



## LEGAL MEMORANDUM

DATE: February 21, 2015

RE: Legal Analysis of Oregon HB 2307

(Prohibiting Licensed Counselors From Counseling Minors Regarding Unwanted Same-Sex Attraction)

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### Introduction

Oregon HB 2307 prohibits licensed counselors from counseling minors regarding *unwanted* same-sex attraction. This would interfere with the personal liberty interests of parents and children to obtain the counseling they believe is best for them, as well as, infringe constitutionally-protected free speech and free exercise rights. HB 2307 will harm the rights of children with unwanted same-sex attraction, leaving them to seek counseling from unlicensed persons who do not possess all of the training of a licensed counselor.

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 law and its effect on free speech and religious freedom. We have been asked by the Oregon Family Council to review HB 2307, and provide our legal opinion as to HB 2307. As explained below, HB 2307 is problematic for at least the following reasons:

- I. HB 2307 interferes with the liberty interests of patients. This will ultimately harm children with unwanted same-sex attraction by depriving them of therapy that could help them achieve their therapeutic goals. *See infra* at 2-5.
- II. HB 2307 is unconstitutional under the First Amendment and Art. I, § 8 of the Oregon Constitution. It engages in impermissible viewpoint discrimination with regard to speech, allowing only the government's preferred speech. *See infra* at 2. It also is an impermissible content-based speech regulation. *See infra* at 4-7.
- III. HB 2307 is unconstitutional under the First Amendment and Article I § 3 of the Oregon Constitution, which prohibit laws that burden the free exercise of religion. It burdens free exercise without employing the least restrictive means to serve a compelling interest, it seeks to control the free exercise and enjoyment of religious opinions, and it interferes directly with the rights of conscience. *See infra* at 7-8.

## I. HB 2307 Interferes With the Liberty Interest of Patients And Will Harm Children.

Sexual orientation change effort (SOCE) is a therapy provided by licensed mental and social health professionals who counsel those who have *unwanted* same-sex attraction.<sup>1</sup> Every patient should be free to choose the therapy that they believe will best help them accomplish their therapeutic goals. HB 2307 restricts this freedom by interfering with minor patients' right to choose. Indeed, HB 2307 forbids a minor patient who experiences unwanted same-sex attraction from receiving therapy from a licensed counselor to help him reduce or eliminate the attraction.

### A. Some People Experience a Change in Their Sexual Orientation.

#### 1. Some People Experience Change as a Result of SOCE Therapy.

It is demonstrable that sexual orientation change efforts (SOCE) helps some patients reduce or eliminate unwanted same-sex attraction. Dr. Nicholas Cummings provided written testimony regarding his own patients' success with SOCE therapy. *Certification of Nicholas A. Cummings, Ph.D., ScD., available at [http://www.consciencedefense.org/contents/media/Nicholas\\_Cummings\\_Declaration.pdf](http://www.consciencedefense.org/contents/media/Nicholas_Cummings_Declaration.pdf)*. Dr. Cummings was Chief Psychologist for the Kaiser Permanente health system, based in San Francisco, from 1959 until 1979. *Id.* at ¶ 2. He was also a member of President Kennedy's Mental Health Task Force and President Carter's Mental Health Commission. *Id.* at ¶ 3. He was the president of the American Psychological Association (APA) from 1979 to 1980. *Id.* at ¶ 7. He wrote over 450 journal articles and 51 books. *Id.* at ¶ 9. Notably, Dr. Cummings has been a life-long champion of what he describes as "gay and lesbian rights." *Id.* at ¶ 15. He is the one who sponsored the resolution by which the APA "issued its official position that homosexuality is not a mental disorder." *Id.* at ¶ 16. He also sponsored the resolution "that gays and lesbians should not be discriminated against in the workplace." *Id.*

However, Dr. Cummings is also a "proponent of the right of patient self-determination." *Id.* at 17. He states, "I believe and teach that gays and lesbians have the right to be affirmed in their homosexual identity and also have the right to seek help in changing their sexual orientation if that is their choice." *Id.*

