

PACIFIC JUSTICE INSTITUTE – Center for Public Policy

P.O. Box 276600
Sacramento, CA 95827
telephone: (916) 857-6900

June 19, 2018

Toni G. Atkins, President pro Tempore
CALIFORNIA SENATE
STATE CAPITOL, Room 205
Sacramento, CA 95814

Re: Assembly Bill 2943 as Amended – Oppose

Dear Senator Atkins,

Pacific Justice Institute – Center for Public Policy¹ writes this letter to address Assembly Bill 2943 as amended. Because the proposed law seeks to codify state orthodoxy in deeply personal matters of conscience, we oppose the Bill.

INTRODUCTION & SUMMARY OF THE BILL

The Bill deems any “advertising, offering for sale, or selling services constituting sexual orientation change efforts to an individual”² as an “unfair method of competition and unfair or deceptive act or practice...when intended to result or that results in the sale...of goods or services to a consumer” thus rendering such unlawful.³ The meaning of “sexual orientation change efforts” (or SOCE) sets few limitations. It includes “**any practices that seek to change an individual’s sexual orientation**” and encompasses “efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex.”⁴ The sole exception relates to “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 or to otherwise promote healthy sexual and romantic relationships; and (B) do not seek to change sexual orientation.”⁵ As a matter of law, AB 2943 categorizes SOCE as consumer fraud. Thus, a court can award damages and issue an injunction against a person or entity engaging in that practice. For the reasons set forth below, the proposed Bill runs afoul of the guarantees to privacy, association, and expressive conduct found in the First Amendment and Article I, §§ 1-2 and 4 of the California Constitution.

¹ This organization is established pursuant to section 501(c)(4) of the Internal Revenue Code.

² A.B. 2943, § 3 at Sec. 1770(a)(28).

³ A.B. 2943, § 2 at Sec. 1770(a).

⁴ A.B. 2943, § 2 at Sec. 1761(i)(1) (emphasis added).

⁵ A.B. 2943, § 2 at Sec. 1761(i)(2).

DISCUSSION

The Bill Intrudes On Privacy

The Bill infringes on the liberty interests of a subset of persons within the LGBTQ⁶ community who seek to set their own course regarding sexual attractions and behaviors. In 1972 the People of California chose to amend their own constitution to include *privacy* as an inalienable right. The election brochure provided to the voters stated that the “right of privacy is the right to be left alone” comprising a liberty which “is a fundamental and compelling interest.”⁷ This liberty “protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose.”⁸ Because privacy “is fundamental to a free society,”⁹ the voters of this state determined to memorialize this liberty in their Constitution as an inalienable right lest there come a time when future generations forget. That time has arrived.

For a generation after the amendment of the Constitution, the LGBTQ community embraced the autonomy in matters of sexual intimacy that resulted from the right “to be left alone” found in Article I, Section 1.¹⁰ The irony rests in the fact that the sponsors of this Bill wish to deprive current and former members of their own community of the liberty to conduct their private sexual lives according to personal predilections. Scores of those members traveled to the Capitol to express to legislators in two packed Assembly committee hearings that they underwent the change that the sponsors of this Bill claim as fraud. As one person came to the microphone, he looked directly at the Bill’s author (Evan Low), stated his name and said simply, “I exist; I exist.” That speaker stands as emblematic of that assemblage. They make up a misunderstood and disdained sexual minority and religious group.¹¹ Today this group of unwanted people watch the legislative process to see whether lawmakers strip them of their rights and their very existence.

A.B. 2943 also impacts others that never wore the LGBTQ identity. This Bill interferes with the liberty interests of those who seek help from mental health and/or religious professionals to act in accordance with their values and personal goals. For example, a married man or woman who falls into adulterous or inappropriate romantic entanglements may desire to see a marriage and family counselor or pay for a marriage seminar at their church in order to keep the marriage intact and protect their children from the trauma of a broken home. Such a person can surely seek such help and most would applaud that effort. But under this Bill, if the man or woman faces a comparable temptation with a person of the same sex, he or she loses the option of

⁶ *LGBTQ* is an initialism for lesbian, gay, bisexual, transgender and queer or questioning.

