IF IT AIN'T BROKE, DON'T FIX IT: OUTLAWING CONVERSION THERAPY

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INTRODUCTION

On December 28, 2014, 17-year-old Leelah Alcorn, who had been assigned male at birth and given the name Joshua, walked into oncoming traffic on Interstate 71 in Ohio.[2] She was struck and killed by a tractor-trailer.[3] Leelah knew by the age of 14 that she was transgender, a girl trapped in the body of a boy, but her parents insisted it was only a phase.[4] They sent her to therapists who persisted in their assertions that she could only be male, and her parents insisted that God had not made a mistake in her.[5] When the therapy failed to produce results and Leelah confessed to her parents that she was attracted to boys, they removed her from school and took away her social media privileges.[6] Less than six months later, Leelah would die by suicide.

Approximately three hours after Leelah walked in front of a tractor-trailer, the suicide note she had queued to her Tumblr.com account was published automatically.[7] In her note, Leelah listed the reasons for her death, including isolation, loneliness, and conversion therapy.[8] She said:

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[2] Sharon Coolidge, *Transgender teen: "My death needs to mean something"*, THE CINCINNATI ENQUIRER (Dec. 30, 2014), https://www.usatoday.com/story/news/nation-now/2014/12/30/transgender-teen-death-means-something/21059923/ (last visited Sept. 15, 2018).

[3] *Id.*

[4] "Leelah" Josh Alcorn, *Leelah Alcorn's suicide note [full text]*, CATHOLIC TRANS (Jan. 3, 2015), https://catholictrans.wordpress.com/2015/01/03/leelah-alcorns-suicide-note-full-text/ (last visited Sept. 15, 2018).

[5] *Id.*

[6] *Id.*

[7] Coolidge, *supra* note 2.

[8] Alcorn, *supra* note 4.

> My mom started taking me to a therapist, but would only take me to christian [sic] therapists, (who were all very biased) so I never actually got the therapy I needed to cure me of my depression. I only got more christians [sic] telling me that I was selfish and wrong and that I should look to God for help.[9]

She ended the note by requesting that all of her possessions be donated to transgender civil rights organizations and with an appeal to society as a whole: "Gender needs to be taught about in schools, the earlier the better. My death needs to mean something. My death needs to be counted in the number of transgender people who commit suicide this year . . . . Fix society. Please."[10] According to the Trevor Project—an organization that provides crisis intervention and suicide prevention resources for LGBT+ youth[11]—lesbian, gay, and bisexual teenagers are almost five times more likely to attempt suicide than their heterosexual peers,[12] while approximately 40% of transgender adults attempted suicide at one point.[13] Furthermore, of those transgender adults who had attempted suicide, 92% indicated that their attempts occurred prior to reaching age 25.[14] Within the numbers of lesbian, gay, and bisexual teenagers, those "who come from highly rejecting families are 8.4 times as likely to have attempted suicide as LGB peers who reported no or low levels of family rejection."[15]

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[9] *Id.*

[10] *Id.*

[11] *About*, THE TREVOR PROJECT, https://www.thetrevorproject.org/about/ (last visited Dec. 1, 2020).

[12] *Facts about suicide*, THE TREVOR PROJECT, https://www.thetrevorproject.org/resources/preventing-suicide/facts-about-suicide/ (last visited Sept. 15, 2018) (citing CDC, Sexual Identity, Sex of Sexual Contacts, and Health-Risk Behaviors Among Students in Grades 9-12: Youth Risk Behavior Surveillance. Atlanta, GA: U.S. Department of Health and Human Services (2016)).

[13] *Facts about suicide*, THE TREVOR PROJECT, https://www.thetrevorproject.org/resources/preventing-suicide/facts-about-suicide/ (last visited Sept. 15, 2018) (citing James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M., The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality (2016)).

[14] *Id.*

[15] *Facts about suicide*, THE TREVOR PROJECT, https://www.thetrevorproject.org/resources/preventing-suicide/facts-about-suicide/ (last visited Sept. 15, 2018) (citing Family Acceptance Project™. Family rejection as a predictor of

Conversion therapy, in particular, is harmful as it increases an LGBT+ youth's feelings of rejection from family and makes them at least eight times more likely to attempt suicide.[16] The American Psychiatric Association agrees, stating in its Position Statement on Psychiatric Treatment and Sexual Orientation, "The potential risks of reparative therapy are great, including depression, anxiety, and self-destructive behavior, since therapist alignment with societal prejudices against homosexuality may reinforce self-hatred already experienced by the patient."[17] The s tatement concludes by stating that the "... American Psychiatric Association opposes any psychiatric treatment, such as reparative or conversion therapy which is based upon the assumption that homosexuality per se is a mental disorder or based upon the a priori assumption that the patient should change his/her homosexual orientation."[18]

Because the practice of conversion therapy results in severe psychological harm to those who endure it, combined with the lack of evidence that it produces the desired results, Congress has the responsibility to use its power to outlaw the action for minors. This comment will first explore the history of conversion therapy and the laws of the states that have already banned its practice. Then it will discuss current legislation such as the Therapeutic Fraud Prevention Act—which is pending before Congress—that would outlaw conversion therapy at the federal level. Finally, the comment will explore opposing viewpoints, with particular focus on those that argue

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negative health outcomes in white and Latino lesbian, gay, and bisexual young adults. Pediatrics. 123(1), 346-52. (2009)).

[16] *About conversion therapy*, THE TREVOR PROJECT, https://www.thetrevorproject.org/get-involved/trevor-advocacy/50-bills-50-states/about-conversion-therapy (last visited Sept. 15, 2018) [hereinafter *About Conversion Therapy*].

[17] The American Psychiatric Association, *Appendix I, in* THERAPIES FOCUSED ON ATTEMPTS TO CHANGE SEXUAL ORIENTATION (REPARATIVE OR CONVERSION THERAPIES) COPP POSITION STATEMENT 5 (2000) (APA Doc. Ref. No. 200001).

[18] *Id.*

conversion therapy is protected under the Free Exercise Clause of the First Amendment, and explain why those arguments do not outweigh the policy reasons for banning the practice.

BACKGROUND

Organizational attempts to "cure" a person's sexual orientation and gender identity have existed since at least the late 19th Century, when psychologists began exploring ways to treat what they saw as a mental affliction.[19] However, as medical professionals began to understand that homosexuality was not a mental illness and systematically removed it from the lexicon of illnesses, the medically sanctioned practice of conversion therapy became less and less accepted.[20] In 2009, the American Psychiatric Association issued a report, finding that "sexual orientation change efforts can pose critical health risks to lesbian, gay, and bisexual people" and advising "parents, guardians, young people, and their families to avoid sexual orientation change efforts that portray homosexuality as a mental illness or developmental disorder."[21] By the mid-2000s, state legislatures were working to outlaw the practice at the state level, and in 2012, California was the first to successfully do so.[22]

California's Senate Bill 1172, drafted by then-State Senator Ted Lieu, provided that the "bill would prohibit a mental health provider . . . from engaging in sexual orientation change efforts . . . with a patient under 18 years of age" and that violation of the bill would result in disciplinary

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[19] David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. Cal. L. Rev. 1297, 1300 (1999). HeinOnline.
[20] *Id.*
[21] *2011-2012 Regular Session-SB 1172, Sexual Orientation Change Efforts*, CAL. GEN. ASSEMB., https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB1172 [hereinafter Cal. S.B. 1172].
[22] Marie-Amelie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 ALA. L. REV. 793, 795 (2017). HeinOnline.

action.[23] The Bill was enacted on September 30, 2012,[24] but "[w]ithin days of its passage, several groups sought a preliminary injunction to prevent the scheduled implementation of S.B. 1172 on January 1, 2013."[25]

The first of these lawsuits was brought by two licensed therapists who practiced sexual orientation change efforts ("SOCE") and one adult who planned to become a therapist and utilize SOCE.[26] The Plaintiffs first argued that implementation of S.B. 1172 would violate their right to free speech under the First Amendment, as their practice of SOCE was predicated on discussion with their patients.[27] The court initially granted their request for an injunction, but the Ninth Circuit reversed the decision, holding that S.B. 1172 regulates "therapeutic treatment, not expressive speech."[28] The District Court for the Eastern District of California then reviewed the case for the Plaintiffs' claims that the bill violated the Free Exercise and Establishment Clauses[29] of the First Amendment.[30] After extensive analysis regarding the intent of S.B. 1172, the court concluded that "Plaintiffs have not shown they are likely to succeed on the merits of their § 1983 claims based on violations of the Free Exercise and Establishment Clauses or any privacy rights. Absent such a showing, plaintiffs are not entitled to a preliminary injunction."[31]

