth a two-step test for determining whether conduct is sufficiently

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compelling interest as it offered no proof that the games caused minors to act aggressively).

64. *See O'Brien*, 391 U.S. at 376 (noting that when both speech and non-speech elements are present, substantial government interests may justify infringing on free speech rights).

65. *See id.* at 377 (implying that a regulation satisfies the four elements if the government's interest in regulating conduct outweighs an incidental infringement on fundamental liberty).

66. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 195 (1992) (plurality opinion) (applying strict scrutiny to a prohibition on political speech at the polls because it was content-based).

67. *See* United States v. Stevens, 130 S. Ct. 1577, 1592 (2010) (ruling that a law banning depictions of animal cruelty failed strict scrutiny because it was not narrowly tailored to further the state interest of protecting animals).

68. *Compare* Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1062 (9th Cir. 2010) (finding that the tattooing process is protected as speech because it is inextricably intertwined with the tattoo—a symbol of pure expression), *with* Indiana v. Brady, 492 N.E.2d 34, 39 (Ind. Ct. App. 1986) (determining the process of tattooing is not constitutionally protected because it is only conduct).

69. *Compare* Texas v. Johnson, 491 U.S. 397, 400 (1989) (holding that flag burning is protected speech because of the obvious message conveyed), *with* R.A.V. v. City of St. Paul, 505 U.S. 372, 386 (1992) (stating that "fighting words" are a "non-speech" form of communication because they offer no value to society).

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expressive to rise to the level of protected speech.[70] The First Amendment protects those actions that, despite not using any words, are so imbued with elements of speech that an objective viewer would readily understand the idea or message that the actor intended to express.[71] In applying this test, the courts are careful to note that First Amendment protection does not automatically attach to conduct just because it involves elements of speech.[72]

iii. "Speech" That Is Not "Speech"

Certain types of "speech" are so useless to society that the Supreme Court has repeatedly found that there is no First Amendment concern when states impose regulations that implicate this speech, though very few categories of speech meet this test.[73] Fraud is one of the few exceptions, and the Supreme Court has made it clear that the First Amendment does not protect fraudulent speech.[74] Under California law, four main elements comprise the tort of fraud: a knowingly false representation, the intent to deceive or induce reliance, a justifiable reliance on the false representation, and resulting damages.[75] Generally, the statements at issue must be fact, not opinion, although opinions in certain circumstances will give rise to fraudulent action.[76]

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70. *See* Spence v. Washington, 418 U.S. 405, 415 (1974) (per curiam) (ruling that a student who hung the American flag upside down with a peace symbol attached engaged in expressive conduct since he conveyed a message that would be objectively understood).

71. *See* Giebel v. Sylvester, 244 F.3d 1182, 1187 (9th Cir. 2001) (affording First Amendment protection to a handbill because it clearly intends to convey a particular message to the reader).

72. *See, e.g.*, City of Dall. v. Stanglin, 490 U.S. 19, 25 (1989) (rejecting the idea that any time conduct has an element of expression, it is entitled to First Amendment protection).

73. *See* United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (concluding that there are only a few permissible content-based laws, such as those that regulate fighting words and defamation).

74. *See id.* at 2547 (indicating that while the First Amendment protects false statements, so as not to chill true speech, it does not protect false statements that result in harm).

75. *See* Engalla v. Permanente Med. Grp., Inc., 938 P.2d 903, 917 (Cal. 1997) (detailing the elements of fraud, including a reckless disregard for the truth, not just actual knowledge of a falsity).

76. *See* CAL. CIVIL JURY INSTRUCTION NO. 1904 (2012) (instructing jurors that when one holds himself out as an expert, the court treats his representations as fact, even though a non-professional would be treated as expressing an opinion).

2. The Right to the Free Exercise of Religion

The First Amendment protects not only speech but also prohibits the government from infringing on the free exercise of any religion or belief system.[77] As with the disputes over what constitutes speech, there is considerable ambiguity in determining what "infringes" upon religion and even what constitutes a "religious belief."[78]

Prior to the Supreme Court's 1990 decision in *Employment Division v. Smith*, the Supreme Court afforded religious belief significantly more protection than it does today.[79] Under strict scrutiny, all laws that substantially burdened religious freedom were invalid unless the state could show that the law addressed a compelling state interest and was the least restrictive means to address the interest.[80] Unsurprisingly, few laws were able to meet that burden.[81] In 1990, however, the Supreme Court broadened the state's ability to establish laws that incidentally burdened religion.[82] Rather than reviewing laws under strict scrutiny, the Court created a new test: if a law is a valid and neutral law of general applicability then it is constitutional.[83] The Court reasoned that to mandate exceptions to every law that infringed upon the free exercise of any religion would permit an individual "to become a law unto himself."[84]

Reacting to the Court's decision in *Employment Division v. Smith*, Congress passed the Religious Freedom Restoration Act (RFRA), re-imposing strict scrutiny on laws that infringe upon the free exercise of

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77. *See* U.S. CONST. amend. I. ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

78. *See, e.g.*, Alvarado v. City of San Jose, 94 F.3d 1223, 1226-27 (9th Cir. 1996) (determining whether the statue was even a religious object for purposes of a free exercise claim).

79. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (requiring that the state satisfy the high burden of strict scrutiny for any law infringing on religious rights).

80. *See* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 702 (9th Cir. 1999) (noting that "substantial" may be satisfied by even an incidental burden).

81. *See, e.g.*, *Yoder*, 406 U.S. at 234 (invalidating a compulsory school attendance law as applied to Amish parents who refused to send their children to school on religious grounds).

82. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (limiting the applicability of *Yoder* and *Sherbert*, and allowing laws that are generally applicable and neutral to stand).

83. *See id.* at 874 (upholding a law that resulted in the firing of two Native Americans who smoked peyote for religious purposes).

84. *See id.* at 879 (discussing social anarchy and constitutional anomalies that would result if individuals could use their religious beliefs to avoid complying with the law).

religion.[85] While the RFRA does apply to federal law, the RFRA exceeded the scope of Congress' authority to establish state law, although the states may enact their own versions of the RFRA.[86] California has not passed its own version of the RFRA, and has yet to establish whether the state reviews laws that are generally applicable and neutral under strict scrutiny or a lesser standard of review.[87]

Regardless of the appropriate standard of review, only those laws that "substantially burden" religion are constitutionally problematic.[88] The Supreme Court set forth the substantial burden test, which finds that any law that predicates a benefit on conduct that causes an individual to choose between engaging in the conduct and not following her beliefs, or following her beliefs and not engaging in the conduct, constitutes a substantial burden.[89] A court should review the law only once this threshold has been crossed.[90]

III. ANALYSIS

A. The Ninth Circuit Correctly Reviewed Senate Bill 1172 Under the Rational Basis Test Because Mere Conduct Does Not Implicate First Amendment Free Speech Rights.

