

February 1, 2023

Members of the Commerce Finance and Policy Committee
State Office Building
100 Rev. Martin Luther King Jr. Blvd.
St. Paul, Minnesota 55155

Dear Members,

True North Legal is a non-profit legal organization that advocates for life, family, and religious freedom on behalf of all Minnesotans. We offer the following high-level analysis of our significant legal and policy concerns regarding HF 16.

The proposed legislation prohibiting licensed mental health professionals in the state—counselors—from practicing so-called conversion therapy raises significant legal and policy concerns relating to counseling access for all Minnesotans. These bans are unconstitutional content-based restrictions on certain forms of counseling and cause more harm than the good these bills purport to remedy; they are a gateway to experimental medicine while denying counseling services for minors when they need it most. HF 16 is also unnecessary because deceptive trade practice and consumer protection laws as well as professional licensing requirements for mental health professionals already protect the public against unlawful therapies.

HF 16 goes well beyond regulating therapy practices that are widely considered egregious. Rather, it seeks to define conversion therapy so broadly that it effectively prohibits licensed mental health professionals from offering many previously available counseling services. All Minnesotans should be free to access the counseling they desire; this bill will dramatically curtail that right.

I. HF 16 as drafted will result in the denial of client access to critical mental health care and will prohibit counseling professionals from serving those clients who desire help.¹

The so-called conversion therapy ban legislation specifically prohibits “*any practice* by a mental health practitioner or mental health professional [...] *that seeks to change* an individual's sexual orientation or gender identity, including efforts to *change behaviors* or *gender expressions* or *to eliminate or reduce sexual or romantic attractions or feelings* toward individuals of the same gender.”²

While this proposed legislation claims to protect minors and vulnerable adults from egregious therapy practices, the plain language of the bill leaves no question that the intent is *not* to ban egregious therapy practices associated with conversion therapy—such as electric shock

¹ Abigail Shrier. *Irreversible Damage: The Transgender Craze Seducing Our Daughters*. Regnery Publishing, 2020.

² HF 16, 93rd Legislative Session, 2023-24 (emphasis added).

therapy and nausea-inducing drugs—as such legislation would have already passed with bipartisan support. Rather, the proposed legislation is an attempt to silence anyone who believes it is possible to live in conformity with one’s biological sex despite struggles with one’s sexual identity or someone who believes that health and healing are possible through counseling and watchful waiting.

These counseling bans will only result in the denial of access to critical mental health care and mental health professionals, ironically to the detriment of those in need of counseling services.³ Rather than protect access to mental health care based on a patient’s self-selected⁴ counseling goals, this legislation seeks to impermissibly “stifle speech on account of its message...require[ing] the utterance of a particular message favored by the Government⁵...[and] pos[ing] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.”⁶ The effect of this muzzling will not only be to drive diverse views out of the marketplace and the public square, but it will also create a vacuum of care as licensed counselors and other mental health professionals will be prohibited from practicing or will self-censor⁷ out of fear of losing their licensure. These overly broad, vague, and unconstitutional restrictions will leave many hurting individuals without the hope and help they are voluntarily seeking.

Equally concerning, the proposed language also applies to vulnerable adults, who, by definition, could be mentally and emotionally competent individuals merely possessing “physical infirmities”⁸ and requiring assistance. The proposed legislation extends its reach over the choices of otherwise competent adults and prevents them from accessing the counseling they need to achieve their desired results, which is likely to expose the state to costly legal challenges like a similar ordinance did in New York.⁹

³ *Individuals Treated for Gender Dysphoria with Medical and/or Surgical Transition Who Subsequently Detransitioned: A Survey of 100 Detransitioners* (available at <https://link.springer.com/content/pdf/10.1007/s10508-021-02163-w.pdf>) (accessed January 30, 2023) (New research shows that far too many young people, and particularly teenage girls, are being steered towards transgender identification before receiving adequate psychological evaluation and counseling).

