

MEMORANDUM

DATE	April 26, 2018
TO	Board of Psychology
FROM	 Jason Glasspiegel Central Services Coordinator
SUBJECT	Agenda Item #21(b)(1)(E) – AB 2943 (Low) Unlawful Business Practices: Sexual Orientation Change Efforts

Background:

This bill would include, as an unlawful practice prohibited under the Consumer Legal Remedies Act (CLRA), advertising, offering to engage in, or engaging in sexual orientation change efforts with an individual.

This bill would define sexual orientation change efforts as follows:

(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.

Location: Senate Committee on Rules

Status: 4/19/2018 In Senate. Read first time. To Senate Committee on Rules for assignment.

Votes: 4/3/2018 Assembly Committee on Privacy and Consumer Protection (8-2-0)
 4/10/2018 Assembly Committee on Judiciary (8-1-1)
 4/19/2018 Assembly Floor (50-18-10)

Action Requested:

The Policy and Advocacy Committee recommends that the Board **Support** AB 2943 as this bill would extend protections to consumers who are currently not protected from sexual orientation change efforts.

Attachment A: Analysis of AB 2943 (Low)
Attachment B: AB 2943 (Low) Text
Attachment C: Assembly Judiciary Analysis

2018 Bill Analysis

Author: Low	Bill Number: AB 2943	Related Bills: AB 1779 (Nazarian)
Sponsor: Equality California (Co-Sponsor) National Center of Lesbian Rights (Co-Sponsor) Trevor Project (Co-Sponsor)	Version: Amended 3/23/2018	
Subject: Unlawful business practices: sexual orientation change efforts		

SUMMARY

This bill would include, as an unlawful practice prohibited under the Consumer Legal Remedies Act (CLRA), advertising, offering to engage in, or engaging in sexual orientation change efforts with an individual.

RECOMMENDATION

SUPPORT - The Policy and Advocacy Committee recommends a Support position on AB 2943 to the Board, as this bill would extend protections to consumers who are currently not protected from sexual orientation change efforts (also known as conversion therapy) and the harmful effects of this practice on those individuals.

REASON FOR THE BILL

Per the author, sexual orientation change therapy is a dangerous and discredited practice that falsely claim to change a person's sexual orientation from homosexual to heterosexual, change their gender identity or expression, or lessen their same-sex attraction. The American Psychiatric Association, American Psychological Association (APA), the American Counseling Association, the National Association of Social Workers, and the American Medical Association all oppose the practice on the basis

Other Boards/Departments that may be affected:	
<input type="checkbox"/> Change in Fee(s) <input type="checkbox"/> Affects Licensing Processes <input checked="" type="checkbox"/> Affects Enforcement Processes	
<input type="checkbox"/> Urgency Clause <input type="checkbox"/> Regulations Required <input type="checkbox"/> Legislative Reporting <input type="checkbox"/> New Appointment Required	
Policy & Advocacy Committee Position: <input checked="" type="checkbox"/> Support <input type="checkbox"/> Support if Amended <input type="checkbox"/> Oppose <input type="checkbox"/> Oppose Unless Amended <input type="checkbox"/> Neutral <input type="checkbox"/> Watch Date: <u> 4/19/2018 </u> Vote: <u> 3-0-0 </u>	Full Board Position: <input type="checkbox"/> Support <input type="checkbox"/> Support if Amended <input type="checkbox"/> Oppose <input type="checkbox"/> Oppose Unless Amended <input type="checkbox"/> Neutral <input type="checkbox"/> Watch Date: _____ Vote: _____

that conversion therapy is not evidence-based and can be potentially harmful to a patient's mental health.

AB 2943 would declare sexual orientation change efforts a fraudulent practice under the CLRA. Doing so would extend certain consumer protections to individuals damaged by sexual orientation change therapy efforts.

According to the author, AB 2943 is needed to increase accountability for those who claim to provide therapy but are in fact peddling an unfounded and destructive practice.

ANALYSIS

According to the APA Task Force on Appropriate Therapeutic Responses to Sexual Orientation, efforts to change sexual orientation are unlikely to be successful and involve some risk of harm. Research and clinical literature demonstrate that same-sex sexual and romantic attractions, feelings and behaviors are normal and positive variations of human sexuality, regardless of sexual orientation identity. The appropriate application of affirmative therapeutic interventions for those who seek sexual orientation change efforts involves therapist acceptance, support and understanding of clients and the facilitation of clients' active coping, social support and identity exploration and development, without imposing a specific sexual orientation identity outcome.

The CLRA begins with section 1750 of the Civil Code and establishes provisions in law which cannot be waived by a consumer. The CLRA declares unlawful, several methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer.

Current law makes it a violation of the Business and Professions Code to offer sexual orientation change efforts with anyone under the age of 18. This bill would go beyond the current law by creating an outright ban on the practice.

This bill would add advertising, offering to engage in, or engaging in sexual orientation change efforts with an individual as a violation of the CLRA, which would allow a consumer to file suit under the Civil Code. Additionally, by adding these services under the Civil Code, any violation by a licensed psychologist would then become a violation of section 2960(a) of the Business and Professions Code, "conviction of a crime substantially related to the qualifications functions or duties of a psychologist or psychological assistant." By making this violation a crime, this bill could result in an impact on the Board's Enforcement Unit.

LEGISLATIVE HISTORY

SB 1172 (Chapter 835, Statutes of 2012) – This bill prohibits mental health providers from performing sexual orientation change efforts with a patient under 18 years of age. Violating this law subjects the provider to discipline by the provider's licensing entity.

AB 1779 (Nazarian) – This bill would change section 865.1 of the Business and Professions Code to include dependent adults and those under the age of 18, as patient categories sexual orientation change efforts cannot be practiced on.

OTHER STATES' INFORMATION

Currently, nine other states and the District of Columbia ban the use of sexual orientation change therapy for minors.

PROGRAM BACKGROUND

The Board advances quality psychological services for Californians by ensuring ethical and legal practice and supporting the evolution of the practice. To accomplish this, the Board regulates licensed psychologists, psychological assistants, and registered psychologists.

This bill could result in an increase in the number of enforcement cases received by the Board, but would not change the way which our enforcement program reviews and investigates violations.

FISCAL IMPACT

Not Applicable

ECONOMIC IMPACT

Not Applicable

LEGAL IMPACT

Not Applicable

APPOINTMENTS

Not Applicable

SUPPORT/OPPOSITION

Support:

Equality California (co-sponsor) ; National Center for Lesbian Rights (co-sponsor); The Trevor Project (co-sponsor); American Academy of Pediatrics; California Asian Pacific Chamber of Commerce ; California Council of Community Behavioral Health Agencies; California LGBT Health & Human Services Network; California Psychological Association; Consumer Attorneys of California; Equality California; Human Rights Campaign; Los Angeles LGBT Community Center; Sacramento LGBT Community Center; San Francisco AIDS Foundation; Numerous individuals

Opposition:

Alliance Defending Freedom; American College of Pediatricians; Bethel Church; California Family Council; Concerned Women for America of California; Equipped to Love; Moral Revolution; National Task Force for Therapy Equality; Pacific Justice Institute; The Salt and Light Council; William Jessup University; Numerous individuals

ARGUMENTS

Proponents: National Center for Lesbian Rights states that bill would codify existing California laws that already protect consumers from false and deceptive practices such as conversion therapy. Doing so is important so that consumers know upfront, before they are defrauded, that these practices are fraudulent and also so that those who have already been defrauded are aware they have a remedy.”

The Trevor Project states that “Conversion therapy does not have a scientific standing. Every major medical and mental health organization has stated that the treatment of conversion therapy is ineffective and potentially harmful. Conversion therapists are stealing from hard working American families who have their best interest of their children at heart. This is consumer fraud and California courts and the highest courts in the land have agreed on this point time and time again.”

