

# **FAMILY ISSUES FACT SHEET**

No. 2022-15 (February 2022)

## **HB 2802 HOUSING; EMPLOYMENT; PUBLIC ACCOMMODATIONS; ANTIDISCRIMINATION**

### **EXECUTIVE SUMMARY**

HB 2802 is a broad bill that undermines the rights of religious believers, counselors, and small businesses. It contains two main parts. First, the bill contains an unconstitutional counseling ban that seeks to silence one form of professional speech by imposing a government-sanctioned understanding of human sexuality on licensed health care professionals. They would be found guilty of “unprofessional conduct” for providing so-called “conversion therapy” to a minor. In practical terms, the bill prohibits minors struggling with unwanted same-sex attraction or gender identity issues from receiving licensed professional counseling.

Second, HB 2802 adds “sexual identity” and “gender identity” to current Arizona law that prohibits discrimination in housing, employment, and public accommodations based on the protected classes of a person’s race, color, religion, sex, age, disability, familial status, or national origin. Nondiscrimination laws are meant to be a shield to protect people from unjust discrimination. However, adding sexual orientation and gender identity (SOGI) to the protected classes enables these “nondiscrimination laws” to be used as a sword against individuals and organizations who have a historic understanding of marriage and gender. SOGI laws do not solve problems; they create them - like undermining constitutional freedoms of speech and religion, threatening women’s and girls’ equality and privacy, and limiting religious organizations that serve women and children.

Further, the bill fails to provide religious exemptions required by the First Amendment. It limits narrow legal protections and places a target on houses of worship, religious schools, and faith-based organizations that hold to a historic understanding of marriage and gender. While the U.S. Supreme Court ruled in [\*Bostock v. Clayton County\*](#) that an employer may not fire a person merely for their sexual orientation, these laws go much further than that.

### **BACKGROUND ON THERAPY BANS**

HB 2802 prohibits licensed health care professionals from engaging in so-called “conversion therapy.” The bill broadly defines “conversion therapy” as “*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 the patient’s or client’s sexual orientation or gender identity.” This is not conversation therapy; it is simply the same type of talk-therapy one would seek to work through depression or anxiety. True conversion therapy hasn’t been practiced by credible professionals in decades.

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While chilling the speech of health care professionals who would like to help minors with unwanted same sex attraction or gender dysphoria, the bill allows treatment that assists, supports, and encourages gender transition and same-sex attraction. The bill exempts clergy or religious counselors only if they are acting substantially in a pastoral or religious capacity, not as a health care professional. It also exempts parents and grandparents who are health care workers, but only if they are acting substantially in a parental role. These are weak exceptions using undefined terms considering they limit what counseling a minor can seek, and a counselor may offer. These exceptions do nothing to remedy the infringement on First Amendment rights.

## THERAPY BANS ARE LEGALLY PROBLEMATIC

The 11<sup>th</sup> Circuit Court of Appeals recently struck down “Conversion Therapy” bans in Boca Raton and Palm Beach County, ruling the ban violated the First Amendment as a content-based regulation on speech. The court stated, “The First Amendment has no carve out for controversial speech.”<sup>i</sup>

New York recently repealed its counseling ban after David Schwartz, a psychotherapist, sued the state for unconstitutionally censoring his speech. Schwartz wrote in the Daily News, “They have no right to intimidate my friends and colleagues into silence or force them to offer professional advice that only affirms same-sex behavior and identity. And politicians have no right to interfere with the therapy goals my patients have asked me to help them achieve.”<sup>ii</sup>

Schwartz cites the results of a massive study that found no gene that causes someone to be attracted to the same sex.<sup>iii</sup> The study found attraction was influenced by a complex combination of both genetic and environmental influences. This supports Schwartz’s opinion that same-sex attraction could possibly be treated with psychotherapy.

