Bad Medicine: The Ninth Circuit Reviews Issues of Free Speech, Professional Regulations, and California's Ban on Sexual Orientation Change Efforts in *Pickup v. Brown*

I. INTRODUCTION

Mental health treatments that aim to "cure" gays, lesbians, and bisexuals of their homosexuality have been consistently available to Americans for decades in spite of the declassification of homosexuality as a mental illness in the early 1970s.[1] These treatments, called "sexual orientation change efforts" (SOCE), may take a wide variety of forms.[2] For example, they can be highly aversive, involving the administration of physical pain or discomfort, or they can be nonaversive, utilizing counseling and affection training to reframe the patient's desires and behavior.[3] Last September, Governor Jerry Brown of California signed Senate Bill 1172 into law, prohibiting licensed mental health professionals in California from employing SOCE in the treatment of children under the age of eighteen.[4] Relying on the prevailing opinion of the medical community that these therapies are ineffective and present a risk of psychological harm, the California legislature drafted this law to protect the psychological well-being of minors.[5]

Soon after its signing, S.B. 1172 encountered challenges from two groups of plaintiffs in *Welch v. Brown* and *Pickup v. Brown*.[6] These groups were made up of SOCE practitioners and of parents asserting the

1. Pickup v. Brown, 728 F.3d 1042, 1048-49 (9th Cir. 2013), *amended by* 740 F.3d 1208 (9th Cir. 2014).
2. *Id.*
3. *Id.*
4. *Id.* at 1049. The law specifically defines SOCE as "any practices by mental health providers that seek to change an individual's sexual orientation[,] . . . includ[ing] 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) (West 2013).
5. *Pickup*, 728 F.3d at 1050.
6. Welch v. Brown, 907 F. Supp. 2d 1102 (E.D. Cal. 2012), *rev'd sub nom.* Pickup v. Brown, 728 F.3d 1042 (9th Cir. 2013).

rights of their minor children to undergo SOCE, seeking to prevent the law from being enforced.[7] The first group of plaintiffs (*Welch* plaintiffs) obtained a preliminary injunction based on their free speech claim's likelihood of success.[8] In *Welch*, the United States District Court for the Eastern District of California held that a stringent level of scrutiny was applicable because the law, despite being a professional regulation, restricted the expression of the plaintiffs' viewpoints and the content of their speech.[9] The court believed that S.B. 1172 would not survive strict scrutiny due to the lack of conclusive evidence that SOCE actually causes harm to minors.[10] In contrast, that same court applied rational basis review in denying injunctive relief to the second group of plaintiffs (*Pickup* plaintiffs).[11] The government and the *Pickup* plaintiffs appealed these decisions.[12] In a combined decision, the United States Court of Appeals for the Ninth Circuit vacated the district court's decision granting an injunction to the *Welch* plaintiffs, affirmed the district court's denial of the *Pickup* plaintiffs' request for an injunction, and *held* (1) that the speech S.B. 1172 affects is not speech, but rather professional conduct, (2) it is, therefore, subject only to rational basis review, and (3) it can withstand this review because of the state's compelling interest in protecting its minor citizens and regulating its medical profession. *Pickup v. Brown*, 728 F.3d 1042, 1051-62 (9th Cir. 2013).

II. BACKGROUND

The First Amendment prohibits the United States government from, among other things, making laws "abridging the freedom of speech."[13] This same limitation also applies to the state legislatures because of the Due Process Clause of the Fourteenth Amendment.[14] When a state passes a regulation infringing upon a core constitutional right, a court must review that regulation under strict scrutiny; unless the regulation is narrowly tailored to further a compelling state interest, it is unconstitutional.[15] In cases involving freedom of speech, a core

7. *Pickup*, 728 F.3d at 1050.
8. *Welch*, 907 F. Supp. 2d at 1111.
9. *Id.*
10. *Id.* at 1117-21.
11. *Pickup*, 728 F.3d at 1051.
12. *Id.* at 1048.
13. U.S. CONST. amend. I.
14. *Id.* amend. XIV, § 1.
15. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326-28 (2003) (upholding affirmative action policy on the basis that promotion of diversity in a student body was a sufficiently compelling government interest to withstand strict scrutiny).

constitutional right, such heightened scrutiny is the applicable standard of review.[16] The First Amendment generally provides enormous protection to speech, but that protection is not absolute.[17]

