No. 13-949

In the Supreme Court of the United States

DAVID H. PICKUP, *ET AL.*,
Petitioners,
v.
EDMUND G. BROWN, JR., GOVERNOR OF CALIFORNIA, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF FREEDOM X AND PARENTS AND FRIENDS OF EX-GAYS & GAYS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

WILLIAM J. BECKER, JR.
Counsel of Record
FREEDOM **X**
11500 Olympic Blvd. Suite 400
Los Angeles, California 90064
(310) 636-1018
FreedomXLaw@gmail.com

Counsel for *Amici Curiae*

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether Sexual Orientation Change Efforts ("SOCE") therapy constitutes "speech" protected by the First Amendment of the United States Constitution and is therefore subject to strict scrutiny analysis.

2. Whether SB 1172 violates the First Amendment free speech guarantee by discriminating against licensed professionals who provide SOCE talk therapy to minor patients.

3. Whether SB 1172 violates the First Amendment free exercise clause by discriminating against patients seeking SOCE treatment on the ground that homosexuality is a sin and/or immoral.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATE STATUTES

MISCELLANEOUS

INTEREST OF AMICI CURIAE[1]

Amicus Freedom X is a public interest law firm dedicated to protecting the freedom of religious, political and intellectual expression. Freedom X and its donors and supporters are vitally interested in the outcome of this case inasmuch as they believe that unless medical providers are given the chance to administer SOCE treatment to interested patients seeking such treatment, regardless of their motivation, and who provide their informed consent with regard to any potential harm non-averse treatment may cause, they will be foreclosed from such treatment by licensed professionals qualified to competently provide it. Freedom X believes SB 1172 deprives such medical providers of their liberty to deliver care to patients who seek it and violates their right to engage in talk therapy in violation of their First Amendment right of free speech. SB 1172 further violates the freedom of conscience of citizens who for moral or religious reasons wish to eliminate sexual urges that conflict with their beliefs and values.

Amicus Parents and Friends of Ex-Gays & Gays ("PFOX") is a national non-profit organization that has supported, since its inception, many thousands of

---

[1] All the parties received 10 days notice and have consented to Freedom X. Their written consents are attached hereto. As required by Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

families of individuals with unwanted same-sex attraction who have made the personal decision to leave homosexuality. PFOX advocates for the civil rights of the ex-gay community. As a family organization, PFOX appears as *amicus* because the state's ban on therapy harms children who have been sexually molested by a same-sex predator, are now confused about their sexual orientation, and yet are prohibited in seeing a licensed therapist of their choice. PFOX is concerned that children are being denied full access to mental health care because of state disapproval of the content of certain therapy talk sessions.

SUMMARY OF ARGUMENT

This Court should scrutinize the Ninth Circuit's decision—a decision holding California may declare certain words and conversations in a mental health counseling context to be unlawful. The Ninth Circuit's decision nowhere cites any precedent approving a state's direct prohibition of any class of psychologist-patient conversations. Instead, the Ninth Circuit adopted the government's view that psychologist-patient conversations constitute "conduct." *Pickup v. Brown*, 740 F.3d 1208, 1228-1230 (2013).

Psychological therapy always starts with a conversation, and in this case, the therapy involves only private talking between the therapist and the patient. The Ninth Circuit decision and the District Court decision both say that talking about how a patient might change his or her sexual orientation is not "speech," but is "conduct." Neither decision

anywhere gives a single example of how the transmission of words is transmuted from "speech" into "conduct."

It is impossible to determine whether a voluntary conversation-only mental health session is violating SB 1172 except by hearing or reading the words each person is speaking. Some words and phrases and paragraphs are lawful; some are not, according to SB 1172 supporters. How do we know which are which? Only by examining the content of the words.

The only practical way to enforce SB 1172 is to examine the words spoken. In a matter as personal as private voluntary non-coercive mental health therapy, the First Amendment bars the government from dictating the words that may or may not be spoken.

Amici contend SB 1172 was enacted to advance a socio-political agenda—not to protect public health and safety. Amici additionally contend the advocacy in defense of SB 1172 is likewise agenda-driven. Evidence of pretext demonstrating that SB 1172 is content- and viewpoint-based is abundant, and both the California Legislature's and the Ninth Circuit's reliance on a Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation reveals just how pretextual the rationale for enacting SB 1172 was.

