From the Desk of
Senator Tim Knopp

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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

May 6, 2015

Senator Ted Ferrioli
Senate Republican Leader
900 Court Street NE S323
Salem OR 97301

Re: Constitutionality of HB 2307

Dear Senator Ferrioli:

You have asked this office the following questions related to A-engrossed House Bill 2307:

1. Does the bill violate the free speech protections of the United States Constitution as impermissible viewpoint discrimination?

2. Does the bill violate the free speech protections of the United States or Oregon Constitution as impermissible content-based speech regulation?

3. Does the bill violate the protections afforded religion in the United States and Oregon Constitutions by burdening the free exercise of religion?

The answer to each of your questions is no. A-engrossed House Bill 2307 does not violate any of the provisions described above.

Under section 1 (1) of A-engrossed House Bill 2307, "[a] mental health care or social health professional may not practice conversion therapy if the recipient of the conversion therapy is under 18 years of age." Conversion therapy is defined, in part, as the provision of "professional services for the purpose of attempting to change a person's sexual orientation or gender identity." Before proceeding with our analysis, we want to draw your attention to the fact that this prohibition does not prohibit speech. It prohibits certain types of "professional services." These professional services may involve speech. But the prohibition does not prohibit speech *per se*, which is integral to our analysis of the bill.

I. Viewpoint and Content-Based Discrimination under the First Amendment

The First Amendment to the United States Constitution states, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech." The Supreme Court of the United States has developed jurisprudence for determining whether a law impermissibly violates that provision. Under that jurisprudence, a court first must determine whether the First Amendment protects the type of speech at issue. If the First

Amendment protects the type of speech at issue, a court must determine whether the law regulates the content of the speech or the time, place or manner of the speech. In making that determination, a court will examine "whether the government has adopted [the] regulation of speech because of disagreement with the message it conveys."[1] If a law regulates the content of the speech, then a court will presume that the law is invalid and strictly scrutinize it. On the other hand, if a law regulates the time, place or manner of the speech, then a court will uphold the law if it is "narrowly tailored to serve a significant governmental interest [and leaves] open ample alternative channels for communication of the information."[2]

Viewpoint discrimination is a type of content-based regulation. Content-based regulation regulates speech on the basis of the substance of the speech.[3] "Viewpoint discrimination is an egregious form of content discrimination."[4] Courts will strictly scrutinize any law that imposes a content-based regulation. Courts will subject a law that imposes viewpoint discrimination to even greater scrutiny.[5]

With respect to A-engrossed House Bill 2307, the first question that we must ask is whether the bill regulates speech. If the bill regulates speech, the second question we must ask is whether the bill regulates the time, place or manner of speech, the content of speech or the viewpoint of the speaker. We find that the bill does not regulate speech. It regulates "professional services," i.e., conduct. According to the United States Supreme Court:

> [I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed.[6]

The Supreme Court has further opined that "words can in some circumstances violate laws directed not against speech but against conduct."[7] A-engrossed House Bill 2307 clearly aims to prohibit certain types of conduct, i.e., the provision of professional services for the purpose of attempting to change a person's sexual orientation or gender identity. The bill does not attempt to regulate speech *per se*. It does not prohibit a mental health care or social health professional from articulating their viewpoint on sexual orientation or gender identity, even to a patient of the mental health care or social health professional. Rather, it prohibits professional services that attempt to *change* that sexual orientation or gender identity. The bill allows for speech. It does not allow for an intentional act that aims to change a person's sexual orientation or gender identity.

II. Content-Based Discrimination under Article I, Section 8

Article I, section 8, of the Oregon Constitution, states, in pertinent part, that "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to

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[1] *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).
[2] *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).
[3] *Mesa v. White*, 197 F.3d 1041, 1046 (10th Cir. 1999).
[4] *Mesa* at 1047 (citation omitted).
[5] *Id.*
[6] *Giboney v. Empire Storage and Ice Company*, 336 U.S. 490, 502 (1949).
[7] *R.A.V. v. Saint Paul*, 505 U.S. 377, 389 (1992).

speak, write, or print freely on any subject whatever." In *State v. Robertson*, the Supreme Court of Oregon established a framework for determining whether a law impermissibly violates that provision.[8] The framework first separates laws that affect speech into three categories:

> The first *Robertson* category consists of laws that "focus on the *content* of speech or writing" or are "written in terms directed to the substance of any 'opinion' or any 'subject' of communication." . . . The second *Robertson* category consists of laws that "focus[ ] on forbidden effects, but expressly prohibit[ ] expression used to achieve those effects." . . . Finally, the third *Robertson* category consists of laws that "focus[ ] on forbidden effects, but without referring to expression at all."[9] (Emphasis in original.)

