



1-1-2013

## Chapter 835: “Gay Conversion Therapy” Ban: Protecting Children or Infringing Rights?

Nick Clair

*Pacific McGeorge School of Law*

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>

 Part of the [Law and Psychology Commons](#), [Legislation Commons](#), and the [Sexuality and the Law Commons](#)

### Recommended Citation

Nick Clair, *Chapter 835: “Gay Conversion Therapy” Ban: Protecting Children or Infringing Rights?*, 44 MCGEORGE L. REV. 550 (2013).  
Available at: <https://scholarlycommons.pacific.edu/mlr/vol44/iss3/3>

This Comments is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact [mgibney@pacific.edu](mailto:mgibney@pacific.edu).

## Chapter 835: “Gay Conversion Therapy” Ban: Protecting Children or Infringing Rights?

Nick Clair

### Code Sections Affected

Business and Professions Code §§ 865, 865.1, 865.2 (new).  
SB 1172 (Lieu); 2012 STAT. Ch. 835.

### I. INTRODUCTION

As early as 1869, medical researchers have sought a method to convert homosexuals into heterosexuals.<sup>1</sup> Early clinical attempts to change a person’s sexual orientation ranged from prescribing prostitutes of the opposite sex<sup>2</sup> to negative reinforcement, such as an electric shock given to patients who became aroused by same-sex nude images.<sup>3</sup> Treatments that aim to convert a homosexual person into a heterosexual person are known collectively as “conversion therapy.”<sup>4</sup> Modernly, conversion therapy is influenced by psychoanalytic therapy<sup>5</sup> and sometimes involves the use of medication.<sup>6</sup>

Mainstream professional mental health associations have long considered conversion therapy to be ineffective in its purpose and potentially dangerous to teenagers and young adults<sup>7</sup> because the therapy can “lead to depression and suicidal tendencies.”<sup>8</sup> Testifying before the California State Assembly Committee on Business, Professions and Consumer Protection Committee, Ryan Kendall stated:

---

1. Timothy F. Murphy, *Redirecting Sexual Orientation: Techniques and Justifications*, 29 J. SEX RES. 501, 501 (1992).

2. *Id.* at 502–03.

3. *Id.* at 505–06.

4. *Gay Teen Conversion Therapy Debate*, NEWS 10 ABC, <http://www.news10.net/video/1642685578001/52684897001/Gay-Teen-Conversion-Therapy-Debate> (last visited June 7, 2012) (on file with the *McGeorge Law Review*).

5. Murphy, *supra* note 1, at 507–08.

6. Complaint for Injunctive and Declaratory Relief at 53, *Welch v. Brown* (No. 2:12-cv-02484-WBS-KJN), 2013 WL 496382 (on file with the *McGeorge Law Review*) (“In the event of a patient seeking to gain a stronger level of control over sexual behaviors, desires, and addictions such as pornography, treatment can include prescription drugs to help control sexual drive, sometimes referred to as libido, in addition to counseling.”).

7. Lisa Leff, *Backers Aim to Widen Ban on Gay Conversion Therapy*, SEATTLEPI (Oct. 1, 2012), <http://www.seattlepi.com/news/article/Ban-on-gay-conversion-therapy-to-be-challenged-3907857.php> (on file with the *McGeorge Law Review*).

8. *California Senate Considers Ban on Gay Conversion Therapy*, KQED NEWS (May 8, 2012, 2:14 pm), <http://blogs.kqed.org/newsfix/2012/05/08/california-considers-ban-on-gay-conversion-therapy/> (on file with the *McGeorge Law Review*).

