

**Colorado Chapter of National Lawyers Association**  
**Commission for the Protection of Constitutional Rights**

TESTIMONY OF BRAD BERGFORD, PRESIDENT

Regarding House Bill 16-1210, Concerning a Prohibition on  
Conversion Therapy by A Licensed Mental Health Provider

April 11, 2016

My name is Brad Bergford. I am here on behalf of the Colorado Chapter of National Lawyers Association and its Commission for the Protection of Constitutional Rights, which urges you to vote against HB16-1210.

HB 16-1210 would, if enacted, prohibit a licensed physician specializing in psychiatry or a licensed or registered mental health care provider from engaging in conversion therapy with a patient under 18 years of age. A licensed medical professional who engaged in conversion therapy, even at the request of the parents of the minor child, would be subject to disciplinary action by the medical professional's licensing authority.

"Conversion therapy" is defined as an effort to seek to change an individual's sexual orientation, including efforts to change behaviors, gender expressions, and to eliminate or reduce sexual or romantic attraction or feelings toward individuals of the same sex.

HB 16-1210 would prohibit licensed medical professionals from counseling minors regarding *unwanted* same-sex attraction. Such a prohibition would infringe constitutionally protected free speech and free exercise rights, as well as interfere with the personal liberty interests of parents and children to obtain the counseling they believe is best for them.

**HB 16-1210 would interfere with the liberty interest of patients and their parents.** Every patient should be free to choose the therapy that the patient or, in the case of minors, the patient's parents, believe will best help the patient accomplish their therapeutic goals. HB 16-1210 would restrict this freedom by interfering with minor patients and their parents' right to choose.

For instance:

**13-22-107. Legislative declaration - definitions - children - waiver by parent of prospective negligence claims**

(1) (a) The general assembly hereby finds, determines, and declares it is the public policy of this state that:

(III) Parents have a fundamental right and responsibility to make decisions concerning the care, custody, and control of their children. The law has long presumed that parents act in the best interest of their children.

(IV) Parents make conscious choices every day on behalf of their children concerning the risks and benefits of participation in activities that may involve risk;

(V) These are proper parental choices on behalf of children that should not be ignored. So long as the decision is voluntary and informed, the decision should be given the same dignity as decisions regarding schooling, medical treatment, and religious education. (C.R.S. 13-22-107)

**HB 16-1210 interferes with patients' right to choose the therapy that best furthers their therapeutic goals.**[4] 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 and their parents, should have the right to self-determination. That is, they should be allowed to seek therapy from a licensed counselor for unwanted same-sex attraction. HB 16-1210 will deprive them of that freedom.

The child with unwanted same-sex attraction will still have that attraction if HB 16-1210 is enacted. But now he will be unable to seek help from a licensed therapist for his attraction. This will deprive such children of the counseling and counselors of their choice, thereby infringing on their right of self-determination and violating their dignity. Minor patients and their parents should be able to choose the therapy that they believe is best for them. And they should be able to choose the therapist that they believe is best to provide their chosen therapy. HB 16-1210 needlessly and unwisely interferes with this freedom of choice.

**HB 16-1210 is unconstitutional under the First Amendment and Article II, section 10, of the Colorado Constitution. It engages in impermissible viewpoint discrimination with regard to speech, allowing only the government's preferred speech. It also is an impermissible content-based speech regulation.**

HB 16-1210, if enacted, will be unconstitutional under the Free Speech clause of the First Amendment and Colorado Constitution, for two reasons. It will be an impermissible viewpoint-based restriction on speech. In addition, it will restrict speech based on its content, and in a way that cannot survive the required level of scrutiny. Effectively, HB 16-1210 would look to the content of the speech to determine what speech is permissible. 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.

SOCE is a type of *talk* therapy provided by licensed counselors to those who have *unwanted* same-sex attraction. In this regard, it is similar to other talk

therapies used by mental health providers to assist patients with their therapeutic goals.

HB 16-1210 allows speech that presents the government's preferred viewpoint regarding same-sex attraction. But, it forbids speech that opposes that government-preferred viewpoint or presents a counter point of view. This type of viewpoint discrimination is unconstitutional.

In *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992), the United States Supreme 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 that the Court has ruled are proscribable, which are limited to speech such as obscenity, defamation, and fighting words, none of which are at issue here. *Id.* at 382-83. But even within this category of proscribable speech, which can generally be banned, government is still forbidden from favoring one viewpoint over another. *Id.* at 384. 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 16-1210, however, would ban speech precisely because “the sovereign” disagrees with it. It expressly allows therapies that provide “acceptance, support, and understanding” of one’s same-sex attraction. It would ban therapies that seek to help someone reduce or eliminate same-sex attraction. Put bluntly, HB 16-1210 would allow the government’s preferred message about same-sex attraction, while forbidding the government’s disfavored message about that topic. The State of Colorado may not constitutionally do this.

Such laws will only be upheld if they survive strict scrutiny, which requires the government to demonstrate that it is pursuing a compelling interest, 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 under constitutional law. *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997).

HB 16-1210 will not likely survive this test. Colorado might assert an interest in protecting children from harm. That may be a “compelling interest,” but that does not appear to be an interest that is furthered here.

In addition, HB 16-1210 does not use the “least restrictive means” to achieve its stated compelling interest. Amazingly, HB 16-1210 seeks to ban *all* licensed therapists from offering *any* type of SOCE. That is not the “least restrictive

means” of achieving the State’s purported interest. HB 16-1210 is thus likely to be held unconstitutional under the First Amendment.

**HB 16-1210 is unconstitutional under the First Amendment and Article II, section 4 of the Colorado Constitution, both of which prohibit laws that burden the free exercise of religion.** If enacted, HB 16-1210 will impermissibly burden the free exercise of religion. Some of those who seek therapy for unwanted same-sex attraction do so for religious reasons. That is, their religious belief informs them that same-sex attraction is undesirable or even immoral. And some counselors who offer SOCE therapy likewise do so for religious reasons. HB 16-1210 will burden the free exercise of religion of these patients and healthcare 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 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).

HB 16-1210 is subject to strict-scrutiny analysis because it is not generally applicable. It applies only to certain mental healthcare providers. It prohibits counselors who are “licensed and registered, or certified” under Colorado Revised Statutes Article 43, which governs mental health, from offering SOCE therapy to minors. But Article 43 explicitly exempts persons “engaged in the practice of religious ministry,” persons who provide “employment or rehabilitation counseling,” social workers who work for the department of human services, and persons licensed pursuant to other sections. C.R.S. § 12-43-215. So, not all counselors would be affected by HB 16-1210; only some would be. HB 16-1210 is thus not a law of general applicability.

Because HB 16-1210 is not a law of general applicability, it must satisfy strict scrutiny review. But as already explained, HB 16-1210 is unlikely to survive strict scrutiny review. HB 16-1210 is therefore likely to be held unconstitutional under the Free Exercise Clause of the First Amendment. For the same reason, it is likely to be held unconstitutional under Article II, section 4 of the Colorado Constitution, which also protects the free exercise of religion.

### **Conclusion**

HB 16-1210 is likely unconstitutional because it engages in viewpoint discrimination, it is an impermissible content-based speech regulation, and it 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. Accordingly, we oppose HB16-1210 and urge its defeat.