CASE NO. 13-15023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD WELCH, et al.

Plaintiffs–Appellees,

v.

EDMUND G. BROWN, JR., Governor of the State of California, et al.

Defendants–Appellants.

BRIEF *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW, IN SUPPORT OF PLAINTIFFS -- APPELLEES URGING AFFIRMANCE

On Appeal From The United States District Court,
Eastern District of California, Case No. CV-12-2484-WBS-KJN,
The Honorable William B. Shubb, Judge

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*, FOUNDATION FOR MORAL LAW

Amicus Curiae Foundation for Moral Law (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the moral foundation of this country's laws and justice system.

The Foundation has an interest in this case because it believes that this nation's laws should reflect the moral basis upon which the nation was founded, and that the ancient roots of the common law, the pronouncements of the legal philosophers from whom this nation's Founders derived their view of law, the views of the Founders themselves, and the views of the American people as a whole from the beginning of American history through the present, have held that homosexual conduct has always been and continues to be immoral and not protected by law.

The Foundation also stands for freedom of expression of religious and moral beliefs and believes counselors should be free to counsel in accordance with their religious, moral, sociological, and scientific beliefs, including the belief that that homosexual conduct is wrong, immoral,

unhealthy and destructive. The Foundation also stands for the authority of parents to make decisions for their children, including the decision to pursue conversion therapy, and for the right of children to pursue conversion therapy if they so desire.

SOURCE OF AUTHORITY TO FILE

This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties. No party or party's counsel authored any portion of this brief. No one other than the *Amici Curiae* or their counsel contributed any money to fund this brief.

SUMMARY OF ARGUMENT

Under the guise of protecting homosexual minors, SB 1172 actually prevents minors and their parents from seeking and finding the therapy they want and need. Under the guise of preventing the imposition of conversion therapy, SB 1172 actually establishes by law a rigid orthodoxy -- that sexual preference is fixed genetically and cannot be changed -- when in fact that is a much-disputed proposition both within and outside the counseling profession. Under the guise of affirming the homosexual lifestyle, SB 1172 actually establishes by law the religious and moral belief that homosexuality and homosexual acts are morally acceptable when in fact a large portion of the population and of the counseling community believe on religious, moral,

and scientific grounds that homosexuality and homosexual acts are wrong. And under the guise of protecting minors at an age when they are vulnerable, SB 1172 actually prevents minors from obtaining therapy at the time when they need it most and can benefit from it most.

Make no mistake about it: SB 1172 is a blatant attempt to enforce the gay lobby's position that gender identity is fixed, to prohibit therapists from counseling otherwise, and to prevent minors and their parents from seeking counseling to change their homosexual orientation.

Counselors who practice conversion therapy do so because they believe it is a sound counseling practice and because their religious and moral convictions impel them to do so. Their right to believe in, advocate, and practice conversion therapy is protected by the guarantees of free exercise of religion, free speech, freedom of the press, freedom of association, and the privacy/liberty guarantees of the Fifth and Fourteenth Amendments to the U.S. Constitution as well as Article I, §§ 1, 2, and 4 of the California State Constitution. Equally, the rights of minors who want conversation therapy and of parents who want this therapy for their children are protected by the guarantees of free exercise, free speech, freedom of the press, freedom of association, and the privacy/liberty guarantees of the Fifth and Fourteenth amendments to the U.S. Constitution as well as Article I §§

1, 2, and 4 of the California State Constitution. SB 1172 violates these rights of counselors, minors, and parents. The court below rightly ruled SB 1172 unconstitutional, and this Court should affirm that ruling.

ARGUMENT

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Lawrence v. Texas, 539 U.S. 558, 574 (2003), quoting *Planned Parenthood v. Casey,* 505 U.S. 83, 851 (1992).