*McGeorge Law Review / Vol. 44*

[C]onversion therapy destroyed my life and tore apart my family. In order to stop the therapy that misled my parents into believing that I could somehow be made straight, I was forced to run away from home . . . . At the age of 16, I had lost everything. 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.<sup>9</sup>

Chapter 835<sup>10</sup> makes California the first state in this country to ban mental health professionals from performing conversion therapy.<sup>11</sup> Other states are considering similar legislation.<sup>12</sup> Many gay-rights groups<sup>13</sup> and mental health organizations<sup>14</sup> support the law, though Chapter 835 has also been the subject of legal challenges.<sup>15</sup>

## II. LEGAL BACKGROUND

California's power to regulate medical treatments and laws governing the medical profession are generally viewed as a valid exercise of the state's police power.<sup>16</sup> Nevertheless, it is unclear what First Amendment limitations exist in regulating medical professional speech, especially in the context of mental health professionals who often employ entirely speech-based treatments.<sup>17</sup>

---

9. CA Governor Brown Signs Bill to Protect LGBT Youth from Psychological Abuse, EQUALITY CAL. (Sept. 29, 2012), <http://www.eqca.org/site/apps/nlnet/content2.aspx?c=kuLRJ9MRKrH&b=4990109&ct=12211565> (on file with the *McGeorge Law Review*).

10. 2012 Cal. Stat. ch. 835.

11. Wyatt Buchanan, *State Bans Gay-Repair Therapy for Minors*, S.F. CHRON. (Sept. 29, 2012), <http://www.sfgate.com/news/article/State-bans-gay-repair-therapy-for-minors-3906032.php> (on file with the *McGeorge Law Review*).

12. S2278, 2012 Leg., 2012–2013 Reg. Sess. (N.J. 2012) (as introduced on Oct. 15, 2012); HB 1882, 2013 Leg., 2013–2014 Reg. Sess. (Wash. 2013) (as introduced on Feb. 14, 2013); see also Dustin Racioppi, *Gay Conversion Therapy Sparks Culture War in N.J.*, USA TODAY (Mar. 31, 2013), <http://www.usatoday.com/story/news/nation/2013/03/31/gay-conversion-therapy-culture-war/2038981/> (on file with the *McGeorge Law Review*); *Bill Would Ban 'Conversion Therapy' for Gay, Lesbian Youth*, KGMI (Apr. 5, 2013), <http://kgmi.com/Bill-Would-Ban-Conversion-Therapy-For-Gay-Lesbian-/15972260> (on file with the *McGeorge Law Review*) (discussing the proposed legislation).

13. Karen Ocamb, *California to LGBT Youth: No More 'Ex-Gay'—You're Officially OK!*, LGBT POV (Oct. 1, 2012), <http://lgbtpov.frontiersla.com/2012/10/01/california-to-lgbt-youth-no-more-ex-gay-youre-officially-ok/> (on file with the *McGeorge Law Review*).

14. SENATE FLOOR, ANALYSIS OF SB 1172, at 7 (Aug. 28, 2012).

15. See, e.g., *Legal Group Files Suit Against Conversion Therapy Law*, CAL. HEALTHLINE (Oct. 09, 2012), <http://www.californiahealthline.org/articles/2012/10/9/legal-group-files-suit-against-conversion-therapy-law.aspx> (on file with the *McGeorge Law Review*) (announcing the second lawsuit seeking to overturn Chapter 835).

16. Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1052–55 (9th Cir. 2000) (upholding psychotherapist licensing scheme and noting "licensing scheme is a valid exercise of California's police power" and noting "[r]egulating psychology, and through it psychoanalysis, is rational because it is within the state's police power to regulate mental health treatment").