⁴ As was reported in the *New York Times*, a 2008 study in the Netherlands found that 70% of boys who had gender dysphoria grew out of it within 10 years. Laws that prohibit individuals from reconciling their emotions and sexuality deny medical care for many individuals. Richard A. Friedman, “How Changeable is Gender,” *THE NEW YORK TIMES*, Aug. 22, 2015 (available at <https://www.nytimes.com/2015/08/23/opinion/sunday/richard-a-friedman-how-changeable-is-gender.html>) (accessed January 30, 2023).

⁵ *Tuner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (citing *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 116 (1991)).

⁶ *Otto v. City of Boca Raton*, 981 F. 3d 854, 861 (11th Cir. 2020) (emphasis added) (citing *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2374 (2018)).

⁷ In holding Boca Raton’s conversion therapy ban ordinance unconstitutional, the court reasoned in *Otto v. City of Boca Raton*, 981 F. 3d 854, 864 (11th Cir. 2020), (“...what good would it do for a therapist whose client sought SOCE therapy to tell the client that she thought the therapy could be helpful, but could not offer it? It only matters that some words about sexuality and gender are allowed, and others are not...”).

⁸ Minnesota’s statutory definition of vulnerable adult includes any such person 18 years of age or older who “...possesses a physical or mental infirmity or other physical, mental, or emotional dysfunction: (i) that impairs the individual's ability to provide adequately for the individual's own care without assistance, including the provision of food, shelter, clothing, health care, or supervision; and (ii) because of the dysfunction or infirmity and the need for care or services, the individual has an impaired ability to protect the individual's self from maltreatment; (b) For purposes of this subdivision, "care or services" means care or services for the health, safety, welfare, or maintenance of an individual.” Minn. Stat. § 626.5527 Subd. 21(4)(i)-(ii)(b).

⁹ As was reported by the *New York Times*, after passing a conversion therapy ban ordinance, the New York City Council repealed the ban for fear that it would be struck down by the United States Supreme Court when an Orthodox Jewish psychotherapist challenged the ban on First Amendment grounds. Jeffery C. Mays, “New York City is Ending a Ban on

II. As proposed, HF 16’s counseling ban is unconstitutional, and Minnesota will be subject to legal challenges if passed.

In November of 2020, a federal appellate court struck down a ban narrower than Minnesota’s proposed language, as an infringement on constitutionally protected free speech under the First Amendment.¹⁰ Further, the United States Supreme Court signaled its position on these bans in *National Institute of Family and Life Advocates (NIFLA) v. Becerra*.¹¹ Consequentially, the proposed counseling ban as introduced in Minnesota presents the same constitutional infirmities, including:

- **Censoring constitutionally protected speech of licensed counselors, clients, and many others, based on content and viewpoint.** The proposed legislation “does not [ban] counseling that provides assistance...acceptance, support, and understanding...or facilitates an individual’s coping, social support and identity exploration and development”¹² if that person seeks to change their sex or gender identity. Rather, it only bans speech that helps a person address unwanted same-sex attractions or gender confusion, while permitting speech that helps someone change one’s gender identity or embrace such attractions. This blatant content and viewpoint discrimination is firmly illegal and inconsistent with the United States Supreme Court’s holding that the government may not legally censor speech because of the viewpoint the speech represents.¹³ It is the counselors and clients that should be directing the conversations about a patient’s experience, not the government.
- **Impermissibly vague and entirely subjective terminology.** The proposed language lacks clear guidelines about what conversations, resources, and messages would be permitted and, more importantly, prohibited, including ministry engagement on these issues, and what constitutes “seek[ing] to change” as it relates to an individual’s stated counseling goals. This leaves counselors, clients, and all others expected to comply with the prohibitions confused about what is actually prohibited, which is entirely inconsistent with the First Amendment’s protections against such ambiguity.¹⁴
- **Infringement on the free exercise of religion.** The proposed language is a clear violation of the Free Exercise Clauses of both the U.S. Constitution and the Minnesota Constitution.¹⁵ Many people who seek counseling to address unwanted same-sex attraction or gender confusion do so for religious reasons. And many of the world’s

Conversion Therapy. Here’s Why,” THE NEW YORK TIMES, September 12, 2019 (available at <https://www.nytimes.com/2019/09/12/nyregion/conversion-therapy-ban-nyc.html>) (last accessed January 30, 2023).