## TOP 5 REASONS TO OPPOSE THE THERAPY BAN

1. **It unconstitutionally censors protected professional speech** by telling licensed mental health professionals what type of counseling they can and cannot provide. Three recent U.S. Supreme Court decisions, *Masterpiece*, *Janus*, and *NIFLA*, clearly establish that professional speech is constitutionally protected. The 11<sup>th</sup> Circuit Court of Appeals struck down a similar counseling ban as unconstitutional. When faced with a lawsuit for a similar counseling ban in a separate 2019 case, the City of New York decided to repeal its law rather than lose in court.
2. **It penalizes minors who disagree with the government-sanctioned understanding of human sexuality.** HB 2802 *favors* minors with government-sanctioned beliefs about sexual orientation and gender identity but *penalizes* minors with different beliefs by denying them access to professional counseling.
3. **It denies fundamental parental rights.** Under [A.R.S. § 1-602](#), parents have a fundamental right to direct and oversee the health care of their children. This bill violates

that right by denying their children access to licensed professional counseling they believe is critical to their child's wellbeing.

4. **It contradicts Arizona's Free Exercise of Religion Act ([A.R.S. § 41-1493.04](#))**, which protects the right of licensed professionals to express sincerely held religious beliefs in a professional context, provide faith-based services, and make business decisions like client selection decisions. This bill guts these statutory rights for licensed mental health professionals.
5. **Arizona residents do not support therapy bans.** A recent poll of 600 Arizona likely voters found nearly 68% would oppose legislation that prohibits parents' ability to seek paid counseling and therapy they believe is best for their minor child.<sup>iv</sup>

## TALKING POINTS ON THE THERAPY BAN

1. **It is fundamentally wrong and unconstitutional to silence speech based on its content – banning one viewpoint while allowing the opposing viewpoint. Government should not choose sides.**
2. **Parents have a fundamental right to direct the care and wellbeing of their children. Counseling bans infringe on that right and seek to force both parents and children to conform to government-sanctioned beliefs about human sexuality and gender.**
3. **Counseling bans unconstitutionally restrict the free speech of both professionals and clients seeking to discuss long-held and widespread beliefs about human sexuality and gender. Arizona should have no part in passing unconstitutional laws and the cost of losing a certain court challenge.**
4. **Government should not dictate how a minor handles unwanted same-sex attraction or gender identity concerns. Parents make those decisions for their children. Likewise, the government should not be telling professional counselors what they can and cannot talk about.**
5. **Arizona residents do not support therapy bans. A recent poll of 600 Arizona likely voters found nearly 68% would oppose legislation that prohibits parents' ability to seek paid counseling and therapy they believe is best for their minor child.<sup>v</sup>**

## BACKGROUND ON SOGI LAWS

Ten cities in Arizona currently have a SOGI law. Although some of these laws have narrow religious exemptions for houses of worship, they do not protect the rights of people of faith to live and work according to their religious convictions. Rather, these laws have been used around the country to punish photographers, florists and cake artists who have declined to participate in a same-sex wedding.

The public does not support this kind of power grab by government. A 2021 poll found that among 600 likely Arizona voters, 53% of voters oppose non-discrimination laws when they threaten creative professionals.<sup>vi</sup> Nearly 74% of voters oppose laws that undermine religious freedom.<sup>vii</sup>

Not only does the public oppose SOGI laws, so does the constitution. In September 2019, the Arizona Supreme Court ruled in [\*Brush & Nib Studio v. City of Phoenix\*](#), that Phoenix could not compel artists to create custom wedding invitations celebrating same-sex weddings. The Court found doing so would violate the artists' constitutional free speech rights and religious rights under the Free Exercise of Religion Act (FERA).

## PROBLEMS WITH SOGI LAWS

SOGI laws create substantial privacy and safety concerns for women and girls, impede religious nonprofits from helping women, children, and foster families, as well as harm small businesses. They display a profound disdain for the free exercise of religion by requiring state-run organizations, private businesses, and religious institutions to operate as follows:

- Churches, religious schools and colleges, and faith-based organizations that hold to a historic understanding of marriage and gender could be required to compromise beliefs.
- Fitness Centers, water parks, YMCAs, public swimming pools, and similar facilities will have to allow men identifying as women to access women's showers, locker rooms, and bathrooms. Naturally, sexual predators will take advantage to access potential victims.
- Women's domestic violence shelters will have to allow a man identifying as a woman to share living quarters, showers, and bathrooms with vulnerable women.
- Sex-specific jobs like a counselor at an all-girls summer camp, an employee at a women's domestic violence shelter, or a caregiver for an elderly woman could not deny a job to a man identifying as a woman.
- Businesses, churches, and nonprofits that offer their facilities to the public for events (weddings and receptions) likely would have to make them available for same-sex weddings.