17. Howard Mintz, *California's Gay Conversion Therapy Ban Gets a Federal Court Hearing*,

## 2013 / Business and Professions

### A. State Law

Currently, no law in California specifically prohibits any mental health treatment<sup>18</sup> and there are very few such laws in the United States.<sup>19</sup> California does have a number of laws protecting children from harm, including prohibiting the sale of alcohol to persons under twenty-one,<sup>20</sup> requiring minors between the ages of eight and sixteen to wear proper safety restraints while in motor vehicles,<sup>21</sup> and banning minors from using tanning booths.<sup>22</sup>

### B. Constitutional Law

In *National Ass'n for the Advancement of Psychoanalysis v. California Board of Psychology*, the Ninth Circuit Court of Appeals considered whether the California Board of Psychology violated any constitutional rights by not licensing psychologists who were licensed in other jurisdictions, but did not meet California's licensing requirements.<sup>23</sup> The court considered both substantive due process and free speech constitutional challenges to the licensing scheme.<sup>24</sup>

Regarding the substantive due process claim, the court found that the relationship between psychologist and patient is not a fundamental right, and also noted that "most federal courts have held that a patient does not have a constitutional right to obtain a particular type of treatment or to obtain treatment from a particular provider if the government has reasonably prohibited that type of treatment or provider."<sup>25</sup>

---

MERCURYNEWS.COM (Apr. 17, 2013), [http://www.mercurynews.com/crime-courts/ci\\_23045746/court-considers-california-ban-gay-conversion-therapy](http://www.mercurynews.com/crime-courts/ci_23045746/court-considers-california-ban-gay-conversion-therapy) (on file with the *McGeorge Law Review*).

18. See generally CAL. BUS. & PROF. CODE §§ 2900–99 (West 2008) (regulating psychological practice but not prohibiting any specific mental health treatment).

19. See L.V. Anderson, *Bad Therapy*, SLATE (Oct. 1, 2012), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2012/10/illegal\\_psychotherapies\\_gay\\_conversion\\_therapy\\_rebirthing\\_therapy\\_psychedelic\\_therapy\\_electro\\_convulsion\\_therapy\\_and\\_others\\_.html](http://www.slate.com/articles/news_and_politics/explainer/2012/10/illegal_psychotherapies_gay_conversion_therapy_rebirthing_therapy_psychedelic_therapy_electro_convulsion_therapy_and_others_.html) (on file with the *McGeorge Law Review*) ("The only kinds of therapy to be banned or restricted in the United States are ones that are violent or that involve certain psychoactive drugs. 'Rebirthing therapy,' which aims to reproduce the physical experience of labor in order to help children feel reborn, was outlawed in Colorado and North Carolina in 2001 and 2003 respectively in response to the asphyxiation death of a 10-year-old girl during a rebirthing session."). This article also notes that while electroconvulsive therapy (commonly known as "electroshock") has fallen out of practice, it remains legal in every U.S. state, with some restrictions in Texas. *Id.*

20. BUS. & PROF. § 25658 (West 1997).

21. CAL. VEH. CODE § 27360.5 (West 2000).

22. BUS. & PROF. § 22706 (West 2008)

23. 228 F.3d 1043, 1048 (9th Cir. 2000).

24. *Id.* at 1049.

25. *Id.* at 1050 (quoting *Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993)) (internal quotation marks omitted). *But see* *Andrews v. Ballard*, 498 F. Supp. 1038, 1048 (S.D. Tex. 1980) ("[T]he decision to obtain or reject medical treatment . . . is both personal and important enough to be encompassed by the right of privacy.").

*McGeorge Law Review / Vol. 44*

Regarding the First Amendment claim, the court held that psychoanalysis is primarily concerned with the treatment of “emotional suffering and depression, *not* speech,” and, while mental healthcare providers are entitled to some First Amendment protections, the profession is not immune from regulation.<sup>26</sup> Further, due to the health and safety concerns inherent in mental health treatment, the state has a compelling interest in its regulation.<sup>27</sup>

After “conclude[ing] that the licensing scheme is a valid exercise of California’s police power,” the court found that the licensing scheme was content and viewpoint neutral.<sup>28</sup> The court defined the law as content neutral because it did “not dictate what can be said between psychologists and patients during treatment”<sup>29</sup> and because it was adopted to promote the public interest and not “because of any disagreement with psychoanalytical theories.”<sup>30</sup>