⁷ *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 291 (1981) (C.J. Bird, concurring) quoting ballot arguments in favor of amending CA Const., Art. I, § 1.

⁸ *Id.*

⁹ *Id.* at 292.

¹⁰ The full text reads, “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”

¹¹ In the law banning SOCE for minors by licensed mental health professionals, in four separate places the legislative record cites the World Health Organization who describe this phenomena as a “conflict between sexual urges and religious belief systems.” 2011 Legis. Bill Hist. CA S.B. 1172 (May 10, 2012); *Id.* (May 14, 2012); *Id.* (May 29, 2012); *Id.* (August 28, 2012). Like S.B. 1172, A.B. 2943 relies on a report by the American Psychological Association (APA Report). JUDITH M. GLASSGOLD, PSYD, ET AL., AMERICAN PSYCHOLOGICAL ASSOCIATION, REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION (2009). See the footnote on page 2 of the APA Report. In addition, see generally the voluminous citations to the literature in Appendix B which deal with religion and spirituality. One can access the APA Report at <http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>.

seeking the services of a licensed counselor or even signing up for a religious retreat with the aim of reducing, managing or eliminating same-sex sexual behavior or romantic attractions. The sole reason for the loss of such resources is the happenstance of their status as gay, lesbian or bisexual. Persons in such situations may not wish to seek counsel that “provides acceptance, support, understanding and identity exploration” or their sexual orientation.¹² Instead, they may indeed want help to “change behaviors, or to reduce or eliminate sexual or romantic attractions or feeling toward individuals of the same sex.”¹³ Their spouse could justifiably insist on it. The proposed Bill takes away their right to fight to bring restoration to a troubled marriage and family. A.B. 2943 lacks even a rational basis if an individual can seek counsel with help for straight but not gay affairs.

Our state faces a dangerous moment when the government tells law abiding citizens that they cannot journey down a road that they perceive as their own destiny because those from self-described mainstream or elite mental health organizations hold this route as dangerous. In California, a citizen can use tobacco products -- even while gasping for breath on a deathbed, drink until drowning in a pool of vomit, gamble away a family’s fortune, and have unprotected sex until succumbing to a lethal sexually transmitted disease. So long as a citizen retains soundness of mind, the inalienable rights set forth in the first article of the California Constitution stand for the proposition that the state lacks the authority to protect you from you. The Bill’s sponsors simply do not consent to that provision of the Constitution.

The Bill Exceeds Professional Practices

A misperception rests in the notion that A.B. 2943 merely regulates the conduct of mental health professionals. In 2012 lawmakers passed S.B. 1172 to prohibit a counselor, psychologist or psychiatrist from “performing sexual orientation change efforts with a patient under 18 years of age.”¹⁴ Violating provisions of S.B. 1172 subjected a mental health provider to “professional discipline.”¹⁵ In the present Bill, if the author’s primary intent focused on professional therapy the proper place to insert such a law rests in the Business and Professions Code. For example, the drafter could quite easily strike the last modifying phrase of S.B. 1172 (i.e., Bus. & Prof. Code § 865.2) as follows: “Under no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient ~~under 18 years of age.~~” Instead, the sponsors of A.B. 2943 placed the law in the Consumer Legal Remedies Act so that “any practice” in which “advertising or offering” SOCE occurs stands as fraud by operation of law.

This was not lost on the writer of the legal analysis presented to the Assembly Judiciary Committee. She¹⁶ noted that the courts determined that “SB 1172 regulates only treatment” and “professional conduct.”¹⁷ In contrast, A.B. 2943 “seeks to extend SB 1172’s prohibition – limited to therapy efforts *by* mental health providers and *with* minors – to **all persons** who engage in SOCE.”¹⁸ In sum, testimony and representations criticizing SOCE by “medical and mental health organizations”¹⁹ speaks exclusively to therapeutic treatments

¹² A.B. 2943, § 2(i)(2).