Opponents: The American College of Pediatricians states that “Everyone should be free to find therapy and support to help them achieve their desired goals and outcomes, including those who want to explore all options regarding feelings of same-sex attraction and gender identity confusion.”

Concerned Women for America of California states that AB 2943 “prohibits speech, a serious First Amendment infringement, between counselors and their clients seeking help with unwanted sexual orientation and gender identity issues. Further, it, at the least, puts in question the sale of books, participation in events, and related activities.”



AB-2943 Unlawful business practices: sexual orientation change efforts. (2017-2018)

SECTION 1. *The Legislature finds and declares the following:*

(a) Contemporary science recognizes that being lesbian, gay, bisexual, or transgender is part of the natural spectrum of human identity and is not a disease, disorder, or illness.

(b) The American Psychological Association convened the Task Force on Appropriate Therapeutic Responses to Sexual Orientation. The task force conducted a systematic review of peer-reviewed journal literature on sexual orientation change efforts and issued a report in 2009. The task force concluded that sexual orientation change efforts can pose critical health risks to lesbian, gay, and bisexual people, including confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, suicidality, substance abuse, stress, disappointment, self-blame, decreased self-esteem and authenticity to others, increased self-hatred, hostility and blame toward parents, feelings of anger and betrayal, loss of friends and potential romantic partners, problems in sexual and emotional intimacy, sexual dysfunction, high-risk sexual behaviors, a feeling of being dehumanized and untrue to self, a loss of faith, and a sense of having wasted time and resources.

(c) The American Psychological Association issued a resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts in 2009, stating: "[T]he [American Psychological Association] advises parents, guardians, young people, and their families to avoid sexual orientation change efforts that portray homosexuality as a mental illness or developmental disorder and to seek psychotherapy, social support, and educational services that provide accurate information on sexual orientation and sexuality, increase family and school support, and reduce rejection of sexual minority youth."

(d) The American Psychiatric Association published a position statement in March of 2000, stating:

"Psychotherapeutic modalities to convert or 'repair' homosexuality are based on developmental theories whose scientific validity is questionable. Furthermore, anecdotal reports of 'cures' are counterbalanced by anecdotal claims of psychological harm. In the last four decades, 'reparative' therapists have not produced any rigorous scientific research to substantiate their claims of cure. Until there is such research available, [the American Psychiatric Association] recommends that ethical practitioners refrain from attempts to change individuals' sexual orientation, keeping in mind the medical dictum to first, do no harm.

The potential risks of reparative therapy are great, including depression, anxiety and self-destructive behavior, since therapist alignment with societal prejudices against homosexuality may reinforce self-hatred already experienced by the patient. Many patients who have undergone reparative therapy relate that they were inaccurately told that homosexuals are lonely, unhappy individuals who never achieve acceptance or satisfaction. The possibility that the person might achieve happiness and satisfying interpersonal relationships as a gay man or lesbian is not presented, nor are alternative approaches to dealing with the effects of societal stigmatization discussed.

Therefore, the American Psychiatric Association opposes any psychiatric treatment such as reparative or conversion therapy which is based upon the assumption that homosexuality per se is a mental disorder or based upon the a priori assumption that a patient should change his/her sexual homosexual orientation."

(e) The American Academy of Pediatrics published an article in 1993 in its journal, Pediatrics, stating: "Therapy directed at specifically changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation."

(f) The American Medical Association Council on Scientific Affairs prepared a report in 1994, stating: "Aversion therapy (a behavioral or medical intervention which pairs unwanted behavior, in this case, homosexual behavior, with unpleasant sensations or aversive consequences) is no longer recommended for gay men and lesbians. Through psychotherapy, gay men and lesbians can become comfortable with their sexual orientation and

understand the societal response to it."

(g) The National Association of Social Workers prepared a 1997 policy statement, stating: "Social stigmatization of lesbian, gay and bisexual people is widespread and is a primary motivating factor in leading some people to seek sexual orientation changes. Sexual orientation conversion therapies assume that homosexual orientation is both pathological and freely chosen. No data demonstrates that reparative or conversion therapies are effective, and, in fact, they may be harmful."

(h) The American Counseling Association Governing Council issued a position statement in April of 1999, stating: "We oppose 'the promotion of "reparative therapy" as a "cure" for individuals who are homosexual.'"

(i) The American School Counselor Association issued a position statement in 2014, stating: "It is not the role of the professional school counselor to attempt to change a student's sexual orientation or gender identity. Professional school counselors do not support efforts by licensed mental health professionals to change a student's sexual orientation or gender as these practices have been proven ineffective and harmful."

(j) The American Psychoanalytic Association issued a position statement in June 2012 on attempts to change sexual orientation, gender, identity, or gender expression, stating: "As with any societal prejudice, bias against individuals based on actual or perceived sexual orientation, gender identity or gender expression negatively affects mental health, contributing to an enduring sense of stigma and pervasive self-criticism through the internalization of such prejudice."

Psychoanalytic technique does not encompass purposeful attempts to 'convert,' 'repair,' change or shift an individual's sexual orientation, gender identity or gender expression. Such directed efforts are against fundamental principles of psychoanalytic treatment and often result in substantial psychological pain by reinforcing damaging internalized attitudes."

(k) The American Academy of Child and Adolescent Psychiatry published an article in 2012 in its journal, Journal of the American Academy of Child and Adolescent Psychiatry, stating: "Clinicians should be aware that there is no evidence that sexual orientation can be altered through therapy, and that attempts to do so may be harmful. There is no empirical evidence adult homosexuality can be prevented if gender nonconforming children are influenced to be more gender conforming. Indeed, there is no medically valid basis for attempting to prevent homosexuality, which is not an illness. On the contrary, such efforts may encourage family rejection and undermine self-esteem, connectedness and caring, important protective factors against suicidal ideation and attempts. Given that there is no evidence that efforts to alter sexual orientation are effective, beneficial or necessary, and the possibility that they carry the risk of significant harm, such interventions are contraindicated."

(l) The Pan American Health Organization, a regional office of the World Health Organization, issued a statement in May of 2012, stating: "These supposed conversion therapies constitute a violation of the ethical principles of health care and violate human rights that are protected by international and regional agreements." The organization also noted that reparative therapies "lack medical justification and represent a serious threat to the health and well-being of affected people."

(m) The American Association of Sexuality Educators, Counselors and Therapists (AASECT) issued a statement in 2014, stating: "[S]ame sex orientation is not a mental disorder and we oppose any 'reparative' or conversion therapy that seeks to 'change' or 'fix' a person's sexual orientation. AASECT does not believe that sexual orientation is something that needs to be 'fixed' or 'changed.' The rationale behind this position is the following: Reparative therapy, for minors, in particular, is often forced or nonconsensual. Reparative therapy has been proven harmful to minors. There is no scientific evidence supporting the success of these interventions. Reparative therapy is grounded in the idea that nonheterosexual orientation is 'disordered.' Reparative therapy has been shown to be a negative predictor of psychotherapeutic benefit."

(n) The American College of Physicians wrote a position paper in 2015, stating: "The College opposes the use of 'conversion,' 'reorientation,' or 'reparative' therapy for the treatment of LGBT persons. . . . Available research does not support the use of reparative therapy as an effective method in the treatment of LGBT persons. Evidence shows that the practice may actually cause emotional or physical harm to LGBT individuals, particularly adolescents or young persons."

