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Legal Memo

California's AB 2943 As Amended Remains An Unconstitutional Overreach Into the Lives of All Californians That Can Be Challenged Even In Light of *Pickup v. Brown.*

Introduction

Liberty Counsel is a non-profit litigation, education, and policy organization with an emphasis on constitutional law, with offices in Florida, Virginia, and Washington, D.C. Liberty Counsel provides *pro bono* legal representation to individuals, groups, and government entities, such as school districts, with a particular focus on religious liberty and other First Amendment issues. Liberty Counsel has represented and is representing professional counselors and their clients in challenges to bans on so-called "conversion therapy," known as Sexual Orientation Change Efforts or SOCE. These laws are ideologically driven and lack scientific justification. In addition, they actually cause harm rather than preventing harm to children and undermine parental authority.

California enacted such a ban in 2012, SB1172, which prohibited professional counselors from engaging in SOCE with minors. The Ninth Circuit Court of Appeals upheld the law against a First Amendment challenge, concluding that the law regulated professional conduct and therefore needed to only satisfy rational basis review. *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014).

Now, the California Legislature is attempting to reach even further into the private lives of its residents by declaring that SOCE is a *per se* deceptive business practice akin to Ponzi schemes and other scams. AB 2943, which was introduced in the Assembly on February 16, 2018, would add SOCE to the list of fraudulent schemes under the states' Consumer Legal Remedies Act (CLRA), Civil Code §1770. The bill passed the Assembly by a vote of 50-18 and was sent to the Senate.

On May 30, 2018, the Senate slightly amended the language of the new proposed subdivision (28) of Civil Code §1770 to purportedly narrow its scope by inserting "services." This change was made in response to arguments that the bill would effectively ban the sale of resources, including the Bible and other books that discuss the ability to change sexual orientation or gender identity. While members of the State Senate Judiciary Committee on June 12, 2018 asserted that this change alleviated the concerns about banning books and similar

resources, in fact it did nothing to narrow the scope of the bill or lessen the threat that it poses to free speech and free exercise rights for all Californians.

Also, because it casts such a wide net of liability, it will, in at least some applications, fall outside of the rational basis protections accorded to SB 1172 and could be subjected to strict scrutiny. Thus, despite the precedent of *Pickup v. Brown*, AB 2943 could be invalidated as violative of the First Amendment.

Comparison of the Two Bills

SB 1172

SB 1172 added Article 15 to Chapter 1 of Division 2 (Healing Arts) of California's Business and Professions Code:

Cal.Bus. & Prof.Code § 865:

> For the purposes of this article, the following terms shall have the following meanings:
> (a) "Mental health provider" means a physician and surgeon specializing in the practice of psychiatry, a psychologist, a psychological assistant, intern, or trainee, a licensed marriage and family therapist, a registered marriage and family therapist, intern, or trainee, a licensed educational psychologist, a credentialed school psychologist, a licensed clinical social worker, an associate clinical social worker, a licensed professional clinical counselor, a registered clinical counselor, intern, or trainee, or any other person designated as a mental health professional under California law or regulation.
> (b)(1) "Sexual orientation change efforts" means any practices by mental health providers that seek to change an individual's sexual orientation. This includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex.
> (2) "Sexual orientation change efforts" does not include 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 § 865.1

> Under no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age.

Cal.Bus. & Prof.Code § 865.2

> Any sexual orientation change efforts attempted on a patient under 18 years of age by a mental health provider shall be considered unprofessional conduct and shall subject a mental health provider to discipline by the licensing entity for that mental health provider.

Therefore, SB1172 was narrowly drawn to affect only mental health professionals who engage in SOCE with people under the age 18. The only penalty imposed for violating the law is disciplinary action by the state licensing board. It is the narrow scope of SB1172 upon which the Ninth Circuit relied to conclude that the law only needed to satisfy rational basis as a regulation of professional conduct. *Pickup v. Brown,* 740 F. 3d at 1229-30.

AB 2943:

By contrast, AB2943, as introduced, is not narrow in scope or effect. Instead of applying only to licensed mental health professionals, AB2943 would apply to anyone who provides goods or services that relate to SOCE counseling aimed at reducing or eliminating unwanted same-sex attractions for a person of any age. It goes beyond a purported regulation of professional conduct enforceable by disciplinary action to labeling SOCE a de facto scam akin to bait and switch and automated telemarking schemes. Cal. Civil Code §1770.

The bill would add two provisions to the CLRA:

A new definitional subsection would be added to Section 1761 of the Civil Code:

1761. As used in this title:

> (i) (1) "Sexual orientation change efforts" means any practices that seek to change an individual's sexual orientation. This includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex.
> (2) "Sexual orientation change efforts" does not include 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.

This definition of SOCE is similar to the definition used in SB1172, but expands it beyond mental health professionals. The definition in SB1172 says: "[A]ny practices <u>by mental health providers</u> that seek to change an individual's sexual orientation." The definition in AB2943 eliminates the phrase "mental health providers" to read: "any practices that seek to change an

individual's sexual orientation." This creates a virtually unlimited class of potential defendants who might face civil lawsuits by activists seeking to silence the message that unwanted same-sex attractions can be reduced or eliminated.

