

June 19, 2018

VIA HAND DELIVERY

Honorable Members of the California Assembly and Senate
State Capitol
Sacramento, California 95814

Re: *Assembly Bill 2943 – Unlawful Business Practices:
Sexual Orientation Change Efforts*

Dear Governor Assemblymembers and Senators:

My firm represents the interests of hundreds of ministers, churches, and religious organizations in California. In particular, we represent Church United, an association of more than 700 ministers in California from dozens of faith backgrounds and diverse racial identities. Their commonality of interests centers on their desire to positively impact the State of California with hope and to preserve their individual rights to exercise their faith without unlawful infringement.

We appreciate the desire of the legislature in passing AB 2943. Like the legislature, my clients have a great desire to help and protect all individuals who may be seeking advice and counsel regarding their gender identity and sexual orientation. We are aligned with the legislature in our desire to protect this important and vulnerable group of people. I dare to say that no one group of professionals has more experience in providing advice and counsel to LGBTQ individuals than the ministers in this State. Without question, my clients are regularly sought out for religious advice regarding sexual identity issues.

Our State has experienced the extremes of political strife centering on the LGBTQ community. Too often, the religious community has been stereotyped by media and LGBTQ organizations as bigoted and extreme. This stereotype is hardly accurate. While there is a small but vocal group of persons in the faith community who express bigotry and animosity, the vast majority of ministers in this State are sharing their faith with sincerity and compassion to all persons, including the LGBTQ community. This letter intends to express the views of the vast majority of ministers who desire to continue sharing their message of love, peace and hope to the LGBTQ community.

Unfortunately, AB 2943 does not necessarily fulfill its goal of serving the best interests of the LGBTQ community. Rather, it will result in more harm to the LGBTQ community as many individuals will be prohibited from obtaining the support and resources they desire. More importantly, even as amended, the law amounts to an unconstitutional ban on goods (such as books) and services.

Neal Hardin

Neal Hardin is a seminary student in Southern California. He recently chose to pursue a seminary education because of his desire to professionally share the Gospel of Christ through love, peace, and hope. Neal is a 28-year-old engineer that has experienced same-sex attraction since he was a teenager. Despite this, he has chosen to live a life of chastity in accordance with his faith

and identity as a Christian. Neal is unmarried, but desires to either continue in singleness in service to God or to marry a woman of the opposite sex in the future. In keeping with this desire, Neal has sought support and paid for books and counseling from licensed professionals, ministers, and other individuals who have had similar life experiences. However, if AB 2943 is passed, he will now be prohibited from purchasing supportive books or from obtaining supportive counseling.

Is it really the intent of the legislature to prevent individuals like Neal from seeking affirmation and support consistent with his own desires and convictions? Or would you presume to tell him what is in his own best interest?

Desert Stream Ministries

My firm additionally represents Desert Stream Ministries. Desert Stream Ministries and its founder/executive director Andrew Comiskey provide help to Christians struggling with sexual and relational problems. As one aspect of its services, Desert Stream Ministries provides paid and unpaid counselling to individuals who desires to abstain from homosexual behavior and individuals seeking advice on living a heterosexual lifestyle. This counseling is offered from a biblical perspective and a Christian worldview. On occasion, Andrew Comiskey is also paid by third parties to attend conferences and other churches where he speaks on the subject of sexual orientation and gender issues.

If AB 2943 is enacted, Desert Streams Ministries will be prohibited from receiving a fee for counseling Christians who desire to abstain from homosexual behavior and those who desire to pursue a heterosexual lifestyle. It would additionally be prohibited from receiving a fee for speaking from a Biblical perspective on sexual orientation and gender issues at conferences and to churches.

Jim Domen

My firm also represents Pastor Jim Domen, M. Div. He is the president and founder of Church United. Jim lived a homosexual lifestyle for many years. He made a decision to leave that lifestyle because of his desire to pursue his faith in Christianity. Jim even went to seminary and served on staff as a pastor at a church, despite the fact that he previously lived a homosexual lifestyle for many years. Jim's service in the church was extremely fulfilling to his life and his true identity as a Christian man. Jim soon met a woman that he fell in love with and married. He had never previously experienced that kind of attraction for a person of the opposite sex. Jim now has two biological children with his wife and another child on the way. Jim is like many others in California who have chosen to leave a homosexual lifestyle after realizing that his true identity is not based on sexuality, but based on his life as a Christian husband, father, and leader in ministry.

Jim finds fulfillment in his marriage, his attraction for his wife, and in the heterosexual lifestyle. Jim still seeks out counseling as he navigates the lifestyle he chooses to live. He has paid licensed and unlicensed counselors for counseling that affirms his decision to leave the homosexual lifestyle and affirms his heterosexuality. Periodically, Jim is paid to counsel individuals seeking advice from him on their own journey toward a heterosexual lifestyle. He is regularly paid as a speaker to attend churches, conferences, and other meetings to share his experience. Lastly, Jim is in the process of creating and writing an autobiography wherein he discusses his experience and encourages others to abstain from homosexual behavior.

