

**THE COLORADO FREEDOM INSTITUTE**

TESTIMONY OF MICHAEL J. NORTON  
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THE COLORADO FREEDOM INSTITUTE

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

March 8, 2016

My name is Michael J. Norton. I am president and general counsel of the Colorado Freedom Institute. The Colorado Freedom Institute is a nonprofit legal organization dedicated to protecting religious freedom for Coloradans and for people across America in the public square, in our schools, and for our churches. The Colorado Freedom Institute also fights for the sanctity of human life and for traditional marriage and families.

Today, I am also privileged to represent Colorado Family Action. The mission of CFA is to advocate for laws and policies that will make Colorado a safe, prosperous, and wholesome climate for families.

Both the Colorado Freedom Institute and Colorado Family Action oppose HB 16-1210 and urge you to vote against it.

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 reparative therapy with a patient under 18 years of age. A licensed medical professional who engaged in reparative 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.

Notably, HB 16-1210 characterizes reparative therapy as "conversion therapy" and defines it as an effort to seek to change an individual's sexual orientation, including efforts to change behaviors, gender expressions, or 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. HB 16-1210 is all about promoting what is currently politically correct and is not designed to promote the best health interests of children or in the best interests of their parents.

Such a prohibition would interfere with the personal liberty interests of parents and children and their right to obtain the counseling they believe is best for them. It would also infringe constitutionally protected free speech and free exercise rights of these parents and their children.

**HB 16-1210 would interfere with the liberty interest of patients and their parents, and harm children.** 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 preferred reparative therapy and its therapeutic goals.

**Some people experience change in their sexual attractions.** A recent article entitled "The Transgender Battle Line: Childhood" by Debra W. Soh, a doctoral candidate in psychology who specializes in sexual neuro-science at York University in Toronto, published in the Wall Street Journal on January 5, 2016, highlights this fact and captures the current demand for political correctness by some in this debate.

In her article, Dr. Soh points out that today, parents are under pressure from gender-identity politics "which asserts that children as young as 5 should be supported in wanting to live as the opposite sex. Any attempts to challenge this approach are deemed intolerant and oppressive." She added, "Gender identity . . . is flexible and can change over the course of life. . . . [H]elping prepubescent children feel comfortable in their birth sex makes more sense than starting a lifetime of hormonal treatments and surgeries that will in all likelihood turn out to be unnecessary and unwanted."

Dr. Soh concluded by stating that silencing those who oppose reparative therapy "sends the message to parents that early transitioning is the only valid and ethical approach for a gender-dysphoric child. This message . . . is false and unscientific. It is more progressive to offer them the time and the space they need to figure out who they are and what is ultimately best for them."

It is not the only approach and it may well be the wrong approach.

**Some people experience change as a result of SOCE reparative therapy.** It is demonstratable that sexual orientation change efforts or SOCE<sup>1</sup> help some patients

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<sup>1</sup> SOCE is an umbrella term that describes several types of reparative therapy that 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.").

reduce or eliminate unwanted same-sex attraction just as those patients desire. Dr. Nicholas Cummings provided written testimony regarding his own patients' success with SOCE reparative 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 APA resolution "that gays and lesbians should not be discriminated against in the workplace." *Id.*

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 gay. *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 testified 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 American Psychological Association, who has served on presidential task forces 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 as a result of counseling.

Dr. Cummings' personal experience corresponds with the results of numerous studies of SOCE reparative therapies, which demonstrate that SOCE produces successful outcomes for some. There is a lot of literature on the subject, and much of it is cataloged in SUCCESSFUL OUTCOMES. 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 SOCE and found that meaningful change had occurred. *Id.* at 76-77. Similarly, Joseph Nicolosi surveyed 689 men and 193 women who had participated in some kind of SOCE and found that 34.3 percent reported a shift from a homosexual orientation to an exclusively or almost exclusively heterosexual orientation. *Id.* at 74.

**Some people experience change even without SOCE reparative therapy.**<sup>2</sup> Even without SOCE, some people experience change in their sexual attractions. Of special note 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 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 in "Adolescent Sexual Orientation: Surprising amounts of change" which is 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 attractions. 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 began a family with him. 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

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<sup>2</sup> The Center for Disease Control and Prevention's 2007 report, *Adolescent Health in the United States*, surveyed 10,000 teenagers and found that the vast majority of sixteen-year olds who reported only same-sex sexual attractions reported only opposite-sex sexual attractions one year later. Because these surveys produced such unexpected results, similar studies were soon replicated all over the Western world. The outcomes were almost identical, with population-based samples now reaching into the hundreds of thousands.