The first analysis the court undertakes is that of the Free Exercise Clause, which "provides that 'Congress shall make no law . . . prohibiting the free exercise [of religion].'"[32] It is well

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[23] Cal. S.B. 1172, *supra* note 21.
[24] *Id.*
[25] David Friedman, *The Right to Stay Gay: SB 1172 and SOCE*, 25 STAN L. & POL'Y REV. 193, 196 (2014). HeinOnline.
[26] Welch v. Brown, 58 F. Supp. 3d 1079, 1082-83 (E.D. Cal. 2014).
[27] *Id.* at 1081.
[28] *Id.*
[29] U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").
[30] *Id.*
[31] *Welch*, 58 F. Supp. 3d at 1092.
[32] *Id.* at 1084-85.

established that "[u]nder the Free Exercise Clause of the First Amendment, the government may not, among other things, 'impose special disabilities on the basis of religious views or religious status.'"[33] However, it was also established in the case of *Emp't Div., Dep't of Human Res. of Or. v. Smith* that "[t]he right to freely exercise one's religion, however, 'does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."'"[34] Therefore, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[35] After explaining these rules, the court in *Welch v. Brown* explains and analyzes the terms "neutrality" and "general applicability" as they apply to S.B. 1172.[36]

With regard to neutrality, "'if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral.' In determining whether a law is neutral, the court must examine the text of the statute and its operation."[37] After examining two quotes in the legislative history of the bill, the court concluded that "[n]othing in the legislative history gives rise to the inference that, in enacting the bill, the Legislature sought to suppress, target, or single out the practice of any religion."[38] Next, the court examines the effect of the law on the plaintiff who is both a licensed counselor and provides SOCE as a pastor with his church.[39] It notes that "[t]he Free Exercise Clause is not violated even though a group motivated by religious

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[33] Alpha Delta Chi-Delta Chapter v. Reed, 648 F.3d 790, 804 (9th Cir. 2011) (quoting Emp't Div. v. Smith, 494 U.S. 872, 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)).
[34] Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 877, 110 S. Ct. 1595, 108 L. Ed. 2d 879 (1990)).
[35] Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993) (citing Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990)).
[36] *Welch*, 58 F. Supp. 3d at 1085-88.
[37] *Id.* at 1085.
[38] *Id.* at 1086.
[39] *Id.* at 1087.

reasons may be more likely to engage in the proscribed conduct" and concludes that "the evidence before the court indicates that S.B. 1172 'punishe[s] conduct for the harm it causes, not because the conduct is religiously motivated.'"[40]

The rule for general applicability is: "A law is not generally applicable when the government, 'in a selective manner[,] impose[s] burdens only on conduct motivated by religious belief.'"[41] The court quickly and unequivocally dismisses the idea that S.B. 1172 burdens religiously-motivated conduct, as the language of the bill specifically provides that SOCE executed by a mental health provider is prohibited and, in fact, does not include religious leaders in its definition of "mental health provider".[42] Therefore, "[b]ecause it is likely that S.B. 1172 is a neutral law of general applicability", it is not prohibited under the Free Exercise Clause.[43]

The court next analyzes the Establishment Clause, which provides, "Congress shall make no law respecting an establishment of religion."[44] The Establishment clause "applies not only to official condonement of a particular religion or religious belief, but also to official disapproval or hostility towards religion."[45] Furthermore, the rule for examining whether a law violates the Establishment Clause is that "(1) it has a secular legislative purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not foster excessive government entanglement with religion."[46] The court examines only the third prong of this test, as this is the portion on which the plaintiffs depend, insisting that S.B. 1172 "results in excessive government entanglement with

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[40] *Id.* (citing Stormans, Inc. v. Selecky, 586 F.3d 1109, 1131 (9th Cir. 2009)).
[41] *Welch*, 58 F. Supp. 3d at 1088 (citing Stormans, Inc. v. Selecky, 586 F.3d 1109, 1134 (9th Cir. 2009)).
[42] *Welch*, 58 F. Supp. 3d at 1088.
[43] *Id.*
[44] U.S. Const. amend. I.
[45] Am. Family Ass'n, Inc. v. City & County of San Francisco, 277 F.3d 1114, 1120-21 (9th Cir. 2002).
[46] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

religion."[47] In distinguishing S.B. 1172 from the cases on which the plaintiffs rely, the court states that " S.B. 1172 neither contemplates nor requires an examination of religious views or doctrine . . . . The inquiry into whether a mental health provider performed SOCE will be the same regardless of whether the provider utilized the treatment while working for a church. S.B. 1172 will thus not require the state to engage in 'intrusive judgments regarding contested questions of religious belief or practice.'"[48] Therefore, the court reasons, S.B. 1172 does not violate the Establishment Clause of the Fourth Amendment.[49]

As a result, the court concludes that because the religious therapists are not likely to succeed on their Constitutional claims, their request for a preliminary injunction must be denied.[50] The second case was brought by a number of different plaintiffs, including "two sets of parents who would like their children to undergo SOCE, two minors who would like to undergo SOCE, several SOCE therapists, and two organizations, the National Association for Research and Therapy of Homosexuality and the American Association of Christian Counselors."[51] The plaintiffs in the second case made much the same arguments as the first case, suggesting that the bill "violates the First and Fourteenth Amendments by infringing on SOCE practitioners' right to free speech, minors' right to receive information, and parents' right to direct the upbringing of their children. They also argued that S.B. 1172 is unconstitutionally vague."[52] Unlike the first case, however, this request for an injunction was initially denied.[53] The Ninth Circuit ultimately agreed with the trial court, holding that the bill would not violate the constitutional rights of the

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[47] *Welch*, 58 F. Supp. 3d at 1089.
[48] *Id.* at 1089-90.
[49] *Id.* at 1090.
[50] *Id.* at 1092.
[51] Friedman, *supra* note 25.
[52] Pickup v. Brown, 740 F.3d 1208, 1225 (9th Cir. 2014).
[53] *Id.*

parents, the children, or the counselors, and that the bill was sufficiently detailed such that it could not be void for vagueness, and the decision of the trial court was affirmed.[54]

New Jersey's law banning conversion therapy was approved on August 19, 2013, very shortly after California set the stage with their S.B. 1172.[55] Its language is substantially similar to that used in California and bans the practice of attempting to change the sexual orientation of a minor, violations of which result in disciplinary action.[56] Again similar to the law in California, the new law received criticism, and lawsuits were filed seeking injunctive relief on constitutional grounds.[57]

In the first and most comprehensive of these cases, *King v. Christie*, plaintiffs representing several counselors, parents, and children, filed suit against the State of New Jersey, challenging the constitutionality of the new law.[58] The plaintiffs specifically claimed that instituting a ban on conversion therapy would violate their First Amendment rights, specifically the right to free speech and the right to the free exercise of religion.[59] Relying in part on the analysis from the California cases, the court held that New Jersey's law did not violate the plaintiffs' right to free speech.[60] Nor, the court concluded, does the law infringe upon the plaintiffs' right to practice their religion.[61] On these bases, the State's motion for summary judgment was granted.[62] The plaintiffs appealed this judgment, but the Third Circuit Court affirmed the lower court's decision, holding that "[w]e agree with the District Court that A3371 does not violate Plaintiffs' right to free exercise of

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[54] *Id.* at 1236.
[55] N.J. REV. STAT. §§ 45:1-54 and 45:1-55 (2018).
[56] *Id.*
[57] Brielle N. Kovalchek, *Do Actions Speak Louder than Words?: An Analysis of Conversion Therapy as Protected Speech Versus Unprotected Conduct*, 16 RUTGERS J. L. & RELIGION 428, 429 (2015). HeinOnline.
[58] King v. Christie, 981 F. Supp. 2d 296, 302 (D.N.J. 2013).
[59] *Id.* at 305.
[60] *Id.* at 326.
[61] *Id.* at 333.
[62] *Id.*

religion, as it is a neutral and generally applicable law that is rationally related to a legitimate government interest."[63]

Since California and New Jersey's groundbreaking bills passed their respective legislatures and survived challenges, several more states have followed suit, including Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, New Hampshire, New Mexico, Oregon, Rhode Island, Vermont, and Washington.[64] One of the most recent of these is Delaware's Senate Bill 65, which was passed and signed by the Governor on July 23, 2018.[65] Even though Delaware has not yet received challenges to its bill, if similar organizations to those in California and New Jersey bring lawsuits against its constitutionality, injunctive relief would likely not be granted by the court, especially considering the Third Circuit, in which Delaware resides, has already ruled on the constitutionality of conversion therapy bans in *King v. Governor of N.J.*[66] Furthermore, none of the instituted bans on conversion therapy have yet been overturned by courts, and each attempt to bring the issue before the Supreme Court has been denied by the justices.[67]

Separate from the legislature, some who have been victimized by the practice of conversion therapy have brought cases against the organizations that claimed they could be cured. The most famous and influential of these cases is *Ferguson v. JONAH.*[68] In this case, six individuals sued the organization known as Jews Offering New Alternatives for Healing ("JONAH"), which had promised sexual orientation "correction" and provided the attendant therapy to each of the

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[63] King v. Governor of N.J., 767 F.3d 216, 246 (3d. Cir. 2014).

