THE LEGAL STATUS OF CONVERSION THERAPY

JOHN J. LAPIN*

ABSTRACT

“I was told that my faith community rejected my sexuality; that I was the abomination we had heard about in Sunday school; that I was the only gay person in the world; that it was inevitable I would get H.I.V. and AIDS.”

“The therapist ordered me bound to a table to have ice, heat and electricity applied to my body. I was forced to watch clips on a television of gay men holding hands, hugging and having sex. I was supposed to associate those images with the pain I was feeling to once and for all turn into a straight boy. In the end it didn’t work. I would say that it did, just to make the pain go away.”

1. INTRODUCTION ................................................................. 251

II. AN EXAMINATION OF SELECT STATE CONVERSION THERAPY BANS ....... 255
   A. THE NEW YORK, NEW JERSEY, CALIFORNIA, AND NEVADA STATUTES ............. 255

III. A REVIEW OF CHALLENGES TO CONVERSION THERAPY BANS ................. 256
   A. SPEECH ........................................................................... 258
   B. RELIGION ....................................................................... 263
   C. ASSOCIATION .................................................................. 266
   D. VAGUENESS .................................................................... 266
   E. FUNDAMENTAL RIGHTS .................................................... 268

IV. HOW VICTIMS OF CONVERSION THERAPY CAN SEEK REDRESS IN STATES WITHOUT BANS .......................................................... 269
   A. CONSUMER FRAUD .............................................................. 269
   B. MINORS’ FUNDAMENTAL RIGHTS ........................................... 272

V. CONCLUSION: THE COURT WITHOUT JUSTICE KENNEDY ..................... 275

I. INTRODUCTION

Efforts by medical researchers, psychologists, and clergy to turn lesbians, gays, and bisexuals straight began at least 150 years ago, just as the “‘homosexual’ first

---

* Georgetown University Law Center, J.D., cum laude, 2019; Tufts University, B.A., summa cum laude, 2013. With thanks to Professors Paul M. Smith and Evan Wolfson and to the staff of the Georgetown Journal of Gender & the Law. ©2021, John J. Lapin.
2. I will avoid using “homosexuality” and “homosexual,” which some find clinical and offensive, and will instead use “being LGBT” and “LGBT.” Further, though there are pernicious efforts to “convert” or “correct” the gender identity of transgender people, the specifics of those efforts, to the extent they differ

---

251
came into being,"4 when “the medical and psychological community considered homosexuality an illness.”5 Though attempting to change an individual’s sexual orientation is today roundly condemned by the medical and psychological academy,6 many states permit so-called “conversion therapy,”7 which “encompasses a variety of methods, including both aversive and non-aversive treatments.”8 In the past, these aversive techniques involved “inducing nausea, vomiting, or paralysis; providing electric shocks; or having an individual snap an elastic band around the wrist when aroused by same-sex erotic images or thoughts.”9 Even today, non-aversive practices to “‘cure’ individuals of their same-sex sexual orientations . . . include a number of techniques ranging from shaming to hypnosis to inducing vomiting to electric shocks.”10 Many self-proclaimed therapists now use less invasive means, including “assertiveness and affection training with physical and social reinforcement,” hypnosis, and redirecting thoughts.11 Nevertheless, even with less barbaric techniques, the risk of serious psychological trauma to those who attempt to change their sexual orientation, and especially to minors, who are often forced into treatment, is profound. The Williams Institute at UCLA Law School reports that LGB people who have suffered from conversion therapy showed far greater odds of having suicidal thoughts and attempts compared to LGB people who were not subject to conversion therapy.12 According to the American Psychological Association, “[t]he potential risks of reparative therapy . . . includ[e] depression, anxiety and self-destructive

from sexual orientation conversion, are outside the scope of this note. As such, I will occasionally use the terms “being LGB” or “LGB,” but will remain faithful to the sources that I rely upon.

5. Pickup v. Brown, 728 F.3d 1042, 1048 (9th Cir. 2013), amended and reh’g denied 740 F.3d 1208 (9th Cir. 2014).
7. Conversion therapy is sometimes called “reparative therapy” or “sexual orientation change efforts” (“SOCE”). For consistency, I will use “conversion therapy,” because that is the term most widely used. Conversion therapy includes “talk therapy, behavioral (e.g.,] aversive stimuli), group therapy or milieu (e.g.,] ‘retreats or inpatient treatments’ . . . ) treatments” to change an individual’s sexual orientation heterosexual. Jack Drescher et al., The Growing Regulation of Conversion Therapy, 102 J. MED. REG. 7 (2016).
8. Pickup, 728 F.3d at 1048.
9. Id. at 1048–49.
11. Pickup, 728 F.3d at 1049.
behavior, since therapist alignment with societal prejudices against homosexuality may reinforce self-hatred already experienced by the patient.\textsuperscript{13} These risks reinforce an already high level of familial rejection, which often negatively affects the health of LGB youth.\textsuperscript{14} But the practice is not just risky and harmful; it does not work. There is “increasing evidence that [conversion therapy is] ineffective and may cause harm to patients and their families who fail to change” their sexual orientation.\textsuperscript{15}

Even still, while there is consensus in the medical and mental health academy that both being LGB and being straight are normal expressions of sexuality, political and religious organizations still aggressively promote efforts to change sexual orientation through therapy.\textsuperscript{16} Confronted with aggressive promotion of a harmful practice, LGBT rights and mental health groups have joined with medical and psychological experts to ban conversion therapy.\textsuperscript{17} These efforts have not gone unnoticed; state legislatures are finding ways to prohibit the practice, and courts have held that conversion therapy bans are constitutional and that the practice constitutes consumer fraud.\textsuperscript{18} But progress has been slow, and, as of September 2020, only twenty states and the District of Columbia have laws banning conversion therapy for minors.\textsuperscript{19} Scattered localities in other states protect minors, but generally only in larger cities. Thirty states do not ban conversion therapy, even for minors, leaving forty-nine percent of the LGBT population with no state-level protection from conversion therapy for minors.\textsuperscript{20}

To get a sense of the magnitude of the risk to the population, nearly 700,000 adults have received conversion therapy, about half as teenagers; 20,000 LGBT

\footnote{14. Caitlin Ryan et al., Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, Bisexual Young Adults, 123 PEDIATRICS 346, 349 (2009).}
\footnote{15. Drescher et al., supra note 7, at 7.}
\footnote{16. Just the Facts, supra note 13, at 5.}
\footnote{17. Marie-Amélie George, Understanding Conversion Therapy Bans, 68 ALA. L. REV. 793, 794–95 (2017).}
\footnote{20. MAP Conversion Therapy Laws, supra note 19. This is according to research by MAP, the National Center for Lesbian Rights, and the Trevor Project. North Carolina’s governor signed an executive order banning the use of public funding for conversion therapy of minors. See Jamie Ehrlich, North Carolina Bans Public Funding of ‘Conversion Therapy’ for Youth, CNN (Aug. 2, 2019), https://www.cnn.com/2019/08/02/politics/roy-cooper-north-carolina-conversion-therapy-ban/index.html.}
As of the writing of this Note, Justice Amy Coney Barrett, who replaced Justice Ruth Bader Ginsburg, has just recently taken her seat on the Court, and analysis of her LGBT jurisprudence is outside the scope of this paper. Justice Barrett, however, will almost certainly pull the Court to the right, reducing the number of justices with a solid history of supporting LGBT rights to three—Justices Breyer, Sotomayor, and Kagan.

Youth between ages thirteen and seventeen will receive conversion therapy from a licensed health care professional before they turn eighteen; 6000 youth who live in states that ban conversion therapy would have been treated by a licensed professional if their state permitted; and, most staggeringly, 57,000 youth will be victims of conversion therapy from an unlicensed religious or spiritual advisor before age eighteen. Nevertheless, even though conversion therapy affects so many people, and even though a majority of Americans support banning its use on youth, and despite the fact that it is widely considered not only ineffective but also harmful, conversion therapy is supported in the most recent Republican Party platform.