As a result, the Ninth Circuit's decision advances the advocates' agenda at the expense of First Amendment integrity.

ARGUMENT

I. SB 1172 IS A CONTENT- AND VIEWPOINT-BASED PROHIBITION OF SPEECH AND THUS SHOULD BE SUBJECTED TO STRICT SCRUTINY

"[A]s a general matter [under the First Amendment], . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2733 (2011) (quoting and citing *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002)). The well-known exceptions to that rule fall into "limited areas" that restrict or prohibit obscenity, incitement, and fighting words. *Brown*, 131 S. Ct. at 2733 (citing authorities). Those exceptions "represent well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Id.* (internal quotations and citation omitted).

A law, like SB 1172, which "imposes a restriction on the content of protected speech [is] invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. [] The State must specifically identify an actual problem in need of solving, [] and the curtailment of free speech must be actually necessary to the solution, []. That is a demanding standard. *It is rare that a regulation restricting speech because of its content will ever be permissible*.[]" *Id.* at 2738 (emphasis added; internal quotations and citations omitted).

Does the language of SB 1172 restrict speech? SB 1172 prohibits "a mental health provider" from engaging in "sexual orientation change efforts" ("SOCE") with a person under age 18. Cal. Bus. & Prof. Code § 865. Under SB 1172, SOCE means "any practices that seek to change an individual's sexual orientation, but only if they involve efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex." Cal. Bus. & Prof. Code § 865(b)(1).

Under SB 1172, SOCE is defined to exclude psychotherapies that:

(A) provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and

(B) do not seek to change sexual orientation.

Cal. Bus. & Prof. Code § 865(b)(2).

This litigation has nothing to do with "averse" therapies that involve physical coercion or physical pain. *Pickup*, 740 F.3d at 1223. The Ninth Circuit panel and District Court decisions both acknowledge this litigation refers only to non-averse "talk therapy," *i.e.*, words spoken and heard in a therapeutic session. *Pickup*, 740 F.3d at 1222; *Pickup v. Brown*, 2012 WL 6021465 (E.D. Cal.) Agreed by all parties and judges in this case, the issue here arises from spoken words. The Ninth Circuit panel held SOCE may be "speech" because it involves spoken words, but that it constitutes "conduct" for purposes of First Amendment analysis. *Id.* at 1230-1231.

Of course, the Ninth Circuit and the District Court characterized SOCE talk therapy as "conduct" chiefly because the California state government advocated that position and the courts adopted it. The Ninth Circuit in effect held that because counseling practice is a profession, any conversation that happens in counseling is "conduct," not protected private speech. *Id.* at 1229-1230. The California legislature itself implies that conclusion in the text of SB 1172.

Amici contend that SB 1172 discriminates against those who reject homosexuality and its cognate forms of sexual behavior (i.e., LGBT) on moral and religious grounds, and thus is content- and viewpoint based. Amici further contend that the stated rationales for SB 1172 are pretexts concealing a legislative intent to prohibit voluntary noncoercive speech (between a mental health professional and a minor patient) because of the content and ideas of that speech. Proof that a party opponent's "explanation is unworthy of credence" supplies "circumstantial evidence" that can prove the party opponent's unlawful intentions, "and it may be quite persuasive."[2] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) (citation omitted). A "trier of fact can reasonably infer from the falsity of the explanation" the party is

---

[2] Federal anti-employment discrimination law precedents in this Court and the federal circuits have developed legal methods of identifying circumstantial evidence of the motives and intentions of parties who have acted with unlawful intent but would never admit their mental state. "Direct evidence would be an admission by the decisionmaker" of unlawful discriminatory motivation; "[s]uch admissions are understandably rare. . . ." *Darchak v. City of Chicago Bd. of Educ.*, 580 F.3d 622, 631 (7th Cir. 2009).

dissembling to cover up an unlawful purpose. *Id.* "Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." *Id.* Evidence of pretext also appears in the contradictions between the party's various statements and documents. *See Perfetti v. First Nat. Bank of Chicago*, 950 F.2d 449, 451 (7th Cir. 1991).

