The Legal Status of Conversion Therapy

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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]

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I. Introduction

Efforts by medical researchers, psychologists, and clergy to turn lesbians, gays, and bisexuals[2] straight began at least 150 years ago,[3] just as the "'homosexual' first

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1. Sam Brinton, *I Was Tortured in Gay Conversion Therapy. And It's Still Legal in 41 States*, N.Y. Times (Jan. 24, 2018), https://www.nytimes.com/2018/01/24/opinion/gay-conversion-therapy-torture.html.

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

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

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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.

3. Timothy Murphy, *Redirecting Sexual Orientation: Techniques and Justifications*, 29 J. SEX. RES. 501, 501 (1992).

4. GEOFFREY R. STONE, SEX AND THE CONSTITUTION 214 (2017).

5. Pickup v. Brown, 728 F.3d 1042, 1048 (9th Cir. 2013), *amended and reh'g denied* 740 F.3d 1208 (9th Cir. 2014).

6. After being LGB was removed from the DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS in 1973, organizations began to oppose sexual orientation discrimination: American Psychological Association (1975), American Psychiatric Association (1973), American Psychoanalytic Association (1991), National Association of Social Workers (2000). As such, once common literature on "psychotherapeutic efforts to change sexual orientation" ceased, and the academy discredited "approaches to psychotherapy that were not [LGB] affirmative." AM. PSYCH. ASS'N, *Report of the APA Task Force on Appropriate Therapeutic Responses to Sexual Orientation* 12 (2009) [hereinafter APA *Report*], https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf.

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.

10. MOVEMENT ADVANCEMENT PROJECT, LGBT POLICY SPOTLIGHT: CONVERSION THERAPY BANS (July 2017), https://www.lgbtmap.org/file/policy-spotlight-conversion-therapy-bans.pdf.

11. *Pickup*, 728 F.3d at 1049.

12. Press Release, Williams Institute at UCLA School of Law, LGB People Who Have Undergone Conversion Therapy Almost Twice as Likely to Attempt Suicide (June 15, 2020), https://williamsinstitute.law.ucla.edu/press/lgb-suicide-ct-press-release/.

behavior, since therapist alignment with societal prejudices against homosexuality may reinforce self-hatred already experienced by the patient."[13] These risks reinforce an already high level of familial rejection, which often negatively affects the health of LGB youth.[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.[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.[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.[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.[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.[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.[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

13. AM. PSYCH. ASS'N, *Just the Facts About Sexual Orientation and Youth: A Primer for Principals, Educators, and School Personnel* 7 (2008), https://www.apa.org/pi/lgbt/resources/just-the-facts.pdf [hereinafter *Just the Facts*].

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).

15. Drescher et al., *supra* note 7, at 7.

16. *Just the Facts*, *supra* note 13, at 5.

17. Marie-Amélie George, *Understanding Conversion Therapy Bans*, 68 ALA. L. REV. 793, 794–95 (2017).

18. *See, e.g.*, Ferguson v. JONAH, 136 A.3d 447 (N.J. Super. Ct. 2014); *see also* Erik Eckholm, *In a First, New Jersey Jury Says Group Selling Gay Cure Committed Fraud*, N.Y. TIMES (June 25, 2015), https://www.nytimes.com/2015/06/26/nyregion/new-jersey-jury-says-group-selling-gay-cure-committed-fraud.html.

19. New Jersey (2013), California (2013), District of Columbia (2014), Oregon (2015), Illinois (2016), Vermont (2016), New Mexico (2017), Connecticut (2017), Rhode Island (2017), Nevada (2018), Washington (2018), Hawaii (2018), Delaware (2018), Maryland (2018), New Hampshire (2019), New York (2019), Massachusetts (2019), Maine (2019), Colorado (2019), Utah (2020), Virginia (2020). *See Conversion Therapy Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/conversion_therapy [hereinafter MAP *Conversion Therapy Laws*]. In 2018, after Puerto Rico's legislature refused to vote on a bill to ban conversion therapy for minors, the territory's governor implemented a ban by executive order. *See* Concepción de León, *Governor of Puerto Rico Signs Executive Order Banning 'Conversion Therapy' for Minors*, N.Y. TIMES (Mar. 27, 2019), https://www.nytimes.com/2019/03/27/us/puerto-rico-conversion-therapy.html.

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.

