ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

LEGAL MEMORANDUM

DATE: May 9, 2017
RE: Legal Analysis of Amendment No. 640 to Nevada SB 201

I. Introduction

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 laws and their effect on religious freedom. We were asked to offer legal analysis of Amendment No. 640 to SB 201 (collectively referred to as " SB 201") along with a May 8, 2017 memo from the Legislative Counsel Bureau.

The proposed bill and amendment would likely be unconstitutional because it infringes upon the constitutional rights of licensed counselors, parents, and children.

II. SB 201 regulates counseling speech based on its content and viewpoint.

The Supreme Court has long held that it is impermissible for the government to regulate speech based upon its content or viewpoint. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) ("Government action that stifles speech on account of its message … pose[s] the inherent risk that the [g]overnment seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.").

Here, SB 201 facially bans any professional counseling speech that "seeks to change the sexual orientation or gender identity of a person … or to eliminate or reduce sexual or romantic attractions or feelings towards persons of the same gender." But it permits counseling that "provides assistance to a person undergoing gender transition" or that "provides acceptance, support and understanding" for a person's sexual orientation or gender identity. As a result, minors who seek affirmance of same-sex attraction are able to procure professional counseling services, whereas those who wish to "eliminate or reduce sexual or romantic attractions or feelings towards persons of the same gender" may not.

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SB 201's ban on counseling speech is thus facially content based because whether counselors may lawfully speak to clients who seek counseling regarding same-sex attraction "depends on what they say." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010). By placing unique restrictions on counseling speech related to sexual orientation, SB 201 "disfavors … speech with a particular content. More than that, the statute disfavors specific speakers, namely" professional counselors who believe certain forms of counseling to address same-sex attraction may be effective. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663 (2011). The law thus "on its face burdens disfavored speech by disfavored speakers." *Id*. And it has the clear "effect of preventing [minors interested in addressing same-sex attraction]—and only [such minors]—from communicating with [mental health professionals] in an effective and informative manner." *Id*.

Furthermore, because SB 201 is designed to target mental health professionals who offer assistance with addressing same-sex attraction "and their messages for disfavored treatment," the law "goes even beyond mere content discrimination to actual viewpoint discrimination." *Id*. (quotation omitted). Rather than simply having "an effect on speech," the law is "directed at certain content," i.e., speech addressing same-sex attraction "and is aimed at particular speakers," i.e., professional counselors who provide such counseling. *Id*. at 2665.

Strict scrutiny is required whenever government creates "a regulation of speech because of disagreement with the message it conveys," *id*. at 2664 (quotation omitted), as SB 201 has unabashedly done here. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (noting that a content-based regulation of speech that purported to shield minors from violent video game content was "invalid unless [the state] demonstrate[d] that it passes strict scrutiny—that is, unless it [was] justified by a compelling government interest and [was] narrowly drawn to serve that interest"). SB 201 is unlikely to survive this rigorous test because of its facially unconstitutional censorship of protected speech based on its content and viewpoint.

III. SB 201 could place ministers at risk of violating state law.

According to the Legislative Counsel's Digest and the May 8th memo, ministers may engage in efforts to address unwanted same-sex attraction as long as they "do not hold themselves out as operating pursuant to their professional licenses." In other words, a minister who is licensed as a marriage and family therapist under Chapter 641A of the Nevada statutes would have to publicly state that he or she is engaging in counseling outside of the scope of their license.

But Nevada law states that it is "unlawful for any person to engage in the practice of marriage and family therapy … unless the person is licensed under the provisions of this chapter." N.R.S. § 641A.410. To provide such services, a minister must be operating within the scope of his or her license." The moment a minister who

is also a licensed counselor informs the client that he is providing counseling services outside of the scope of his license, he is in violation of § 641A.410.[1]

This would be akin to enacting a law telling attorneys that if they take certain types of cases, they must do so outside of the scope of their state law license. But as any legal ethics board would tell you, anyone who engages in the practice of law without being licensed has committed an egregious violation. The same would be true of a physician being told that if she offers certain types of medical advice, she must do so outside of her license to practice medicine.

Telling licensed professionals that they can only engage in certain speech and activities if they do so outside of the umbrella of their license exposes them to ethical and legal liability. It places them between a rock and a hard place. If they do the counseling under their license, they violate SB 201; if they do it outside the scope of their license, they violate N.R.S. § 641A.410.

IV. SB 201 violates the right of minors and their parents to receive information regarding methods to address same-sex attractions.

The First Amendment not only protects the right to speak, it also protects the right to hear and receive it. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943) (right of free speech also "protects the right to receive it").

SB 201 prevents minors facing unwanted same-sex attraction from communicating with professional counselors in "an effective and informative manner." *Sorrell*, 131 S. Ct. at 2663. It thus significantly encroaches upon the fundamental right to receive information, a right the Supreme Court has jealously guarded in the professional speech context. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 757 (1976) (applying the "First Amendment right to receive information and ideas" to a ban on pharmacies publishing drug prices (quotation omitted)); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 366 (1977) (doing the same for a ban on lawyers advertising the price of routine legal services because it "inhibit[ed] the free flow of commercial information").