¹³ A.B. 2943, § 2(i)(1).

¹⁴ Bus. & Prof. Code § 865.1.

¹⁵ Bus. & Prof. Code § 865.2.

¹⁶ Alison Merrilees, Chief Counsel, CA State Assembly Committee On Judiciary.

¹⁷ *Pickup v. Brown*, 740 F.3d 1208, 1222 (9th Cir. 2014).

¹⁸ Assembly Committee on Judiciary analysis of A.B. 2943, p. 8 (March 23, 2018) (italics in original, bold emphasis added).

¹⁹ Id. at p. 1.

by licensed professionals. The Bill reaches beyond that narrow group. It is to practices by persons outside of the mental health professions that I now turn.

Mental Health Organizations Lack The Capacity To Determine The Truth Or Falsity Of Spiritual Claims

The Bill's supporters refer pejoratively to SOCE as "pray the gay away."²⁰ The APA Report relied upon in the preamble to the Bill not only identifies the fact that religious conservatives seek to reduce unwanted same-sex attractions,²¹ but that SOCE frequently involves spiritual approaches.²² Such religious interventions may consist of prayer, support groups and faith healing.²³ The legislative history of the law prohibiting the practice of SOCE by professionals to minors confirmed this as well stating, "conservative Christian transformational ministries[,] use the term *conversion therapy* to refer to the utilization of prayer [and] religious conversion...to change a person's sexual orientation."²⁴

The field of psychology can offer nothing by way of verifying the validity or invalidity of a claimed spiritual experience. If one believes that relief from illness, temptation or affliction came as a result of an exorcism, prayer and meditation at a religious retreat, or going through a workbook with a religious support group, how can such be proven? Likewise, how can it be disproven? Generally speaking, the evidence rests in self-reporting. Just as one finds the scientific method of no use in speaking to matters of miracles and morality and possesses no instruments to take the measurement of faith, so too, psychology cannot render an opinion on the existence of God, angels and demons, or the claim of a spiritual event regarding deliverance from same-sex sexual temptation or behavior.

The constitutional danger lies in the breadth of this Bill as it reaches beyond the area of psychology to attack disfavored religious ideas. During the floor debate, Assemblyman Al Muratsuchi (District 66) embraced the opinions of mental health organizations and concluded that, "[t]he faith community like anyone else needs to evolve with the times."²⁵ Legislative reliance on the gravitas of self-identified mainstream and elite medical and psychological organizations as a basis to use the legal system to censor and punish unpopular faith-based views and practices demonstrates a lack of appreciation for the rights of speech and religion necessary for a free society. More than seventy years ago the U.S. Supreme Court explained the danger to core liberties writing,

²⁰ "You can still try to pray the gay away if you'd like, but it hasn't proved to be effective," said Assemblywoman Susan Talamantes Eggman, a Stockton Democrat." Bollag, Sophia. "California lawmakers move to limit conversion therapy." *Chicago Tribune* April 23, 2018.

²¹ See the footnote on page 2 of the APA Report (cited at footnote 8). In addition, see generally the voluminous citations to the literature in Appendix B which deal with religion and spirituality.

²² See the footnote on page 2 of the APA Report. In addition, see generally the voluminous citations to the literature in Appendix B which deal with religion and spirituality.

²³ APA Report at 27.

²⁴ 2011 Legis. Bill Hist. CA S.B. 1172 (April 30, 2012) (italics added).

²⁵ The relevant comment reads, "The First Amendment does not prohibit banning fraudulent conduct. The faith community like anyone else needs to evolve with the times. The science is clear when you look at the support list: it includes the California Medical Association, California Psychological Association, and the American Academy of Pediatrics. So the claim that the First Amendment can be used as a defense for promoting fraudulent conduct is a fallacious argument." Accessible at <https://vimeo.com/265804606>.

Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.²⁶

The introduction of this Bill shows that lesson is not learnt. A.B. 2943 seeks to haul both mental health and religious professionals into court to face judges and juries. The preamble and expert witnesses brought in by the author attempts to use the prestige of mental health organizations in order to claim that religious beliefs, practices, and experiences relating to SOCE constitute fraud. In so doing, lawmakers forsake fidelity to the Constitution and thereby commit legislative malpractice.

Moreover, by declaring as settled the idea that sexual orientation is not fluid and thus not subject to change, the sponsors of the Bill seek to cut off debate on this issue in the state at large and eliminate conflicting evidence in the courts. More than seventy years ago Justice Jackson wrote, "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."²⁷

The Bill Comprises A Content-Based Restriction On Speech

The Bill's analysis concedes that the proposed law comprises a content-based regulation of speech. The law stands as long settled that "[c]ontent-based regulations are presumptively invalid."²⁸ However, the analysis dismisses this legal premise because AB 2943 touches on *commercial speech*. But the Bill imposes more than an incidental burden on speech for it seeks to ban communications calculated to reduce or eliminate same-sex romantic attractions or behaviors. As such, this restriction on speech demands review under a high legal standard.²⁹ "The First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys. Commercial speech is no exception."³⁰

Some legislators supporting the Bill embrace the notion of sexual determinism, and by extension, reject sexual autonomy. They have the right to hold that view. But even under communications categorized as *commercial*, they may not "burden the speech of others in order to tilt public debate in a preferred direction."³¹

²⁶ *United States v. Ballard*, 322 U.S. 78, 86-87 (1944).

²⁷ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

²⁸ *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992).

²⁹ *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011).

³⁰ *Id.*, 566.

³¹ *Id.*, 578-79.

The Bill Threatens Religious Retreats And Seminars

Unlike S.B. 1172 which placed restrictions on professional conduct, A.B. 2943's reach extends to religious ministries engaging in SOCE upon an exchange of money or publication of an advertisement. A church offering a religious retreat for parishioners which deals with reducing or eliminating same-sex attractions from a spiritual perspective falls under the law because of the bundled costs associated with payment for the activity, i.e., room and board, insurance and travel, and costs of speakers and printed materials. Likewise, a church that brings in a ministry to put on a similar seminar would find liability triggered upon payment of the registration fee.

This is not speculative. In February a church in Michigan (Metro City) put on a workshop of this nature in response to requests from congregants who asked for help and resources with unwanted struggles with same-sex attraction. LGBTQ advocates organized a demonstration which brought 300 people marching in front of the Church's campus. Several state lawmakers requested that the Michigan Attorney General (Bill Schuette) investigate the Church for fraud and abuse based upon Michigan's consumer fraud laws.³²

The Bill Burdens Disfavored Publications

In the retreat or seminar described above, a related purchase of a workbook also exposes both the church and the ministry to a lawsuit. Assuming the workbook advances the position that unwanted same-sex sexual or romantic attractions lie subject to modification and provides exercises to that end, sale of the book is subject to an injunction under the Consumer Legal Remedies Act.³³ Supporters of the Bill justify this remedy as a ban on fraud rather than speech. That argument cunningly takes a disfavored idea and relabels it as "commercial fraud" and thus subject to censorship. This poses a serious constitutional danger. A book does not lose its First Amendment protections because it is sold. The sobering reality is that if the state can ban one book, it can ban any book.

1. The amendment does not foreclose liability for the sale of books

The latest version of the Bill requires a word of explanation regarding the selling of published materials. On May 30, the author amended section 1770(a)(28). In oral statements made during testimony before the Senate Judiciary Committee on June 12, he asserted that the Bill no longer incorporated the sale of books because the new amendment omits the word *goods*. In other words, a book is a type of good. If the omission of the word *goods* reflects the author's intent to remove liability for the sale of publications, the language of the amendment fails to achieve that objective.