While claiming this "right to define one's own concept of existence" for themselves, advocates of SB 1172 would deny this freedom to others. They turn a deaf ear to those minors who do not want to define themselves as homosexuals and who want counseling to help them change from that orientation. They turn a deaf ear to those parents who want to help their children change from a lifestyle that they consider to be immoral, unhealthy, or undesirable for a host of other reasons. They turn a deaf ear to those

counselors who believe sexual orientation is not fixed and who want to help those who want to change from homosexual orientation.

If the Constitution guarantees a liberty/privacy "right to define one's own concept of existence," does that right not belong equally to those who hold traditional values, to the person with homosexual inclinations who wants to define himself as an heterosexual, to the religious person who wants help in dealing with urges that he considers sinful, and to the counselor who wants to define his or her existence as that of a counselor who helps her clients live according to their traditional values? "Equal protection of the law" requires an affirmative answer to that question.

I. THE APPELLEES DONALD WELCH, ANTHONY DUK, AND AARON BITZER HAVE A FIRST AND FOURTEENTH AMENDMENT RIGHT TO PRACTICE CONVERSION THERAPY WITH WILLING PATIENTS.

The District Court below in its Memorandum and Order and Appellees in their Brief of Appellees masterfully and conclusively demonstrate that the First Amendment free speech guarantee applies to their counseling. *Amicus* will therefore not duplicate their analysis. Rather, *Amicus* will only observe that the counseling profession, even more than that of traditional medicine, involves the most intimate exchange between counselor and client of their deepest innermost feelings and convictions

about matters concerning life, ultimate values, morals, ethics, and religion. Counseling can be effective only if the counselor and the client are fully free to speak with one another about the most intimate matters of concern to them. Even more than the practice of traditional medicine and other fields, then, the practice of counseling must be clothed with full First Amendment free speech protection.

Amicus notes, further, that content-based speech restrictions are disfavored, and viewpoint-based speech restrictions are even more disfavored. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). SB 1172 involves both. It is a content-based restriction in that counselors are prohibited from engaging in conversation therapy. It is a viewpoint-based restriction in that counselors are prohibited from taking one specific position on conversion therapy but are not prohibited from taking other provisions. Telling a client that homosexual activity is acceptable, normal, or healthy and that the client should feel free to continue with this activity is permitted under the statute, but telling a client that homosexual activity is immoral or unhealthy and that the client should change from the homosexual lifestyle is prohibited. In fact, the entire

purpose of the statute is to prohibit counselors from expressing this viewpoint.[1]

Amicus argues that, in addition to the free speech guarantee, Appellees' right to engage in sexual orientation change efforts (SOCE) is protected by the Free Exercise of Religion guarantee of the First Amendment, the Freedom of Association guarantee of the First Amendment, and the liberty/privacy guarantee of the Fifth and Fourteenth Amendments.

A. Free Exercise of Religion

Free exercise of religion clearly involves much more than freedom of belief; the very term "exercise" demonstrates that the clause protects religious speech and action as well. As the Supreme Court said in *Cantwell v. Connecticut,* 310 U.S. 296 at 303-04 (1940):

> The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by

[1] Appellants' belated effort to reinterpret the statute to permit counselors to say what they believe about the morality of homosexual conduct so long as they do not actually engage in efforts to change people from that activity is pure conjecture. Nothing in the language of the statute or the history of its adoption suggests this narrow reading. Even if this reading is ultimately adopted, the prohibition against conversion therapy still violates the First Amendment free speech guarantee because SOCE clearly involves a speech element. In fact, the methods used by Appellees Welch and Duk consist only of speech and not of other factors suggested by Appellants.

> law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,-freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

The *Cantwell* Court recognized that religious actions do not have the same absolute protection that is accorded to religious beliefs, but religious actions are nevertheless protected. The government can infringe the free exercise of religion only "for the protection of society," and even then, "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."