Contracting "the spectrum of available knowledge" in this manner clearly implicates fundamental First Amendment concerns. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). For the "right to receive information and ideas" applies to minors as well as to adults. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v.*

[1] The exception ministers in § 641A.410(d) is only applicable to a minister who (1) is not licensed to perform counseling, and (2) never holds himself to the public as being licensed. As a result, a minister who is a licensed counselor and who has previously held himself out as a licensed counselor could not use this safe harbor.

Pico, 457 U.S. 853, 867 (1982) (plurality opinion); s*ee also Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1254-55 (3d Cir. 1992) ("The dissenters in Pico made no contention that the First Amendment did not encompass the right to receive information and ideas, but merely argued that the students could not freely exercise this right in the public school setting ….").

Where the rights to freedom of speech and to receive information and ideas are concerned, "[p]recision of regulation must be the touchstone." *NAACP v. Button*, 371 U.S. 415, 438 (1963). SB 201, however, is a "[b]road prophylactic rule[]" that significantly encroaches upon these fundamental rights. *Id*.; *see also id*. at 439 (recognizing that the government must justify "significant encroachment[s] upon personal liberty," including in the professional speech context, by "showing a subordinating interest which is compelling" (quotation omitted)).

V. SB 201 distorts the usual functioning of the counseling relationship—a private medium of expression—to suppress speech the government disfavors.

In *Legal Services Corp. v. Velazquez*, the Supreme Court considered a speech restriction imposed on lawyers representing the interests of indigent welfare recipients pursuant to a federal grant program, a scenario in which legislative discretion is normally at its height. *See* 531 U.S. 533, 536-37 (2001) (noting that the statute in question prohibited "legal representation funded by recipients of LSC moneys if the representation involve[d] an effort to amend or otherwise challenge existing welfare law"). The Supreme Court compared this speech regulation to previous government attempts "to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning." *Id*. at 543.

Emphasizing the importance of the "accepted usage" of the mode of expression at issue, the Supreme Court explained that the First Amendment generally forbids government from regulating private speech forums "in an unconventional way to suppress speech inherent in the nature of the medium." *Id*. Strict scrutiny was therefore required, *see id*. at 553 (Scalia, J., dissenting) (noting that the majority applied "strict scrutiny"), because the statute in question "restrict[e]d LSC attorneys in advising their clients and in presenting arguments and analyses to the courts," thus "distort[ing] the legal system by altering the traditional role of [a certain class of] attorneys." *Id*. at 544. This unique disability ran counter to the general expectation that "attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case." *Id*. at 545. It was therefore inherently suspect. *Id*. at 546.

Just as "the ordinary course of litigation involves the expression of theories and postulates on both, or multiple, sides of an issue," *id*. at 548, counseling relationships involve addressing divergent perspectives on the broad universe of

issues people bring to their professional counselors, including discussions regarding same-sex attraction. Law is not the only discipline to recognize the fundamental right to "independently … define one's identity that is central to any concept of liberty." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984). The mental health professions have long grounded themselves on this perspective. *See, e.g.*, Am. Counseling Ass'n Code of Ethics Preamble (2014) (defining "counseling" as empowering "diverse individuals … to accomplish [their own] mental health … goals" and emphasizing the importance of patient "autonomy"); Code of Ethics of the Nat'l Ass'n of Social Workers § 1.02 (2008) ("Social workers respect and promote the right of clients to self[-]determination and assist clients in their efforts to identify and clarify their goals.").

But SB 201 renders it impossible for minor patients who desire to reduce or eliminate same-sex attraction to accomplish their mental health goals or exercise their fundamental right to self-determination. Indeed, it has the clear "effect of preventing [minors interested in changing unwanted attractions]—and only [such minors]—from communicating with [mental health professionals] in an effective and informative manner" about same-sex attraction. *Sorrell*, 131 S. Ct. at 2663. Such a burdensome regulation of speech, which fundamentally distorts the counseling relationship, "must be a last—not first—resort." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

VI. SB 201 violates the Equal Protection Clause by treating some licensed professionals differently than others.

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

Under the proposed amendment to SB 201 and its interpretation in the May 8th memo, licensed ministers would not be subject to the law so long as they are "acting in their pastor or religious capacity as members of the clergy or as religious counselors." As a result, certain counselors—namely, those who are ordained with a church—are able to take advantage of this exception. But counselors who are not ordained but who nonetheless want to provide aid to individuals dealing with unwanted same-sex attraction cannot avail themselves of this exception.

As a result, licensed counselors are treated differently based solely upon whether or not they are ordained. And that is not a permissible justification under the Equal Protection Clause.

VII. Conclusion

Amendment 640 to SB 201, and its interpretation in the May 8th memo, do nothing to address the serious constitutional issues raised by SB 201. The vague,

unenforceable guidance contained in the Legislative Counsel's Digest creates confusion for both those who are governed by this law and those responsible for enforcing it. The amendment raises more concerns than it solves by potentially exposing licensed counselors to legal liability for engaging in counseling outside of the scope of their licenses.