Reparative therapy ban passes muster

Erwin Chemerinsky is dean and distinguished professor of law at the University of California, Irvine School of Law.

California's recently enacted law, Senate Bill 1172, which prohibits "therapy" aimed at changing a child's sexual orientation, is clearly constitutional. The government unquestionably has the power to prohibit therapies that are harmful or ineffective. The 9th U.S. Circuit Court of Appeals' preliminary injunction, issued on Dec. 23, 2012, in Pickup v. Brown, keeping the law from going into effect pending appeal, was thus misguided.

SB 1172 prohibits a licensed mental health professional from engaging in "sexual orientation change efforts" with a patient under age 18. The bill quotes findings from groups such as the American Psychological Association that such therapy does not succeed in changing a person's sexual orientation and often causes great psychological harm.

Two lawsuits were filed in federal district court in Sacramento challenging the law and seeking preliminary injunctions. Judge William Shubb issued a preliminary injunction, while Judge Kimberly Mueller denied the request for one. The plaintiffs appealed Judge Mueller's ruling and the 9th Circuit panel reversed and issued a preliminary injunction. The court offered no explanation, simply stating, "Appellants' emergency motion for an injunction pending appeal is granted." The case has been set for expedited briefing and argument. On review, the 9th Circuit should uphold the law and it shouldn't be a close question.

Thousands, and perhaps tens of thousands, of children have been subjected to aggressive efforts by therapists to try and change their sexual orientation. Parents, learning their children are expressing attraction to the same sex, have put them in so-called "conversion" or "reparative" therapy - despite warnings by medical and mental health organizations that these practices have no scientific credibility and put youth at risk of serious harms.

The therapy is often lengthy, seeking to change behavior and also a child's gender identity, thoughts and feelings. At times, the therapy has included aversive treatments, such as the application of electric shock to the hands and genitals and nausea-inducing drugs administered simultaneously with the presentation of homoerotic stimuli.

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There is no evidence that such "conversion therapy" works and significant evidence
that it doesn’t and that it causes real harms, such as depression and even suicide. Besides, the assumption of the "treatment" is that being gay or lesbian is a disease to be cured and no reputable medical or psychological organization accepts that premise.

As a result, the nation’s most respected and prestigious health care organizations have uniformly condemned efforts to change a young person’s sexual orientation as ineffective and harmful, including the American Medical Association, the American Academy of Pediatrics, the American Psychological Association, the American Counseling Association, the American Association for Marriage and Family Therapy, the American Psychiatric Association, the American Psychoanalytic Association, the American School Counselor Association, the National Association of Social Workers, and others.

The lawsuits challenging SB 1172 argue that it violates the First Amendment, especially as a restriction on freedom of speech. The claim is that the law impermissibly restricts the speech rights of therapists who wish to engage in conversion therapy.

But the fact that this therapy is done primarily through words does not mean that it is protected speech under the First Amendment. Speech of professionals, such as doctors and lawyers, can be restricted and can be the basis of liability without raising any First Amendment concerns. A doctor surely could not avoid liability for giving incompetent medical advice by saying that it was speech and thus protected by the Constitution. Doctors, of course, may be sanctioned for their speech during treatment, such as for expressing an inaccurate or false medical opinion to a patient, or for failing to provide adequate instructions or to ask necessary questions or to warn of side effects.

With respect to therapists, state licensing boards and courts already enforce a plethora of speech-based restrictions and requirements, including barring false, deceptive, or harmful statements. A therapist who advised a patient to commit suicide or anorexic to lose more weight undoubtedly could be held liable. There is no First Amendment barrier to such regulations and liability, and there is none to SB 1172.

More generally, courts including the U.S. Supreme Court, long have held that the government may ban treatments, whether for physical or mental conditions, that are ineffective or harmful. Courts have repeatedly rejected the claim that individuals have a constitutional right to use treatments that are banned as harmful or ineffective. Above all, the government always has the power to safeguard children from physical or mental abuse and that is what SB 1172 is about. Therapists in California have no constitutional right to subject minors to dangerous practices based on scientifically false and discredited views about sexual orientation.

Nor do other constitutional claims against the law have any merit. Parents have the constitutional right to control the upbringing of their children, but not when it involves subjecting the children to harmful and ineffective forms of treatment.

SB 1172 is the first law of this type in the country and this might have influenced the 9th Circuit panel to issue the preliminary injunction. But the law fits squarely within a state’s well-established authority to prevent health care professionals, including therapists, from harming their patients. The free speech claim of the challengers, which likely was the basis for the preliminary injunction, is meritless. The 9th Circuit should uphold SB 1172 as consistent with a long and unbroken tradition of the government being able to protect people, and especially children, from ineffective and harmful treatments.

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**U.S. Court of Appeals for the 9th Circuit**

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