COMMENTS OF *PROTECT ALL TEENS* ON PROPOSED AMENDMENTS TO PSYCHOLOGIST LICENSING ACT RULES AND MENTAL HEALTH PROFESSIONAL PRACTICE ACT RULES REGARDING "SEXUAL ORIENTATION CHANGE EFFORTS" AND "GENDER IDENTITY CHANGE EFFORTS" WITH MINORS

September 25, 2019

On September 1, the Division of Professional Licensing (DOPL) published proposed rules that would amend the Mental Health Professional Practice Act rules at sections R156-60-102 and R-156-60-502, Utah Administrative Code (UAC), and the Psychologist Licensing Act rules at sections R156-61-102 and R156-61-502, UAC. The Mental Health Professional Practice Act rules govern licensed clinical social workers, clinical mental health counselors, and marriage and family therapists. The Psychologist Licensing Act rules govern licensed psychologists.

The persons submitting these comments (the signatories to the attached cover letter) who work with and support *Protect all Teens* include a university-level mental health adjunct professor and academic, licensed therapists, individuals who have benefitted from competent and ethical therapy, lawyers, and other interested citizens.

The proposed amendments to sections R156-60-502 and R156-61-502 (which are identical) would define "engaging in or attempting to engage in the practice of sexual orientation change efforts or gender identity change efforts with a client who is less than 18 years old" as unprofessional conduct, which would subject a licensed mental health therapist or psychologist to suspension or revocation of his or her license under section 58-1-401(2)(a), Utah Code Ann. The proposed amendments to sections R156-60-102 and R156-61-102 (which are identical) would add the following definitions[1]:

> (4) "Gender expression" means an individual's presentation and behaviors that express aspects of gender, including gender identity or gender role.
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> (5) "Gender identity" means an individual's experience of their gender, including one's view of oneself as a man, woman, or any other gender.
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> (6) "Gender identity change efforts" means methods, practices, procedures, or techniques with the goal of changing an individual's gender identity, gender expression, or any of the associated components of these.
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> . . . .

[1] The subsection and paragraph numbering quoted here are from the proposed amendment to the Psychologist Licensing Act rule at section R156-61-102. The proposed amendment to the Mental Health Professional Practice Act rule at section R156-60-102 would add new subsections (5) through (7) and (10) through (12), with identical text.

(14) “Sexual orientation” means an individual’s gendered patterns in attraction or behavior, identity related to these patterns, or associated components.

(15) “Sexual orientation change efforts” means methods, practices, procedures, or techniques with the goal of changing an individual’s sexual orientation or any of its components, including gendered patterns in attraction or behavior and identity related to these patterns.

(16) The terms “sexual orientation change efforts” and “gender identity change efforts” do not include methods, practices, procedures, or techniques that:

(a) do not have the goal of changing an individual’s sexual orientation or gender identity; and

(b) have any of the following goals:

(i) reducing an individual’s internalized stigma;

(ii) providing acceptance, support, and comprehensive assessment of an individual;

(iii) facilitating an individual’s active coping, social support, and identity exploration and development;

(iv) assisting an individual undergoing gender transition; or

(v) preventing or addressing an individual’s unlawful conduct or unsafe sexual practices in a manner that is neutral with respect to the sexual orientation and gender identity of the individual.

These proposed amendments are very similar to a bill considered and rejected by the Judiciary Committee of the Utah House of Representatives in March of this year. The Committee debated and voted on HB 399, a bill to ban providing so-called “conversion therapy” to minors and defining doing so as “unprofessional conduct” under section 58-1-501(2), Utah Code Ann. The Committee rejected HB 399 as introduced by a vote of 8-4, and adopted and sent to the full House a much more specific (and legally defensible) Fourth Substitute by the same vote margin. At the insistence of the sponsor of the original bill, the Fourth Substitute was put on hold through the end of the legislative session.

Following the defeat of the original HB 399, its principal outside proponent, Equality Utah, very publicly condemned the Committee’s action and several parties involved (including the Governor), and promised to come back “year after year,” if necessary, until a bill that it wanted is passed. Some three months later, by letter dated June 17, 2019, Governor Herbert instructed the Executive Director of the Utah Department of Commerce, of which DOPL is a division, to have the Psychologist

Licensing Board prepare proposed rules "to ethically regulate psychological interventions for minor children regarding their sexual orientation and gender identity."

The proposed rule amendments are the product of internal consideration and vote (without public input) of the Psychologist Licensing Board, followed by the Social Worker Licensing Board and the Clinical Mental Health Counselor Licensing Board in response to the Governor's directive.

The basic structure, practical operation, and effect of the proposed rule amendments are substantively the same as that of the original HB 399. The proposed amendments thus, unfortunately, present all the same professional, practical, and legal problems and flaws as HB 399 presented, as discussed further below. Indeed, the proposed amendments may give rise to some additional problems.

It is important to recognize at the outset the larger national context of the issues involved. HB 399 did not originate in Utah. With certain variations not relevant here, HB 399 as introduced was substantively the same as SB 201 enacted in Nevada in 2017. SB 201 is one of the "copycat" laws enacted in 16 states that are substantively the same as SB 1172 enacted in California in 2012 (Cal. Bus. & Prof. Code §§ 865-865.2) and A3371 enacted in New Jersey in 2013 (N.J. Rev. Stat. § 45:1-55). Sixteen other states have rejected similar proposals.

HB 399 was part of an ongoing effort by national and state gay and transgender activist groups to de-legitimize and suppress by force of law any therapeutic approach that is not "gay-affirming" or transgender/gender-dysphoria-affirming (as described below), and therefore not consistent with their political agenda. If DOPL were to adopt the proposed amendments as a final rule, DOPL would unwittingly promote that agenda and at the same time effectively attempt to circumvent, by administrative decree, the Legislature's refusal to adopt HB 399. In addition, it would be promulgating a rule that is illegal because it is contrary to the First and Fourteenth Amendments to the Constitution of the United States.

Finally, were the proposed amendments to be put into effect, the most probable result would be to cause substantial harm to youth in the State of Utah who are struggling with unwanted same-sex attractions or gender confusion or dysphoria instead of protecting them—the exact opposite result of what DOPL undoubtedly intends.

I. Brief Summary

The following is a brief summary of the problems and flaws in the proposed rule amendments. These profound flaws and problems, as well as suggested alternative regulatory language that would solve them, are explained in greater depth below.

1. The proposed amendments are based on the premise that ordinary ethical "talk therapy" (conversations between a client and a therapist) that recognizes that sexual attractions or gender perceptions can and do change for some people over time is somehow harmful to

minors. That premise is based on the outdated and discredited assumption that same-sex attractions are innate (i.e., genetically predetermined) and that transgender perceptions/gender dysphoria are somehow immutable. In substance, the proposed amendments would enshrine these propositions into law.

Neither scientific research nor logic nor clinical experience supports these propositions. Indeed, both clinical experience and recent research show that the sexual attractions of those who experience same-sex attractions may be, and often are, fluid. Nor is there any scientific evidence of a "gay gene;" indeed, research exploring possible genetic correlation of same-sex attraction implies that there is no such gene or genes. Moreover, gender confusion or dysphoria obviously is not immutable; the vast majority of cases of teenage gender dysphoria resolve themselves over time without any therapeutic intervention at all.

2. The proposed rule amendments are grounded in a misunderstanding or mischaracterization of what actually does—and does not—happen in counseling by an ethical, competent therapist who recognizes that sexual attractions and gender identity sometimes can and do change. In fact, an ethical therapist, while open to the possibility of client change, is not attempting to "change" the client at all. The focus of therapists whose approach is open to a client's desire for change is not primarily on the attractions or feelings themselves. Instead, their therapy addresses underlying issues that are causing clients distress (which may range from family, parental, and social relationships to sexual abuse or trauma to pornography use) that may also bear on a client's sexual attractions or behaviors or gender confusion. Therapy may explore the importance and role that the attractions and behaviors play in the client's life and what may reinforce them (including pornography use), and exploring fluidity in attractions, all according to the client's freely chosen and desired objectives.

Ethical and competent therapy never involves physically aversive techniques (such as electroshocking genitals or inducing vomiting). No known licensed therapist in Utah has used such techniques for decades, as the supporters of the proposed amendments concede. Nor does ethical and competent therapy involve verbally abusive techniques such as bullying, intimidation, shaming, or humiliation. Contrary to the impression the activists who support the proposed amendments want people to have, the proposed amendments are not directed either exclusively or even primarily at physically aversive practices. They are designed to suppress ordinary conversational speech between a client and his or her therapist that does not support the unscientific innate and immutable activist misinformation.

Again contrary to what the activist supporters of the proposed amendments want government officials to believe, there is no scientific research that indicates that ethical and competent "talk" therapy with a licensed therapist that is open to the possibility that a client's sexual attractions, sexual orientation, or gender dysphoria may be fluid is harmful to either minor or adult clients. Indeed, the real-world experience of both therapists and clients is the opposite. While many clients may not experience significant change in same-sex attractions or behaviors or gender perceptions in the course of therapy, many do. A substantial share of gender-confused youth will be helped in resolving that confusion. Many clients experiencing same-sex attractions do experience significant or substantial diminishment of those attractions and increased ability to manage them and live lives consistent with their personal religious and moral convictions.

Further, some clients also experience increase in heterosexual attractions, even in some cases to the point of entering into healthy and satisfying heterosexual marriages.

3. The proposed amendments (like HB 399) are structured to define prohibited "sexual orientation change efforts" and "gender identity change efforts" both every broadly and ambiguously, and at the same time create a "safe harbor" for therapeutic approaches that are "gay-affirming" or transgender/gender-dysphoria-affirming. Because the "affirming" approach would be the only therapeutic approach for which a therapist could be assured that he or she would not be at risk of professional discipline, the inevitable result would be to chill any therapeutic discussion that is not gay-affirming or transgender/gender-dysphoria-affirming. That was the intent of the proponents of HB 399.

Indeed, the fear of being caught up in a costly quasi-judicial proceeding, with its attendant negative publicity, would lead therapists to be overcautious about any conversation outside an "affirming" approach concerning any issue that could bear on same-sex attractions or gender confusion or dysphoria.

4. The proposed amendments would enshrine into state law the unsupported and unscientific notions that there are more than two genders and that "gender" is different from, and independent of, biological sex.

5. The proposed amendments give rise to a number of unanswered, difficult, and very troublesome questions in practical application in the therapist's office. In a wide variety of situations that are likely to arise, the therapist simply would not know and could not ascertain where the line is between what discussions would be prohibited and what discussions would be permitted (other than those from a gay-affirming or transgender/gender-dysphoria-affirming perspective). Good rules provide bright and clear lines defining what is prohibited versus what is proper. The proposed amendments exemplify the opposite.

6. The likely practical result of the proposed amendments would be to (a) limit therapists' ability to effectively help minors; (b) potentially increase the risk of suicide in minors rather than reduce it; (c) make it more difficult to effectively address trauma resulting from sexual abuse; (d) make it more difficult to address compulsive sexual thoughts and behaviors; (e) prevent therapists from addressing with minor clients feelings or emotions related to gender confusion or the risks of gender-altering medical procedures; and (f) impede minor clients' ability to achieve their own self-determined goals.

7. The proposed amendments are not based on objective research or scientific fact. In drafting the proposed amendments, the Psychologist Licensing Board, according to the Rule Analysis, "consulted with national experts, and coordinated with the American Psychological Association" (APA). However, it appears that the "experts" consulted were limited to gay-affirming and transgender-affirming advocates. Further, it is very clear that the APA division that deals with sexual orientation and gender issues (Division 44) is severely ideologically corrupted and biased, and cannot credibly lay claim to either balance or scientific objectivity. Its own official statements show that Division 44 is much more of a pro-gay-activist and pro-transgender political advocacy section of the APA than a research and scientific organization,

and the materials it produces—on which the Psychologist Licensing Board relies—reflect that. Nevertheless, even the radically pro-gay and pro-transgender Division 44, by its own admission, has not found any reliable scientific evidence that ordinary ethical, competent therapy by qualified licensed therapists that addresses issues that may have bearing on a client's sexual attractions or behaviors or gender perceptions is harmful to minor or adult clients, much less generally or inherently harmful.

Science has not discovered a "gay gene" or genes, and the results of genetic research imply that there is no such gene. Further, extensive research does indicate that the sexual attractions of a large percentage of men and women who experience same-sex attractions are fluid over time. Same-sex attractions or "orientation" are not inborn or immutable.

The current fad of transgenderism and medical "gender change" procedures is unscientific and involves many risks and dangers, particularly with medical, hormonal, or chemical "change" procedures that are irreversible.

In short, objective research and actual science do not give support to, and provide no basis for, the proposed rule amendments.

8. The proposed amendments are both a content- and viewpoint-based regulation of speech that is presumptively unconstitutional under the First and Fourteenth Amendments to the Constitution of the United States. Supporters of the proposed amendments (and of HB 399) argue that they are constitutional in view of decisions of the Ninth Circuit and the Third Circuit in 2014 that sustained the California and New Jersey statutory minor therapy bans against a First Amendment challenge. However, those decisions were based primarily on a First Amendment legal theory that the U.S. Supreme Court later expressly rejected in a 2018 decision. Indeed, the Supreme Court identified both the Ninth Circuit and the Third Circuit decisions as the primary examples of the legal doctrine the Supreme Court rejected. Thus, the 2014 Ninth Circuit and Third Circuit decisions are not valid or reliable precedent.

9. To sustain the proposed amendments against a First Amendment challenge under the proper standard required by the Supreme Court, the State would have to show that the amendments are narrowly tailored to serve what the courts call a "compelling state interest." To show a "compelling state interest," the State would have to show that any therapeutic conversation that is not gay-affirming or transgender/gender-dysphoria-affirming is essentially always harmful to minors. To maintain such a theory, the State would have to show that same-sex attractions and confused gender perceptions are immutable—a proposition which is completely unsupported by evidence and is contrary to both research and actual experience.

10. The proposed amendments, in their operation, would not be neutral toward religion. They are based on an implicit hostility to the religious principles of a majority of clients (of all religious backgrounds) who seek therapy to address unwanted same-sex attractions or to resolve gender dysphoria, and would make it more difficult for those clients to obtain professional assistance in living according to their faith and religious convictions. The proposals further would exert forceful legal pressure on therapists of faith to either provide therapy that is contrary to their religious convictions or to remain silent or leave their practices.

The proposed amendments could be regarded as neutral only if the State could demonstrate as a matter of scientific fact that same-sex attractions (or gender perception or gender confusion contrary to physiology) are immutable. The proposals implicitly presuppose the illegitimacy of religious beliefs that do not accept that proposition, that view same-sex sexual activity as immoral, or that reject transgenderism or gender-altering medical procedures. The proposals thus would raise serious difficulties under the Free Exercise clause of the First Amendment (unless, again, the State could demonstrate that they narrowly tailored to serve a "compelling state interest").

11. In any number of situations, the proposed amendments would leave people of common intelligence (in this case, therapists) necessarily guessing at their meaning and differing as to their application. The proposed amendments do not give fair notice of what therapeutic conversational speech is forbidden. Consequently, the proposed amendments are impermissibly vague, and thus void, under the Due Process clause of the Fourteenth Amendment.

12. Adoption of the proposed amendments as final rules almost certainly would lead to time- and resource-consuming and expensive litigation challenging their validity—litigation that the State is likely to lose under the governing legal standards established by recent controlling U.S. Supreme Court decisions.