[64] *Conversion "Therapy" Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/conversion_therapy (last visited Sept. 15, 2018) [hereinafter *Conversion "Therapy" Laws*].

[65] S.B. 56, 149th Gen. Assemb., 1st Reg. Sess. (Del. 2018), *available at* https://legiscan.com/DE/text/SB65/2017 (last visited Sept. 15, 2018).

[66] *King*, 767 F.3d at 216.

[67] Andrew Chung, *U.S. top court rejects 'gay conversion' therapy ban challenge*, REUTERS (May 1, 2017, 10:02 AM), https://www.reuters.com/article/us-usa-court-gayconversion-idUSKBN17X1SJ (last visited Sept. 16, 2018).

[68] 136 A.3d 447 (N.J. Super. Ct. 2014).

individuals for years.[69] This "therapy" consisted of such humiliating acts as standing nude, beating effigies of their mothers, and reenacting past trauma.[70] The plaintiffs paid up to $100 per session at JONAH, and not only did the therapy not produce the desired results, but the plaintiffs each sought reparative therapy as a result of their experiences.[71] As such, the plaintiffs brought suit against JONAH for violations of New Jersey's Consumer Fraud Act, claiming that the reparative therapy satisfies the requirement that the plaintiffs suffered an "ascertainable loss." [72]

The jury returned a unanimous verdict for the plaintiffs, concluding that the SOCE offered by JONAH could not be considered therapy.[73] Furthermore, in a pre-trial ruling, the Court ruled that homosexuality is not, as a matter of law, a "mental disease, disorder, or equivalent thereof", a groundbreaking statement for a court to make.[74] After this ruling, "it is extraordinarily difficult . . . to sell conversion therapy without simultaneously committing consumer fraud."[75] In fact, all fifty states have passed a consumer protection law under which a civil action for conversion therapy could be brought by plaintiffs who have been defrauded by the practice.[76] Therefore, "litigation continues to be the best route towards national cessation of conversion therapy."[77] However, a combined method would produce the result that "[s]tate bans on the provision of conversion therapy to minors will continue to be passed. Selling the service to adults will be considered fraud, punished by million-dollar penalties and injunctive relief."[78]

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[69] *Id.*
[70] *Id.* at 450.
[71] *Id.* at 451.
[72] *Id.*
[73] Peter R. Dubrowski, *The Ferguson v. JONAH Verdict and a Path towards National Cessation of Gay-to-Straight "Conversion Therapy"*, 110 NW. U. L. REV. ONLINE 77, 79 (2015-2016).
[74] *Id.*
[75] *Id.* at 80.
[76] *Id.* at 90.
[77] *Id.* at 98.
[78] *Id.* at 99.

I. ENACTED CONVERSION THERAPY BANS

Currently, eighteen states, as well as the territories of Washington, D.C. and Puerto Rico, have outlawed the practice of conversion therapy for minors.[79] This section will include a chart that compares the laws passed in these states and territories, significant provisions in the laws, and cases both decided and pending that challenge those laws. This section will also treat in greater depth the legislation of two specific states for an understanding of the ways in which legislation and litigation regarding conversion therapy will be shaped in the coming years.

[79] *Conversion "Therapy" Laws*, *supra* note 64.

A. CONVERSION THERAPY BANS BY STATE

State/Territory	Date Ban Became Effective	Significant Provisions	Challenging Cases
New Jersey[80]	August 19, 2013	"A person who is licensed to provide professional counseling…shall not engage in sexual orientation change efforts with a person under 18 years of age." Does not include: gender transition counseling, counseling that provides support and understanding, or counseling that does not seek to change sexual orientation.	*King v. Christie*[81] (summary judgment for defendants affirmed, cert. denied) - Plaintiffs again filed a petition for certiorari with the Supreme Court of the United States on February 11, 2019.
California[82]	August 29, 2013	"Under no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age." "Any sexual orientation change efforts attempted on a patient under 18 years of age by a mental health provider shall be considered unprofessional conduct and shall subject a mental health	*Welch v. Brown*[83] (constitutional claims fail on the merits, preliminary injunction denied) *Pickup v. Brown*[84] (denial of injunction affirmed, cert. denied)

[80] AB 3371, 212th Gen. Assemb., 2012 Reg. Sess. (N.J. 2012), *available at* https://www.njleg.state.nj.us/2012/Bills/PL13/150_.PDF (last visited Apr. 14, 2019).
[81] 981 F. Supp. 2d 296, 302 (2013)
[82] SB-1172, 2011-2012 Reg. Sess. (Cal. 2012), *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201120120SB1172 (last visited Apr. 14, 2019).
[83] 58 F. Supp. 3d 1079, 1085-88 (E.D. Cal. 2014).
[84] 740 F.3d 1208, 1225 (9th Cir. 2014).

		provider to discipline by the licensing entity for that mental health provider."	
Washington, D.C.[85]	March 11, 2015	"(a) A provider shall not engage in sexual orientation change efforts with a consumer who is a minor. (b) A violation of subsection (a) of this section shall be considered a failure to conform to acceptable conduct within the mental health profession…and shall subject a provider to discipline and penalties." - On January 16, 2019, D.C. Mayor Muriel Bowsher signed an amendment to the bill "striking the phrase 'minor' and inserting the phrase 'minor or a consumer, regardless of age, for whom a conservator or guardian has been appointed'".[86]	
Oregon[87]	May 18, 2015	Where a psychologist has practiced conversion therapy with a client who is under 18 years of age, the State Board may: "(a) Deny a license…; (b) Refuse to renew the license…; (c) Suspend the license...for a period of not less than one year; (d) Issue a letter of reprimand; (e) Impose probation with authority to restrict the scope of	

[85] B20-0501, D.C. Council, 2014 Reg. Sess. (D.C. 2014), *available at* http://lims.dccouncil.us/Download/29657/B20-0501-SignedAct.pdf (last visited Apr. 14, 2019).

[86] D.C. Law 22-247, *available at* https://code.dccouncil.us/dc/council/laws/22-247.html (last visited Dec. 3, 2020).

[87] H.B. 2307, 78th Legis. Assemb., 2015 Reg. Sess. (Or. 2015), *available at* https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/HB2307/Enrolled (last visited Apr. 14, 2019).

		practice…; (f) Revoke the license…; or (g) Impose a civil penalty."	
Illinois[88]	January 1, 2016	"No person or entity may, in the conduct of any trade or commerce, use or employ any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission…that represents homosexuality as a mental disease, disorder, or illness, with intent that others rely upon the concealment, suppression, or omission of such material fact." "Mental health providers found to have engaged in sexual orientation change effort on a patient under the age of 18 may be subject to discipline by the licensing entity or disciplinary review board with competent jurisdiction."	*Pastors Protecting Youth v. Madigan*[89] (defendants' motion to dismiss granted and case deemed nonjusticiable)
Vermont[90]	July 1, 2016	"Any conversion therapy used on a client younger than 18 years of age by a mental health care provider shall constitute unprofessional conduct as provided in the relevant provisions of Title 26 and shall subject the mental health care provider to discipline	

[88] H.B. 217, 99th Gen. Assemb., 2015 Reg. Sess. (Ill. 2015), *available at* http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=88&GA=99&DocTypeId=HB&DocNum=217&GAID=13&LegID=&SpecSess=&Session= (last visited Apr. 14, 2019).