AB 2943 would make it illegal for Jim to pay anyone for counsel that affirms his heterosexuality or that affirms his commitment to his traditional family. AB 2943 would prohibit

Jim from receiving money for counseling individuals or receiving money for speaking on the topic of choosing a heterosexual lifestyle.

In addition, depending on the aggressiveness of the State's interpretation of the law, Jim will even be prohibited from speaking from the pulpit on these issues at church services. To highlight this concern, the legislative analyst stated that "arguably this law does not apply to ministers in their churches." Does this really mean that the default position of the State will be that it does apply to prevent any person from addressing the forbidden message from the pulpit – at least until it is challenged in court?

Finally, Jim would be prohibited from selling his book in California. Is our State really willing to initiate a book burning initiative? If it does, you can fully expect that millions of people in California will protest and refuse to follow this unconstitutional and unconscionable law. Below, we explain why this law is unenforceable for a complete lack of constitutionality.

Background and Applicability of AB 2943

The Consumer Legal Remedies Act ("CLRA") makes unlawful certain "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." (*Cal. Civil Code* § 1170(a) (emphasis added).) AB 2943 adds "sexual orientation change efforts" to the list of unlawful business practice under the CLRA.

Sexual orientation change efforts ("SOCE") are defined by the bill as "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 romantic attractions or feelings toward individuals of the same sex." The Act specifically allows activities that "provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity and exploration and development" of romantic attractions toward individuals of the same sex.

AB 2943 prohibits all persons, both medical and non-medical personnel, such as pastors and churches, from advertising or offering SOCE to any person who engages in a "transaction" resulting in or intended to result in a sale or lease of goods or services. The CLRA defines "transaction" as "an agreement between a consumer and any other person, whether or not the agreement is a contract enforceable by action, and includes the making of, and the performance pursuant to, that agreement." (*Cal. Civ. Code* § 1761(e).)

Legal Analysis

The Act is unconstitutional for several reasons. First, the Act amounts to an impermissible viewpoint regulation of speech. Second, the Act is unconstitutionally vague. Third, the Act impermissibly burdens the free exercise of religion.

Viewpoint Discrimination

The Act is viewpoint-based because it expressly prohibits "any practices" including pure speech, "that seek to change an individual's sexual orientation," while only allowing practices that provide "acceptance, support, and understanding . . . of romantic attractions toward individuals of the same sex." Although content and viewpoint discrimination are both presumed unconstitutional and subject to the highest scrutiny, viewpoint discrimination is an especially "egregious form of content discrimination" and a "blatant" First Amendment violation. (*Rosenberger v. Rectors and*

Visitors of Univ. of Va. (1995) 515 U.S. 819, 829.) Such viewpoint-based speech restrictions, i.e., those “based on hostility—or favoritism—towards the underlying message expressed,” are impermissible under the First Amendment. (*R.A.V. v. City of St. Paul* (1992) 505 U.S. 377, 386; see also *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n* (1983) 460 U.S. 37, 46 (holding that the government cannot “suppress expression merely because public officials oppose the speaker’s view”).)

AB 2943 is based on hostility toward the biblical perspective that disapproves of homosexual behavior. Based on this hostility, people like Neal Hardin who chose to live a life of chastity in accordance with their faith and identity as a Christian will be prohibited from purchasing supportive books or from obtaining supportive counseling. This is true despite the fact that Neal is a consenting adult voluntarily seeking such counseling. However, Neal would be able to receive counselling from the viewpoint of encouraging “exploration and development” of attraction toward individuals of the same sex.

In defense of the constitutionality of the Act, the legislative history heavily relies on *Pickup v. Brown* (9th Cir. 2014) 740 F.3d 1208, where the Ninth Circuit Court of Appeal held that prohibiting licensed medical professionals from performing SOCE on minors was constitutional. However, the restriction in *Pickup* was not analyzed as a restriction of speech because the statute in question prohibited only the *conduct* of licensed medical professionals, not speech. (*Id.*)

The *Pickup* court held that the First Amendment rights of professionals, such as doctors and mental health providers, operate “along a continuum.” (*Id.* at 1227.) On one end of the continuum, where “First Amendment protection is at its greatest,” is when the “professional is engaged in a public dialogue.” (*Id.*) At the midpoint of the continuum, where the speech falls “within the confines of a professional relationship, First Amendment protection of a professional’s speech is somewhat diminished.” (*Id.* at 1228.) Finally, at the other end of the continuum, is “the regulation of professional conduct, where the State’s power is great, even though such regulation may have an incidental effect on speech.” (*Id.* at 1129.) The court found that the regulation in *Pickup* fell within the professional conduct category, and thus, any infringement on speech was merely incidental.

Here, AB 2943 is not a regulation of professional conduct because the prohibition is not limited to any type of professional, nor is it limited to the confines of a type of treatment. AB 2943 prohibits all persons from advertising or offering SOCE in *any* context involving a transaction. A pastor who is paid to give a public speech from a Christian worldview on SOCE, wherein “First Amendment protection is at its greatest,” would be prohibited from doing so. Jim Domen would be prevented from encouraging others through his journey to heterosexuality through paid speeches or the sale of his book. All of these messages are forbidden, not because of the content, but because of the viewpoint from which the content is spoken. Thus, AB 2943 is unconstitutional because it is a viewpoint based regulation.