Indeed, DOPL and the Department of Commerce cannot simply assume that the State Attorney General would view the proposed amendments as legally valid and that he would be willing to commit his office to defend them against judicial challenge. DOPL would be well-advised to seek the Attorney General's advice before adopting final rules (or promulgating an effective date for the proposed amendments). Failing to do so, in our view, would be a dereliction of responsibility.

13. The options available to DOPL and the Department of Commerce are not limited to either adopting the proposed amendments or doing nothing. There is a much better way to write regulations to address the possibility of any real abuses in the therapeutic process—one that is specific, legally and constitutionally sound, avoids the problems inherent in the recommended proposals, and implements the intent and purpose of the Governor's instruction. Moreover, such an approach can and should protect all the minors in Utah who struggle with issues surrounding sexuality and gender perception—not just the gay minors or self-identified transgender minors.

Suggested regulatory language is attached to these comments as Appendix B.[2]

[2] That language is a suggested amendment to the Psychologist Licensing Act rules. Identical amendments could be made to the Mental Health Professional Practice Act rules.

II. Unstated Implicit Assumptions Underlying the Proposed Amendments

The proposed amendments, like HB 399, are based on a number of implicit assumptions that are not stated in their respective texts but become apparent when examining the actual application of the proposed restrictions on therapy. These implicit assumptions include:

1. A minor who is experiencing unwanted same-sex attractions should be prevented from seeking professional assistance that may have the result of a reduction or change in those attractions or enabling the minor to better manage them. Such conversational therapy is inherently harmful because it never works and cannot work, because the attractions are immutable. Taking any other therapeutic position is inherently harmful to the minor. Preventing the minor from obtaining such therapy therefore is necessary to protect the vulnerable minor.

2. However, if a minor wants to further explore or embrace and become comfortable with his or her same-sex attractions, the minor should be allowed to seek professional therapeutic assistance in doing so. The proposed rule really assumes that when it comes to sexual attractions "once gay, always gay; and once gay, you have to stay gay."

3. Any minor who (at the moment) is experiencing gender confusion or dysphoria, or (at the moment) is questioning whether he or she was born into a body of the wrong gender, should be supported and encouraged in pursuing (or at least exploring) gender "change." Any possibility that the minor may be confused in this respect, or that misperceived emotional feelings may sort themselves out over time or could be effectively addressed in counseling, should be legally pronounced off limits. Gender "change" or change exploration should be only encouraged professionally, never questioned or challenged or discouraged.

4. There are more than two genders, and the number of genders is undetermined and expanding.

III. Structure and Practical Effect of the Proposed Amendments

A. Differences Between Therapeutic Approaches

To understand how the proposed rule amendments would work in practice, it is necessary to understand the difference between therapies that are "gay-affirming," or therapies that are transgender/gender-change-affirming, on the one hand, and therapy that is open to the possibility of change on the other hand. While experienced mental health professionals can explain this in more depth, a summary is necessary here to understand both the practical effects of the proposed amendments and the legal problems to which they give rise.

In general, gay-affirming therapeutic approaches assume that same-sex attraction or a homosexual orientation is immutable or unchangeable. These therapies generally work to help a client become more comfortable with his or her attractions, feelings, and behaviors.

Gay-affirming therapeutic approaches also support, or assume as a given, all three components of the gay identity social construct. Those are that a same-sex orientation is not

only innate and immutable (as discussed above) but also essential—*i.e.*., the idea that sexual orientation is as important, if not more important, than gender, and certainly more important than other aspects of a person's identity, such as faith, profession, interests, hobbies, etc.

Similarly, transgender/gender-change-affirming therapies assume that gender confusion or dysphoria is somehow inherent; these therapeutic approaches often support chemical, hormonal or surgical gender "change" procedures.

Therapies that are open to the possibility of change in sexual attractions, feelings or behaviors generally do not focus on the attractions and feelings themselves, and do not prescribe some formula or regimen to "fix" them. If a minor (or adult) client willingly comes to a therapist who takes an open-to-change approach and explains that he or she (the client) is experiencing unwanted same-sex attractions or feelings, the therapist does <u>not</u> say, in effect, "OK, we can do something about that. Here's how you change them or fix them." A therapist whose approach is open to change understands that for any particular individual, the etiology of same-sex attractions is complicated, often poorly understood, and will have factors unique to that individual. The same-sex attractions or feelings may be a consequence of other emotional issues and past experiences in the minor's life. (Some factors do appear across many cases, including regular use of gay-oriented pornography and related behaviors.) But the attractions or feelings are not a root cause in and of themselves.

Change-allowing therapy generally focuses more on inquiring into and exploring a client's past experiences (including sexual trauma), emotional issues, social and family relationships, pornography use, etc., that may have bearing on the client's sexual attractions or behaviors. The therapist likely may not discuss the client's attractions directly until considerable time has passed. When they do come up, it usually will be in a context of the client talking about a change or fluidity in those attractions that the client has experienced, and the therapist asking questions that may help the client further explore what the client is experiencing for himself or herself. Consistent with a client's freely chosen objectives, therapy may explore the importance and role that the attractions and behaviors play in the client's life and why, as well as exploring what may be reinforcing them (including pornography use). The therapist may assist the client in exploring fluidity in the client's attractions if that is one of the client's freely chosen and desired objectives.

In any of these processes, a competent and ethical therapist will not have a pre-determined treatment goal. A central principle of ethical therapy is client self-determination (a principle of which the members of the several licensing boards are well aware). An ethical therapist would not attempt to impose his own goals on a client or try to determine what the client should seek to achieve. The goals and objectives of the therapy are up to the client, and that is true for minor clients as well as adult clients.

An ethical and competent therapist certainly will not engage in verbally abusive or pressure tactics (such as intimidation, bullying, shaming, humiliation, threat of force or rejection, or other verbal abuse). Doing so obviously would contravene the principles of client self-determination and that the therapist does not impose his or her own values. Further, no ethical licensed therapist would engage in physically aversive practices (such as electroshocking of

genitals or other body parts, ingesting drugs to induce vomiting while looking at homoerotic images, etc.).[3] There is no evidence that any therapist in Utah has used such techniques for decades—a fact which therapy ban proponents concede.[4]

As with mental health therapy for any other issue, results for individual clients will be along a continuum and will occur in process of time. Whether addressing underlying causes of a client's distress results in a change in sexual attractions or behaviors, and the degree to which such change occurs, varies with each individual. Results range from no change at all to varying degrees of reduction of same-sex attractions to great reduction in same-sex attractions and emergence of heterosexual attractions, even to the point of entering into and sustaining a healthy heterosexual marriage and family.

Therapy that is open to change also rejects the notion that gender confusion or dysphoria is unchangeable—particularly in view of the fact that in more than 80 percent of the cases involving teenage gender dysphoria, the feelings resolve themselves over time, and the youth identifies fully with his or her biological sex, without any therapy or intervention at all.

B. Structure and Design of the Proposed Amendments

The proposed amendments would define "engaging in or attempting to engage in the practice of sexual orientation change efforts or gender identity change efforts" with a minor client as unprofessional conduct that would subject a therapist to professional disciplinary proceedings and loss of license. The proposed amendments do not define the term "practice." The definitions of the terms "sexual orientation change efforts" and "gender identity change efforts" whose "practice" is prohibited themselves include "methods, practices, procedures, or techniques."

This is not limited to physically aversive practices such as electroshocking a client's genitals, injecting drugs or ingesting substances to induce vomiting while looking at homoerotic images, etc. Such techniques are what most people think of when they hear the term "sexual orientation change efforts." The "practice" a licensed therapist undertakes with a client in the office consists of conversational speech. The recommended proposals would clearly include and apply to ordinary conversations in a therapeutic context.

The proposed amendments first define "sexual orientation change efforts" and "gender identity change efforts" both broadly and ambiguously, as quoted above.[5] The proposed

[3] Advocates of therapy bans in other states, like the proponents of HB 399, often cite old anecdotal accounts of such practices (but rarely, if ever, on the part of licensed therapists). Further, there have been no complaints or allegations of harm from such practices before any professional licensing board in Utah.

[4] For example, at the beginning of the first Judiciary Committee hearing on HB 399 held on March 1, 2019, the principal advocate on behalf of both Equality Utah and the bill's sponsor acknowledged that physically aversive practices were not the real point of the bill, and that the purpose and intent of the bill was to regulate speech.

[5] The proposed amendments use these two separate terms instead of the combined term "conversion therapy" used in HB 399. In that bill, "conversion therapy" was defined as

(footnote continued next page)

amendments then specify certain exclusions from this definition, namely "methods, practices, procedures, or techniques" that:

> (a) do not have the goal of changing an individual's sexual orientation or gender identity; and
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> (b) have any of the following goals:
>
> > (i) reducing an individual's internalized stigma;
> > (ii) providing acceptance, support, and comprehensive assessment of an individual;
> > (iii) facilitating an individual's active coping, social support, and identity exploration and development;
> > (iv) assisting an individual undergoing gender transition; or
> > (v) preventing or addressing an individual's unlawful conduct or unsafe sexual practices in a manner that is neutral with respect to the sexual orientation and gender identity of the individual.

These closely track similar exclusions in HB 399[6] and in the California, New Jersey, and other "copycat" statutes. These exclusions create a "safe harbor" for therapies that are gay-affirming or that affirm transgender perceptions or feelings and "gender change" procedures.

If gay-affirming and transgender/gender-dysphoria-affirming therapeutic approaches protected by the safe harbor are the only therapy for which therapists can be assured that there is no risk of professional discipline, the natural result would be to chill any discussion with a minor in the therapist's office that is open to the possibility of change in attractions, feelings, and behaviors or that does not at least implicitly support transgender perceptions and "gender change" procedures. That would be the effect of the proposed amendments if they were to be adopted in final form. That was also the intent of HB 399 and its proponents, and is the reason that HB 399's proponents support the proposed amendments.

> any practice or treatment that seeks to change the sexual orientation or gender identity of a patient or client, including mental health therapy that seeks to change, eliminate, or reduce behaviors, expressions, attractions, or feelings related to a patient or client's sexual orientation or gender identity.

This is substantively very similar to, if not indistinguishable from, "methods, practices, procedures, or techniques with the goal of changing an individual's sexual orientation or any of its components, including gendered patterns in attraction or behavior and identities related to these patterns" and "means methods, practices, procedures, or techniques with the goal of changing an individual's gender identity, gender expression, or any of the associated components of these" under the proposed amendments. The definitions in both the proposed amendments and HB 399 are substantively very similar to the definition of "sexual orientation change efforts" in California SB 1172 (which did not include "gender identity"), and New Jersey A3371 (which includes "gender identity").

[6] Namely, (1) "provid[ing] assistance to a patient or client undergoing gender transition," (2) "provid[ing] acceptance, support, and understanding of a patient or client," (3) "facilitat[ing] a patient or client's ability to cope, social support, and identity exploration and development," and (4) "address[ing] unlawful [or] unsafe" sexual activities "in a manner that is neutral with respect to sexual orientation."

The potential for professional discipline for any therapeutic approach that is not gay-affirming or transgender/gender-dysphoria-affirming threatens a therapist with a costly quasi-judicial proceeding and, very possibly, a subsequent costly judicial proceeding—with attendant negative publicity—that would be damaging professionally, financially, and personally. This inevitably would lead therapists to be overcautious about any conversation outside an "affirming" approach concerning any issue that could bear on same-sex attractions or gender confusion or dysphoria.

In substance, the proposed amendments would implicitly enshrine into law the idea that same-sex attractions are immutable, that they cannot change—notwithstanding the lack of scientific evidence to support that proposition. Indeed, both clinical experience and recent research show instead that the sexual attractions of those who experience same-sex attractions may be, and often are, fluid. The proposed amendments would operate to prevent minor clients who experience unwanted same-sex attractions from obtaining therapy to explore fluidity in those attractions and to address issues that may bear on those unwanted attractions. The proposed amendments further would prevent minor clients who are experiencing gender confusion or dysphoria from obtaining therapy to help explore that confusion.

C. Unanswered Questions in Practice

Under the proposed amendments, in the real world of the therapist's office, what conversational speech, exactly, would be prohibited or potentially lead to professional disciplinary proceedings? Unanswered (and very troublesome) questions include the following:

1. What is necessary for a "method," "practice," "procedure," or "technique" (*i.e.*., speech) to be regarded as having the "goal" of changing an individual's sexual orientation or any of its components, including attractions or behaviors, or as having the "goal" of changing an individual's gender identity, gender expression, or any of the associated components? Importantly, under the words of the proposals, the question is not whether the therapist seeks to change the client's orientation, attractions, behaviors, or "identity." The question is whether the "practice" or "technique" or "method" itself has the "goal" of changing orientation, attractions, behaviors, identity, etc., independent of any subjective intent of the therapist. (And we may note again that an ethical, competent therapist will have no intent one way or another.) On what basis or standards or assumptions is the determination of what the "goal" of the therapy is to be made?

2. Whose view controls regarding whether particular talk therapy has the "goal" of changing orientation, attractions, behaviors, or identity? The opinion of the licensing board? The opinion of the DOPL Director? The opinion of outside advocacy groups? The court's opinion (independent of the licensing board)? The therapist's opinion? The client's opinion? The client's opinion retrospectively recalled several years after therapy concluded?

3. What if the minor client, as a matter of his or her own self-determined goals, wants to reduce or eliminate unwanted same-sex attractions or homosexual behaviors, or wants to explore feelings of gender confusion? Is any series of conversations that might have the result of helping the minor client attain his or her own self-determined goals a therapy or treatment that that has

the "goal" of changing those attractions or behaviors or "identity"? Are conversations that may help a minor client explore possible fluidity in his or her attractions a practice or treatment that has the "goal" of changing attractions or behaviors or "orientation" toward the same sex?

4. Does any discussion or conversation between a therapist and a minor client in the course of therapy that is open to change constitute a treatment that has the "goal" of changing attractions, behaviors, orientation, or "identity"? Is discussion of past life events, sexual abuse or trauma, sexual experiences in earlier years, etc., that might have some bearing or effect on a particular minor client's attractions and behaviors a treatment that has the "goal" of changing them?

5. The recommended proposals would define "sexual orientation" as "an individual's gendered patterns in attraction and behavior, or identity related to these patterns, and associated components." Aside from the opaqueness of terms such as "gendered patterns" and "components," what is a particular individual's "sexual orientation" if he or she feels attracted to the same sex but also experiences fluidity in his or her sexual attractions, and experiences attractions to the opposite sex to varying degrees in varying situations? What would "changing" sexual orientation mean in that context? What, exactly, would constitute a bisexual "orientation," and what would constitute ethical therapy under the proposed amendments for a bisexual orientation?

6. What does the definition of "sexual orientation" as "an individual's gendered patterns in attraction and behavior, or identity related to these patterns, and associated components" encompass? The phrases "gendered patterns in attractions and behaviors" and "associated components" (whatever that means) are so unclear that some could interpret them to include fetish-related attractions, pedophilic attractions, polyamory, voyeurism, etc. The ambiguity of this language could unnecessarily open the door to future arguments that such attractions or "orientations" should be protected categories.

7. If a minor client feels confused about his or her sexual attractions, or is simply not sure what his "sexual orientation" is and is wondering whether he is "gay" or "straight," what is the minor's "sexual orientation"? Does any therapy that might lead to a diminution of attractions to or for the same sex involve a "change" in the minor's "sexual orientation"?

