

THE RECORDER

Circuit weighs limits on ‘therapy’

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The testimony is powerful.

Forced by his parents to undergo therapy to “fix” his homosexuality, Ryan Kendall ran away from home and legally separated from his family. “At the age of 16, I had lost everything,” Kendall told the California Legislature last year. “My family and my faith had rejected me, and the damaging messages of conversion therapy, coupled with this rejection, drove me to the brink of suicide.”

Responding to Kendall and others who say they’ve been similarly victimized, the Legislature banned licensed mental health professionals from practicing what’s known as sexual orientation change efforts — also known as SOCE or conversion therapy — on minors.

“Being lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming” that requires curing, the Legislature declared in enacting SB 1172 last August. “Any practices by mental health providers that seek to change an individual’s sexual orientation” are deemed unprofessional conduct subject to discipline.

Next month, five SOCE counselors will go to the U.S. Court of Appeals for the Ninth Circuit, seeking to enjoin the law as an unconstitutional intrusion on the doctor-patient relationship. Although associated with conservative Christian causes, their attorneys come armed with a power-

ful liberal precedent: a 2002 Ninth Circuit ruling that forbade the government from cracking down on doctors for recommending medical marijuana.

As in *Conant v. Walters*, 309 F.3d 629, “SB 1172 unconstitutionally reaches beyond merely regulating the counseling professions to dictating what can be said during counseling sessions,” writes Liberty Counsel’s Mathew Staver in a brief to the court.

The argument advanced by Staver and attorneys at Sacramento’s Pacific Justice Institute has gained some traction ahead of the April 17 arguments. One district judge has embraced it — though another has rejected it — and it is causing division among the law’s proponents.

Attorney general Kamala Harris’ office is arguing that professional conduct regulations aren’t subject to the First Amendment so long as they’re a rational exercise of the state’s police power.

Amicus curiae American Civil Liberties Union, while urging the Ninth Circuit to uphold the law, is asking that the court “strongly repudiate” the rational basis test and instead hold that regulation of medical autonomy



CHANGE EFFORTS: James Guay, who underwent so-called conversion therapy at age 16 to “cure” him of his homosexuality, testified in support of a state law being challenged at the Ninth Circuit that bans sexual orientation change efforts by mental health professionals.

be subject to a higher — though not the highest — standard of review.

An *amicus* group of First Amendment scholars, including UC-Irvine’s Erwin Chemerinsky and Stanford’s Pamela Karlan, argue that SOCE isn’t worthy of First Amendment protection, but if the court finds it is, the law meets heightened scrutiny.

And an *amicus* group called Survivors of SOCE, including Kendall, argue that SOCE is so pernicious, SB 1172 can meet any standard of review, including the most stringent, strict scrutiny.

“The overwhelming evidence in the legislative record is more than sufficient to uphold SB 1172 on the merits,” writes their attorney, Sanford Rosen, “despite plaintiffs-appellants’ questionable constitutional challenges, and regardless of what level of scrutiny is applied by the court.”

THE TALKING CURE

Sexual orientation change efforts encompass a broad range of therapies. According to Senate committee analyses prepared for SB 1172, SOCE historically has included aversive treatments such as electric shock, nausea-inducing drugs or the snapping of a rubber band on the wrist while presenting the patient with homoerotic stimuli. The National Association for Research and Therapy of Homosexuality, one of the plaintiffs challenging the law, says aversive treatments are “no longer recommended” under its treatment guidelines. Other plaintiff therapists don’t explicitly disavow aversive techniques in their declarations, but emphasize the role of counseling, cognitive therapy and even prayer in their approaches.

They emphasize that speech is at the core of the process. “Psychotherapy is speech,” Staver writes on their behalf. “Verbal and non-verbal communication is the essential element of the therapeutic process.”

Their patients genuinely want to change their orientation, the therapists say, and treatment occurs only with informed consent. “If the client is unwilling, attempts at changing a belief or behavior — of any kind — is folly,” plaintiff Donald Welch states in a declaration. “This is particularly true of a teenager.”

The therapists regard same-sex attraction not as an immutable characteristic, but more as an accident of history that can be rewritten. Name plaintiff David Pickup says he developed same-sex attractions after being molested as a youngster by an older boy. SOCE, he says in a declaration, “helped save my life. It helped me get rid of all the shame that I had for experiencing homosexual feelings and actually led to the lessening and dissipation of my homosexual attractions.”

SB 1172, Staver writes in his brief, “would prohibit a minor and his parents from seeking help from a licensed professional if the likes of a Jerry Sandusky sexually molested a minor, and, as often happens, the minor developed anger and identity confusion, began to have urges to act out sexually in the way he was abused, and wanted to reduce or eliminate that behavior.”

That perspective troubles people like James Guay, who underwent SOCE therapy at age 16 and testified last year in favor of SB 1172. SOCE begins with the presumption there’s something “flawed or evil” about homosexuality, says Guay, who’s now a marriage and family therapist. Teens are pressed to identify abuse by a parent or other person that may never have happened, he says. When they aren’t “cured,” patients are told they’re “not praying hard enough, not trying hard enough.” The shaming is powerful, he says, “when it’s something so fundamental to who we are.”

The Legislature concluded that SOCE applied to minors can lead to “confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, suicidality,” and many other negative outcomes.