[89] 237 F. Supp. 3d 746 (N.D. Ill. 2017).

[90] S. 132, 2015-2016 Reg. Sess. (Vt. 2015), *available at* https://legislature.vermont.gov/Documents/2016/Docs/ACTS/ACT138/ACT138%20As%20Enacted.pdf (last visited Apr. 14, 2019).

		pursuant to the applicable provisions of that title."	
New Mexico[91]	April 7, 2017	"A person licensed pursuant to provisions of Chapter 61 NMSA 1978 shall not provide conversion therapy to any person under eighteen years of age. The provision of conversion therapy in violation of the provisions of this subsection shall be grounds for disciplinary action by a board in accordance with the provisions of the Uniform Licensing Act."	
Connecticut[92]	May 10, 2017	"No health care provider shall engage in conversion therapy." - No provision stating that this prohibition applies only to therapy with minors.[93] "Any conversion therapy practiced by a health care provider shall be considered unprofessional conduct and shall be grounds for disciplinary action…, including, but not limited to, suspension or revocation of the professional's license, certification or registration to practice his or her profession."	

[91] S.B. 121, 52nd Legis., 2017 Reg. Sess. (N.M. 2017), *available at* https://nmlegis.gov/Sessions/17%20Regular/final/SB0121.pdf (last visited Apr. 14, 2019).

[92] H.B. 6695, 2017 Reg. Sess. (Ct. 2017), *available at* https://www.cga.ct.gov/2017/ACT/pa/2017PA-00005-R00HB-06695-PA.htm (last visited Apr. 14, 2019).

[93] *Id*.

Rhode Island[94]	July 19, 2017	"Any conversion therapy practiced by a licensed professional . . . on a patient under the age of eighteen (18) shall be considered unprofessional conduct and shall subject them to discipline by the department, which discipline may include suspension and revocation of the professional's license."	
Nevada[95]	January 1, 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 or legal guardian to authorize such therapy*."[96] "Any violation of subsection 1 is a ground for disciplinary action by a state board that licenses a psychotherapist as defined in subsection 3."	
Washington[97]	June 7, 2018	"This act may not be construed to apply to: . . . Religious practices or counseling . . . that do not constitute performing conversion therapy by licensed health care providers on patients under age eighteen."	

[94] H.B. 5277, 145th Gen. Assemb., 2017 Reg. Sess. (R.I. 2017), *available at* http://webserver.rilin.state.ri.us/BillText/BillText17/HouseText17/H5277A.pdf (last visited Apr. 14, 2019).

[95] S.B. 201, 79th Gen. Assemb., 2017 Reg. Sess. (Nev. 2017), *available at* https://www.leg.state.nv.us/Session/79th2017/Bills/SB/SB201_EN.pdf (last visited Apr. 14, 2019).

[96] *Id*. (emphasis added).

[97] S.B. 5722, 65th Legis., 2018 Reg. Sess. (Wash. 2018), *available at* http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/Senate/5722.SL.pdf (last visited Apr. 14, 2019).

Hawaii[98]	July 1, 2018	"No person who is licensed to provide professional counseling shall: (1) Engage in or attempt to engage in sexual orientation change efforts on a person under eighteen years of age; or (2) Advertise the offering of sexual orientation change efforts on a person under eighteen years of age." "Any person who is licensed to provide professional counseling who engages in or attempts to engage in the offering of sexual orientation change efforts on a person under eighteen years of age shall be subject to disciplinary action by the appropriate professional licensing authority."	
Delaware[99]	July 23, 2018	"The Board may impose any of the following sanctions…singly or in combination when it finds a licensee or former licensee is guilty of any offense described herein, except that the license of any licensee who is convicted of a felony sexual offense shall be permanently revoked: . . . Has engaged in conversion therapy with a child; or Has referred a child to a provider in another jurisdiction to receive conversion therapy."	

[98] S.B. 270, 29th Legis., 2017 Reg. Sess. (Haw. 2017), *available at* https://www.capitol.hawaii.gov/session2018/bills/SB270_SD1_.HTM (last visited Apr. 14, 2019).

[99] S.B. 56, 149th Gen. Assemb., 1st Reg. Sess. (Del. 2018), *available at* https://legiscan.com/DE/text/SB65/2017 (last visited Sept. 15, 2018).

Maryland[100]	October 1, 2018	"A mental health or child care practitioner who engaged in conversion therapy with an individual who is a minor shall be considered to have engaged in unprofessional conduct and shall be subject to discipline by the mental health or child care practitioner's licensing or certifying board."	*Doyle v. Hogan*[101] (currently pending)
New Hampshire[102]	January 1, 2019	"Any licensed professional…who proposes to engage or engages in conversion therapy on a patient under 18 years of age shall be considered to have engaged in unprofessional conduct and shall be subject to such discipline as the relevant licensing authority deems appropriate."	
New York[103]	January 25, 2019	"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, and any mental health professional found guilty of such misconduct . . . shall be subject to the penalties prescribed in section sixty-five hundred eleven of this subarticle."	

[100] S.B. 1028, 438th Gen. Assemb., 2018 Reg. Sess. (Md. 2018), *available at* http://mgaleg.maryland.gov/2018RS/bills/sb/sb1028t.pdf (last visited Mar. 30, 2019).
[101] No. 1:19-cv-00190-DKC (D. Md. Jan. 18, 2019).
[102] H.B. 587, 2018 Reg. Sess. (N.H. 2018), *available at* http://www.gencourt.state.nh.us/bill_Status/billText.aspx?sy=2018&id=160&txtFormat=html (Apr. 14, 2019).
[103] A576, 2019-2020 Reg. Sess. (N.Y. 2019), *available at* https://legislation.nysenate.gov/pdf/bills/2019/A576 (last visited Apr. 14, 2019).

Puerto Rico[104]	March 27, 2019	"The Board of Examiners of Psychologists and the Board of Examiners of Professional Counselors, as regulators of the exercise of psychology and professional counseling in Puerto Rico, are urged to prohibit the offer of services of conversion or reparative therapies to change sexual orientation or gender identity in minors." The Executive Order also issues directives to the Secretary of Health, ASSMCA Administrator, and the Secretary of Economic Development and Trade, giving them 90 days to establish regulatory requirements in compliance with the Order.	
Massachusetts[105]	April 8, 2019	"A health care provider shall not advertise for or engage in sexual orientation and gender identity change efforts with a patient less than 18 years of age." "Any health care provider who violates this section shall be such subject to discipline by the appropriate licensing board, which may include suspension or revocation of license."	

[104] Exec. Order No. 16-2019 (P.R. 2019), *available at https://basecero.ogp.pr.gov/apex/apex_util.get_blob?s=33244722954036&a=161&c=112063554695324788&p=15&k1=4131&k2=&ck=iJ1ikMIcXNp0-T9-NSy-ReSqp6GS89Z3RqOvJimuxC3JZ_1HG-pfPLvMgx4Qa8JNGXNK95XA300MSZozKtOBxw&rt=IR* (Apr. 14, 2019).

[105] H.B.140, 191st Gen. Assemb., 2019 Reg. Sess. (Mass. 2019), *available at* https://malegislature.gov/Bills/191/H140 (last visited Apr. 14, 2019).

Utah	January 21, 2020	"'Conversion therapy' means any practice or treatment that seeks to change the sexual orientation or gender identity of a patient or client, including mental health therapy that seeks to change, eliminate, or reduce behaviors, expressions, attractions, or feelings related to a patient or client's sexual orientation or gender identity." "'Unprofessional conduct' includes:…(2)(a) providing conversion therapy to a patient or client who is younger than 18 years old; and…does not apply to: (i) 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; or (ii) a parent or grandparent who is a mental health therapist and who is acting substantially in the capacity of a parent or grandparent and not in the capacity of a mental health therapist."[106]	

[106] UTAH ADMIN. CODE R. 156-60 (Jan. 21, 2020), *available at* https://rules.utah.gov/publicat/bull_pdf/2019/b20191215.pdf (last visited Jan. 23, 2020).