The Democratic Party platform, on the other hand, states, “Democrats will expand mental health and suicide prevention services, and ban harmful ‘conversion therapy’ practices.”

In this Note, I will analyze the arguments against conversion therapy bans and will argue that the bans are constitutional. In Part II, I will frame the discussion by analyzing four states’ statutory bans. In Part III, I will evaluate the constitutional arguments against the bans and will conclude that each of these arguments fails. Then, in Part IV, I will offer two solutions (litigation on consumer fraud and arguments for minors’ fundamental rights) for victims seeking redress in states that do not ban conversion therapy. I will close in Part V by briefly considering how the Supreme Court might view conversion therapy bans without Justice Kennedy, who wrote many of the Court’s decisions affirming the rights of LGBT people.

---

21. Christy Mallory et al., Conversion Therapy and LGBT Youth, WILLIAMS INST. (Jan. 2018), https://williamsinstitute.law.ucla.edu/publications/conversion-therapy-and-lgbt-youth/. These authors multiplied the proportion of LGB adults over twenty-five who received conversion therapy from a religious leader before age of eighteen (3.4%) by the proportion of youth in grades nine through twelve who identify as LGB (8.0%) and by the proportion of LGB people ages eighteen to twenty-four who are cisgender (95.7%), and then applied the product to the number of youth ages thirteen to seventeen according to the 2010 Census.

22. Id. For instance, seventy-one percent of Floridians, sixty-four percent of Virginians, and sixty percent of New Mexicans believe that the use of conversion therapy on youth should be illegal.


25. As of the writing of this Note, Justice Amy Coney Barrett, who replaced Justice Ruth Bader Ginsburg, has just recently taken her seat on the Court, and analysis of her LGBT jurisprudence is outside the scope of this paper. Justice Barrett, however, will almost certainly pull the Court to the right, reducing the number of justices with a solid history of supporting LGBT rights to three—Justices Breyer, Sotomayor, and Kagan.
II. AN EXAMINATION OF SELECT STATE CONVERSION THERAPY BANS

The legal status of conversion therapy varies by state. Of the thirty states without statewide conversion therapy bans, some have comprehensive antidiscrimination laws in employment, public accommodation, housing, and the like, with the absence of a conversion therapy ban an outlier in an otherwise LGBT-friendly environment. In more conservative states, permitting conversion therapy is just one aspect of a cohesive anti-LGBT climate. To provide context for analyzing the arguments against conversion therapy bans in Part III, I will briefly examine the text and purpose of the conversion therapy bans in New York, New Jersey, California, and Nevada.

A. THE NEW YORK, NEW JERSEY, CALIFORNIA, AND NEVADA STATUTES

New York banned conversion therapy in 2019, enacting a law stating, “It shall be professional misconduct for a mental health professional to engage in sexual orientation change efforts upon any patient under the age of eighteen years.” The law defines New York’s “compelling interest in protecting the physical and psychological well-being of minors, including [LGBT] youth, and in protecting its minors against exposure to serious harms caused by sexual orientation change efforts.” Professional misconduct penalties can include censure, suspension or revocation of a license, a fine of up to $10,000, or up to 500 hours of community service.

New Jersey’s legislature, like New York’s, included in its legislative findings the conclusions of major mental health and medical organizations, each reiterating that conversion therapy is harmful and does not work. New Jersey’s law also emphasizes the state’s compelling interest using the same words as New York. Unlike New York’s law, however, New Jersey does not reference specific punishment or professional misconduct consequences.

California, the first state to ban conversion therapy, enacted a one-sentence law that states: “Under no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age.” Like New
York, California subjects those who attempt conversion therapy on minors to “discipline by the licensing entity for that mental health provider,” but, unlike New York, California does not define the consequences for violators, leaving discipline to the various professions’ licensing boards.

Nevada’s conversion therapy ban, which came into effect in 2018, is unique because it explicitly states that conversion therapy is illegal “regardless of the willingness of the person or his or her parent or legal guardian to authorize such therapy.” This is particularly noteworthy because, as discussed below, one of the main arguments raised by parents seeking to defend, or assert, their right to subject their LGBT children to conversion therapy is that parents have a fundamental right to “care for their child and direct [the child’s] upbringing.” Nevada asserts that this right is not absolute, and the Ninth Circuit has agreed in other contexts.

As these four statutes banning conversion therapy illustrate, states target licensed healthcare providers, perhaps a necessity to ensure the bans’ constitutionality. Moreover, most state bans include legislative findings, detailing the state’s motivation to prohibit conversion therapy. Legislative findings are often used to express the intent of a bill’s sponsors and can preemptively defend a law’s constitutionality by stating the government’s compelling interest, potentially staving off an attack in the courts that the law serves no sufficiently important goal. In the case of conversion therapy bans, many states have emphasized the harm to victims of the practice, the normalcy and immutability of being LGBT, and the fact that conversion therapy has been denounced as pseudoscience by major medical groups.

III. A Review of Challenges to Conversion Therapy Bans

When a state’s ban is challenged for infringing the First Amendment’s religion and speech rights, courts take a much closer look at the state’s goals and whether the law is narrowly drawn in what it proscribes. Generally, a content-neutral law that infringes on speech is subject to “intermediate scrutiny,” i.e., the law must be substantially related to an important governmental interest; however, if the law restricts speech based on content or viewpoint, the law is subject to more exacting review—“strict scrutiny”—and can only stand if it is the most narrowly tailored

35. Id. at § 865.2.
36. Nev. Rev. Stat. § 629.600 (West 2018) (“A psychotherapist shall not provide any conversion therapy to a person who is under 18 years of age regardless of the willingness of the person or his or her parent . . . to authorize such therapy.”). Illinois prohibits “any deception . . . that represents homosexuality as a mental disease . . . with intent that others rely upon the” deception. 405 Ill. Comp. Stat. § 48/20 (2016).
38. See, e.g., Fields v. Palmdale Sch. Dist., 447 F.3d 1187, 1191 (9th Cir. 2006) (holding that parents’ control of their child’s upbringing does not entitle them to regulate a public school’s curriculum).
means to further a compelling governmental interest. Toward this end, every state conversion therapy ban targets licensed mental health providers, not religious or spiritual advisors or counselors. Indeed, Utah’s law explicitly exempts “a clergy member or religious counselor who is acting substantially in a pastoral or religious capacity and not in the capacity of a mental health therapist.” This is not coincidental. Rather, by limiting the effect of state bans to licensed clinicians, states show that their laws are narrowly tailored. Of course, while such tailoring might be constitutionally necessary, the bans do little to help the 57,000 youth who will be victims of conversion therapy by unlicensed religious providers.

The Supreme Court has not yet spoken on the issue of conversion therapy—rather, it has denied each petition for certiorari—yet a number of state and federal courts have ruled against conversion therapy, or, more accurately, have held that bans are constitutional. Many of these cases are defensive litigation supporting existing bans from constitutional attack. As such, this Part, using the Third Circuit case King v. Murphy and the Ninth Circuit case Pickup v. Brown (also called Welch v. Brown at different stages of the litigation), will explain constitutional arguments made by conversion therapy practitioners and parents, who oppose state bans. These litigants often argue that the bans violate their First

---


44. As discussed below, after this Note was drafted, the Eleventh Circuit reversed a district court’s denial of a preliminary injunction against city and county bans in Florida. See Otto v. City of Boca Raton, 353 F. Supp. 3d 1237, 1241 (S.D. Fla. 2019), rev’d and remanded, 981 F.3d 854 (11th Cir. 2020). The arguments that each side advanced in this dispute are similar to those in the Third and Ninth Circuit litigation and, as the court of appeals considered these arguments on an interlocutory appeal, this case will not be discussed in detail on its own.
Amendment rights to (A) speech, (B) religion, and (C) association, (D) their Fifth and Fourteenth Amendment rights to due process and notice, based on vagueness, and (E) their “fundamental rights” to make decisions about the “care, custody, and control of their children.” None of these arguments has been or should be successful.