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 gay and 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 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>.

This sort of change is so well recognized that the American Association for Retired People (AARP) recently published an article telling the stories of some senior adults who changed their sexual attractions and identifications over time. 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 identify as heterosexuals experience same-sex attractions as senior adults, while some who identify as gay or lesbian experience opposite-sex attraction.

**There is no evidence that SOCE reparative therapy is harmful, but much evidence that it is helpful for some who experience unwanted same-sex attraction.<sup>3</sup>** 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-

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<sup>3</sup> Patients who benefit from reparative therapy report that they enhanced their gender identities; learned how to integrate with peers at school; and found solutions that were in keeping with their beliefs. Critics of reparative therapy feel that they were misinformed about realistic outcomes and misled with unsubstantiated theories. They felt pressure to be heterosexual, and they blamed themselves for not changing. Catholic theologian Joshua Gonnerman warns that the "offer of orientation change can be an . . . idol in which all of one's hope is placed" and that "the failure to change sexual orientations can easily shatter someone who placed her hope in heterosexuality." Gonnerman reminds us that chastity is the sexual ethic that the church demands, not heterosexual functioning.

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 Colorado to ban a therapy that can help some of those with unwanted same-sex attraction.

**HB 16-1210 interferes with patients' right to choose the reparative therapy that best furthers their therapeutic goals.**<sup>4</sup> 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 or she will be unable to seek help from a licensed therapist for his or her 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.**

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<sup>4</sup> Wanting to protect clients from false hopes of change that may never happen, Warren Throckmorton, who won an award in 2002 for supporting reparative therapy, helped develop a new framework for managing sexual identity conflicts called sexual identity therapy (SIT). SIT creates therapeutic space for the self-acceptance of clients who are unable or unwilling to change their sexual orientations. It also guards against the simplistic misconception that all gay people did not bond with their parents or were sexually abused. According to Throckmorton, our sexual preferences are not hard-wired but rather a result of temperament, environment, and life experiences. In therapy, Throckmorton helps clients distinguish between identity (chosen self) and attractions (feeling). “Feelings and desires are not standards or commands,” Throckmorton writes, “they are reactions to whatever environment we find ourselves. Feelings often change as we change our environments and make commitments to chosen values.” However, sometimes feelings do not change. In these cases, we must decide whether or not we want to act in accord with our beliefs. For some clients this will mean choosing to be celibate; others will modify or abandon traditionalist religious beliefs.

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.<sup>5</sup>

SOCE reparative therapy 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.<sup>6</sup>

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

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<sup>5</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 H.B. 15-1175 does. It allows therapy designed to help someone accept same-sex attraction. But it will not allow therapy designed to help someone reduce or eliminate same-sex attraction.

<sup>6</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.”). SOCE, in particular, requires counselors to communicate many messages to their clients. Thus, counseling in general, and SOCE counseling specifically, includes inherently communicative speech elements that are entitled to constitutional protection.



things like 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 known to 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 it is not an interest that is furthered here. There are no comprehensive studies that indicate that SOCE is dangerous or harmful. Those who oppose SOCE rely on a few anecdotal stories told by former SOCE patients who claim they were not helped by counseling. But that does not prove that SOCE itself is harmful. And it overlooks the many patients who have been helped by SOCE. Whether counseling helps a particular individual depends on many factors. Some who seek counseling for other unwanted thoughts and actions, such as depression or obsessive compulsive disorder, are not helped by their counseling. And some are even hurt by such counseling. But that does not mean that counseling for depression or obsessive compulsive disorder is harmful, or should be banned.

Without comprehensive studies demonstrating that SOCE is harmful to minors, it is unlikely that a purported interest in protecting children from harm will support a ban on SOCE for minors.

In addition, HB 16-1210 does not use the “least restrictive means” to achieve its purported 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). Thus, many patients have 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 banning it, 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 for their children and which furthers their therapeutic goals.

HB 16-1210 seeks to advance a political agenda, not good science. We oppose HB 16-1210 and urge its defeat.