8. The recommended proposals would define "gender identity" as "an individual's experience of their gender, including one's view of oneself as a man, woman, or any other gender." The idea of a "gender identity" as a person's internal feeling about what gender he or she is or ought to be, independent of physiological reality, is a relatively recent construct of the psychiatric profession. (In addition, this proposed definition would seem to accommodate the multiplication of supposed "genders," another construct newly asserted in the last few years.) If a minor client feels confused about his or her gender perceptions, or is simply not sure he is or should be a boy or a girl, what is the minor client's "gender identity"? Does any therapy that might result in some change in the minor's gender perception or feelings involve "changing" (or having the "goal" of changing) the minor's "gender identity"? Adolescence often is a time of emotional turmoil and confusion. In the vast majority of cases, teenage gender dysphoria resolves itself over time, and the youth identifies fully with his or her biological sex, without any

treatment or intervention at all. Is therapeutic discussion that may help a youth resolve his or her feelings a therapy that has the "goal" of "changing" gender identity?

9. Many therapists believe that a large majority of individuals who maintain a "gender identity" different from the individual's biological sex over an extended period are actually delusional. Does therapy that helps a client resolve delusions have the "goal" of "changing" gender identity? And, again, who decides these questions, and based on what standards or assumptions?

10. Because the proposed amendments are so unclear, as these examples demonstrate, the proposed amendments would make a therapist vulnerable to potential discipline not just for what the therapist may actually say, but for what the client subjectively perceives, or thinks he remembers, the therapist to have said.

D. Therapists Whose Approach Is Open to Change Could Not Safely Rely on the Exclusions for Therapy Addressing Unlawful Conduct or Unsafe Sexual Practices or for Therapy that Does Not Have the "Goal" of Changing a Minor Client's Gender Identity.

The proposed amendments would include within the "safe harbor" therapy that has the goal of "preventing or addressing an individual's unlawful conduct or unsafe sexual practices in a manner that is neutral with respect to the sexual orientation and gender identity of the individual."[7] With respect to unlawful conduct, the combined effect of seven separate sections of the current Utah Code is that all same-sex behavior between an adult 18 years of age or older with a minor aged 12-18, and all same-sex behaviors between minors aged 12-18, is unlawful.[8] Thus, notwithstanding the general prohibition regarding therapy that has the "goal" of changing behaviors, the exception in the safe harbor provision would allow therapy with the goal of "preventing or addressing" same-sex behaviors (conduct) on the part of a minor—but only if that therapy is "neutral" with respect to sexual orientation.

The first problem to which this provision gives rise is whether the exclusion for therapy with the goal of "preventing or addressing" unlawful conduct or unsafe sexual practices also protects discussions of issues beyond the conduct or sexual practices themselves, *i.e.*, emotional and other issues that bear, or may bear, on the attractions that underlie the behaviors. The answer is not clearly yes, and may well be no. Specific references to attractions are included in

[7] Most, if not all, of the statutory minor therapy bans in other states include an exclusion for therapy that addresses "unlawful" and "unsafe" sexual activities in a manner that is "neutral with respect to sexual orientation."

[8] *See* §§ 76-5-401, 76-5-401.1, 76-5-401.2, 76-5-401.3, 76-5-403, 76-5-403.1, and 76-5-406, Utah Code Ann. (Sexual activity involving a child younger than 12 years of age is criminally punishable under other statutes, and need not be addressed here.) This analysis presumes that these provisions would still be held to be constitutional after *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down the Texas anti-sodomy law as a violation of the right to privacy but which was limited to consenting adults. To the extent any portion of the existing statutes as they apply to older minors might be declared unconstitutional under *Lawrence*, the proposals would prohibit a therapist from addressing the conduct unless the sexual practices are "unsafe"—in other words, for example, the therapist could advise the client to use a condom and thereby engage in sexual activity in a supposedly "safe" manner.

defining what therapy is prohibited, and are distinct from the terms "behavior," "conduct" and "sexual practices." The proposed amendments could have used the term "attractions" in the exclusion, but they do not. As a matter of regulatory interpretation, this presents the same issue presented in statutory interpretation when certain terms are used in parts of a statute but are omitted in other related provisions. When the text of laws shows that a legislature knows how to do something expressly but does not, the courts generally will hold that it has not done so implicitly.[9] If the proposed amendments were to be adopted, the courts may well hold that the safe harbor provision does not extend to therapy that addresses attractions underlying the behaviors.

One may argue that permitting therapy that addresses unlawful or unsafe behaviors without being able to discuss matters relevant to attractions and feelings that motivate or underlie those behaviors would make little sense as a practical matter, and that is certainly so. But the counterargument is that reading these terms into the exception when it does not use them makes equally little sense from the viewpoint of construction of regulatory language.

The second issue is what constitutes therapy that is "neutral with respect to the sexual orientation . . . of the individual." (Again, the question is not whether the therapist is neutral; it is whether the <u>therapy</u>—the "methods, practices, procedures, or techniques"—is neutral.) What constitutes "neutral" therapy most probably will depend on the "worldview" regarding same-sex attractions or sexual orientation held by whoever decides what the term "neutral" means. Therapists who take a gay-affirming approach would hold that their therapeutic approach is "neutral" on the ground that they are not trying to make someone gay who is not gay, and they are simply accepting someone as he or she <u>is</u>, which in their view cannot change because same-sex attractions supposedly are immutable.

Therapists who take an approach that is open to the possibility of change likewise maintain that their approach is neutral because they are not trying to direct or compel a change in a client's attractions or feelings. Whether and to what extent a client experiences a change in his or her attractions is not predictable and is not a predetermined goal.

Most therapists who take a gay-affirming approach likely would not regard the open-to-change approach as neutral (and in their view, therefore, a change-allowing approach would not come within the exclusion) because they assume from the outset that same-sex attractions are immutable. A therapeutic approach that accepts as possible a result that the therapists who take a gay-affirming approach believe is not possible would not be neutral in their minds. But if same-sex attractions can change (which is not only possible, but has in fact happened in many cases and continues to happen), then there is a very strong argument that therapy that does not attend to issues that may bear on those attractions is not neutral with respect to sexual orientation. That is

[9] *See, e.g.*, *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176-77 (1994); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979); *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723, 734 (1975). Closely related is the principle of statutory construction *expressio unius est exclusio alterius*, that is, the "expression of one thing is the exclusion of another." *E.g.*, *Kennecott Copper Corp. v. Anderson*, 30 Utah 2d 102, 514 P.2d 217, 219 (1973); *Anderson v. Board of Review of the Industrial Commission of Utah Dept. of Employment Security*, 737 P.2d 211, 218 n.7 (Utah 1987).

because it in effect gives a preference to a homosexual orientation and may limit a client's pursuit of his or her own self-determined goals.

Without any definition of what constitutes therapy that is "neutral" with respect to sexual orientation, the recommended proposals would simply set the stage for disputes within the each of the licensing boards, DOPL, and the courts.

With regard to gender identity, the situation is even worse. The safe harbor provision in the proposed amendments includes therapy that "do[es] not have the goal of changing an individual's sexual orientation or gender identity." Assume that a therapist is working with a boy who is thinking seriously about whether he wants to undergo gender "change" procedures. In the course of their discussions, the therapist should address with the minor client (and his parents) the emotional and psychological risks and hazards of "gender change" procedures. Further, the therapist should advise the minor client and his parents that they will need to discuss the medical and physical risks of chemical, hormonal, or surgical "gender change" procedures—which are many and serious, and often with permanent and irreversible effects—with a competent physician. However, such discussions in a therapeutic context may well be regarded as having the "goal" of changing the minor client's "gender identity." In that event, the discussions would not come within the safe harbor exclusion, and would come within the proposed amendments' definition of "gender identity change efforts," and thus would subject the therapist to professional discipline, even though the advice is absolutely objective.[10]

It is apparent from the foregoing that it is <u>at best</u> completely unclear whether the exception for therapy addressing unlawful conduct in a "neutral" manner with respect to sexual orientation would extend to discussions of issues that bear on a minor client's attractions. It is also completely unclear what discussions would be regarded as "neutral" with respect to sexual orientation. It is also not at all apparent that the exclusion for therapy that does not have the "goal" of changing gender identity would permit honest and objective discussions regarding "gender change." Therefore, a therapist who does not take a gay-affirming or transgender/ gender-dysphoria-affirming approach could not rely on these provisions to protect him or her from potential professional disciplinary proceedings. Consequently, these exceptions would not undo the deterrent and chilling effect the proposed amendments would have.

E. <u>Summary and Examples of the Proposed Amendments' Chilling Effect in Practical Operation</u>

It is clear from the numerous problems and unanswered questions discussed above that in any number and variety of situations that are likely to arise in a therapist's office, the therapist simply would not know and could not ascertain where the line was between what discussions would be prohibited and what discussions would be permitted (other than those from a gay-

[10] The absurdity of this becomes even more apparent when we consider that under the proposed amendments, the therapist could have such discussions with the boy's parents as long as the therapist put the boy out of the room first—because the discussions with the parents would not be "methods, practices, procedures, or techniques with the goal of changing an individual's gender identity, gender expression, or any of the associated components of these" undertaken with the minor client.

affirming and transgender/gender-dysphoria-affirming perspective). The therapist's lawyer would be in no better position. Nor could the therapist have any confidence that he or she could rely on one or more of the exceptions to conduct therapy that is open to change without risk of professional discipline. Consequently, this would lead almost all therapists to avoid or stop any discussion outside the gay-affirming and transgender/gender-dysphoria-affirming safe harbor. Therapists who are unwilling to take a gay-affirming or gender-dysphoria-affirming therapeutic approach would stop discussion with the client at the point the discussion turned to anything that could bear on same-sex attractions or "gender identity" or "gender change."

Several examples illustrate the practical effect that the proposed amendments would have in the real context of the therapist's office.

1. Assume that a youth, on the youth's own initiative, comes to a therapist who takes an approach that is open to change because the youth is experiencing unwanted same-sex attractions and is questioning whether he or she really might be gay or lesbian. Under the proposed amendments, the therapist could explore what kind of sexual activity, if any, the youth is engaging in. Even if the youth denies engaging in sexual behaviors, but wants help in reducing or managing the feelings he or she is experiencing so as to avoid engaging in same-sex behaviors, the therapist likely would be deterred from addressing issues related to those attractions or feelings due to the risk of professional discipline.

2. Assume a situation in which a teenage youth comes to a therapist and reports that he or she is experiencing strong same-sex attractions, or is actively engaged in same-sex behaviors, and is struggling with suicidal feelings. The therapist, of course, could discuss suicide. The therapist also could explore any same-sex behaviors in which the youth is involved (because they are unlawful) <u>if</u> the therapeutic approach the therapist uses is deemed to be "neutral." But the proposed amendments would deter a therapist who takes an approach that is open to change from discussing emotional or relational or personal history issues that may bear on both the same-sex attractions and the suicidal feelings, because doing so may result in a reduction of those attractions and expose the therapist to potential professional discipline. But addressing those issues likely would be an important part of dealing with the suicidal feelings most effectively.

Gay activist groups and most therapists who take a gay-affirming approach look at suicidal feelings from an underlying assumption that suicidal feelings experienced by a gay or same-sex-attracted youth are the result of social rejection, either in the form of direct individual personal rejection by other people or non-acceptance by religious or other social organizations or institutions. While this may be true in some cases, to assume that this is always the case is contrary to the experience of both clients and therapists. Suicidal feelings also may result from guilt regarding behaviors that the youth feels are wrong from a moral perspective but nevertheless feels strongly impelled to engage in for reasons he or she may not understand or be able to explain. They may also result from strong feelings of attraction toward others of the same sex that the youth does not want, cannot explain, and feels powerless to change. In some cases, the despair that a youth may feel in such situations may lead to suicidal feelings. The proposed amendments would effectively deter any discussion that might result in reducing or diminishing the attractions and feelings that are at the root of both unwanted behaviors and suicidal feelings. Taking these issues off the table would limit the therapist's ability to help the

youth. The effect of eliminating therapeutic options would be that less effective help would be available to same-sex-attracted or gender-confused youth with suicidal feelings. The unintended result could be to increase suicides, not reduce them.

3. Assume that a youth voluntarily comes to a therapist (who takes an approach that is open to change) because he or she is struggling with anxiety. Further assume that the therapist begins substantive discussions by asking about the youth's family relationships, past experiences, etc. Further assume that the youth then reveals that he or she has been sexually abused by an older male on several occasions in the past, and that the youth further reports that he or she is experiencing unwanted same-sex attractions and is questioning whether he or she is really gay or lesbian. The therapist presumably is required by law to report the abuse to law enforcement authorities under section 62A-4a-403, Utah Code Ann. If, in the course of treating the abuse, the youth's same-sex attractions begin to diminish, the therapist could be open to the possibility of professional discipline because the therapy may be deemed to have the "goal" of changing same-sex attractions or sexual orientation. Consequently, the therapist would be hesitant to further discuss issues that may bear on those attractions and feelings, which would result in restricting the scope of the discussions relevant to the abuse. Thus, the proposed amendments likely would complicate and potentially reduce the effectiveness of therapy for the very past trauma for which the youth most needs it, and at the time that it would do the youth the most good.

4. Assume a situation in which (1) a teenage youth approaches his father and tells him that he has been viewing a lot of pornography, some of which has been gay pornography; (2) the youth has developed some attractions to, or admiration for, other males and is wondering if he is gay; (3) the youth has developed a compulsive masturbation habit through the pornography use; and (4) the father suggests that professional counseling might be helpful, and the youth agrees and asks his father to arrange for him to see a therapist because he wants help to stop the compulsive behavior and talk about his same-sex attractions.

When the therapist meets with the youth and the issue of compulsive masturbation arises, the safe harbor for therapy "addressing an individual's unlawful conduct" would not extend to situations in which the behavior does not involve other persons, because no statute makes it unlawful. At the same time, the behavior (the compulsive masturbation) may be related to (or a "component" of) the youth's "sexual orientation or any of its components." If addressing the feelings and emotional issues underlying the behavior results in a change or reduction or diminution of the youth's attractions to other males, the therapist then faces the risk that the treatment would be deemed to have the "goal" of "changing [the] individual's sexual orientation or any of its components." Consequently, the proposed amendments would deter a therapist who takes an approach that is open to change from addressing both the behaviors and the emotions and experiences underlying the behaviors and the same-sex attractions developed through viewing the pornographic material.

In contrast, assume the same facts except that the youth does not report developing attractions to other males and is not wondering if he is gay. In that situation, the therapist could address the emotions or feelings underlying the pornography use and the compulsive behavior without risk of professional discipline.

5. Assume a situation in which a 10-year-old male tells his parents that he thinks he really should have been born as a girl, and wants to change his gender. The parents then take the boy to a therapist (who does not take a transgender/gender-dysphoria-affirming approach) to help him address his feelings and confusion. Under the proposed amendments, addressing the feelings, emotions, or expressions related to the boy's perceived gender "identity" would put the therapist at risk, because it might result in a change in those feelings, and thus potentially be regarded as having the "goal" of changing the boy's "gender identity." To remain safe, the therapist could only "reduce" the young boy's "internalized stigma," provide "acceptance [and] support," facilitate his "active coping, social support, and identity exploration and development," and assist him in "undergoing gender transition."

IV. The Proposed Amendments Are Not Based on Objective Research or Scientific Fact

Governor Herbert's June 17 letter to Ms. Giani expressed the view that the ethical and professional practice of psychology is an area "that should be governed by the best available science rather than left unregulated or regulated in a manner that is colored by politics." He further stated that through the administrative process he "would like the issues to be clarified by using the best contemporary peer-reviewed science."

We agree completely. And to accomplish that objective, it is critically important that the crafting and adoption of regulations not be controlled or led by pseudo-science, or by a biased ideological agenda dressed up in a supposedly "scientific" veneer.

