

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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DONALD WELCH, ANTHONY DUK,
AARON BITZER.

CIV. NO. 2:12-2484 WBS KJN

MEMORANDUM AND ORDER RE: MOTION
FOR PRELIMINARY INJUNCTION

Plaintiffs,

V.

EDMUND G. BROWN, JR., Governor of the State of California, In His Official Capacity, ANNA M. CABALLERO, Secretary of California State and Consumer Services Agency, In Her Official Capacity, DENISE BROWN, Director of Consumer Affairs, In Her Official Capacity, CHRISTINE WIETLISBACH, PATRICIA LOCK-DAWSON, SAMARA ASHLEY, HARRY DOUGLAS, JULIA JOHNSON, SARITA KOHLI, RENEE LONNER, KAREN PINES, CHRISTINA WONG, In Their Official Capacities as Members of the California Board of Behavioral Sciences, SHARON LEVINE, MICHAEL BISHOP, SILVIA DIEGO, DEV GNANADEV, REGINALD LOW, DENISE PINES, JANET SALOMONSON, GERRIE SCHIPSKE, DAVID SERRANO SEWELL, BARBARA YAROSLAYSKY, In Their Official Capacities as

1 Members of the Medical Board
2 of California,
3 Defendants.

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5 Plaintiffs Donald Welch, Anthony Duk, and Aaron Bitzer
6 seek to enjoin enforcement of Senate Bill 1172 ("SB 1172"), which
7 prohibits mental health providers in California from engaging in
8 sexual orientation change efforts ("SOCE") with minors. The
9 court previously granted plaintiffs' motion for a preliminary
10 injunction after finding they could likely show that SB 1172
11 violated their rights to free speech under the First Amendment.
12 Characterizing SB 1172 as a regulation of therapeutic treatment,
13 not expressive speech, the Ninth Circuit held that SB 1172 did
14 not violate free speech rights and thus reversed the court's
15 order granting plaintiffs' motion for a preliminary injunction.
16 See Pickup v. Brown, 740 F.3d 1208, 1229-32, 1236 (9th Cir.
17 2014). The Ninth Circuit also held that SB 1172 is not
18 unconstitutionally vague or overbroad and does not violate First
19 Amendment expressive association rights or the fundamental rights
20 of parents seeking SOCE for their minor children. Id. at 1232-
21 36.

22 Because the court's previous order concluded that
23 plaintiffs were likely to prevail on their 42 U.S.C. § 1983 claim
24 asserting that SB 1172 violated their rights to free speech, the
25 court did not address the alleged constitutional violations
26 underlying plaintiffs' remaining § 1983 claims. After providing
27 the parties with the opportunity for supplemental briefing, the
28 court now addresses plaintiffs' motion for a preliminary

1 injunction on the grounds that SB 1172 violates the Free Exercise
2 and Establishment Clauses and privacy rights. Based on the Ninth
3 Circuit's decision on appeal, the court need not address
4 plaintiffs' § 1983 claims alleging that SB 1172 is
5 unconstitutionally vague or overbroad and violates First
6 Amendment expressive association rights and the fundamental
7 rights of parents seeking SOCE for their minor children. See id.
8 (rejecting such claims).

9 I. SB 1172 and Plaintiffs

10 SB 1172 went into effect on January 1, 2013 and was
11 codified in sections 865, 865.1, and 865.2 of the California
12 Business and Professions Code.¹ Section 865.1 states, "Under no
13 circumstances shall a mental health provider engage in sexual
14 orientation change efforts with a patient under 18 years of age."
15 Cal. Bus. & Prof. Code § 865.1. Section 865.2 provides that any
16 SOCE "attempted on a patient under 18 years of age by a mental
17 health provider shall be considered unprofessional conduct and
18 shall subject a mental health provider to discipline by the
19 licensing entity for that mental health provider." Id. § 865.2.

20 Subsection 865(b)(1) defines "sexual orientation change
21 efforts" as "any practices by mental health providers that seek
22 to change an individual's sexual orientation," including "efforts
23 to change behaviors or gender expressions, or to eliminate or
24 reduce sexual or romantic attractions or feelings toward
25 individuals of the same sex." Id. § 865(b)(1). Excluded from

26
27 ¹ Although SB 1172 is now codified under the
28 aforementioned code sections, the court will continue to refer to
"SB 1172" when discussing the three sections collectively.

1 classification as SOCE are "psychotherapies that: (A) provide
2 acceptance, support, and understanding of clients or the
3 facilitation of clients' coping, social support, and identity
4 exploration and development, including sexual orientation-neutral
5 interventions to prevent or address unlawful conduct or unsafe
6 sexual practices; and (B) do not seek to change sexual
7 orientation." Id. § 865(b) (2).