1. Senate Bill 1172 Regulates Mere Conduct, Not Expressive Conduct or Speech, and Therefore, It Does Not Implicate First Amendment Free Speech Rights.

The First Amendment does not protect conversion therapy because the

85. *See* 42 U.S.C. § 2000bb (2006) (finding that the compelling interest test strikes the appropriate balance between religious liberties and government interests).

86. *See* City of Boerne v. Flores, 521 U.S. 507, 534 (1997) (noting that Congress's power is limited to remedial, preventive legislation, and finding that the Religious Freedom Restoration Act (RFRA) intruded into power reserved to the states).

87. *See* Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento Cnty., 85 P.3d 67, 91 (Cal. 2004) (declining to identify the level of review for a law implicating free exercise of religion as it failed even the lowest level of scrutiny).

88. *See, e.g.*, Jimmy Swaggart Ministeries v. Bd. of Equalization, 493 U.S. 378, 392 (1990) (affirming the California lower courts' findings that a generally applicable sales tax did not impose a significant burden on the organization's religious practices).

89. *See* Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 717-18 (1981) (recognizing that a substantial burden existed on an employee's religion where an employee was forced to choose between fidelity to her religion and keeping her job).

90. *See, e.g.*, Smith v. Fair Emp't & Hous. Comm'n, 913 P.2d 909, 929 (Cal. 1996) (applying no level of review after finding a prohibition against discrimination based on marital status did not implicate a landlord's free exercise of religion rights).

First Amendment protects only pure speech and expressive conduct.[91] Although some forms of SOCE may use speech to carry out its aim, conversion therapy is better characterized as simply conduct, because it is comprised of psychological treatments and practices that aim to bring about a certain result and not express an idea.[92] A plain reading of the statute makes it clear that the ban regulates only "practices" aimed at changing sexual orientation.[93] As the trial court noted, "practices" are actions designed to apply and carry out an idea and not actions that express the idea itself.[94] The Supreme Court has indicated that the state infringes upon free speech rights when it restrains a speaker from communicating information.[95] SB 1172 does not prohibit the therapist from communicating information about SOCE or even from suggesting that the patient might benefit from SOCE.[96] SB 1172 only prohibits the therapist from performing SOCE on a patient who is under eighteen years of age.[97] Just as state and federal laws permit the government to regulate drugs, the government may also regulate medical treatments and procedures.[98]

The nature of therapy causes significant confusion as to whether the First Amendment protects the speech that occurs during psychoanalysis.[99] The

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91. *See, e.g.*, Roth v. United States, 354 U.S. 476, 484 (1957) (explaining that speech is protected to promote an exchange of ideas).

92. *See* Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1054 (9th Cir. 2000) (stating that psychoanalysis is conduct for First Amendment purposes because its purpose is to treat emotional suffering and not speech).

93. *See* Pickup v. Brown, No. 2:12-CV-02497-KJM-EFB, 2012 WL 6021465, at *9 (E.D. Cal. Dec. 4, 2012) (noting that, because the statute does not define "practice" or "change," the court should construe the words according to their plain meaning).

94. *See id.* (citing CONCISE OXFORD ENGLISH DICTIONARY 1126 (12th ed. 2011)) (defining "practice" as the "application or use of an idea, belief, or method, as opposed to the theory or principles of it").

95. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984) (explaining that restraints on how information may be used implicate free speech rights).

96. *Cf.* Conant v. Walters, 309 F.3d 629, 637 (9th Cir. 2002) (finding that prohibiting physicians from recommending medical marijuana is unconstitutional because it is a content-based and viewpoint-based restriction on speech).

97. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942) (distinguishing between words intended to express an idea and verbal "acts," such as cursing, which do not express ideas).

98. *See* Watson v. Maryland, 218 U.S. 173, 176 (1910) (noting that no profession is more ripe for regulation than the medical profession because of the substantial health and safety concerns involved in the practice of medicine).

99. *See* Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1054 (9th Cir. 2000) (asserting that the First Amendment applies to speech during psychoanalysis but that the state may permissibly regulate the

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words used are akin to a surgeon's scalpel, a prescription for an antibiotic, or the techniques used in physical therapy; they are nothing more than the physician's tool for performing a treatment.[100] In fact, if one thinks of SOCE only in terms of aversion therapy—therapies such as electroshock, burning, or drug therapy—the plaintiffs would be far less likely to succeed in obtaining a preliminary injunction, let alone a permanent one, because speech clearly is not implicated through those techniques, and the state would be acting within its power to regulate medical treatments that it has not deemed effective or safe.[101] While SOCE may be carried out in part—or even in whole—by speech, regulating conduct that implicates speech is not an abridgment of free speech rights.[102] What is being regulated here is the underlying conduct—regardless of the method in which that conduct is carried out—and not speech conveying a particular idea.[103]

Despite clear precedent establishing the state's power to regulate medical treatments, including mental health treatments, the lower courts disagreed over whether SOCE implicates constitutionally protected speech.[104] Because the speech involved in SOCE is nothing more than a form of conduct, the conduct, and not the words themselves, must trigger the free speech protections.[105] Under the test set forth in *Spence v. Washington*, to constitute an infringement on the free speech rights of the therapists engaging in SOCE, the conduct that is being restricted must clearly convey the therapists' viewpoint.[106] If the primary goal of SOCE is to change the

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speech).

100. *Cf.* O'Brien v. U.S. Dep't of Health & Human Serv., 894 F. Supp. 2d 1149, 1166-67 (E.D. Mo. 2012) (finding that providing healthcare is not a statement in the same sense as burning a flag).

101. *See, e.g.*, Sharrer v. Zettel, No. C 04-00042 SI, 2005 WL 885129, at *7 (N.D. Cal. Mar. 7, 2005) (declaring that the state may prohibit a type of treatment or provider because there is no fundamental right to choose a particular provider or type of treatment).

102. *See* IDK, Inc. v. Cnty. of Clark, 836 F.2d 1185, 1194 (9th Cir. 1988) (explaining that while the First Amendment protects philosophical, moral, social, and ethical expressions, it does not protect every communication addressing those topics).

103. *See* Aguilar v. Avis Rent-a-Car Sys., Inc., 980 P.2d 846, 854 (Cal. 1999) (defending restrictions on speech since the statute did not target protected expression).

104. *See* Welch v. Brown, 907 F. Supp. 2d 1102, 1112 (E.D. Cal. 2012) (concluding that some forms of SOCE that are carried out by speech and communication occurring during psychoanalysis are entitled to First Amendment protection).

105. *Cf.* Schenck v. United States, 249 U.S. 47, 52 (1919) (treating as conduct those words that have the power to present the danger the government seeks to prevent).