(o) In October 2015, the Substance Abuse and Mental Health Services Administration of the United States Department of Health and Human Services issued a report titled "Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth." The report found that "[i]nterventions aimed at a fixed outcome, such as gender conformity or heterosexual orientation, including those aimed at changing gender identity, gender expression, and sexual orientation are coercive, can be harmful, and should not be part of behavioral health treatment."

(p) Courts, including in California, have recognized the practice of sexual orientation change efforts as a commercial service. Therefore, claims that sexual orientation change efforts are effective in changing an individual's sexual orientation, may constitute unlawful, unfair, or fraudulent business practices under state consumer protection laws. This bill intends to make clear that sexual orientation change efforts are an unlawful practice under California's Consumer Legal Remedies Act.

(q) California has a compelling interest in protecting the physical and psychological well-being of lesbian, gay, bisexual, and transgender individuals.

(r) California has a compelling interest 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.

SEC. 2. Section 1761 of the Civil Code is amended to read:

1761. As used in this title:

(a) "Goods" means tangible chattels bought or leased for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for these goods, and including goods that, at the time of the sale or subsequently, are to be so affixed to real property as to become a part of real property, whether or not they are severable from the real property.

(b) "Services" means work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods.

(c) "Person" means an individual, partnership, corporation, limited liability company, association, or other group, however organized.

(d) "Consumer" means an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes.

(e) "Transaction" means an agreement between a consumer and another person, whether or not the agreement is a contract enforceable by action, and includes the making of, and the performance pursuant to, that agreement.

(f) "Senior citizen" means a person who is 65 years of age or older.

(g) "Disabled person" means a person who has a physical or mental impairment that substantially limits one or more major life activities.

(1) As used in this subdivision, "physical or mental impairment" means any of the following:

(A) A physiological disorder or condition, cosmetic disfigurement, or anatomical loss substantially affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; or endocrine.

(B) A mental or psychological disorder, including intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities. "Physical or mental impairment" includes, but is not limited to, diseases and conditions that include orthopedic, visual, speech, and hearing impairment, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, and emotional illness.

(2) "Major life activities" means functions that include caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(h) "Home solicitation" means a transaction made at the consumer's primary residence, except those transactions initiated by the consumer. A consumer response to an advertisement is not a home solicitation.

(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.

SEC. 3. Section 1770 of the Civil Code is amended to read:

1770. (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:

- (1) Passing off goods or services as those of another.
- (2) Misrepresenting the source, sponsorship, approval, or certification of goods or services.
- (3) Misrepresenting the affiliation, connection, or association with, or certification by, another.
- (4) Using deceptive representations or designations of geographic origin in connection with goods or services.
- (5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have.
- (6) Representing that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or secondhand.
- (7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another.
- (8) Disparaging the goods, services, or business of another by false or misleading representation of fact.
- (9) Advertising goods or services with intent not to sell them as advertised.
- (10) Advertising goods or services with intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity.
- (11) Advertising furniture without clearly indicating that it is unassembled if that is the case.
- (12) Advertising the price of unassembled furniture without clearly indicating the assembled price of that furniture if the same furniture is available assembled from the seller.
- (13) Making false or misleading statements of fact concerning reasons for, existence of, or amounts of, price reductions.
- (14) Representing that a transaction confers or involves rights, remedies, or obligations that it does not have or involve, or that are prohibited by law.
- (15) Representing that a part, replacement, or repair service is needed when it is not.
- (16) Representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not.
- (17) Representing that the consumer will receive a rebate, discount, or other economic benefit, if the earning of the benefit is contingent on an event to occur subsequent to the consummation of the transaction.
- (18) Misrepresenting the authority of a salesperson, representative, or agent to negotiate the final terms of a transaction with a consumer.
- (19) Inserting an unconscionable provision in the contract.
- (20) Advertising that a product is being offered at a specific price plus a specific percentage of that price unless (A) the total price is set forth in the advertisement, which may include, but is not limited to, shelf tags, displays, and media advertising, in a size larger than any other price in that advertisement, and (B) the specific price plus a specific percentage of that price represents a markup from the seller's costs or from the wholesale price of the product. This subdivision shall not apply to in-store advertising by businesses that are open only to members or cooperative organizations organized pursuant to Division 3 (commencing with Section 12000) of Title 1 of the Corporations Code where more than 50 percent of purchases are made at the specific price set forth in the advertisement.
- (21) Selling or leasing goods in violation of Chapter 4 (commencing with Section 1797.8) of Title 1.7.
- (22) (A) Disseminating an unsolicited prerecorded message by telephone without an unrecorded, natural voice

first informing the person answering the telephone of the name of the caller or the organization being represented, and either the address or the telephone number of the caller, and without obtaining the consent of that person to listen to the prerecorded message.

(B) This subdivision does not apply to a message disseminated to a business associate, customer, or other person having an established relationship with the person or organization making the call, to a call for the purpose of collecting an existing obligation, or to any call generated at the request of the recipient.

(23) (A) The home solicitation, as defined in subdivision (h) of Section 1761, of a consumer who is a senior citizen where a loan is made encumbering the primary residence of that consumer for purposes of paying for home improvements and where the transaction is part of a pattern or practice in violation of either subsection (h) or (i) of Section 1639 of Title 15 of the United States Code or paragraphs (1), (2), and (4) of subdivision (a) of Section 226.34 of Title 12 of the Code of Federal Regulations.

(B) A third party shall not be liable under this subdivision unless (i) there was an agency relationship between the party who engaged in home solicitation and the third party, or (ii) the third party had actual knowledge of, or participated in, the unfair or deceptive transaction. A third party who is a holder in due course under a home solicitation transaction shall not be liable under this subdivision.

(24) (A) Charging or receiving an unreasonable fee to prepare, aid, or advise any prospective applicant, applicant, or recipient in the procurement, maintenance, or securing of public social services.

(B) For purposes of this paragraph, the following definitions shall apply:

(i) "Public social services" means those activities and functions of state and local government administered or supervised by the State Department of Health Care Services, the State Department of Public Health, or the State Department of Social Services, and involved in providing aid or services, or both, including health care services, and medical assistance, to those persons who, because of their economic circumstances or social condition, are in need of that aid or those services and may benefit from them.

(ii) "Public social services" also includes activities and functions administered or supervised by the United States Department of Veterans Affairs or the California Department of Veterans Affairs involved in providing aid or services, or both, to veterans, including pension benefits.

(iii) "Unreasonable fee" means a fee that is exorbitant and disproportionate to the services performed. Factors to be considered, if appropriate, in determining the reasonableness of a fee, are based on the circumstances existing at the time of the service and shall include, but not be limited to, all of the following:

(I) The time and effort required.

(II) The novelty and difficulty of the services.

(III) The skill required to perform the services.

(IV) The nature and length of the professional relationship.

(V) The experience, reputation, and ability of the person providing the services.

(C) This paragraph shall not apply to attorneys licensed to practice law in California, who are subject to the California Rules of Professional Conduct and to the mandatory fee arbitration provisions of Article 13 (commencing with Section 6200) of Chapter 4 of Division 3 of the Business and Professions Code, when the fees charged or received are for providing representation in administrative agency appeal proceedings or court proceedings for purposes of procuring, maintaining, or securing public social services on behalf of a person or group of persons.

(25) (A) Advertising or promoting any event, presentation, seminar, workshop, or other public gathering regarding veterans' benefits or entitlements that does not include the following statement in the same type size and font as the term "veteran" or any variation of that term:

(i) "I am not authorized to file an initial application for Veterans' Aid and Attendance benefits on your behalf, or to represent you before the Board of Veterans' Appeals within the United States Department of Veterans Affairs in any proceeding on any matter, including an application for such benefits. It would be illegal for me to accept a fee for preparing that application on your behalf." The requirements of this clause do not apply to a person licensed to act as an agent or attorney in proceedings before the Agency of Original Jurisdiction and the Board of Veterans' Appeals within the United States Department of Veterans Affairs when that person is offering those services at the

advertised event.

