



LEGAL MEMORANDUM

DATE: February 5, 2019

RE: Legal Analysis of Nebraska LB 167 and LB 168

I. Summary

Alliance Defending Freedom is a non-profit legal organization that advocates for life, religious liberty, and marriage and the family. We regularly analyze proposed laws and their effect on constitutional freedoms. We were asked to offer legal analysis of LB 167 and LB 168. These proposed bills would likely be unconstitutional because they infringe upon the rights of numerous Nebraska residents, religious organizations, and professional counselors.

LB 167 is a targeted restriction on the speech of counseling clients, licensed counselors, and religious leaders. It targets a specific message—that an individual can experience personal transformation to their sexuality or identity—for censorship. Such viewpoint-based restrictions on speech are unconstitutional. The breadth of protected activities subject to this impermissible censorship is staggering:

- A therapist could not help a married mother of three who is experiencing unwanted attraction to a close female friend overcome those feelings;
- A 17-year old girl who is experiencing confusion over her gender identity but who, because of concerns about the unknown health impact of hormone therapy and surgery, wants to embrace her female biological sex would be unable to find a counselor to help her achieve her goal; and
- A religious ministry could not advertise or hold a paid conference on sexual purity if the conference encourages attendees to avoid sexual activity outside of marriage between a man and woman, including homosexual activity, and provides guidance on how to reduce such attractions.

LB 168 is even more problematic. While a licensed psychiatrist could affirm that a 3-year old biological male is a transgender female, and even recommend puberty blockers, hormone therapy, and surgery that render the child permanently sterile, it would be criminal “child abuse” for parents to take their 3-year old to a psychiatrist to help the child embrace his male biology.

Numerous faiths teach that individuals can experience personal change, and many clients seek professional help to conform their lives to the teachings of their faith. LB 167 and 168 both demonstrate open hostility towards these religious teachings,

labeling them as deceptive and abusive, and depriving individuals of the freedom to live out these teachings.

Finally, these bills seem to be based on the assumption that the government has broad power to regulate the speech of any licensed profession. But that premise has been rejected by the Supreme Court in *National Institute of Family and Life Advocates (NIFLA) v. Becerra*, which decisively held that no such general power exists. The Court went on to highlight two cases involving state laws similar to LB 167 that banned so-called “conversion therapy” for minors as being erroneously decided for holding that counseling speech was afforded lesser constitutional protection. 138 S. Ct. 2361, 2371 (2018).¹

As a result, laws like these are now being challenged in federal court. *See, e.g., Schwartz v. City of New York*, Case No. 1:19-cv-463 (E.D.N.Y.) (a case by an Orthodox Jewish psychotherapist challenging New York City’s counseling ban on First Amendment grounds). Recently, a federal magistrate judge recommended that a similar law in Tampa, Florida be enjoined because the plaintiffs “established a substantial likelihood of success on the merits of their free-speech claims under the First Amendment.” *Vazzo, et al. v. City of Tampa*, Case No. 8:17-cv-02896, Doc. 149 at 2 (Jan. 30, 2019). Nebraska legislators will likely expose the State to costly and time-consuming litigation if they choose to enact LB 167 or 168.

II. Overview of LB 167 and 168

LB 167 and 168 both seek to punish speech and other activities misleadingly referred to as “conversion therapy.” LB 167 broadly defines “conversion therapy” to include any “efforts to change behaviors or gender expressions or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender.” LB 168 adopts a similar definition focused on “any effort to change the behavioral expression of an individual’s sexual orientation ... [or] gender expression.” However, counseling that provides “assistance to an individual undergoing gender transition” or “acceptance, support, and understanding” is permitted under the bills.

LB 167 first prohibits any licensed individual (including nail technicians, athletic trainers, and veterinarians) from providing counseling to assist a minor with undesired same-sex attractions or gender identity confusion. This applies regardless of whether the individual is acting within the scope of their licensed profession. LB 167 next prohibits any person from (1) providing such counseling or similar activities to any person—**including adults**—for monetary compensation or (2) advertising such counseling or services. Doing either of these activities constitutes a violation of the

¹ 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.”).

Nebraska Uniform Deceptive Trade Practices Act, Neb. Rev. St. § 87-301 *et seq.* Finally, LB 167 prohibits any state or local funds from being given to an organization that engages in so-called “conversion therapy.”

Because of the bill’s vague terminology—banning any “effort” that could be subjectively viewed as helping a person experience personal transformation—the scope of outlawed activities is extremely broad. It encompasses one-on-one counseling and discussions, written materials produced to help with these issues, and even conferences and public events where these issues are addressed.