During his years of practice, Dr. Cummings and his staff saw thousands of patients who identified as homosexual. *Id.* at ¶ 19. Most of these patients sought therapy "to come to grips with their homosexual identity [or] to resolve relationship issues." *Id.* at 20. But a small number of patients came for counseling because of *unwanted* same-sex attraction. Their reasons for wanting to change their sexual orientation varied. *Id.* at ¶ 22. But they each experienced unwanted same-sex attraction. *Id.* Dr. Cummings testifies that, **of those who sought to change their sexual orientation, "hundreds were successful."** *Id.* at 23. Dr. Cummings' professional pedigree makes it impossible to ignore his testimony. This former head of the APA, who has

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<sup>1</sup> SOCE is an umbrella term that describes several types of therapy proscribed to help patients reduce or eliminate unwanted same-sex attraction. See JAMES E. PHELAN, SUCCESSFUL OUTCOMES OF SEXUAL ORIENTATION CHANGE EFFORTS: AN ANNOTATED BIBLIOGRAPHY (2014) at 3 (noting that SOCE "methodology and techniques have varied.").

served on the task forces of presidents and championed ending discrimination against people who identify as gay, has testified that he and his team of psychiatrists witnessed hundreds of patients change their sexual orientation.

Dr. Cummings' clinical experience corresponds with the results of numerous studies of SOCE therapies, which demonstrate that SOCE produces successful outcomes for some. There is much literature on the subject, and much of it is helpfully cataloged in SUCCESSFUL OUTCOMES. This literature demonstrates that SOCE is effective for some who experience unwanted same-sex attraction. To take but a few examples from the several hundred studies catalogued, Elan Karten's 2006 dissertation studied 117 men who had participated in some type of reorientation activity and found that meaningful sexual reorientation had occurred. *Id.* at 76-77. Similarly, Joseph Nicolosi surveyed 689 men and 193 women who had participated in some kind of change therapy and found 34.3 percent reported a shift from a homosexual orientation to an exclusively or almost exclusively heterosexual orientation. *Id.* at 74.

## **2. Some People Experience Change Even Without SOCE Therapy.**

Even without SOCE, some people experience a change in their sexual orientation. Of special note for HB 2307 is the 2007 study by Savin-Williams and Ream regarding *adolescent* same-sex attraction. They relied on research conducted on thousands of teenagers over a five year period. Seventy-five percent of those who initially reported as adolescents that they were same-sex attracted reported five years later that they were exclusively opposite-sex attracted. SAVIN-WILLIAMS, R.C. AND REAM, G.L. PREVALENCE AND STABILITY OF SEXUAL ORIENTATION COMPONENTS DURING ADOLESCENCE AND YOUNG ADULTHOOD (2007). While this study is not currently available online, it is described by Dr. N.E. Whitehead, "Adolescent Sexual Orientation: Surprising amounts of change," *available at* <http://www.mygenes.co.nz/Change.htm>.

One need not read academic studies and social science literature to recognize that some people experience a change in their sexual orientation. That fact is evident from popular culture. For example, New York City Mayor Bill de Blasio is married to Chirlane McCray, a former lesbian. In 1979, McCray wrote a front-page article for *Essence* magazine declaring, "I am a lesbian." But she met Mr. de Blasio, fell in love, and has borne him two children. She no longer identifies as lesbian. *See* Laurel Babcock, "Bill & Wife Speak Out," *NY Post*, December 11, 2012, *available at* <http://nypost.com/2012/12/11/bill-wife-speak-out/>; Hunter Walker, "The Lesbian Past of Bill de Blasio's Wife," *Observer*, December 5, 2012, *available at* <http://observer.com/2012/12/the-lesbian-past-of-bill-de-blasios-wife/>.