(ii) The statement in clause (i) shall also be disseminated, both orally and in writing, at the beginning of any event, presentation, seminar, workshop, or public gathering regarding veterans' benefits or entitlements.

(B) Advertising or promoting any event, presentation, seminar, workshop, or other public gathering regarding veterans' benefits or entitlements that is not sponsored by, or affiliated with, the United States Department of Veterans Affairs, the California Department of Veterans Affairs, or any other congressionally chartered or recognized organization of honorably discharged members of the Armed Forces of the United States, or any of their auxiliaries that does not include the following statement, in the same type size and font as the term "veteran" or the variation of that term:

"This event is not sponsored by, or affiliated with, the United States Department of Veterans Affairs, the California Department of Veterans Affairs, or any other congressionally chartered or recognized organization of honorably discharged members of the Armed Forces of the United States, or any of their auxiliaries. None of the insurance products promoted at this sales event are endorsed by those organizations, all of which offer free advice to veterans about how to qualify and apply for benefits."

(i) The statement in this subparagraph shall be disseminated, both orally and in writing, at the beginning of any event, presentation, seminar, workshop, or public gathering regarding veterans' benefits or entitlements.

(ii) The requirements of this subparagraph shall not apply in a case where the United States Department of Veterans Affairs, the California Department of Veterans Affairs, or other congressionally chartered or recognized organization of honorably discharged members of the Armed Forces of the United States, or any of their auxiliaries have granted written permission to the advertiser or promoter for the use of its name, symbol, or insignia to advertise or promote the event, presentation, seminar, workshop, or other public gathering.

(26) Advertising, offering for sale, or selling a financial product that is illegal under state or federal law, including any cash payment for the assignment to a third party of the consumer's right to receive future pension or veteran's benefits.

(27) Representing that a product is made in California by using a Made in California label created pursuant to Section 12098.10 of the Government Code, unless the product complies with Section 12098.10 of the Government Code.

(28) Advertising, offering to engage in, or engaging in sexual orientation change efforts with an individual.

(b) (1) It is an unfair or deceptive act or practice for a mortgage broker or lender, directly or indirectly, to use a home improvement contractor to negotiate the terms of any loan that is secured, whether in whole or in part, by the residence of the borrower and that is used to finance a home improvement contract or any portion of a home improvement contract. For purposes of this subdivision, "mortgage broker or lender" includes a finance lender licensed pursuant to the California Finance Lenders Law (Division 9 (commencing with Section 22000) of the Financial Code), a residential mortgage lender licensed pursuant to the California Residential Mortgage Lending Act (Division 20 (commencing with Section 50000) of the Financial Code), or a real estate broker licensed under the Real Estate Law (Division 4 (commencing with Section 10000) of the Business and Professions Code).

(2) This section shall not be construed to either authorize or prohibit a home improvement contractor from referring a consumer to a mortgage broker or lender by this subdivision. However, a home improvement contractor may refer a consumer to a mortgage lender or broker if that referral does not violate Section 7157 of the Business and Professions Code or any other law. A mortgage lender or broker may purchase an executed home improvement contract if that purchase does not violate Section 7157 of the Business and Professions Code or any other law. Nothing in this paragraph shall have any effect on the application of Chapter 1 (commencing with Section 1801) of Title 2 to a home improvement transaction or the financing of a home improvement transaction.

Date of Hearing: April 10, 2018

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
AB 2943 (Low) – As Amended March 23, 2018

SUBJECT: UNLAWFUL BUSINESS PRACTICES: SEXUAL ORIENTATION EFFORTS

KEY ISSUE: SHOULD ADVERTISING, OFFERING TO ENGAGE IN, OR ENGAGING IN SEXUAL ORIENTATION CHANGE EFFORTS BE CONSIDERED AN UNLAWFUL BUSINESS PRACTICE IN CALIFORNIA?

SYNOPSIS

According to information provided by the author's office and reflected in the uncodified findings and declarations of this bill, the American Psychiatric Association, American Psychological Association, American Counseling Association, National Association of Social Workers, and American Medical Association, among other professional medical and mental health organizations and professional associations, oppose the practice of sexual orientation change efforts (SOCE) on the basis that it is not evidence-based and is potentially harmful to a patient's mental health. Current California law defines "sexual orientation change efforts," commonly known as conversion therapy, as "any practices by mental health providers that seek to change an individual's sexual orientation, including efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex." California first banned sexual orientation change efforts with SB 1172 (Lieu, Ch. 835, Stats. 2012, which prohibited a "mental health provider" from conducting any "sexual orientation change efforts" with any patient under 18 years of age.

The Ninth Circuit Court of Appeals upheld SB 1172 against a variety of constitutional challenges made by practitioners of SOCE, organizations that advocate for SOCE, as well as children who were undergoing SOCE and their parents in two separate cases that were consolidated in one published decision. Pickup v. Brown (9th Cir. 2014) 740 F.3d. 1208 held that, "as a regulation of professional conduct, [SB 1172] does not violate the free speech rights of SOCE practitioners or minor patients, is neither vague nor overbroad, and does not violate parents' fundamental rights." The analysis concludes that, in light of the court's holding in Pickup, the provisions of this bill would also pass constitutional muster.

This bill seeks to extend SB 1172's prohibition on sexual orientation change efforts beyond those provided by mental health providers to minors. First, it seeks to apply the prohibition on the performance of SOCE to all persons, regardless of age. Second, it seeks to make SB 1172's prohibition applicable to all persons who engage in transactions resulting in or intended to result in a sale or lease of goods or services. Finally, it seeks to restrict advertising and offering of SOCE. However, as the analysis explains, it is arguably somewhat unclear whether the bill does, in fact, prohibit the act of performing SOCE on all persons, as the author intends. The analysis suggests that the author may wish to clarify, perhaps in one or more other code sections, that SOCE itself is unlawful. If that were the case, then the bill's proposed amendments to prohibit advertising or offering SOCE, would be even more closely tailored to the bill's goals and there would be an even stronger argument that the bill does not restrict commercial speech in an unconstitutional manner.

The bill is co-sponsored by Equality California, the National Center for Lesbian Rights, and The Trevor Project and is supported by a large number of LGBTQ advocacy organizations, professional medical and psychological associations, and civil liberty advocates. It is opposed by a large number of providers of SOCE. The bill was recently approved by the Assembly Privacy and Consumer Protection Committee, where it passed by a vote of 8-2.

SUMMARY: Makes sexual orientation change efforts, as defined by the bill, an unlawful business practice under the state's Consumer Legal Remedies Act (CLRA). Specifically, **this bill:**

- 1) Defines "Sexual orientation change efforts" to mean 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) Clarifies that "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.
- 3) States that the following, 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, is an unfair method of competition and an unfair or deceptive act or practice that is unlawful pursuant to the Consumer Legal Remedies Act (CLRA): Advertising, offering to engage in, or engaging in sexual orientation change efforts with an individual.

EXISTING LAW:

- 1) Defines "Mental health provider" to mean 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. (Business and Professions Code (BPC) Section 865 (a).)
- 2) Defines "sexual orientation change efforts" to mean 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. (*Id.*, at (b)(1).)
- 3) Exempts from the definition of "Sexual orientation change efforts" 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. (*Id.*, at (b)(2).)