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.[21] Nevertheless, even though conversion therapy affects so many people, and even though a majority of Americans support banning its use on youth,[22] 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.[23] The Democratic Party platform, on the other hand, states, "Democrats will expand mental health and suicide prevention services, and ban harmful 'conversion therapy' practices."[24]

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.[25]

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.

23. Jeremy W. Peters, *Emerging Republican Platform Goes Far to the Right*, N.Y. TIMES (Jul. 12, 2016), https://www.nytimes.com/2016/07/13/us/politics/republican-convention-issues.html. Along with "promoted state laws to limit which restrooms transgender people could use," the GOP platform "nodded to 'conversion therapy' for gays by saying that parents should be free to make medical decisions about their children without interference." *Id. See also Republican Platform 2016*, COMMITTEE ON ARRANGEMENTS FOR THE 2016 REPUBLICAN NATIONAL CONVENTION 37 (July 16, 2016), https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf. Note, the Republican Party made no changes to its 2020 platform. Ronn Blitzer, *GOP Announces No New 2020 Platform, Party to 'Enthusiastically Support' Trump Agenda*, FOX NEWS (Aug. 24, 2020), https://www.foxnews.com/politics/gop-no-new-2020-platform-trump-agenda.

24. *2020 Democratic Party Platform*, DEMOCRATIC NATIONAL COMMITTEE 42 (Aug. 18, 2020), https://democrats.org/wp-content/uploads/sites/2/2020/08/2020-Democratic-Party-Platform.pdf.

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.[26] In more conservative states, permitting conversion therapy is just one aspect of a cohesive anti-LGBT climate.[27] 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,[28] 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."[29] 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."[30] 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.[31]

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.[32] New Jersey's law also emphasizes the state's compelling interest using the same words as New York.[33] 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."[34] Like New

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26. Wisconsin, for example, bans sexual orientation discrimination in private employment, housing, and public accommodation, but the state lacks a statewide conversion therapy ban. *See Wisconsin's Equality Profile*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality_maps/profile_state/WI (last visited Oct. 22, 2020).

27. Oklahoma, for instance, lacks public accommodation, adoption, family leave, hate-crime, and other laws supporting LGBT people. *See Oklahoma's Equality Profile*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality_maps/profile_state/OK (last visited Oct. 22, 2020).

28. Michael Gold, *New York Passes a Ban on 'Conversion Therapy' After Years-Long Efforts*, N.Y. TIMES (Jan. 21, 2019), https://www.nytimes.com/2019/01/21/nyregion/conversion-therapy-ban.html.

29. N.Y. EDUC. LAW § 6531-a (McKinney 2019).

30. 2019 N.Y. Sess. Laws 576.

31. N.Y. PUB. HEALTH LAW § 230-a (McKinney 2008).

32. N.J. STAT. ANN. § 45:1-54 (West 2013).

33. *Id.* Licensed counselors "shall not engage in sexual orientation change efforts" with a minor. *Id.* at § 45:1-55(a).

34. CAL. BUS. & PROF. CODE § 865.1 (2013).

York, California subjects those who attempt conversion therapy on minors to "discipline by the licensing entity for that mental health provider,"[35] 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."[36] 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."[37] Nevada asserts that this right is not absolute, and the Ninth Circuit has agreed in other contexts.[38]

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.[39]

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).

37. Doe v. Christie, 33 F. Supp. 3d 518, 520 (D.N.J. 2014), *aff'd sub nom.* Doe ex rel. Doe v. Governor of N.J., 783 F.3d 150 (3d Cir. 2015).

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).

39. *See infra* Part III. *See, e.g.*, 2012 Cal. Legis. Serv. Ch. 835 (S.B. 1172) (West).

means to further a compelling governmental interest.[40] Toward this end, every state conversion therapy ban targets licensed mental health providers, not religious or spiritual advisors or counselors.[41] 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."[42] 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[43]—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.[44] These litigants often argue that the bans violate their First

40. *See generally*, United States v. Carolene Products Co., 304 U.S. 144 (1938); Church of the Lukumi Babalu Aye, Inc., v. Hialeah, 508 U.S. 520, 531–32 (1993) ("Only if a government fails this neutrality test must its policy "be justified by a compelling government interest and . . . be narrowly tailored to advance that interest."); Craig v. Boren, 429 U.S. 190 (1976); United States v. O'Brien, 391 U.S. 367 (1968); *see also* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. Pa. L. Rev. 2417 (1996).