The other proposed addition to the CLRA would include an addition to Section 1770 of the Civil Code. As introduced and approved in the Assembly, the addition provided that:

> The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer are unlawful:
>
> (28) Advertising, offering to engage in, or engaging in sexual orientation change efforts with an individual.

As amended by the State Senate, the language now reads:

> The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer are unlawful:
>
> (28) Advertising, offering for sale, or selling services constituting sexual orientation change efforts to an individual.

The only operative changes in the language were substituting "sale" and "selling" for "engage" or "engaging in" and adding the word "services." According to Senate Judiciary Committee members, these changes were made to emphasize that the bill addresses only commercial transactions and only services, not goods such as Bibles and other books.

However, the slight change in the wording does nothing to diminish the breadth of liability under the bill, and so does not address the constitutional infirmities. The operative language of Civil Code 1770 describing the basis for liability remains unchanged. It still provides that the practices listed in subdivisions 1 through 28 are unlawful if **undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer.** (emphasis added). Therefore, regardless of the addition of the word "services" to subsection 28, AB2943 will still apply to transactions intended to or actually resulting in the sale or lease of "goods or services to any consumer." So, if a speaker sells goods (*i.e.,* books, videos, other physical resources) that address services defined as "SOCE" under the bill, he will fact potential liability for unfair business practices.

Consequently, even as revised, the bill is expansive, taking in not merely what the Ninth Circuit labeled as professional conduct, *i.e.,* a counselor engaging in SOCE counseling with a child, but "advertising" SOCE counseling (whatever that means) and "offering to" engage in

counseling with anyone. Also the CLRA requires that its terms be "liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection." Civil Code §1760. Anyone who engages in a transaction intended to or actually resulting in the sale or lease of good or services that advertises, offers to engage or actually engages in SOCE "services" as the bill currently reads, could be subject to a civil lawsuit from any consumer alleged to have been harmed. Under the CLRA, consumers can seek

> (1) Actual damages, but in no case shall the total award of damages in a class action be less than one thousand dollars ($1,000).
> (2) An order enjoining the methods, acts, or practices.
> (3) Restitution of property.
> (4) Punitive damages.
> (5) Any other relief that the court deems proper.

In addition the court **shall award court costs and attorney's fees to a prevailing plaintiff,** but only **may** award fees to a prevailing defendant if the court finds that the plaintiff's prosecution of the action was not in good faith. Civil Code §1780.

Courts require that "plaintiffs in a CLRA action show not only that a defendant's conduct was deceptive but that the deception caused them harm." Put differently, causation is 'a necessary element of proof' for relief." *Davis v. Chase Bank U.S.A., N.A.,* 650 F. Supp. 2d 1073, 1087 (C.D. Cal. 2009) (citing *Wilens v. TD Waterhouse Group, Inc.,* 120 Cal.App.4th 746, 754, (2003)). While this imposes some limitation on prospective plaintiffs, the legislature's statement that the terms are to be liberally construed will likely mean that causation will be established with even a sliver of evidence. The CLRA defines "services" to mean "work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods." Civil Code § 1761(b). Courts have been all over the board on whether various transactions qualify as "goods or services," but have determined that health care services are covered by the CRLA. *Wehlage v. EmpRes Healthcare, Inc.,* 791 F. Supp. 2d 774, 789 (N.D. Cal. 2011).

AB2943's categorization of SOCE as an unfair or deceptive business practice regardless of who is referencing or engaging in SOCE and regardless of the age of the recipient casts a wide net of potential liability and exacerbates the constitutional violations present in SB1172. However, that expansive reach also provides an opportunity to challenge the ban notwithstanding the Ninth Circuit's ruling in *Pickup v. Brown.*

AB 2943 Can Be Invalidated As Violative of the First Amendment Despite the Ninth Circuit Ruling in *Pickup*

While at first blush the Ninth Circuit's ruling in *Pickup* would appear to foreclose a constitutional challenge to this expanded SOCE ban, a careful reading of the decision shows that

the expansive scope of AB2943 will place it, in certain circumstances, outside of the rational basis protection accorded to SB1172 and under the more onerous strict scrutiny standard generally applied to content-based restrictions on speech.

In *Pickup*, the Ninth Circuit adopted a free speech "continuum" for determining what level of analysis would be used for First Amendment challenges to speech restrictions on professionals. While the validity of the continuum is in question, its adoption by the Ninth Circuit means that it has to be addressed when seeking to challenge speech restrictions and particularly proposed SOCE bans such as AB2943, at least until it is reversed by the Ninth Circuit or overturned by the Supreme Court.

At the outset, it is important to note that the *Pickup* continuum is applicable only to laws that affect the First Amendment rights of professionals. *Pickup,* 740 F.3d at 1227. Therefore, to the extent that AB2943 is applied to chill the speech or other expressive activity of people who are not mental health professionals, the "continuum" should not apply and the speech restriction should be subject to the usual First Amendment analysis accorded to content-based speech restrictions, *i.e.*, strict scrutiny. *Sorrell v. IMS Health*, 131 S. Ct. 2653, 2667 (2011); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). Since the definition of SOCE clearly restrictions only the viewpoint that same-sex attractions can be changed, it should be categorized as not merely content-based, but also viewpoint based, and therefore, *per se* unconstitutional. *Rosenberger*, 515 U.S. at 828.