Similarly, there are many people who used to identify as homosexual who now identify as straight. For example, Parents and Friends of Gays and Exgays, an organization committed to helping ex-gays and parents and friends of gays who want help, hope and community, has on its website the video-recorded testimony of 23 such people, each telling their story of how they came to identify as ex-gay. *See* PFOX, "Personal Stories" *available at* <http://www.pfox.org/personal-stories/>. Another example is Christopher Doyle, who does not have his video on PFOX's website, but who proudly identifies as ex-gay. *See* "Meet Christopher Doyle," *International Healing Foundation*, *available at* <http://www.comingoutloved.com/meet-christopher-doyle>. Mr. Doyle has appeared on the Dr. Oz Show, publicly identifying himself as an ex-gay and discussing SOCE therapy. *See* The Dr. Oz Show, "From Gay to Straight? The

Controversial Therapy,” November 28, 2012, *available at* <http://www.doctoroz.com/episode/gay-straight-controversial-therapy>. That some people change their sexual orientation is so well recognized that American Association for Retired People (AARP) recently published an article telling the stories of some senior adults who changed their sexual orientation. Dr. Pepper Schwartz, “Can Sexual Preference Change With Age?,” *AARP*, June 13, 2014, *available at* <http://www.aarp.org/home-family/sex-intimacy/info-2014/gay-lesbian-sexual-preference-schwartz.html?intcmp=AE-HOME-TOENG-TOGL>. The article notes that some who lived their lives as heterosexuals experience same-sex attractions as senior adults, while some who lived as homosexuals experience opposite-sex attraction.

**3. There Is No Evidence That SOCE Is Harmful, But Much Evidence That It Is Helpful For Some Who Experience Unwanted Same-sex Attraction.**

This evidence, together, indicates that some people experience a change in their sexual orientation. It also indicates that some who seek to reduce or eliminate unwanted same-sex attraction through SOCE therapy are able to do so. There have been no studies indicating that SOCE therapy is dangerous. There is simply no reason for Oregon to ban a therapy that can help some of those with unwanted same-sex attraction.

**B. HB 2307 Interferes With Patients’ Right to Choose the Therapy That Best Furthers Their Therapeutic Goals.**

The Supreme Court has explained that “[t]he citizen is entitled to seek out or reject certain ideas or influences without Government interference or control.” *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 817 (2000). Patients, including minor patients, should have the right to self-determination. That is, they should be allowed to seek therapy for unwanted same-sex attraction. HB 2307 will deprive them of that ability, potentially causing them great discomfort and anguish.

The person with unwanted same-sex attraction will still have that attraction if HB 2307 is enacted but it will be categorically unlawful for him or her to seek counsel from a licensed therapist that could provide the help desired and needed. This may cause children to turn to unlicensed persons for help, who may not have the expertise necessary to serve their therapeutic goals. Instead of protecting minors, HB 2307 will actually hurt them and even marginalize them for seeking professional help for their choice of sexual orientation. It will deprive them of the counseling of their choice, thereby infringing on their right of self determination and violating their dignity. This, by itself, will harm these minor children.

**II. HB 2307 Unconstitutionally Engages In Viewpoint Discrimination and Bans Speech.**

HB 2307, if enacted, will be unconstitutional under the Free Speech clause of the First Amendment and Oregon Constitution, for two reasons. It will be an impermissible viewpoint-based restriction on speech. Such restrictions are *always* impermissible. In addition, it will restrict speech based on its content, and cannot survive the required level of constitutional scrutiny.

**A. HB 2307 Is Unconstitutional Viewpoint Discrimination.**

“SOCE,” is a type of *talk* therapy for those who have *unwanted* same-sex attraction.<sup>2</sup> In this regard, it is similar to other talk therapies used by mental health providers to assist patients with their therapeutic goals.<sup>3</sup> Simply put, those who practice SOCE do so by talking—that is, by engaging in speech—with their patients.