In the July 18, 2019 meeting of the Psychologist Licensing Board, during which the Board voted to recommend the proposal to DOPL, the very brief discussion focused on unspecified materials from the American Psychological Association (APA) that one of the Board members had obtained. It was apparent from the discussion that none of the Board members had any prior familiarity with these materials, and that none of them had any significant experience counseling with individuals experiencing same-sex attraction or gender confusion. The Board unquestioningly deferred to these materials as supposedly reflecting an established consensus of the "experts" in the field. In that connection, the Rule Analysis published with the proposed amendments in the September 1 issue of the *Utah State Bulletin* stated (p. 9):

> In July 2019, the Psychologist Licensing Board conducted an extensive review of the professional literature, consulted with national experts, and coordinated with the American Psychological Association to draft amendments to their Rule R156-61.

Except for the APA, the Psychologist Licensing Board has not identified who these "national experts" were. As evidenced by the documents posted on the Board's public notice website (to which audio recordings of its meetings also are posted)—*see* https://www.utah.gov/pmn/sitemap/publicbody/835.html---the APA materials on which the Board relied come from APA's Division 44, the "Society for the Psychology of Sexual

Orientation and Gender Diversity."[11] The Psychologist Licensing Board (and the other boards that have followed its lead) and the Rule Analysis simply assume that Division 44 and the materials it has produced are both objective and scientific.

Neither of those assumptions is true. Contrary to those assumptions, it is apparent that severe ideological bias has corrupted and controls APA Division 44. To see that bias, one need merely visit Division 44's official website, https://www.apadivisions.org/division-44/. It is readily apparent that Division 44 is principally a pro-gay activist and pro-transgender advocacy organization with a clear political agenda, rather than an academic and scientific organization dedicated to objective research. The "Mission and Goals" statement of the Division published on the site (https://www.apadivisions.org/division-44/about) states:

> Mission and goals
>
> The Society for the Psychology of Sexual Orientation and Gender Diversity (SPSOGD) welcomes all those interested in psychological research, practice, education and training and advocacy on issues related to sexual orientation and gender diversity, as well as lesbian, gay, bisexual, transgender and gender nonconforming and queer individuals and allies.
>
> Div. 44 (SPSOGD) is committed to advancing social justice in all its activities. The Society celebrates the diversity of lesbian, gay, bisexual, transgender and gender nonconforming and queer people and recognizes the importance of multiple, intersectional dimensions of diversity including but not limited to: race, ethnicity, ability, age, citizenship, health status, language, nationality, religion and social class.
>
> The Society seeks to be a vibrant and supportive home within the field of psychology for those interested in sexual orientation and gender diversity as well as other issues related to social justice. We support and mentor students, early career professionals and all members throughout their professional careers. We work collaboratively with other divisions and organizations on sexual orientation and gender diversity concerns to advance the health and well-being of lesbian, gay, bisexual, transgender and gender nonconforming and queer people locally, nationally and internationally.
>
> The primary purposes of the Society shall be:
>
> To advance the contributions of psychology as a discipline to the understanding of sexual orientation and gender diversity through basic and applied research;
>
> To promote the development and delivery of affirmative psychological services to lesbian, gay, bisexual, and transgender and gender nonconforming and queer people;

[11] APA Division 44 is one of 54 divisions of the APA.

To promote education and training on sexual orientation and gender diversity across contexts and audiences;

To use psychological knowledge to advocate for the advancement of social justice, public interest and the welfare of lesbian, gay, bisexual, and transgender and gender nonconforming and queer people;

To inform the general public about research, practice, education and training and advocacy efforts related to sexual orientation and gender diversity.

In all of our activities, we take an intersectional approach to understanding the multiple systems and factors that influence lesbian, gay, bisexual, transgender and gender nonconforming and queer people.

Further, the Society appreciates the historic struggles of lesbian, gay, bisexual, transgender and gender nonconforming and queer people within psychology and broader national and international sociopolitical contexts. We acknowledge and honor the advocacy efforts undertaken by past and current members to promote social justice and inclusivity. We aim to preserve and apply the lessons learned from our history in our activities promoting research, affirmative practice, education and training and advocacy. [Emphasis added.]

Nor is this obvious bias and advocacy agenda new. Under the heading "History," the website states: "APA's Div. 44, founded as the Society for the Psychological Study of Lesbian and Gay Issues in 1985 by a group of pioneering LGB psychologists and their allies, is psychology's focal point for research, practice, and education on the lives and realities of LGBT people." [Emphasis added.]

It is quite clear that APA Division 44 accepts completely and unquestioningly—and actively promotes—the underlying assumptions of the gay identity construct and gay-affirming therapeutic approaches. It describes its mission in terms of political and social advocacy more than science. Its mission statement is framed in gay activist jargon, and is anything but balanced or objective. Division 44 clearly is not open to any approach that is not gay-affirming or transgender/gender dysphoria-affirming or that questions the underlying assumptions of those approaches, even though those assumptions are not supported by science or scientific research.

In its latest venture, Division 44 recently has formed a task force on what it euphemistically calls "consensual non-monogamy." According to its official website (https://www.apadivisions.org/division-44/leadership/task-forces/index), the mission of this task force is as follows:

Consensual Non-Monogamy Task Force

The Task Force on Consensual Non-Monogamy promotes awareness and inclusivity about consensual non-monogamy and diverse expressions of intimate relationships. These include but are not limited to: people who practice polyamory, open relationships, swinging, relationship anarchy and other types of ethical, non-monogamous relationships.

> Finding love and/or sexual intimacy is a central part of most people's life experience. However, the ability to engage in desired intimacy without social and medical stigmatization is not a liberty for all. This task force seeks to address the needs of people who practice consensual non-monogamy, including their intersecting marginalized identities.
>
> The goal of the task force is to generate research, create resources and advocate for the inclusion of consensual non-monogamous relationships in the following four areas:
>
> Basic and applied research
> Education and training
> Psychological practice
> Public interest [Emphasis added.]

In quoting this mission statement, we wish we were kidding. Why Division 44 assumes or believes that polyamory, open relationships, swinging, relationship anarchy and other types of non-monogamous relationships are "ethical" is a complete mystery, and leaves the reader's jaws agape (unless the reader happens to be totally amoral). To observe that this statement is unscientific, unbalanced and biased would be a gross understatement.

It is difficult to avoid the conclusion that Division 44 is committed to trying to dress up sexual anarchy in a scientific veneer and thereby make it normal and acceptable. Needless to say, that is not science; it is politicized science fiction.

This is not to criticize the APA as a whole. As noted before, Division 44 is only one of 54 divisions of the APA, and no one is questioning that other divisions do much important and good work. Division 44, however (to borrow an expression from the intelligence community), has gone rogue from a professional standpoint.

In March 2007, Division 44 authorized the creation of a "Task Force on Appropriate Therapeutic Responses to Sexual Orientation" to update the APA's 1997 resolution on the subject. This task force was charged with reviewing the literature and making recommendations pertaining to so-called "sexual orientation change efforts." All six Task Force members were well-known gay activist mental health professionals, all but one of whom are themselves gay. Further, the nominations of several qualified professionals who did not promote a gay-affirming approach to be members of the Task Force were all rejected.[12] In attempting to defend that decision at the time, the director of the APA's Lesbian, Gay and Bisexual Concerns Office argued: "We cannot take into account what are fundamentally negative religious perceptions of homosexuality—they don't fit into our world view."[13]

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[12] *See*, Rosik, C.H. (Ph.D.), "A Tale of Two Task Forces," *Journal of Human Sexuality* 8:11-26, at p. 16 and note 2 (available online at https://docs.wixstatic.com/ugd/ec16e9_54c5e7e690e340d088aa1ec49d00208f.pdf).

[13] *Id.* (quoting Yarhouse, M. A., "The Battle Regarding Sexuality," in N. Cummings, W. O'Donahue, & J.

(footnote continued next page)

The Task Force produced a report in August 2009—the "Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation" (2009 Task Force Report).[14] The report used an expansive concept of "sexual orientation change efforts" that encompassed much more than conventional therapy by a licensed therapist:

> In this report, we use the term sexual orientation change efforts (SOCE) to describe methods (e.g., behavioral techniques, psychoanalytic techniques, medical approaches, religious and spiritual approaches) that aim to change a person's same-sex sexual orientation to other-sex, regardless of whether mental health professionals or lay individuals (including religious professionals, religious leaders, social groups, and other lay networks, such as self-help groups) are involved.

2009 Task Force Report, p. 26 n. 25. Even with that expansive definition and the obvious imbalance and bias of the Task Force makeup, in the summary of the section titled "Reports of Harm" in chapter 4, the Task Force admitted:

> Early and recent research studies provide no clear indication of the prevalence of harmful outcomes among people who have undergone efforts to change their sexual orientation or the frequency of occurrence of harm because no study to date of adequate scientific rigor has been explicitly designed to do so. Thus, we cannot conclude how likely it is that harm will occur from SOCE.

2009 Task Force Report, p. 42. The chapter conclusion which followed stated:

> We found that nonaversive and recent approaches to SOCE have not been rigorously evaluated. Given the limited amount of methodologically sound research, we cannot draw a conclusion regarding whether recent forms of SOCE are or are not effective.
>
> We found that there was some evidence to indicate that individuals experienced harm from SOCE. Early studies do document iatrogenic effects of aversive forms of SOCE. High dropout rates characterize early aversive treatment studies and may be an indicator that research participants experience these treatments as harmful. Recent research reports indicate that there are individuals who perceive they have been harmed and others who perceive they have benefited from nonaversive SOCE. Across studies, it is unclear what specific individual characteristics and diagnostic criteria would prospectively distinguish those individuals who will later perceive that they have succeeded and benefited from

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Cummings (Eds.), *Psychology's War on Religion* (pp. 63–94). (Phoenix, AZ: Zeig, Tucker, & Theisen, Inc. (2009)).

[14] Available online at https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf.

> nonaversive SOCE from those who will later perceive that they have failed or been harmed.

Id., p. 43. That use of physically aversive techniques such as electroshocking of the genitals or inducing vomiting while viewing homoerotic images could well result in harm would not be surprising, of course. But as noted previously, no ethical licensed therapist would use such techniques, and none in Utah have been accused of doing so. But the Task Force clearly did not find any scientifically reliable evidence of harm from "nonaversive SOCE," which, under the Task Force's definition, encompassed more than conventional ethical therapy by licensed therapists.

In the summary and conclusions of the report, the Task Force ultimately acknowledged:

> There are no scientifically rigorous studies of recent SOCE that would enable us to make a definitive statement about whether recent SOCE is safe or harmful and for whom.

Id., p. 83.

In short, even the radically pro-gay Division 44's Task Force found no evidence that ordinary conversational therapy by licensed therapists using conventional techniques that is open to the possibility of change in an individual's sexual attractions, "orientation," or behaviors is harmful, much less generally harmful. Notwithstanding that fact, the supporters of the proposed rule seek to chill any therapeutic speech that does not take a gay-affirming approach, asserting that "research" and "science" supports such a ban. That is, quite simply, false.

The Psychologist Licensing Board also posted to its public notice website documents the Trevor Project's "National Survey on LGBTQ Youth Mental Health" and an article from the *Journal of Homosexuality* by Dr. Caitlyn Ryan, Director of the Family Acceptance Project at San Francisco State University, and others. Both the Trevor Project and the Family Acceptance Project (and its director in particular) are well-known pro-gay advocacy groups. They are not scientific research organizations. The problem is that once an organization identifies itself and its purposes as an advocacy organization for a particular group or class of persons, it loses its claim to reliability or objectivity as a source of scientific research or unbiased scientific knowledge. Advocacy groups may have an interpretation of statistics or statistical findings, for example, but they are not objective science-led organizations. But the supporters of the proposed amendments cite or quote from these documents as though the authors or organizations were the equivalent of the laboratories at the Centers for Disease Control. In reality, they are no more objective than the National Rifle Association, Planned Parenthood, or any other well-known national lobbying organization.

The same is true of the document "Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth," prepared by Abt Associates, Inc., under a contract with the Substance Abuse and Mental Health Services Administration (SAMHSA) of the U.S. Department of Health and Human Services and published in 2015. That document in fact does

not reflect the official position of the U.S. Government or any of its agencies. The "Disclaimer" on page i states:

> The views, opinions, and content of this publication are those of the author and do not necessarily reflect the views, opinions, or policies of SAMHSA or HHS. Listings of any non-Federal resources are not all-inclusive and inclusion of a listing does not constitute endorsement by SAMHSA or HHS.

The document's author, Abt Associates, Inc., is a "Beltway Bandit" in the Washington, D.C. area that does consulting work with numerous governmental agencies on a wide range of matters. (*See* its website at https://www.abtassociates.com/.) It has no particular expertise in mental health, and, in particular, no particular expertise in same-sex attractions or behaviors or gender confusion. It is hardly a stretch to observe that any contract with a Federal agency to prepare such a document will result in a product that is consistent with the political policy or preference of the contracting agency at the time.

Similar problems characterize the materials that the Social Worker Licensing Board posted to its public notice website after it voted to recommend the proposed amendments. In reality, the supposed scientific "consensus" of the "experts" to which these documents refer is a consensus of ideology and sexual philosophy and politics, not scientific research or objective scientific findings.

Once the gay activist movement had attained many of its legal goals based principally on the argument that same-sex attractions are inborn and immutable—particularly the Supreme Court's decision in *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2071 (2015), compelling all states to recognize same-sex marriage—two leading pro-gay activists here in Utah[15] wrote a lengthy article that gave the game away, with respect to both science and legal argument.[16] In the abstract at the beginning, they state:

> On the basis of scientific research as well as U.S. legal rulings regarding lesbian, gay, and bisexual (LGB) rights, we make three claims: First, arguments based on the immutability of sexual orientation are unscientific, given what we now know from longitudinal, population-based studies of naturally occurring changes in the same-sex attractions of some individuals over time. Second, arguments based on the immutability of sexual orientation are unnecessary, in light of U.S. legal decisions in which courts have used grounds other than immutability to protect the rights of sexual minorities. Third, arguments about the immutability of sexual

[15] Namely, Lisa M. Diamond, Ph.D., Professor of Developmental Psychology, Health Psychology, and Gender Studies at the University of Utah (a leading lesbian feminist activist), and Clifford J. Rosky, Professor of Law at the University of Utah (a leading pro-gay legal activist, both in California and Utah). Professor Rosky was the spokesman for both the sponsor and the proponents of HB 399 in the last legislative session.

[16] Diamond, L.M., and Rosky, C.J., "Scrutinizing Immutability: Research on Sexual Orientation and U.S. Legal Advocacy for Sexual Minorities," 53 *Journal of Sex Research* 363-391 (2016) (hereinafter "Scrutinizing Immutability"). (The article may be downloaded online from several sites, including https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2965179.)

> orientation are unjust, because they imply that same-sex attractions are inferior to other-sex attractions, and because they privilege sexual minorities who experience their sexuality as fixed over those who experience their sexuality as fluid.