The Court clarified the protection afforded free exercise of religion in *Wisconsin v. Yoder*, 406 U.S.205 (1972). The Court held that if one can demonstrate that he or she has (1) a sincere religious belief and (2) a law or regulation imposes a substantial burden on the exercise of that sincere religious belief, then the burden shifts to the government to demonstrate that it has a compelling state interest that cannot be achieved by less restrictive means.

Appellees have clearly demonstrated that they hold sincere religious convictions concerning SOCE. Donald Welch is an ordained pastor who

serves as Counseling Pastor for Skyline Wesleyan Church, which teaches that "human sexuality ... is to be expressed only in a monogamous lifelong relationship between one man and one woman within the framework of marriage." He has demonstrated that his counseling ministry with Skyline Wesleyan Church will be jeopardized if he is forced to comply with SB 1172. Dr. Anthony Duk is a Roman Catholic medical doctor who conducts conversion therapy because his Roman Catholic religious convictions require him to do so, and he could not continue conducting SOCE if SB 1172 is upheld. Aaron Bitzer is an adult Christian who experienced same-sex attractions in childhood and was able to overcome these attractions through SOCE. He desires to become a therapist specifically to help others overcome same-sex attraction through SOCE, and if SB 1172 is upheld he will not be able to follow his plan (and, he believes, God's plan) for his life. Clearly, these plaintiffs have sincere religious convictions, and SB 1172 imposes a substantial burden upon the exercise of their convictions.

Before addressing the compelling interest / less restrictive means prong of the *Yoder* test, we need to note that in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Court narrowed the *Yoder* ruling and held that the compelling interest / less restrictive means test applies only when the law (1) is directly aimed at

religion, or (2) infringes not only free exercise of religion but also another right. Arguably, SB 1172 is directly aimed at religion. *Amicus* points to Appellants' proffered testimony of Dr. Beckstead, who claims that a major premise underlying SOCE is that homosexuality is contrary to some counselors' religious and personal beliefs, that a problem with SOCE is that its practitioners do not seek to harmonize patients' religious beliefs with same-sex attraction or help patients to change their religious beliefs, and that the State should bar SOCE based on "the psychology of sexual orientation, the psychology of gender, and the psychology of religion." (Brief of Appellees 35-36). As the Supreme Court noted in *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 533 (1993), an ordinance may be directly aimed at religion either by its stated intent or by its practical effect.

Clearly, though, the free exercise claim raised by Appellees is a "hybrid right" -- free exercise of religion combined with free speech, freedom of association, and liberty/privacy. Accordingly, the State can infringe on Appellees' free exercise of religion only if it can demonstrate a compelling interest that cannot be achieved by less restrictive means. As the District Court so ably demonstrated and as Appellees have persuasively

argued, and as *Amicus* will argue later in this brief, Appellants fall far short of meeting that standard.

B. Freedom of Association

In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Court held that freedom of association is implied in the language of the First and Fourteenth Amendments; however, it is an upper-tier fundamental protected right only when it involves (1) intimate association or (2) association for an expressive purpose. In *Boy Scouts of America et al. v. Dale*, 530 U.S. 640 (2000), the Court held that the Boy Scouts of America existed for expressive purposes and were therefore entitled to strict scrutiny protection.

Welch and Duk (and, in the future, Bitzer) associate with their patients, because no counseling can take place without some kind of association between the counselor and the patient. This association clearly qualifies for upper-tier strict scrutiny protection. (1) The association is intimate, usually including only the counselor and the patient, face-to-face, behind closed doors, and the counselor is required by the rules of his profession to keep the matters discussed confidential. The counselor and his patient commonly discuss the most intimate matters, exploring details of the patient's life and thoughts that the patient might not disclose even to his/her spouse lawyer, or medical doctor. (2) The association is expressive, with

both the counselor and the patient divulging deep personal thoughts concerning life, morality, religion, sex, family, relationships, and a host of other matters.