¹⁰ *Otto v. City of Boca Raton*, 981 F. 3d 854, 864 (11th Cir. 2020).

¹¹ *Nat’l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2371 (2018)). More specifically, the Court cited to the erroneous conclusions in *King v. Governor of the State of New Jersey*, 767 F.3d 216, 232 (3d Cir. 2014) (“[A] licensed professional does not enjoy the full protection of the First Amendment.”) and *Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2014) (“Most, if not all, medical and mental health treatments require speech, but that fact does not give rise to a First Amendment claim when the state bans a particular treatment.”).

¹² HF 16, 93rd Legislative Session, 2023-24 (emphasis added).

¹³ *Otto v. City of Boca Raton*, 981 F. 3d 854 at 870.

¹⁴ *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

¹⁵ Minn. Const. art. XVI; *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990) (holding the Minnesota Constitution affords even greater conscience protections than the United States Constitution).

religions rely on sacred texts in their shared belief regarding human sexuality and sexual activity within a man-woman marriage. As recognized by the Supreme Court in *Obergefell v. Hodges*, “this view [of man-woman marriage] has long been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.”¹⁶ But this legislation rejects Justice Kennedy’s observation, subjecting licensed counselors, biblical counselors, religious organizations, and even publishers to liability and severe consequences under the law.

- **Stripping parents of constitutionally protected rights.** Parents—not the government—have the right to control the upbringing of their children, and HF 16 directly interferes with that right.¹⁷

III. Legislation regulating licensed mental health providers is unnecessary as it is already regulated by consumer protection laws (deceptive trade) and professional licensing standards, and no such instances of egregious practices have been reported in Minnesota.

Equally concerning, HF 16 seeks to provide the government with impermissible censorship while threatening violators with severe consequences despite Minnesota consumer protection laws governing deceptive trade practices.¹⁸ Under the proposed legislation, faith-driven activities, including youth conferences and publishers, could be considered fraudulent and deceptive practices, subjecting anyone who engages in them to ruinous lawsuits, punitive damages, and attorneys’ fees. It rejects Justice Kennedy’s admonition in *Obergefell v. Hodges*, that “religious organizations and persons [be] given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.”¹⁹

Further, the legislature does not need to pass legislation regulating “conversion therapy” because the Minnesota Psychology Practice Act delegates authority for conduct and discipline of licensed counselors and psychologists to the Board of Psychology, with oversight by the Minnesota Department of Health. It is therefore unnecessary to pass legislation that is already regulated by state agencies. Even more, it is regulated by a board of experts who are members of the profession themselves. The statutory accountability is, therefore, already present.²⁰

¹⁶ *Obergefell v. Hodges*, 135 S. Ct 2584, 2594 (2015).

¹⁷ “The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now *established beyond debate* as an enduring American tradition.” *Wisconsin v. Yoder*, 406 U. S. 205, 232 (1972) (emphasis added).

¹⁸ See also Minnesota Deceptive Trade Practices Act, Minn. Stat. § 325D.44.