"Scrutinizing Immutability," p. 1 (emphasis added). The authors devote a large section of the article to demonstrating that claims that sexual orientation and attractions are immutable are unscientific, and that the sexual attractions of a large share of men and women who experience same-sex attractions or orientation are in fact fluid over time. Among other things, the authors observe:

> Savin-Williams et al. (2012) analyzed data from the National Longitudinal Study of Adolescent Health (Add Health), which has been regularly tracking same-sex attractions and sexual identity in a random, representative sample of more than 12,000 adolescents since 1994. We focus here on changes in attractions reported between the third wave of data collection (when respondents were between 18 and 24 years old, with a mean age of 22) and the fourth wave of data collection (when respondents were between 24 and 34 years old, with a mean age of 29). We focus on these waves because the measures used to assess same-sex attraction were more specific than at previous waves and hence less likely to have been misinterpreted, and also because evidence suggests that at younger ages, when respondents were around 16 years old, some of the boys' ˇˇˇˇˇ reports of same-sex attractions may have been intentionally capricious (i.e., due to "jokester" youths giving false reports; Savin-Williams & Joyner, 2014).
>
> At the third and fourth waves of data collection, respondents were asked to describe themselves as 100% heterosexual, Mostly heterosexual, Bisexual, Mostly homosexual, or 100% homosexual. Of the 5.7% of men and 13.7% of women who chose one of the nonheterosexual descriptors at Wave 3, 43% of the men and 50% of the women chose a different sexual orientation category six years later. Of those who changed, two-thirds changed to the category 100% heterosexual. Rates of change were greatest (and transitions to 100% heterosexual were most common) among those who initially described themselves as Mostly heterosexual (which was the single largest subgroup of nonheterosexuals, accounting for 58% of the men and 74% of the women reporting any same-sex attractions). In men, 59% of the Mostly heterosexual group changed over the following six years, and 82% of those transitions were to 100% heterosexual. In women, 47% of the Mostly heterosexual group changed over the following six years, and 84% of those transitions were to 100 % heterosexual. In contrast, only 8% of the exclusively homosexual men and 26% of the exclusively homosexual women who initially considered themselves exclusively gay changed categories six years later. Of the exclusive heterosexuals, 3% of the men and 11% of the heterosexual women switched to a nonheterosexual category six years later.
>
> Ott et al. (2011) assessed change in sexual orientation in the Growing Up Today Study (GUTS). This study included more than 13,000 youth who were the children of women who participated in the well-known Nurses Health Study II

(NHSII), a prospective cohort study of more than 116,000 registered nurses. Although this study did not involve a random representative sample of youth, the size and breadth of the sample contributes unprecedented information on longitudinal change in sexuality during young adulthood. Participants described themselves as Completely heterosexual, Mostly heterosexual, Bisexual, Mostly homosexual, Completely homosexual, or Unsure. Of the 7.5% of men and 8.7% of women who chose a nonheterosexual descriptor at ages 18 to 21, 43% of the men and 46% of the women chose a different category by age 23. Among the same-sex attracted youth who changed, 57% of the men's changes and 62% of the women's changes involved switching to Completely heterosexual.

[Table omitted.]

As found with Add Health (Savin-Williams et al., 2012), change was most common among those with attractions to both sexes (including the bisexual group as well as the Mostly heterosexual and Mostly homosexual groups) and least common among those who described themselves as exclusively homosexual. Of those who initially described themselves as exclusively homosexual, 10% of the men and 33% of the women changed categories by age 23. Of those who considered themselves exclusively heterosexual at 18 to 21 years of age, 4% of the men and 6% of the women changed categories by age 23.

The National Survey of Midlife Development (MIDUS) assessed sexual identity at two different points in time, ten years apart, in a representative sample of approximately 2,600 individuals, ranging in age from 25 to 74 (the mean age was 47 at the first assessment). The fact that this study asked individuals whether they were homosexual, heterosexual, or bisexual, rather than simply asking about their same-sex and othersex attractions, is likely responsible for the fact that so few respondents (less than 1% among both men and women) described themselves as homosexual or bisexual. Yet among this group 64% of the women and 26% of the men identified their sexual orientation differently 10 years later (Mock & Eibach, 2012). Half of the men's changes and 55% of the women's changes involved switching to heterosexuality. Similar to the other longitudinal studies cited, changes were less common among those with exclusively same-sex attractions than those with bisexual attractions: Of those who initially considered themselves homosexual (as opposed to bisexual) at Time 1, 10% of the men and 64% of the women changed categories by Time 2. Changes were rare among those who initially described themselves as heterosexual; only 1% of men and 1% of the women who considered themselves heterosexual at Time 1 changed categories by Time 2.

The Dunedin Multidisciplinary Health and Development Study (DMHD) is one of the longest-term longitudinal studies (although it does not involve a random sample). A birth cohort of approximately 1,000 New Zealanders in a single city have been observed from their early 20s to their late 30s (Dickson et al., 2003; Dickson, Roode, Cameron, & Paul, 2013). Respondents were asked to

> describe their current pattern of attraction as Only to the opposite sex, More often to the opposite sex but at least once to the same sex, About equally to both sexes, More often to the same sex but at least once to the opposite sex, Only to the same sex, never to the same sex, or Not attracted to anyone. Given the multiple assessments, these data permit us to examine changes between ages 21 and 26, between ages 26 and 32, and between ages 32 and 38. As shown in Table 1 [omitted above], rates of change do not appear to decline as respondents get older. Rates of change in attractions among same-sex-attracted men ranged from 26% to 45%, and rates of change in same-sex-attracted women ranged from 55% to 60%. Among the same-sex-attracted men reporting change, between 67% and 100% of the changes were toward heterosexuality, and this also was true for 83% to 91% of the same-sex-attracted women undergoing changes. Overall, changes among men who identified as heterosexual were observed in 1% to 2% of men and ranged from 4% to 12% among heterosexual women.
>
> Given the consistency of these findings, it is not scientifically accurate to describe same-sex sexual orientation as a uniformly immutable trait. Although some sexual-minority individuals report consistent patterns of same-sex attraction over time, other sexual-minority individuals undergo changes: sometimes increases/decreases in same-sex attractions and sometimes increases/decreases in other-sex attractions.

"Scrutinizing Immutability," pp. 9-11.

At the same time, research over decades has failed to produce any evidence of a "gay gene" or genes, and research implicitly refutes the notion that same-sex attractions are genetically predetermined or "inborn." To save space here, a summary of relevant study results is attached as Appendix A.

If the current state of the research and science shows that same-sex attractions are not inborn or immutable, that sexual attractions of those who experience same-sex attractions often are fluid, and that there is an absence of evidence of actual harm from ethical, competent, licensed therapy that is open to the possibility that attractions may be fluid and may change, there is no logical or scientific basis on which to prohibit therapy that is open to change simply because it does not take a gay-affirming approach.

Further, the current fad in socially radical professional circles to support gender confusion and dysphoria, and to encourage radical hormonal, chemical, or medical gender "change" procedures is unscientific and poses the potential for enormous harm to minor clients. The idea of a "gender identity" as a person's internal feeling about what gender he or she is, or ought to be, and the idea of multiple "genders," are relatively recent constructs of the psychiatric profession that are essentially cut out of whole cloth and lack real scientific basis. These notions are inconsistent with the genetic and physiological reality of biological sex, which is clearly ascertainable.

Further, it is not possible to maintain that gender perceptions or feelings of gender confusion contrary to physiological reality are somehow immutable. Available research indicates that as many as 88 percent of girls and up to 98 percent of boys outgrow gender dysphoria by late adolescence with either watchful waiting or therapy that affirms biological sex.[17] That disproves any notion of immutability, and necessarily implies that therapy that addresses issues bearing on gender perception or confusion is not inherently harmful.

In addition, hormonal, chemical, or surgical gender "change" procedures pose serious risks to children and adolescents, including effects that are irreversible. Why should therapists be compelled to either support such procedures or to remain silent and be prevented from engaging in objective and balanced discussion of all the issues in an individual client's situation? Moreover, the proposed rule amendments leave no room for the potential likelihood that a minor who experiences consistent gender dysphoria over extended time periods may be delusional.

On what basis, therefore, should the coercive power of government be exercised to prevent a licensed therapist and a minor client from exploring whatever issues are causing that client distress simply because an issue may have some bearing on the client's sexual attractions, feelings, or "orientation," or on the client's confused feelings or perceptions regarding his or her gender? The answer is that there is no scientific or logical basis on which to do so. Indeed, adopting and enforcing such a prohibition would limit a therapist's ability to help a struggling youth, and thereby may well harm that youth.

V. Constitutional Problems and Flaws in the Proposed Rule Amendments

A. Freedom of Speech — First and Fourteenth Amendments

1. Content- or Viewpoint-Based Speech Regulations Are Presumptively Unconstitutional

The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." In *Gitlow v. New York*, 268 U.S. 652 (1925), the Supreme Court held that this applies to the states through operation of the "due process clause" in section 1 of the Fourteenth Amendment ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .").

Obviously, the definitions of "sexual orientation change efforts" and "gender identity change efforts" in the proposed rule amendments would seek to suppress speech both based on its content and on the basis of favoring "gay-affirming" or transgender/gender-change-affirming speech over therapeutic speech that takes a different viewpoint. Numerous cases have established firmly that regulations targeting speech based on its content are presumptively

[17] Tolman, Deborah L., and Diamond, Lisa M, (eds.), *APA Handbook of Sexuality and Psychology* (Washington, D.C.: American Psychological Association, 2014). *See also* Cohen-Kettenis, Peggy T., Delemarre-van de Waal, Henriette A., and Gooren, Louis J. G., "The Treatment of Adolescent Transsexuals: Changing Insights," *Journal of Sexual Medicine* 2008;5:1893, 1895 (80–95 percent of prepubertal children with Gender Identity Disorder (GID) will no longer experience a GID in adolescence (further citations omitted)).

unconstitutional.[18] Further, speech regulations based on favoring one viewpoint over another also are presumptively unconstitutional.[19] (These principles are so well established that extended quotations from the cited cases are omitted here as unnecessary.)

Under the cited (and numerous other) cases, judicial review of such statutes or regulations is on a "strict scrutiny" standard. The speech regulation is valid only if it is narrowly tailored to serve what the courts call a "compelling state interest."

2. The *Pickup* and *King* Decisions Upholding the California and New Jersey Minor Therapy Bans

Notwithstanding these well-established principles, in January 2014 the U.S. Court of Appeals for the Ninth Circuit upheld California's ban on "sexual orientation change efforts" with minors in SB 1172 (enacted 2012) in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). In September of that year, the U.S. Court of Appeals for the Third Circuit upheld New Jersey's ban on "sexual orientation change efforts" with minors in A3371 (enacted in 2013) in *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014). The definition of "sexual orientation change efforts" in both statutes was substantively indistinguishable from the definitions of "sexual orientation change efforts" and "gender identity change efforts" in the proposed amendments.[20]

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[18] *E.g.*, *Reed v. Town of Gilbert*, 576 U.S. __, 135 S. Ct. 2218, 2226-2227 (2015); *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); *Consolidated Edison of N.Y. v. Public Service Commission of N.Y.*, 447 U.S. 530, 536 (1980); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

[19] *E.g.*, *Matal v. Tam*, 582 U.S. __, 137 S. Ct. 1744, 1757 (2017); *Rosenberger v. Rectors and Visitors of the University of Virginia*, 518 U.S. 819, 828-829 (1995); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641-643 (1994); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 393-394 (1993); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65, 72 (1983); *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 535-536 (1980); *Carey v. Brown*, 447 U.S. 455, 462-463 (1980).

[20] The California statute (Cal. Bus. & Prof. Code § 865(b)) defines "sexual orientation change efforts" as follows:

> (1) "Sexual orientation change efforts" means any practices by mental health providers that seek to change an individual's sexual orientation. This includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex.
> (2) "Sexual orientation change efforts" does not include psychotherapies that: (A) provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and (B) do not seek to change sexual orientation.

The New Jersey statute (N.J. Rev. Stat. § 45:1-55(2)(b)) defines "sexual orientation change efforts" as follows:

> As used in this section, "sexual orientation change efforts" means the practice of seeking to change a person's sexual orientation, including, but not limited to, efforts to change behaviors, gender identity, or gender expressions, or to reduce or eliminate sexual or romantic attractions or feelings toward a person of the same gender; except that sexual orientation change efforts shall not include counseling for a person seeking to transition from one gender to another, or counseling

(footnote continued next page)

If DOPL were to adopt the proposed amendments as a final rule which then was challenged in the courts, its supporters would urge the court to rely on *Pickup* and *King* to uphold the rule as constitutional. However, in a 2018 decision, the U.S. Supreme Court expressly rejected the principal legal basis for both decisions.

a. "Professional Speech"

In *Pickup*, the Ninth Circuit tried to justify its ruling rejecting a freedom-of-speech challenge based on three ideas. The first and primary basis was the notion that "professional speech" is a special category that that receives less constitutional protection than other speech. In the court's view, regulations on "professional speech" weren't subject to "strict scrutiny" review, and instead would be upheld if the court finds a "rational basis" for the regulation (a lower standard of review). The Ninth Circuit found a "rational basis" for the ban in several legislative "findings" regarding "sexual orientation change efforts" that were included in section 1 of SB 1172 as enacted (but which, in accord with normal codification practice, were not included in the California Code when the substantive provisions of the enacted law were codified). These "findings" were quotations from, or a summary statement describing, statements by various professional and other organizations. 740 F.3d at 1227-1229, 1231-1232.

In *King*, similarly, the Third Circuit also held that regulations on "professional speech" are subject to a lower standard of protection than other speech, particularly when the state's police power to regulate the profession is involved. The Third Circuit held that under the diminished standard of protection, "prohibitions of professional speech are constitutional only if they directly advance the State's interest in protecting its citizens from harmful or ineffective professional practices and are no more extensive than necessary to serve that interest"—the same level of protection accorded to commercial speech. 767 F.3d at 233. The court held that New Jersey had met its burden, relying on the same statements by various organizations that the California legislature and the Ninth Circuit in *Pickup* cited.

However, the "professional speech" distinction applied by the Ninth Circuit and the Third Circuit does not survive the June 2018 Supreme Court decision in *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. ___, 138 S. Ct. 2361 (2018) (*NIFLA v. Becerra*). In that case, the State of California required licensed clinics that primarily provide services to pregnant women to post and distribute to all clients a government-written notice that the State provides free or low-cost services, including abortions, with telephone contact information. The statute required unlicensed clinics to post and include in all advertising materials a government-written notice that the clinic is not licensed to provide medical services. The Supreme Court held that the State tried to compel speech by professionals who opposed its content. The Supreme Court rejected this as content-based speech regulation. The Supreme Court held:

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that:
(1) provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and
(2) does not seek to change sexual orientation.

> Some Courts of Appeals have recognized "professional speech" as a separate category of speech that is subject to different rules. See, *e.g.*, *King v. Governor of New Jersey*, 767 F.3d 216, 232 (3d Cir. 2014); *Pickup v. Brown*, 740 F.3d 1208, 1227–1229 (9th Cir. 2014); *Moore–King v. County of Chesterfield*, 708 F.3d 560, 568–570 (4th Cir. 2013). These courts define "professionals" as individuals who provide personalized services to clients and who are subject to "a generally applicable licensing and regulatory regime." *Id.*, at 569; see also, *King*, *supra*, at 232; *Pickup*, *supra*, at 1230. "Professional speech" is then defined as any speech by these individuals that is based on "[their] expert knowledge and judgment," *King*, *supra*, at 232, or that is "within the confines of [the] professional relationship," *Pickup*, *supra*, at 1228. So defined, these courts except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny. See *King*, *supra*, at 232; *Pickup*, *supra*, at 1253–1256; *Moore–King*, *supra*, at 569.
>
> But this Court has not recognized "professional speech" as a separate category of speech. Speech is not unprotected merely because it is uttered by "professionals."
> . . .
>
> . . . This Court has afforded less protection for professional speech in two circumstances—neither of which turned on the fact that professionals were speaking. First, our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their "commercial speech." See, *e.g.*, *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651, 105 S. Ct. 2265 (1985); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250, 130 S. Ct. 1324 (2010) ; *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455–456, 98 S. Ct. 1912 (1978). Second, under our precedents, States may regulate professional conduct, even though that conduct incidentally involves speech. See, *e.g.*, *id.*, at 456, 98 S. Ct. 1912; *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884, 112 S. Ct. 2791 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.). But neither line of precedents is implicated here.