Because Appellants' free exercise rights are combined with freedom of association rights and free speech rights, these become "hybrid rights" and are therefore entitled to the strict scrutiny compelling interest / less restrictive means test of *Yoder* and *Smith.*

C. Liberty / Privacy

As noted earlier, Justice Kennedy stated in *Lawrence v. Texas,*

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

539 U.S. 558, 574 (2003), quoting *Planned Parenthood v. Casey,* 505 U.S. 83, 851 (1992). *Lawrence* involved the right to engage in homosexual conduct, which, Justice Kennedy said, involves "the most intimate and personal choices a person may make in a lifetime" and "are central to the liberty protected by the Fourteenth Amendment."

If this liberty includes the right to choose to engage in homosexual conduct, it also includes the right not to so engage. If it includes the right to believe homosexual activity is acceptable, it also includes the right to believe the opposite. If Justice Kennedy's conclusion is taken as true, then the inverse must be true as well. It simply does not make sense, nor is it good law, to pick and choose when and by whom these "intimate and personal rights" may be exercised. The position espoused by the Appellants is the classic case of one "having his cake, and eating it too" -- we have the right to make intimate and personal choices as to how we define our existence, but others do not have this right if their choices are different from ours.

This liberty also includes the right of minors who are troubled by homosexual urges to resist those urges and to seek help in doing so. It also includes the right of parents, who are responsible for their children's upbringing and training,[2] to guide them toward heterosexual rather than homosexual relationships and to seek help from counselors in doing so.[3]

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[2] *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary,* 268 U.S. 510 (1925): "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and

This liberty/privacy right also includes the right of counselors to engage in SOCE. Assuming he or she is professionally qualified to do so, a lawyer has the right to define his/her existence by directing his/her practice toward protecting the environment, advancing the civil rights of minorities (including homosexuals), protecting the due process rights of those accused of crimes, prosecuting criminals to secure justice for victims, obtaining compensation for those injured by corporations, or a host of other causes. Similarly, Donald Welch and Anthony Duk have the right to define their existence by directing their counseling practice toward helping people avoid or leave a lifestyle which they believe to be harmful and immoral. Likewise Aaron Bitzer, having struggled with homosexual urges in his own childhood and having overcome them with the help of SOCE, has chosen to define his existence by dedicating his life toward helping others overcome homosexuality, and he has a liberty/privacy right to do so.

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direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

[3] The District Court below ruled that the Appellees as counselors are not entitled to third party standing to bring the claims of minors and their parents. As we will explain later in this brief, *Amicus* respectfully disagrees with this portion of the District Court's ruling. Furthermore, the parallel case of *Pickup v. Brown*, Civ. No. 2:12-2497 KJM EFB (E.D. Cal.) Compl. 2-6 (Docket No. 1), which is also before this Court, involves minors seeking SOCE and parents seeking SOCE for their minor children.

Ironically, some of the more strident gay rights activists who demand their right to live a certain lifestyle, are quick to deny those same rights to others. As Dr. D.A. Carson demonstrates in his book *The Intolerance of Tolerance* (Grand Rapids: Eerdmans 2012), many of the more militant activists are no longer willing to settle for the right to practice the homosexual lifestyle. Rather, they demand that the homosexual lifestyle be not only allowed but also accepted and approved, and they seek to use the force of law to silence and suppress those who make different choices for their lives and professions.

D. Compelling Interest / Less Restrictive Means

The right of Donald Welch, Anthony Duk, and (in the future) Aaron Bitzer and many others to engage in SOCE is a "hybrid right" combining free exercise of religion, free speech, freedom of association, and liberty/privacy. The State can infringe that right only if it can demonstrate that it has a compelling interest that cannot be achieved by less restrictive means.

The District Court correctly ruled that the State has failed to meet this burden, and Appellees have ably defended this ruling in their Brief. *Amicus* will not duplicate what the Court and the Appellees have already presented.

Rather, we argue that because homosexual conduct has been disfavored and/or prohibited in much of the world throughout history, including at least until very recently in the United States, an alleged state interest in affirming homosexuals should not be considered so compelling as to justify an infringement upon a student and future counselor's freedom of speech and free exercise of religion.