When speech and conduct intertwine, the standard of review is potentially more lenient. In *Giboney v. Empire Storage & Ice Co.*, the United States Supreme Court upheld an injunction forbidding members of a labor union from picketing their employer's office.[18] There, the plaintiffs challenged the injunction under the First Amendment, claiming that it prevented them from publicizing truthful facts about a labor dispute.[19] The Court rejected this argument because the speech that the injunction abridged was part of a larger scheme of conduct aimed at preventing the plaintiffs' employer from selling goods to retailers outside their union, an arrangement that would have amounted to a felony under applicable state law.[20] The Court went on to say that regulations of certain conduct do not violate the First Amendment "merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[21] Thus, the rule from this case mandates weighing substance over form in instances where speech initiates conduct that the government has reason to regulate.[22]

The line between protected speech and unprotected conduct is often blurry, and courts must take great care to make sure they do not unconstitutionally render the First Amendment inapplicable to certain areas of speech. The Supreme Court recently offered additional guidance on this issue in *Holder v. Humanitarian Law Project* (*HLP*), in which several nonprofit aid organizations contested on First Amendment grounds a statute that prohibited the provision of material support to groups designated as terrorist organizations.[23] The statute prevented them from using communication to offer training and advice to members of two organizations in order to educate those members on the use of nonviolent legal means to bring about change in their countries.[24] The government took the position that whatever expression the statute

16. *See, e.g.*, Thomas v. Collins, 323 U.S. 516, 530 (1945) ("[A]ny attempt to restrict [freedom of speech or the press] must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed . . . will not suffice.").

17. *Id.*

18. 336 U.S. 490, 497-98 (1949).

19. *Id.*

20. *Id.* at 498.

21. *Id.* at 502.

22. *Id.*

23. 130 S. Ct. 2705, 2712-15 (2010).

24. *Id.* at 2713-14.

prohibited was incidental to conduct, receiving significantly less First Amendment protection.[25] The argument that the statute generally proscribed conduct as opposed to speech proved unpersuasive, and the Court chose to apply strict scrutiny.[26] While the *Giboney* holding allows the government to infringe upon speech merely incidental to conduct that it has reason to regulate, the holding in *HLP* sets limits on that authority to regulate when the imposition on speech rises above the level of "incidental." Thus, the existence of a link between protected speech and unprotected conduct is not necessarily fatal to full protection under the First Amendment.

The existence of a professional relationship, especially in cases where the government regulates a profession, may also lower the applicable level of First Amendment protection.[27] Where a profession is complicated or dangerous enough to merit a licensing scheme, the government has a heightened interest in ensuring that the First Amendment does not serve to protect the commission of outright fraud and charlatanism in the course of that business. Justice White's concurrence in *Lowe v. Securities & Exchange Commission* summarizes this reasoning.[28] There, he opined that when a professional engages in a business relationship with a client by means of a government-issued license to participate in that profession, he or she does so for the purpose of aiding the client and not for the purpose of speaking publicly.[29] On the other hand, when the "personal nexus" between a licensed professional and his or her client is nonexistent and the professional is not engaged in business on behalf of the client, there is full First Amendment protection.[30] In short, this idea expands on the rule in *Giboney* by advocating for lower First Amendment protection for communications between a licensed professional and a client in the course of their professional relationship.[31]

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25. *Id.* at 2722-24.
26. *Id.* at 2724.
27. Lowe v. Sec. & Exch. Comm'n, 472 U.S. 181, 233 (1985) (White, J., concurring).
28. *Id.* at 211-36.
29. *Id.* at 232.
30. *Id.*
31. *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) (stating that the First Amendment does not apply to regulations of conduct "merely because the conduct was in part initiated, evidenced, or carried out by means of [spoken or written] language"); *Lowe*, 472 U.S. at 224-36 (White, J., concurring) (finding that when a licensing scheme or regulations is put in place by government, the government has a heightened interest in making sure that the commission of fraud or illegal conduct does not get the full benefit of the First Amendment's protection).