138 S. Ct. at 2371-2372 (emphasis added). Thus, the Supreme Court expressly rejected the primary basis for both the *Pickup* and *King* decisions, and cited those decisions as the principal examples of the legal doctrine the court was rejecting.

NIFLA v. Becerra establishes that there is no special category for "professional speech" that receives less constitutional protection than other speech. Therefore, the "strict scrutiny"/"compelling state interest" standard applies to speech in a professional context. 138 S. Ct. at 2384.[21]

[21] If the proposed amendments were to be adopted as a final rule, its supporters presumably would try to come up with a "compelling state interest" to defend the ban against a freedom-of-speech challenge under the "strict scrutiny" standard of review. That will be discussed further below.

b. Speech as "Conduct"

The second basis for the Ninth's Circuit's decision in *Pickup* was the idea that once the therapist and the client are inside the office, speech transforms into "conduct," which the state may regulate even if there is an incidental effect on speech. 740 F.3d at 1226-1227, 1229-230. The Ninth Circuit likened counseling to "medical treatment" or a physician prescribing drugs or use of physically aversive therapies, and asserted that communications in a psychotherapist's office are "not inherently expressive." *Id*. at 1230.

Analogizing therapeutic speech and discussion to prescribing drugs or aversive therapies is not logical. Counseling, which involves asking questions and interpersonal oral communications, is not the same as prescribing medications, conducting physical examinations, performing surgery, or other medical treatment functions. Further, the idea that communications in a therapist's office are not "inherently expressive" is absurd. Indeed, the Third Circuit in *King*, even though it agreed with the Ninth Circuit that so-called "professional speech" should receive only a lower standard of protection, rejected the Ninth Circuit's "conduct" rationale in a lengthy analysis, and held that discussions in a therapist's office clearly are "speech." The Third Circuit correctly explained:

> Defendants have not directed us to any authority from the Supreme Court or this circuit that have characterized verbal or written communications as "conduct" based on the function these communications serve. Indeed, the Supreme Court rejected this very proposition in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 130 S. Ct. 2705 (2010). In that case, plaintiffs claimed that a federal statute prohibiting the provision of "material support" to designated terrorist organizations violated their free speech rights by preventing them from providing legal training and advice to the Partiya Karkeran Kurdistan ("PKK") and the Liberation Tigers of Tamil Eelam ("LTTE"). *Id*. at 10 11, 130 S. Ct. 2705. Defendants responded that the "material support" statute should not be subjected to strict scrutiny because it is directed toward conduct and not speech. *Id*. at 26 28, 130 S. Ct. 2705.
>
> The Supreme Court, however, expressly rejected the argument that "the only thing actually at issue in [the] litigation [was] conduct." *Id*. at 27, 130 S. Ct. 2705. It concluded that while the material support statute ordinarily banned conduct, the activity it prohibited in the particular case before it—the provision of legal training and advice—was speech. *Id*. at 28, 130 S. Ct. 2705. It reached this conclusion based on the straightforward observation that plaintiffs' proposed activity consisted of "communicating a message." *Id*. In concluding further that this statute regulated speech on the basis of content, the Court's reasoning was again simple and intuitive: "Plaintiffs want to speak to the PKK and the LTTE, and whether they may do so under § 2339B depends on what they say." *Id*. at 27, 130 S. Ct. 2705. Notably, what the Supreme Court did not do was reclassify this communication as "conduct" based on the nature or function of what was communicated.

> Given that the Supreme Court had no difficulty characterizing legal counseling as "speech," we see no reason here to reach the counter intuitive conclusion that the verbal communications that occur during SOCE [sexual orientation change efforts] counseling are "conduct."

767 F.3d at 225. As the Third Circuit correctly determined, the Ninth Circuit's rationale that therapeutic speech equates to "conduct" is untenable.

In *NIFLA v. Becerra*, the Supreme Court additionally held that the California statute compelling clinics to post the government-prescribed notices was not a regulation of professional conduct that incidentally burdened speech. The court explained:

> In addition to disclosure requirements under *Zauderer*, this Court has upheld regulations of professional conduct that incidentally burden speech. "[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567, 131 S. Ct. 2653 (2011), and professionals are no exception to this rule, see *Ohralik, supra*, at 456, 98 S. Ct. 1912. Longstanding torts for professional malpractice, for example, "fall within the traditional purview of state regulation of professional conduct." *NAACP v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328 (1963); but cf. *id.*, at 439, 83 S. Ct. 328 ("[A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights"). While drawing the line between speech and conduct can be difficult, this Court's precedents have long drawn it, see, *e.g.*, *Sorrell*, *supra*, at 567, 131 S. Ct. 2653; *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S. Ct. 684 (1949), and the line is "'long familiar to the bar,'" *United States v. Stevens*, 559 U.S. 460, 468, 130 S.Ct. 1577 (2010) (quoting *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 127, 112 S.Ct. 501 (1991) (Kennedy, J., concurring in judgment)).
>
> . . .
>
> <u>The licensed notice at issue here is not an informed-consent requirement or any other regulation of professional conduct. The notice does not facilitate informed consent to a medical procedure. In fact, it is not tied to a procedure at all. . . . The licensed notice regulates speech as speech.</u>
>
> . . . .
>
> The dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals' speech "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Turner Broadcasting*, 512 U.S., at 641, 114 S. Ct. 2445. . . .

> Further, when the government polices the content of professional speech, it can fail to "'preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'" *McCullen v. Coakley*, 573 U.S. ___, 134 S. Ct. 2518, 2529 (2014). Professionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields. Doctors and nurses might disagree about the ethics of assisted suicide or the benefits of medical marijuana; lawyers and marriage counselors might disagree about the prudence of prenuptial agreements or the wisdom of divorce; bankers and accountants might disagree about the amount of money that should be devoted to savings or the benefits of tax reform. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams v. United States*, 250 U.S. 616, 630, 40 S. Ct. 17 (1919) (Holmes, J., dissenting), and the people lose when the government is the one deciding which ideas should prevail.

138 S. Ct. at 2373-2375 (emphasis added).

The same principles the Supreme Court applied, and the observations it made, in *NIFLA v. Becerra* apply with equal force to the threat of professional discipline for therapeutic speech that the proposed amendments would impose. The proposals are not an informed consent requirement for a medical or any other procedure. They would regulate speech as speech. The dangers associated with content-based regulation of speech are clearly present in this context. Professionals do indeed have good-faith disagreements in the context of therapy relevant to same-sex attractions and gender perception and gender change issues.

c. Protection of Minors

The third basis for the Ninth Circuit's ruling in *Pickup* was an emphasis on protection of minors from what the State (according to the legislative findings) believed is potentially harmful therapy. 740 F.3d at 1231-1232. The idea that any professional discussion with a minor of issues that could bear on unwanted same-sex attractions or behaviors that is not gay-affirming (or therapy that addresses gender dysphoria that is not transgender/gender-dysphoria-affirming) is inherently harmful is one of the unspoken assumptions that underlie the proposed amendments and all the minor therapy bans that have been enacted or proposed in other states. This also directly relates to what the proposed amendments' supporters likely would argue is the "compelling state interest" on which courts should rely to uphold the bill against a constitutional challenge to it on First and Fourteenth Amendment grounds even under the "strict scrutiny" standard of review. We may combine the analysis of the third ground for the Ninth Circuit's decision with analysis of whether the State or supporters of the recommended proposals could show a "compelling state interest" that would justify the suppression of communication in the counseling context.

3. Does the State Have a "Compelling Interest" in Suppressing Therapy That Does Not Take a Gay-Affirming or Transgender/Gender-Dysphoria-Affirming Approach?

We may expect the proposed amendments' supporters to argue that therapy that is open to change is harmful because it is never effective and cannot be effective. Thus, its inevitable failure increases misplaced feelings of guilt, anxiety, confusion, despair, hopelessness, shame, etc.; impairs a youth from accepting who he or she truly is; increases feelings of isolation and makes social adjustment more difficult, etc. Therefore, they would argue, even under the "strict scrutiny" standard, the state has a compelling interest in protecting vulnerable "LGBTQ" youth from such harm. This argument, of course, is based on the underlying assumption that same-sex attractions are innate and immutable. If same-sex attractions are not inborn or immutable, then therapy that addresses issues that may bear on those attractions is not inherently ineffective or inherently harmful, and, indeed, may be very helpful.

Presumably, the proposed amendments' supporters would also argue that transgender feelings or perceptions are inherent or immutable. If they were to concede that transgender perceptions or feelings—or "identity," as they undoubtedly would call it—is not in some way inherent, then they would have to concede that therapy might have the result that a minor's gender perception or feelings change to align with the minor's biological sex. Of course, that would contradict their narrative that therapy is inherently harmful.

There is a certain irony here. In the context of same-sex attraction, the proposed amendments' supporters argue that the attractions are immutable notwithstanding the absence of any scientific evidence for a "gay gene" or genes (and notwithstanding the research that implies there is no such gene) and the evidence of fluidity in attractions. In the context of transgenderism, they have to go a step further; they would have to argue that transgender perceptions or feelings are somehow inherent when those perceptions or feelings or supposed "identity" directly conflict with the minor's easily-ascertainable genetic and physiological identity as male or female. On what basis the supporters of the recommended proposals would claim that therapy in the transgenderism context would be ineffective in all cases, and therefore inherently harmful, is unclear to say the least.

The assertion that any speech that is not gay-affirming or transgender/gender-dysphoria-affirming is inherently "harmful" to minors in all or most circumstances is transparently untrue as a factual matter. Each of the five examples of the proposals' chilling effect given above at pp. 17-19 illustrates this. In each of those situations, allowing therapy that is open to the possibility of change could help the minor clients, not hurt them.

In enacting their therapy bans, both California and New Jersey (as have several, but not all, of the subsequent states) relied on some 14 statements by various professional or other organizations (or some group within the organization) to the effect that that "sexual orientation change efforts" are not effective and may cause "harm." Supporters of the proposed rule amendments may submit and quote from these same reports and statements to argue that therapy that is not gay-affirming and not transgender/gender-dysphoria-affirming is harmful and that the State has a compelling interest in protecting youth from it.

Examining each of these reports and statements individually here would require too much space and is not necessary at this point. For purposes of these comments, it is important to emphasize that there are numerous logical, methodological, and definitional problems in the several statements. It suffices here to make three summary observations:

First, many of the statements do not define what terms such as "sexual orientation change efforts" or "conversion therapy" or "reparative therapy" mean, or what exactly comes within those terms and what does not. For those statements that do contain some definition, the definitions are very broad, encompassing physically aversive techniques and use of aggressive pressure by anyone—especially unlicensed and unregulated "camps" or groups—rather than conventional ethical therapy conducted by licensed and regulated therapists.[22]

Second, the organization statements make dubious and controversial assertions and do not establish facts. The accuracy—including ideological bias and political motivation—of the sources is very much open to question. The "reports" are based on qualitative "studies" of anecdotal stories told by gay individuals, or on information derived from on-line gathering processes (in which a person fills out an on-line survey on the person's memory of his or her experience), regarding anything the person identifies as a change process. That may be with a pastor or cleric, family member(s), friends, some character who runs a camp purporting to change sexual orientation through strange practices, etc. These surveys generally are advertised in gay-friendly websites or newspapers.

Third, it becomes apparent upon examination that there is a complete absence of actual evidence that conventional ethical conversational therapy that addresses underlying issues that are causing clients distress, and that may have some bearing on same-sex attractions, has resulted in any significant "harm" to minor clients, any more than therapy for problems such as depression, anxiety, obsessive-compulsive disorders, etc., results in harm.

In short, as discussed above with respect to the 2009 APA Task Force Report, there is no empirical evidence supported by scientific research that establishes therapeutic harm from conventional ethical therapy conducted by licensed therapists that is open to the possibility of change.

In the absence of documented evidence or proof that ordinary ethical therapeutic conversation that addresses issues that may bear on same-sex attractions is actually harmful generally, if DOPL were to adopt the proposed amendments as a final rule, the State Attorney General would be left with having to try to support the unstated but central premise that same-sex attractions are innate and immutable. Notwithstanding the frequency with which, and the volume at which, numerous gay activist groups or individuals and their political and media allies

[22] The irony here is that to the extent anyone can be found today who uses physically aversive techniques or threatening or abusive language, they almost certainly will not be licensed therapists. But licensed therapists are, necessarily, the only persons who would be subject to the licensing boards' proposals. Thus, to the extent someone who is not a therapist might use such techniques now, the recommended proposals would not even apply to them, and therefore would do nothing to address the problem.

have repeated that assertion, neither clinical experience nor scientific research supports that notion, as discussed above. The State Attorney General's position would be even more untenable in arguing that gender perception contrary to physiological reality or feelings of gender confusion are somehow immutable, as already noted.

Unless the State Attorney General were to establish as a factual matter that same-sex attractions and feelings are immutable, and that gender perceptions contrary to physiological reality or feelings of gender confusion are immutable, there would be no legal or factual basis for a "compelling state interest" in protecting minors from any therapy that is not gay-affirming or transgender/gender-dysphoria-affirming. What state interest would be served by preventing minors from communicating with therapists about all issues that are causing them distress? How would that protect minors? The state's interest in preserving and promoting the well-being of minors is served by access to therapy that addresses issues such as family dynamics, past sexual abuse or trauma or experiences, relationships, etc. In many cases, those issues may well bear on a minor client's attractions, behaviors, feelings, and gender perceptions. Indeed, depriving minor clients of therapy that can address the full range of issues involved in the distress they face is much more likely to harm them.

In short, adopting the proposed amendments as a final rule would not serve the state's interest in protecting minors, much less a "compelling state interest." It follows that such a rule could not survive "strict scrutiny" review and would be unconstitutional.

4. Free Speech Rights of Minor Clients

In addition, the therapist is not the only person whose free speech rights effectively would be abridged under the proposed amendments. Because a therapist would be at risk of professional discipline for any discussion that does not follow a gay-affirming or transgender/gender-dysphoria-affirming approach, a therapist who takes an approach that is open to change would have very little to say once the discussion turned to any issue that might bear on same-sex attractions or gender confusion. This would have the practical collateral effect of seriously restricting the speech of the minor client. While the minor would not be barred from saying anything he or she wished, the therapist's hesitancy to respond and ask further exploratory questions would soon lead the minor to stop talking about the issues causing him or her distress.

It is correct to say that minors do not have all the same free speech rights as adults. Speech to and by minors may be restricted in several circumstances in which speech by and between adults may not be.[23] At the same time, authorities such as school boards and legislatures may not restrict communications to or by minors simply because the authority disagrees with the content of the communication.[24] Unless the State could prove that therapy

[23] *E.g.*, *Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 126 (1989); *New York v. Ferber*, 458 U.S. 747, 756-757 (1982); *Ginsberg v. New York*, 390 U.S. 629, 639-640 (1968).

[24] *E.g.*, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

that is open to the possibility of change and that addresses issues that may underlie same-sex attractions, behaviors, and feelings, as well as gender perception/identity issues, etc., is generally harmful to minors, the State has no reason to restrict—much less a compelling interest in restricting—a minor's speech in the therapeutic setting.