The Ninth Circuit decision and its stated rationales disclose irreconcilable internal contradictions, some of which result from the flawed or inapposite "scientific" evidence. Those contradictions come from within the stated legislative justifications for SB 1172.

II. SB 1172'S LEGISLATIVE RATIONALE IS PRETEXTUAL AND THEREFORE DERIVED FROM A DISCRIMINATORY MOTIVE AS EVIDENCED BY THE LANGUAGE OF THE STATUTE AND STUDIES THE RESPONDENTS RELY UPON

A. SB 1172's Exclusive Reliance On Anecdotal Claims Of Harm Caused By SOCE Shows The Legislature Relied Upon Unreliable Evidence That SOCE Treatment Is Actually Proven To Be Harmful

"Although the Legislature is entitled to some deference, the courts are required to review whether the Legislature has drawn reasonable inferences from the evidence presented." *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 962 (9th Cir. 2009) aff'd sub nom. *Brown v. Entm't Merchants*

Ass'n, 131 S. Ct. 2729, citing *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997).

Although courts accord deference to the predictive judgments of the legislature, their "obligation is to assure that, in formulating their judgments, [the legislature] *has drawn reasonable inferences based on substantial evidence*." *Id.* (emphasis added). "This is not to suggest that a 10,000–page record must be compiled in every case or that the Government must delay in acting to address a real problem; but the Government must present more than anecdote and supposition. The question is whether an actual problem has been proved. . . ."). *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822 (2000).

The California Legislature relied only on anecdote and supposition where the perceived inefficacy of SOCE treatment *has not been proved*. As the Ninth Circuit panel observed, the Legislature principally deferred to a report prepared by the Task Force of the American Psychological Association ("APA Report")[3] in concluding that SOCE treatment has failed to demonstrate any efficacy. On the basis of that report's findings and conclusions, the Legislature acknowledged that reports of harm, including depression, suicidal thoughts or actions, and substance abuse have been only anecdotally documented. *Pickup*, 740 F.3d at 1123; *see also* Complaint, Exh. 1 (2012 Cal. Legis. Serv. ch. 835) ("[A]necdotal reports of 'cures' are counterbalanced by anecdotal claims of psychological harm."). The Ninth Circuit panel decided the quality of the evidence based upon the quantity of reports critical of

[3] *Pickup vs. Brown*, U.S.D.C. No. 12-02497, Docket No. 54-1.

SOCE treatment. Yet the findings of all of those reports are based strictly on anecdotal claims, which do not, as a matter of qualitative judgment, prove SOCE to be an ineffective or harmful form of psycho-therapeutic treatment.

B. SB 1172's Omission Of An Indispensable Element Of The APA Report's Complete Definition Of "Acceptance And Support" Altering Its Meaning Shows An Intent To Ban Therapists From Accepting And Supporting A Patient's Values, Beliefs And Needs That Differ From The Socio-Political Motives Of The Legislature

According to the APA Report, "adults perceive a benefit [from therapy] when they are provided with client-centered, multicultural, evidence-based approaches that provide (a) *acceptance and support*, (b) assessment, (c) active coping, (d) social support, and (e) identity exploration and development." APA Report, p. 5 (emphasis added). The Report states: "Acceptance and support include unconditional acceptance and support for the various aspects of the client; [and] respect for the client's values, beliefs, and needs …" *Id.* (emphasis added).

The APA Report expressly defines "acceptance and support" to include "respect for the client's *values, beliefs, and needs*." APA Report, p. 5 (emphasis added). SB 1172 explicitly exempts from its prohibitions psycho-therapeutic treatment that extends "acceptance and support" to patients from its prohibitions. Cal. Bus. & Prof. Code § 865(b)(2). Yet while SB 1172 adopts the acceptance and support" language from the APA Report, it omits the APA language describing what exactly it is a therapist is

encouraged to accept and support during therapy sessions—the patient's "*values, beliefs and needs*." (Emphasis added). *See* 2012 Cal. Legis. Serv. ch. 835 § 1(o).This selective adoption of the APA study's language substantively alters the APA's recommendations in a way that significantly changes the client-patient relationship. In effect, SB 1172 only vaguely and incompletely identifies what type of acceptance and support is allowable while the APA urges therapists to accept and support the patient's values, beliefs and needs.