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

21 Plaintiff Anthony Duk is a medical doctor and board
22 certified psychiatrist in private practice who works with adults
23 and children over the age of sixteen. (Duk Decl. ¶ 1 (Docket No.
24 13).) His current patients include minors "struggling with"
25 homosexuality and bisexuality and he utilizes SOCE. (Id. ¶ 6.)
26 Plaintiff Aaron Bitzer is an adult who was "involved in" SOCE as
27 an adult and had plans to become a therapist and practice SOCE.
28 (Bitzer Decl. ¶¶ 1-11, 15 (Docket No. 12).)

II. Analysis

To succeed on a motion for a preliminary injunction, plaintiffs must establish that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest.

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

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

A. Section 1983 Claims for Violations of the Religion
Clausen

1. Application of SB 1172 to Welch

SB 1172 prohibits the use of SOCE with minors only when performed by a "mental health provider," which is limited to:

1 a physician and surgeon specializing in the practice
2 of psychiatry, a psychologist, a psychological
3 assistant, intern, or trainee, a licensed marriage and
4 family therapist, a registered marriage and family
5 therapist, intern, or trainee, a licensed educational
6 psychologist, a credentialed school psychologist, a
7 licensed clinical social worker, an associate clinical
social worker, a licensed professional clinical
counselor, a registered clinical counselor, intern, or
trainee, or any other person designated as a mental
health professional under California law or
regulation.

8

9 Cal. Bus. & Prof. Code § 865(a). Based on this definition, the
10 parties agree that SB 1172 does not affect a religious leader's
11 ability to provide SOCE through his or her church so long as that
12 religious leader is not a "mental health provider" under the
13 statute.

14 The parties dispute, however, whether SB 1172 extends
15 to a religious leader providing SOCE through his or her church
16 when, like Welch, the religious leader is also a "mental health
17 provider" under the statute. Defendants contend that SB 1172
18 would not restrict Welch from providing SOCE in his capacity as a
19 Counseling Pastor, so long as he does not "hold himself out" as a
20 licensed marriage and family therapist when providing therapeutic
21 treatment as a Counseling Pastor. (Defs.' Opp'n at 14:25-27
22 (Docket No. 33); cf. Amicus Curiae Opp'n at 9:7-10 (Docket No.
23 39) ("When he is practicing marriage and family therapy as a
24 state-licensed therapist, whatever the setting, [] he is subject
25 to the same regulations as every other licensed marriage and
26 family therapist, and must comply with SB 1172.").)

27 Defendants rely on several statutory exemptions for the
28

1 proposition that SB 1172 would not restrict Welch from offering
2 SOCE when working as a Counseling Pastor. Most relevant to Welch
3 is the Licensed Marriage and Family Therapist Act ("LMFT Act"),
4 which governs the licensing and regulation of marriage and family
5 therapists. Cal. Bus. & Prof. Code §§ 4980-4980.90; see also
6 Cal. Bus. & Prof. Code § 4980.04 (providing the short title).
7 The LMFT Act prohibits the unlicensed practice of marriage and
8 family therapy as defined in the LMFT Act.² Id. § 4980(b). The
9 LMFT Act provides that "[a] person engages in the practice of
10 marriage and family therapy when he or she performs or offers to
11 perform or holds himself or herself out as able to perform this
12 service for remuneration in any form, including donations." Id.
13 § 4980.10 (emphasis added). Section 4980.01, however, exempts
14 application of the LMFT Act to "any priest, rabbi, or minister of
15 the gospel of any religious denomination when performing
16 counseling services as part of his or her pastoral or

17 ² Section 4980.02 of the LMFT Act defines "the practice
18 of marriage and family therapy" as:

19 [The] service performed with individuals, couples, or
20 groups wherein interpersonal relationships are
21 examined for the purpose of achieving more adequate,
22 satisfying, and productive marriage and family
23 adjustments. This practice includes relationship and
24 premarriage counseling. The application of marriage
25 and family therapy principles and methods includes,
26 but is not limited to, the use of applied
27 psychotherapeutic techniques, to enable individuals to
mature and grow within marriage and the family, the
provision of explanations and interpretations of the
psychosexual and psychosocial aspects of
relationships, and the use, application, and
integration of the coursework and training required by
Sections 4980.36, 4980.37, and 4980.41, as applicable.

28 Id. § 4980.02.

1 professional duties." Id. § 4980.01; see also Nally v. Grace
2 Cmty. Church, 47 Cal. 3d 278, 298 (1988) ("[T]he Legislature has
3 exempted the clergy from the licensing requirements applicable to
4 marriage, family, child and domestic counselors . . .").