B. MARYLAND – S.B. 1028

On February 5, 2018, Maryland State Senators Richard Madaleno (D-Dist. 18), William Ferguson (D-Dist. 46), Guy Guzzone (D-Dist. 13), Cheryl Kagan (D-Dist. 17), Susan Lee (D-Dist. 16), Roger Manno (D-Dist. 19), Paul Pinsky (D-Dist. 22), William Smith (D-Dist. 20), Craig Zucker (D-Dist. 14), and Ronald Young (D-Dist. 3) introduced Senate Bill 1028 "[for] the purpose of prohibiting certain mental health or child care practitioners from engaging in conversion therapy with individuals who are minors."[107] The preamble to S.B. 1028 states first and foremost that "[c]ontemporary science recognizes that being lesbian, gay, bisexual, or transgender (LGBT) is part of the natural spectrum of human identity and is not a disease, a disorder, or an illness."[108] It then lists the findings of several studies by prominent medical, psychiatric, and governmental organizations showing that conversion therapy not only does not reach its purported goal of changing a person's sexual orientation or gender identity, but that it is actively harmful to its recipients.[109]

The bill defines "conversion therapy" as "a practice or treatment by a mental health or child care practitioner that seeks to change an individual's sexual orientation or gender identity" and states that "a mental health or child care practitioner may not engage in conversion therapy with an individual who is a minor."[110] Furthermore, engaging in conversion therapy with a minor is considered unprofessional conduct and will result in discipline by the board certifying the

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[107] S.B. 1028, 438th Gen. Assemb., 2018 Reg. Sess. (Md. 2018), *available at* http://mgaleg.maryland.gov/2018RS/bills/sb/sb1028t.pdf (last visited Mar. 30, 2019).
[108] *Id.*
[109] *Id.* ("The American Psychological Association convened a Task Force . . . that . . . concluded in its 2009 report that sexual orientation change efforts can pose critical health risks to lesbian, gay, and bisexual people."; "The American Psychiatric Association stated in 2000 that 'psychotherapeutic modalities to convert or "repair" homosexuality are based on developmental theories whose scientific validity is questionable.'").
[110] *Id.*

counselor.[111] Finally, the bill includes a provision stating that no state funds may be used to encourage or endorse conversion therapy.[112] After one amendment to add a sponsor to the bill, the Maryland State Senate passed S.B. 1028 in a vote of 34 to 12.[113]

In the House of Representatives, Delegate Neil Parrott (R-Dist. 2A) proposed three amendments: (1) to remove the prohibition of using state funds to provide a grant or contract with "any entity that conducts or refers an individual to receive conversion therapy"[114]; (2) to change the definition of "conversion therapy" in the bill to "a physical treatment" that includes "any physical treatment that seeks to change" a person's sexual orientation or identity[115]; and (3) to add that conversion therapy does not include "a practice or treatment by a mental health or child care practitioner who represents to the public that the practices and treatments provided by the mental health or child care practitioner are based in religion".[116] All of Delegate Parrott's amendments were rejected by a large margin, and the House passed the bill by a vote of 95 to 27.[117] On May 15, 2018, Governor Larry Hogan signed the bill into law, and it became effective as of October 1, 2018.[118]

On January 18, 2019, Christopher Doyle, a licensed psychotherapist who runs the International Healing Foundation[119], filed suit against Governor Hogan and Maryland Attorney General Brian

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[111] *Id.*

[112] *Id.*

[113] *Maryland Senate Bill 1028*, LEGISCAN, *available at* https://legiscan.com/MD/bill/SB1028/2018.

[114] *Amendment to Senate Bill 1028*, *available at* http://mgaleg.maryland.gov//2018RS/amds/bil_0008/sb1028_35382501.pdf.

[115] *Amendment to Senate Bill 1028*, *available at* http://mgaleg.maryland.gov//2018RS/amds/bil_0008/sb1028_35342201.pdf (*emphasis* added to changes).

[116] *Amendment to Senate Bill 1028*, *available at* http://mgaleg.maryland.gov//2018RS/amds/bil_0008/sb1028_13382602.pdf.

[117] *Maryland Senate Bill 1028*, *supra* note 113.

[118] *Id.*

[119] Founded by Richard Cohen, now defunct, the International Healing Foundation purported to assist people who experience unwanted same-sex attraction. (*See* Warren Throckmorton, *Richard Cohen, Founder of International Healing Foundation, to Conduct Meeting for Unification Church*, WTHROCKMORTON.COM (NOV. 8, 2014),

Frosh, alleging that the passage of S.B. 1028 violates his rights to both freedom of speech and free exercise of religion.[120]

Mr. Doyle's first count alleges that the bill violates his constitutional right to freedom of speech, as it "authorizes only one viewpoint on counseling to eliminate, reduce, or resolve unwanted same-sex attractions, behaviors, or identity by forcing Plaintiff to present only one viewpoint on the otherwise permissible subject matters of sexual orientation, gender identity and same-sex attractions, behaviors, and identity." [121] As in the case of *King v.* Christie, it is first necessary to determine "whether the statute on its face seeks to regulate speech."[122] Similar to that case, the language of S.B. 1028 does not refer to speech or communication and instead refers to the "practice" and "efforts" of conversion therapy.[123] "Such language," states the court in *King*, "is commonly understood to refer to conduct, and not speech, expression, or some other form of communication."[124] In fact, as in the California and New Jersey statutes, S.B. 1028 does not regulate a psychotherapist's ability to lecture about or discuss conversion therapy; it only prevents a therapist from "engaging in counseling for the purpose of actually practicing SOCE."[125] Therefore, the bill does not, on its face, regulate freedom of speech.

It is, then, necessary to determine whether conversion therapy, as Mr. Doyle refers to it in his complaint, is "'speech' in the constitutional sense."[126] As the Supreme Court stated in the case of

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https://www.wthrockmorton.com/2014/11/08/richard-cohen-founder-of-international-healing-foundation-to-conduct-meeting-for-unification-church/.).

[120] Verified Complaint for Declaratory Relief, Preliminary and Permanent Injunctive Relief, and Damages, Doyle v. Hogan, et al., No. 1:19-cv-00190-DKC (D. Md. Jan. 18, 2019), ECF No. 1 [hereinafter MD Verified Complaint].

[121] *Id.* at 30.

[122] King v. Christie, 981 F. Supp. 2d 296, 312 (D.N.J. 2013).

[123] S.B. 1028, 438th Gen. Assemb., 2018 Reg. Sess. (Md. 2018), *available at* http://mgaleg.maryland.gov/2018RS/bills/sb/sb1028t.pdf (last visited Mar. 30, 2019).

[124] *King*, 981 F. Supp. 2d at 313.

[125] *Id.* at 314.

[126] *Id.* at 315.

Giboney v. Empire Storage & Ice Co.[127], "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." The *King* court answered this question by undertaking an analysis of "whether SOCE counseling should be considered (i) a form of speech, subject to constitutional protections, (ii) mere conduct, subject to reasonable regulation by the state, or (iii) some combination of both."[128] The court notes that "commentators have also long discussed psychological counseling in a manner that suggests counseling is therapy, and thus a form of conduct"[129] and reiterates "the longstanding principle that a state generally may enact laws rationally regulating professionals, including those providing medicine and mental health services."[130] It, therefore, concluded "that [the New Jersey conversion therapy ban] on its face does not target speech, and 'counseling' is not entitled to special constitutional protection merely because it is primarily carried out through talk therapy."[131]

Mr. Doyle argues in his complaint that the bill "authorizes only one viewpoint on counseling" for same-sex attraction[132] and that it "discriminates against Plaintiff's speech on the basis of the content of the message he offers."[133] In fact, the bill does not restrict Mr. Doyle's ability to discuss conversion therapy or even to talk about with his clients, and it does not even restrict Mr. Doyle's ability to practice conversion therapy with clients who are adults. The bill states only that "a mental health or child care practitioner may not engage in conversion therapy with an individual who is a

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[127] 336 U.S. 490, 502 (1949).
[128] *King*, 981 F. Supp. 2d at 315.
[129] *Id.* at 317.
[130] *Id.* at 319.
[131] *Id.* at 320.
[132] MD Verified Complaint, *supra* note 120, at 30.
[133] *Id.*

minor."[134] Furthermore, Mr. Doyle argues that the bill restricts his clients' corollary right to "receive information"[135] regarding conversion therapy, which again is simply not the case, as he is free to discuss conversion therapy but not to practice it. His final argument regarding freedom of speech is that S.B. 1028 is unconstitutionally "vague" and overbroad, "as it chills and abridges the free speech rights of all licensed mental health providers in Maryland."[136] Provocative hyperbole aside, counseling is a profession subject to state regulation just as any other medical profession, and, in fact, S.B. 1028 is included in the Annotated Code of Maryland, Health Occupations Article,[137] which regulates everything from acupuncturists and chiropractors to physicians and pharmacists. Therefore, because the bill only prohibits the practice of conversion therapy for minors and does not specifically target constitutionally protected speech, S.B. 1028 does not infringe upon Mr. Doyle's freedom of speech or that of his clients.