HB 2307 allows speech that presents the government’s preferred viewpoint regarding same-sex attraction and homosexual behavior. Additionally, HB 2307 does not expressly prohibit professionals from discussing change efforts with patients, from referring patients to unlicensed practitioners of change efforts, or otherwise from offering opinions on the subject of homosexuality. But it forbids speech that opposes the preferred viewpoint, or presents a counter point of view. This type of viewpoint discrimination is always unconstitutional.

The seminal case explaining viewpoint discrimination is the United States Supreme Court’s *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992), in which the Court ruled that the government is forbidden from banning constitutionally-protected speech because the government disfavors it. In reaching that conclusion, the Court explained that “[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of the ideas expressed.” *Id.*, 505 U.S. at 382 (internal citations omitted). The only exception to this general rule is for those types of speech the Court has ruled are proscribable, which are limited to things like obscenity, defamation, and fighting words. *Id.* at 382-83. But even within this category of proscribable speech, which can generally be banned, government is still forbidden from prohibiting speech because of its viewpoint. *Id.* at 384. So, for example, government could ban all obscenity, or it could ban only the most prurient obscenity, but it is constitutionally forbidden from banning only that obscenity that is critical of the government, or that is supportive of one of the competing political parties. *Id.* at 387-88. The crucial factor is that the basis for the restriction on speech cannot “even arguably [be] conditioned upon the sovereign’s agreement with what a speaker may intend to say.” *Id.* at 390 (internal quotation and citation omitted).

HB 2307, however, bans speech precisely because “the sovereign” disagrees with it. It expressly allows therapies that provide “acceptance, support, and understanding” of one’s sexual orientation. HB 2307 at 1. But it bans therapies that seek to help someone reduce or eliminate same-sex attraction. *Id.* at 1. Put bluntly, HB 2307 allows the government’s preferred message

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<sup>2</sup> SOCE is an umbrella term that describes several types of therapy proscribed to help patients reduce or eliminate unwanted same-sex attraction. See JAMES E. PHELAN, SUCCESSFUL OUTCOMES OF SEXUAL ORIENTATION CHANGE EFFORTS: AN ANNOTATED BIBLIOGRAPHY (2014) at 3 (noting that SOCE “methodology and techniques have varied.”).

<sup>3</sup> Established counseling principles demonstrate that every form of counseling inherently involves communication. Robert V. Keteyian, *Understanding Individual Communication Styles in Counseling*, 19 *The Family Journal* 90 (2011) (“communication is the life blood of counseling”). Indeed, all counseling requires discrete and subtle communication methods. *Id.* (“Other factors are important in developing the relationship, of course, but communication is the vehicle, and directly and indirectly, we often teach communication skills: We model positive communication practices and, at times, coach clients about how to handle sensitive discussions with important people in their lives.”). Sexual orientation change efforts (SOCE), in particular, require counselors not only to communicate basic messages of affirmation and safety, but also to communicate, if appropriate under the client’s circumstances, the specific message that sexual orientation change is possible. Thus, counseling in general, and SOCE counseling specifically, includes inherently communicative speech elements that are entitled to constitutional protections for free speech.

(same-sex attraction should not be changed), while forbidding the government's disfavored message (same-sex attraction should be changed). The state of Oregon may not constitutionally do this.

**B. HB 2307 Is Unconstitutional Because It Is An Impermissible Content-based Restriction on Speech.**

As already explained, HB 2307 seeks to ban speech that helps a patient to overcome his *unwanted* sexual desires. And it does this precisely by looking at the content of the speech to determine what speech is permissible and what is not. It will allow counseling for many unwanted thoughts and behaviors. But it will not allow counseling for unwanted same-sex attraction. It thus bans speech based on its content.<sup>4</sup> Content-based regulations of speech are presumptively unconstitutional under the First Amendment. *R.A.V.*, 505 U.S. at 382. Such laws will only be upheld if they survive strict scrutiny, which requires that the government demonstrate that it has a compelling interest it seeks to advance by its law, and that it has used the least restrictive means to further its interest. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). This is the most demanding test known to constitutional law. *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997).