By omitting the APA Report's qualified definition of "acceptance and support" to include the patient's "values, beliefs and needs," SB 1172 shows a legislative intent to prevent the patient's values and beliefs from guiding the psycho-therapeutic treatment. It further reveals the Legislature's intent to impose its beliefs and values on patients whose beliefs and values differ.

C. SB 1172's Unlicensed Counselor Exemption Betrays The Law's Explicit Purpose Of Protecting Harm To Minors

While psychologists and mental health professionals—those who are professionally trained to treat patients seeking SOCE therapy—are barred from administering the psychological treatment, SB 1172 explicitly allows religious "leaders" to engage in SOCE treatment without limitation. *Pickup*, 740 F.3d at 1223 (noting the statute does not "[p]revent unlicensed providers, such as religious leaders, from administering SOCE to children or adults"). If the Respondent State has a "compelling interest in protecting the physical and psychological well-being of minors, . . . [by] protecting its minors against

exposure to serious harms caused by sexual orientation change efforts," exempting non-professionals from the prohibition does not achieve that objective. 2012 Cal. Legis. Serv. ch. 835 § 1(n). Indeed, it makes as much sense as banning qualified physicians from conducting abortions while exempting back-alley abortionists. As a practical matter, the religious leader exemption from SB 1172 permits patients seeking SOCE treatment to obtain it from unlicensed non-professionals.[4]

Logically, if the State's rationale of protecting harm to minors is a sincere and credible one, then the State has a compelling interest to ensure that SOCE is administered by trained, regulated professionals—rather than unregulated, unmonitored practitioners.

Barring licensed mental health professionals from engaging in voluntarily-sought SOCE, while allowing religious leaders to engage in SOCE under identical conditions, shows the claimed legislative purpose of SB 1172 unworthy of credence. When a person explains his or her action but the explanation is self-contradictory or fails to make sense, it is unworthy of credence, and it constitutes circumstantial evidence of pretext. Weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in a party opponent's proffered justifying reasons for its action can lead a reasonable factfinder to rationally

---

[4] The District Court decision highlighted this practical fact: "[T]he statute does not preclude a minor's taking information from a licensed mental health professional and then locating someone other than a licensed professional to provide SOCE." *Pickup*, 2012 WL 6021465 at *9. This fact undermines the supposed legislative purpose of SB 1172.

find them "unworthy of credence," and conclude that the party opponent did not act for those asserted reasons. *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994); *Mickey v. Zeidler Tool and Die Co.*, 516 F.3d 516, 526 (6th Cir. 2008) (showing of unworthiness of explanation raised triable issue of fact); *Reeves*, 530 U.S. at 147 (stating that questionable and noncredible explanations allow the inference of the party opponent's unlawful intent).

SB 1172's stated public health basis—protecting children from the alleged harms of voluntarily-sought SOCE—is unworthy of credence and cannot be the true reason for the SOCE ban.

D. SB 1172's Purpose And Effect Is To Prevent Therapists From Treating Patients Motivated To Seek SOCE Treatment On The Basis Of Their Conservative Values Or Religious Convictions

The Ninth Circuit gave substantial credence to the Legislature's reliance on the APA Report. *Id.* at 1224, 1231-1232. The APA Report makes evident that political and religious concepts figure prominently in its own analysis of SOCE. Some examples:

- APA Report, p. 12: stating of SOCE proponents: "Many of the individuals and organizations appeared to be embedded within conservative political and religious movements that supported the stigmatization of homosexuality."
- APA Report, p. 17: "Beliefs about sexual behavior and sexual orientation rooted in interpretations of traditional religious doctrine

also guide some efforts to change others' sexual orientation as well as political opposition to the expansion of civil rights for LGB individuals and their relationships."

- APA Report, p. 17: "One of the issues in SOCE is the expansion of religiously based SOCE. Religious beliefs, motivations, and struggles play a role in the motivations of individuals who currently engage in SOCE."
- APA Report, p. 18: "Some difficulties arise because the professional psychological community considers same-sex sexual attractions and behaviors to be a positive variant of human sexuality, while some traditional faiths continue to consider it a sin, moral failing, or disorder that needs to be changed. The conflict between psychology and traditional faiths may have its roots in different philosophical viewpoints."
- APA Report, p. 52: summarizing, "The recent literature identifies a population of predominantly White men who are strongly religious and participate in conservative faiths."