In *Conant v. Walters* the Ninth Circuit also examined federal policy of targeting physician recommendations of medical marijuana.<sup>31</sup> The *Conant* court, however, did not view marijuana recommendations as the equivalent of prescriptions.<sup>32</sup> Patients might have other uses for recommendations, such as applying for an experimental study or advocating for changes to marijuana laws.<sup>33</sup> The court found that the government’s policy was a content-based restriction on free speech because only “discussion of medical use of marijuana trigger the policy” and viewpoint-based because it only punishes the view that marijuana would be beneficial to a patient.<sup>34</sup>

Finally, the U.S. Supreme Court has addressed the practice of medicine as speech in the context of abortion.<sup>35</sup> In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court noted that where a medical professional utilizes speech as “part of the practice of medicine” such can be subject to “reasonable licensing and regulation by the [s]tate.”<sup>36</sup> *Casey* held that a physician’s First Amendment right not to speak is not violated by a law requiring him or her to provide certain information to a client seeking an abortion.<sup>37</sup>

---

26. *Nat’l Ass’n for the Advancement of Psychoanalysis*, 228 F.3d at 1054.

27. *Id.*

28. *Id.* at 1054–55.

29. *Id.* at 1055.

30. *Id.* at 1055–56.

31. 309 F.3d 629 (9th Cir. 2002).

32. *Id.* at 634.

33. *Id.* The court, however, suggested that an actual prescription for marijuana may not have the same speech protections, saying that if a physician were to issue a recommendation while intending “the patient to use it as a means for obtaining marijuana . . . then a physician would be guilty of aiding and abetting the violation of federal law.” *Id.* at 635.

34. *Id.* at 637.

35. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 884 (1992).

36. *Id.*

37. *Id.*

*2013 / Business and Professions*

## III. CHAPTER 835

Chapter 835 includes various legislative findings, including that homosexuality is not a disease or mental disorder<sup>38</sup> and that California has a compelling state interest in protecting minors “against exposure to serious harms caused by sexual orientation change efforts.”<sup>39</sup> In light of those findings, Chapter 835 prohibits psychiatrists, psychologists, licensed counselors, clinical social workers, and various other mental health professionals<sup>40</sup> from performing “sexual orientation change efforts” on minors.<sup>41</sup> Chapter 835 deems “sexual orientation change efforts” to constitute unprofessional conduct that “shall subject a mental health provider to discipline by the licensing entity for that mental health provider.”<sup>42</sup>

## IV. ANALYSIS

A. *Debate over Validity of Conversion Therapy*

While conversion therapy has its roots in the theories of Sigmund Freud,<sup>43</sup> modern conversion therapists theorize that humans are innately heterosexual, but environmental factors, usually a distant father and overbearing mother, cause homosexuality.<sup>44</sup> Common conversion therapies have included positive reinforcement of opposite-sex sexual behavior, aversion therapy, such as

---

38. 2012 Cal. Stat. ch. 835, § 1(a) (“Being lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming.”).

39. *Id.* § 1(n).

40. CAL. BUS. & PROF. CODE § 865(a) (enacted by Chapter 835) (defining “mental health professional” as “a physician and surgeon specializing in the practice of psychiatry, a psychologist, a psychological assistant, a licensed marriage and family therapist, a registered marriage and family therapist, intern, or trainee, an educational psychologist, a licensed clinical social worker, an associate clinical social worker, a licensed professional clinical counselor, or a registered clinical counselor, intern, or trainee”).

41. *Id.* § 865(b)(1) (enacted by Chapter 835) (defining “sexual orientation change efforts” to include all treatments which “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.”).

42. *Id.* § 865.2 (enacted by Chapter 835).