- 4) Provides that under no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age. (BPC Section 865.1.)
- 5) Provides that 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. (BPC Section 865.2.)
- 6) Prohibits, under the CLRA, any unfair methods of competition, acts or practices by any person which either results in or is intended to result in the sale or lease of goods or services to any consumer. (Civil Code Section 1770. All further statutory references are to this code, unless otherwise indicated.)
- 7) Provides, under the CLRA, that any consumer who suffers damage as a result of a practice declared to be unlawful under the CLRA may bring an action against that person to recover damages, as specified, and allows for a class action suit to be filed on behalf of a class of consumers adversely affected by an unfair method of competition, act or practice. (Sections 1780, 1781.)
- 8) Requires, under the CLRA, thirty days or more prior to the commencement of an action for *damages*, the consumer to do the following:
 - a) Notify the person alleged to have employed or committed methods, acts, or practices that are alleged to be violations of the CLRA in writing (sent by certified or registered mail, return receipt requested, to the place where the transaction occurred or to the person's principal place of business within California). (Section 1782 (a).)
 - b) Demand that the person correct, repair, replace, or otherwise rectify the goods or services alleged to be in violation of the CLRA. (Section 1782 (a).)
- 9) Prohibits, under the CLRA, any action for damages if an appropriate correction, repair, replacement, or other remedy is given, or agreed to be given within a reasonable time, to the consumer within 30 days after receipt of the notice. (Section 1782 (b).)
- 10) Prohibits, under the CLRA, any action for damages upon a showing by a person alleged to have employed or committed methods, acts, or practices declared unlawful by the CLRA that all of the following exist:
 - a) All consumers similarly situated have been identified, or a reasonable effort to identify such other consumers has been made.
 - b) All consumers so identified have been notified that upon their request the person shall make the appropriate correction, repair, replacement, or other remedy of the goods and services.
 - c) The correction, repair, replacement, or other remedy requested by the consumers has been, or, in a reasonable time, shall be, given.

- d) The person has ceased from engaging, or if immediate cessation is impossible or unreasonably expensive under the circumstances, the person will, within a reasonable time, cease to engage, in the methods, act, or practices. (Section 1782 (c).)
- 11) Allows, under the CLRA, an action for injunctive relief to be commenced without compliance with 8), above, and allows a consumer to amend his or her complaint without leave of court to include a request for damages 30 days after the commencement of an action for injunctive relief after compliance with 8), above. (Section 1782 (d).)
- 12) Specifies that attempts to comply with the CLRA by a person receiving a demand shall be construed to be an offer to compromise and shall be inadmissible as evidence pursuant to Section 1152 of the Evidence Code, but that such attempts to comply with a demand shall not be considered an admission of engaging in an act or practice declared unlawful by the CLRA and that evidence of compliance or attempts to comply with this section may be introduced by a defendant for the purpose of establishing good faith or to show compliance with the CLRA. (Section 1782 (d).)
- 13) Makes numerous legislative findings and declarations, based upon contemporary scientific research and policy positions of mainstream professional medical and psychological associations, about the adverse consequences—including severe impact to physical and mental health--caused when mental health professionals attempt to change a person's sexual orientation by treating the person as if they had a mental illness or psychological condition that could and should be changed in the therapeutic process.

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

COMMENTS: This bill seeks to ban both the practice of sexual orientation change efforts (SOCE, also commonly called conversion therapy), and the advertising or offering of SOCE services. As the American College of Physicians has explained, “The core basis for “conversion,” “reorientation,” or “reparative” therapy, which is generally defined as therapy aimed at changing the sexual orientation of lesbian women and gay men, is mostly based on religious or moral objections to homosexuality or the belief that a homosexual person can be “cured” of their presumed illness. According to the author, SOCE is ineffective and harmful:

Study after study has shown that conversion therapy is ineffective, damaging, and counterproductive. It is our duty to protect Californians from such deceptive practices that will expose them to physical and emotional harm. AB 2943 would make clear that claiming to be able to change a person's sexual orientation by advertising or engaging in sexual orientation change efforts is a fraudulent business practice that misleads consumers and exposes LGBT people to damaging psychological abuse.

Conversion Therapy - Background. According to information provided by the author's office and reflected in the uncodified findings and declarations of this bill, the American Psychiatric Association, American Psychological Association, American Counseling Association, National Association of Social Workers, and American Medical Association, among other professional medical and mental health organizations and professional associations, oppose the practice of SOCE on the basis that it is not evidence-based and is potentially harmful to a patient's mental health. For example, the American College of Physicians in 2015 explained the College's opposition to the use of SOCE for the treatment of LGBT persons as follows:

In 2007, the American Psychological Association conducted a literature review of 83 studies on the efficacy of efforts to change sexual orientation. It found serious flaws in the research methods of most of the studies and identified only [one] study that met research standards for establishing safety or efficacy of conversion therapy and also compared persons who received a treatment with those who did not. In that study, intervention had no effect on the rates of same-sex behavior, so it is widely believed that there is no scientific evidence to support the use of reparative therapy. [...]

Available research does not support the use of reparative therapy as an effective method in the treatment of LGBT persons. Evidence shows that the practice may actually cause emotional or physical harm to LGBT individuals, particularly adolescents or young persons. Research done at San Francisco State University on the effect of familial attitudes and acceptance found that LGBT youth who were rejected by their families because of their identity were more likely than their LGBT peers who were not rejected or only mildly rejected by their families to attempt suicide, report high levels of depression, use illegal drugs, or be at risk for HIV and sexually transmitted illnesses. The American Psychological Association literature review found that reparative therapy is associated with the loss of sexual feeling, depression, anxiety, and suicidality. (American College of Physicians, *Lesbian, Gay, Bisexual, and Transgender Health Disparities: Executive Summary of a Policy Position Paper From the American College of Physicians*, *Ann Intern Med.* (2015) [internal citations omitted], found at <http://annals.org/aim/fullarticle/2292051/lesbian-gay-bisexual-transgender-health-disparities-executive-summary-policy-position>.)

California was the first state in the nation to prohibit SOCE by mental health professionals with minors. Since then, 21 states and the District of Columbia have passed laws that prohibit or regulate SOCE. According to the National Conference of State Legislatures, legislation that, similar to SB 1172, prohibits or limits SOCE by mental health care professionals with minors, is pending in 11 states.

Existing law (SB 1172)—Upheld on Constitutional Grounds. Existing California law defines “sexual orientation change efforts” as “any practices by mental health providers that seek to change an individual’s sexual orientation, including efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex.” (BPC Section 865 (b)(1).) California banned sexual orientation change efforts *by* some persons *with* some other persons in 2012, when SB 1172 (Lieu, Ch. 835, Stats. 2012) became law, the first such law in the nation. Specifically, SB 1172 prohibits a “mental health provider” (defined as 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) from conducting any “sexual orientation change efforts” with any patient under 18 years of age. SB 1172 also provides that any such sexual orientation change efforts by a mental health provider involving a patient under 18 years of age is unprofessional conduct and subjects the provider to discipline by the provider’s licensing entity. (BPC Section 865-865.2.)

The Ninth Circuit Court of Appeals upheld SB 1172 against a variety of constitutional challenges made by practitioners of SOCE, organizations that advocate for SOCE, as well as children who were undergoing SOCE and their parents in two separate cases—*Pickup v. Brown* and *Welch v. Brown*—in one published decision: *Pickup v. Brown* (9th Cir. 2014) 740 F.3d. 1208. It held that, “as a regulation of professional conduct, [SB 1172] does not violate the free speech rights of SOCE practitioners or minor patients, is neither vague nor overbroad, and does not violate parents’ fundamental rights.” (*Id.*, at p. 1222.)