A. SPEECH

Practitioners contend that since conversion therapy is now non-aversive and speech-based, bans abridge practitioners’ freedom to say what they wish in the course of therapy and thereby violate the First Amendment, unless the bans can withstand appropriate scrutiny.†† Defenders of the bans counter that the statutes do not actually regulate speech but in fact regulate the conduct of therapy, a medical or psychological practice like any other, and therefore the bans are subject to less exacting scrutiny.†‡ Defenders maintain that conduct does not have the same First Amendment protection as speech unless that conduct is “inherently expressive,” which medical treatment is not. Therefore, defenders argue, conversion therapy bans are subject to intermediate scrutiny, or even rational basis review, like other regulations of conduct.

Prohibitions on conduct, however, are not “an abridgement of freedom of speech . . . merely because the conduct was in part initiated, evidenced, or carried out by means of language.”†§ As the Supreme Court has held, when Congress decided, for example, to “prohibit employers from discriminating in hiring on the basis of race,” which thereby “require[d] an employer to take down a sign reading ‘White Applicants Only’,” Congress “hardly mean[t] that the law should be analyzed as one regulating the employer’s speech rather than conduct.”†‖ Of course, the Supreme Court has held that “words can in some circumstances violate laws directed not against speech but against conduct.”†¶ Just because practitioners of non-aversive conversion therapy use words as the method of treatment, as with other kinds of talk therapy, bans do not thereby target speech instead of conduct. Speech is “merely” the way in which “the conduct [is] initiated, evidenced, or carried out.”

---

45. See, e.g., Pickup, 740 F.3d at 1235.
46. As a substantial discussion of scrutiny is outside the scope of this paper, I will assume the reader’s familiarity with levels of scrutiny for speech-based regulations, including content and viewpoint discrimination, and conduct-based regulations. I will also assume familiarity with scrutiny of statutes that potentially burden the free exercise of religion. For more information on these topics, see, for example, Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 664 (1994), Church of the Lukumi Babalu Aye, Inc., v. Hialeah, 508 U.S. 520, 530–34 (1993), and United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938).
47. See, e.g., Pickup, 740 F.3d at 1225.
52. R.A.V., 505 U.S. at 389.
The Ninth Circuit has responded to free-speech arguments against conversion therapy bans by holding that while doctor–patient communication about medical treatment “receive[s] substantial First Amendment protection,” it is not immune from regulation, and the government may regulate conduct “necessary to administering treatment itself.” Furthermore, therapists are “not entitled to special First Amendment protection merely because the mechanism used to deliver mental health treatment is the spoken word.” This is not a novel concept or a rhetorical flourish used to shoehorn speech into conduct regulation. Every state has a board of medicine, which licenses doctors. The government, therefore, routinely regulates the practice of medicine.

In Planned Parenthood of Southeastern Pennsylvania v. Casey, the Supreme Court held, “the physician’s First Amendment rights not to speak,” in that case about abortion risks, “are implicated” by the state’s requirement that doctors disclose information about abortion risks “but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.” Casey’s holding is relevant to analyzing conversion therapy bans because California’s statute regulates conduct in the practice of medicine. The statute regulates conduct because it “does nothing to prevent licensed therapists from discussing the pros and cons of [conversion therapy] with their patients,” which, according to the Ninth Circuit, falls well within California’s police power to supervise licensed professionals, whether or not speech is used to carry out a therapy. Regulations of conduct, of course, are subject to only intermediate scrutiny—that is, they must only be substantially related to an important government purpose. A conversion therapy ban, which seeks to protect LGB youth from a harmful and ineffective practice, can meet this standard because protecting at-risk youth is an important government purpose, and banning a harmful practice is closely related to that purpose.

Thus, Casey’s “reasonable licensing and regulation” language would seem to permit conversion therapy bans without great controversy. In 2018, however, the Court upheld an injunction against a California law that required licensed “crisis pregnancy centers” to notify patients that they could obtain free or low-cost abortions and that patients could contact a California state agency for more information. The California law also required unlicensed centers to disclaim that they did not provide medical services. The centers argued that both notice requirements, regulating licensed and unlicensed centers, violated their First Amendment rights to spread their anti-abortion messages, since the Court has held that “the

54. Pickup v. Brown, 740 F.3d 1208, 1227 (9th Cir. 2014).
55. Id.
57. Pickup, 740 F.3d at 1229.
58. Id.
61. Id. at 2369.
freedom of speech ‘prohibits the government from telling people what they must say.’” 62 Justice Thomas, writing for the majority, agreed. The California requirements regulated speech as speech, not speech as conduct, and the requirements were “content based” because they “alter[ed] the content” of the centers’ speech by infringing on centers’ ability to persuade women not to have abortions at all. 63 As content-based regulations of speech, the law was required to survive strict scrutiny, which the Court held it did not. 64 The law was both “wildly underinclusive” 65 —because if California’s goal was to provide pregnant women with information about abortions, it failed to reach most pregnant women—and not narrowly tailored—because the state could inform women about abortion services without restricting or forcing the clinics’ speech as significantly. 66

NIFLA complicates both the argument that conversion therapy bans prohibit conduct, not speech, and the argument that licensed professionals are subject to greater regulation as professionals. Nevertheless, NIFLA can be distinguished from the conversion therapy cases. California’s abortion notices in NIFLA, unlike conversion therapy bans, were not the sort of “reasonable licensing and regulation” of professional conduct that the Court permitted in Casey. First, the activity at issue in NIFLA—supposed compelled disclosures about abortion—really was a content-based regulation of speech. Conversion therapy bans, however, target the conduct of providing dangerous and ineffective therapy. That is, the bans neither require health care providers to speak about a certain issue, like abortion in NIFLA, nor do they silence speech about an issue. Conversion therapy regulations “do[] nothing to prevent licensed therapists from discussing the pros and cons of [conversion therapy] with their patients.” Rather, the statutes “regulate[] conduct.” 67 They proscribe licensed clinicians from performing medically unsound treatment. In this sense, conversion therapy bans are similar to banning bloodletting, trephining, forced sterilization, or another harmful, pseudoscientific practice.

Some have read Casey to hold that professional speech is subject to less exacting scrutiny, yet the Court in NIFLA stated, “this Court has not recognized ‘professional speech’ as a separate category of speech. Speech is not protected merely because it is uttered by ‘professionals.’” 68 Rather, the Court has “afforded less

64. Id. at 2374.
65. Id. at 2375 (quoting Brown v. Entertainment Merchants Ass’n, 564 U.S. 786 (2011)).
66. Id. at 2376. Justice Breyer dissented that if a state can require a doctor to notify an abortion patient about adoption, it can require a pregnancy center to notify about abortion services. Id. at 2384 (Breyer, J., dissenting).
68. NIFLA, 138 S. Ct. at 2371–72.
protection for professional speech in two circumstances,” first, when “laws . . . require professionals to disclose factual, noncontroversial information in their ‘commercial speech’,” and, second, “[s]tates may regulate professional conduct, even though that conduct incidentally involves speech.” 69 Neither line of precedent saved California’s abortion law. A conversion therapy ban, however, regulates the professional conduct of licensed health care providers, and the professional conduct only incidentally involves speech. Therefore, the ban may survive under the second set of protections.

Furthermore, NIFLA did not overrule Casey; it distinguished it. NIFLA does not hold that the state can no longer “reasonabl[y] licens[e] and regulat[e]” certain professions, and the fact that the NIFLA Court treated licensed and unlicensed centers similarly does not limit a state’s ability to regulate the conduct of licensed providers. Even if the bans targeted speech directly, defenders of the bans need not argue that a practitioner’s license renders the state’s regulation of the practitioner’s speech subject to less exacting scrutiny. Whether professional speech is more or less protected does not defeat the defenders’ arguments.