41. CONN. GEN. STAT. § 19a-907a (2017) ("No health care provider shall engage in conversion therapy."); DEL. CODE ANN. tit. 24, § 3902 (2018); D.C. CODE § 7–1231.14a (2015) ("A provider shall not engage in sexual orientation change efforts with a consumer who is a minor."); HAW. REV. STAT. § 453J-1 (2018); 405 ILL. COMP. STAT. § 48/20 (2016); Abusive Practices to Change Sexual Orientation and Gender Identity in Minors, H.140, 191st Sess. (Mass. 2019), https://malegislature.gov/Bills/191/H140; MD. CODE, HEALTH OCC. § 1-212.1 (2018) ("A mental health or child care practitioner may not engage in conversion therapy with [a] minor."); N.H. REV. STAT. § 332-L:2 (2019); N.M. STAT. ANN. § 61-1-3.3 (2017) ("A person who is licensed to provide professional counseling . . . shall not engage in conversion therapy with a person under 18 years of age."); OR. REV. STAT. § 675.850 (2019) ("conversion therapy on recipients under 18 years of age prohibited"); 23 R.I. GEN. LAWS §§ 23-94-3, 23-94-4 (2017) ("Conversion therapy efforts for minors prohibited."); VT. STAT. tit. 18, § 8351, tit. 26, § 4042 (2016) ("A mental health care provider shall not use conversion therapy with a client younger than 18 years of age."); WASH. REV. CODE § 18.130.180 (2018) ("[p]erforming conversion therapy on a patient under age eighteen" is unprofessional conduct).

42. UTAH ADMIN. CODE R156-60-502(2)(b)(i) (amended effective Jan. 21, 2020).

43. King v. Murphy, 139 S. Ct. 1567 (2019); Welch v. Brown, 834 F.3d 1041 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2093 (2017); King v. Governor of N.J., 767 F.3d 216 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 2048 (2015); Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, 573 U.S. 945 (2014).

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."[45] 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.[46] 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.[47] Defenders maintain that conduct does not have the same First Amendment protection as speech unless that conduct is "inherently expressive,"[48] 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.[49]

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."[50] 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."[51] Of course, the Supreme Court has held that "words can in some circumstances violate laws directed not against speech but against conduct."[52] 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."[53]

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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.

48. Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. (*"FAIR II"*), 547 U.S. 47, 66 (2006).

49. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376–77 (1968)

50. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).

51. *FAIR II*, 547 U.S. at 62. *See also* R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992).

52. *R.A.V.*, 505 U.S. at 389.

53. *Giboney*, 336 U.S. at 502.

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."[54] Furthermore, therapists are "not entitled to special First Amendment protection merely because the mechanism used to deliver mental health treatment is the spoken word."[55] 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*."[56] *Casey*'s holding is relevant to analyzing conversion therapy bans because California's statute regulates conduct[57] 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.[58] Regulations of conduct, of course, are subject to only intermediate scrutiny—that is, they must only be substantially related to an important government purpose.[59] 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.[60] The California law also required unlicensed centers to disclaim that they did not provide medical services.[61] 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.*
56. 505 U.S. 833, 884 (1992) (emphasis added).
57. *Pickup*, 740 F.3d at 1229.
58. *Id.*
59. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376–77 (1968).
60. Nat'l Inst. of Family & Life Advocates (NIFLA) v. Becerra, 138 S. Ct. 2361 (2018).
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

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62. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 213 (2013) (quoting *FAIR II*, 547 U.S. at 61). *Cf.* Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573–73 (1995) (holding that when the speech is expressive, courts must apply heightened scrutiny notwithstanding a law's content-neutrality).

63. *NIFLA*, 138 S. Ct. at 2371 (quoting Riley v. Nat'l Fed. of the Blind of North Carolina., Inc., 487 U.S. 781, 795 (1988)).

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).

67. Pickup v. Brown, 740 F.3d 1208, 1229 (9th Cir. 2014) (O'Scannlain, 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] The Ninth Circuit's conclusion follows *Giboney*, *Casey*, and *R.A.V.*—and it survives *NIFLA*. If prohibitions on conduct do not become prohibitions on speech subject to heightened scrutiny simply because the targeted conduct (conversion therapy) is carried out by speech (e.g., hypnosis, redirecting thoughts), which *NIFLA* did not undercut, and if the government can regulate conduct, then conversion therapy bans do not violate free speech rights.