First Amendment—Freedom of Speech. The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” (U.S. Const., amend. I.) The *Pickup* decision found that SB 1172 regulates conduct, rather than speech, because SB 1172 was fundamentally concerned with the inherently private advice given by practitioners to patients, and the Legislature’s determination—based upon the judgement of numerous well-respected professional organizations and scientific studies that specific advice, namely being sexually attracted to a person of the same sex is a sign of a mental disorder that can and should be treated—rather than the regulation of a medical professional’s communication to the public on a matter of public concern for which the First Amendment offers the greatest protection. (*Id.*, at p. 1229.) The court also noted that “doctors are routinely held liable for giving negligent medical advice to their patients, without serious suggestion that the First Amendment protects their right to give advice that is not consistent with the accepted standard of care” and are subject to loss of their licenses for doing so. (*Id.*, at p. 1228.) The court also pointed out that many forms of speech are not affected by SB 1172: “the law *allows* discussions about treatment, recommendations to obtain treatment, and expressions of opinions about SOCE and homosexuality.” (*Ibid* [emphasis in original].) At the same time, the court seemed to focus on the fact that SB 1172, unlike other laws deemed to violate the First Amendment, did not regulate “(1) political speech (2) by ordinary citizens.” (*Id.*, at p. 1230.) It concluded that, “Because SB 1172 regulates only treatment, while leaving mental health providers free to discuss and recommend, or recommend against” SOCE, and “any effect it may have on free speech interests is merely incidental” that “SB 1172 is subject to only rational basis review and must be upheld if it bears a rational relationship to a legitimate state interest.” (*Id.*, at p. 1231.) Applying that standard to SB 1172, “[w]e ask only whether there are plausible reasons for [the legislature’s] action, and if there are, our inquiry is at an end. Therefore, we hold that SB 1172 is rationally related to the legitimate government interest of protecting the well-being of minors.” (*Id.*, at p. 1232.)

First Amendment—Freedom of Association. The First Amendment protects “intimate human relationships, which are implicated in personal decisions about marriage, childbirth, raising children, cohabiting with relatives, and the like” which “receives protection as a fundamental element of personal liberty.” (*Pickup v. Brown, supra*, 740 F.3d. at p. 1233.) While the Plaintiffs in *Pickup* claimed that infringement, the Ninth Circuit observed that partly because the therapist-client relationship “lasts only as long as the client is willing to pay the fee,” the First Amendment’s protection of the freedom of association does not encompass the therapist-patient relationship. (*Ibid.*)

First Amendment—Free Exercise of Religion. According to the United States Supreme Court, the “protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious

reasons.” (*Church of Lukumi Babalu Aye v. City of Hialeah* (1993) 508 U.S. 520, 532.) When *Pickup* was remanded to the California Eastern District Court, that court dismissed the plaintiffs’ claims that SB 1172 infringed on the free exercise of their religion, finding that “the policy is generally applicable, neutral, and does not regulate plaintiffs’ beliefs as such. Under that level of scrutiny, plaintiffs’ free exercise claim must fail because, for the all of the reasons articulated in the context of the free speech claim, the policy is rationally related to a legitimate governmental interest.” (*Pickup v. Brown* 2015 U.S. Dist. LEXIS 123881, at p. 18.)

Vagueness. “It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108.) Nevertheless, “perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.” (*Ward v. Rock Against Racism* (1989) 491 U.S. 781, 794.) The plaintiffs in *Pickup* argued that they could “ascertain where the line is between what is prohibited and what is permitted—for example, they wonder whether the mere dissemination of information about SOCE would subject them to discipline” but the Ninth Circuit held that “the text of SB 1172 is clear to a reasonable person.” (*Pickup v. Brown, supra*, 740 F.3d at p. 1234 [citations omitted].)

Discipline attaches only to “practices” that “seek to change” a minor “patient[’s]” sexual orientation. Cal. Bus. & Prof. Code §§ 865-865.1. A reasonable person would understand the statute to regulate only mental health treatment, including psychotherapy, that aims to alter a minor patient’s sexual orientation. Although Plaintiffs present various hypothetical situations to support their vagueness challenge, the Supreme Court has held that “speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications. (*Ibid.*)

The Ninth Circuit also reasoned that because “SB 1172 regulates licensed mental health providers, who constitute ‘a select group of persons having specialized knowledge, the standard for clarity is lower. . . . Indeed, it is hard to understand how therapists who identify themselves as SOCE practitioners can credibly argue that they do not understand what practices qualify as SOCE.” (*Ibid.*)

Parents’ Fundamental Rights. Parents have a constitutionally protected right to make decisions regarding the care, custody, and control of their children, but that right is limited. (*Fields v. Palmdale Sch. Dist.* (9th Cir. 2005) 427 F.3d 1197, 1204.) Whether setting curfew times, requiring school uniforms, mandating vaccinations, or mandating medical care to which the parent of the child objects for religious or philosophical reasons, states may enact laws that limit parental rights when the physical or mental health of the child is jeopardized. (*Pickup v. Brown, supra*, 740 F.3d at p. 1235.) The Ninth Circuit found that SB 1172 was just such a law and that “the fundamental rights of parents do not include the right to choose a specific type of provider for a specific medical or mental health treatment that the state has reasonably deemed harmful.” (*Id.*, at p. 1236.)

Ongoing Conflicts and Controversy About SOCE. In February 2016, the Human Rights Campaign, National Center for Lesbian Rights, and Southern Poverty Law Center filed a consumer fraud complaint with the Federal Trade Commission against People Can Change, a major provider of conversion therapy. The complaint alleges that People Can Change’s advertisements and business practices—which expressly and implicitly claim that they can

change a person’s sexual orientation or gender identity—constitute deceptive, false, and misleading practices and can cause serious harm to consumers, in violation of Section 5 of the Federal Trade Commission Act.

In apparent response, The National Task Force for Therapy Equality, which describes itself as “a coalition of licensed psychotherapists, psychiatrists, physicians, public policy organizations, and psychotherapy clients/patients from across the United States of America,” filed its own complaint with the FCC in order to “secure therapy equality for clients that experience distress over unwanted same-sex attractions and gender identity conflicts.” The counter-complaint alleges that the three organizations who filed the February 2016 FTC complaint “have been actively working together for at least five years in a deceptive and fraudulent hate campaign with the goal of deceiving law makers on the state, federal, and international level to enact legislation to ban licensed psychotherapy for clients (minors) that experience unwanted same-sex attractions and gender identity conflicts.” (National Task Force for Therapy Equality, “*In Their Own Words Lies, Deception and Fraud*” (May 2, 2017), Report to the FTC, accessed April 5, 2018:

<https://www.voiceofthevoiceless.info/wp-content/uploads/2017/05/In-Their-Own-Words-Lies-Deception-and-Fraud-National-Task-Force-Complaint-to-the-Federal-Trade-Commission.pdf>.)

Although the complainants allege that the three organizations have engaged in “libelous, slanderous, deceptive, and misleading actions against the complainants and other SOCE proponents, they apparently have never sued the three organizations and sought an injunction or damages for such allegedly tortious and illegal conduct.

This bill seeks to extend SB 1172’s prohibition on sexual orientation change efforts. While existing state law makes it illegal for licensed mental health providers to engage in SOCE with minors, the practice is lawful for mental health providers (and all other lay and professional practitioners) to conduct with consenting adults. This bill seeks to extend the prohibition of SB 1172 in several ways. First, it seeks to apply the prohibition on the performance of SOCE to all persons, regardless of age. Second, it 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. Finally, this bill seeks to prohibit the “advertising or offering” of SOCE, as well as SOCE itself.