LB 167 brings with it severe consequences for violations. Any licensed individual faces revocation of their license. And under the Uniform Deceptive Trade Practices Act, a counselor, minister, or any other individual or organization is subject to injunctions silencing their speech, damages, costs, and attorneys’ fees through a lawsuit that can be filed by any person who claims that they were “likely to be damaged” by the speech or other activities. Neb. Rev. St. § 87-303. Violators can also be charged with a Class II misdemeanor. Neb. Rev. St. § 87-303.08.

LB 168 goes further, declaring it to be *per se* child abuse for parents to allow their child to be “placed in a situation to be subjected to conversion therapy” by a “mental health or child care practitioner.” Parents who help their child find counseling to explore all options related to their sexuality or identity, or who even place their child in a religious day care center that requires the child to dress consistent with their biological sex, would be guilty of a Class IIIA felony with penalties up to 3 years in jail and a \$10,000 fine.

III. LB 167 and 168 impermissibly regulate speech between a client and counselor based on its content and viewpoint.

Both LB 167 and 168 facially target speech and other expressive activities that help a person “to change behaviors and gender expressions or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender.” But they permit counseling and speech that “provides acceptance, support, and understanding.” In other words, speech that helps a person address unwanted attractions or behaviors is banned, while speech that helps someone embrace those behaviors is permitted.

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.”).

That includes regulating the speech of licensed professionals like counselors and

therapists. Last year, the Supreme Court struck down a California law regulating speech, despite arguments from the state that “professional speech” is entitled to lesser First Amendment protection. The Court held that “[s]peech is not unprotected merely because it is uttered by ‘professionals.’” *NIFLA*, 138 S. Ct. at 2371-72. “[W]hen the government polices the content of professional speech, it can fail to ‘preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.’” *Id.* This marketplace of ideas is vital because “[p]rofessionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields.” *Id.* at 2374-75.

Despite pronouncements from the APA or other state or national organizations, there remains “good faith disagreements” in the therapeutic profession about the pros and cons of counseling to help individuals make personal life changes related to their sexual orientation or gender identity. *See* Abigail Shrier, “When Your Daughter Defies Biology,” *WALL STREET JOURNAL*, Jan. 7, 2019 (“This idea that what we’re supposed to do as therapist is to ‘affirm’? That’s not my job,” said psychotherapist Lisa Marchiano.”). Indeed, in the 2009 “Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation,” the APA acknowledged that:

- “Some individuals perceived that they had benefited from SOCE [sexual orientation change efforts],”
- “Other individuals reported that SOCE was helpful—for example, it helped them live in a manner consistent with their faith. Some individuals described finding a sense of community through religious SOCE and valued having others with whom they could identify,” and
- “[S]ome individuals modified their sexual orientation identity (e.g., individual or group membership and affiliation, self-labeling) and other aspects of sexuality (e.g., values and behavior).”

Nebraska may not engage in viewpoint discrimination by taking away the freedom of individuals to explore such counseling and determine if it is the right fit for them.

For example, imagine a 40-year-old wife and mother who experiences same-sex attractions but who also believes that acting upon those attractions would be inconsistent with her sincerely-held religious beliefs and not in the best interest of her husband and children. If that woman believed that, rather than acting on her attractions, she should instead choose to find fulfillment in her marriage, she would be unable to obtain professional counseling to assist her with that goal. Why? Because LB 167 prohibits counseling that would assist her with reducing same-sex attractions in order to live consistent with her beliefs because such counseling seeks to “reduce ... feelings towards individuals of the same gender.”

Similarly, if a 17-year old male, after several years of identifying as a female,

came to realize that he would be most personally fulfilled by living consistent with his male biological sex, LB 167 would prohibit him from finding a counselor to help him toward his desired outcome because it bans “efforts to change behaviors or gender expressions.” And under LB 168, his parents could be charged with felony “child abuse” if they helped their son find a counselor to assist with the son’s goals.

Yet 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. Richard A. Friedman, “How Changeable is Gender,” THE NEW YORK TIMES, Aug. 22, 2015. Under LB 167, these young men would be denied counseling to help them as they grow out of their gender confusion. And loving parents who want to help will live in fear of criminal prosecution for doing so.

Through LB 167 and 168, Nebraska is dictating which counseling conversations are permissible and which are not based solely on the views expressed regarding sexuality and gender identity. Such targeted restrictions on speaking certain views and ideas are impermissible under the First Amendment.

IV. LB 167 and 168 use vague, subjective terminology that opens the door to harassing lawsuits aimed at faith-based counselors and ministries.