HB 2307 cannot survive this test. To survive scrutiny, the State must assert a constitutionally cognizable compelling interest, one of "the highest order." *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (describing the compelling interest necessary to survive strict scrutiny review as one of "the highest order"). It is not clear what interest Oregon has in this law—unless it is the dubious interest in having licensed therapists affirm same-sex attraction while prohibiting them from affirming opposite-sex attraction when that is what the patient wants. What is clear, however, is that the State cannot ban speech simply because it disagrees with it. Nor can it ban speech because it finds it offensive or liable to anger others. *See, e.g., Cohen v. California*, 403 U.S. 15, 16-18 (1971) ("F\_\_\_ the Draft" is protected speech); *Texas v. Johnson*, 491 U.S. 397, 415-16 (1989) (burning the United States Flag is protected speech); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 396 (1992) (burning a cross is protected speech).

No one would doubt that Oregon has an important interest in protecting children. But to censor speech, the particular regulation must serve a "compelling interest." HB 2307, however, allows unlicensed counseling of minors experiencing unwanted same-sex attraction. That plainly belies any claim that banning such therapy is compelling. But even assuming it was, HB 2307 does not use the "least restrictive means" to achieve that interest. Numerous studies have demonstrated that SOCE is effective for some patients who desire to reduce or eliminate same-sex attraction. *See, e.g., JAMES E. PHELAN, SUCCESSFUL OUTCOMES OF SEXUAL ORIENTATION CHANGE EFFORTS: AN ANNOTATED BIBLIOGRAPHY (2014) ("SUCCESSFUL OUTCOMES")* (cataloging the results of a multitude of studies that demonstrate successful outcomes with various types of SOCE). So it is not the case that all SOCE is harmful; many patients have

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<sup>4</sup> A content-neutral ban on speech is one that bans all speech about a certain topic. So, for example, a ban on all talk therapy addressing sexual orientation, without regard to the content of the talk therapy, would be a content-neutral ban. That, however, is not what HB 2307 does. It allows therapy designed to help someone accept his sexual orientation. But it will not allow therapy designed to help someone reduce or eliminate same-sex attraction, thereby changing his sexual orientation.

happily achieved their therapeutic goals as a result of various types of SOCE. But instead of demonstrating through evidence that a particular therapy or therapeutic technique is harmful to children, and regulating it,<sup>5</sup> HB 2307 seeks to ban *all* licensed therapists from offering *any* type of SOCE. That is not the “least restrictive means” of achieving the State’s interest in protecting children from harmful therapy. Rather, it is akin to banning all therapy for depression because a certain type of therapy for depression, or a certain therapist, is shown to be harmful. The correct, constitutionally permissible response is to ban whatever *has been clearly demonstrated* to harm. It is not constitutionally permissible to ban therapies that are not harmful. Such a ban sweeps too broadly and deprives patients of choosing a therapy that helps them achieve their goals in a healthy manner.

HB 2307 is thus not narrowly tailored to the interest of protecting children from harmful counseling. It does not use the least restrictive means, but bans more speech than necessary to achieve the State’s interest. It is therefore likely to be held unconstitutional under the First Amendment.

Additionally, the Oregon Constitution provides that “No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.” Or. Const. Art. I, § 8. This provision has two parts. First, the freedom to speak on any topic is protected. Second, that “every person shall be responsible for the abuse of this right” indicates that Oregonians are entitled to speak without government interference, but must be prepared to bear responsibility for abusing the right. That is not a government ban on speech, but rather recognizes that legal action can be taken against the individual person who uses speech in the narrow categories that the constitution does not protect. For example, libel, fighting words, inciting others to riot, or shouting fire in a crowded theatre is not constitutionally protected because those narrow categories of speech present imminently dangerous threats that implicate compelling interests of the state. But Article I, § 8 does not allow the government to ban any speech it doesn’t like, unless it can satisfy strict scrutiny review. And like the First Amendment, Art. 1 § 8, will only hold responsible the individual “person” abusing speech in the above referenced ways. It does not permit government to ban an entire viewpoint or an entire group of persons from seeking and giving counsel because they dissent from the official government position on a particular topic.