43. AM. PSYCHOLOGICAL ASS’N, APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION 21 (2009), available at <http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf> [hereinafter APA REPORT] (on file with the *McGeorge Law Review*). Freud theorized that humans were bisexual, carrying both male and female traits, until environmental factors ultimately determined sexual orientation. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 791 (2002). Freud did not seem to consider homosexuality “an illness” and expressed doubt as to whether a homosexual could become heterosexual except in rare cases. Sigmund Freud, *Letter to a Mother of a Homosexual*, <http://www.fordham.edu/halsall/pwh/freud1.asp> (last visited July 13, 2012) (on file with the *McGeorge Law Review*).

44. Yoshino, *supra* note 43, at 795.

*McGeorge Law Review / Vol. 44*

shocking the patient when viewing images of a same-sex person, hypnosis, and orgasmic reconditioning.<sup>45</sup>

The consensus accepting these theories began to weaken due to developing research.<sup>46</sup> New studies have shown homosexuality is prevalent in a wide range of human cultures and animal species.<sup>47</sup> Research demonstrating equal levels of adaptation and functioning in homosexual and heterosexual populations further undercut the theory that homosexuality is a mental illness.<sup>48</sup>

The American Psychological Association deleted homosexuality as a pathology from the Diagnostic and Statistical Manual of Mental Disorders (DSM) in 1973.<sup>49</sup> Research shifted away from the effectiveness of conversion therapy and toward methods allowing homosexuals to become comfortable with their sexual orientation.<sup>50</sup> Conversion therapy persists, but today treatments often include the patient coming to terms with an absent father,<sup>51</sup> group therapy,<sup>52</sup> and “cuddle therapy,” which allows the patient to recreate a father-son relationship.<sup>53</sup>

The American Psychological Society created a task force to review the academic literature relating to conversion therapy<sup>54</sup> and found evidence that, while sexual orientation is unlikely to change, conversion therapy has had some success in changing sexual-orientation identity.<sup>55</sup> Conversion therapists, however, maintain that their therapy, in practice, can be effective at changing not only sexual-orientation identity, but also sexual orientation.<sup>56</sup>

45. APA REPORT, *supra* note 43, at 22.

46. *Id.* at 22 (giving weight to the view that homosexuality is natural).

47. *Id.* at 23.

48. *Id.*

49. Yoshino, *supra* note 43, at 797–99 (noting that homosexuality was originally classified as a pathology, and although deleted in 1973 due to gay rights and therapist activism, variants persisted until 1994).

50. APA REPORT, *supra* note 43, at 24.

51. David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297, 1308 (1999).

52. *Id.*

53. *Diagnosis: Mystery Pt. 2*, DAILY SHOW (Mar. 19, 2007), <http://www.thedailyshow.com/watch/mon-march-19-2007/diagnosis--mystery-pt--2> (on file with the *McGeorge Law Review*) (speaking with Richard Cohen of the International Healing Foundation).

54. APA REPORT, *supra* note 43, at 2.

55. *Id.* at 3.

Recent studies of [conversion therapy] participants do not adequately distinguish between sexual orientation and sexual orientation identity. We concluded that the failure to distinguish these aspects of human sexuality has led SOCE research to obscure what actually can or cannot change in human sexuality. The available evidence, from both early and recent studies, suggests that although sexual orientation is unlikely to change, some individuals modified their sexual orientation identity (i.e., individual or group membership and affiliation, self-labeling) and other aspects of sexuality (i.e., values and behavior).

*Id.*

56. *The Three Myths About Homosexuality*, NAT’L ASSOC. FOR RESEARCH & THERAPY OF HOMOSEXUALITY, <http://narth.com/menus/myths.html> (last visited June 4, 2012) (on file with the *McGeorge Law Review*). *But see* David DiSalvo, *How One Flawed Study Spawned a Decade of Lies*, FORBES (May 19, 2012), <http://www.forbes.com/sites/daviddisalvo/2012/05/19/how-one-flawed-study-spawned-a-decade-of-lies/>