Thus, unlike the SB 1172, this bill would apply to *all persons*, including but not limited to mental health providers, who engage in SOCE on a commercial basis, as well as the advertising and offering of such services. As explained in more detail below, the bill is unusual in that it seeks to amend the state’s Consumer Legal Remedies Act (CLRA) by prohibiting the advertising of an act while also seeking to prohibit the act itself. Existing provisions of the CLRA regulate commercial activities, including the advertising and offering of products and services for sale, but the underlying products and services themselves are legal; they just cannot be advertised in a deceptive or misleading manner.

SB 1172 Compared to This Bill—Constitutional Similarities and Differences. The reasoning of the *Pickup* court is likely applicable, at least to some extent, to the analysis of this bill and whether it would also withstand similar constitutional challenges from those who advocate for the ability of licensed and unlicensed practitioners to provide SOCE to the public at large.

First Amendment—Freedom of Speech. The *Pickup* decision found that SB 1172 regulates conduct, rather than speech, for several reasons, including the facts that SB 1172 was fundamentally concerned with the inherently private advice given by practitioners to patients, rather than the regulation of a medical professional’s communication to the public on a matter of

public concern for which the First Amendment offers the greatest protection; doctors are routinely held liable for giving negligent medical advice and are subject to loss of licensure for giving advice that is not consistent with the accepted standard of care; and many forms of speech are not affected by SB 1172, which *allows* discussions about treatment, recommendations to obtain treatment, and expressions of opinions about SOCE and homosexuality. Virtually all of these facts are also true about this bill: SOCE, by its nature, is focused on one individual's sexual orientation rather than being communicated to the public at large; the conduct of purveyors of goods and services, like the conduct of licensed health care professionals, are routinely subject to regulation; and this bill also allows discussion *about* SOCE (other than advertising and offering such services), as long as SOCE itself is not attempted.

By making the acts of “advertising” or “offering to engage in . . . sexual orientation change efforts” this bill potentially raises First amendment concerns by restricting commercial speech and advertising rights. While commercial speech is a type of content-based restriction, and content-based restrictions ordinarily receive strict scrutiny analysis under the First Amendment jurisprudence of the U.S. Supreme Court, the Supreme Court has held that the First Amendment accords commercial speech lesser protection than other constitutionally guaranteed expression. This is in part because, unlike other varieties of speech, speech proposing a commercial transaction occurs in an area traditionally subject to governmental regulation. (*Central Hudson Gas & Elec. Corp. v. Public Service Commission* (1980) 447 U.S. 557, 562-63.) Ultimately, the First Amendment prohibits commercial speech against “unwarranted” governmental regulation. However, only truthful, non-misleading speech is protected by the First Amendment as commercial speech.

The U.S. Supreme Court has articulated a four-prong test by which commercial speech regulations are evaluated for constitutionality. This test asks: (1) whether the expression concerns lawful activity and is not misleading; (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether it is not more extensive than is necessary to achieve that interest. (*Central Hudson Gas & Elec. Corp., supra*, 447 U.S. at p. 351.)

Here, on the **first prong**, given the information memorialized in the legislative findings and declarations of the bill it is arguably misleading to advertise SOCE for all individuals because claims that homosexuality is a trait that can be “converted” or “repaired” in an individual have been overwhelmingly discredited by the mainstream scientific community. On the **second prong**, the important government interests of this bill are reflected in the bill's findings and declarations: California not only has an important interest in protecting the physical and psychological well-being of LGBT individuals, but also 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. On the **third prong**, by ensuring that sexual orientation change efforts are expressly listed as an unlawful business practice under the state's CLRA, discouraging the advertisements of these paid services in their first instance, and giving defrauded consumers legal recourse against those who violate the law, this bill would directly advance its two stated governmental interests.

As with most commercial speech regulations, the ultimate determination of constitutionality may hinge upon the **fourth prong**. Recent Supreme Court jurisprudence suggests that while the regulation chosen does not have to be the least restrictive alternative, it must use a means that is substantially related to the desired objective. (See e.g. *Greater New Orleans Broadcasting Assn.*

v. U.S. (1999) 527 U.S. 173 and *Thompson v. Western States Med. Center* (2002) 535 U.S. 357.) Here, the bill does not apply to non-commercial activities, and therefore would seem to exempt religious and moral counselors who are unpaid. Furthermore, it specifically excludes certain activities from the definition of “sexual orientation change efforts,” making it clear that “sexual orientation change efforts” do not include psychotherapies that both: (1) 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 (2) do not seek to change sexual orientation. In other words, psychotherapy efforts that seek to help a person struggling with their sexual identity would continue to be permitted under this bill if the efforts are to help support a person to better understand his or her own sexual orientation and, critically, do not seek to change that person’s sexual orientation. For these reasons, the bill appears to be no more extensive than necessary to achieve its desired objectives.

First Amendment—Free Exercise of Religion. The policy of this bill may be objectionable to some on the basis of religion or morality. However, the bill itself “is generally applicable, neutral, and does not regulate plaintiffs’ beliefs as such.” (*Pickup v. Brown* 2015 U.S. Dist. LEXIS 123881, at p.18.) It does not discriminate “against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons” and would not trigger the type of strict scrutiny described by the U.S. Supreme Court in *Church of Lukumi Babalu Aye v. City of Hialeah*, described above. Therefore, using the Ninth Circuit’s deferential standard of rational review that it applied to SB 1172, this bill would certainly seem to meet the test of advancing a policy that is rationally related to a legitimate governmental interest and would therefore survive a challenge on the basis that it violates the First Amendment’s protection for the free exercise of religion.

Furthermore, the bill should have no impact on the ability of unpaid would-be counselors, including religious or spiritual advisors and anyone else who attempts to counsel other persons to change their sexual orientation, as long as such efforts are conducted on an unpaid basis. Assuming that counseling services are not offered as part of a transaction intended to result in, or that results in, the sale or services for SOCE, those services could lawfully continue to be provided, advertised, and offered under the provisions of the bill.

Vagueness. The bill uses very general terms to describe SOCE. It defines SOCE as follows:

[A]ny 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.

SB 1172 used similarly general terms when it defined SOCE:

[A]ny 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. (BPC Section 865 (b)(1).)

The only difference between the two definitions is that SB 1172 includes a description of *who* provides the SOCE and this bill does not. Otherwise, the definitions are identical. So if SB 1172 were not unconstitutionally vague, this bill is also likely to withstand a vagueness challenge.

It should be noted that the Ninth Circuit pointed out in *Pickup* that “SB 1172 regulates licensed mental health providers, who constitute ‘a select group of persons having specialized knowledge, the standard for clarity is lower’” (*Pickup v. Brown, supra*, 740 F.3d at p. 1234), which is not the case in this bill, given that it applies to a much more broad group of practitioners, including those who are not licensed and may not be highly educated or regulated. However, it would still be true that persons “who identify themselves as SOCE practitioners” including those who are not licensed or highly educated, could not “credibly argue that they do not understand what practices qualify as SOCE.” (*Ibid.*) The Ninth Circuit seems to imply that everyone knows what SOCE is. The fact that so many organizations and individuals have weighed in on the merits of this bill—both positively and negatively—seems to indicate that they all know exactly what conduct this bill intends to prohibit.

The CLRA - Possible Issues With Amending it to Prohibit SOCE Conduct. The Legislature has long considered consumer protection to be a matter of high public importance. State law is replete with statutes aimed at protecting California consumers from unfair, dishonest, or harmful market practices. The CLRA (Civ. Code Sec. 1750 *et seq.*), for example, was enacted “to protect the statute’s beneficiaries from deceptive and unfair business practices,” and to provide aggrieved consumers with “strong remedial provisions for violations of the statute.” (*Am. Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 11.) The CLRA defines a number of generic acts of advertising or promoting goods and services as “unfair methods of competition and unfair or deceptive acts or practices,” such as “[m]isrepresenting the source, sponsorship, approval, or certification of goods or services” (Civil Code Section 1770(a)(2).) It also lists a number of specific ways that goods can be falsely advertised or represented, such as by violating the Made in California labeling law. (*Id.*, at (a)(27)). Therefore, the CLRA therefore already prohibits many forms of deception or misleading advertising, which is one type of conduct related to SOCE that this bill seeks to prohibit. However, the CLRA does not make any underlying conduct (i.e. manufacturing a good that is advertised as being “Made in California” in a State outside California) illegal, as this bill intends to do.