5 Although section 4980.01 exempts religious leaders from
6 having to obtain a license to provide marriage and family
7 counseling through their church, it does not resolve the
8 application of SB 1172 to Welch. Welch already has a license
9 under the LMFT Act and presumably wants to "hold himself out" as
10 a licensed marriage and family therapist when providing therapy
11 as a Counseling Pastor for his church. Section 4980.01 exempts
12 Welch from having to obtain a license to provide therapy through
13 his church, but does not appear to exempt him from regulation of
14 his conduct while performing therapy pursuant to his license.
15 Albeit in dicta, the Ninth Circuit seemed to recognize that SB
16 1172 would govern Welch's conduct when it emphasized that SB 1172
17 does not:

18 • Prevent mental health providers from referring
19 minors to unlicensed counselors, such as religious
20 leaders
21 • Prevent unlicensed providers, such as religious
22 leaders, from administering SOCE to children and
23 adults.

24 Pickup, 740 F.3d at 1223 (emphasis added). Accordingly, it is
25 likely Welch will be able to show that SB 1172 will subject him
26 to the possibility of discipline if, as a licensed marriage and
27 family therapist, he utilizes SOCE while working as a Counseling
28 Pastor for his church. Welch can therefore pursue his § 1983

1 claims asserting that SB 1172 violates his rights under the Free
2 Exercise and Establishment Clauses.

3 2. Free Exercise Clause

4 “The Free Exercise Clause, applicable to the states
5 through the Fourteenth Amendment, provides that ‘Congress shall
6 make no law . . . prohibiting the free exercise [of religion].’”
7 Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127 (9th Cir. 2009)
8 (quoting U.S. Const., amend. I) (omission and alteration in
9 original). “Under the Free Exercise Clause of the First
10 Amendment, the government may not, among other things, ‘impose
11 special disabilities on the basis of religious views or religious
12 status.’” Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790,
13 804 (9th Cir. 2011) (quoting Emp’t Div., Dep’t of Human Res. of
14 Or. v. Smith, 494 U.S. 872, 877 (1990)).

15 “The right to freely exercise one’s religion, however,
16 ‘does not relieve an individual of the obligation to comply with
17 a “valid and neutral law of general applicability on the ground
18 that the law proscribes (or prescribes) conduct that his religion
19 prescribes (or proscribes).’” Stormans, 586 F.2d at 1127
20 (quoting Smith, 494 U.S. at 879). The Supreme Court has thus
21 held that “a law that is neutral and of general applicability
22 need not be justified by a compelling governmental interest even
23 if the law has the incidental effect of burdening a particular
24 religious practice.” Church of the Lukumi Babalu Aye, Inc. v.
25 City of Hialeah, 508 U.S. 520, 531 (1993) (citing Smith, 494 U.S.
26 872).

27 In Stormans, the Ninth Circuit examined the Supreme
28 Court’s free exercise jurisprudence and traced the development of

1 the Court's decision to apply only rational basis review to laws
2 that are neutral and of general applicability. See Stormans, 586
3 F.3d at 1128-1130. The Ninth Circuit explained, "Underlying the
4 Supreme Court's jurisprudence is the principle that the Free
5 Exercise Clause 'embraces two concepts[]—freedom to believe and
6 freedom to act.' The first is absolute but, in the nature of
7 things, the second cannot be." Id. at 1128 (alteration in
8 original). "This principle traces its roots to the idea that
9 allowing individual exceptions based on religious beliefs from
10 laws governing general practices 'would . . . make the professed
11 doctrines of religious belief superior to the law of the land,
12 and in effect [] permit every citizen to become a law unto
13 himself.'" Id. (quoting Reynolds v. United States, 98 U.S. 145,
14 167 (1878) (alteration in original)).

15 a. Neutrality

16 "[I]f the object of a law is to infringe upon or
17 restrict practices because of their religious motivation, the law
18 is not neutral." Lukumi, 508 U.S. at 533. In determining
19 whether a law is neutral, the court must examine the text of the
20 statute and its operation. Stormans, 586 F.3d at 1130. "A law
21 lacks facial neutrality if it refers to a religious practice
22 without a secular meaning discernable from the language or
23 context." Lukumi, 508 U.S. at 533. Here, the parties do not
24 dispute that SB 1172 is facially neutral. (Pls.' Mem. at 10:14.)
25 Nonetheless, "[a]part from the text, the effect of a law in its
26 real operation is strong evidence of its object," Lukumi, 508
27 U.S. at 535, and laws may lack neutrality if they "suppress,
28 target, or single out the practice of any religion because of

1 religious content." Stormans, 586 F.3d at 1131.