The APA Report repeatedly asserts that religious views, and particularly Christian and Jewish views and their proponents, actually cause or exacerbate problems for homosexual people. E.g., APA Report, pp. v, 17-20, 45-49, 52. SB 1172's stated reliance upon the APA Report as an objective, scientific study is betrayed as false because the report is actually critical of certain identified religious groups and their views about homosexuality. *See Pickup*, 740 F.3d at 1223.

In the subsection entitled "APA Policies on the Intersection of Religion and Psychology," the Report recounts APA's position that a largely unbridgeable gap lies between social science and religious viewpoints. APA Report, p. 19. Pointedly, the APA Report decries any religious involvement in psychology that conflicts with the APA's views just as it encourages psychologists to question religious beliefs about human behavior:

> In areas of conflicts between psychology and religion, as the APA Resolution on Religious, Religion-Related, and/or Religion-Derived Prejudice [] states, psychology has no legitimate function in "arbitrating matters of faith and theology" [] or to "adjudicate religious or spiritual tenets," and psychologists are urged to limit themselves *to speak to "psychological implications of religious/spiritual beliefs or practices when relevant psychological findings* about those implications exist" []. Further, the resolution states that faith traditions "*have no legitimate place* arbitrating behavioral or other sciences" [] or to "adjudicate empirical scientific issues in psychology" [].

APA Report, p. 19 (emphasis added; internal citations omitted).

The Ninth Circuit decision emphasized SB 1172's exemption for religious leaders to practice SOCE as though the exemption strengthened the case for SB 1172. *See Pickup*, 740 F.3d at 1223. Precisely the opposite is true. The religious exemption reveals a hidden political or social-engineering strategy. Carefully comparing the

decision's rhetoric to the APA Report's content shows why.

E. SB 1172 Expressly Relies on the Pretense That Professional Association Opinion Statements Constitute Scientific Evidence When They Do Not

SB 1172 supposedly rests on scientific evidence, and the Legislature purported to rely on experts by citing professional association statements of opinion. That reliance satisfies a rhetorical position, but it does not approach adequate scientific evidence dispositive of its claims. This Court has "decline[d] the invitation to rest constitutional law upon such uncertain foundations" such as "public opinion polls, the views of interest groups, and the positions adopted by various professional associations." *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989), overruled on other grounds, *Roper v. Simmons*, 543 U.S. 551 (2005).

SB 1172 was enacted with the Legislature's statement of legislative intent published within it. *See Pickup*, 740 F.3d at 1223-1224. "The legislature relied on the well-documented, prevailing opinion of the medical and psychological community that SOCE has not been shown to be effective and that it creates a potential risk of serious harm to those who experience it." *Id.* Perhaps the Legislature can rely on anything, or nothing, to enact a statute. In the judicial system, however, assertions of "fact" require sufficient relevant and admissible evidence. The Legislature asserted it used certain documents to support its views about SOCE; both the District Court and Ninth Circuit decision relied upon the Legislature's conclusory assertions.

Amici contend the purported reliance upon "well-documented, prevailing opinion" of professional organizations was inauthentic and pretextual, concealing a content- and viewpoint-based desire to marginalize the conscientious objections of people of faith or others who view homosexuality to be in violation of religious beliefs or immoral. The opinion statements of professional organizations do not supply proof supporting any aspect of the underlying truth, reliability or validity of the bases of those opinions. Citing a survey article or "a law review to a court does not suffice to introduce into evidence the truth of the hearsay or the so-called scientific conclusions contained within it." *Ramdass v. Angelone*, 530 U.S. 156, 172 (2000).

By citing the APA Report (and other professional association statements of opinion) as its primary basis for enacting SB 1172, the Legislature revealed the lack of actual scientific evidence supporting its SOCE prohibition.