Homosexual conduct was, until recently, strongly disapproved in most cultures and in Anglo-American law. Prohibitions against homosexual conduct go back to ancient times. The Bible, which has influenced moral values for Judaism, Christianity, Islam, and other religions, contains clear disapproval of homosexual conduct in the Old Testament (Leviticus 18:22) and in the New Testament (Romans 1:26-27).[4] Among the Romans, homosexual conduct did exist, but homosexual acts were capital offenses under the Theodosian Code (IX.7.6) and under the Justinian Code (IX:9.31).

The English common law contained similar provisions. Sir William Blackstone, of whose *Commentaries on the Common Law of England* (1763) Justice James Iredall said in 1799 that "[F]or near 30 years [it] has been the

[4] Although recently certain writers have tried to reinterpret these and other passages, throughout most of history Jews, Christians, and Muslims have interpreted them as prohibiting and/or disapproving homosexual conduct.

manual of almost every student of law in the United States,"[5] after discussing the offense of rape, wrote concerning homosexual conduct:

> IV. WHAT has been here observed, especially with regard to the manner of proof [for the crime of rape], which ought to be the more clear in proportion as the crime is the more detestable, may be applied to another offense, of a still deeper malignity; the infamous crime against nature, committed either with man or beast. A crime, which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offense of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out: for, if false, it deserves a punishment inferior only to that of the crime itself.
>
> I WILL not act so disagreeable part, to my readers as well as myself, as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature. It will be more eligible to imitate in this respect the delicacy of our English law, which treats it, in its very indictments, as a crime not fit to be named; "*peccatum illud horribile, inter christianos non nominandum* " ["that horrible crime not to be named among Christians"]. A taciturnity observed likewise by the edict of Constantius and Constans: "*ubi scelus est id, quod non proficit scire, jubemus insurgere leges, armari jura gladio ultore, ut exquisitis poenis subdantur infames, qui sunt, vel qui futuri sunt, rei* ." ["Where that crime is found, which it is unfit even to know, we command the law to arise armed with an avenging sword, that the infamous men who are, or shall in future be guilty of it, may undergo the most severe punishments."] Which leads me to add a word concerning its punishment.

[5] U.S. Supreme Court Justice James Iredell, *Claypool's American Daily Advisor*, April 11, 1799 (Philadelphia) 3; *Documentary History of the Supreme Court of the United States, 1789-1800, at 347* (Maeva Marcus, ed., Columbus University Press 1990).

> THIS the voice of nature and of reason, and the express law of God, determine to be capital. Of which we have a signal instance, long before the Jewish dispensation, by the destruction of two cities by fire from heaven: so that this is an universal, not merely a provincial, precept. And our ancient law in some degree imitated this punishment....[6]

Blackstone's condemnation of homosexual acts is echoed by numerous scholars of that age and before, among them Sir Edward Coke and Thomas Aquinas.[7] That this condemnation was carried over into American law is attested by Perkins and Boyce, who state in their hornbook *Criminal Law*, "Homosexual conduct" was made a felony by an English statute so early that

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[6] Sir William Blackstone, *Commentaries on the Laws of England* Book IV Ch. 4. The term "liberty" as it is used in the Preamble to the U.S. Constitution and in the Fifth and Fourteenth Ameendments was understood by the Framers as Blackstone understood liberty. Blackstone understood liberty in terms of moral right and wrong:

> The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, with out any restraint or control, unless by the law of nature: being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free will.

Blackstone, *op. cit.* I:121. Note that Blackstone said man's liberty is restrained by "the law of nature," and that he called homosexual conduct "the infamous crime against nature."