5. Regulation of the "Practice of Medicine"

The principal spokesman for HB 399's proponents argued after the House Judiciary Committee hearing on May 5 that the freedom-of-speech arguments against the bill should be rejected because the State has the authority to regulate the practice of medicine. We may expect supporters of the proposed amendments to make a similar argument.

There are a number of Supreme Court decisions, dating from the early days of the republic, sustaining state authority to regulate the practice of medicine.[25] As summarized in the court's opinion in *Barsky v. Board of Regents*, 347 U.S. 442, 449 (1954):

> It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power. The state's discretion in that field extends naturally to the regulation of all professions concerned with health.

It further goes without dispute that the state may prohibit or punish fraudulent medical practice, medically harmful treatment techniques, malpractice, improper medical prescriptions, etc.

But that does not imply that the state has power, under the guise of regulating medical or mental health practice, to potentially punish licensed medical or mental health practitioners from engaging in speech or conversation that a majority of legislative members or an executive regulatory body has decided is disfavored because of its content and viewpoint. As the Supreme Court reemphasized in *NIFLA v. Becerra*, "[A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." 138 S. Ct. 2373, quoting *NAACP v. Button*, 371 U.S. 415, 439 (1963).

To penalize therapeutic conversation that is open to the possibility of change rather than being gay-affirming or transgender/gender-dysphoria-affirming, the State would have to demonstrate that any conversation that does not take an "affirming" viewpoint is harmful. That simply brings us back to the same questions discussed above. If same-sex attractions or transgender feelings are not immutable, then therapy that attends to issues that may have bearing on those attractions or feelings is not inherently harmful, and, indeed, may be helpful. (As noted

[25] *See, e.g.*, *Gibbons v. Ogden*, 22 U.S. 1, 205 (1824) (quarantine and health laws, state power to provide for health of its citizens); *Dent v. West Virginia*, 129 U.S. 114 (1889) (professional qualification and licensing requirements); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (state-mandated vaccinations); *Collins v. Texas*, 223 U.S. 288 (1912) (professional qualification and licensing requirements); *Graves v. Minnesota*, 272 U.S. 425 (1926) (qualifications and licensing requirements for dentistry); *See also*, Richards, "The Police Power and the Regulation of Medical Practice: A Historical Review and Guide for Medical Licensing Board Regulation of Physicians in ERISA-Qualified Managed Care Organizations," 8 *Annals of Health Law* 201 (1999).

previously, the proposed amendments would implicitly enshrine into law the proposition that same-sex attractions, or gender perceptions contrary to physiological reality, are immutable.)

Further, the argument that a rule such as the proposed amendments comes within the power to regulate the practice of medicine is simply another way of phrasing the Ninth Circuit's argument in *Pickup* that therapeutic conversation amounts to "conduct" once the office door closes. The Third Circuit correctly rejected that argument in *King*. Even more importantly, it is contrary to the principles the Supreme Court applied in *NIFLA v. Becerra* discussed above.

6. Overbreadth

Another important principle of First Amendment law is that "a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'"[26] This is known as the "overbreadth" doctrine, under which statutes may be held to violate the First and Fourteenth Amendments. The same principle applies to executive regulations.[27]

The overbreadth doctrine is usually invoked as an exception to the rule that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.[28] That almost certainly would not be the situation if one or more therapists who do not take a gay-affirming approach were to challenge a final rule—the therapists would be directly challenging the rule's application to them as unconstitutional. But the principles behind the overbreadth doctrine show that even if the State or the proposed amendments' supporters could come up with a specific situation in which a final rule could constitutionally be applied to particular speech by a licensed health care professional, the rule still would be facially invalid because its broad and undefined sweep would operate to suppress a far greater scope and quantity of constitutionally protected speech.

As the Supreme Court explained in *Virginia v. Hicks*, 539 U.S. 113 (2003):

> The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the standards for facial challenges. See *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984). The showing that a law punishes a "substantial" amount of protected free speech, "judged in relation to the statute's plainly legitimate sweep," *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973), suffices to invalidate all enforcement of that law, "until and unless a

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[26] *United States v. Stevens*, 559 U.S. 460 (2010), quoting *Washington State Grange v. Washington State Republican Party*, 552 U. S. 442, 449, n. 6 (2008). *See, e.g., Gooding v. Wilson*, 405 U.S. 518 (1972) (Georgia statute punishing "opprobrious words or abusive language, tending to cause a breach of the peace"). *See* the discussions of the doctrine and cases in *Broadrick v. Oklahoma*, 413 U.S. 601, 612-614 (1973), and *State University of New York v. Fox*, 492 U.S. 469, 484 (1989).

[27] *See, e.g., Jordan v. Pugh*, 425 F.3d 820 (10th Cir. 2005), in which the principle is implicit.

[28] *E.g., New York v. Ferber*, 458 U.S. 747, 767 (1982); *Broadrick v. Oklahoma*, 413 U.S. at 610.

> limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression," *id*., at 613. See also *Virginia v. Black*, 538 U.S. 343, 367 (2003); *New York v. Ferber*, 458 U.S. 747, 769, n. 24 (1982); *Dombrowski v. Pfister*, 380 U.S. 479, 491, and n. 7, 497 (1965).
>
> We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech — especially when the overbroad statute imposes criminal sanctions. See *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977); *NAACP v. Button*, 371 U.S. 415, 433 (1963). Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, *Dombrowski*, *supra*, at 486-487 — harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas. Overbreadth adjudication, by suspending all enforcement of an over inclusive law, reduces these social costs caused by the withholding of protected speech.
>
> As we noted in *Broadrick*, however, there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law — particularly a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." 413 U.S., at 615. For there are substantial social costs created by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, *ibid*., before applying the "strong medicine" of overbreadth invalidation, *id*., at 613.

539 U.S. at 118-120. Although the court rejected the overbreadth challenge under the circumstances of that case, the quoted excerpt is an excellent summary of the applicable principles.

If the proposed amendments were to be adopted as a final rule, even if some speech within the sweeping definitions of "sexual orientation change efforts" or "gender identity change efforts" might be harmful in some situations, its practical effect, for reasons explained previously, would be to chill a broad range of constitutionally-protected speech. It would create a classic example of a situation in which "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech . . . — harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." Further, there is no limiting construction to remove the threat or deterrence to constitutionally protected expression.

Such a rule's application to protected speech is more than "substantial," both in the absolute sense and in relation to any potential legitimate applications.

7. Summary

In summary, if DOPL were to adopt the proposed amendments as a final rule, it would operate to suppress a wide range of speech (by both therapists and minor clients) based on both content and viewpoint. Because there is no exception for "professional speech," the "strict scrutiny" standard of review would apply. To successfully defend such a rule against a First and Fourteenth Amendment challenge, the State would have to show a "compelling state interest," and there is no such "compelling state interest." Nor could such a rule be upheld as a regulation of unprotected "conduct" (as opposed to speech). Further, the Supreme Court's 2018 decision in *NIFLA v. Becerra* makes clear that the courts could not rely on the Ninth Circuit's and Third Circuit's earlier decisions in *Pickup* and *King* to uphold such a rule. Moreover, the rule clearly would be overbroad. The courts therefore should hold that a final rule identical or similar to the proposed amendments violates the First and Fourteenth Amendments to the U.S. Constitution.

B. Free Exercise of Religion — First and Fourteenth Amendments

The First Amendment to the U.S. Constitution also provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." As with freedom of speech, the Supreme Court has held that this applies to the states through the due process clause of the Fourteenth Amendment. *Cantwell v. Connecticut,* 310 U.S. 296 (1940).

Under Supreme Court precedents, "valid and neutral law[s] of general applicability"—*i.e.*, laws that are neutral toward religion—don't violate the Free Exercise clause.[29] But as the Supreme Court further held in *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520 (1993):

> [I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.
> . . . .
>
> Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt. . . .
> . . . .

[29] *Employment Div., Dept. of Human Resources of Oregon v. Smith,* 494 U. S. 872 (1990). The opinion in that case raised troublesome questions and led to the 1993 enactment of Religious Freedom Restoration Act.

> Apart from the text, the effect of a law in its real operation is strong evidence of its object.

508 U.S. at 533-535 (emphasis added).

In the recent case involving the Christian baker in Colorado who refused to create a cake for a same-sex wedding, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. ___, 138 S. Ct. 1719, 1731 (2018), the Supreme Court (although it dodged the central question of whether the state nondiscrimination statute overrides the baker's constitutional right to free exercise of religion) overturned the Colorado Civil Rights Commission's punishment of the baker. Citing several Commission statements and irregularities, the Supreme Court held that the Commission showed impermissible hostility toward, and official disapproval of, the baker's sincere religious beliefs. The court held:

> [T]he Commission's treatment of Phillips' [the baker's] case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.
>
> In *Church of Lukumi Babalu Aye*, *supra*, the Court made clear that the government, if it is to respect the Constitution's guarantee of free exercise, 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. The Free Exercise Clause bars even "subtle departures from neutrality" on matters of religion. *Id.*, at 534.

138 S. Ct. at 1731.

The majority of clients who seek help to reduce unwanted same-sex attractions and behaviors, including minors, do so at least in part because of a desire and effort to live consistently with their religious convictions. The drafters of therapy ban measures such as the proposed amendments and HB 399 try to make them appear on the surface to be facially neutral, but they plainly are not so in operation. They are clearly based on at least an implicit hostility to the religious principles and religious viewpoint of a majority of clients who seek therapy to address unwanted same-sex attractions or to resolve gender dysphoria. The proposed amendments, like minor therapy ban statutes enacted in some other states, clearly pass judgment upon, or presuppose the illegitimacy of, religious beliefs that hold same-sex behaviors to be immoral, that do not believe that same-sex attractions or gender confusion are genetically inherent or inborn, that view same-sex attractions as a problem from a spiritual standpoint, or that reject transgenderism or medical gender-change procedures.

The only way a measure such as the recommended proposals could be neutral is if the State could demonstrate as a matter of scientific fact that same-sex attractions (or gender perception or gender confusion contrary to physiology) are immutable. As explained previously, neither clinical experience nor scientific research supports that proposition.

A final rule identical or similar to the proposed amendments would have a serious negative impact on minor clients' efforts to live according to their own religious convictions. And minor clients, especially older teenagers, do have their own convictions. It is difficult to avoid the conclusion that the intent of groups that support measures such as the proposed amendments is to discourage religiously-motivated desires to manage or minimize feelings and change behaviors.

Further, many therapists who use approaches that are open to the possibility of change want to avoid having to provide gay-affirming or transgender/gender-dysphoria-affirming therapy contrary to their own religious convictions or else remain silent. The proposed amendments would exert great legal pressure on therapists with religious convictions to either provide therapy that is contrary to those convictions or to remain silent.

The proposed amendments' hostility toward religious beliefs that that are not consistent with the agenda of gay and transgender activist supporters would have an additional negative impact in the case of therapists employed by churches and other religious organizations, such as Catholic Social Services and LDS Family Services. In operation, the proposed amendments are hostile to, and presuppose the illegitimacy of, not only the beliefs and convictions of the therapists but also the doctrines and principles of the churches and religious organizations that employ them. If such a rule were adopted, it would effectively prevent a church or religious organization from providing help to its adherents to live the principles it teaches. It would force a church or religious organization either to provide therapy that is contrary to its doctrines and principles or to remain silent and not provide therapy at all.

Is there a "compelling state interest" to justify this? That brings us back to the same question that arises with respect to freedom of speech addressed in detail above—namely, whether therapy that is open to change is inherently harmful to minors. As explained above, the answer is no.

Because of the proposed amendments' hostility to, and implicit official disapproval of, religious convictions contrary to the gay-affirming and transgender/gender-dysphoria-affirming view, a final rule identical or similar to the proposed amendments should be held to violate the Free Exercise clause of the First Amendment, as applied to the States through the Fourteenth Amendment.

C. "Void for Vagueness" — Fourteenth Amendment "Due Process" Clause

As quoted above, section 1 of the Fourteenth Amendment provides that "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." The applicable principles regarding when a statute is so vague as to deprive affected citizens of due process were summarized in the 2012 Supreme Court decision in *Federal Communications Commission v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012). At issue was the FCC's modification of its indecency enforcement regime to regulate "fleeting expletives" and "fleeting nudity." In vacating an FCC forfeiture order against one of the broadcasters on the ground that the FCC's policy guidance and administrative decisions failed to give broadcasters sufficient notice of what would be considered indecent, the Supreme Court held:

> A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. *See Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"); *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972) . . . . A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Ibid.* . . .
>
> Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. *See Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972). When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

567 U.S. at 250-251 (emphasis added).[30]

As discussed at pp. 12-14 above, there is a wide range of ambiguities and unresolved questions under the definitions of "sexual orientation change efforts" and "gender identity change efforts" in the proposed amendments once we are in the real world of the therapist's office. It is plainly apparent that in many, even most, situations, the proposed amendments would not give fair notice of what conversation is forbidden and what conversation is permitted, and there is no way for a therapist—or, even, for a lawyer—to determine where the line is. Clearly, the proposed amendments would leave people of common intelligence necessarily guessing at their meaning and differing as to their application.

In *Pickup v. Brown*, the Ninth Circuit breezily waved off the plaintiffs' argument that SB 1172 was void for vagueness by asserting, essentially, that the statute is clear because the people to whom it applies must certainly know what it means. 740 F.3d at 1234. The Ninth Circuit's reasoning simply begged the question and was circular. The court utterly failed to address the issues to which the definition of "sexual orientation change efforts" in SB 1172 gave rise. While stated in different words, the Third Circuit in *King* adopted a similar rationale. 767 F.3d at 240.

The Supreme Court reaffirmed application of the fundamental principles in its recent decision in *Sessions v. Dimaya*, 584 U.S. ___, 138 S. Ct. 1204 (2018), which by necessary

[30] *See also, Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-1049 (1991).

implication clearly rejects the Ninth Circuit's and Third Circuit's approach.[31] The court rejected the government's argument that a "less searching form" of the void-for-vagueness doctrine should apply because the case involved a civil remedy (deportation) and was not a criminal case, because deportation is such a drastic measure and particularly severe penalty. In a concurring opinion, Justice Gorsuch gave a comprehensive review of the history and constitutional foundations of the doctrine. He correctly noted:

> [I]f the severity of the consequences counts when deciding the standard of review, shouldn't we also take account of the fact that today's civil laws regularly impose penalties far more severe than those found in many criminal statutes? Ours is a world filled with more and more civil laws bearing more and more extravagant punishments. Today's "civil" penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses and livelihoods, and the power to commit persons against their will indefinitely. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies.

138 S. Ct. at 1229. The potential for loss of professional licenses and livelihoods is precisely the risk in the case of the proposed amendments.

Further, as in the *Fox Television Stations* case, speech is involved, and "rigorous adherence to those requirements [*i.e.*, that "regulated parties should know what is required of them" and "precision and guidance" to prevent arbitrary enforcement] is necessary to ensure that ambiguity does not chill protected speech." 567 U.S. at 251. In the context of regulation of speech, the courts are particularly sensitive to vagueness because of the negative effect on protected First Amendment rights.

For example, in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), the Supreme Court considered the constitutionality of provisions of the New York Civil Service law that provided for removal of an employee on any of several grounds. One was "the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts." After analyzing the ambiguities and questions this phraseology presented, the court observed:

> The teacher cannot know the extent, if any, to which a "seditious" utterance must transcend mere statement about abstract doctrine, the extent to which it must be intended to and tend to indoctrinate or incite to action in furtherance of the defined doctrine. The crucial consideration is that no teacher can know just where the line is drawn between "seditious" and nonseditious utterances and acts.