F. SB 1172's Statement Of Purpose, The APA Report And The Ninth Circuit Decision Lack True Scientific Evidence To Justify The Law's Enactment

The supporters of SB 1172 cannot reasonably claim that its banning professionals from administering SOCE receives "expert" scientific support from the APA Report and the other professional association statements. This Court has declared clearly the "requirement" of ensuring the "reliability and relevancy of expert testimony." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). An expert, "whether basing testimony upon professional studies or personal experience [must

employ] in the courtroom the *same level of intellectual rigor* that characterizes the practice of an expert in the relevant field." *Id.* (emphasis added). No such rigor appears in the mere statements of association's opinions.

1. Rigorous Studies And Expert Testimony Are Nowhere Cited; The APA Report Conceded Its Own Evidentiary Weakness

This Court has affirmed the rejection of proffered "studies" and expert testimony where: (a) the connection between the cited study and the asserted conclusion reached was not clear; (b) the link between the data and expert's opinion was only the fact that the expert testified to the link; and (c) the principles and methods underlying the opinion or study were not affirmatively shown to be valid and reliable. *General Elec. Co. v. Joiner*, 522 U.S. 136, 144-146 (1997); *see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993) (holding the evaluation of expert evidence must focus on principles and methodology). Experts' statements can be excluded entirely where "there is simply too great an analytical gap between the data and the opinion proffered." *Joiner*, 522 U.S. at 146.

Here, the APA Report itself conceded substantial weaknesses in the data upon which it based its conclusions. The Report asserted that the then-existing SOCE research aimed "to demonstrate that SOCE consistently and reliably produce changes in aspects of sexual orientation. Overall, due to *weaknesses in the scientific validity of research on SOCE*, the empirical research does not provide a sound basis for making compelling causal claims."

APA Report, p. 28 (emphasis added). All of the research the APA Report surveyed suffered from what the Report (at p. 38) considered serious defects:

> Our analysis of the methodology of SOCE reveals substantial deficiencies. These deficiencies include limitations in making causal claims due to threats to internal validity (such as sample attrition, use of retrospective pretests, lack of construct validity including definition and assessment of sexual orientation, and variability of study treatments and outcome measures).
>
> The APA Report continued:
>
> > Additional limitations with recent research include problems with conclusion validity (the ability to make inferences from the data) due to small or skewed samples, unreliable measures, and inappropriate selection and performance of statistical tests.
>
> Thus the APA Report conceded:
>
> > Due to these limitations, the recent empirical literature provides little basis for concluding *whether SOCE has any effect on sexual orientation*. Any reading of the literature on SOCE outcomes must take into account the limited generalizability of the study samples to the population of people who experience same-sex sexual attraction and are distressed by it.
>
> APA Report, p. 38 (emphasis added).

2. Causation Of Harm—The Only Conceivable Reason To Restrict Voluntary Non-Coercive SOCE—Is Nowhere Shown

The APA Report conceded it could not conclusively state that SOCE caused or even could be associated with "harm to mental health":

> Both the early and recent research *provide little clarity on the associations* between claims to modify sexual orientation from same-sex to other-sex and subsequent improvements or harm to mental health.

Id., p. 85 (emphasis added).

The APA Report's conceded a lack of association means a lack of causal link between SOCE and harmful outcomes.[5] The Ninth Circuit decision conceded the opponents of SOCE were relying upon "anecdotal reports of harm." *Pickup*, 740 F.3d at 1224, 1232. To be even admissible, let alone conclusive, scientific evidence of causation must be more than a mere opinion. *Porter v. Whitehall Laboratories, Inc.*, 9 F.3d 607, 614 (7th Cir. 1993). An "expert opinion [that] is not supported by sufficient facts to validate it in the eyes of the law" cannot support a fact-finding determination. *Brooke Group*

---

[5] Even if there were some statistical association or correlation, that alone would not prove a causal link between SOCE and some alleged harm. *See In re Navy Chaplaincy*, 738 F.3d 425, 429 (D.C. Cir. 2013) (noting "correlation is not causation"); *Tagatz v. Marquette Univ.*, 861 F.2d 1040 (7th Cir. 1988) (same, and explaining the meaning of correlation in statistical analysis); *cf. Ste. Marie v. Eastern R. Ass'n*, 650 F.2d 395, 399-403 (2d Cir. 1981) (exploring the deficiencies in statistical evidence offered to prove causation).

Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242 (1993). The weaknesses in the evidence and the crucial lack of an association, let alone causal link, between voluntary non-coercive SOCE and harm to patients show SB 1172's stated rationale to be pretextual.