2 Plaintiffs contend that SB 1172 lacks neutrality based
3 primarily on two comments in the legislative history of the bill.
4 As a threshold matter, whether a court can consider legislative
5 history in free exercise challenges is an "unsettled" area of
6 law. Id. at 1131-32. Although the Supreme Court in Lukumi
7 examined legislative history to illustrate that the prohibition
8 on animal sacrifice was aimed at the Santeria religion, only one
9 justice joined in that part of decision, and two justices
10 expressly disagreed with the consideration of legislative
11 history. See id. at 1132 (discussing the votes of the justices);
12 cf. United States v. O'Brien, 391 U.S. 367, 383 (1968) (stating
13 that, in the context of a First Amendment free speech claim, the
14 "Court will not strike down an otherwise constitutional statute
15 on the basis of an alleged illicit legislative motive").

16 Assuming consideration of legislative history is proper
17 in free exercises cases, the statements in the bill analyses of
18 SB 1172 are easily distinguishable from the blatant animosity
19 expressed toward the Santeria religion during the passage of the
20 ordinances in Lukumi. For example, at the city council meeting
21 held just weeks after the Santeria Church announced its plans to
22 open, one councilman said that the "Santeria devotees at the
23 Church 'are in violation of everything this country stands for.'" Lukumi, 508 U.S. at 541. The chaplain of the local police
24 department "told the city council that Santeria was a sin,
25 'foolishness,' 'an abomination to the Lord,' and the worship of
26 'demons.'" Id. The city attorney described the practices of the
27 Santeria religion as "abhorrent" and the public crowd at the
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1 meeting "interrupted statements by council members critical of
2 Santeria with cheers." Id. at 541-42.

3 Here, plaintiffs first rely on the statement in the
4 Senate Rules Committee Analysis indicating that the World Health
5 Organization ("WHO") notes that sexual orientation "by itself is
6 not to be regarded as a disorder? [sic] it is often a result of
7 unfavorable and intolerant attitudes of the society or a conflict
8 between sexual urges and religious belief systems.'" Senate
9 Rules Committee, Committee Analysis of SB 1172, at 6 (Aug. 28,
10 2012). This statement appears in a section of the analysis that
11 traces the changing views of sexual orientation by the American
12 Psychiatric Association and the WHO. The quoted statement from
13 the WHO raises both secular and religious influences as factors
14 contributing to reasons individuals may seek SOCE. It does not
15 suggest that the California Legislature was targeting religious
16 beliefs or religious motivations underlying SOCE when enacting SB
17 1172.

18 The second statement plaintiffs rely on appears in the
19 section of the same bill analysis that describes the practice of
20 SOCE. The section explains how the APA defines the treatment,
21 how a founder of modern reparative theory defines it, and then
22 states, "Others, particularly conservative Christian
23 transformational ministries, use the term conversion therapy to
24 refer to the utilization of prayer, religious conversion, [and]
25 individual and group counseling to change a person's sexual
26 orientation." Id. at 7. Discussing how various groups,
27 including religious groups, define SOCE does not demonstrate that
28 the Legislature was targeting SOCE performed by religious groups,

1 especially when SB 1172 does not prohibit SOCE performed within a
2 church setting so long as it is not performed by a mental health
3 provider.

4 The legislative analyses leading to SB 1172 illustrate
5 that the Legislature was concerned with the harm SOCE therapy
6 causes minors regardless of whether it is motivated by secular or
7 religious beliefs. Nothing in the legislative history gives rise
8 to the inference that, in enacting the bill, the Legislature
9 sought to suppress, target, or single out the practice of any
10 religion. Unlike in Lukumi, where the city enacted the
11 ordinances "because of, not merely in spite of their suppression
12 of Santeria religious practice," Lukumi, 508 U.S. at 540, the
13 legislative history reveals that the California Legislature
14 enacted SB 1172 despite religious views, not because of them.

15 Lastly, the fact that Welch may be restricted from
16 performing SOCE as a Counseling Pastor does not defeat the
17 neutrality of SB 1172. In Stormans, the state of Washington
18 passed regulations that, with limited exceptions, required
19 pharmacists and pharmacies to deliver all lawfully prescribed
20 medications, including Plan B, an emergency contraceptive.
21 Similar to the limitation Welch may face, the Ninth Circuit in
22 Stormans concluded, "That the rules may affect pharmacists who
23 object to Plan B for religious reasons does not undermine the
24 neutrality of the rules." Stormans, 586 F.3d at 1131.

