



LEGAL MEMORANDUM

DATE: March 8, 2018
RE: Legal Analysis of California AB 2943

I. Introduction

Alliance Defending Freedom is an alliance-building, non-profit legal organization that advocates for life, religious liberty, and marriage and the family. We regularly offer analysis of proposed laws and their effect on religious freedom. We were asked to offer legal analysis of AB 2943. The proposed bill would likely be unconstitutional because it infringes upon constitutional rights of numerous California residents, religious organizations, and professional counselors.

At its core, AB 2943 outlaws speech, whether offered by a licensed counselor, a best-selling author, or even a minister or religious leader. It targets a specific message—that an adult who is experiencing unwanted same-sex attraction or gender identity confusion can find help to address those issues—for censorship. The breadth of this censorship is staggering. Under AB 2943:

- A licensed counselor could not help a married mother of three who is experiencing unwanted attraction to a close female friend or confusion over her gender identity overcome those feelings;
- A religious ministry could not hold a conference on maintaining sexual purity if the conference encourages attendees to avoid homosexual behavior;
- A bookstore (including online bookstores like Amazon) could not sell many recently published books challenging gender identity ideology and advocating that these beliefs should be rejected by society; and
- A pastor paid to speak at an event addressing current social topics could not encourage attendees that they can prevail over same-sex desires or feelings that they were born the wrong sex.

In these scenarios, there is a transaction (the counselor's payment; the conference attendance fees; the cost of the book; and the pastor's speaking fee) that triggers AB 2943. And under the bill, a person or organization who is paid by a consumer for goods or services cannot engage in any practice—including pure speech—that tells someone that they can overcome unwanted same-sex attraction or gender identity confusion.

II. Overview of AB 2943

AB 2943 amends California's Consumer Legal Remedies Act, a consumer protection law that outlaws unfair and deceptive practices, by adding so-called "sexual orientation change efforts" to the list of prohibited practices. Sexual orientation change efforts (SOCE) are defined as "any practices that seek to change an individual's sexual orientation. This includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual romantic attractions or feelings toward individuals of the same sex."

Because of the bill's vague terminology, the scope of outlawed practices is extremely broad. It encompasses one-on-one counseling and talk therapy, written materials produced to help with these issues, and even conferences and public events where these issues are addressed. Indeed, the Consumer Legal Remedies Act specifically commands that it be "liberally construed and applied," Cal. Civil Code § 1760, resulting in prohibitions against SOCE potentially being applied beyond the confines of a traditional counseling relationship to many other constitutionally protected activities.

AB 2943 brings with it severe consequences for those who engage in or offer to engage in SOCE. They can be subject to injunctions silencing their speech, actual damages, punitive damages, and attorneys' fees.

III. AB 2943 impermissibly regulates speech based on its content and viewpoint.

The Supreme Court has long held that it is impermissible for the government to regulate speech based upon its content or viewpoint. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) ("Government action that stifles speech on account of its message ... pose[s] the inherent risk that the [g]overnment seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.").

Here, AB 2943 facially bans any practices—including counseling and other pure speech—that "seek to change an individual's sexual orientation" including "any efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex." But it permits counseling and speech that "provide[s] acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity and exploration and development." In other words, helping a person address unwanted attractions is banned, while helping someone embrace such attractions is permitted.

For example, imagine a 40-year-old wife and mother who experiences same-sex attractions but who also believes that acting upon those attractions would be

inconsistent with her sincerely-held religious beliefs and not in the best interest of her husband and children. If that woman believed that, rather than acting on her attractions, she should instead choose to find fulfillment in her marriage, she would be unable to obtain professional counseling to assist her with that goal. Why? Because AB 2943 prohibits counseling that would assist her with reducing same-sex attractions in order to enable her to live a life consistent with her beliefs.

Similarly, if a man in his late 20s, after several years of mistakenly identifying as a female, came to realize that he would be most fulfilled by living consistent with his male biological sex, AB 2943 would prohibit him from finding a counselor to help him toward his desired outcome because it bans “efforts to change behaviors or gender expressions.” Yet as was reported in the New York Times, a 2008 study in the Netherlands found that 70% of boys who had gender dysphoria grew out of it within 10 years. Richard A. Friedman, “How Changeable is Gender,” The New York Times, Aug. 22, 2015 (available at <https://www.nytimes.com/2015/08/23/opinion/sunday/richard-a-friedman-how-changeable-is-gender.html>). Under AB 2943, these men would be denied wanted counseling to help them transition back to a life as a male.

Most troubling is that AB 2943’s prohibitions reach far beyond counseling. Numerous books have been written to help those struggling with unwanted same-sex attraction or gender identity confusion. See <https://goo.gl/YE6DZP> (Amazon listings for “same-sex attraction”). Selling such books, which “seek to change an individual’s sexual orientation,” would potentially be a banned “practice under AB 2943. The same would be true for religious organizations that hold ticketed conferences or events that address sexual purity and discourage same-sex behavior. In fact, a Michigan legislator recently called for the attorney general to investigate whether a church violated Michigan’s consumer protection act when it held workshops for those seeking help with same-sex attraction. See <https://housedems.com/article/rep-condemn-conversion-therapy-workshop-planned-downriver> (attached).