### **III. HB 2307 Unconstitutionally Burdens the Free Exercise of Religion.**

In addition to impermissibly burdening free speech, HB 2307 will, if enacted, impermissibly burden the free exercise of religion. Many who seek therapy for unwanted same-sex attraction do so for religious reasons. That is, their religious belief informs them that same-

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<sup>5</sup> We are not aware of any form of SOCE, as actually practiced, that presents more risk of harm than is presented by other, comparable therapies designed to reduce or eliminate unwanted thoughts or behaviors. But for purposes of this analysis, we will accept as true the possibility that someone, somewhere, might offer therapy designed to reduce or eliminate same-sex attraction that would be harmful. For example, therapy involving negative physical stimulus for same-sex desires, such as shock aversion therapy, might be harmful. But we are not aware of any such therapy being offered *anywhere* for unwanted same-sex attraction, including in Oregon. In addition, the various therapies that are collectively called SOCE are all *talk* therapies, and do not involve harmful physical techniques.

sex attraction is undesirable. And some of those who offer SOCE therapy likewise do so for religious reasons. HB 2307 will burden the free exercise of religion of these patients and providers. Because such a law cannot withstand constitutional scrutiny, it is likely to be found unconstitutional.

The U.S. Supreme Court has explained that laws burdening federal free exercise rights will be upheld when they are neutral (that is, they do not target religion) and generally applicable (that is, they apply to everyone and so do not provide exemptions for certain people). *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990). But laws burdening free exercise that are not generally applicable, or target religion, must survive strict scrutiny review. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

HB 2307 is not generally applicable, but rather only applies to certain licensed mental and social healthcare providers. It applies to state-licensed “mental health care or social health professional[s]” who engage in “[e]fforts to change a person’s sexual orientation or gender identity” with clients who are minors. HB 2307 at 1. The bill defines such change efforts to include “the provision of services for the purpose of attempting to change a person’s sexual orientation or gender identity.” *Id.* Undoubtedly, many counselors and patients engage in this therapy to be faithful to their religious convictions. But explicitly exempted from the bill are counselors that engage in “[c]ounseling that assists a client who is seeking to undergo a gender transition” and “[c]ounseling that provides a client with acceptance, support and understanding, or counseling that facilitates a client’s coping, social support and identity exploration or development.” *Id.*

That is hardly a neutral position. HB 2307 would not apply to licensed counselors who engage in efforts to support a person’s same-sex attraction, but it would apply predominantly to those who are motivated by their religious convictions to change same-sex attraction.

Because HB 2307 is not a law of general applicability, it must satisfy strict scrutiny review. Thus it must further a “compelling interest” and be “narrowly tailored;” that is, employ the least restrictive means. *Church of the Lukumi Babalu Aye*, 508 U.S. at 531-32. As already explained HB 2307 is unlikely to survive strict scrutiny review and thus is likely to be held unconstitutional under the Free Exercise Clause of the First Amendment. For similar reasons, it is likely to be held unconstitutional under Article I, § 3 of the Oregon Constitution, which provides that, “No law shall in any case whatever control the free exercise, and enjoyment of religious opinions, or interfere with the rights of conscience.”

### **Conclusion**

HB 2307 interferes with the liberty interest of patients to choose the therapy they believe is best to further their therapeutic goals, and thus it has the potential to harm children. It also is unconstitutional because it engages in viewpoint discrimination, is an impermissible content-based speech regulation, and impermissibly burdens the free exercise of religion. Historically, Oregonians have respected the rights of others to live out their own self-determination. Those experiencing unwanted same-sex attractions should not be denied the same privileges others have to obtain the counseling they seek just because the government and those fanning the political winds want to muzzle and suppress those who choose a different way of living.