## 2013 / Business and Professions

Though there is not enough research to reach a definitive conclusion about the safety of conversion therapy, studies have shown that it has a negative effect on mental health, including depression and suicidal thoughts, in some individuals.<sup>57</sup> There is always a risk in therapy that a patient may suffer further harm if a treatment fails, but the risks are even greater for the conversion therapy patient.<sup>58</sup> The patient, believing that there is a cure for homosexuality, may believe that he or she is the cause of the failure, which can lead to self-destructive behavior.<sup>59</sup>

### B. Scope of Chapter 835

Chapter 835 prevents minors from obtaining conversion therapy from mental health professionals.<sup>60</sup> Sexual-orientation change efforts are likely to continue, however, because Chapter 835 does not apply to unlicensed lay or religious persons who would attempt to change a minors' sexual-orientation or to adults who choose to undergo conversion therapy.<sup>61</sup> At least one conversion therapist intends to comply with Chapter 835 until patients reach the age of eighteen and then transition them into conversion therapy.<sup>62</sup> Proponents of the law hope that parents will be discouraged from seeking conversion therapy due to the legislature's classification of conversion therapy as unsafe.<sup>63</sup>

### C. Constitutionality of Chapter 835

Chapter 835 raises the issues of whether psychological treatments are conduct or pure speech, for First Amendment purposes.<sup>64</sup> Further, if psychological treatments are considered speech, there is an issue as to whether

---

(on file with the *McGeorge Law Review*) (discussing the study most often cited by conversion therapy proponents); John M. Becker, *Exclusive: Dr. Robert Spitzer Apologizes to Gay Community For Infamous 'Ex-Gay' Study*, TRUTH WINS OUT (Apr. 25, 2012), <http://www.truthwinsout.org/news/2012/04/24542/> (on file with the *McGeorge Law Review*).

57. APA REPORT, *supra* note 43, at 42.

58. Cruz, *supra* note 51, at 1351.

59. *Id.* at 1352.

60. CAL. BUS. & PROF. CODE § 865(a) (enacted by Chapter 835).

61. *Id.*

62. David W. Virtue, *Gay Conversion Therapy Still an Option, Says World Renowned Psychotherapist*, VIRTUEONLINE (Oct. 3, 2012), <http://www.virtueonline.org/portal/modules/news/article.php?storyid=16598#UHhmtq4DFY> (on file with the *McGeorge Law Review*).

63. Karen Ocamb, *Sen. Lieu & NCLR's Minter Ready for Challenges Against SB 1172*, BILERICO PROJECT (Oct. 2, 2012, 11:30 AM), [http://www.bilerico.com/2012/10/sen\\_lieu\\_nclrs\\_minter\\_ready\\_for\\_challenges\\_against.php](http://www.bilerico.com/2012/10/sen_lieu_nclrs_minter_ready_for_challenges_against.php) (on file with the *McGeorge Law Review*).

64. David L. Hudson Jr., *'Gay-conversion Therapy': Is It Speech or Conduct*, FIRST AMENDMENT CTR. (Dec. 7, 2012), <http://www.firstamendmentcenter.org/gay-conversion-therapy-is-it-speech-or-conduct> (on file with the *McGeorge Law Review*).



*McGeorge Law Review / Vol. 44*

the body of research on which the legislature relied in banning conversion therapy is sufficient to justify infringing on therapists' First Amendment rights.<sup>65</sup>

Lower courts have reached different conclusions as to whether Chapter 835 attempts to regulate conduct or speech.<sup>66</sup> The Eastern District of California, in *Welch v. Brown*, held that because conversion therapy is intertwined with views on the nature of homosexuality, the performance of such therapy must be regarded as protected speech.<sup>67</sup> Because Chapter 835 "bans a mental health provider from expressing his or her viewpoints about homosexuality as part of [conversion therapy] treatment," it is not content or viewpoint neutral, and is thus subject to strict scrutiny review.<sup>68</sup> It was held that because of the relatively weak scientific evidence supporting the position that conversion therapy causes harm, Chapter 835 would not be able to withstand strict scrutiny<sup>69</sup> and is therefore unconstitutional.<sup>70</sup>