Vagueness

A law that “either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.” (*People ex rel. Gqillo v. Acuna* (1997) 14 Cal. 4th 1090, 1115 (quoting *Connally v. Gen. Const. Co.* (1926) 269 U.S. 385, 391).) In other words, a law is impermissibly vague “if it fails to provide adequate notice to those who must observe its strictures and impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” (*People v. Rubalcava* (2000) 23 Cal. 4th 322, 332 (internal quotations omitted).

“Moreover, when First Amendment freedoms are at stake, an even greater degree of specificity and clarity of laws is required.” (*Fotiv. City of Menlo Park* (9th Cir. 1998) 146 F.3d 629, 638.)

Here, the definition of SOCE is vague because it prohibits “efforts to change behaviors or gender expressions, or to eliminate or reduce sexual romantic attractions or feelings toward individuals of the same sex.” Is it the intent of the legislature to prevent a homosexual from obtaining counseling in order to reduce his sexual desires due to an overwhelming sexual addiction? Is it the intent of the legislature to prevent a homosexual from obtaining the treatment he desires to eliminate his improper desire for young boys? Is it the intent of the legislature to prevent a female who is married to a male from receiving counseling that affirms her love for her husband and discourages her attraction to another female? We doubt that this is really the intent.

Furthermore, the Act states that “any practices that seek to change an individual’s sexual orientation” is prohibited. Does the mere reading of biblical text regarding homosexuality constitute such a practice? Does prayer to God to help an individual like Jim Domen stay faithful to his wife and resist homosexual temptation constitute such a practice? Would the aforementioned examples only be prohibited if the speaker was being paid to deliver the message? Would a church member who pays a tithe to her church be involved in a “transaction”?

The CLRA specifically provides that it be “liberally construed and applied.” (*Cal. Civil Code* § 1760.) Case law likewise provides liberal construction of the word “transaction” in the context of the CLRA. (See *Nordberg v. Trilegiant Corp.*, 445 F. Supp. 2d 1082, 1097 (N.D. Cal. 2006) (finding existence of “transaction” where plaintiff was refunded unauthorized membership fee charged by defendant).) This liberal applicability exacerbates the vagueness of AB 2943.

The legislative history explored whether AB 2943 could apply to “religious counseling provided by clergy for which the clergy does not except payment.” The best assurance the legislative history could provide was that such religious counseling is “arguably not the type[] of transactions for services covered under the CLRA or [AB 2943].” (Assemb. Comm. on Privacy and Consumer Protection, Reg. Sess. (Cal. 2018-2019), Page 5.) In fact, the legislative history admits that “it is arguably somewhat unclear whether the bill does, in fact, prohibit the act of performing SOCE of all persons, as the author intends.” (*Id.* Page 1.) In other words, it may be that “SOCE itself is unlawful” under the bill. (*Id.*)

Although the regulation in *Pickup* survived a vagueness challenge, it only did so because those that had to abide by the law were mental health professionals who presumably understood the type of psychotherapy involved. (*Pickup*, supra, 740 F.3d 1208.) The court explained that “a reasonable person would understand the statute to regulate only mental health treatment.” (*Id.* at 1234.) The court further explained that because the law “regulates licensed mental health providers” who have “specialized knowledge,” and such professionals would understand what practices qualify as SOCE. (*Id.*) That is not the case with AB 2943 which prohibits all persons from all forms of SOCE anywhere, in any context, as long as there is a transaction involved. Unlike *Pickup*, AB 2943 does not provide the clarifying limitation of mental health professionals administering a SOCE mental health treatment. As a result, AB 2943 would not withstand a vagueness challenge.

Free Exercise Violation

The two prominent Free Exercise cases generally regarded as setting the bounds of the Free Exercise Clause are *Employment Div. v. Smith*, 494 U.S. 872 (1990) and *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). In both cases, the United States Supreme Court explained that laws burdening the free exercise of religion are subject to strict scrutiny if

they are not neutral toward religion or are not generally applicable. AB 2943 is not neutral toward religion because it prohibits biblical counseling, speaking from a biblical view on homosexuality, and selling books advocating a Christian perspective on sexual orientation. Additionally, the Act must be narrowly tailored in its application. Clearly, it is not narrow in its scope. Therefore, the Act violates the free exercise of religion.

Conclusion

AB 2943 is an unconstitutional bill because it engages in viewpoint discrimination, it is unconstitutionally vague, and it impermissibly burdens the free exercise of religion. More importantly, AB 2943 will not fulfill its goal of serving the best interests of the LGBTQ community. Rather, it will result in individuals being prohibited from obtaining the support and resources they desire. For these reasons, we respectfully request that you vote “no” on AB 2943.

Kind regards,



Robert H. Tyler, Esq.

I am including my name below because I agree that AB 2943 is unconstitutional and clearly violates our God-given rights.

Name: _____

Age: _____

Street Address: _____

City/State/Zip Code: _____

Phone Number: _____

Email Address: _____