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69. *Id.* at 2372. The landmark case of the first "circumstance" is *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985), in which the Court upheld regulation requiring a "purely factual and uncontroversial" disclosure requirement to correct an otherwise misleading advertisement. Most circuits had conceived of *Zauderer* as imposing a rational basis test. *See, e.g.*, Safelite Grp., Inc. v. Jepsen, 764 F.3d 258, 264 (2d Cir. 2014); Centro Tepeyac v. Montgomery Cnty., 722 F.3d 184, 189 (4th Cir. 2013); R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1212 (D.C. Cir. 2012), *overruled by* Am. Meat Inst. v. U.S. Dep't Agric., 760 F.3d 18 (D.C. Cir. 2014); Pub. Citizen, Inc. v. La. Att'y Disciplinary Bd., 632 F.3d 212, 227 (5th Cir. 2011); Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 316 (1st Cir. 2005).

70. Pickup v. Brown, 728 F.3d 1042, 1048–49 (9th Cir. 2013).

71. APA *Report*, *supra* note 6, at 22.

72. Complaint at 3–4, ¶ 9 and at 15, ¶ 52, Ferguson v. JONAH, 136 A.3d 447 (N.J. Super. Ct. 2014), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/case/Ferguson_v._JONAH_-_Complaint.pdf [hereinafter *Ferguson* Complaint].

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.

78. United States v. O'Brien, 391 U.S. 367, 376–77 (1968).

minors."[79] 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.[80] The court also discounted the harmfulness findings of the medical academy.[81] 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."[82] 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."[83] 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,"[84] 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.[85]

The First Amendment begins, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[86] Though "[t]he Establishment and Free Exercise Clauses . . . are not the most precisely drawn portions of the Constitution,"[87] 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,"[88] even if the law "has the incidental effect

79. Otto v. City of Boca Raton, 353 F. Supp. 3d 1237, 1242 (S.D. Fla. 2019) (emphasis added).
80. Otto v. City of Boca Raton, 981 F.3d 854, 859, 861–62 (11th Cir. 2020).
81. *Id.* at 869.
82. *Id.* at 880.
83. Grutter v. Bollinger, 539 U.S. 306, 333 (2003) (quoting Shaw v. Hunt, 517 U.S. 899, 908 (1996)).
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.
87. Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 668 (1970).
88. Brown v. City of Pittsburgh, 586 F.3d 263, 284 (3d Cir. 2009).

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 "offer[ing] certain prayers or quot[ing] 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 Hialeah*[93] 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,

89. Church of the Lukumi Babalu Aye, Inc., v. Hialeah, 508 U.S. 520, 531 (1993).
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

97. Blackhawk v. Pennsylvania, 381 F.3d 202, 209 (3d Cir. 2004).

98. N.J. STAT. ANN. § 45:1-55(b) (West 2013).

99. *See* Church of the Lukumi Babalu Aye, Inc., v. Hialeah, 508 U.S. 520, 535 (1993) ("[A] '"religious gerrymander" . . . [is] "an impermissible attempt to target petitioners and their religious practices.").

100. King v. Governor of N.J., 767 F.3d 216, 242–43 (3d Cir. 2014).

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,"[102] 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.[103]

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."[104] 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,[105] like the Boy Scouts' former exclusion of LGBT members[106] 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.[107] Nor is such a relationship protected by the Fourteenth Amendment's due process clause or a by any other sort of general liberty interest.[108] Rather, the patient–therapist relationship is contractual and pecuniary. "These relationships simply do not rise to the level of fundamental right,"[109] 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.[110] 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).
105. Roberts v. U.S. Jaycees, 486 U.S. 609, 617–19 (1984).
106. Boy Scouts of Am., Inc. v. Dale, 530 U.S. 640, 650 (2000).
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.[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.[112] The plaintiffs claim that the definition is insufficient.

For a statute to survive a vagueness challenge, the statute need not provide perfect clarity,[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[114] and likely obligated to remain aware of the legality of certain medical practices.

The Ninth Circuit's analysis was similar. The plaintiffs in *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.)[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."[116] Fringe or hypothetical cases of uncertainty about whether conduct is permissible will not suffice to prove vagueness.[117]

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111. *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.") *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.").