[31] At issue was the "residual clause" of the definition of "crime of violence" in 18 U.S.C. § 16(b), incorporated into certain provisions of the Immigration and Nationality Act for deportation of aliens convicted of an aggravated felony. The residual clause defines a crime of violence as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

385 U.S at 599 (emphasis added). The court then addressed additional provisions barring employment of any person who "by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine" of forceful overthrow of government, or of any person involved with the distribution of written material "containing or advocating, advising or teaching the doctrine" of forceful overthrow, and who himself "advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein." After noting the troublesome questions and ambiguities to which these provisions gave rise, the court further observed:

> The very intricacy of the plan and the uncertainty as to the scope of its proscriptions make it a highly efficient *in terrorem* mechanism. It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living . . . .

385 U.S. at 601 (emphasis added). In holding these provisions to be unconstitutionally vague, the court explained:

> We emphasize once again that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms," *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 438; "[f]or standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.*, at 432-433. New York's complicated and intricate scheme plainly violates that standard. When one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wider of the unlawful zone. . . ." *Speiser* v. *Randall*, 357 U.S. 513, 526. For "[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions." *N.A.A.C.P.* v. *Button, supra*, at 433. The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed. See *Stromberg* v. *California*, 283 U.S. 359, 369; *Cramp* v. *Board of Public Instruction*, 368 U.S. 278; *Baggett* v. *Bullitt, supra* [377 U.S. 360].

385 U.S. at 603-604 (emphasis added). The proposed amendments present exactly the same problems and dangers. As explained above, no therapist (or lawyer) could know just where the line is between permissible and impermissible speech under the definitions of "sexual orientation change efforts" and "gender identity change efforts." It would be a bold therapist who would not stay as far away as possible from utterances which might jeopardize his license and living when he must guess as to what utterances are permissible versus what utterances are prohibited.

In *Baggett v. Bullitt*, 377 U.S. 360 (1964), the Supreme Court considered the definitions of "subversive person," "subversive organization," and "foreign subversive organization" and the oath required of Washington State employees disclaiming being a subversive person or a member of a subversive organization under the Washington Subversive Activities Act of 1951. The Supreme Court held:

> In *Cramp v. Board of Public Instruction*, 368 U.S. 278, the Court invalidated an oath requiring teachers and other employees of the State to swear that they had never lent their "aid, support, advice, counsel or influence to the Communist Party" because the oath was lacking in "terms susceptible of objective measurement" and failed to inform as to what the State commanded or forbade. The statute therefore fell within the compass of those decisions of the Court holding that a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law. *Connally v. General Construction Co.*, 269 U.S. 385; *Lanzetta v. New Jersey*, 306 U.S. 451; *Joseph Burstyn, Inc., v. Wilson*, 343 U.S. 495; *United States v. Cardiff*, 344 U.S. 174; *Champlin Refining Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210.
>
> . . . . The questions put by the Court in *Cramp* may with equal force be asked here. Does the statute reach endorsement or support for Communist candidates for office? Does it reach a lawyer who represents the Communist Party or its members or a journalist who defends constitutional rights of the Communist Party or its members or anyone who supports any cause which is likewise supported by Communists or the Communist Party? The susceptibility of the statutory language to require forswearing of an undefined variety of "guiltless knowing behavior" is what the Court condemned in *Cramp*. This statute, like the one at issue in *Cramp*, is unconstitutionally vague.

377 U.S. at 366-369 (emphasis added). The court went on to identify other situations in which the meaning and reach of the statute were impermissibly vague. The vagueness problems involved with the proposed amendments are equally as severe, if not more so, than those the Supreme Court discussed in *Baggett* and *Cramp*. The proposed amendments would "fail[] to inform as to what the State command[s] or forb[ids]," and, as observed previously, would forbid speech "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."

Thus, if DOPL were to adopt the proposed amendments as a final rule, and were it to be challenged, the courts should rigorously adhere to the principles discussed above. Notwithstanding the failure by both the Ninth Circuit in *Pickup* and the Third Circuit in *King* to substantively analyze these issues, the courts should hold such a rule to be a violation of due process as impermissibly vague.

D. Probable Litigation and the State Attorney General's Role

Adoption of a final rule identical or similar to the proposed amendments would virtually ensure that litigation challenging the constitutionality of the rule would follow. Such litigation would be costly and unproductive for DOPL and the State. Depending on the course of the proceedings, it could go on for many months, or even years. While that litigation is pending, it is very likely that the courts would enter a preliminary injunction against enforcement of the rule. In the end, for all of the reasons explained above, it is very likely that the result would be a final judicial decision that the rule is unconstitutional and void.

When a final rule is challenged, it falls to the State Attorney General and his staff, as counsel for the State, to defend the rule. For all of the reasons explained above, it would be very unwise for DOPL to simply assume that the Attorney General would view the rule as constitutional and would want to commit—or be willing to commit—the limited resources of his office to defend it. In view of all the legal difficulties with the proposed amendments, it would appear to be very wise, in the circumstances, for DOPL to consult with, and seek the advice of, the Attorney General before adopting a final rule or publishing an effective date for the proposed amendments. (This analysis, together with any other legal comments that DOPL may receive, should be transmitted to the Attorney General to assist in his analysis.)

VI. Suggested Alternative Regulatory Approach

Fortunately, the options available to DOPL are not limited to either adopting the proposed amendments or doing nothing. DOPL certainly could propose a clear and specific rule which (1) passes constitutional muster; (2) avoids the numerous problems to which the recommended proposals would give rise; and (3) would implement the spirit, intent, and purpose of the Governor's June 17, 2019 letter. A better and sound approach would focus on preventing real potential abuses and unethical practices, and protecting the rights to ethical and competent therapy for all the minors in Utah—not just the gay or self-identified transgender minors.

Attached as Appendix B is the suggested text of such a proposed rule, in the hope that it may be of use to DOPL and the respective professional licensing boards. The first portion would add new subsections to the definition of "unprofessional conduct." The second portion would add two new sections protecting minor clients' therapeutic rights, which also include further protections for minor clients.

The language suggested in Appendix B would amend the Psychologist Licensing Act rules. Identical amendments could be proposed and adopted for the Mental Health Professional Practice Act rules.

Appendix A — Genetics in Relation to Sexual Orientation

Studies of twins fail to support the hypothesis that same-sex attractions or orientation are genetically predetermined. As Byne and Parsons explain, in Bailey and Pillard's study[1],

> [T]he concordance rate for homosexuality in nontwin biologic brothers was only 9.2 percent—significantly lower than that required by a simple genetic hypothesis, which, on the basis of shared genetic material, would predict similar concordance rates for dizygotic[2] twins and nontwin biologic brothers. Furthermore, the fact that the concordance rates were similar for nontwin biologic brothers (9.2 percent) and genetically unrelated adoptive brothers (11.0 percent) is at odds with a simple genetic hypothesis, which would predict a higher concordance rate for biologic siblings.[3]

Bailey and Pillard themselves admit that the rate of homosexuality among nontwin biological siblings, as reported by the subjects, was "significantly lower than would be predicted by a simple genetic hypothesis and other published reports."[4]

In their analysis, Byne and Parsons point out that the evidence actually suggests an environmental rather than a genetic cause for homosexuality, arguing that

> [W]e must at least consider the possibility that the higher concordance rate for homosexuality in dizygotic twins compared with nontwin biologic brothers is due to increased similarity of the trait-relevant environment in the former. This is because dizygotic twins and full biologic siblings share the same proportion of genetic material. Thus, any difference in the true concordance rates would be attributable to environmental rather than genetic factors.[5]

Other twin studies fail to support the genetic theory. A study in *The Journal of Sex Research* examined monozygotic[6] and dizygotic twins in the Minnesota Twin Registry. While the study claimed to find "significant genetic effects" for the sexual orientation of women, no such effects were found for men: "For men, no significant genetic effects were found for number of opposite- and same-sex sexual encounters, nor for sexual orientation."[7] The study

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[1] J. Michael Bailey and Richard C. Pillard, "A Genetic Study of Male Sexual Orientation," *Archives of General Psychiatry* 48(12):1089-96 (January 1992) (hereinafter "Bailey and Pillard").

[2] *I.e.*, "fraternal"—not identical—twins.

[3] William Byne and Bruce Parsons, "Human Sexual Orientation: The Biologic Theories Reappraised," *Archives of General Psychiatry* 50(3):228-39 (April 1993) (hereinafter "Byne and Parsons"), p. 229.

[4] Bailey and Pillard, p. 1089.

[5] Byne and Parsons, pp. 229–30.

[6] *I.e.*, identical twins.

[7] Scott L. Hershberger, "A Twin Registry Study of Male and Female Sexual Orientation," *The Journal of Sex Research*, 34 (2): 212 (1997) (hereinafter "Hershberger").

concluded that environmental factors were a primary component of the formation of sexual orientation: "Special sibling environment effects were found for self-identified sexual orientation for male and female MZ [monozygotic] twins and opposite-sex female DZ [dizygotic] twins." The authors concluded: "Environmental effects were also important for sexual orientation, in fact, more important in the aggregate than genetic effects . . ."[8]

Bailey and Pillard themselves note other twin studies that were unable to demonstrate a genetic cause: "Buhrich et al reported a twin study of sexual orientation and related behaviors. . . . They found a strong familial resemblance, but had insufficient power to determine whether that correlation was due to genetic or environmental factors or both."[9]

Miron Baron, writing in the *British Medical Journal*, also questioned the results of the twin studies that have been conducted:

> Most of these results are uninterpretable because of small samples or unresolved questions about phenotypic classification, the selection of cases, and the diagnosis of twin zygosity or because they make the untested assumption that monozygotic and dizygotic twins have similar environmental experiences such that any difference in concordance rate would be genetic in origin.[10]

Baron concluded: [T]he finding that the adoptive brothers of homosexual twins are more prone to homosexuality than the biological siblings suggests that male homosexuality may well be environmental."[11]

If homosexuality were a trait determined entirely by a person's genes, one would expect 100 percent of the identical (monozygotic or MZ) twins of homosexuals to also be homosexual. Yet this is not the case; indeed, "what is most intriguing" about the twins studies to Byne and Parsons

> is the large proportion of MZ twins who were discordant for homosexuality despite sharing not only their genes but also their prenatal and familial environments. The large proportion of discordant pairs underscores our ignorance of the factors that are involved, and the manner in which they interact, in the emergence of sexual orientation.[12]

In just the last few weeks, the results of a new genetic study were published in the August 30, 2019 issue of *Science* magazine. The study examined the entire genome of some 477,000

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[8] Hershberger, pp. 220, 221.

[9] Bailey and Pillard, p. 1090.

[10] Miron Baron, "Genetic Linkage and Male Homosexual Orientation," *British Medical Journal*, 7 August 1993, p. 307.

[11] *Id*., p. 337.

[12] Byne and Parsons, p. 230.

people (men and women) who reported having sexual relations with someone of the same sex on at least one occasion. (The sample was not randomly chosen. The genome databanks were borrowed from the UKBiobank and 23andMe. However, the massive size of the sampling makes it important.) This study showed that between 8 and 25 percent genetic variants (single nucleotide polymorphisms, or SNPs) were correlated with having engaged in same-sex behavior on at least one occasion. But that number includes SNPs that weren't statistically significantly associated with same-sex behavior. When only the five SNPs that were found to be statistically significant were considered, correlation dropped to less than 1 percent.[13] The plain and unavoidable implication is that same-sex behavior is not genetically inborn or predetermined.

[13] *See* the reports in, *e.g.*, https://www.sciencenews.org/article/no-evidence-that-gay-gene-exists; https://www.nature.com/articles/d41586-019-02585-6; and https://www.scientificamerican.com/article/massive-study-finds-no-single-genetic-cause-of-same-sex-sexual-behavior/.

Appendix B — Suggested Alternative Text for a Proposed Rule

The Psychologist Licensing Act rule, Chapter 61 of Title R156, Utah Administrative Code, is amended as follows:

1. Section R156-61-502, Utah Administrative Code, is amended by deleting the word "or" at the end of subsection (21) and adding new subsections (23) through (29) as follows:

"(23) engaging in any of the following practices for the intended purpose of attempting to change the sexual attractions, sexual feelings, or sexual behaviors of a minor, or a minor's gender perception:

"(a) Castration;

"(b) Electroshocking of the genitals;

"(c) Administering electroshocking or electroconvulsive procedures to body parts other than the genitals;

"(d) Administering drugs or substances to a minor to induce vomiting or nausea; or

"(e) Using any other aversion technique that involves inflicting physical pain or physical discomfort on a minor;

"(24) Using any of the following as a therapeutic intervention in therapy with a minor:

"(a) Threat of force or rejection;

"(b) Intimidation;

"(c) Punishment;

"(d) Verbal abuse;

"(e) Bullying;

"(f) Humiliation; or

"(g) Shaming;

"(25) Undressing or using nudity in a therapy session with a minor;

"(26) Representing that that therapy will or probably will result in a substantial and permanent change in a minor's feelings of sexual attraction towards persons of the same sex;

"(27) Representing that a minor's sexual attractions, sexual feelings, or sexual behaviors toward persons of the same sex cannot change (whether as a result of therapy or otherwise);

"(28) Advocating in the course of therapy with a particular minor client that the minor client's feelings of sexual attraction towards persons of the same sex should or should not change, unless the persons to whom the minor client is sexually attracted are pre-pubescent children. In the preceding sentence, the term "should" refers to the desirability of change from the therapist's moral or philosophical viewpoint, and not to the probable results of therapy; or

"(29) Endorsing or advocating a minor client's unlawful sexual behaviors."

2. New section R156-61-503 is added as follows:

"**R156-61-503. Protection of Therapist's Rights When Not Conducting Therapy**

"Nothing in section R156-61-502 is to be construed to limit any licensed therapist from advocating any position or viewpoint publicly or privately when not conducting therapy with an individual minor client."

3. New sections R156-61-701 and R156-61-702 are added as follows:

"**R156-61-701. Protection of Minor Client Therapeutic Rights.**

"(1) Every minor has the right to voluntarily consult with, and seek and receive professional assistance from, a licensed psychologist regarding —

"(a) Any feelings of sexual attraction;

"(b) Any sexual behaviors;

"(c) Any issues related to gender perception; and

"(d) Any emotional issues that may be relevant to such attractions, behaviors, or gender perception.

"(2) The minor's right to professional consultation and assistance under subsection (1) is subject to:

"(a) Any requirement under applicable law, including section 62A-4a-403, Utah Code Ann., that a psychologist must report a particular matter or information to law enforcement authorities; and

"(b) The consent or authorization of the minor's parent or legal guardian under section 78B-3-406(6), Utah Code Ann.

"**R156-61-701. Minor Client Protection — Termination of Therapy With a Minor Client Brought to Therapy Involuntarily**.

"(1) If a licensed psychologist believes, or in the course of therapy comes to believe, that a minor client has been or probably has been brought to the psychologist for therapy involuntarily, under threat of force or rejection, intimidation, threat of punishment, or otherwise against the minor client's will, the psychologist may inquire with the minor client regarding all circumstances relevant to that question.

"(2) If the licensed psychologist concludes that the minor client has been or probably has been brought to therapy involuntarily, under threat of force or rejection, intimidation, threat or punishment, or otherwise against the minor client's will, the psychologist may terminate therapy regardless of whether the minor's parent or legal guardian agrees that therapy should be terminated. The psychologist will not be subject to professional discipline for the decision to terminate therapy."