“Under no circumstances,” states the law, “shall a mental health pro-



JASON DOY

DIFFERING VIEWS: In December U.S. District Judge Kimberly Mueller upheld the state’s ban on sexual orientation change efforts, saying its restrictions on therapy “do not implicate fundamental rights” and had a rational basis. But another judge quickly reached the opposite conclusion.

vider engage in sexual orientation change efforts with a patient under 18 years of age.” An explicit exception is made for therapy that provides only “acceptance, support, and understanding.”

The plaintiff therapists brought separate challenges in Sacramento federal court. In December U.S. District Judge Kimberly Mueller upheld the law in *Pickup v. Brown*, saying its restrictions on therapy “do not implicate fundamental rights” and had a rational basis.

The same week, U.S. District Judge William Shubb came to the opposite conclusion. “At least some forms of

SOCE, such as ‘talk therapy,’ involve speech and the Ninth Circuit has stated that the ‘communication that occurs during psychoanalysis is entitled to First Amendment protection,’” Shubb wrote in *Welch v. Brown*, quoting a passage in *Conant v. Walters* that drew on other precedents.

HOW MUCH POWER TO REGULATE?

Before the Ninth Circuit, deputy attorney general Alexandra Robert Gordon argues Mueller had it right, that the state has “near plenary power” to regulate the medical profession. Even “where speech is ‘part of the practice of medicine,’ it is ‘subject to reasonable licensing and regulation by the state,’” she writes, citing two U.S. Supreme Court decisions that upheld restrictions on abortions, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and *Gonzales v. Carhart*, 550 U.S. 124 (2007).

This makes the ACLU, a natural ally in the case, nervous. “This is a troubling and dangerous precedent and it should be strongly repudiated by this court,” writes ACLU staff attorney Elizabeth Gill in her *amicus* brief supporting the law. “If popularly elected legislatures can ban any medical practice — regardless of the medical profession’s consensus as to the efficacy or even necessity of that practice — then regulation of the profession could be driven entirely by the ideological goals of the legislatures.”

Gill proposes that SB 1172 be held to a higher standard of review than rational basis. While not using the words “heightened” or “intermediate” scrutiny, she argues that SB 1172 meets a “reasonable regulation” standard because it is consistent with the norms of medical practice, and preventing harm to children outweighs the therapists’ interests in providing SOCE.

The law professor *amicus* group essentially advocates both the AG’s and the ACLU’s positions. “SOCE enjoys

no more First Amendment protection than the hawking of snake oil,” writes their lawyer, Jon Eisenberg, of counsel at Horvitz & Levy. But if the First Amendment does apply, he adds, the law would be subject only to intermediate scrutiny. “It cannot be at the level of strict scrutiny, because SB 1172 does not discriminate on the basis of content or viewpoint.”

CALLING ON ‘CONANT’

To the SOCE therapists, SB 1172 is all about viewpoint. “The views held by the plaintiffs have collided with the official ideology of the state,” writes Kevin Snider of Sacramento’s Pacific Justice Institute in his brief for *Welch*. “Scarcely does the Legislature so unmistakably put its stamp on the ‘pro’ side of an issue, to the exclusion of the ‘con’ side.”

The state can ban electroshock and rubber-band snapping, Snider says, just as it can regulate other physical practices like dispensing medicine or assisted suicide. But, he writes, “communications within the practice of a profession, such as during therapy, receive First Amendment protection.”

For support he and Staver liberally cite *Conant*, the celebrated Ninth Circuit decision that blocked the federal government from cracking down on doctors who recommend medical marijuana.

Judge Mary Schroeder wrote in *Conant* that the government’s policy struck “at core First Amendment interests” and that “physicians must be able to speak frankly and openly to patients.”

Chief Judge Alex Kozinski added in a concurrence that gagging doctors would only drive patients to unqualified sources. “Word-of-mouth and the Internet are poor substitutes for a medical doctor,” he wrote, and “cannot make up for the loss of individualized advice from a physician with many years of training and experience.”

Similarly, Staver argues, the Ninth Circuit should “refuse to accept the state’s assumptions here that counselor plaintiffs will recommend counseling that is harmful to minors, and that minors and their parents who are provided with truthful information about SOCE counseling will make harmful decisions.”

Equality California, which sponsored SB 1172 and intervened in the *Welch* case, says that interpretation of *Conant* cannot be right. Medical regulations “will always constrain doctors whose ideas about medical practice are inconsistent with professional norms,” writes attorney Shannon Minter on Equality California’s behalf. “That is precisely the purpose of the regulation of medicine.”

GETTING ATTENTION

As part of the Survivors of SOCE *amicus* group, Guay wants to see the law upheld. But whatever may happen in court, he says he’s glad to see SOCE being put under a microscope. “Hopefully, parents will think twice before putting their kids through this sort of psychological abuse,” he says.

Guay’s lawyer, Rosen of Rosen Bien Galvan & Grunfeld, says he’s confident of a win. He’s not worried about the disagreements over standard of review. The attorney general is being “prudently conservative” by advocating the rational basis standard — “that is what attorneys general do sometimes,” he says.

It doesn’t much matter which level of review is employed, he says. “Whatever the Ninth Circuit decides, it will be fine.”