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

113. Hill v. Colorado, 530 U.S. 703, 733 (2000).

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).

115. *Pickup*, 740 F.3d at 1230.

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." *Pickup*, 740 F.3d at 1234. The California code in fact defines sexual orientation in other provisions.

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."[118] 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,[119] "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."[120] The state can intrude, for example, when a parent refuses medical care for, or otherwise abuses, a child.[121] Therefore, notwithstanding parents' fundamental rights to make decisions about the "care, custody, and control"[122] of their children, the state may promote health, safety, and welfare within reason.[123]

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."[124] 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.[125] The law does not "support the extension of" parents' decision-making authority "to demand[ing] that the State

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strollers) of the rule's "penumbra." The existence of hard cases does not make a statute unconstitutionally vague. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 608–15 (1958). *See also* Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1109–10 (2008).

118. Doe v. Christie, 33 F. Supp. 3d 518, 520 (D.N.J. 2014).

119. "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This . . . is now established beyond debate as an enduring American tradition." Wisconsin v. Yoder, 406 U.S. 205, 232 (1972). For a discussion of fundamental rights more generally, see, for example, *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). Neither the Third nor Ninth Circuits devote substantial time to analyzing parents' rights under *Yoder* or *Glucksberg*.

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.

121. Jehovah's Witnesses v. King Cnty. Hosp., 278 F. Supp. 488, 504 (W.D. Wash. 1967), *aff'd per curiam*, 390 U.S. 598.

122. Troxel v. Granville, 530 U.S. 57, 66 (2000).

123. *Id.* at 87–89.

124. Doe v. Christie, 33 F. Supp. 3d 518, 529 (D.N.J. 2014).

125. Pickup v. Brown, 740 F.3d 1208, 1235 (9th Cir. 2014).

make available a particular form of treatment."[126] 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."[127]

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 REDRESS 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.[128]

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),[129] 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. Dubrowski, *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.[130] 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."[131] JONAH forced clients to "remove their clothing and stand in a circle naked, with [a defendant] also nude."[132] 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.[133]

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.[134] The plaintiffs sued under New Jersey's consumer fraud law,[135] which prohibits "any unconscionable commercial practice, deception, fraud, false pretense, false promise, [or] misrepresentation . . . in connection with the sale or advertisement of any merchandise."[136] 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."[137] 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"[138]—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.[139]

New Jersey follows the rule for expert witnesses set forth in *Frye v. United States*,[140] and the judge in *Ferguson* excluded the testimony of defendants'

"Jewish Institute for Global Awareness." *Mission Statement*, JEWISH INST. FOR GLOB. AWARENESS, https://perma.cc/W5L7-ADFJ.

130. Ferguson v. JONAH, 136 A.3d 447, 454–55 (N.J. Super. Ct. 2014).

131. *SPLC Suit Forces New Jersey Group to Cease Bogus 'Conversion Therapy' Program, Pay Damages*, SPLC (Dec. 18, 2015), https://www.splcenter.org/news/2015/12/18/splc-suit-forces-new-jersey-group-cease-bogus-%E2%80%98conversion-therapy%E2%80%99-program-pay-damages.

132. *Ferguson*, 136 A.3d at 450.

133. *Id.*

134. *Ferguson* Complaint, *supra* note 72, at 3, ¶ 7.

135. N.J. STAT. ANN. § 56:8–2 (2015).

136. *Id.* at § 56:8–1(c) ("[M]erchandise" is "any . . . service[] or anything offered . . . to the public for sale.").

137. *Ferguson* Complaint, *supra* note 72, at 11–12, ¶¶ 38–39.

138. *Id.* at 20, ¶ 80 (citing a description in the complaint of what the company told a client).

139. Dubrowski, *supra* note 129, at 87 (citing Transcript of Trial at 155, Ferguson v. JONAH, No. L-5473-12 (N.J. Super. Ct. Law Div. June 8, 2015)).