106. *See* Hightower v. City & Cnty. of S.F., No. C-12-5841 EMC, 2013 WL 361115, at *7 (N.D. Cal. Jan. 29, 2013) (explaining that even if a person intends to convey a message by walking down the street naked, the general public is unlikely to understand the particular message and, therefore, the conduct is not protected as

sexual orientation of those with same-sex attractions, then it follows that the therapists' viewpoint is that something is inherently wrong with same-sex attractions and that the patient needs therapy to get rid of the undesirable attractions.[107] Yet, according to plaintiffs, they have no particular viewpoint on homosexuality and encourage their patients' right to self-determination.[108]

Alternatively, the therapists' viewpoint may express nothing more than the belief that sexual orientation can be changed.[109] Even if this is the therapists' position, SOCE does not clearly convey a specific viewpoint, despite the therapists' intention to do so.[110] If the test for determining whether conduct falls within the protection afforded by the First Amendment is whether that conduct is "so imbued with elements of speech" that it clearly conveys a particular viewpoint and that viewpoint is readily apparent to an observer, then SOCE necessarily fails that test because it conveys a number of viewpoints.[111]

2. Senate Bill 1172 Is a Regulation on Medical Treatments and Survives Rational Basis Review.

Senate Bill 1172 is nothing more than the state's permissible exercise of its power to regulate professional standards of behavior and competence.[112] The courts presume that laws that do not infringe on any constitutional rights pass scrutiny provided that they address a legitimate state interest and bear a reasonable relation to achieving that end.[113] The state has an

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speech).

107. *See, e.g.*, Memorandum in Support of Preliminary Injunction at 11:4-7, Pickup v. Brown, No. 2:12-CV-02497-KJM-EFB, 2012 WL 6021465 (E.D. Cal. Dec. 4, 2012) (rejecting the mainstream understanding that same-sex attraction is a variant of sexuality and claiming homosexuality is the result of child molestation).

108. *See id. at* 15:9-13 (declaring that the therapist must respect client goals and treatment choices and may not impose the therapist's own preferences on the client).

109. *See id.* at 12:17-20 (indicating that Dr. Nicolosi believes that individuals are capable of reducing their same-sex attractions).

110. *See* Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1058 (9th Cir. 2010) (distinguishing between purely expressive activity and conduct that could express an idea but does not).

111. *Compare* Welch v. Brown, 907 F. Supp. 2d 1102, 1116 (E.D. Cal. 2012) (noting that plaintiffs practice SOCE because homosexuality is a sin), *with* Pickup v. Brown, No. 2:12-CV-02497-KJM-EFB, 2012 WL 6021465, at *3 (E.D. Cal. Dec. 4, 2012) (indicating that the therapists' motivation is supporting patients' right to self-determination).

112. *See, e.g.*, Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996) (acknowledging that the state's power to regulate health matters out of a duty to protect the lives and health of all its residents).

113. *See* Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of

interest in the protection of minors.[114] Because SB 1172 prohibits a form of therapy whose efficacy or safety is not established, and because the evidence shows that the therapy may in fact be harmful, the state's ban on the therapy rationally relates to its stated end.[115] Although the veracity of the reports that the legislature relied on to determine that conversion therapies are harmful has not been established, the court presumes that statutes that do not infringe on constitutional rights are valid.[116] The plaintiffs challenging SB 1172 bear the burden of showing that the legislature could not reasonably have conceived the reports to be true, and, unable to meet that burden, the plaintiffs' challenge fails and SB 1172 must stand.[117]

B. Even if the Court Had Found Senate Bill 1172 Regulates Expressive Conduct, the Regulation Meets the Requirements of the Four-Pronged Test Set Forth in O'Brien *and Survives Intermediate Scrutiny.*

As is often the case when courts are faced with challenged regulations, the Ninth Circuit could have simply assumed, without actually reaching the issue, that SB 1172 regulates expressive conduct and therefore must survive heightened scrutiny.[118] Even if the Court assumed SB 1172 implicates free speech rights, the law would still pass the heightened scrutiny test set forth in *O'Brien*.[119]

SB 1172 easily satisfies the first prong of the *O'Brien* test, as the states

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Psychology, 228 F.3d 1043, 1050 (9th Cir. 2000) (determining that rational basis was the correct standard of review for a licensing scheme that did not implicate fundamental rights).

114. *See, e.g.*, Globe Newspaper Co. v. Superior Court for Norfolk Cnty., 457 U.S. 596, 607-08 (1982) (finding a compelling interest in protecting minors from the trauma of testifying in furtherance of the duty to protect the minors' psychological well-being).

115. *Cf.* California v. Privitera, 591 P.2d 919, 923 (Cal. 1979) (upholding the state's prohibition on the administration of any drug for treating cancer that had not yet been approved).

116. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (confirming that legislatures are presumed to have acted within their constitutional power if any facts reasonably may be conceived to justify their actions).

117. *See, e.g.*, *Nat'l Ass'n for the Advancement of Psychoanalysis*, 228 F.3d at 1050 (noting that a law withstands rational basis review if the state could have had a legitimate reason for its action).

118. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (assuming for the purposes of upholding a regulation that sleeping is expressive conduct, but not deciding the issue).

119. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) (specifying that a law must be within the constitutional power of the state, further an important governmental interest unrelated to the suppression of free expression, and be narrowly tailored).

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retain any powers that the United States Constitution does not specifically enumerate as belonging to the federal government.[120] As noted earlier, the ban furthers the state's interest in protecting the psychological well-being of minors, thus satisfying the second prong of the test.[121] It also satisfies the third prong of the *O'Brien* test because the legislature narrowly tailored SB 1172 by applying it only to minors and not all potential SOCE patients, and by regulating only practices that have unproven efficacy and safety.[122] SB 1172 satisfies the final prong of the *O'Brien* test because the California legislature did not enact SB 1172 with the intention of suppressing speech.[123] Rather, based on the concern that SOCE causes psychological harm, the legislature passed SB 1172 to prohibit therapy practices that often result in vulnerable minors experiencing increased incidents of depression, anxiety, and suicide.[124] Any incidental infringement of free speech is a byproduct, and not an intended outcome, of the regulation, which is aimed at mitigating those harmful results.[125] Because the treatments result in psychological harm, it is only the techniques themselves that the state wishes to regulate.[126] Just as the state may regulate abortion procedures in the face of medical uncertainty, the state may also regulate those therapy procedures that it deems potentially harmful.[127]

Although the *O'Brien* test does not specifically address whether a regulation is content-based or content-neutral, courts only apply the

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120. *See* Watson v. Maryland, 218 U.S. 173, 176 (1910) (stating that the state police power includes regulating the medical profession).

121. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 230 (1972) (limiting parental rights where harm to the physical or mental health of children may be inferred).