25 Plaintiffs point out that on remand and after a more
26 complete record developed at trial, the district court in
27 Stormans ultimately concluded that Washington's regulations
28 requiring stocking and disbursing of all medications, including

1 Plan B, was subject to strict scrutiny and violated the Free
2 Exercise Clause. See Stormans Inc. v. Selecky, 844 F. Supp. 2d
3 1172, 1199 (W.D. Wash. 2012). Pivotal to its finding that the
4 regulations “target religious conduct” and therefore lacked
5 neutrality, however, was the fact that the regulations “exempt
6 pharmacies and pharmacists from stocking and delivering lawfully
7 prescribed drugs for an almost unlimited variety of secular
8 reasons, but fail to provide exemptions for reasons of
9 conscience.” Id. at 1189. The district court also found that
10 the “Board of Pharmacy has interpreted the stocking and delivery
11 rules in a way that favors secular conduct over religiously-
12 motivated conduct.” Id. at 1192. In this respect, the
13 comparison of the district court’s decision in Stormans and this
14 case is inapposite because SB 1172 does not contain a single
15 secular exception but provides an unqualified exemption for
16 unlicensed religious leaders.

17 When faced with a similar state statute prohibiting
18 SOCE with minors, the Third Circuit recently held that the
19 statute was neutral. King v. Governor of the State of New
20 Jersey, 767 F.3d 216, 242-43 (3d Cir. 2014). Plaintiffs seek to
21 distinguish King on the ground that the New Jersey law
22 “prohibit[ed] all attempts to change sexual orientation,
23 regardless of whether such efforts were intended to influence a
24 client toward heterosexuality or homosexuality.” (Pls.’ Ltr. Br.
25 at 2 (Docket No. 86).) Even assuming plaintiffs are correct that
26 SB 1172 is limited to or aimed at SOCE efforts affecting only
27 homosexuality,³ the distinction is irrelevant. As the Ninth

28 ³ The definition of SOCE in section 865 is not limited
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1 Circuit has explained, "The Free Exercise Clause is not violated
2 even though a group motivated by religious reasons may be more
3 likely to engage in the proscribed conduct." Stormans, 586 F.3d
4 at 1131.

5 Similar to other neutral laws that have an effect on
6 religious conduct, the evidence before the court indicates that
7 SB 1172 "'punishe[s] conduct for the harm it causes, not because
8 the conduct is religiously motivated.'" Id. (quoting Am. Life
9 League, Inc. v. Reno, 47 F.3d 642, 654 (4th Cir. 1995)). It is
10 therefore unlikely that plaintiffs could establish that SB 1172
11 lacks neutrality.⁴

12 b. General Applicability

13 "A law is not generally applicable when the government,
14 'in a selective manner[,] impose[s] burdens only on conduct
15 motivated by religious belief.'" Id. at 1134 (quoting Lukumi,
16 508 U.S. at 543). "The 'selective manner' analysis tests the
17 rules for substantial underinclusiveness." Id. Here, SB 1172
18 does not impose burdens on religiously-motivated conduct, but
19 categorically prohibits SOCE performed by a "mental health

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21 homosexuality, but merely indicates that the definition "includes
22 efforts to change behaviors or gender expressions, or to
23 eliminate or reduce sexual or romantic attractions or feelings
24 toward individuals of the same sex." Cal. Bus. & Prof. Code §
25 865(b)(1). Plaintiffs nonetheless contend that "the Ninth
26 Circuit's interpretation of SB 1172 focused exclusively on
27 efforts to reduce same-sex attraction." (Pls.' Ltr. Br. at 2.)

28
29 ⁴ Plaintiffs' reliance on Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) is misplaced. Hobby Lobby Stores, Inc., involved a claim under the Religious Freedom and Restoration Act ("RFRA"), which provides "very broad protection for religious liberty" and rejects the Supreme Court's holding in Smith that a neutral law of general applicability is subject only to rational basis review. See Hobby Lobby Stores, Inc., 134 S. Ct. at 2760-61. Plaintiffs have not brought a claim under RFRA.

1 provider" regardless of the motivation for providing SOCE. As in
2 Stormans, there is no evidence that the California Legislature
3 sought to eliminate the use of SOCE with minor patients only when
4 motivated by religious beliefs. See id.

5 In fact, the only way SB 1172 could be viewed as under-
6 inclusive is in its exclusion of SOCE performed by an individual
7 who is not a "mental health provider," such as an unlicensed
8 religious leader. This accommodation for religion cuts against a
9 finding that SB 1172 selectively imposes a burden on conduct
10 motivated by religious belief. See id. at 1137 ("[T]he rules do
11 not selectively impose an undue obligation on conduct motivated
12 by religious belief because the rules actually provide for
13 religious accommodation."). In light of the exemption allowing
14 unlicensed religious leaders to provide SOCE and the lack of any
15 evidence suggesting that SB 1172 is under-inclusive, it is
16 unlikely that plaintiffs could show that SB 1172 is not generally
17 applicable.

18 Because it is likely that SB 1172 is a neutral law of
19 general applicability, plaintiffs' claim based on a violation of
20 the Free Exercise Clause would likely be examined under only
21 rationale basis scrutiny.⁵ Accord King, 767 F.3d at 243.