G. Encouraged by SB 1172 Advocates Who Overlook Key Elements of the APA Report, The Ninth Circuit Uses Evidence About Coercive SOCE Methods To Supply Reasons to Ban Voluntary Non-Coercive SOCE Methods

The Ninth Circuit decision recognized this case focuses solely upon "talk therapy," sometimes referred to as the "talking cure." *Pickup*, 740 F.3d at 1218, 1219, 1226, 1229 n.6, 1230-1231. SB 1172 prohibits any form of professionally-administered SOCE and cites the APA Report as the chief scientific authority for rationalizing the prohibition. But SB 1172 fails to disclose that the APA Report singled out for criticism only involuntary and coercive techniques. The Report especially highlights concerns about coercive and involuntary treatment. A word search of the APA Report reveals it refers to "coercive" techniques and programs 28 times.

The Report's only recommendation for "legal protection" refers to "[s]exual minority children and youth [who] are especially vulnerable populations with unique developmental tasks [] [and] who lack adequate *legal protection from involuntary or coercive treatment*. . . ." APA Report, p. 121 (emphasis added; internal citations omitted). This recommendation stems from the Report's observation that "[c]oercive and involuntary treatment present ethical dilemmas

for providers working with many clients [] however, with children and adolescents, such concerns are heightened []. *Children and adolescents are more vulnerable to such treatments because of the lack of legal rights* and cognitive and emotional maturity and emotional and physical dependence on parents, guardians, and [mental health professionals]." *Id.*, p. 76 (emphasis added).

The SB 1172 advocates, echoed by the Ninth Circuit decision, say the APA Report supports legally prohibiting any and all SOCE "talk therapy," even where it is totally voluntary. That contention is not just untrue but indicative of a complete indifference to the rights of patients voluntarily seeking SOCE treatment to overcome sexual urges they desire to lose. Pretext evidence shows the party's explanation is not the real reason for the party's action, which allows the inference that the party's true reasons are the unlawful reasons. *See Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) (discussing the adverse inference drawn against a prosecutor's explanation given for striking jurors because it conflicted with other evidence and could therefore be not worthy of credence, citing and quoting Reeves, 530 U.S. at 147).

In the First Amendment context, when a government restricts speech or religious activities on grounds of its effects upon the hearers, the courts examine those grounds carefully. Thus, when a government seeks to justify a restriction on adult theaters because of its "*desire to prevent the psychological damage* it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute [be] appropriate." *Boos v. Barry*, 485 U.S. 312, 321 (1988) (emphasis added)

(analyzing a "justification [for a law restricting speech that] focuses only on the content of the speech and the direct impact that speech has on its listener"). This Court held that such a law "regulates speech due to its potential primary impact" and therefore "must be considered content-based." *Id.*

Here, the Legislature's true reasons for attempting to prohibit SOCE speech stem from a political and social viewpoint that derogates Orthodox Judaism, conservative Christianity, and any other religious viewpoint that might consider homosexual behavior sinful. *See* APA Report, pp. 12, 18, 20, 46, 47. "The First Amendment mandates governmental *neutrality* between religion and religion, and *between religion and nonreligion*." *Epperson v. State of Ark.*, 393 U.S. 97, 104 (1968) (emphasis added). By citing as a chief authority the openly religion-critical APA Report, the Legislature through SB 1172 has taken a position against a religious viewpoint even when that viewpoint is privately expressed in a voluntary setting.

III. BECAUSE A VIOLATION OF SB 1172 IS SPEECH THAT WOULD TYPICALLY BE UNWITNESSED, THE POTENTIAL FOR FALSE CLAIMS AND BLACKMAIL IS SUBSTANTIAL, AND SUCH CLAIMS COULD ONLY BE DECIDED BY ANALYSIS OF SPEECH CONTENT

The D.C. Circuit long ago recognized the destructive power of mere accusations and the danger of blackmail, when it stated: "as in all acute conflicts between ... public and private interests, the law must be exceedingly careful in its processes.