As the *Pickup* court intimated, that would also be true, even in the case of professionals, if it is applied to situations outside of the counselor-client or physician-patient relationship. *Pickup*, 740 F.3d at 1227-28.

> At one end of the continuum, where a professional is engaged in a public dialogue, First Amendment protection is at its greatest. Thus, for example, a doctor who publicly advocates a treatment that the medical establishment considers outside the mainstream, or even dangerous, is entitled to robust protection under the First Amendment—just as any person is—even though the state has the power to regulate medicine.

Id. Because "communicating to the public on matters of public concern lies at the core of First Amendment values,…outside the doctor-patient relationship, doctors are constitutionally equivalent to soapbox orators and pamphleteers, and their speech receives robust protection under the First Amendment." *Id.* This would be the case under AB2943 if it is applied against a counselor or physician who is, *e.g.*, speaking at a conference, writing in a blog or book, or teaching a class in which SOCE counseling is discussed. Under these circumstances, even in light of *Pickup*, the Court should apply strict scrutiny and invalidate the law.

To the extent that AB2943 is applied in the context of a counselor-client or physician-patient relationship, under the *Pickup* continuum it would be analyzed using either intermediate

scrutiny or rational basis. *Id.* at 1228-29. If AB2943 is being applied in the context of a professional talking about SOCE in the context of a counselor-client relationship, it should fall on what the *Pickup* court said was the midpoint of their "continuum." *Id.* "When professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate," so that their speech can be subject to some regulation. *Id.* In that case, if the speech is seen not as part of "treatment," but as a suggestion about the availability of treatment, then the court should apply *Conant v. Walters,* 309 F.3d 629 (9th Cir.2002) and invalidate it as a content-based speech restriction. AB2943 purports to include "advertising" or "offering to engage in" SOCE unlawful, but the *Conant* decision should invalidate that categorization, even in light of *Pickup*, in the case of mental health or other health care professionals.

If AB2943 is applied, as is SB1172, to mental health professionals offering SOCE counseling in the context of a counselor-client relationship, then the court would likely view *Pickup* as binding and apply rational basis, under which it must be upheld if it bears a rational relationship to a legitimate state interest. *Pickup*, 740 F.3d at 1231. In *Pickup,* the state claimed that SB 1172 advanced California's interest in "protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual and transgender youth, and in protecting its minors against exposure to serious harms caused by sexual orientation change efforts." *Id.* The Ninth Circuit found that "protecting the well-being of minors is a legitimate state interest," and that it was reasonable for the state to conclude that SOCE caused serious harms to children based upon its reliance upon the APA report and other reports cited in the legislation. *Id.* Those reports, according to the Court, satisfied the threshold requirement of "whether there are plausible reasons for [the legislature's] action." *Id.* at 1232 (citing *Romero–Ochoa v. Holder,* 712 F.3d 1328, 1331 (9th Cir.2013)). Here, the state cannot claim a legitimate state interest in protecting the health of minors since AB2943 applies to individuals of any age. Instead, the state claims it has a compelling state interest in "protecting the physical and psychological well-being of lesbian, gay, bisexual, and transgender individuals" and" in protecting consumers from false and deceptive practices that claim to change sexual orientation and in protecting consumers against exposure to serious harm caused by sexual orientation change efforts." The state bases its claims about the "harm" of SOCE on the same APA report and other studies that were the basis for SB1172. In light of the superficial treatment the Ninth Circuit gives under rational basis, it is likely that the court would find that AB2943 meets the standard in the context of a counselor offering SOCE counseling.

Therefore, a challenge brought on behalf of mental health professionals for engaging in SOCE counseling would likely have the same outcome as the challenge of SB1172. However, a challenge brought on the wider applications of AB2943, to speaking about or advertising SOCE by counselors and particularly by others would be more likely to be successful as they can be distinguished from SB1172 under the same analysis used in *Pickup* (which we don't accept as valid, but must follow for the time being) and subjected to strict scrutiny.

Questions for State Senators:

1. Are you willing to revise the language of Civil Code §1770 to remove "goods" from the introductory definition?
2. Are you willing to revise the language of the CLRA to provide for strict rather that liberal interpretation of the law to protect conscience rights of those who provide goods and services?
3. Are you willing to add a conscience provision to the bill to protect free speech and free exercise rights of those who are compelled by conscience and/or religious belief to speaks about the ability of individuals to change their sexual orientation and/or gender identity?
4. Are you willing to otherwise indemnify those who offer goods which discuss the ability to change sexual orientation and gender identity from being sued under the CLRA?

If none of these provisions nor similar protections are put in place, then the bill will be challenged and will likely be invalidated as violating the United States and California Constitution.

Dated June 25, 2018

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