It would be illogical for therapy effectuated by speech to be given greater protection than the same therapy effectuated by physical treatment. Consider that practitioners used to induce “nausea, vomiting, or paralysis; provide electric shocks; or have an individual snap an elastic band around the wrist when aroused by same-sex erotic images or thoughts.” 70 Practitioners now “reframe desires, redirect[] thoughts, or us[e] hypnosis, with the goal of changing sexual arousal, behavior, and orientation.” 71 Why should a therapist be more protected when he screams “faggot” or “homo” at a client in a mock locker room than when he directs the client to snap an elastic band on his wrist each time the client is attracted to a man? 72


70. Pickup v. Brown, 728 F.3d 1042, 1048–49 (9th Cir. 2013).
71. APA Report, supra note 6, at 22.
Perhaps it is ironic or unappealing to conclude that talk therapy is not speech. The Third Circuit thought so in King. Contrary to the Ninth Circuit, it held that conversion therapy is speech. Though most content-based speech regulations must meet strict scrutiny, the Third Circuit held, before NIFLA was decided, that the state’s conversion therapy ban targeted professional speech and therefore needed only to meet intermediate scrutiny.\(^73\) The Third Circuit likened talk therapy in conversion therapy to the legal counseling held to be speech in Holder v. Humanitarian Law Project.\(^74\) In Holder, on the Third Circuit’s reading, the Supreme Court rejected “the argument that verbal communications become ‘conduct’ when they are used to deliver professional services.”\(^75\) Ultimately, however, the Third Circuit’s speech–conduct analysis is moot, as the Supreme Court explicitly overruled the notion of a particular level of scrutiny afforded to professional speech in NIFLA.

If the Third Circuit decided King today, assuming that it would again hold that New Jersey’s ban regulates speech and not conduct, it would review the ban under strict scrutiny, because it would consider the ban to be a content-based regulation of speech. The ban would not regulate merely the time, place, and manner of speech, for instance. Nevertheless, the ban would survive strict scrutiny because New Jersey could show that it is necessary to achieve the compelling governmental interest of protecting at-risk youth. The Third Circuit held that the state’s interest in “protect[ing] minor [LGBT] clients—a population that is especially vulnerable”\(^76\) was “substantial,”\(^77\) not merely “important,” as required for intermediate scrutiny. New Jersey could have no interest stronger than the health and safety of its “most vulnerable” citizens.

Indeed, the difference between levels of governmental interest is not always clear. The Court in O’Brien described different levels of interest, stating that the Court “has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong” yet admitting that “imprecision inheres in these terms.”\(^78\) Protecting a vulnerable population from physical and psychological trauma is not merely a preferred governmental objective, it is a necessary and compelling one. Indeed, a federal district court in Florida denied therapists’ request for a preliminary injunction, holding that Boca Raton’s conversion therapy ban, “[r]egardless of the level of review applied to the ordinances,” violates the government’s “compelling interest in protecting the safety and welfare of

\(^73\) King v. Governor of N.J., 767 F.3d 216, 237 (3d Cir. 2014) (“professional speech receives diminished protection [and prohibitions] are constitutional only if they directly advance the State’s interest in protecting citizens from harmful . . . professional practices and is no more extensive than necessary.”).

\(^74\) Id. at 225.

\(^75\) Id. at 228. The Third Circuit was persuaded by the three Ninth Circuit judges who dissented from the denial of rehearing en banc. Legislators cannot “nullify the First Amendment’s protections for speech by playing this labeling game.” Pickup, 740 F.3d at 1218 (O’Scannlain, J., dissenting).

\(^76\) King, 767 F.3d at 237–38.

\(^77\) Id. at 237.

After this Note was initially drafted, the practitioners appealed, and the Eleventh Circuit reversed and remanded, summarily concluding that the bans regulate speech, not conduct, and that the bans concern the content of the practitioners’ speech. The court also discounted the harmfulness findings of the medical academy. In dissent, Judge Martin wrote that the bans, even if they regulate speech rather than conduct, are permissible because “narrow regulation of a harmful medical practice affecting vulnerable minors falls within the narrow band of permissibility.” Litigation is now proceeding in the district court.

A necessary or compelling governmental interest, however, is not sufficient on its own. States must also show that their bans are “specifically and narrowly framed to accomplish [the compelling governmental] purpose.” No state could accomplish its interest in protecting these “exceptionally vulnerable” citizens from the harmful practice of conversion therapy in a less restrictive manner. After all, the bans only regulate licensed medical professionals and still permit these professionals to speak about “the pros and cons of [conversion therapy] with their patients,” who may seek conversion therapy, even from a licensed provider, once they turn eighteen. The bans do not reach religious providers of conversion therapy, nor do they even incidentally burden other speech that does not cause the harm that the government seeks to prevent. Conversion therapy bans, therefore, are the least restrictive means of accomplishing the government’s compelling interest.

B. RELIGION

Separate from providers’ free speech arguments, defenders of conversion therapy maintain that state bans violate their religious freedom because the laws impermissibly target religion, in violation of the First Amendment, but these arguments also fail.

The First Amendment begins, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Though “[t]he Establishment and Free Exercise Clauses . . . are not the most precisely drawn portions of the Constitution,” courts have held that a neutral and generally applicable law will “withstand a free exercise challenge” if it is “rationally related to a legitimate government objective,” even if the law “has the incidental effect

81. Id. at 869.
82. Id. at 880.
84. Pickup v. Brown, 740 F.3d 1208, 1229 (9th Cir. 2014).
85. King v. Governor of N.J., 767 F.3d 216, 241 (3d Cir. 2014); Welch v. Brown, 834 F.3d 1041, 1042 (9th Cir. 2016).
86. U.S. CONST. amend. I.
of burdening a particular religious practice or group.”89 Parents and providers argue that bans are neither “neutral” nor “generally applicable” and that therefore courts need apply strict scrutiny.90 These arguments are not convincing because “[a] law is ‘neutral’ if it does not target religiously motivated conduct either on its face or as applied in practice.”91 Conversion therapy bans “regulate[] conduct only within the confines of the counselor–client relationship,” so the argument that a religious person is prohibited from “offering certain prayers or quoting certain Scriptures to young people,” or that a clergyman is prohibited from engaging in religious conversion therapy, is mistaken. The bans do not apply at all to private individuals or “members of the clergy . . . providing religious counseling to congregants.”92

Indeed, the First Amendment is not a cloak of protection for all activity with a religious bent. While the Ninth Circuit in Pickup held that California’s conversion therapy ban is a conduct regulation, and therefore to be reviewed under intermediate scrutiny, even the Third Circuit, which analyzed New Jersey’s ban as a speech regulation, held that the First Amendment does not afford “absolute protection” for a religious practice. The court concluded that New Jersey’s law is neutral and generally applicable under the Supreme Court’s landmark religion case Lukumi Babalu Aye v. City of Hialeah93 because a reasonable person would not view any state ban as having “the principal or primary effect of advancing or inhibiting religion.”94 The legislatures’ purpose and effect in banning conversion therapy was to “protect the physical and psychological well-being of minors, including [LGB] youth . . . against exposure to serious harms caused by sexual orientation change efforts.”95 The Ninth Circuit reiterated that minors who wish to change their sexual orientation may seek “alternative paths,” besides licensed therapists, and they “are free to do so on their own and with the help of friends, family, and religious leaders,” or they may see a licensed therapist when they turn eighteen.96 Contrary to parents’ and providers’ arguments, therefore, conversion therapy bans are not like the prohibition against ritual animal slaughter invalidated in Lukumi, because they are not directed at religious people acting pursuant to religious motivations, nor do they advance or inhibit religion. The text and legislative history of each state ban demonstrate that the intended effect was not to inhibit religion. Any burden on a particular religion is, at most,

90. King, 767 F.3d at 242.
91. Lukumi Babalu Aye, 508 U.S. at 533–40. Note, this analysis differs from a court’s determination whether a speech regulation is content-neutral.
92. Welch v. Brown, 834 F.3d 1041, 1042 (9th Cir. 2016); id. at 1044–45 (quoting complaint) (emphasis in ).
93. King, 767 F.3d at 241–42.
94. Am. Fam. Ass’n, Inc. v. City of S.F., 277 F.3d 1114, 1122 (9th Cir. 2002).
95. Pickup v. Brown, 740 F.3d 1208, 1223 (9th Cir. 2014).
96. Welch, 834 F.3d at 1045.
incidental. The bans do not, therefore, violate the religion clauses of the First Amendment.