As a result of AB 2943, adults who seek affirmance of same-sex attraction are able to procure counseling services and other resources, whereas those who believe that they should live a chaste life consistent upon their sincerely-held religious beliefs or that they should seek to live consistent with their biological sex are denied professional counseling to assist them with their goals.

AB 2943’s ban on counseling speech is thus facially content based because whether counselors may lawfully speak to clients who seek counseling regarding same-sex attraction or gender identity “depends on what they say.” *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010). By placing unique restrictions on speech related to sexual orientation and gender identity, AB 2943 “disfavors ... speech with a particular content.

Strict scrutiny is required whenever the government creates “a regulation of

speech because of disagreement with the message it conveys,” *id.* at 2664 (quotation omitted), as AB 2943 has unabashedly done here. AB 2943 is unlikely to survive this rigorous test because of its facially unconstitutional censorship of protected speech based on its content and viewpoint.

IV. AB 2943 burdens the free exercise of religion.

In addition to impermissibly burdening free speech, AB 2943 will, if enacted, impermissibly burden the free exercise of religion. Some who seek counseling to address sexual orientation or gender identity do so for religious reasons. That is, their religious belief informs them that they should not act upon same-sex attractions or that they should seek to live consistent with their God-given biological sex. And some counselors who offer such counseling therapy likewise do so for religious reasons. AB 2943 will burden the free exercise of religion of these patients and providers.

Even more troubling is the burden AB 2943 imposes on numerous Californians. Many of the world’s major religions—including Judaism, Islam, and Christianity—teach against sexual activity outside of marriage between a man and woman. Relying upon sacred text, they believe that individuals have a choice to abstain from improper sexual behavior, and thus they actively work with individuals to overcome such desires. These faiths have been engaging in efforts to help all people embrace the beauty of sexual activity within a man-woman marriage for millennia, as the Supreme Court recognized in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (“This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.”).

Yet AB 2943 labels such faith-driven activity as fraudulent and deceptive practices, subjecting anyone who engages in them to ruinous lawsuits, punitive damages, and attorneys’ fees. It rejects Justice Kennedy’s admonition that “religious organizations and persons [be] given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.” *Id.* at 2607.

Simply put, the burden imposed by AB 2943 cannot withstand constitutional scrutiny, and it is likely to be found unconstitutional. The U.S. Supreme Court has explained that laws that burden the free exercise of religion will be subject to strict scrutiny if they are not neutral toward religion (that is, if they target religion) or are not generally applicable (that is, if they do not apply to everyone and provide exemptions for certain people). *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

AB 2943 targets religion—specifically religious beliefs regarding same-sex attraction and gender confusion—for censorship and punishment. The bill must therefore satisfy strict scrutiny review. But as already explained, AB 2943 is unlikely

to survive strict scrutiny review. It is therefore likely to be held unconstitutional under the Free Exercise Clause of the First Amendment.

V. AB 2943 violates the right of individuals to receive information regarding methods to address same-sex attractions and gender identity.

The First Amendment not only protects the right to speak, it also protects the right to hear and receive it. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas.”); *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943) (right of free speech also “protects the right to receive it”).

AB 2943 prevents adults facing unwanted same-sex attraction or gender identity confusion from communicating with professional counselors in “an effective and informative manner.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011). It thus significantly encroaches upon the fundamental right to receive information, a right the Supreme Court has jealously guarded in the professional speech context. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 757 (1976) (applying the “First Amendment right to receive information and ideas” to a ban on pharmacies publishing drug prices (quotation omitted)); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 366 (1977) (doing the same for a ban on lawyers advertising the price of routine legal services because it “inhibit[ed] the free flow of commercial information”).

Contracting “the spectrum of available knowledge” in this manner clearly implicates fundamental First Amendment concerns. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). Where the rights to freedom of speech and to receive information and ideas are concerned, “[p]recision of regulation must be the touchstone.” *NAACP v. Button*, 371 U.S. 415, 438 (1963). AB 2943, however, is a “[b]road prophylactic rule[]” that significantly encroaches upon these fundamental rights. *Id.*; *see also id.* at 439 (recognizing that the government must justify “significant encroachment[s] upon personal liberty,” including in the professional speech context, by “showing a subordinating interest which is compelling” (quotation omitted)).

VI. AB 2943 distorts the usual functioning of the counseling relationship—a private medium of expression—to suppress speech the government disfavors.

In *Legal Services Corp. v. Velazquez*, the Supreme Court considered a speech restriction imposed on lawyers representing the interests of indigent welfare recipients, a scenario in which legislative discretion is normally at its height. *See* 531 U.S. 533, 536-37 (2001) (noting that the statute in question prohibited legal representation “if the representation involve[d] an effort to amend or otherwise challenge existing welfare law”). The Supreme Court compared this speech regulation

to previous government attempts “to use an existing medium of expression and to control it ... in ways which distort its usual functioning.” *Id.* at 543.