22 5 For the first time in their supplemental letter brief,
23 plaintiffs mention the possibility of seeking strict scrutiny
24 under a hybrid rights theory. See Smith, 494 U.S. at 882; see
25 generally Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999)
26 ("Smith, however, excepts a hybrid-rights claim from its rational
27 basis test. In Smith, the Court distinguished the strict
28 scrutiny imposed in 'hybrid situation[s]' in which a law
'involve[s] not the Free Exercise Clause alone, but the Free
Exercise Clause in conjunction with other constitutional
protections.'"). Notwithstanding the fact that plaintiffs failed
to pursue such a theory in their motion for a preliminary

1 3. Establishment Clause

2 The Establishment Clause of the First Amendment,
3 applied against the states by incorporation into the Fourteenth
4 Amendment, see Cantwell v. Connecticut, 310 U.S. 296, 303 (1940),
5 provides, "Congress shall make no law respecting an establishment
6 of religion." U.S. Const. amend. I. "This clause applies not
7 only to official condonement of a particular religion or
8 religious belief, but also to official disapproval or hostility
9 towards religion." Am. Family Ass'n, Inc. v. City & County of
10 San Francisco, 277 F.3d 1114, 1120-21 (9th Cir. 2002).

11 "A statute or regulation will survive an Establishment
12 Clause attack if (1) it has a secular legislative purpose, (2)
13 its primary effect neither advances nor inhibits religion, and
14 (3) it does not foster excessive government entanglement with
15 religion." Williams v. California, 764 F.3d 1002, 1014 (9th Cir.
16 2014) (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).
17 "Although the Lemon test is perhaps most frequently used in cases
18 involving government allegedly giving preference to a religion,
19 the Lemon test accommodates the analysis of a claim brought under
20 a hostility to religion theory as well." Am. Family Ass'n, Inc.,
21 277 F.2d at 1121. Here, plaintiffs rely exclusively on the third
22 prong of the Lemon test, arguing that SB 1172 results in
23 excessive government entanglement with religion.

24 "In determining whether there is an excessive
25 entanglement with religion, [the court] must analyze 'the

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27 injunction, plaintiffs do not explain how they could rely on any
28 free speech rights after the Ninth Circuit's decision on appeal.

1 character and purpose of the institutions that are benefitted,
2 the nature of the aid that the State provides, and the resulting
3 relationships between the government and the religious
4 activity.'" Williams, 764 F.3d at 1015 (quoting Lemon, 403 U.S.
5 at 615). Here, only the third inquiry is relevant to plaintiffs'
6 claim based on hostility toward religion. "A relationship
7 results in an excessive entanglement with religion if it requires
8 'sustained and detailed' interaction between church and State
9 'for enforcement of statutory or administrative standards.'" Id.
10 (quoting Lemon, 403 U.S. at 621).

11 In contending that SB 1172 results in excessive
12 entanglement in violation of the Establishment Clause, plaintiffs
13 first rely on cases rejecting clergy malpractice claims.
14 "[I]t is well settled that civil tort claims against clerics that
15 require the courts to review and interpret church law, policies,
16 or practices in the determination of the claims are barred by the
17 First Amendment under the entanglement doctrine." Franco v. The
18 Church of Jesus Christ of Latter-day Saints, 21 P.3d 198, 204
19 (Utah 2011) (citing Serbian E. Orthodox Diocese v. Milivojevich,
20 426 U.S. 696, 709-10 (1976)). In Franco, plaintiffs sought to
21 bring a state law malpractice claim based on a church bishop's
22 ecclesiastical counseling and advice to "forgive, forget, and
23 seek Atonement" in response to the minor plaintiff's claim of
24 sexual abuse. Id. at 200-01. The Utah Supreme Court held that
25 the Establishment Clause prohibited the claim because
26 adjudication of it would "necessarily entangle the courts in the
27 examination of religious doctrine, practice, or church polity."
28 Id. at 204.

1 Plaintiffs also rely on the Tenth Circuit's decision in
2 Colorado Christian University v. Weaver, 534 F.3d 1245 (10th Cir.
3 2008). In Weaver, Colorado provided scholarships to eligible
4 students who attended any accredited public or private college in
5 Colorado unless the state determined that the college was
6 "pervasively sectarian." Weaver, 534 F.3d at 1250. The Tenth
7 Circuit held that the program violated the Establishment Clause
8 because "it expressly discriminates among religions, allowing aid
9 to 'sectarian' but not 'pervasively sectarian' institutions, and
10 it does so on the basis of criteria that entail intrusive
11 governmental judgments regarding matters of religious belief and
12 practice." Id. at 1256. The court explained, "'[T]he inquiry
13 into the recipient's religious views required by a focus on
14 whether a school is pervasively sectarian is not only unnecessary
15 but also offensive. It is well established, in numerous other
16 contexts, that courts should refrain from trolling through a
17 person's or institution's religious beliefs.'" Id. at 1261
18 (quoting Mitchell v. Helms, 530 U.S. 793, 828 (1999)).