- A company or individual may be compelled to provide access to any health care service, including puberty blockers and gender reassignment surgery and treatment – even for children.

## TALKING POINTS – TOP 5 REASONS TO OPPOSE THE SOGI BILL

1. **It undermines constitutionally guaranteed freedoms of speech and religion.** It requires people and organizations to communicate or act contrary to their beliefs about marriage, sexuality, and what it means to be male and female. Artists, adoption, and foster care providers, homeless women’s shelters, religious schools, and even churches have been, and will be victims of coercion, under these laws.
2. **It threatens women’s equality and privacy.** The bill forces sex-specific facilities, like women’s shelters, locker rooms, showers, and restrooms, to admit men who identify as women.
3. **It harms small businesses.** The bill forces business owners to choose between their livelihood and operating consistent with their core values. Under the bill, business owners that serve all people face lawsuits, fines, and jail just because they decline to communicate a message or participate in an event, that violates their conscience.
4. **It does not solve a widespread problem.** These laws are solutions in search of a problem. The citizens of Arizona do not refuse to hire, serve, or rent to people because of the lack of a statewide SOGI law. Arizonans are tolerant and fair-minded, and the free market, through boycotts and public pressure, would swiftly impose substantial social costs on anyone engaged in baseless discrimination.
5. **It is not required for economic growth.** SOGI proponents wrongly argue the laws are good for business. But the lack of a statewide SOGI law has not impeded growth. Phoenix metro area job growth ranked [1st in the nation](#) in 2019, and in 2020 Arizona’s job growth ranked [2nd in the nation](#) and [#1 for newcomers](#). Arizona also ranked [4th in the nation](#) for GDP. Arizona continues to draw major sporting events, including three Super Bowls with another in 2023; an NCAA Men’s Division One Final Four in 2017 with another in [2024](#). Arizona continues to host a major PGA golf tournament and spring training games annually.

## CONCLUSION

Instead of solving a problem, HB 2802 creates a host of problems. It unconstitutionally silences one form of professional speech by imposing a government-sanctioned understanding of human sexuality on licensed health professionals. It deprives children and parents of the freedom to access the health care services they want and need. By adding sexual orientation and gender identity to state nondiscrimination laws, it undermines constitutionally guaranteed freedoms of

speech and religion, threaten women’s equality and privacy, hurts vulnerable children, and harms small businesses.

HB 2802 threatens our first freedoms. As the Arizona Supreme Court eloquently wrote, “The rights of free speech and free exercise, so precious to this nation since its founding, are not limited to soft murmurings behind the doors of a person’s home or church, or private conversations with like-minded friends and family. These guarantees protect the right of every American to express their beliefs in public.”<sup>viii</sup> Arizonans must be free to peacefully live and work according to their core beliefs without fear of unjust punishment.

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<sup>i</sup> Robert W. Otto, Julie H. Hamilton v City of Boca Raton, FL, County of Palm Beach, FL, <https://media.ca11.uscourts.gov/opinions/pub/files/201910604.pdf>

<sup>ii</sup> Daily News, Sept. 18, 2019. <https://www.nydailynews.com/opinion/ny-oped-why-im-fighting-new-york-citys-conversion-therapy-ban-20190918-yz3ve5mnxzdnfjqlrpy2vii-story.html>

<sup>iii</sup> Science Magazine, August 30, 2019. <https://science.sciencemag.org/content/365/6456/eaat7693>

<sup>iv</sup> Data Orbital 11, 2021 600N

<sup>v</sup> Ibid.

<sup>vi</sup> Datal orbital 11, 2021 600N

<sup>vii</sup> Ibid.

<sup>viii</sup> Brush & Nib Studios, LC v. City of Phoenix, 247 Ariz. 269, 274 (Ariz. 2019).