Count II of Mr. Doyle's complaint argues further that S.B. 1028 violates his clients' right to receive information as part of their first amendment right to free speech.[138] Because the obviously deficient merits of these contentions were discussed in the previous paragraphs, I will not devote further analysis to this separate count except to reiterate that S.B. 1028 does not restrict Mr. Doyle's freedom to give his clients information about conversion therapy.

Mr. Doyle argues in Count III of his complaint that S.B. 1028 violates his and his clients' constitutional right to free exercise of religion in that it

> is neither neutral nor generally applicable, but rather specifically and discriminatorily targets the religious speech, beliefs, and viewpoint of those

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[134] S.B. 1028, 438th Gen. Assemb., 2018 Reg. Sess. (Md. 2018), *available at* http://mgaleg.maryland.gov/2018RS/bills/sb/sb1028t.pdf (last visited Mar. 30, 2019).
[135] MD Verified Complaint, *supra* note 120.
[136] *Id.* at 31-32.
[137] MD. CODE ANN., HEALTH OCC. § 6-101.
[138] *Id.* at 32-33.

> individuals who believe change is possible, and thus expressly constitutes a substantial burden on sincerely held religious beliefs that are contrary to the State-approved viewpoints on same-sex attractions, behavior, and identity.[139]

As previously stated, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[140]

> To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.[141]

Nothing in the language of S.B. 1028 refers to religion or religious practices or rituals. While it is true that Delegate Parrott's proposed amendment to exclude religious practice from the definition of "conversion therapy" was denied, this does not indicate on its face that the bill was intended to apply only to the practice of conversion therapy by religious individuals or organizations. However, facial neutrality is not the only consideration, as "[t]he [Free Exercise] Clause 'forbids subtle departures from neutrality,' and 'covert suppression of particular religious beliefs.'"[142] Again, though S.B. 1028 applies to religious organizations that practice conversion therapy, it is by no means restricted to religious organizations and cannot be said to covertly

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[139] *Id.* at 35.

[140] Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993) (citing Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990)).

[141] *Id.* at 533 (1993) ("It is a necessary conclusion that almost the only conduct subject to Ordinances 87-40, 87-52, and 87-71 is the religious exercise of Santeria church members. The texts show that they were drafted in tandem to achieve this result." *Id*. at 535.).

[142] *Id.* at 534 (citing Gillette v. United States, 401 U.S. 437, 452, 28 L. Ed. 2d 168, 91 S. Ct. 828 (1971) and Bowen v. Roy, 476 U.S. 693, 703, 106 S. Ct. 2147, 2154 (1986)).

suppress religion simply because "a group motivated by religious reasons may be more likely to engage in the proscribed conduct."[143] Therefore, S.B. 1028 is neutral as it applies to the Free Exercise Clause.

Mr. Doyle further contends, however, that S.B. 1028 is not generally applicable, but specifically targets religious practice.[144] "It is a permissible reading of the [Free Exercise Clause]. . . to say that if prohibiting the exercise of religion…is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[145] The Supreme Court goes even further in the *Smith* case by stating, "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[146] Certainly, prohibiting the exercise of religion was not the intent of the bill, as nothing in either the text of the bill itself or the preambles setting out the legislature's reasoning for the bill mentions religion of any kind. In fact, the preamble of the bill mentions only the medical, psychiatric, and social consequences of conversion therapy and states that "Maryland has a compelling interest in protecting the physical and psychological well–being of minors, including LGBT youth, and in protecting minors against exposure to serious harm caused by sexual orientation change efforts."[147] As such, it cannot be argued in good faith that the object of S.B. 1028 is to prohibit the free exercise of religion, but only that prohibiting the practice of conversion therapy by religious organizations is merely an "incidental effect" of a generally applicable provision.[148]

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[143] Welch v. Brown, 58 F. Supp. 3d 1079, 1087 (E.D. Cal. 2014) (citing Stormans, Inc. v. Selecky, 586 F.3d 1109, 1131 (9th Cir. 2009)).
[144] MD Verified Complaint, *supra* note 120.
[145] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 878 (1990).
[146] *Id.*
[147] S.B. 1028, 438th Gen. Assemb., 2018 Reg. Sess. (Md. 2018), *available at* http://mgaleg.maryland.gov/2018RS/bills/sb/sb1028t.pdf (last visited Mar. 30, 2019).
[148] *Emp't Div. v. Smith*, 494 U.S. at 878.

Therefore, because the Maryland law banning conversion therapy for minors uses language that is both neutral and generally applicable, and because the law regulates a profession and its conduct rather than specific speech, Mr. Doyle's constitutional complaint against the Governor and Attorney General must fail. Indeed, on September 20, 2019, the United States District Court for the District of Maryland dismissed the complaint and denied Mr. Doyle's motion for injunction.[149]

C. MASSACHUSETTS – H140

On January 22, 2019, Massachusetts Representative Kay Khan (D-11th Middlesex), introduced House Bill 140, titled "An Act relative to abusive practices to change sexual orientation and gender identity in minors."[150] Contrary to most of the bills proposing a ban on conversion therapy that came before it, Massachusetts House Bill 140 does not include a preamble setting out the medical, psychiatric, and social research concluding that the practice of conversion therapy is harmful.[151] Rather, the Bill (1) defines the terms "gender identity," "health care provider," "sexual orientation," and "sexual orientation and gender identity change efforts," (2) establishes that change efforts shall not be practiced with patients under the age of 18, and (3) states the licensing consequences for violation of the bill.[152]

Two amendments to the bill were introduced, both by Representative Shawn Dooley (R-9th Norfolk).[153] The first of these amendments, filed on March 13, 2019, requested to add the phrase: "Any unlicensed person portraying or otherwise offering the appearance of a professional health care provider who offers or seeks to offer advice to another person on their mental or

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[149] Christopher Doyle, LPC v. Hogan, 411 F. Supp. 3d 337, 351 (D. Md. 2019).
[150] H.B. 140, 191st Gen. Assemb., 2019 Reg. Sess. (Mass. 2019), *available at* https://malegislature.gov/Bills/191/H140 (last visited Apr. 14, 2019).
[151] *Id.*
[152] *Id.*
[153] *Id.*

physical wellbeing" to the Bill's definition of "health care provider."[154] The amendment was laid aside that same day as beyond the scope of the bill.[155] The second amendment, also filed on March 13, 2019, requested that "sexual orientation and gender identity change efforts" not include practices that "utilize discussion alone."[156] Mr. Dooley withdrew this proposed amendment before the representatives could vote on its inclusion.[157] In regard to the second proposed amendment, Mr. Dooley stated on the floor:

> The reality is we are legislating what can be said between a doctor and his patient in the sanctity of that relationship . . . Let's say an 8-year-old boy comes in and says, "'I'm an 8-year-old girl." . . . Why not give every opportunity for that therapist to explore that? Why can't the therapist say, "No, you're not?"[158]

However, it is difficult, in light of previous decisions in cases challenging conversion therapy bans, to see Mr. Dooley's proposed amendments as protecting the doctor-patient dialogue, as he suggests. Rather, the amendments appear to be an attempt to inject language that would make the bill vulnerable to attacks on constitutional grounds. First, he sought to add non-licensed individuals practicing therapy to the definition of "health care providers" under the bill. While it is true that this language says nothing explicit about people practicing therapy in religious capacities, that could certainly be an argued intent, were a Free Exercise Clause challenge to be filed.[159] The amendment would have added a clause that is facially neutral but has the implication

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[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] Chris Lisinski, *147-8: Mass. House Overwhelmingly Votes to Ban Conversion Therapy for Minors*, WBUR NEWS (Mar. 13, 2019), https://www.wbur.org/news/2019/03/13/house-vote-conversion-therapy-ban (last visited Apr. 15, 2019).
[159] *See* King v. Christie, 981 F. Supp. 2d 296, 302 (D.N.J. 2013); *see also* Ferguson v. Jonah 136 A.3d 447 (N.J. Super. Ct. 2014).

of applying almost exclusively to religious organizations and would, therefore, make Mass. House Bill 140 especially susceptible to injunction on First Amendment grounds.