This same reasoning appeared in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, in which the Supreme Court upheld a Pennsylvania statute requiring doctors to provide patients with truthful information about the risks of abortion.[32] Speaking for the plurality, Justice O'Connor recognized that the law abridged the plaintiffs' rights not to speak, but noted that because the practice of medicine is "subject to reasonable licensing and regulation by the [s]tate," the constitutional protections of doctor-patient speech are far from absolute.[33] The plurality also mentioned that a doctor did not have to comply with the statute if that doctor could show, by a preponderance of the evidence, that he or she reasonably believed that the disclosure of such information would cause mental or physical harm to the patient.[34] Because it functioned as a reasonable regulation on a highly regulated professional field, the statute did not unfairly restrict a doctor's use of his or her medical judgment.[35]

One case from the Ninth Circuit, *National Association for the Advancement of Psychoanalysis v. California Board of Psychology* (*NAAP*), frames these issues in a mental health context.[36] In that case, practitioners of psychoanalysis claimed that California's restrictive licensing scheme for mental health practitioners infringed on their free speech rights by preventing them from engaging in the practice of psychoanalysis.[37] Describing psychoanalysis as the "talking cure," the plaintiffs argued that because the treatment predominantly involves talking to the patient, it should receive the same First Amendment protection as pure speech.[38] Applying *Giboney*, the court in the noted case weighed the substance of psychoanalysis over its form and determined that the practice of psychoanalysis, while possessing a speech component, was largely conduct.[39] The Ninth Circuit identified the treatment of mental illnesses as the main component of psychoanalysis and concluded that, while speech used in therapy is still partially under the aegis of the First Amendment and the licensing scheme needed to surpass rational basis review to be valid, the regulation did not implicate free speech to the point of triggering strict scrutiny.[40] The court concluded by holding that the regulations withstood rational basis

32. 505 U.S. 833, 884 (1992) (plurality opinion).
33. *Id.* (citing Whalen v. Roe, 429 U.S. 589, 603 (1977)).
34. *Planned Parenthood*, 505 U.S. at 884.
35. *Id.*
36. 228 F.3d 1043, 1054 (9th Cir. 2000).
37. *Id.*
38. *Id.*
39. *Id.* at 1053-54.
40. *Id.* at 1054.

scrutiny because the state has a legitimate interest in shielding its citizens from fraud in the guise.[41]

Two years after *NAAP*, the Ninth Circuit identified another variation on the theme of *Giboney* and recognized that some regulations of verbal interactions between doctors and patients do indeed trigger strict scrutiny. In *Conant v. Walters*, the Ninth Circuit upheld an injunction against the enforcement of a federal policy that prohibited doctors from recommending to or discussing with their patients the use of marijuana for medicinal purposes.[42] The Ninth Circuit distinguished that case from *Casey* by pointing out that a regulation banning the mere recommendation or discussion of medical marijuana robbed doctors of the ability to use their professional judgment.[43] The court explained further that it was improper for the government to operate on the assumption that merely discussing marijuana "might lead the patient to make a bad decision."[44] In this case, both the possibility of harm and the causal chain of events in which a doctor's discussion about marijuana leads to the patient "making a bad decision" and suffering harm were far too attenuated to reasonably justify regulation of such speech, especially because the court applied heightened scrutiny.[45]

Yet another factor that can influence the standard of review in First Amendment challenges is content-neutrality. In cases where a regulation restricts speech based on the government's disagreement with the viewpoints of the speaker that regulation lacks content-neutrality and the court must apply strict scrutiny.[46] Content-neutrality played a part in the Supreme Court's decision in *HLP* once the court determined that the statute implicated the plaintiffs' free speech rights. The court observed that the statute regulated speech based on its content; for example, an HLP member could pass on generalized knowledge to a member of a foreign terrorist organization, but communications that imparted

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41. *Id.* at 1054-55.

42. 309 F.3d 629, 632 (9th Cir. 2002).

43. *Id.* at 638; *cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) (noting that the government did not rob doctors of their judgment by requiring them to disclose truthful information on the risks of abortion to patients because it allowed them to withhold such information if they rationally believed that the required disclosures would cause harm to the plaintiff).

44. *Conant*, 309 F.3d at 637.

45. *Id.* at 638-39.

46. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (citations omitted) ("The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid.").

specialized knowledge violate the statute. Thus, the statute's regulations were content-based, and the Court subjected the statute to rigorous scrutiny. Also, while the restrictions on speech in this case were enough to trigger First Amendment protection, the Court also scrutinized the statute based on its regulation of expressive, non-verbal conduct.[47] The plaintiffs' conduct conveyed a humanitarian message to their target organizations, and the statute silenced that message.[48] Thus, to the extent that conduct is expressive, a court may evaluate whether regulations of that conduct are content-based.[49]

Analyses of content-neutrality also appeared in both *NAAP* and *Conant*, in which the Ninth Circuit reached completely different results. In *NAAP*, the court had no trouble in holding that the licensing scheme was content-neutral and that the only purpose for the regulation was to protect the "public health, safety, and welfare."[50] There, the licensing scheme merely heightened the requirements for obtaining a mental health practitioner's license, which had the incidental effect of excluding some psychoanalysts with degrees from universities not recognized by California but in no way actually restricted what could be said in mental health treatment.[51] Further, the regulation did not restrict anyone, licensed or unlicensed, from practicing psychotherapy outside of a professional context and unaccompanied by the requirement that the patient pay a fee.[52] In *Conant*, the court reached the opposite conclusion and found that the regulation was not content-neutral because it was a restriction on what a doctor could say to a patient, whether or not that speech occurred as part of the treatment.[53] In addition, it blocked the expression of the controversial viewpoint that medical marijuana usage could be beneficial to a patient.[54] As a result, the court in *Conant* applied strict scrutiny review to the regulation.[55]

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47. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2723-24 (2010).

48. *Id.*

49. *But see* Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 66 (2006) (upholding a statute requiring Department of Defense to deny federal funding to universities which prohibited access and assistance to military recruiters on grounds that such acts were neither speech nor inherently expressive conduct).

50. Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1055-56 (9th Cir. 2000) (quoting CAL. BUS. & PROF. CODE § 2900 (West 2013)).

51. *Id.* at 1055-56.

52. *Id.* at 1055.

53. Conant v. Walters, 309 F.3d 629, 637-38 (9th Cir. 2002).

54. *Id.* at 638.

55. *Id.* at 639.

III. COURT'S DECISION

In the noted case, the Ninth Circuit carefully evaluated the precedents it set in *NAAP* and *Conant*, as well as authority from Supreme Court cases, in order to determine the applicable standard of review and the ultimate constitutionality of S.B. 1172.[56] To accomplish this, the court first laid out its interpretations of *NAAP* and *Conant* and then assessed them alongside the Supreme Court's decisions in *Giboney*, *Lowe*, and *Casey* before formulating a unified rule with which it could evaluate S.B. 1172.[57] Next, the court applied this rule to S.B. 1172 and found that it did not infringe upon free speech rights in a way that would trigger strict scrutiny.[58] Finally, it applied rational basis review to S.B. 1172 and found that the overwhelming weight of evidence asserting that SOCE is both inefficacious and potentially harmful to children, combined with the state's policy goal of protecting the well-being of minors, provided a rational basis for regulation.[59]

Although the Ninth Circuit uses an abuse of discretion standard in reviewing the grant of preliminary injunctions, the court in the noted case undertook plenary review of all of the plaintiffs' arguments and began by determining the proper standard of review for S.B. 1172.[60] In doing so, the court referred to its holdings in *NAAP* and *Conant* to explain where First Amendment protection begins and ends for doctor-patient speech.[61] However, because *NAAP* and *Conant* by themselves are insufficient cases for determining the level of protection that the different types of doctor-patient communications may receive, the court used a sliding scale to make this determination. In fleshing out the scale with examples, the court combined *Conant* and *NAAP* with the Supreme Court's jurisprudence in *Lowe*, *Casey*, and *Giboney*.[62] The court put instances where a professional is engaged in public dialogue (such as the circumstances in *Lowe*) at one end of the scale, where First Amendment protection is the strongest.[63] In the middle of the scale, the court placed instances where professionals communicate to their clients in the context

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56. Pickup v. Brown, 728 F.3d 1042, 1051-56 (9th Cir. 2013).
57. *Id.* at 1056.
58. *Id.* at 1056-57.
59. *Id.*
60. *Id.* at 1048 (quoting Gorbach v. Reno, 219 F.3d 1087, 1091 (9th Cir. 2000) (en banc) ("[W]e may undertake plenary review of the issues if a district court's ruling 'rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance.'").
61. *Id.* at 1051-53.
62. *Id.* at 1053-56.
63. *Id.* at 1053-54.