The Third Circuit’s analysis is similar to the Ninth Circuit’s. A law is not neutral if it “burdens a category of a religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated.” 97 Just as with the Ninth Circuit’s analysis of California’s ban, the Third Circuit first determined that New Jersey’s ban was facially neutral because it made no reference to any religion or religious beliefs. The crux of the court’s analysis, then, was whether the law impermissibly harms religious counseling to a greater degree than nonreligious counseling. The Third Circuit plaintiffs raised a slightly different argument than the Ninth Circuit’s and asserted that the statute’s exemptions, which permit counseling, for example of minors seeking to transition genders or to prevent “unlawful conduct or unsafe sexual practices” via a sexual orientation-neutral intervention, 98 constitute a “religious gerrymander.” 99 But it is not clear precisely what the Third Circuit plaintiffs meant by this, since none of New Jersey’s exemptions has anything to do with religion—neither explicitly nor implicitly. It is not as if the state permits one religion to practice conversion therapy but not another, or permits one sort of religious therapy but not another. Nor are religious providers covered by the bans. Ultimately, the court held, “plaintiffs fail to explain how [New Jersey’s ban’s] focus[es] on the professional status of the counselor or the age of the client [that] belies a concealed intention to suppress a particular religious belief.” 100 The ban is neutral and generally applicable, passing the required rational basis review.

A law that reached religious providers as well would have to be carefully drawn to ensure its constitutionality. Consider, for instance, the City of Hialeah’s ban on ritual animal sacrifice. Though the ban was generally written, it implicitly targeted members of the Santaría Church, the only religious group in the city to sacrifice animals. 101 A conversion therapy ban that prohibited unlicensed therapists could be seen to target religious groups, like Orthodox Judaism and Evangelical Christianity; though, if religions as different as those two would both be impacted by a more effective conversion therapy ban, it may be difficult to argue that such a ban is religiously motivated. Even still, a ban on conversion therapy covering unlicensed therapists may impermissibly “burden[] a category

101. Hialeah’s city council worried “that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety,” and the city enacted an ordinance subjecting “whoever . . . unnecessarily or cruelly . . . kills any animal” to criminal punishment. Lukumi Babalu Aye, 508 U.S. at 526.
of a religiously motivated conduct,” given that many unlicensed therapists are religious. Such a ban would be challenged aggressively, and the overall progress of the movement could be jeopardized. As evidence, when some Puerto Rican senators sought to ban not just licensed health care providers but also religious institutions receiving state funding, they alienated possible supporters, and the House speaker never called the bill for a vote.

C. ASSOCIATION

The Pickup plaintiffs’ final First Amendment argument is that state bans violate their rights to free association, that is, their protected “choices to enter into and to maintain the intimate human relationship between counselors and clients.”

First Amendment-protected relationships are based on either (1) personal decisions concerning “intimate human relationships,” like marriage and cohabitation, which are based on liberty, or (2) activity-based relationships, like the Boy Scouts’ former exclusion of LGBT members or an all-male private club. The Ninth Circuit plaintiffs, who were therapy providers, complained that the ban violated their liberty-based associational rights. But California’s statute has no effect on therapists maintaining therapeutic relationships with clients; it only prohibits certain practices. And the patient–therapist relationship is not the type of intimate human relationship or activity-based relationship that the First Amendment’s association clause protects. Nor is such a relationship protected by the Fourteenth Amendment’s due process clause or a by any other sort of general liberty interest. Rather, the patient–therapist relationship is contractual and pecuniary. “These relationships simply do not rise to the level of fundamental right,” like marriage or cohabitation, on which an “intimate human relationship” associational argument can be made.

D. VAGUENESS

The King and Pickup plaintiffs—parents and practitioners—argued that the phrase “sexual orientation change efforts,” which appears in the statutes of New Jersey and California, is unconstitutionally vague. Vague statutes violate the Fifth and Fourteenth Amendment rights to due process for either or both of two reasons. First, citizens cannot conform their behavior to the strictures of a vague statute, because they cannot be sure precisely what conduct the statute proscribes. Second, vague statutes afford law

---

102. Blackhawk, 381 F.3d at 209.
103. De León, supra note 19, at 1.
104. Pickup v. Brown, 740 F.3d 1208, 1232 (9th Cir. 2014).
107. Pickup, 740 F.3d at 1233.
108. Id.
109. Id. (quoting Nat’l Ass’n for the Advancement of Psychoanalysis v. Cal. Bd. of Psych., 228 F.3d 1043, 1050 (9th Cir. 2000)).
110. King v. Governor of N.J., 767 F.3d 216, 240 (3d Cir. 2014); Pickup, 740 F.3d at 1233.
enforcement too much discretion, thereby risking discriminatory and arbitrary enforcement.\textsuperscript{111} The plaintiffs’ vagueness arguments fail under both of these reasons. The New Jersey statute, for instance, defines “sexual orientation change efforts” as “including . . . efforts to change behaviors, gender identity, or gender expressions, or to reduce or eliminate sexual . . . attractions or feelings toward a person of the same gender; except that [it] shall not include counseling for a person seeking to transition from one gender to another,” or limited other sorts of counseling.\textsuperscript{112} The plaintiffs claim that the definition is insufficient.

For a statute to survive a vagueness challenge, the statute need not provide perfect clarity,\textsuperscript{113} yet New Jersey’s statute is simple and clear—and just because many “efforts” might be prohibited, it is not the case that the statute is vague. To analyze for vagueness, one must consider the two evils of vague statutes, mentioned above. New Jersey’s statute is guilty of neither. First, New Jerseyans can conform their conduct to the confines of the law. The individuals whose conduct is regulated are licensed therapists, surely familiar with their professional organizations’ policies that already condemn conversion therapy\textsuperscript{114} and likely obligated to remain aware of the legality of certain medical practices.

The Ninth Circuit’s analysis was similar. The plaintiffs in \textit{Pickup} sought to support their vagueness challenge by posing hypotheticals. They asked whether, for instance, disseminating information on conversion therapy or simply speaking about the relative merits of conversion therapy would violate California’s ban. (They would not.)\textsuperscript{115} And while hypotheticals might make for interesting thought experiments, the Supreme Court has held that “speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications.”\textsuperscript{116} Fringe or hypothetical cases of uncertainty about whether conduct is permissible will not suffice to prove vagueness.\textsuperscript{117}

\textsuperscript{111} \textit{Compare} Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989) (“[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.”) \textit{with} NAACP v. Button, 371 U.S. 415, 433 (1963) (“First Amendment freedoms need breathing space to survive,” so “government may regulate in the area only with narrow specificity.”).

\textsuperscript{112} N.J. STAT ANN. § 45:1-55 (West 2013).

\textsuperscript{113} Hill v. Colorado, 530 U.S. 703, 733 (2000).

\textsuperscript{114} If a statute “involves conduct of . . . persons having specialized knowledge, and the challenged phraseology is indigenous to . . . that class, the standard is lowered and a court may uphold a statute which uses words or phrases having a technical or other special meaning.” United States v. Weitzenhoff, 35 F.3d 1275, 1289 (9th Cir. 1994).

\textsuperscript{115} \textit{Pickup}, 740 F.3d at 1230.

\textsuperscript{116} Hill, 530 U.S. at 733. The Third Circuit plaintiffs argued that “sexual orientation” was unconstitutionally vague but abandoned this argument on appeal. The Ninth Circuit plaintiffs maintained that “sexual orientation” is vague, but the court held that the meaning “is clear enough to a reasonable person” and “even more apparent to health care providers.” \textit{Pickup}, 740 F.3d at 1234. The California code in fact defines sexual orientation in other provisions.