19 Unlike clergy malpractice claims or the scholarship
20 program in Weaver, SB 1172 neither contemplates nor requires an
21 examination of religious views or doctrine. Without
22 consideration of the motive or justification for providing SOCE,
23 SB 1172 categorically prohibits a mental health provider from
24 providing that type of therapeutic treatment to a minor. In
25 enforcing SB 1172, the state need not evaluate or even understand
26 the teachings, doctrines, or beliefs of a church about
27 homosexuality or one's ability to change his or her sexual
28 orientation. The inquiry into whether a mental health provider

1 performed SOCE will be the same regardless of whether the
2 provider utilized the treatment while working for a church. SB
3 1172 will thus not require the state to engage in "intrusive
4 judgments regarding contested questions of religious belief or
5 practice." Id.

6 The case at hand is also distinguishable from N.L.R.B.
7 v. Catholic Bishop of Chicago, 440 U.S. 490 (1979). In that
8 case, the Supreme Court found that the National Labor Relations
9 Board's exercise of jurisdiction over teachers of parochial
10 schools presented a "significant risk" that the Establishment
11 Clause would be infringed. N.L.R.B., 440 U.S. at 502. The Court
12 explained that, in response to teachers' charges of unfair labor
13 practices, the schools claimed that "their challenged actions
14 were mandated by their religious creeds." Id. The Court was
15 concerned that resolution of such religious defenses would result
16 in excessive entanglement because it would "necessarily involve
17 inquiry into the good faith of the position asserted by the
18 clergy-administrators and its relationship to the school's
19 religious mission." Id.

20 Here, however, even if a mental health provider's use
21 of SOCE relies on church doctrines or teachings, the state need
22 not evaluate or consider those religious teachings in order to
23 determine whether the provider performed SOCE. A mental health
24 provider cannot defend against a disciplinary action under SB
25 1172 on the ground that the SOCE was utilized because of the
26 provider's or patient's religious beliefs.

27 It is also unlikely that SB 1172 will require continued
28 state oversight of a church, its teachings, or counseling, which

1 weighs against a finding of excessive entanglement. Cf. N.L.R.B.
2 v. Hanna Boys Ctr., 940 F.2d 1295, 1304 (9th Cir. 1991) (finding
3 the lack of an Establishment Clause violation when, *inter alia*,
4 the government would not be involved "in continuing or systematic
5 monitoring of the Church's activities and should not involve
6 monitoring the religious aspects of [the institutions] activities
7 at all[, and government] involvement will not create the reality
8 or the appearance of the government's supervising or
9 collaborating with the Church").

10 Lastly, plaintiffs attempt to raise the relevance of
11 religious doctrine by arguing that Welch offers "some degree of
12 conversion therapy but [plaintiffs] do not believe that [he]
13 'seek[s] to change' clients as prohibited by the statute."
14 (Pls.' Ltr. Br. at 4.) In the prior appeal, the Ninth Circuit
15 held that SOCE is a type of "therapeutic treatment" and that the
16 text of the statute "is clear to a reasonable person." Pickup,
17 740 F.3d at 1229, 1234. The Ninth Circuit found it "hard to
18 understand how therapists who identify themselves as SOCE
19 practitioners can credibly argue that they do not understand what
20 practices qualify as SOCE." Id. Under the Ninth Circuit's
21 reasoning, this line of argument is disingenuous.

22 Accordingly, it is unlikely plaintiffs will be able to
23 show that SB 1172 impermissibly entangles the state with religion
24 and thus it will likely be subject only to rational basis review.

25 4. Rational Basis Review

26 Because it appears likely that SB 1172 does not run
27 afoul of the Religion Clauses, it will likely be subject only to
28 rational basis review. Stormans, 586 F.3d at 1137. "Under

1 rational basis review, the rules will be upheld if they are
2 rationally related to a legitimate governmental purpose." Id.
3 "To invalidate a law reviewed under this standard, '[t]he burden
4 is on the one attacking the legislative arrangement to negative
5 [sic] every conceivable basis which might support it.'" Id.
6 (quoting Heller v. Doe by Doe, 509 U.S. 312, 320 (1993))
7 (alteration in original). Plaintiffs have not proffered any
8 argument as to why SB 1172 could not survive rational basis
9 review and, more importantly, the Ninth Circuit held on appeal
10 that "SB 1172 is rationally related to the legitimate government
11 interest of protecting the well-being of minors." Pickup, 740
12 F.3d at 1232.