of the professional relationship (using *Conant* and *Casey* as illustrative examples), reflecting the fact that the state has an interest in regulating the speech of professionals in order to protect its citizens.[64] Finally, the court positioned professional conduct at the far end of the scale, where there is relatively little First Amendment protection.[65]

Applying this scale to S.B. 1172, the Ninth Circuit concluded that the law is indeed a regulation of conduct and should accordingly face lower levels of scrutiny.[66] The court explained that the law does not prohibit therapists from discussing the merits of SOCE with minor patients, nor does it prohibit therapists from referring minor patients to SOCE practitioners outside of California.[67] Because S.B. 1172 merely bans the use of SOCE by licensed professionals for the purpose of treating minors, and in light of the holding in *NAAP* that pure speech in the form of therapy may be regulated as nonexpressive conduct or at the very least may receive lowered First Amendment protection, the court concluded that S.B. 1172 should be subject to rational basis review.[68] Moreover, the court dismissed the plaintiffs' arguments that S.B. 1172 is not content-neutral.[69] With regard to this argument, the court in the noted case stated that the plaintiffs had misunderstood *NAAP* to require strict scrutiny for any regulation prescribing behavior on the basis of viewpoint or content; to the contrary, nothing in *NAAP* requires a court to evaluate regulations of treatment for content-neutrality.[70]

Additionally, the court rejected the plaintiffs' argument that *HLP* required the use of heightened scrutiny.[71] It distinguished the facts of that case from those of the noted case; while the noted case concerned regulations of therapy by licensed professionals, *HLP* involved speech and expressive conduct without the added context of a licensed profession.[72] It also noted that the Supreme Court had applied rigorous scrutiny to the statute in *HLP* due in no small part to the fact that it restricted the plaintiffs' message, while nothing in S.B. 1172 restricted transmission of the "message" of SOCE to patients.[73] Finally, as an added measure of security, the court explained that because the statute

64. *Id.* at 1054-55.
65. *Id.* at 1055.
66. *Id.*
67. *Id.* at 1055-56.
68. *Id.* at 1056.
69. *Id.*
70. *Id.*
71. Pickup v. Brown, 740 F.3d 1208, 1229-30 (9th Cir. 2014).
72. *Id.*
73. *Id.* at 1230 (quoting Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2724 (2010)).

regulated only conduct, heightened review would only be necessary if such conduct was expressive.[74]

The Ninth Circuit was then faced with the issue of whether S.B. 1172 could withstand rational basis review. After weighing the evidence that the California legislature used in drafting the law, the court concluded that the law was rationally related to the protection of the well-being of minors.[75] While the legislature did consider some evidence of the benefits of SOCE in creating the law, the overwhelming weight of the evidence, coming from a variety of reputable and reliable sources, pointed to the potential mental health risks that SOCE poses to minors.[76] Therefore, the court held that the legislature's reliance upon this consensus was reasonable, which is all that a rational basis analysis requires.[77]

After the issuance of the original decision in the noted case, the proponents of SOCE petitioned for rehearing *en banc*.[78] The petition was denied, and three judges issued a dissenting opinion.[79] The judges disagreed vehemently with the panel's labeling of speech used in SOCE as professional conduct and characterized the ruling in the noted case as a contravention of Supreme Court precedent and established free speech doctrine.[80] It opined that by stripping certain communications between therapists and patients of their First Amendment protections and by not subjecting S.B. 1172 to a higher standard of scrutiny, the court would be opening the door for the government to step in and prohibit "expression based on a political or moral judgment about the content and purpose of the communications."[81] In addition to accusing the panel of disobeying the Supreme Court's warnings against creating a new category of unprotected speech by designating SOCE as nonexpressive conduct, the dissent claimed that the panel had misinterpreted the applicable case law.[82]

In furthering these arguments, the dissent relied heavily upon *HLP* and criticized the majority for misapplying the facts of that case.[83] In particular, the dissent objected to the majority's characterization of the