As an initial matter, one searches in vain in the original version to find the word *good* or its cognates in subsection 28. Of course, subsection 28 follows a list of twenty-seven items that are a part of section a. One reads all twenty-eight subsections in conjunction with section a, for section a establishes the underlying conditions for what follows. "The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both

³² Alysa Zavala-Offman. "Amid downriver church controversy, Michigan lawmakers propose conversion therapy ban." *Detroit Metro Times* February 14, 2018.

³³ Civil Code § 1782(d).

internally and with each other, to the extent possible.”³⁴ The recent change did not take out the word *good*. Instead, *good* appears in section a which sets the table for the next subsections where Assemblyman Low’s amendment shows up.

Turning now to the new amendment, within its context the text reads as follows:

“(a) 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~~ *for sale, or selling services constituting* sexual orientation change efforts ~~with~~ *to* an individual.”³⁵

A plain reading shows that advertising, offering for sale, or selling services constituting SOCE remains unlawful under the Consumer Legal Remedies Act if the transaction intends to result or results in the sale of goods. Swimming against rules of statutory construction, the author simply reads the *sale of goods* out of section a.³⁶ “[L]egislation must be construed as a whole while avoiding an interpretation which renders any of its language surplusage.”³⁷ In sum, despite the amendment one remains liable for the sale of published literature promoting efforts that change sexual orientation.

As explained above, this amended Bill tosses a frigid damp blanket on the bright fires of free expression. “Any sanction imposed for the exercise of protected First Amendment conduct must be viewed as having a chilling effect on speech. . . .”³⁸ In the event of passage, California sits poised as the only state to subject a bookseller to civil liability because of government disagreement over the idea contained in the literature. The proponents of the Bill argue that the sale of a book remains lawful so long as no one attempts to change sexual orientation. This demonstrates a profound misunderstanding of freedom of speech and the press. A primary purpose of delivering a speech is to persuade. Such remains true as much for the written word as for the spoken. The notion that California’s devout stand free to write and publish so long as they refrain from trying to change minds grieves those who cherish liberty of conscience.

³⁴ *People ex rel. Kennedy v. Beaumont Inv., Ltd.*, 111 Cal. App. 4th 102, 113 (2003).

³⁵ Section a sits as part of the current Consumer Legal Remedies Act at Civil Code §1770(a). The undersigned bolded the relevant wording for clarification. The amendment is subsection 28 and can be cited as A.B. 2943, § 3 at Sec. 1770(a)(28). The italics, strikethrough and colored font appears in the official website entitled California Legislative Information and indicates amended language. See, https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201720180AB2943 (accessed June 18, 2018).

³⁶ *San Jose Unified Sch. Dist. v. Santa Clara Cty. Office of Educ.* (2017) 7 Cal. App. 5th 967, 981 (2017).

³⁷ *City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 468.

³⁸ *Adcock v. Bd. of Educ.* (1973) 10 Cal. 3d 60, 66. To the extent that the amended Bill causes confusion about its reach poses the same legal problem. “Uncertainty” in a law relating to a form of expression “is likely to have a chilling effect on speech.” *Berger v. City of Seattle*, 569 F.3d 1029, 1048 (9th Cir. 2009).

CONCLUSION

The state roils a free society when it enables disgruntled citizens to intimidate neighbors who merely desire to live their lives peacefully and in accordance with a conscience informed by faith. Such heavy handedness produces a structural crack in the foundation of inalienable rights upon which a free society rests. Facing the prospect of court-ordered injunctions, the proposed law further creates the conditions that can rock faith-based ministries which advertise or offer SOCE. Under this Bill a court can penetrate the inner sanctum of a church to enjoin the operations of a ministry whose traditional beliefs lawmakers now deem fraud. Such raises the specter of a judicial wrecking ball swinging at full momentum into the wall separating church and state.

When constitutional fortifications crumble, Californians will find themselves picking through the rubble in search of pieces of what was once a functional republic. Therefore, Pacific Justice Institute – Center for Public Policy respectfully registers its opposition to A.B. 2943.

Very truly yours,



Kevin Snider, Chief Counsel