Civil Code 1770, the CLRA, starts with the following language (which applies to all the acts of advertising and representation listed below):

(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 . . .

While Section 1170 (a) includes “acts and practices” in the first half of its introductory statement, the second half of that statement clarifies that only those “acts or practices” which are “intend to result or that results in the sale of goods or services to any consumer” (in other words, the acts or practices of advertising) are prohibited. It may be somewhat confusing, therefore, to attempt to ban the act of engaging in SOCE by including SOCE itself within the CLRA; the “act or practice” of SOCE is not “intended to result . . . in the sale of good or services to any consumer.” Rather, the reverse is true. The *advertising* of SOCE is intended to result in the *sale* of SOCE *services* to the consumer. So it may not be logical (or effective) to attempt to prohibit the act of engaging in SOCE by amending the CLRA.

Furthermore, supporters of the bill argue that it may already be a violation of the CLRA for a licensed therapist to promote or recommend SOCE. According to supporters of the bill, consumers have already successfully brought civil actions about SOCE providers under the

CLRA. For example, the National Center for Lesbian Rights writes in support of the bill as follows:

Last year, our client Katherine McCobb filed suit in California state court against her former psychotherapist due to the therapist's fraudulent and dangerous misrepresentations during paid counseling sessions that Ms. McCobb's sexual orientation as a lesbian was pathological, and that counseling from the therapist and participation in the group therapy sessions he administered would enable her to become heterosexual. . . Ms. McCobb brought the case under the California Consumers Legal Remedies Act, Unfair Competition Law, and common law, all of which prohibit unfair, fraudulent, and deceptive business practices. Cal. Bus. & Prof. Code § 17200 et seq.; Cal. Civ. Code § 1770(a). The Court overruled the therapist's demurrer to the complaint, determining that Ms. McCobb alleged sufficient facts to support these causes of action.

Without knowing details of Ms. McCobb's complaint, it is impossible to say with certainty how she formulated her claim under the CLRA, but it would be possible to argue that a licensed psychotherapist violated the CLRA in several ways by *recommending* SOCE, its efficacy, or its benefits (even to a consenting adult, which would not violate SB 1172):

- Misrepresenting the source, sponsorship, approval, or certification of goods or services (i.e. misrepresenting that SOCE was approved by a specific professional association) in violation of Section 1770 (a)(2)
- Misrepresenting the affiliation, connection, or association with, or certification by, another (i.e. misrepresenting that the psychologist was certified by a specific professional association to conduct SOCE) in violation of Section 1770 (a)(3)
- Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have (i.e. misrepresenting that a patient's sexual orientation as a lesbian is pathological and that SOCE can "cure" it) in violation of Section 1770 (a)(5)

In order to eliminate questions about the effect of the bill's proposed amendments to the CLRA, and achieve the author's and sponsors' goal of banning the commercial activity of SOCE by all persons with all persons, the author may wish to consider amending one or more other sections of existing law (perhaps by amending the language of SB 1172 itself to prohibit licensed mental health providers from conducting SOCE with all persons), or adding a new provision to the law, outside the CLRA, that clearly prohibits such conduct. In that case, it would still be appropriate to retain the bill's advertising and offering provisions within the CLRA.

ARGUMENTS IN SUPPORT: The National Center for Lesbian Rights observes, in support of the bill, that AB 2943 merely clarifies existing law that the advertising of SOCE is a deceptive or misleading act: "This bill would codify existing California laws that already protect consumers from false and deceptive practices such as conversion therapy. Doing so is important so that consumers know upfront, before they are defrauded, that these practices are fraudulent and also so that those who have already been defrauded are aware they have a remedy."

The Trevor Project and numerous other LGBTQ advocacy organizations focus on the harmful and ineffective impact of SOCE: "Conversion therapy does not have a scientific standing. Every major medical and mental health organization has stated that the treatment of conversion therapy

is ineffective and potentially harmful. Conversion therapists are stealing from hard working American families who have their best interest of their children at heart. This is consumer fraud and California courts and the highest courts in the land have agreed on this point time and time again.”

ARGUMENTS IN OPPOSITION: Many opponents allege that the bill violates the First Amendment, among other constitutional rights. For example, Concerned Women for America of California (CWAC) writes that it is opposed to AB 2943 because it “prohibits speech, a serious First Amendment infringement, between counselors and their clients seeking help with unwanted sexual orientation and gender identity issues. Further, it, at the least, puts in question the sale of books, participation in events, and related activities.”

Opponents also observe that the bill interferes with the ability of some persons who wish to undergo SOCE to do so. The American College of Pediatricians (ACP) likewise points out that “Everyone should be free to find therapy and support to help them achieve their desired goals and outcomes, including those who want to explore all options regarding feelings of same-sex attraction and gender identity confusion.” Similarly, CWAC points out that some individuals may want to participate in SOCE and AB 2493 takes that option away from them: “The state would be inappropriately intruding in private counseling situations – counseling that has helped thousands achieve the goals the patient is seeking. Denying this therapy, which has had well-documented success, is not the role of government.”

Contrary to many of the larger professional medical and mental health associations that support the bill and are mentioned in the bill’s findings and declarations, ACP writes that, “There is no evidence of harm from sexual orientation change therapy provided by licensed professionals. . . Decades of supportive studies exist. . . The “torture” stories have not involved trained therapists and generally are unsubstantiated . . .[and] homosexuality is changeable.”

Similar Pending California And Federal Legislation: AB 1779 (Nazarian) would prohibit a mental health provider from engaging in sexual orientation change efforts with a patient under a conservatorship or a guardianship, regardless of that patient’s age. AB 1779 has been referred to the Assembly Business and Professions Committee.

Congress - H.R. 2119; S. 928, The Therapeutic Fraud Prevention Act, was introduced in the House of Representatives by Rep. Ted Lieu (D-CA) and in the Senate by Sens. Patty Murray (D-WA) and Cory Booker (D-NJ) on April 25, 2017. These bills prohibit sexual orientation or gender identity conversion therapy from being provided in exchange for compensation. They also bar advertisements for such therapy that claim to: (1) change an individual's sexual orientation or gender identity, (2) eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender, or (3) be harmless or without risk.

REGISTERED SUPPORT / OPPOSITION:

Support

Equality California (co-sponsor)
National Center for Lesbian Rights (co-sponsor)
The Trevor Project (co-sponsor)
American Academy of Pediatrics
California Asian Pacific Chamber of Commerce

California Council of Community Behavioral Health Agencies
California LGBT Health & Human Services Network
California Psychological Association
Consumer Attorneys of California
Equality California
Human Rights Campaign
Los Angeles LGBT Community Center
Sacramento LGBT Community Center
San Francisco AIDS Foundation
Numerous individuals

Opposition

Alliance Defending Freedom
American College of Pediatricians
Bethel Church
California Family Council
Concerned Women for America of California
Equipped to Love
Moral Revolution
National Task Force for Therapy Equality
Pacific Justice Institute
The Salt and Light Council
William Jessup University
Numerous individuals

Analysis Prepared by: Alison Merrilees / JUD. / (916) 319-2334