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74. *Id.*
75. *Pickup*, 728 F.3d at 1056-57.
76. *Id.* at 1057.
77. *Id.*
78. *Pickup*, 740 F.3d at 1214.
79. *Id.* at 1214-15.
80. *Id.* at 1215-16.
81. *Id.* at 1216.
82. *Id.* at 1216-18.
83. *Id.*

plaintiffs in *HLP* as "ordinary citizens," noting that one of the plaintiffs had consultative status to the United Nations, and that the distinction between the "layperson" plaintiffs of that case and the professional plaintiffs in the noted case was thus "illusory."[84] Based on this conclusion, the dissent opined that the two cases had much more in common than the majority believed; both involved plaintiffs providing professional services by "communicat[ing] a message," and the government had stepped in to prohibit this act of communication.[85] Thus, in light of perceived factual similarities between the two cases, the dissent accused the panel of using semantics to label speech as conduct and stressed that S.B. 1172, like the statute in *HLP*, should undergo some form of heightened scrutiny.[86] The dissent stated, "The Supreme Court has chastened us lower courts for creating, out of whole cloth, new categories of speech to which the First Amendment does not apply."[87] Based on this concern, it took issue with the panel's interpretation of the Ninth Circuit's holdings in *NAAP* and *Conant* to support its finding that SOCE falls outside of the bounds of First Amendment protection.[88] Instead, the dissent asserted that rehearing was necessary to subject S.B. 1172 to more rigorous scrutiny, in line with First Amendment jurisprudence.

IV. ANALYSIS

In the noted case, the Ninth Circuit analyzed nearly every argument the plaintiffs made instead of merely reviewing the lower courts' decisions to grant or deny a preliminary injunction against S.B. 1172's enforcement.[89] The court also resolved the inconsistency resulting from

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84. *Id.* at 1216-17 (quoting Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2713-14 (2010)).

85. *Id.* at 1216 (quoting *Holder*, 130 S. Ct. at 2713-14).

86. *Id.* at 1217-18.

87. *Id.* at 1221.

88. *Id.*

89. In addition to the arguments discussed in this Note, the Ninth Circuit in the noted case also rejected arguments that the regulations were overbroad, void for vagueness, infringed upon freedom of association, and infringed upon parental rights to choose medical treatments for their children. Pickup v. Brown, 728 F.3d 1042, 1057-61 (9th Cir. 2013). Of these claims, the only one that the Ninth Circuit considered in any significant depth was the parental rights argument, which was a matter of first impression for the court. *Id.* at 1042, 1060. However, in light of copious precedent from the Ninth Circuit and elsewhere denying the existence of a substantive due process right for any individual to undergo the medical treatment of his or her choice, the court had no trouble in holding that parents similarly have no substantive due process right to choose medical treatments for their children. *Id.* at 1061. Furthermore, if the court did acknowledge such a right, parents would be able to compel the legislature to take into account their personal opinions and ideas as to which treatments are suitable while it shapes its regulation of the medical

the Eastern District of California's grant of a preliminary injunction for the *Welch* plaintiffs and denial of an injunction for the *Pickup* plaintiffs. The court in the noted case rejected the interpretation of the applicable case law by the court in *Welch*, that is, that *every* verbal interaction between therapists and patients receives the same First Amendment protections regardless of whether the speech functions as a part of the treatment.[90] This reading conflicts with the combined holdings of *NAAP* and *Conant*, which guided the court in the noted case and require courts to examine speech in the context of the medical profession on a case-by-case basis due to the varying levels of protection available. In these cases, the abridged expressions' function within the professional relationship determined the applicable level of protection.

On the other hand, the Ninth Circuit's avoidance in the noted case of the content-neutrality argument that featured prominently in the *Welch* decision seems strange. Arguably, the Ninth Circuit's reasoning in doing so was sound, because *NAAP* does not say anything about evaluating psychotherapy treatments for content-neutrality when a court has already found those treatments to be professional conduct; moreover, the plaintiffs did not cite any case law in which strict scrutiny had been applied to regulations of treatment.[91] However, because the court granted plenary review, it seems inconsistent to then brush the challenge aside. Furthermore, to dismiss conduct entirely from the realm of content-neutrality analysis without evaluating whether it is expressive is inconsistent with the Supreme Court's holding in *HLP*. The noted case is easily distinguishable from *Conant* because nothing in S.B. 1172 prevents a therapist from expressing to his or her patient a belief, for example, that being gay is a choice, or that the patient should consider changing his or her sexual orientation. As long as a therapist does not actively attempt to change a patient's sexual orientation, he or she is in no way constrained by S.B. 1172 from expressing a viewpoint that same-sex attractions are a curable condition.[92] Furthermore, California's legislature

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profession; the conclusion the court in the noted case reached essentially prevents the parental tail from wagging the government dog. *Id.*

90. Welch v. Brown, 907 F. Supp. 2d 1102, 1112 (E.D. Cal. 2012), *rev'd sub nom.* Pickup v. Brown 728 F.3d 1042, (9th Cir. 2013) ("Therefore, even if SB 1172 is characterized as primarily aimed at regulating conduct, it also extends to forms of SOCE that utilize speech and, at a minimum, regulates conduct that has an incidental effect on speech.").