122. *See* Dream Palace v. Cnty. of Maricopa, 384 F.3d 990, 1016 (9th Cir. 2004) (noting that the "narrowly tailored" requirement is fulfilled so long as the government's interest would be less effectively achieved in the absence of the regulation).

123. *See* CAL. BUS. & PROF. CODE § 865 (West 2013) (declaring that the purpose of the law is to protect vulnerable youth from harmful therapy practices predicated on outdated medical theories).

124. *See* Pickup v. Brown, No. 2:12-CV-02497-KJM-EFB, 2012 WL 6021465, at *5 (E.D. Cal. Dec. 4, 2012) (noting that the legislature relied on the APA's findings that SOCE causes harm).

125. *See* United States v. O'Brien, 391 U.S. 367, 382 (1968) (applying intermediate scrutiny because the statute targeted only the non-communicative element of the plaintiff's behavior).

126. *See* Roe v. Wade, 410 U.S. 113, 150 (1973) (recognizing a state interest in maximizing the safety of medical procedures).

127. *See* Gonzales v. Carhart, 550 U.S. 124, 128-29 (2007) (upholding the Partial Birth Abortion Ban Act because the government found the procedure inhumane and not medically necessary).

O'Brien test to those laws that are content-neutral.[128] While SB 1172 may look like a content-based regulation at first glance because the law distinguishes between different types of therapies, under a secondary interpretation of content-neutral regulations, the law is content-neutral because the predominant intent of the regulation is aimed at protecting minors and not at chilling a specific type of therapy.[129]

C. Senate Bill 1172 Is Unlikely to Survive Strict Scrutiny Because the Regulation Does Not Address an Actual Harm, and the Regulation Is Not the Least Restrictive Means of Addressing the State's Asserted Compelling Interest.

Because the Ninth Circuit determined that SB 1172 is conduct, not speech, the Court never reached the issue of whether SB 1172 is content-based or viewpoint-based discrimination. Were the Court to determine on rehearing that SB 1172 is a regulation on speech, the Court is likely to rely on the traditional understanding of content-based regulations, rather than looking to the legislative intent to determine that the law is content-neutral.[130] The Court will likely find that the law is a content-based regulation because SB 1172 is a prohibition on a specific type of therapy, and because determining whether one is engaged in the prohibited therapy requires looking at the content of the therapy session.[131]

Content-based regulations are presumptively invalid, and therefore, the burden falls on the state to prove that the regulation is not unconstitutional.[132] With such a high burden, California will likely be unable to show that SB 1172 serves a compelling interest, is narrowly tailored, and is the least restrictive means of achieving its end.[133] While

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128. *See* Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2659 (2011) (applying strict scrutiny to content-based regulations on commercial speech).

129. *Cf.* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (examining the main impetus for a regulation banning adult theaters in certain neighborhoods, and finding that because the regulation was aimed at the secondary effects of the theaters, and not speech, the regulation was content neutral).

130. *See, e.g.*, United States v. Stevens, 130 S. Ct. 1577, 1584 (2010) (defining content-based regulations as restrictions based on the subject matter, such as media depicting animal cruelty).

131. *See, e.g.*, Berger v. City of Seattle, 569 F.3d 1029, 1051 (9th Cir. 2009) (concluding that a regulation allowing street performers to passively solicit donations was a content-based regulation, singling out certain forms of content for differential treatment).

132. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2739 (2011) (finding that the state failed to meet its burden of showing an actual psychological harm from violent video games, as opposed to just potential harm).

133. *See* Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 962 (9th

protecting the safety and health of a minor is a recognized compelling interest, the state must be able to show that its regulation protects against an actual harm, not just a potential or speculative harm.[134] When exploring the need for SB 1172, the California Legislature relied on the findings of the APA Task Force, which indicated that the potential harms from conversion therapies are great.[135] But potential harms are not enough to justify a content-based regulation of free speech.[136] Further, the state would be unable to show that SOCE is the cause of these harms, rather than other life activities beyond the control of the state.[137] As such, SB 1172 would not survive strict scrutiny if the legislature asserted the protection of minors as its compelling interest.[138]

Moreover, the government likely could not show that regulating mental health providers who provide SOCE to minors is the least restrictive means of achieving its end.[139] Even if the state could show that the regulation addressed an actual harm, many other less restrictive regulations could sufficiently protect the health and safety of California minors.[140] Possible less restrictive regulations include requiring informed consent rather than imposing an outright ban, or prohibiting only those treatments that do not implicate speech at all and are questionable even by the standards of the mental health providers who do provide conversion therapy.[141] Not even

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Cir. 2009) (noting that a compelling interest may be hard to show because no field is so well understood that no new discoveries are possible).

134. *See Entm't Merchs. Ass'n*, 131 S. Ct. at 2739 (striking down a statute as not satisfying strict scrutiny since the state did not show video games caused minors to act aggressively).

135. *See* CAL. BUS. & PROF. CODE § 865 (West 2013) (identifying the potential harms of SOCE as, inter alia, depression, substance abuse, self-hatred, hostility, and problems with intimacy).

136. *See, e.g.*, United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 819-20 (2000) (emphasizing that anecdotal evidence and supposition are insufficient to prove actual harm).

137. *See* Welch v. Brown, 907 F. Supp. 2d 1102, 1120 (E.D. Cal. 2012) (citing plaintiffs' declarations indicating that the cause of the harms are unsupportive parents, stigma, bullying, and other factors, rather than SOCE).

138. *See Entm't Merchs. Ass'n*, 131 S. Ct. at 2738-39 (noting that ambiguous proof is not sufficient for showing an actual harm).

139. *See* Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 964-65 (9th Cir. 2009) (indicating that the burden rests on the state to show that less restrictive means are not available, even if less effective).

140. *See* Nunez v. City of San Diego, 114 F.3d 935, 948 (9th Cir. 1997) (finding that, despite a compelling interest to protect minors, requiring a juvenile curfew without exceptions for legitimate night-time activity was not narrowly tailored).

141. *Cf.* 45 C.F.R. § 46.116 (2013) (requiring informed consent, including disclosure of foreseeable risks and discomforts and alternative treatments, from any

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the therapists who provide conversion therapy could characterize as speech the treatments that Sam Brinton endured.[142]

D. Even Though Senate Bill 1172 Is Unlikely to Withstand Strict Scrutiny, the Regulation Is Still Constitutional Because It Falls Under Two Exceptions to the Strict Scrutiny Standard.

1. Even if Senate Bill 1172 Infringes on Constitutional Rights, Regulations that Safeguard the Health and Safety of the Public Are Reviewed Under the Rational Basis Test.