[7] *Ex parte H.H.*, 830 So. 2d 21, 33-34 (2002) (Moore, C.J., concurring specially).

it was a common-law offense in this Country, and statutes expressly making it a felony were widely adopted."[8]

The "crime against nature" was prohibited in many of the colonial law codes. When the Constitution was adopted, homosexual conduct was prohibited either by statute or by common law in all thirteen states. When the Fourteenth Amendment was adopted, homosexual conduct was prohibited in 32 of 37 states, and during the twentieth century it was prohibited in all states until 1961. Also, numerous states, either by statute or by case law, prohibited homosexual parents from adopting or having custody of a child. As recently as 2008, the people of California approved Proposition 8, which amended the California State Constitution to prohibit same-sex marriage; the constitutionality of Proposition 8 is currently before the U.S. Supreme Court. In light of this legal history, this Court should be hesitant to conclude that the State has a compelling interest in prohibiting counselors from trying to change behavior that until very recently was illegal.

Even in the counseling and mental health professions, the favor shown to homosexuals is comparatively recent. The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*

[8] Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 465 (3d ed. 1982).

classified homosexuality as a mental disorder until 1973.[9] The American Counseling Association (ACA) performed a massive overhaul of its Code of Ethics as recently as 2005. In fact, only seventeen states and the District of Columbia have adopted the 2005 ACA Code of Ethics, and at least as of 2010 California was not one of those sixteen states.[10] It is therefore difficult to conclude that compliance with the Code is a compelling state interest.

In fact, the ACA Code of Ethics does not address reparative therapy (also called conversion therapy or SOCE). In 1998 the ACA Ethics Committee addressed reparative therapy, expressed skepticism about its effectiveness, and suggested that counselors either not refer clients to reparative therapists or, if they do, fully inform clients of the unproven nature and potential risks of such therapy.[11] And in May 2006 the Ethics Committee issued an opinion that conversion/reparative therapy does fall under Standard C.6.e and that counselors using this approach must tell clients that conversion/reparative therapy is developing or unproven.[12] Furthermore, the May 2006 opinion is far from settling the issue. In

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[9] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (1974).

[10] American Counseling Association, http://www.counseling.org/Resources/CodeOfEthics/TP/Home/CT2.aspx accessed 22 December 2010).

[11] American Counseling Association, "ACA in the News," 22 May 2006.

[12] American Counseling Association, "ACA in the News" 1 August 2006 .

February 2008 the President of the 50,000-member American Association of Christian Counselors (AACC) wrote to his own membership and to the ACA,

> Our analysis of the opinion is that it stands in direct opposition to those counselors who work with clients who choose not to affirm homosexuality in their lives. Furthermore, the opinion not only challenges the religious diversity of people, but also undermines a client's right to self-determination and the freedom of choice when it comes to a therapeutic environment.[13]

Also, Dr. Warren Throckmorton addressed a letter of complaint to the ACA, signed by over 400 counselors, cited the following ACA Policy:

> Policy 301.7
> Policy and Role on Non-Consensus Social Issues of Conscience
>
> Having respect for the individual's values and integrity in no way restricts us as individuals from finding legitimate avenues to express and support our views to others, who decide and make policy around these issues. To this end, it will be ACA Governing Council policy to encourage its members to find and use every legitimate means to examine, discuss, and share their views on such matters within the Association. We also endorse the member's right to support social, political, religious, and professional actions groups whose values and positions on such issues are congruent with their own. Through such affiliations, every member has an opportunity to participate in shaping of government policies which guide public action.

[13] Dr. Tim Clinton, "Letter to the American Counseling Association" 13 February 2008, American Association of Christian Counselors, http://www.aacc.net/2008/02/13/letter-to-the-american-counseling-association/ (accessed 22 December 2010).