A court's analysis of a law under Article I, section 8—as with a court's analysis of a law under the First Amendment—begins with a determination of whether the law regulates the content of speech. If the law regulates the content of speech, then a court will find that the law is unconstitutional "unless the scope of the restraint is wholly confined within some historical exception. . . ."[10]

On the other hand, if the law does not regulate the content of speech, then a court will determine whether the law regulates the forbidden effects of speech. If a law expressly prohibits speech for the purpose of preventing a forbidden effect of the speech, it belongs to the second *Robertson* category. If a law falls within that category, a court will uphold the law if it regulates activities that are related to the forbidden effect, or the court will invalidate the law if it "'restrains' the free expression of opinion or 'restricts' the right to speak freely on any subject, as protected by Article I, section 8."[11]

We find that A-engrossed House Bill 2307 properly belongs to the third *Robertson* category because it focuses on a forbidden effect—attempting to change a minor's sexual orientation or gender identity—without referring to expression. As explained above, the bill aims to prohibit certain types of conduct and does not attempt to regulate speech *per se*.

III. Free Exercise of Religion

Under the First Amendment to the United States Constitution, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The Fourteenth Amendment to the United States Constitution extends the application of the Free Exercise Clause to state action. If state action prohibits the free

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[8] 293 Or. 402 (1982).
[9] *City of Eugene v. Miller*, 318 Or. 480, 488 (1994), *quoting Robertson* at 412, 417 and *State v. Plowman*, 314 Or. 157, 164 (1992), *cert. denied*, 508 U.S. 974 (1993).
[10] *Miller* at 488, *quoting Robertson* at 412.
[11] *Outdoor Media Dimensions, Incorporated v. Department of Transportation*, 340 Or. 275, 290. In *Outdoor Media*, the Supreme Court of Oregon explained that its analysis under the second category of *Robertson* is similar to a court's analysis of time, place and manner restrictions under First Amendment jurisprudence. 340 Or. at 288-289.

exercise of religion, the state action is subject to the *Sherbert* test.[12] The *Sherbert* test requires that a court weigh:

> (1) [T]he magnitude of the statute's impact upon the exercise of the religious belief,
> (2) [T]he existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief, and
> (3) [T]he extent to which recognition of an exemption from the statute would impede the objectives sought to be advanced by the state.[13]

The United States Supreme Court curtailed the application of the *Sherbert* test in 1990 in *Employment Division v. Smith*.[14] In that case, the Court held that a burden on free exercise no longer had to be justified by a compelling state interest if the burden was an unintended result of laws that are generally applicable. After *Smith*, only laws that were intended to prohibit the free exercise of religion, or violated other constitutional rights, such as freedom of speech, were subject to the compelling interest test.[15]

We find that A-engrossed House Bill 2307 neither intends to prohibit the free exercise of religion nor does the bill burden the free exercise of religion while violating other constitutional rights. The bill only prohibits the provision of "professional services." It does not prohibit a person from engaging in any conduct that is not a "professional service." A mental health care or social health professional may continue to articulate their beliefs about sexual orientation or gender identity in any setting. Within a church or other religious setting, a mental health care or social health professional is free to articulate those beliefs as a teacher or as a participant in a study or prayer group. As long as the mental health care or social health professional does not aim to change a specific minor's sexual orientation or gender identity within a professional context, the mental health care or social health professional is not subject to the bill's prohibition.

We conclude by responding to a letter that you forwarded to our office written by Alliance Defending Freedom. That letter concluded that A-engrossed House Bill 2307 "is unconstitutional because it engages in viewpoint discrimination, is an impermissible content-based speech regulation, and impermissibly burdens the free exercise of religion." We disagree. The fundamental error with the analysis provided by Alliance Defending Freedom is that the letter assumes that the bill regulates speech and not conduct. However, close analysis of the language of the bill indicates otherwise.

Feel free to contact our office if you have any further questions about A-engrossed House Bill 2307.

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[12] *See Sherbert v. Verner*, 374 U.S. 398 (1963).
[13] *EEOC v. Mississippi College*, 626 F.2d 477, 488 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).
[14] 494 U.S. 872 (1990).
[15] 494 U.S. at 880-882.

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Very truly yours,

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