Under LB 167 and 168, any “efforts to change behaviors or gender expressions” are proscribed. But determining what “efforts” violate this ban is an inherently subjective inquiry, and neither law provides concrete guidance on what types of conversations, conduct, or other activities would be subject to this wide net. As a result, a counselor or other individual is required to guess at the entirely undefined line between services that permissibly provide “acceptance, support, and understanding” and those that unlawfully seek to “change” that person’s sexual orientation or gender identity.

The confusion continues with LB 167’s ban on any licensed Nebraskan—a list that includes nail technicians, veterinarians, and athletic trainers—providing counseling to a minor to address same-sex attraction or gender identity confusion even when performed outside the scope of their licensed profession. As a result, a volunteer youth pastor who is also a licensed athletic trainer would seemingly be prohibited from teaching a lesson to his youth group encouraging them to abstain from all sexual activity, including homosexual behavior, because that could be interpreted as an effort to “change behaviors.”

“[A] law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.” *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). Under LB 167, anyone who speaks, teaches, or counsels on subjects involving sexual orientation or gender identity is forced to guess whether their statements violate the law. And since LB 167 empowers any Nebraskan to sue alleged violators, an aggressive plaintiff can sue counselors and others

who speak messages that the plaintiff disagrees with, claiming that they were “likely to be damaged” by such expression. As a result, many individuals and organizations will be forced to self-censor—completely avoiding any discussions of sexuality or gender identity—out of fear of facing a costly lawsuit.

The vagueness concerns are amplified under a criminal statute like LB 168. The use of an intentionally vague definition of “conversion therapy” in “a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.” *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (internal citations and quotations omitted).

Laws must provide clear guidance of what is proscribed to ensure that “ambiguity does not chill protected speech.” *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 254 (2012). But LB 167 and 168 are intentionally vague. They not only leave clients, counselors, and speakers in the dark as to what words and actions trigger liability, but they also give opponents of such speech the power to define its permissible bounds and even impose criminal liability when they subjectively believe the laws have been violated.

V. LB 167 and 168 violate the free exercise of religion.

In addition to impermissibly burdening free speech, LB 167 and 168 will, if enacted, violate the Free Exercise Clause. Some who seek counseling to address sexual orientation or gender identity do so for religious reasons. That is, their religion informs them that they should not act upon same-sex attractions or that they should seek to live consistent with their God-given biological sex. And some counselors who offer such counseling likewise do so for religious reasons.

Many of the world’s major religions—including Judaism, Islam, and Christianity—teach against sexual activity outside of marriage between a man and woman. Relying upon sacred texts, members of these faiths believe that individuals have a choice to abstain from improper sexual behavior, and thus they actively work with individuals to overcome such desires. These faiths have been engaging in efforts to help all people embrace the beauty of sexual activity within a man-woman marriage for millennia, as the Supreme Court recognized in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (“This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.”).

Yet LB 167 and 168 demonstrate hostility towards such faith-driven activity, labeling it as deceptive and criminalizing it as “child abuse.” They tell clients who have benefitted from religious counseling that they were deceived, and parents wanting to explore all options with their child that they are abusive. But as the Supreme Court held just last year, the government “cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.” *Masterpiece*

Cakeshop, Ltd. v. Colorado Civil Rights Comm’n, 138 S. Ct. 1719, 1731 (2018). LB 167 and 168 violate this by declaring certain faith-based counseling as illegitimate.

VI. LB 167 and 168 violate the right of adults, parents, and minors to explore all options related to their sexuality and identity.

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) (the right of free speech also “protects the right to receive it”).

LB 167 and 168 prevent anyone facing unwanted same-sex attraction from communicating with professional counselors in “an effective and informative manner.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011). They significantly encroach 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)). 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. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion).

Given the widespread debate over best course of treatment for children experiencing gender dysphoria, minors and parents alike benefit from having access to the full “spectrum of available knowledge”. Yet LB 167 and 167 deprive families of this knowledge, mandating that the only path available is one that leads to puberty blockers, hormone replacement, and sterilizing surgery.

VII. Conclusion

LB 167 and 168 undermine individual freedom through their restrictions on counseling and other forms of speech. Individuals who, for example, seek affirmance of same-sex attraction are able to procure counseling services and other resources, whereas those who believe that they should live a chaste life consistent with their religious beliefs or that they should seek to live consistent with their biological sex are denied counseling and other resources to help them achieve these goals.

LB 167 and 168 are likely unconstitutional because they engage in viewpoint discrimination, are impermissibly vague, and demonstrate hostility towards religious beliefs regarding sexuality and identity. They limit the freedom to explore all counseling options and interfere with the liberty of patients to choose the counseling that they believe best furthers their personal goals.