140. 293 F. 1013 (D.C. Cir. 1923). *Frye* states that a court must consider whether the method by which an expert's scientific testimony was obtained is generally accepted by other experts in the particular field.

experts as pseudoscience.[141] After a three-week trial and just three hours of deliberation, the jury found that JONAH committed "unconscionable consumer fraud"[142] 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."[143] In a settlement that precluded appeal, JONAH was forced to pay $3.5 million in attorneys' fees and expenses and to permanently close.[144] Following *Ferguson*'s success, some LGBT groups have expressed interest in using consumer protection laws to fight conversion therapy in states without bans,[145] and a federal district judge in Mississippi noted that "citizens have successfully sued so-called 'gay conversion' therapists for consumer fraud and professional malpractice."[146]

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.[147] 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.[148] 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."[149] Dubrowski's survey shows fourteen other states with the four "critical metrics"—lack of intent and reliance requirements, and availability of equitable relief and attorneys' fees—that make New Jersey so

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.").

142. Dubrowski, *supra* note 129, at 79 (citing Erik Eckholm, *In a First, New Jersey Jury Says Group Selling Gay Cure Committed Fraud*, N.Y. TIMES (June 25, 2015), https://www.nytimes.com/2015/06/26/nyregion/new-jersey-jury-says-group-selling-gay-cure-committed-fraud.html)).

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)).

144. Order Granting Permanent Injunctive Relief and Awarding Attorneys' Fees at 4, Ferguson v. JONAH, No. L-5473-12 (N.J. Super. Ct. Law Div. 2015) (April 14, 2019), https://perma.cc/BC2N-5W8C.

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."

146. Barber v. Bryant, 193 F. Supp. 3d 677, 695 n.18 (S.D. Miss. 2016), *rev'd*, 860 F.3d 345 (5th Cir. 2017).

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 academy[153] 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.

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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.

154. Complaint for Action to Stop False, Deceptive Advertising and Other Business Practices, Human Rights Campaign v. People Can Change, Inc., SPLC (Feb. 2016) [hereinafter HRC Complaint], https://www.splcenter.org/sites/default/files/ftc_conversion_therapy_complaint_-_final.pdf; Lou Chibbaro, Jr., *FTC Mum on 'Historic' Conversion Therapy Case*, WASH. BLADE (Aug. 1, 2018), https://www.washingtonblade.com/2018/08/01/ftc-mum-on-historic-conversion-therapy-case-brothers-road/.

155. HRC Complaint, *supra* note 154, at 10–30.

156. *Id.* at 31.

157. *State Vaccination Requirements*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/vaccines/imz-managers/laws/state-reqs.html (last reviewed Nov. 15, 2016).

158. Doe v. Christie, 33 F. Supp. 3d 518, 529–30 (D.N.J. 2014), *aff'd* 783 F.3d 150 (3d Cir. 2015).

159. Lee Black, *Limiting Parents' Rights in Medical Decision Making*, 8.10 JAMA 676, 676 (2006).

More specifically, as parents' rights are limited legitimately when the exercise of those rights threatens the minor,[160] 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.[161] While no court in the United States has considered this doctrine in a conversion therapy case, courts in other nations have,[162] 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.[163] States routinely recognize mature minors' autonomy and capacity to make important life decisions.[164] 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.[165] 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."[166] Massachusetts's law is similar.[167] 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

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160. For a discussion of parents' responsibilities, see John Alan Cohan, *Parental Duties and the Right of Homosexual Minors to Refuse Reparative Therapy*, 11 BUFF. WOMEN'S L.J. 67 (2003).

161. Jonathan F. Will, *My God My Choice: The Mature Minor Doctrine and Adolescent Refusal of Life-Saving or Sustaining Medical Treatment Based Upon Religious Beliefs*, 22 J. CONTEMP. HEALTH L. & POL'Y 233, 236 (2006).

162. Debate about the bounds of minors' sexual autonomy is international. *See generally* Kirsten Scheiwe, *Between Autonomy and Dependency: Minors' Rights to Decide on Matters of Sexuality, Reproduction, Marriage, and Parenthood—Problems and the State of Debate*, 18 INT'L J. OF L., POL'Y & FAM. 262, 262–63 (2004).

163. Heather Boonstra & Elizabeth Nash, *Minors and the Right to Consent to Health Care*, 3 GUTTMACHER POL'Y REV. 4, 5–6 (2000).

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).

165. *See, e.g.*, CAL. FAM. CODE. §§ 6500, 6922, 6925, 7000, 7002, 7143 (West); CAL. HEALTH & SAFETY CODE § 124260 (West); Minors' Consent Laws for HIV and STD Services, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/hiv/policies/law/states/minors.html; Rodman H. Griffith, *Adolescent Autonomy and Minors' Legal Rights: Contraception and Abortion*, 4 J. APPLIED DEV. PSYCHOL. 307 (1982).