\textsuperscript{117} Consider H.L.A. Hart’s famous “no vehicles in the park” hypothetical, differentiating “straightforward” applications of the rule’s “core” (cars) from “hard cases” (bicycles, roller skates,
E. FUNDAMENTAL RIGHTS

While practitioners, who are the targets of conversion therapy bans, raise the majority of the First, Fifth, and Fourteenth Amendment challenges, parents have argued that the bans violate their fundamental rights to choose how to raise their children, to direct their children’s education, care, and upbringing. The argument is that the state should not be able to intervene if parents think the best way to care for their LGBT children is to take them to a therapist to cure them of their sexuality.

In New Jersey, for instance, a minor and his parents challenged the state’s ban, arguing that it violated the parents’ right to “care for their child and direct his upbringing.” The argument is unconvincing. While parents do have a fundamental right to direct the upbringing of their children, because that right is deeply rooted in the nation’s history, “neither rights of religion nor . . . parenthood are beyond limitation. Acting to guard the general interest in youth’s well being, the state[’s] . . . authority is not nullified merely because the parent grounds his claim . . . on religion or conscience.” The state can intrude, for example, when a parent refuses medical care for, or otherwise abuses, a child. Therefore, notwithstanding parents’ fundamental rights to make decisions about the “care, custody, and control” of their children, the state may promote health, safety, and welfare within reason.

More specifically, there is no case “in which a court has affirmatively found that parents are constitutionally entitled to select a specific type of medical care for their child that the state has reasonably deemed harmful or ineffective.” The state argued that plaintiffs cannot “compel the state to permit licensed mental health [professionals] to engage in unsafe practices, and cannot dictate the prevailing standard of care,” and the court agreed. The law does not “support the extension of” parents’ decision-making authority “to demand[ing] that the State

---

120. Prince v. Massachusetts, 321 U.S. 158, 166 (1944). “The state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare.” Id. at 167.
123. Id. at 87–89.
125. Pickup v. Brown, 740 F.3d 1208, 1235 (9th Cir. 2014).
make available a particular form of treatment.” The Ninth Circuit reasoned similarly. The court referred to its previous decisions holding that individuals do not have a clear right to choose specific treatments, stating, “[i]t would be odd if parents had a substantive due process right to choose specific treatments for their children—treatments that reasonably have been deemed harmful by the state—but not for themselves.”

Generally, when a state seeks to infringe on a fundamental right, the state action must survive strict scrutiny, which requires the state to show that the intrusion is necessary and the least restrictive means to achieve a compelling governmental interest. This reasoning is similar to the First Amendment analysis above. Both the Third and Ninth Circuits agreed with the plaintiffs that parents’ right to direct their child’s upbringing is fundamental; however, neither court determined explicitly whether the conversion therapy bans withstood strict scrutiny. Rather, the conclusion was implicit in the courts’ emphasis that fundamental rights are not absolute and that the states’ interest in protecting vulnerable children is extremely compelling.

IV. HOW VICTIMS OF CONVERSION THERAPY CAN SEEK REDRESSES IN STATES WITHOUT BANS

A. CONSUMER FRAUD

Some of the states that do not ban conversion therapy have politically powerful populations hostile to LGBT people, while the legislatures of other more moderate states have not been able to agree on the scope of a conversion therapy ban. A discussion of the unique political obstacles that advocates face in different states is outside the scope of this Note; however, the most significant roadblock to eradicating conversion therapy nationwide is that every state-level ban only prohibits the conversion therapy by a licensed health care provider. While constitutionally necessary for the reasons discussed in the preceding section, licensed providers inflict only a fraction of the trauma of conversion therapy. None of the 57,000 youth who will receive conversion therapy from an unlicensed religious or spiritual person is saved by any state ban currently in existence.

Instead, to try to reach the tens of thousands of youth who will be subjected to religious-based conversion therapy, it could be more fruitful to take note of a New Jersey case, Ferguson v. JONAH, in which a jury found that a non-profit religious company that offered conversion therapy, Jews Offering New Alternatives to Homosexuality (JONAH), violated the state’s Consumer Fraud Act by claiming it

126. Doe v. Governor of N.J., 783 F.3d 150, 156 (3d Cir. 2015).
127. Pickup, 740 F.3d at 1236.
128. Mallory et al., supra note 21, at 3.
129. During litigation, the company changed its name to “Jews Offering New Alternatives for Healing.” Peter R. Dubowski, The Ferguson v. JONAH Verdict and a Path National Cessation of Gay-to-Straight “Conversion Therapy,” 110 NW. U. L. REV. ONLINE 77, 87 (2015). It is now known as the
could change sexual orientation. In that case, the Southern Poverty Law Center (SPLC), on behalf of former clients, argued that JONAH’s practices harmed LGBT people and their families by peddling “discredited, pseudo-scientific treatments.” JONAH forced clients to “remove their clothing and stand in a circle naked, with [a defendant] also nude.” In another instance, a plaintiff was instructed “to beat an effigy of his mother with a tennis racket while screaming, as if killing her”; plaintiffs later were told to reenact past abuse.

The plaintiffs in Ferguson paid JONAH more than $10,000 per year for therapy sessions and weekend retreats on the basis of the defendants’ misrepresentations "that their services were scientifically proven to be effective,” which defendants maintained by citing a psychologist who was permanently expelled from his licensing organizations. The plaintiffs sued under New Jersey’s consumer fraud law, which prohibits “any unconscionable commercial practice, deception, fraud, false pretense, false promise, [or] misrepresentation . . . in connection with the sale or advertisement of any merchandise.” According to the plaintiffs, JONAH and the other defendants falsely claimed: (i) that being LGB is a mental disorder, (ii) that sexual orientation is alterable and JONAH could successfully change a person from LGB to straight, and (iii) “that when conversion therapy does not produce the promised results, the clients . . . are to blame for not sufficiently investing in and surrendering to Defendants’ services.” Because these claims—and promises like, “[y]ou can change if you just try hard enough . . . we are experts at this . . . we have helped so many people”—were knowing misrepresentations, JONAH defrauded the plaintiffs. And the defendants could never have believed what they said. Even at trial, they claimed that clients had a “two-in-three chance of . . . changing their sexuality,” despite keeping no records and conducting no follow-up.

New Jersey follows the rule for expert witnesses set forth in Frye v. United States, and the judge in Ferguson excluded the testimony of defendants’
experts as pseudoscience. After a three-week trial and just three hours of deliberation, the jury found that JONAH committed “unconscionable consumer fraud” and that it was “a misrepresentation in violation of [the state’s consumer protection statute] to state that homosexuality was not a normal variation of human sexuality, but was instead a mental illness, disorder, or equivalent thereof.” In a settlement that precluded appeal, JONAH was forced to pay $3.5 million in attorneys’ fees and expenses and to permanently close. Following Ferguson’s success, some LGBT groups have expressed interest in using consumer protection laws to fight conversion therapy in states without bans, and a federal district judge in Mississippi noted that “citizens have successfully sued so-called ‘gay conversion’ therapists for consumer fraud and professional malpractice.”

According to Peter Dubrowski, who worked on the plaintiffs’ trial team and conducted a fifty-state survey of consumer protection laws, Ferguson-like cases could be brought elsewhere, given that every state has an analogous law. Dubrowski concedes that New Jersey’s statute is particularly plaintiff-friendly and that advancing this argument would be more difficult in states that, for example, lack individual rights of action for consumer fraud, require a defendant’s intent or knowledge or a plaintiff’s reliance, or do not permit equitable relief or attorneys’ fees. Nevertheless, many states “do not require demonstrating that the defendant either knew or intended his actions to be fraudulent,” thereby eliminating the “true believer” problem, which arises when conversion therapists can say they disagree with prevailing science and believe their practices work in an attempt to shield themselves from consumer fraud liability.”