91. *Pickup*, 728 F.3d at 1056 n.6.

92. One possible reason for the court's unwillingness to apply this analysis to the noted case is the potential difficulty in delineating where SOCE actually begins. One could arguably say that a therapist verbally castigating a patient is actually engaging in an aversive form of SOCE by attempting to induce feelings of shame or guilt about being homosexual. Consequently, this

did not draft S.B. 1172 for the purpose of eradicating unpopular viewpoints about sexual orientation; the law was designed primarily to protect gay, lesbian, and bisexual youths from the well-documented levels of guilt, anxiety, stigma, and other ill effects that can occur as a result of SOCE. Accordingly, S.B. 1172 is much more analogous to the licensing scheme in *NAAP* than the statutes in *Conant* and *HLP*, and would thus probably withstand content-neutrality analysis.

In its analysis of the law, the court also exposed one of the more glaring limitations of S.B. 1172: its failure to regulate the practice of SOCE by persons who are not licensed mental health practitioners. The court in *Welch* also observed this shortcoming, opining that S.B. 1172 is woefully deficient if it bans licensed therapists from administering a potentially harmful treatment to minors, yet does nothing to regulate the administration of that same treatment by unlicensed individuals, who could arguably cause more harm.[93] Though valid, this criticism is unfair based on the obvious constitutional restraints faced by legislators. Considering the amount of friction California's legislature has encountered in trying to encompass members of a commonly regulated profession, it would have been impossible to extend the reach of S.B. 1172 to laymen. Such a regulation is likely still impossible even after the Ninth Circuit's affirmation of the law due to the absence of a licensed profession and a professional relationship. Furthermore, the unlicensed practice of SOCE by an ordinary citizen on anyone, regardless of age, is prohibited under section 2903 of the California Business & Professions Code to the extent that the recipient pays a fee for the services.[94] While the combined coverage of the two statutes leaves some outliers (say, for instance, a church leader who offers SOCE services pro bono to children of congregation members), section 2903 vitiates the need for S.B. 1172 to apply outside of the mental health profession and in other cases where the statute's reach is blocked on constitutional grounds. Therefore, S.B. 1172 is not as underrepresentative as the *Welch* court believes it to be.

The panel amended its opinion following the Ninth Circuit's denial of rehearing *en banc* to address the conflict between *HLP* and the other

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was one of the *Welch* court's reasons for concluding that S.B. 1172 is not content-neutral. *Welch*, 907 F. Supp. 2d at 1115.

93. *Id.* at 1120.

94. CAL. BUS. & PROF. CODE § 2903 (West 2002). SOCE would most likely fall under the category of psychotherapy, which the statute defines as "the use of psychological methods in a professional relationship to assist a person or persons to acquire greater human effectiveness or to modify feelings, conditions, attitudes and behavior which are emotionally, intellectually, or socially ineffectual or maladjustive." *Id.*

Ninth Circuit and Supreme Court cases.[95] The amended opinion points out the vast differences between the facts of that case and the facts of noted case.[96] In light of the results that the Supreme Court plurality in *Casey* and the Ninth Circuit in *NAAP* and *Conant* reached, it is a mistake to compare speech in a nonprofit environment outside of the context of a licensed profession to speech rendered as treatment in a healthcare context. On the other hand, the panel did not address the "illusory" divide between a layperson and a professional to which the dissent from denial of rehearing referred.[97] Nonetheless, the professional status of the plaintiffs in *HLP* is irrelevant to the comparison of the two cases. S.B. 1172 is a statute aimed at regulating a specific, licensed profession, while the statute in *HLP* targeted "material support"—a nebulous category of services that could have been offered by a variety of professionals, licensed or not.