Emphasizing the importance of the “accepted usage” of the mode of expression at issue, the Supreme Court explained that the First Amendment generally forbids government from regulating private speech forums “in an unconventional way to suppress speech inherent in the nature of the medium.” *Id.* Strict scrutiny was therefore required, *see id.* at 553 (Scalia, J., dissenting) (noting that the majority applied “strict scrutiny”), because the statute in question “restrict[e]d LSC attorneys in advising their clients and in presenting arguments and analyses to the courts,” thus “distort[ing] the legal system by altering the traditional role of [a certain class of] attorneys.” *Id.* at 544. This unique disability ran counter to the general expectation that “attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case.” *Id.* at 545.

Just as “the ordinary course of litigation involves the expression of theories and postulates on both, or multiple, sides of an issue,” *id.* at 548, counseling relationships involve addressing divergent perspectives on the broad universe of issues people bring to their counselors, including discussions regarding same-sex attraction and gender identity. Law is not the only discipline to recognize the fundamental right to “independently ... define one’s identity that is central to any concept of liberty.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984). The mental health professions have long grounded themselves on this perspective. *See, e.g.*, Am. Counseling Ass’n Code of Ethics Preamble (2014) (defining “counseling” as empowering “diverse individuals ... to accomplish [their own] mental health ... goals” and emphasizing the importance of patient “autonomy”); Code of Ethics of the Nat’l Ass’n of Social Workers § 1.02 (2008) (“Social workers respect and promote the right of clients to self[-]determination and assist clients in their efforts to identify and clarify their goals.”).

But AB 2943 renders it impossible for adults who desire to live a chaste life despite their same-sex attraction or who desire to live consistent with their biological sex to accomplish their mental health goals or exercise their fundamental right to self-determination. Such a burdensome regulation of speech, which fundamentally distorts the counseling relationship, “must be a last—not first—resort.” *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

VII. Conclusion

AB 2943 is likely unconstitutional because it engages in viewpoint discrimination, is an impermissible content-based speech regulation, and impermissibly burdens free exercise of religion. It also interferes with the liberty interest of patients and their parents to choose the therapy that they believe is best to further their therapeutic goals.

Reps Condemn Conversion Therapy Workshop Planned for Downriver

 houseedems.com/articles/rep-condemn-conversion-therapy-workshop-planned-downriver

February 8, 2018

Legislators back bill banning the practice, call on attorney general to investigate

Thursday, February 8, 2018

LANSING — State Reps. **Adam Zemke** (D-Ann Arbor) and **Darrin Camilleri** (D-Brownstown Township) spoke out today against the “Unashamed Identity Workshop” hosted by Metro City Church, with locations in Taylor and Riverview, and provided by FORGE Ministries for girls ages 12-16.

Zemke has introduced House Bill 5550 to prohibit mental health professionals from engaging in efforts to change the sexual orientation and gender identity of a minor. If passed, Michigan would join nine other states and the District of Columbia in having similar statutes prohibiting conversion therapy.

“It is wildly inappropriate to offer conversion therapy classes in our communities, and doing so is misrepresentative of our values as a welcoming state,” Zemke said. “I am proud to sponsor a bill to prohibit these practices in Michigan. Not only has scientific evidence overwhelmingly found that these approaches fail to accomplish their purported task, but they are also profoundly destructive and painful for the participating individual and his or her loved ones. It’s time to put an end to this terrible practice once and for all.”

The pseudoscientific practice of conversion therapy is based on the illegitimate and unscientific claim that being lesbian, gay, bisexual or transgender is a mental illness that must be cured. This is not only entirely false, but it can also lead the victim of conversion therapy to develop dangerous behaviors, including depression, lower self-esteem, substance abuse and even suicide. The nation’s leading mental health experts, including the American Psychiatric Association, the American Psychological Association, the National Association of Social Workers and others, have all spoken out against this outdated, irresponsible and harmful practice. As a result, Zemke and Camilleri sent a letter to Attorney General Bill Schuette today urging him to investigate FORGE Ministries and Metro City Church for a violation of the Michigan Consumer Protection Act. Specifically, whether FORGE Ministries and Metro City Church committed any unfair, unconscionable or deceptive practices. Reps. **Jon Hoadley** (D-Kalamazoo), **Tim Sneller** (D-Burton) and **Jeremy Moss** (D-Southfield) also signed onto the letter.

“The attorney general is uniquely situated with the power and duty to prevent those that sponsor this workshop from targeting families and young people and scamming them out of their hard-earned money for a practice that has no basis in science,” Camilleri said. “This inappropriate and destructive practice has no place in our communities. Rather than trying to change each other, we must instead come together to accept and appreciate our differences, and realize that those differences are what makes our state stronger.”

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