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."[168] 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'.[169] Considering these statutes, a state ignoring mature minors' objections to conversion therapy is arbitrary and illogical.[170]

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."[171] In fact, "[t]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."[172] 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."[173] 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.[174] Though that case concerned adults, mature minors and their advocates could argue that this

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168. THOMAS A. JACOBS, CHILDREN AND THE LAW: RIGHTS AND OBLIGATIONS § 10:21 (2020 ed.). *See generally* Parham v. J.R., 442 U.S. 584 (1979) (recognizing a minor's right to participate in the decision to refuse therapeutic treatment; a child has a substantial liberty interest in not being confined unnecessarily for medical treatment).

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

170. Much of the scholarship has centered on minors' invocation of "do not resuscitate" orders, but that sort of decision is even more consequential than refusing conversion therapy. *See, e.g.*, Melinda T. Derish & Kathleen Vanden Heuvel, *Mature Minors Should Have the Right to Refuse Life-Sustaining Medical Treatment*, 28 J.L. MED. & ETHICS 109 (2000); Jennifer L. Rosato, *The Ultimate Test of Autonomy: Should Minors Have a Right to Make Decisions Regarding Life-Sustaining Treatment?*, 49 RUTGERS L. REV. 1 (1996). *But see* Michael Hayes, Note, *The Mature Minor Doctrine: Can Minors Unilaterally Refuse Medical Treatment*, 66 U. KAN. L. REV. 685 (2018) (arguing that a minor's right to refuse medical treatment does not follow from either the adult's right to refuse medical treatment or the mature minor's right to consent to medical treatment).

171. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

172. *Id.* at 167.

173. Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914).

174. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 270 (1990).

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

175. 517 U.S. 620 (1996).
176. 539 U.S. 558 (2003).
177. 570 U.S. 744 (2013).
178. 576 U.S. 644 (2015).
179. Boy Scouts of Am., Inc. v. Dale, 530 U.S. 640, 661 (2000).
180. 138 S. Ct. 1719 (2018).
181. *See, e.g.*, Richard F. Duncan, *A Piece of Cake or Religious Expression:* Masterpiece Cakeshop *and the First Amendment*, NEB. L. REV. BULL. (Jan. 7, 2019), https://lawreview.unl.edu/piece-cake-or-religious-expression-masterpiece-cakeshop-and-first-amendment; Robert W. Tuttle & Ira C. Lupa, *Masterpiece Cakeshop—A Troublesome Application of Free Exercise Principles by a Court Determined to Avoid Hard Questions*, TAKE CARE (Jun. 7, 2018), https://takecareblog.com/blog/masterpiece-cakeshop-a-troublesome-application-of-free-exercise-principles-by-a-court-determined-to-avoid-hard-questions.

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

182. Nat'l Inst. of Family & Life Advocates (NIFLA) v. Becerra, 138 S. Ct. 2361, 2379 (2018).
183. *Id.*
184. *Id.*
185. King v. Murphy, 139 S. Ct. 1567 (2019).
186. Letter from 63 LGBT Groups to Senate Judiciary Committee (July 31, 2018), https://www.judiciary.senate.gov/imo/media/doc/2018.07.31%20Lambda%20Legal%20and%2063%20LGBT%20Groups%20-%20Kavanaugh%20Nomination.pdf.

Obergefell, the marriage equality decision written by his former boss and the Justice whom he was nominated to replace.[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.'"[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.[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."[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."[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.[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.[193] This is because "the good textualist is not a literalist."[194] Even though many textualists cite dictionary definitions no "mainstream judge is interested solely in the literal definitions of a statute's words."[195] This is "Statutory Interpretation 101."[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."[197] Therefore, "Bostock and Zarda

187. *Nomination of the Hon. Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on Judiciary Day 3, Part 3*, 115th Cong. (2018). Justice Kavanaugh clerked for Justice Kennedy from 1993 to 1994.

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.

189. *Id.* at 1823.

190. *Id.*

191. *Id.* at 1824–25.

192. *Id.*

193. *Id.* at 1826.

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

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

196. *Id.* at 1828.

197. *Id.*

were fired because they were gay, not because they were men."[198] According to Justice Kavanaugh, Title VII provideds 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.*