Although the Ninth Circuit's interpretation of the applicable case law appears optimal from both consumer protection and youth protection standpoints, the dissent offers a compelling call to avoid this interpretation. While the Supreme Court, in *Casey*, has given its blessing to the states to regulate the speech of licensed professionals, it has not explicitly given lower courts the authority to relabel such regulated speech as inexpressive conduct, and the dissent gives examples of the Supreme Court's warnings against such hubris.[98] While I believe that the dissent misinterprets some of the case law, it makes the valid argument that the panel's designation of speech used in therapy as inexpressive conduct does not rest on a firm legal foundation. Unfortunately, the panel's rationale for upholding S.B. 1172, including the interpretations of most of its framework of case law, depends on this designation. However, the Court may consider the addition of classes of unprotected speech upon a showing that a new restriction is "part of a long (if heretofore unrecognized) tradition of proscription."[99] Whether S.B. 1172 will survive the rigors of this test, or even have to undergo it at all,

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95. Pickup v. Brown, 740 F.3d 1208, 1229-30 (9th Cir. 2014).

96. *Id.*

97. *See id.*

98. *Id.* at 1221; *see also* United States v. Alvarez, 132 S. Ct. 2537, 2343, 2551 (2012) (invalidating a law criminalizing the act of lying about receiving the Congressional Medal of Honor on the basis that it was a content-based restriction on free speech); United States v. Stevens, 559 U.S. 460, 460, 482 (2010) (vacating conviction under a statute criminalizing the depiction of animal cruelty on First Amendment content-neutrality grounds).

99. *Alvarez*, 132 S. Ct. at 2547 (quoting Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2734 (2011).

remains to be seen.[100] Given the government's compelling interest in protecting its citizenry from fraud and malpractice, the vast weight of scientific evidence that points to SOCE as ineffective and harmful, and the government's ability to regulate the speech and conduct of licensed professionals, S.B. 1172's ultimate survival might not be too farfetched. But, while I admire the creativity and boldness of the Ninth Circuit in creating a doctrine of case law to regulate therapeutic speech as professional conduct and their intentions in upholding the statute, I cannot help but share the dissent's concern, at least in part, that this new doctrine will be a source of tension between the courts.

V. CONCLUSION

The saga of S.B. 1172 may not be complete; on February 4, 2014, the Ninth Circuit granted a ninety-day stay of enforcement to allow for appeals to the Supreme Court. Though the court in the noted case has created an unprecedented doctrine in service of protecting youth from the fraudulent and harmful practice of SOCE, this doctrine is founded on the assumption that a lower court may freely designate speech as unprotected conduct without the blessing of the Supreme Court. As the dissent correctly points out, this may easily lead to more strenuous government control of expression.

Notwithstanding its attendant policy concerns and the uncertain fate of S.B. 1172, the Ninth Circuit's decision to uphold the statute is a significant symbolic victory for the LGBT community. So far, New Jersey is the only other state that has passed a law comparable to S.B. 1172, but this decision will embolden legislatures seeking to enact similar legislation in other states, especially in the other jurisdictions that the Ninth Circuit covers.[101] While it is my hope that California eventually enforces S.B. 1172, I also hope that lawmakers continue to search for a solid legal foundation upon which subsequent regulations banning SOCE can rest.[102] At the very least, S.B. 1172 and its legal framework will serve

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100. Proponents of S.B. 1172 filed a petition for writ of certiorari on February 6, 2014. Karen Gullo, *High Court Asked To Review California Gay-Conversion Law*, BLOOMBERG (Feb. 6, 2014 1:39 PM), http://www.bloomberg.com/news/2014-02-06/high-court-asked-to-review-california-gay-conversion-law.html, *archived at* http://perma.cc/T5H6-SFQ2.

101. The New Jersey SOCE statute has been challenged several times, but the District Court of New Jersey upheld it against one of these challenges last November. *See* King v. Christie, No. 13–5038, 2013 WL 5970343 (D.N.J. Nov. 8, 2013).

102. Recommendations for an alternative approach to constructing SOCE statutes are beyond the scope of this case note. For in-depth discussions of alternate approaches, see Shawn L. Fultz, *If It Quacks Like a Duck: Reviewing Health Care Providers' Speech Restrictions Under the First Prong of* Central Hudson, 63 AM. U. L. REV. 567 (2013), and Jacob M. Victor, *Regulating*

as a prototype for future statutes so that other states can begin to protect their children from SOCE.

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Sexual Orientation Change Efforts: The California Approach, Its Limitations, and Potential Alternatives, 123 YALE L.J. (forthcoming 2014).

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