The rational basis test is appropriate not only for regulations that do not infringe upon constitutional rights, but also when danger to health is present, regardless of whether those regulations implicate fundamental rights.[143] California has a legitimate interest in safeguarding the health of its citizens and may infringe on fundamental rights to further this goal.[144] Although the courts have historically only applied this exception to the right to privacy in the context of abortion regulations, nothing suggests that this exception could not apply to fundamental rights in other areas of medicine.[145] The likelihood that the state would apply this exception is especially high in situations in which minors are involved, particularly those minors the state finds vulnerable, as California courts have previously allowed regulations for minors that it would not allow for adults.[146] Thus, although California's regulatory power to prohibit patients from seeking conversion therapy may not extend to adults, it undoubtedly does extend to minors, as evidenced by the state's willingness to mandate regulations for

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research subject).

142. *Cf.* Pitcherskaia v. INS, 118 F.3d 641, 648 (9th Cir. 1997) (equating Pitcherskaia's conversion therapy, involving electroshock, with torture and persecution).

143. *See* Roe v. Wade, 410 U.S. 113, 163 (1973) (indicating that the state may infringe on a woman's privacy right when the danger to her health outweighs the safety of the procedure).

144. *See* Wilson v. Cal. Health Facilities Comm'n, 167 Cal. Rptr. 801, 804 (Ct. App. 1980) (acknowledging that the state may regulate procedures that infringe upon fundamental rights when there is a legitimate interest in safeguarding the health of its citizens).

145. *Cf.* Cohen v. California, 403 U.S. 15, 21 (1971) (indicating that the right to privacy can outweigh the right to free speech, such as when the listener is a captive audience).

146. *See, e.g.*, Meyers v. Arcata Union High Sch. Dist., 75 Cal. Rptr. 68, 73 (Ct. App. 1969) (recognizing that schools may impose stricter regulations on student constitutional rights than would be permissible to impose on adults).

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youths but not adults.[147] Even if the Court vacates its decision and finds that SB 1172 implicates free speech rights, it should still only apply rational basis review because SOCE poses a danger to health.[148]

2. Even if Senate Bill 1172 Is a Content-Based Regulation, Sexual Orientation Change Efforts Are Best Characterized as Fraud, Which the First Amendment Does Not Protect.

Even if the Ninth Circuit were to determine that SB 1172 regulates speech, and rejected the danger-to-health exception discussed above, the Court is still unlikely to review SB 1172 under strict scrutiny because SB 1172 protects against fraud.[149] There is little, if any, question that the therapists' statements result in a legal harm—a required element to prove fraud—because, at the very least, the claims that the therapists can diminish or eliminate same-sex attractions through SOCE result in a pecuniary loss by the patients paying for useless services, and the therapists' intent in making these statements is for the purpose of eliciting compensation.[150] The patients satisfy the second element of fraud—showing justifiable reliance on the therapists' misrepresentations—because the patients, often desperate for a "cure" for homosexuality, have no reason to believe that licensed professionals are touting anything more than snake oil.[151]

The difficult element in characterizing SOCE as fraud is showing that the therapists knew their statements were false; however, there are several indications that the therapists know or should know that promoting SOCE as an effective treatment is a misrepresentation.[152] First, in *Welch v.*

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147. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992) (invalidating the spousal notice provision of the Abortion Control Act, but upholding the parental notification requirement).

148. *Cf.* California v. Privitera, 591 P.2d 919, 922 (Cal. 1979) (noting that the right to choose an abortion does not include the right to choose the type of procedure, and that the regulations need only pass rational basis review).

149. *See, e.g.*, Engalla v. Permanente Med. Grp., Inc., 938 P.2d 903, 917 (Cal. 1997) (requiring that a claim of fraud show that the speaker made a knowingly false representation with the intent to deceive the listener, that the listener justifiably relied on the misrepresentation, and that the listener suffered actual harm).

150. *See* Pohl v. Mills, 24 P.2d 476, 480 (Cal. 1933) (recognizing that paying for a copyrighted structure without receiving a copyrighted structure constitutes a pecuniary loss and meets the damages element for alleging a fraudulent action).

151. *See* Dyke v. Zaiser, 182 P.2d 344, 351 (Cal. Ct. App. 1947) (asserting that a person with inferior knowledge may justifiably rely on the assertions of a speaker when the speaker knows he or she is the more knowledgeable party).

152. *See* Harper v. Silver, 19 Cal. Rptr. 78, 80-81 (Ct. App. 1962) (indicating that a speaker knowingly makes a false statement when available information indicates the statement is false).

Brown, plaintiff Anthony Duk admits that he has never had any success with any of his patients;[153] thus, even if he professes to believe that SOCE works, his statements claiming that SOCE is an effective treatment indicate a reckless disregard for the truth.[154] Second, every major medical organization has rejected SOCE, and former conversion therapy advocates have rescinded their studies supporting SOCE.[155] A reasonable person, aware of every major medical organization's rejection of SOCE and who follows medical organizations' ethical codes, would know or have reason to believe that SOCE is not an effective treatment.[156]

Generally, the belief that a person can change her sexual orientation is a social or religious belief instead of a fact, and is not sufficient to bring SOCE under the umbrella of fraud.[157] However, because the plaintiffs in both *Welch v. Brown* and *Pickup v. Brown* characterized this belief as a fact and, as professionals, held their beliefs out as fact to their patients, the court will treat their opinions as material representations of fact.[158]

E. Senate Bill 1172 Does Not Substantially Infringe Upon Religious Rights Because the Law Does Not Force the Patients to Choose Between Following Their Religion and Complying with the Law.

Though the Ninth Circuit found that the plaintiffs waived the argument that Senate Bill 1172 violates their religious rights, and therefore did not address the issue on appeal, SB 1172 does not substantially infringe upon the plaintiffs' religious beliefs because it fails the test that was set forth in *Thomas*.[159] The plaintiffs alleging the violations of the free exercise of

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153. Welch v. Brown, 907 F.2d 1102, 1106 (E.D. Cal. Dec. 4, 2012).

154. *See* Yellow Creek Logging Corp. v. Dare, 30 Cal. Rptr. 629, 632-33 (Ct. App. 1963) (noting that a reckless disregard for truth is a statement made with no basis for its truth).

155. *Cf.* In re Am. Coll. for Advancement in Med., No. 962 3147, 1998 WL 847999, at *2 (F.T.C. Dec. 1998) (prohibiting the American College for Advancement in Medicine from claiming that chelation therapy is an effective treatment when no reliable scientific evidence supports the claim).

156. *See, e.g.*, Kockelman v. Segal, 71 Cal. Rptr. 2d 552, 558 (Ct. App. 1998) (recognizing that a psychiatrist must treat his patients in accordance with the standards of the profession).

157. *See* Chavez v. Citizens for a Fair Farm Labor Law, 148 Cal. Rptr. 278, 280 (Ct. App. 1978) (explaining that fraud requires a false representation of fact because there is no such thing as a false idea under the First Amendment).