According to Peter Dubrowski, who worked on the plaintiffs’ trial team and conducted a fifty-state survey of consumer protection laws, Ferguson-like cases could be brought elsewhere, given that every state has an analogous law. Dubrowski concedes that New Jersey’s statute is particularly plaintiff-friendly and that advancing this argument would be more difficult in states that, for example, lack individual rights of action for consumer fraud, require a defendant’s intent or knowledge or a plaintiff’s reliance, or do not permit equitable relief or attorneys’ fees. Nevertheless, many states “do not require demonstrating that the defendant either knew or intended his actions to be fraudulent,” thereby eliminating the “true believer” problem, which arises when conversion therapists can say they disagree with prevailing science and believe their practices work in an attempt to shield themselves from consumer fraud liability.”

141. Ferguson v. JONAH, No. HUD-L-5473-12, 2015 WL 609436, at *6 (N.J. Super. Ct. 2015) (“The overwhelming weight of scientific authority concludes that homosexuality is not a disorder or abnormal. The universal acceptance of that scientific conclusion—save for outliers such as JONAH—requires that any expert opinions to the contrary be barred.”).
143. Id. at 86 (citing Order Granting Plaintiffs’ Motion for Partial Summary Judgment at 1, Ferguson v. JONAH, No. L-5473-12 (N.J. Super. Ct. Law Div. Feb. 10, 2015)).
145. See, e.g., Ending the Fraud: Utilizing Consumer Protection Laws to Combat Conversion Therapy, LGBT BAR (April 14, 2019), https://perma.cc/E8Y3-VPUA; see also Samantha Allen, California Might Make Conversion Therapy Consumer Fraud, DAILY BEAST (Aug. 29, 2018), https://www.thedailybeast.com/california-might-make-conversion-therapy-consumer-fraud. According to Shannon Minter, legal director at the National Center of Lesbian Rights, California is considering a law that would state that “anytime anybody pays money for conversion therapy, they’re being defrauded.”
147. Dubrowski, supra note 129, at 90.
148. Id. at 91–92.
149. Id. at 91.
plaintiff-friendly.150 Many states that lack one of the critical metrics still do not require that a plaintiff prove intent to defraud or misrepresent.151 To prevail in a future case, therefore, a plaintiff may only need to demonstrate similar misrepresentation by showing that a therapist asserted that conversion therapy was effective, which cannot be done truthfully.152

LGBT rights groups and the medical academy153 have taken note of the litigation theory in cases like Ferguson. The Human Rights Campaign, the National Center for Lesbian Rights, and SPLC filed a complaint with the Federal Trade Commission against People Can Change, Inc., (later rebranded as “Brothers Road”).154 The plaintiffs alleged that the defendant’s practices were false and misleading and contained material omissions because the group claimed that it could ‘absolutely’ change individuals’ sexual orientation, that being LGBT is abnormal or a disorder, and that its services were based in scientifically effective methods.155 The complaint also alleged that the defendant failed to disclose risks associated with conversion therapy.156 As of the drafting of this Note, the FTC has not acted on this complaint, but the complaint could be a sign that consumer fraud cases are gaining traction in the movement to ban conversion therapy.

B. MINORS’ FUNDAMENTAL RIGHTS

In addition to arguing that practitioners’ misrepresentations violate consumer fraud statutes, mature minors, whose parents forced them into conversion therapy, could argue that the practice violates their fundamental rights to autonomy. As discussed above, at Part III.E., parents’ rights to direct the care of their children are not absolute; for example, the state can force parents to vaccinate their children,157 and parents cannot ask for a particular medical treatment that the state has deemed harmful.158 While generally, “when the . . . health of the child is not at stake, states and courts defer to the decisions of the parents,”159 conversion therapy does bear on the health of the minor, so parental deference is not automatic. Minors who are capable of making their own decisions can argue for less deference to parents and greater recognition of their own autonomy.

150. These states are Alaska, California, Connecticut, Illinois, Kansas, Massachusetts, Michigan, Missouri, New York, Ohio, Oregon, Tennessee, Vermont, and Washington. Id. at 92–93.
151. In fact, only nine states require intent or knowledge. These are Colorado, Idaho, Indiana, Iowa, Minnesota, Nevada, North Dakota, South Dakota, and Wyoming. Id. at 94.
152. Id. at 89.
153. Drescher et al., supra note 7, at 7.
155. HRC Complaint, supra note 154, at 10–30.
156. Id. at 31.
More specifically, as parents’ rights are limited legitimately when the exercise of those rights threatens the minor, parental control can be further diminished in the case of minors who are deemed sufficiently mature. Those mature minors should have their choices respected in courts and legislatures irrespective of third parties. While no court in the United States has considered this doctrine in a conversion therapy case, courts in other nations have, and the arguments on both sides could soon surface here. The tension between parental control and minors’ autonomy could be at issue both in cases brought to overturn state bans and in cases brought to challenge the legality of conversion therapy itself.

Existing scholarship and law on these issues will inform the debate between parental deference and the autonomy of minors. According to the Guttmacher Institute, at least twenty-six states permit minors to consent or decide on contraceptive services, eleven on marriage, thirty-four on dropping out of school, thirty-five on placing a child for adoption, and twenty-two on general medical care. States routinely recognize mature minors’ autonomy and capacity to make important life decisions. In California, for instance, minors over age fifteen can consent to pregnancy-related care without parental notification; those over age twelve may consent to diagnosis and treatment for sexually transmitted infections. Thus, myriad state examples recognize that some minors have the capacity to make serious life decisions and should be able to exercise their autonomy. Some states define mature minors explicitly. In Illinois, for instance, a mature minor is a person between sixteen and eighteen “who has demonstrated the ability and capacity to manage his own affairs . . . independent of his parents or guardian.” Massachusetts’s law is similar. Many states also have laws that support a minor’s “right to refuse extreme treatments such as electroconvulsive therapy, psychosurgery, and behavior modification programs utilizing

164. In thirty-four states, parental consent remains the legal requirement. See Doriane Lambelet Coleman & Philip M. Rosoff, The Legal Authority of Mature Minors to Consent to General Medical Treatment, 131 PEDIATRICS 786, 791 (2013).
166. 750 ILL. COMP. STAT. 30/3-2.
167. 104 MASS. CODE REGS. 25.03 (“he or she shall be entitled to consent in the same manner as an adult” and a facility “may decide, in certain circumstances, not to notify the parents.”)
deprivation or aversive techniques.”

Indeed, the Supreme Court has held that mental health providers especially have an ethical duty to respect a minor’s interests even when they conflict with those of the parents’.

Considering these statutes, a state ignoring mature minors’ objections to conversion therapy is arbitrary and illogical.

Future mature minor laws in other states likely will not mention conversion therapy or a particular health-related decision explicitly. Therefore, parents’ objections, would be no different from standard objections to the state limiting parental autonomy in raising and caring for their children. The state can overcome these objections by expressing a sufficiently compelling interest in respecting bodily integrity and individual autonomy. The state would have the better argument because, as the Supreme Court stated seventy-five years ago, “neither rights of religion nor rights of parenthood are beyond limitation.” In fact, “[t]he state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare.” Parental authority does not trump the state’s interest in ensuring health care providers consider patients’ views and autonomy, notwithstanding that a patient may be under age eighteen.

The concept of the mature minor is not new. Then-Judge Cardozo wrote, in 1914, that every person of “adult years and sound mind” has a right to “determine what shall be done with his own body.” While Judge Cardozo wrote “adult years,” the addition of “and sound mind” implies not a specific age but rather one based on the circumstances—e.g., fourteen to consent to sex, sixteen to drive, eighteen to vote. Or, at the very least, adult years alone is insufficient for this sort of autonomy. More recently, the Court affirmed the “right not to consent, that is, to refuse treatment” rooted in a liberty interest in bodily control. Though that case concerned adults, mature minors and their advocates could argue that this


169. Parham, 442 U.S. at 604 (holding that a fact-finder should evaluate the parents’ decision and the child’s rights).


172. Id. at 167.


liberty interest does not manifest at an arbitrary age, like eighteen, but rather when the person is capable of making decisions.