Second, Mr. Dooley proposed an amendment to exclude "talk therapy" from the bill's definition of "sexual orientation and gender identity change efforts."[160] In fact, Mr. Dooley proposed the same language in a similar bill that he had previously proposed, which stalled after a March 5, 2019, and the Senate hearing was cancelled.[161] However, his overly broad phrasing exposes the true purpose behind the proposed change. The bill already provides that "sexual orientation and gender identity change efforts" do not include practices that:

> (1) provide acceptance, support, and understanding of an individual's sexual orientation, gender identity, or gender expression; (ii) facilitate an individual's coping, social support, and identity exploration and development; or (iii) are sexual orientation-neutral or gender identity-neutral including interventions to prevent or address unlawful conduct or unsafe sexual practices; and (2) do not attempt or purport to impose change of an individual's sexual orientation or gender identity.[162]

Mr. Dooley's amendment sought to add the phrase "or utilize discussion alone".[163] However, the bill already provides solely for talk therapy that does not attempt to change or suppress a patient's sexual orientation or gender identity. Furthermore, having recognized the "abusive practice" of conversion therapy, the Massachusetts legislature undoubtedly would agree that "discussion

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[160] Lisinski, *supra* note 158.

[161] H. 110, 191st Gen. Assemb., 2019 Reg. Sess. (Mass. 2019), *available at* https://malegislature.gov/Bills/191/H110 (last visited Apr. 15, 2019).

[162] *Id.*

[163] H. 140, 191st Gen. Assemb., 2019 Reg. Sess. (Mass. 2019), *available at* https://malegislature.gov/Bills/191/H140 (last visited Apr. 14, 2019).

alone" that still facilitates a lack of acceptance or understanding is equally harmful to a patient as any other types of therapy utilized for the same purpose.[164]

Because the Massachusetts General Assembly rejected added language to its House Bill 140 that would have increased its scope to undoubtedly restrict religious freedom and allowed conversion therapy to continue under the guise of "discussion alone", it has become an example of the type of phrasing states looking to pass similar bills in the future should seek to mimic.[165] Even more so than bills before it, Massachusetts's House Bill140 will be difficult to successfully challenge in the courts, especially on constitutional grounds.

II. CURRENTLY PENDING LEGISLATION

Several states are currently considering legislation that would outlaw conversion therapy. Moreover, there is a bill pending before the United States House of Representatives that would outlaw the practice at the federal level. This section will first discuss the federal act, what it would accomplish, and potential opposition it would face both in Congress and in the courts. Then this section will provide a chart of states with pending conversion therapy bans, significant language in those bans, and potential legal consequences, and then will look specifically at California's currently pending attempt to classify SOCE as an unlawful business practice.

A. THERAPEUTIC FRAUD PREVENTION ACT

On April 25, 2017, Representative Ted Lieu of California—the same representative who drafted California's S.B. 1172 when serving as a state senator—introduced House Resolution

[164] *Id.*
[165] *Id.*

2119, also known as the Therapeutic Fraud Prevention Act ("TFPA" or the "Act").[166] The Act states not only that Congress recognizes that being gay, lesbian, and bisexual are not mental disorders, but also that being transgender or gender non-conforming is not "a disorder, disease, illness, deficiency, or shortcoming."[167] It also reiterates the findings and preambles of many of the state bills regarding conversion therapy as a practice:

> (2) The national community of professionals in education, social work, health, mental health, and counseling has determined that there is no scientifically valid evidence that supports the practice of attempting to prevent a person from being lesbian, gay, bisexual, transgender, or gender nonconforming.
>
> (3) Such professionals have determined that there is no evidence that conversion therapy is effective or that an individual's sexual orientation or gender identity can be changed by conversion therapy.
>
> (4) Such professionals have also determined that the potential risks of conversion therapy are not only that it is ineffective, but also that it is substantially dangerous to an individual's mental and physical health, and has been shown to contribute to depression, self-harm, low self-esteem, family rejection, and suicide.[168]

Many of the state bans leave out such findings entirely; therefore, it is especially significant that Representative Lieu chose to include them in his proposed Act. This suggests that passage of the

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[166] Therapeutic Fraud Prevention Act of 2017, H.R. 2119, 115th Cong. (2017).
[167] *Id.* at § 2.
[168] *Id.*

Act would legitimize at the federal level the conclusions of the scientific community that conversion therapy does not and cannot change a person's sexual orientation or gender identity, as well as the harmful effects of the practice upon its victims.[169]

Furthermore, the text of the Act, while similar in basic substance to many of the state-sponsored bans, is more expansive not only in that it would apply to the entire United States but also in that it would outlaw the practice for children, as well as adults.[170] Specifically, Section 4 of the Act states, without qualification for minors:

> (a) Unlawful Conduct.—It shall be unlawful for any person—
>
> (1) to provide conversion therapy to any individual if such person receives monetary compensation in exchange for such services;
>
> (2) to advertise for the provision of conversion therapy and claim in such advertising—
>
> (A) to change another individual's sexual orientation or gender identity;
>
> (B) to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender; or
>
> (C) that such efforts are harmless or without risk to individuals receiving such therapy; or
>
> (3) to assist or facilitate the provision of conversion therapy to an individual if such person receives monetary compensation, from any source, in connection with providing conversion therapy.[171]

Therefore, the language of the Act goes much further than that of the state conversion therapy bans not only in that it applies to all individuals, regardless of age, but it also frames the ban that it suggests in terms of consumer protection. Recognizing that conversion therapy not only

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[169] *See Position Statement on Conversion Therapy and LGBTQ Patients,* AMERICAN PSYCHIATRIC ASSOCIATION (2018), https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-Conversion-Therapy.pdf [hereinafter *Position Statement on Conversion Therapy*].
[170] *Id.* at § 4.
[171] *Id.*

does not meet its purported goal of changing a person's sexual orientation or gender identity but that it causes lasting psychological harm, it is a logical next step for Congress to suggest that paying for such a practice constitutes consumer fraud. The Act would ban all practice, advertisement, and facilitation of conversion therapy across the United States, and violations of the Act would result in civil action by the Federal Trade Commission and/or by civil action brought by the Attorney General of the State in which the violations occurred.[172]

The first obstacle to the Act's passage will, of course, be Congress itself. The same Act was proposed to Congress in 2016, but stalled immediately after its introduction and was allowed to expire with the legislative session.[173] Currently, approximately 46% of the House of Representatives, where the Act was introduced, is Republican.[174] The GOP stated in its most recent version of the Republican Party Platform, "We support the right of parents to determine the proper medical treatment and therapy for their minor children."[175] This statement, nestled under the section relating to "Protecting Individual Conscience in Healthcare" would seem to support parents' decision to send their children to conversion therapy. Because the majority of the House of Representatives is made up of GOP members who are unlikely to stray from the party's platform, it will be difficult for Representative Lieu and his fellow sponsors to convince their colleagues to vote for the passage of the Act.

Were the Act to be passed, the second obstacle would likely be lawsuits similar to those filed in California, New Jersey, and Maryland.[176] These could come from organizations in states

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[172] *Id.*

[173] Therapeutic Fraud Prevention Act of 2017, H.R. 2119, 115th Cong. (2017).

[174] Clerk of the U.S. H. R., *Congressional Profile*, http://clerk.house.gov/member_info/cong.aspx (last visited Dec. 3, 2020).

[175] *Republican Platform 2016*, *available at* https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf (last visited Dec. 3, 2020).

[176] Welch v. Brown, 58 F. Supp. 3d 1079 (E.D. Cal. 2014); King v. Governor of N.J., 767 F.3d 216 (3d Cir. 2014); Christopher Doyle, LPC v. Hogan, 411 F. Supp. 3d 337 (D. Md. 2019).

that had not legislated the issue of conversion therapy and/or that do not yet have case law concerning its legality. The most common arguments made by groups who advocate for the continuation of conversion therapy are that the bans (1) violate the First Amendment right to free speech, (2) violate the First Amendment right to freedom of religion, and (3) are overly broad and/or vague.[177]

Because all of these issues have already been litigated in multiple states, and none of those challenges has yet to successfully stop a conversion therapy ban from becoming law, it is unlikely that the first two arguments, at least, will succeed. Multiple courts, as cited above, have indicated that, while conversion therapy relies on discussion between the person conducting the session and the patient, this does not fall under speech such that it can be protected under the First Amendment. Furthermore, a blanket ban on all versions of conversion therapy, whether related to a religious institution or not, would not interfere with the First Amendment's Establishment Clause or Free Exercise Clause, as laws of generally applicability have historically been upheld.