158. *See, e.g.*, Bily v. Arthur Young & Co., 834 P.2d 745, 768 (Cal. 1992) (finding that an opinion is a positive assertion of fact when the opinion is "not a casual expression of belief but a deliberate affirmation of the matters stated").

159. *See* Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 717-18 (1981) (finding that a religious burden exists where a person must choose between

religion are minors, and SB 1172 does nothing to regulate the behavior of the minors.[160] The minors may seek SOCE from any religious counselors who perform conversion therapy.[161] Because the minors are not forced to choose between following the law and following the religious beliefs that compel them to seek therapy, SB 1172 has no coercive effect on the plaintiffs and does not substantially burden the free exercise of their religion.[162]

F. Senate Bill 1172 Does Not Infringe on Religious Rights Because It Is a Neutral Law of General Applicability.

Freedom of religious belief is absolute; yet, the state may regulate the actions stemming from those beliefs if the laws are generally applicable, neutral, and can withstand the corresponding scrutiny.[163] In the context of SB 1172, the religious belief is the idea that homosexuality is a sin or that it is not a natural way of life; the conduct is the therapists' or the patients' efforts to change the orientation to align with those religious beliefs.[164]

SB 1172 is facially neutral, as it does not single out any particular religion and applies to even those therapists who engage in SOCE with no underlying religious motivations.[165] Nor does SB 1172 covertly suppress religious beliefs, which would also destroy its neutrality.[166] If the California legislature was primarily motivated by the religious undertone of SOCE, the legislature would have prohibited all SOCE, not just those

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following the law or following his religion).

160. *See* CAL. BUS. & PROF. CODE § 865.1 (West 2013) (regulating the professional conduct of mental health providers).

161. *See* CAL. BUS. & PROF. CODE § 865.2 (West 2013) (censuring only mental health providers who engage in SOCE with minors because the law is a regulation on professional conduct).

162. *Cf.* O'Brien v. U.S. Dep't of Health & Human Serv., 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012) (finding no free exercise violation where an employer must provide contraceptives through its health plan because the regulation does not require the employer to use the contraceptives).

163. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring) (confirming the Court's long established differentiation between the religious belief and engaging in conduct associated with that belief).

164. *Cf. id.* at 874-75 (implying a difference between believing peyote serves a religious purpose and ingesting it).

165. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (explaining that if the purpose of the law infringes on religion, then the law is not facially neutral).

166. *See id.* (extending freedom of religion not only to laws that facially burden religion but also to laws covertly suppressing religious beliefs or expression).

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forms of SOCE that are performed on minors by licensed health providers.[167] Rather, the California Legislature relied on the professional expertise of the APA and other reputable organizations to find that SOCE reflects an outdated medical position and that the therapies often lead to heightened anxiety, confusion, and suicide, among other ills.[168] While the legislative history indicates that the legislators were aware that those individuals who seek SOCE are generally deeply religious, the legislative history does not indicate any intention of impeding the religious beliefs of those individuals or their therapists through the Bill.[169]

Not only is SB 1172 neutral, but it is also generally applicable because the law infringes equally on religious and non-religious professional conduct that is thought to bring about harm to minors.[170] SB 1172 applies to any mental health provider who performs SOCE on a minor.[171] SB 1172 prohibits minors from seeking SOCE from licensed healthcare providers, but it does nothing to interfere with the minors' ability to seek treatment from non-licensed providers, such as religious counselors.[172] Likewise, mental health providers may still engage in conversion therapy with adults.[173] Assume, for example, that half of the therapists engaging in SOCE are religiously motivated and half of the therapists engaging in SOCE have no religious convictions about homosexuality.[174] Assume also that half of the individuals seeking conversion therapy are religiously motivated and half of the individuals seeking conversion therapy do so for

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167. *Cf. id.* (emphasizing that Florida banned animal sacrifice because it involved the Santerian practice of animal sacrifice).

168. *Cf.* Gonzales v. Carhart, 550 U.S. 124, 163 (2007) (asserting that state and federal legislatures have broad discretion with regards to regulations in the face of medical uncertainty).

169. *See* CAL. BUS. & PROF. CODE § 865 (West 2013) (noting that the impetus behind SB 1172 is the protection of LGBTQ minors from a psychologically damaging "therapy").

170. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 533 (explaining that a law is not generally applicable if it burdens religious conduct but does not apply to conduct that similarly undermines the law and yet is not religiously motivated).

171. *See* BUS. & PROF. § 865 (censuring all mental health providers engaging in SOCE with minors without regard to the providers' motivations).

172. *See* CAL. BUS. & PROF. CODE § 865.1 (West 2013) (prohibiting mental health providers from engaging in SOCE with patients under eighteen years of age, but imposing no other restrictions).

173. *Cf.* In re R.V., 89 Cal. Rptr. 3d 702, 708 (Ct. App. 2009) (allowing a probation term for a minor that would be unconstitutional for an adult because minors require protection).

174. *Cf.* Hennington v. Georgia, 163 U.S. 299, 304 (1896) (stating that a regulation prohibiting trains from running on Sundays is no less a regulation just because some religions reserve Sunday as a day of rest).

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other reasons.[175] SB 1172 does not substantially regulate only the religiously motivated conduct while leaving whole non-religiously motivated conduct. Rather minors—both those religiously motivated to seek SOCE and those who do so for other reasons—are still free to access services from religious counselors.[176] Adults—regardless of motivation—are still free to access the services; therapists—both those with religious convictions on homosexuality and those without—are free to provide SOCE to adults.[177]

Although SB 1172 is a neutral and generally applicable law, the standard of scrutiny that the Court would have applied when reviewing the law is unclear.[178] If the Court applied the rational basis test, then SB 1172 would stand.[179] California has a legitimate interest in protecting the health and welfare of its minors, and banning SOCE rationally relates to that end.[180] Alternatively, the ban would not withstand strict scrutiny because the asserted compelling interest does not address an actual harm.[181]

Ultimately, because the Ninth Circuit decided that SB 1172 regulated conduct and not speech, the Court likely would have applied rational basis review instead of strict scrutiny.[182] Ninth Circuit precedent indicates the

175. *Cf.* Stormans, Inc. v. Selecky, 586 F.3d 1109, 1129 (9th Cir. 2009) (explaining that laws of general applicability—those not targeting religious conduct—need only pass rational basis review).

176. *Cf.* Islamic Ctr. of Miss., Inc. v. City of Starkville, 840 F.2d 293, 299 (5th Cir. 1988) (noting that the First Amendment does not prohibit the government from enacting neutral regulations that make the free exercise of religion more difficult).

177. *Cf.* Rust v. Sullivan, 500 U.S. 173, 193 (1991) (finding that denying federal funding for abortions does not force physicians to give up abortion-related speech, as it only denies use of funds).

178. *See* Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento Cnty., 85 P.3d 67, 91 (Cal. 2004) (declining to identify the review level as the law passed strict scrutiny).

179. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 629 n.27 (2008) (noting that most laws pass rational basis review).

180. *Cf.* California v. Privitera, 591 P.2d 919, 922 (Cal. 1979) (drawing on *Roe v. Wade* to find a law requiring a drug be certified effective before use is reasonable to protect health).

181. *See* Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 962 (9th Cir. 2009) (finding that the potential for psychological harm from video games is insufficient to justify a ban).

182. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 881-82 (1990) (distinguishing prior cases reviewed under strict scrutiny because those cases involved multiple constitutional challenges). *But see* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring) (recognizing the illogicalness of the "hybrid rule" because it either would be so broad as to cover most constitutional claims or would be redundant if a law violated another

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Court would embrace strict scrutiny only for those challenges that involve more than one constitutional challenge.[183]

IV. POLICY IMPLICATIONS AND RECOMMENDATION

First Amendment challenges are nothing new in the medical field and have resulted in both gains and losses for moving forward science and individual rights.[184] While the courts theoretically must decide cases based on an objective interpretation of the law, political bias often plays a role in how an issue is decided.[185] Were the Ninth Circuit to rehear *Pickup v. Brown*, the liberal social leanings of the Ninth Circuit could conceivably influence the Court to reverse its decision if the Court were to consider the significant effects of its decision with regards to other areas of the law.[186] Were the Court to strike down SB 1172 on free speech grounds, it would likely do so based on the integrity of the physician-patient relationship and the need to protect resulting communications.[187] If the Court were to protect treatment effectuated through speech, then clearly the Court must find that the First Amendment also protects the communications in which the physicians engage with patients as part of treatment.[188] Striking down SB 1172 would have significant negative repercussions for at-risk LGBTQ youth, but, ironically, it could result in significant positive effects for the

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constitutional right).

183. *See, e.g.*, Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 705 (9th Cir. 1999) (applying the hybrid exception and requiring a plaintiff to show that the law violates a companion right).

184. *See, e.g.*, N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court, 189 P.3d 959, 967 (Cal. 2008) (preventing a doctor from denying care to lesbians despite a religious objection).

185. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 550-51 (1896) (upholding segregation because it was based on the established custom and traditions of the state), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

186. *See* Maura Dolan, *California Ban on Gay Therapy Put on Hold*, L.A. TIMES (Dec. 22, 2012, 8:14 AM), http://latimesblogs.latimes.com/lanow/2012/12/gay-therapy-ban-placed-on-hold-in-california.html (noting that President Obama appointed the judge who found SB 1172 to be constitutional while President Bush appointed the judge who granted the injunction).

187. *See* Conant v. Walters, 309 F.3d 629, 637 (9th Cir. 2002) (recognizing the importance of affording constitutional protection to speech between physicians and their patients); *see also* Pickup v. Brown, 728 F.3d 1042, 1053 (9th Cir. 2013) (stating that doctor-patient communications about medical treatments are entitled to substantial First Amendment protection and communication that occurs during therapy is entitled to some First Amendment protection).

188. *See* CAL. CODE REGS. tit. 22, § 75040 (2009) (requiring primary care clinics to provide pre-abortion and post-abortion counseling, including an explanation of alternatives and possible risks).

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pro-choice movement.[189]

The pro-choice community has long struggled with state regulations on abortion practices, including compelled speech and religious-based opt-out clauses for physicians and medical staff who do not want to participate in the provision of abortions.[190] Particularly egregious are laws that require physicians to tell patients seeking abortions that there are correlations between abortion and breast cancer, that the fetus may feel pain, and that the fetus is a living being, despite the lack of reputable medical or scientific support for these statements and the fact that the physicians do not necessarily believe the information that they are compelled to provide.[191] Striking down SB 1172 on free speech grounds could provide support for pro-choice advocates to renew constitutional challenges to abortion regulations.[192] If a physician performing SOCE is allowed to choose, free from state regulation, what he can and cannot say, then logically, a physician providing abortions should be afforded those same constitutional protections.[193] Most notably, striking down SB 1172 would run afoul of Justice Stevens' opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which dismissed the asserted free speech rights of the physicians performing abortions to not engage in compelled speech.[194] While one might try to distinguish *Casey* from the SB 1172 challenges because *Casey* turned on the undue burden test, that test only implicates the privacy right associated with obtaining an abortion, and not the correlating free speech issues.[195]

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189. *Cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) (dismissing the physicians' free speech claims because the speech is only in the context of medical practice).

190. *See State Policies in Brief*, GUTTMACHER INST., https://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf (last visited on Sept. 15, 2013) (noting that thirty-five states require counseling before abortion, five states require physicians to make inaccurate correlations between cancer and abortion, and twenty-five states require physicians to provide patients with written materials).

191. *See, e.g.*, Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889, 906 (8th Cir. 2012) (finding no free speech violation when the state requires physicians to disclose a correlation between suicide and abortions).

192. *See, e.g.*, Planned Parenthood of Ind. v. Comm'r of Ind. Dep't of Health, 794 F. Supp. 2d 892, 916 (S.D. Ind. 2011) (upholding a law that doctors must tell abortion patients that life begins at conception).

193. *Cf. Planned Parenthood Minn., N.D., S.D.*, 686 F.3d at 905-06 (explaining that a state may use its authority to require a physician provide truthful, non-misleading information relevant to a patient's decision, even in the absence of scientific support).

194. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) (finding that the licensing and regulation power of the state encompasses physician speech in medical treatment).

195. *Cf.* Stuart v. Huff, 834 F. Supp. 2d 424, 430 (M.D.N.C 2011) (rejecting the

Assume that SB 1172 is struck down on freedom of religion grounds, allowing mental healthcare providers to impose psychological harm on their patients because of their religious beliefs. Currently, physicians who do not support abortions may opt out of providing them on religious grounds.[196] This same exception—opting in because of religious beliefs—does not exist for those physicians who hold deep-seated beliefs on the provision of abortion.[197] Yet, some physicians do feel this way.[198] Because the courts play a very limited role in determining whether a religious belief is a religious belief—looking only to whether the belief is a sincerely held religious belief—the state must permit physicians who provide abortions based on their sincerely-held religious beliefs to do so, even when practicing at a hospital or facility that denies abortions based on its own religious beliefs.[199] To allow mental healthcare providers whose religious convictions compel them to opt out of laws prohibiting them from inflicting psychological harm on their patients, but not to allow physicians whose religious convictions compel them to provide abortions to avoid inflicting emotional harm on their patients, would violate the First Amendment's protection of fundamental rights.[200]

Sacrificing the mental health of LGBTQ youth in favor of strengthening challenges to abortion regulations, or vice versa, is not a suitable outcome. Fortunately, there is a scenario in which the courts could uphold SB 1172, and thus protect LGBTQ youth, while creating precedent that could benefit the pro-choice movement. Upholding SB 1172 on the ground that SOCE is fraud, and thus not subject to First Amendment protection, would bolster city ordinances attempting to prevent crisis pregnancy centers (CPCs) from

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undue burden test for laws requiring physicians to give patients a verbal description of ultrasound images before abortions).

196. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 123420(a) (West 2013) (prohibiting discipline of employees who refused to provide abortions).

197. *See, e.g.*, HEALTH & SAFETY § 123420(c) (specifying facilities that do not provide abortions may not be compelled to do so).

198. *See, e.g.*, Cassie Murdoch, *Meet the Christian, Formerly Anti-Abortion Doctor Who Now Performs Late-Term Abortions*, JEZEBEL (May 29, 2012, 6:15 PM), http://jezebel.com/5913841/meet-the-christian-formerly-anti+abortion-doctor-who-now-performs-late+term-abortions (noting that Dr. Parker's religious commitment to compassion compels him to provide abortions).

199. *See* United States v. Seeger, 380 U.S. 163, 184 (1965) (stating that a court's role is to objectively determine whether the claimed belief occupies the same place in the life as a belief in God holds in the life of a person qualified for an exemption).

200. *Cf.* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 591 (1989) (explaining that the First Amendment prohibits the expression of a preference for one religion over another).

falsely misleading women.[201] Finding that the free speech and freedom of religion clauses in the federal and California constitutions do not protect false physician speech that results in harm, and also finding that the state may permissibly regulate that speech, would allow the state to regulate the false speech at CPCs that purport to offer reproductive health services, such as abortion and the morning-after pill, but in reality do not provide those services and delay patient access to such services in the hope that the patient will be forced into unwanted motherhood.[202] Upholding SB 1172 would provide a basis for regulating even those CPCs that provide only counseling, and therefore do not employ a medical staff, on the premise that statements based on junk science or suspect research give rise to negligent misrepresentation, which is an actionable form of fraud.[203]

Should the Ninth Circuit en banc decide that SB 1172 does not withstand review, the legislature need only modify the law for it to pass constitutional scrutiny.[204] At a minimum, the legislature should specifically target all of the physical SOCE techniques, such as electroshock therapy, forcing patients to strip down and cuddle with older male therapists, and having patients beat effigies of their mothers. By only targeting the practices that are obviously conduct, the legislature will forestall any further free speech claims while eradicating some of the most offensive SOCE practices.[205] Furthermore, the legislature should commission a reputable study on the harmful effects of SOCE, particularly one that focuses on its effects on minors.[206] By showing that SOCE results in actual harm and that SB 1172 protects against that harm, the State will be better positioned to fend off

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201. *See, e.g.*, First Resort, Inc. v. Herrera, No. C 11-5534 SBA, 2012 WL 4497799, at *8 (N.D. Cal. Sept. 28, 2012) (dismissing all but the First Amendment challenge to San Francisco's ordinance prohibiting CPCs from making false or misleading representations about their stance on abortion).

202. *See* Lewis v. Pearson Found., Inc., 908 F.2d 318, 319 (Mo. 1990) (detailing a visit to a CPC where the center personnel claimed that they would help the patient obtain an abortion but instead showed her graphic images and sent her to a hospital that did not provide abortions).

203. *Cf.* Bily v. Arthur Young & Co., 834 P.2d 745, 768 (Cal. 1992) (noting that misrepresentation includes statements the speaker believes to be true but for which the speaker has no reasonable basis).

204. *See* Reporter's Transcript of Proceedings at 9:20-22, Welch v. Brown, 907 F. Supp. 2d 1102 (E.D. Cal. 2012) (conceding that many of the SOCE treatments are indisputably conduct and subject to the state's regulation).

205. *Cf.* Simopoulos v. Virginia, 462 U.S. 506, 519 (1983) (recognizing states' broad discretion in regulating medical standards, provided they do not deviate from accepted practices).

206. *See* APA TASK FORCE, *supra* note 4, at 3-4 (finding that SOCE studies are inconclusive as to whether SOCE is harmful to minors because the methods utilized in the studies were questionable and only involved adults).

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constitutional challenges to SB 1172.[207]

V. CONCLUSION

The rights guaranteed by the United States and California constitutions are the bedrock of society, and only the most important governmental interests can, and should, justify an intrusion upon those rights.[208] However, those rights cannot be used as a sword to strike down any valid regulation that one might find disagreeable.[209]

SB 1172 is merely one more permissible regulation in a series of regulations in the medical field that safeguard citizens; it does not infringe on any fundamental rights.[210] To allow therapists to claim that the First Amendment insulates words used during therapy sessions from regulation would leave the entire mental health field unregulated and would protect traditional physicians from liability resulting from misdiagnoses and prescriptions for incorrect medications.[211] For the medical profession to remain effective and safe, the state must be allowed to regulate those procedures that pose a threat to its citizens.[212] Likewise, while the state may not target those religious practices and beliefs that it finds offensive, state and federal constitutions must allow the states to make laws that promote the health and safety of its citizens without fear that any person claiming the law conflicted with her religious belief would be able to circumnavigate the law.[213] For these reasons, the Ninth Circuit must affirm

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207. *Cf.* Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 961-62 (9th Cir. 2009) (determining that while the state has a compelling interest in protecting the psychological welfare of minors, there must be proof of actual harm).

208. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 815 (2006) (reviewing 4,000 laws that infringed on speech and finding that only twenty-two percent survived strict scrutiny).

209. *Cf., e.g.*, McChesney v. Hogan, No. 9:08-CV-1186, 2012 WL 3686083, at *19 (N.D.N.Y. July 30, 2012) (rejecting the argument that mandated sexual offender counseling infringes on the free exercise of religion even if the programs reference religion).

210. *Cf.* United States v. Lane Labs-USA Inc., 427 F.3d 219, 222, 236 (3d Cir. 2005) (affirming an injunction against the distribution of drugs that the FDA had not yet approved).

211. *Cf.* O'Brien v. U.S. Dep't of Health & Human Serv., 894 F. Supp. 2d 1149, 1152 (E.D. Mo. 2012) (finding that the First Amendment does not protect doctors when prescribing drugs).

212. *Cf.* Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1054 (9th Cir. 2000) (indicating that the state owes a duty to its citizens to protect them from incompetent, irresponsible, or untrustworthy professionals who seek to obtain money through provision of these services).

213. *Cf.* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (explaining that the

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its original decision, should it grant the plaintiffs motion for rehearing. As Justice Scalia noted, any other result would lead to anarchy.[214]

Free Exercise of Religion Clause embraces two distinct concepts: that the freedom to believe is absolute and that the freedom to act on those beliefs is not).

214. *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (noting that to allow a person to ignore the law in favor of personal beliefs would be equivalent to making religion superior to the law).