13 B. Section 1983 Claims for Violations of Privacy Rights

14 1. Third-Party Standing

15 Plaintiffs' § 1983 claim for violations of privacy
16 rights relies primarily, if not exclusively, on parents' and
17 minors' privacy rights. (See Compl. ¶¶ 65-76.) In its previous
18 order, the court found that plaintiffs may not assert the third-
19 party rights of parents of minor children or minors who want to
20 pursue SOCE. The court reasoned that plaintiffs could not
21 "credibly suggest that parents of minor children who seek SOCE
22 and minors who desire SOCE face a hindrance in asserting their
23 own rights" because those very individuals challenged the
24 constitutionality of SB 1172 in a case filed three days after
25 plaintiffs initiated this action. (Dec. 3, 2012 Order at 8:8-
26 17); accord King, 767 F.3d at 244 ("[T]he fact that minor clients
27 have previously filed suit [challenging a state law banning SOCE
28 with minors] bolsters our conclusion that they are not

1 sufficiently hindered in their ability to protect their own
2 interests.").

3 Plaintiffs now suggest that the court should reconsider
4 its prior decision in light of the negative publicity surrounding
5 this case. That negative publicity--which was more often aimed
6 at this court, not individuals seeking SOCE--did not deter the
7 parent and minor plaintiffs in Pickup from pursuing their rights
8 on appeal. While "a fear of social stigma can in some
9 circumstances constitute a substantial obstacle to filing suit,"
10 an assertion that a client does not want "others to even know
11 they are in therapy" is insufficient to merit third-party
12 standing. King, 767 F.3d at 244. Having determined that
13 plaintiffs lack prudential standing to assert the rights of
14 parents and minors, plaintiffs are unlikely to prevail on any
15 privacy claims based on those rights.

16 2. Evidentiary Privileges

17 Plaintiffs further allege that SB 1172 lacks
18 "safeguards to protect such basic concepts of privacy as the
19 psychotherapist-patient privilege or even the clergy-penitent
20 privilege." (Compl. ¶ 71.) "Under California Evidence Code §
21 1014 a psychotherapeutic patient has the privilege to refuse to
22 disclose and to prevent others from disclosing confidential
23 communications between the patient and doctor." Caesar v.
24 Mountanos, 542 F.2d 1064, 1066 (9th Cir. 1976); see also Cal.
25 Evid. Code § 1016. The Ninth Circuit has recognized that
26 exceptions to the testimonial privilege must comport with a
27 patient's "conditional right of privacy in the doctor-patient
28 relationship" and that the litigation exception in section 1016

1 is "properly justified." Caesar, 542 F.2d at 1067-68.
2 Plaintiffs' reliance on such testimonial privileges attempts to
3 import constitutional significance to state evidentiary
4 privileges. More importantly, nothing in SB 1172 or its
5 legislative history purports to alter California's existing
6 psychotherapist-patient privilege.⁶ It therefore appears
7 unlikely that plaintiffs could prevail on any claim based on the
8 psychotherapist-patient, penitent, or clergy privileges.

9 C. Conclusion

10 Plaintiffs have not shown they are likely to succeed on
11 the merits of their § 1983 claims based on violations of the Free
12 Exercise and Establishment Clauses or any privacy rights. Absent
13 such a showing, plaintiffs are not entitled to a preliminary
14 injunction and the court need not address irreparable harm, the
15 balance of equities, or the public interest. Ass'n des Eleveurs
16 de Canards et d'Oies du Quebec v. Harris, 729 F.3d 937, 953 (9th
17 Cir. 2013). Accordingly, because plaintiffs are not likely to
18 prevail on any of their claims that remained after the Ninth
19 Circuit's decision in Pickup, the court must deny plaintiffs'

20

21 ⁶ Because SB 1172 is limited to "mental health providers" as defined in the statute, it does not appear to extend to a "member of the clergy" as contemplated by penitent or clergy privileges in California Evidence Code sections 1033 and 1034. Cal. Evid. Code §§ 1033 (penitent privilege), 1034 (clergy privilege); see also id. § 1030 (defining "member of the clergy" as a "priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization"). Even if a licensed family therapist providing therapy for the church, such as Welch, comes within the definition of "clergy" for purposes of the penitent and clergy privileges, SB 1172 again does not appear to alter the privileges.

22

1 motion for a preliminary injunction.

2 IT IS THEREFORE ORDERED that plaintiffs' motion for a
3 preliminary injunction as it remains after the appeal in this
4 matter be, and the same hereby is, DENIED.

5 Dated: November 4, 2014

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7 **WILLIAM B. SHUBB**
8 **UNITED STATES DISTRICT JUDGE**

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