While enforcement of this particular [sex conduct] statute must seek the prevention of the offense, it must also seek to prevent unwarranted irreparable destruction to reputations, and it must seek to prevent the equally criminal offense of blackmail; [enforcement of the sex conduct law] *must not foster conditions or practices which make easy and encourage [blackmail].*" *Kelly v. U.S.*, 194 F.2d 150, 154 (D.C. Cir. 1952) (emphasis added).

Because of the danger of an accusation where only two people testify in diametric opposition, in previous eras a defendant could not be convicted of rape based solely upon the testimony of the victim. *E.g.*, *People v. Downs*, 236 N.Y. 306, 308, 140 N.E. 706 (1923). That strict rule has been relaxed, but judicial eyes must still watch out for situations where one person with a grudge or agenda accuses another person of unlawful conduct that is nothing but words.

In *Coltrane v. U.S.*, 418 F.2d 1131 (D.C. Cir. 1969), the D.C. Circuit cited its "long line of decisions" in which the court "consistently held that corroboration of the testimony of complainants in so-called 'sex cases' is *indispensably prerequisite* to conviction, and for the cogent reason that for these offenses the risk of unjust conviction is high." *Id.* at 1134 (emphasis added; footnotes omitted). The *Coltrane* court further stated:

> We know from the lessons of the past that all too frequently such complainants have an urge to fantasize or even a motive to fabricate, while typically the innocent, as well as the guilty, *have only their own testimony upon which to rely*. We realize, too, that *recriminations of that character pose an unusual threat to the reliability of a*

> *judgment on credibility of the allegedly defiled vis a vis the alleged defiler*. Thus in prosecutions for sodomy and taking indecent liberties with a minor, like in other sex cases, the traditional skepticism of courts toward (that) sort of accusation has generated the requirement that satisfactory corroboration of the complainant's account, as well as negation of reasonable doubt as to the accused's guilt, must precede any conviction. *Id.* at 1134-1135 (emphasis added; footnotes with citations and quotations omitted).

Coltrane highlighted a persistent serious problem with prosecutions initiated on the say-so of one person without any corroborating evidence. In the SB 1172 context, the Ninth Circuit and the District Court decisions both fail to define any method for identifying the words and phrases constituting "conduct" that would support a disciplinary action against a therapist. The Ninth Circuit reassures that therapists can talk about SOCE or even refer patients to non-therapists for SOCE. *Pickup*, 740 F.3d at 1223. But what verbal perimeter is defined?

Neither of the lower court decisions provides guidance upon which a mental health professional can rely. There is no safe harbor, and no set of proscribed words or phrases. A prohibition of private conversations so uncertain as this creates the risk of disappointed, hostile, or agenda-driven patients lodging formal complaints against mental health therapists. And, of course, litigious patients incur no cost in filing a disciplinary charge against a therapist—the therapist incurs all of the litigation expenses as well as suffering the obloquy of the accusation.

To resolve a patient's complaint, the licensing board has to examine the content of the conversations. Unless the sessions are recorded, the evidence can only be personal testimony. Who said what to whom and when and how?

The only way to adjudicate such complaints is to examine conversation content and decide who is accurately revealing that content. How is the content evaluated? By whether the persons listening to it agree or disagree with it. "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994) (citation omitted).

According to the APA Report, a sizeable number of psychologists and mental health professional disagree with any effort to help a patient who wants to explore and possibly change sexual orientation. So the decision makers who disagree with SOCE can be expected to seize on any words and phrases that suggest the therapist was using SOCE. What the therapist says – the content – will lead to the disciplinary decision.

It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). Indeed, the government may not "impose special prohibitions on those speakers who express views on disfavored subjects" or on the basis of "hostility—or favoritism—towards the underlying message expressed." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386 (1992). "[A]bove all else, the First

Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

SB 1172 creates a system of speech content prohibition that opens new avenues for unhappy or agenda-driven patients to damage mental health therapists. The conceivable unintended consequences of SB 1172's prohibition operate to squelch any speech by a therapist that makes any reference to SOCE. Such a prohibition is content and viewpoint discriminatory, and should be held unconstitutional.

DATED: March 11, 2014

Respectfully submitted,

William J. Becker, Jr.
Counsel of Record
FREEDOM **X**
11500 Olympic Blvd. Suite 400
Los Angeles, California 90064
(310) 636-1018
FreedomXLaw@gmail.com

Counsel for *Amici Curiae*