V. CONCLUSION: THE COURT WITHOUT JUSTICE KENNEDY

Justice Anthony Kennedy, who retired from the Supreme Court in July 2018, wrote the Court’s decisions in four landmark LGBT rights cases, yet his concurrence in NIFLA, the California abortion ban case discussed above, shows that he was not sympathetic to government regulation of speech, indicating that he may not have been supportive of the movement to ban conversion therapy.

In Romer v. Evans, the Court, led by Justice Kennedy, held unconstitutional a Colorado constitutional amendment that prevented the state from designating sexual orientation a protected status.175 Seven years later, in Lawrence v. Texas, Justice Kennedy again led the Court to hold Texas’s anti-sodomy law unconstitutional.176 Ten years after that, in United States v. Windsor, he brought the Court together to hold the Defense of Marriage Act, which federally defined marriage as between a man and a woman, unconstitutional.177 And finally, just two years later, in Obergefell v. Hodges, it was again Justice Kennedy who found a coalition for marriage equality, requiring states to issue marriage licenses to same-sex couples and to recognize marriages performed elsewhere.178 Many saw Justice Kennedy, who was otherwise quite conservative, as an ally to LGBT people. Nevertheless, notwithstanding his leadership on the Court in those landmark LGBT cases, Justice Kennedy joined the majority in Boy Scouts,179 which upheld that organization’s right to exclude LGBT people from membership regardless of state antidiscrimination laws that prohibited discrimination based on sexual orientation. And, in 2018, Justice Kennedy wrote the Court’s decision in Masterpiece Cakeshop v. Colorado Civil Rights Commission.180 In that case, the Court held that the respondent failed to apply the state’s public accommodation law neutrally and had violated the petitioner’s free exercise of religion. Some have argued Masterpiece effectively permits businesses to decline services based on a customer’s sexual orientation, regardless of whether a state’s public accommodation law prohibits discrimination on that basis.181 Others argue that Masterpiece only concerns animus in adjudicative proceedings. A complete analysis of these cases or of

Justice Kennedy’s LGBT-related jurisprudence is outside the scope of this Note; however, given the contrast between *Romer* and *Boy Scouts*, issued within four years of each other, or *Obergefell* and *Masterpiece*, issued within three years of each other, it is difficult to predict with certainty how Justice Kennedy would have treated the novel issue of conversion therapy. Therefore, the precise effect of his absence is similarly indeterminate.

His concurrence in *NIFLA* indicates that Justice Kennedy disapproved of what he considered government-compelled or -prohibited speech. He warned that the California law “is a paradigmatic example of the serious threat presented” when the government imposes its speech “in the place of individual speech, thought, and expression.”182 It “is not forward thinking to force individuals to be an instrument for fostering public adherence to an ideological point of view they find unacceptable.”183 Rather, Justice Kennedy wrote, the Court must read the First Amendment as it was in 1791, a warning against “relentless authoritarian regimes” that stifled free expression and a lesson on “the necessity of freedom of speech.”184 Justice Kennedy may have characterized conversion therapy bans as instances of an authoritarian regime stifling free speech, which, while consistent with his opinion in *NIFLA*, would upend state bans and hurt the same LGBT people whom he previously protected. Justice Kennedy’s replacement on the Court by the more conservative Justice Brett Kavanaugh may have by itself not shifted the balance on this particular issue. Fewer than four justices wished to review conversion therapy prohibitions when Justice Kennedy served, and, despite the Court’s vociferous condemnation of California’s regulations in *NIFLA*, fewer than four justices wished to review a conversion therapy prohibition as recently as April 2019, after Justice Kavanaugh replaced Justice Kennedy.185 All of this is to say that perhaps even the Court’s most conservative justices agree that conversion therapy bans target conduct, or at least that states’ interests in prohibiting it is sufficiently compelling.

Justice Kavanaugh appears to be less sympathetic to the substantive rights of LGBT people than Justice Kennedy was. Lambda Legal and other groups opposed his confirmation, writing to the Senate Judiciary Committee that his views are “fundamentally at odds with securing equality, liberty, justice and dignity under the law for all people, including LGBT people.”186 At his confirmation hearings, Justice Kavanaugh also refused to answer then-Senator Kamala Harris’s question about whether he agrees with the Court’s decision in

---
183. *Id.*
184. *Id.*
185. King v. Murphy, 139 S. Ct. 1567 (2019).
Obergefell, the marriage equality decision written by his former boss and the Justice whom he was nominated to replace.\textsuperscript{187}

More recently, on the issue of employment decision, in Bostock v. Clayton County, Justice Kavanaugh cited the Court’s decision in Masterpiece that “gay and lesbian Americans ‘cannot be treated as social outcasts or as inferior in dignity or worth.’”\textsuperscript{188} Yet this dignity and worth do not provide protection from employment discrimination because of sexual orientation or gender identity, according to Justice Kavanaugh, and if people want such protection, they must ask their legislators, not their judges.\textsuperscript{189} Interpreting Title VII to prohibit gender identity and sexual orientation discrimination would require “Congress and the President [to] enact[] new legislation, as prescribed by the Constitution’s separation of powers.”\textsuperscript{190}

Justice Kavanaugh assumes “for the sake of argument” that “firing someone because of their sexual orientation may, as a very literal matter, entail making a distinction based on sex.”\textsuperscript{191} But this is not enough, even for a textualist like Justice Kavanaugh. Plaintiffs must also establish either (i) that courts adhere to the literal meaning, as opposed to the ordinary meaning, when interpreting a statute, or, alternatively, (ii) that the ordinary meaning of “discriminate because of sex” encompasses sexual orientation discrimination.\textsuperscript{192} Plaintiffs are unable to do the former because that is simply not how things are done. When faced with a difference between the literal meaning and the ordinary meaning, textualists believe that jurists must follow the ordinary meaning.\textsuperscript{193} This is because “the good textualist is not a literalist.”\textsuperscript{194} Even though many textualists cite dictionary definitions no “mainstream judge is interested solely in the literal definitions of a statute’s words.”\textsuperscript{195} This is “Statutory Interpretation 101.”\textsuperscript{196} Plaintiffs predictably fail at the latter because “[b]oth common parlance and common legal usage treat sex discrimination and sexual orientation discrimination as two distinct categories of discrimination—back in 1964 and still today.”\textsuperscript{197} Therefore, “Bostock and Zarda


\textsuperscript{188} Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1823 (2020) (Kavanaugh, J., dissenting) (quoting Masterpiece, 138 S. Ct. 1727). Bostock was consolidated with Zarda v. Altitude Express, Inc. In Bostock, Clayton County, Georgia fired the petitioner for conduct “unbecoming” a county employee after he started participating in a gay softball league. In Zarda, Altitude Express fired Donald Zarda right after he mentioned being gay.

\textsuperscript{189} Id. at 1823.

\textsuperscript{190} Id.

\textsuperscript{191} Id. at 1824–25.

\textsuperscript{192} Id.

\textsuperscript{193} Id. at 1826.

\textsuperscript{194} Id. at 1825 (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 24 (1997)).

\textsuperscript{195} Id. (quoting Caleb Nelson, What Is Textualism?, 91 VA. L. REV. 347, 376 (2005)).

\textsuperscript{196} Id. at 1828.

\textsuperscript{197} Id.
were fired because they were gay, not because they were men." 198 According to Justice Kavanaugh, Title VII provided a remedy for the latter but not the former.

The Court without Justice Kennedy—and of course without Justice Ginsburg—but with Justice Kavanaugh will most certainly be more hostile to the rights of LGBT people, and, if it gets there, and now Justice Barrett, the movement to ban conversion therapy may be temporarily halted at the Supreme Court. But, like the movement for the freedom to marry, progress may not be linear, and setbacks will not deter advocates and activists.

198. Id.