> To truly celebrate our diversity, we must be united in our respect for the differences in our membership. To this end, the role of the Association in such matters is to support the rights of members to hold contrary points of views, to provide forums for developing understanding and consensus building, and to maintain equal status and respect for all members and groups within the organization. Following this philosophy, the Governing Council considers it inappropriate for this body to officially take sides on issues which transcend professional identity and membership affiliation, and which substantially divide our membership, at least until such time that there can be a visible consensus produced among the membership.
>
> Approved: 7/15/90[14]

Dr. Throckmorton then cited the ACA Ethics Committee resolution cited above and argued that this resolution violates the ACA's own policies on respecting alternative views of therapy. American Counseling Association President, Brian Canfield spoke for the ACA in a letter to Throckmorton on March 19, 2008. Dr. Canfield promised that the ACA Ethics Committee would review Throckmorton's complaints, saying,

> ...to what extent a counselor may ethically engage in providing counseling services to a client who expresses conflict and dissonance over their sexual attraction/orientation with their personal, cultural or religious beliefs and values is, in my opinion, a very legitimate question which needs to be clarified.[15]

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[14] Dr. Warren Throckmorton, http://wthrockmorton.com/2008/02/15/i-think-aca-violated-its-policies-so-i-complained/ (accessed 22 December 2010).
[15] Dr. Brian Canfield, Letter to Throckmorton 19 March 2008; http://en.wikipedia.org/wiki/Warren_Throckmorton#cite_note-22 (accessed 22 December 2010),

This demonstrates what is already common knowledge -- that the question of proper counseling about sexual orientation is far from a settled issue or a rock-hard science. As the Supreme Court said in *Sweezy v. New Hampshire,* 350 U.S. 234, 250 (1957), "No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes." Counseling is one of the softest of the "soft" sciences, and few if any issues in the counseling field are as fluid and rapidly-changing as that of sexual orientation. Many decisions in this field are made on the basis of biases (pro and con), emotions, gut reactions, and, in all too many instances, political pressure. To take a recently-enacted resolution of the ACA that is itself the subject of controversy within the ACA, and make that resolution the final settled orthodoxy by state law, cannot withstand the strict scrutiny test required to justify infringing the constitutional rights of Donald Welch, Anthony Duk, Aaron Bitzer, and innumerable others.

Furthermore, even if the State could demonstrate a compelling interest, the State would also have to demonstrate that its interest cannot be achieved by less restrictive means. Without concluding that these means would pass constitutional muster or fully accommodate Appellees'

constitutional rights, *Amicus* notes that the Legislature could have considered the following less restrictive means:

(a) Relying upon those who are critical of SOCE to inform the public about its alleged dangers through the free marketplace of ideas;

(b) Requiring counselors to inform their patients of the alleged dangers of SOCE before embarking upon a course of SOCE counseling;

(c) Prohibiting counselors from embarking upon a course of SOCE counseling with a minor, without that minor's and that minor's parents' informed written consent[16];

(d) Prohibiting some of the more extreme practices critics allege are associated with SOCE such as electroshock, lobotomies, castration, nausea, vomiting and rubber band snapping, without prohibiting oral counseling[17]; or

(e) Requiring counselors who undertake SOCE to have special training in that type of counseling[18].

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[16] Appellee Welch testified that he does not and will not engage in conversion therapy with an unwilling patient. Brief of Appellees 4-5.

[17] Appellee Duk testified that he engages in only oral counseling and does not use any of these alternatives. Brief of Appellees 5.

[18] Another irony of this case is that if SB 1172 is upheld and licensed counselors are not allowed to provide SOCE, people who want SOCE will seek it from others who may not have such training and licensing. Furthermore, if we accept Appellants' claim that SBG 1172 leaves

The State has not demonstrated a compelling interest in prohibiting SOCE, nor has the State even considered whether these or other less restrictive means could satisfy the State's interest. The District Court therefore correctly enjoined the statute, and this Court should uphold the District Court's ruling.

II. SB 1172 ALSO VIOLATES THE RIGHTS OF MINORS AND TO RECEIVE CONVERSION THERAPY AND OF PARENTS TO OBTAIN CONVERSION THERAPY FOR THEIR CHILDREN.