¹⁹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

²⁰ “A person who wishes to practice psychology in Minnesota is required to hold a license issued by the Minnesota Board of Psychology. Minn. Stat. § 148.907, subd. 1 (2018). The board is composed of eleven Minnesota residents, including at least six licensed psychologists, who are appointed by the governor to four-year terms. Minn. Stat. § 148.90, subsd. 1, 2, 3; 214.09, subd. 2 (2018). The board’s duties are defined by statute and include ‘adopt[ing] and enforc[ing] rules for licensing psychologists and for regulating their professional conduct.’ Minn. Stat. § 148.905, subd. 1(1) (2018). The board may adopt rules necessary to define standards or to carry out the provisions of the Minnesota Psychology Practice Act (MPPA), Minn. Stat. §§ 148.88-.98 (2018), pursuant to chapter 14 of the Minnesota Statutes. Minn. Stat. § 148.905, subd. 2. The board has adopted rules for that purpose. See Minn. R. 7200.0110-.6105 (2017). The MPPA and the board’s rules promote the legislative policy of ‘protect[ing] the public through licensure and regulation to promote access to safe, ethical, and competent psychological services.’ Minn. Stat. § 148.881.” *Matter of Thompson*, 935 N.W.2d 147, 151 (Minn. App. 2019).

The proposed legislation pretends to solve a problem that does not exist. Proponents of this bill and ordinances have testified to the harmful practices associated with so-called “conversion therapy,” but no substantial evidence or record exists of even one instance of it in Minnesota. These bans will further steer minors toward a path of experimental medicine—cross-sex hormone treatments and other detrimental, irreversible harms, resulting in lifelong medical consequences including sterilization, infertility, and permanent dependency on medical treatments.^{21,22}

Many psychologists understand that children with gender dysphoria often change their minds^{23,24} and later come to fully embrace their biological sex. These bans would effectively bar licensed mental health counselors from helping these individuals even when and if the individuals want it and seek it out.

Moreover, in previous hearings, many individuals shared how access to counseling and watchful waiting protocols helped them achieve their own goals. They testified that they received loving, caring, and compassionate counseling services and are now living joyful lives because of the constructive help they received from a counselor in Minnesota. The success story of these individuals discredits the entire premise upon which these types of bills are based.

IV. Conclusion

HF 16 as proposed seeks to establish impermissible censorship over a broad range of counseling opportunities and threatens violators with severe consequences. Even worse, these bans prohibit minors and vulnerable adults from accessing critical care, including when that care is based on self-selected counseling goals. Any legislative body that votes to strip mental health care from individuals desiring to reconcile their hearts and minds with their biological sex sends a clear message: In Minnesota, your mental health goals don’t matter. There is no legal or policy-based reason to ban speech and counseling access to minors and in some cases, adults, across the state. HF 16 imposes unconstitutional burdens on the citizens of this state and would only invite a plethora of legal challenges resulting in insurmountable burdens on the courts and Minnesota taxpayers.

²¹ See, e.g., *Keira Bell: My Story*, <https://www.persuasion.community/p/keira-bell-my-story> (accessed January 30, 2023).

²² Jonathan Van Maren, *World-renowned child psychiatrist calls trans treatments “possibly one of the greatest scandals in medical history”*, The Bridgehead. Blog. Sept. 25, 2019 (available at <https://thebridgehead.ca/2019/09/25/world-renowned-child-psychiatrist-calls-trans-treatments-possibly-one-of-the-greatest-scandals-in-medical-history/>) (accessed January 30, 2023); Shrier, A. (2020). *Irreversible damage: Teenage Girls and the Transgender Craze*. Regnery Publishing.

²³ Littman, L., Parent Reports of Adolescents and Young Adults Perceived to Show Signs of a Rapid Onset of Gender Dysphoria, PLOS ONE (March 2019) (<https://doi.org/10.1371/journal.pone.0214157>) (accessed January 30, 2023) (Often linked to social contagion especially in females).

²⁴ *The NHS Ends the “Gender-Affirmative Care Model” for Youth in England*, SEGM (Oct. 2022) <https://www.segm.org/England-ends-gender-affirming-care> (accessed January 30, 2023) (finding that after “extensive stakeholder engagement and a systematic review of evidence, England’s National Health Service (NHS) has issued new draft guidance for the treatment of gender dysphoria in minors, which sharply deviates from the ‘gender-affirming’ approach.”).