Alternatively, the court in a different case found that Chapter 835 regulated conduct and not speech because it allows therapists to discuss and even recommend conversion therapy, but only prohibits the actual provision of such therapy by state licensed mental health providers.<sup>71</sup> The provision of healthcare treatments is not expressive conduct and thus not entitled to First Amendment protection because it is not attempting to convey a message but to provide treatment; therefore, such conduct is not entitled to First Amendment protection.<sup>72</sup> Thus, Chapter 835 is only subject to a rational basis test,<sup>73</sup> which the law passes due to the existence of evidence on which the legislature could have based its decision.<sup>74</sup>

---

65. Editorial, *A Divide on 'Conversion Therapy' Law*, L.A. TIMES (Dec. 10, 2012), <http://articles.latimes.com/2012/dec/10/opinion/la-ed-gay-conversion-therapy-20121210> (on file with the *McGeorge Law Review*).

66. Compare *Welch v. Brown*, No. 2:12-CV-2484-WBS-KJN, 2012 WL 6020122, at \*8 (E.D. Cal. Dec. 3, 2012) (finding that Chapter 835 "has at least an incidental effect on speech"), with *Pickup v. Brown*, No. 2:12-CV-02497-KJM-EFB, 2012 WL 6021465, at \*9, 14–16 (E.D. Cal. Dec. 4, 2012) (finding that Chapter 835 regulates conduct).

67. 2012 WL 6020122, at \*11 (concluding conversion therapy is "integrally intertwined with viewpoints, messages, and expression about homosexuality"; thus, "SB 1172 bans a mental health provider from expressing his or her viewpoints about homosexuality as part of [conversion therapy] treatment.").

68. *Id.*

69. *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011) (stating the standard that a regulation that is not content or viewpoint neutral must be "justified by a compelling government interest and [be] narrowly drawn to serve that interest").

70. *Welch*, 2012 WL 6020122, at \*12–15.

71. *Pickup*, 2012 WL 6021465, at \*14–16.

72. *Id.* at \*18–19.

73. *Id.* at \*21. "[T]he reviewing court presumes the constitutionality of the state action by requiring those challenging the legislative judgment to 'convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.'" *Id.* (quoting *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1050 (9th Cir. 2000)).

74. *Id.* at \*43.

*2013 / Business and Professions*

## V. CONCLUSION

Chapter 835 prohibits psychologists and other mental health professionals from providing conversion therapy to minors.<sup>75</sup> It is the first law in the nation to prohibit conversion therapy,<sup>76</sup> a practice that critics say is both harmful and ineffective.<sup>77</sup> Some argue that Chapter 835 violates the state and federal free speech rights of therapists.<sup>78</sup> Others say that this law simply regulates conduct, specifically the practice of medicine, and thus does not implicate protected speech.<sup>79</sup> The constitutionality of Chapter 835 will likely hinge on this distinction.<sup>80</sup>

---

75. CAL. BUS. & PROF. CODE §§ 865, 865.1 (enacted by Chapter 835).

76. Bob Unruh, *California Could Become the First State to Ban Homosexual Conversion Therapy*, JUVENILE JUSTICE INFO. EXCH. (May 14, 2012), <http://jjie.org/california-could-become-first-state-ban-homosexual-conversion-therapy-for-teens/85692> (on file with the *McGeorge Law Review*).

77. *Madeleine Brand Show: Will California Ban Sexual Orientation Change Therapy?*, S. CAL. PUB. RADIO (May 9, 2012), <http://www.scpr.org/programs/madeleine-brand/2012/05/09/26408/will-california-ban-sexual-orientation-change-ther> [hereinafter *Madeleine Brand Show*] (on file with the *McGeorge Law Review*).

78. Unruh, *supra* note 76.

79. *Madeleine Brand Show*, *supra* note 77.

80. Hudson, *supra* note 64.