The District Court concluded that Appellees could not assert the third-party claims of minors and their parents who want conversion therapy. The Court explained that in order to assert a third-party claim, the litigant must satisfy three important criteria: (1) The litigant must have suffered an injury in fact, (2) The litigant must have a close relationship with the third party, and (3) There must exist some hindrance to the third party's ability to assert his or her own interests. The Court concluded that, even assuming Appellees can satisfy the first two criteria, they cannot credibly assert the third, because minor children seeking SOCE and parents seeking SOCE for their minor children filed a case in the same court challenging SB 1172, referring to *Pickup v. Brown, op. cit.*

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counselors free to refer SOCE patients, whom could they refer them to? Obviously, to unlicensed counselors.

Amicus believes Appellees can satisfy this third criteria, *Pickup* notwithstanding. Even though the *Pickup* plaintiffs were willing to come forward and file suit, not many persons similarly situated would dare to do so, for two reasons: (1) They might be unwilling to disclose publicly that they or their children have homosexual urges because of peer pressure from friends, fellow students, members of the opposite sex, future military recruiters, and others; or (2) They might be unwilling to disclose publicly that they are seeking SOCE because of fear of criticism and reprisal from those elements of the gay community which abhor SOCE.

Counselors and patients have a very close relationship: counselors cannot counsel without patients, and patients cannot obtain counseling without counselors. Their relationship is much more intimate than that between teachers and students; counseling is one-on-one, very personal, and confidential. The counseling relationship could not exist without the cooperation of both parties. The counselor could not fulfill his "mission" without patients to counsel, and the interests of either cannot be fully considered without considering the interests of the other. Patients naturally look to their counselors for leadership and direction, so counselors are therefore ideally suited to represent the interests of their parents.

Amicus therefore urges this Court to consider the rights and interests of minors who want SOCE and parents who want SOCE for their children alongside the rights and interests of Appellees, especially because the *Pickup* case is also before this Court.

CONCLUSION

SB 1172 needs to be seen for exactly what it is -- a raw attempt to establish one controversial point of view as the established orthodoxy and to silence opposing viewpoints by the force of law, and an equally raw attempt to make the State take sides in a power struggle within and outside the counseling profession. The public debate over issues related to homosexuality and counseling is far from settled, yet militant activists seek to use the law to suppress their critics.

The State should not let itself be used in this power struggle by taking sides in this debate. As the Supreme Court said in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974), "Under the First Amendment, there is no 13-such thing as a false idea." And as the Court said in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943),

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Nor would they occur here. SB 1172 is a blatant infringement upon the First and Fourteenth Amendment rights of counselors, minors, and parents. The District Court correctly enjoined SB 1172, and this Court should uphold the District Court's ruling.

Respectfully submitted, this the 26th day of February, 2013.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) as it contains 6,367 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) as it has been prepared in a proportionally space typeface using Microsoft Word 2010 in 14-point, Times New Roman type style.

Respectfully submitted, this the 26th day of February, 2013.

s/ John A. Eidsmoe

CERTIFICATE OF SERVICE

I, John A. Eidsmoe, as counsel for *Amicus Curiae* Foundation for Moral Law, hereby certify that on February 4, 2013, I electronically filed a true and accurate copy of the foregoing "Brief *Amicus Curiae* of Foundation for Moral Law, In Support of Plaintiffs – Appellees Urging Affirmance" with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the appellate CM/ECF system.

I further certify that all participants of this case which are registered with the CM/ECF system, will be electronically served by said system.

I further certify that the following participant is not registered with the CM/ECF system, and that I have caused to be mailed the foregoing document by First-Class Mail, postage prepaid and properly addressed, or have dispatched it to a third-party commercial carrier for delivery within three (3) calendar days to:

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I make these representations voluntarily and declare them to be true and actuate to the best of my knowledge.

Respectfully submitted, this the 26th day of February, 2013.

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