It would be possible, like the plaintiffs in the California cases, to attempt to argue that the Therapeutic Fraud Prevention Act (TFPA) is too vague and overbroad.[178] However, it is likely that this argument, too, would fail, as the TFPA was drafted by the same representative who wrote California's bill, which was deemed sufficiently clear as to be enforceable. Furthermore, the TFPA adds additional language to that utilized in California that expands on what "gender identity" means, what "conversion therapy" means, and what types of practices are specifically restricted under the Act.[179]

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[177] *See* King v. Christie, 981 F. Supp. 2d 296, 315 (D.N.J. 2013).
[178] *Welch*, 58 F. Supp. 3d at 1079.
[179] Therapeutic Fraud Prevention Act of 2017, H.R. 2119, 115th Cong. (2017).

Therefore, the likely challenges to the Therapeutic Fraud Prevention Act have all been legislated before and are unlikely to succeed in overturning the Act if it is passed. Unfortunately, the Act has stalled since its introduction on April 25, 2017, and has not regained momentum even with the Democratic Party winning the majority in the House of Representatives. On April 25, 2017, the Act was referred to the House Committee on Energy and Commerce, and on April 28, 2017, the Act was referred to the Subcommittee on Digital Commerce and Consumer Protection, but there has been no action since that time. Because the Republican Party has such a strong platform stance regarding choice of doctors and therapists and still holds the majority in the Senate, the greatest challenge will be passing the Act at all, as it may be allowed to simply expire with the term.

B. PENDING CONVERSION THERAPY BANS BY STATE

State/Territory	Status	Significant Provisions
Colorado[180]	House considering Senate amendments (April 5, 2019)	"'Unprofessional conduct' as used in this article means: . . . engaging in conversion therapy with a patient who is under eighteen years of age." "A person licensed, registered, or certified under this article violates this article if the person: . . . [h]as engaged in . . . conversion therapy with a patient who is under eighteen years of age."
Michigan[181]	Bill referred to Committee on Health Policy (February 13, 2018)	"A mental health professional shall not engage in conversion therapy with a minor. a mental health professional who violates this section is subject to disciplinary action and licensing sanctions for unprofessional conduct."
Minnesota[182]	Bill introduced (March 4, 2019)	"No mental health practitioner or mental health professional shall engage in conversion therapy with a client younger than 18 years of age or with a vulnerable adult." "Conversion therapy attempted by a mental health practitioner or mental health professional with a client younger than 18 years of age or with vulnerable adults shall be considered unprofessional conduct and the mental health practitioner or mental health professional may be subject to disciplinary action by the licensing board of the mental health practitioner or mental health professional."

[180] H.B. 19-1129, 72nd Gen. Assemb., 1st Reg. Sess. (Col. 2019), *available at* https://leg.colorado.gov/bills/hb19-1129 (last visited Apr. 15, 2019).

[181] H.B. 5550, 2018 Leg., Reg. Sess. (Mich. 2018), *available at* http://legislature.mi.gov/doc.aspx?2018-HB-5550 (last visited Apr. 15, 2019).

[182] H.R. 2041, 91st Leg., Reg. Sess. (Minn. 2019), *available at* https://www.revisor.mn.gov/bills/text.php?number=HF2041&type=bill&version=0&session=ls91&session_year=2019&session_number=0&format=pdf (last visited Apr. 15, 2019).

Missouri[183]	Bill introduced (January 9, 2019)	"The committee may refuse to issue or renew any license…[or]…may cause a complaint to be filed with the administrative hearing commission… for any one or any combination of the following causes: . . . engaging in conversion therapy with a minor."
Ohio[184]	Referred to the Committee of Health, Human Services and Medicaid (April 26, 2017)	"An applicant or health care professional shall not engage in conversion therapy when providing mental health treatment to a minor patient." "A state licensing board shall impose one or more of the following sanctions on an applicant or health care professional for a failure to comply with this section: suspend, revoke, or refuse to issue or renew the certificate, license, or registration."
Pennsylvania[185]	Referred to the Committee of Consumer Protection and Professional Licensure (January 11, 2019)	"A mental health professional shall not engage in sexual orientation change efforts with an individual under 18 years of age."

[183] H. B. 516, 100th Gen. Assemb., 1st Reg. Sess. (Miss. 2019), *available at* https://house.mo.gov/billtracking/bills191/hlrbillspdf/0244H.01I.pdf (last visited Apr. 15, 2019).

[184] S.B. 126, 132nd Gen. Assemb., Reg. Sess. (Ohio 2017), *available at* https://www.legislature.ohio.gov/legislation/legislation-status?id=GA132-SB-126 (last visited Apr. 15, 2019).

[185] S.B. 56, 2019 Gen. Assemb., Reg. Sess. (Penn. 2019), *available at* https://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2019&sessInd=0&billBody=S&billTyp=B&billNbr=0056&pn=0029 (last visited Apr. 15, 2019).

C. CALIFORNIA ASSEMBLY BILL 2943

An additional method that California is attempting in the legislature is outlawing conversion therapy by amending its consumer protection laws to prohibit the practice.[186] Specifically, California's Assembly Bill 2943 ("AB 2943" or the "Bill"), states its intent to "include, as an unlawful practice prohibited under the Consumer Legal Remedies Act, advertising, offering for sale, or selling services constituting sexual orientation change efforts, as defined, to an individual."[187] In this way, California would successfully outlaw the practice of conversion therapy for both minors and adults, another unprecedented move in the United States.

While it is true that the Illinois bill that outlaws conversion therapy contains consumer fraud language, it states only that advertising for conversion therapy that "represents homosexuality as a mental disease, disorder, or illness" shall be considered "an unlawful practice under the Consumer Fraud and Deceptive Business Practices Act" and does not specifically state that practicing conversion therapy will constitute consumer fraud.[188] And while a lawsuit was filed in Illinois, specifically asking the court to exclude pastors from the State's definition of "trade or commerce," the case was ultimately dismissed for lack of standing, and the First Amendment ramifications of a commercial ban of conversion therapy were not discussed.[189]

As such, an attempt at classifying conversion therapy as consumer fraud has not yet been challenged. However, even though California's Assembly Bill 2943 has not been passed as of the writing of this article, it has already garnered a significant amount of opposition from religious

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[186] Assemb. B. 2943, 2017-2018 Leg., Reg. Sess. (Cal. 2018), *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB2943 (last visited Sept. 15, 2018).
[187] *Id.*
[188] H.B. 217, 99th Gen. Assemb., 1st Reg. Sess. (Ill. 2015), *available at http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=88&GA=99&DocTypeId=HB&DocNum=217&GAID=13&LegID=&SpecSess=&Session=* (last visited Sept. 16, 2018).
[189] Pastors Protecting Youth v. Madigan, 237 F. Supp. 3d 746, 748 (N.D. Ill. 2017).

leaders who claimed that the Bill would ban the Bible in the State of California and is a "dramatic infringement on First Amendment rights."[190] In the media, opponents have relied on tried-and-true arguments that passing the Bill would drastically infringe upon their fights to free speech and freedom of religion.[191] What these arguments always conveniently ignore is that every major psychiatric association has denounced conversion therapy as not only ineffective, but actively harmful.[192]

Based upon the statements made by opponents in the media, California can expect much of the same sort of lawsuits to stop the Bill, if its Congress passes the measure. Fortunately, the arguments for conversion therapy bans violating the First Amendment rights of those who practice it have already been extensively argued and ultimately dismissed. Therefore, there is no reason to assume that California's Assembly Bill 2943 will not pass or that it will not be upheld by the courts.

II. OPPOSING ARGUMENTS

In response to the recent efforts by state legislatures and pro-LGBT+ rights groups not only to outlaw conversion therapy, but also to ensure equal rights for the LGBT+ community, many states have passed Religious Freedom Restoration Acts that expand on the law of the same name passed by Congress in 1993.[193] The original Religious Freedom Restoration Act of 1993 ("RFRA") states in relevant part that the "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling

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[190] David French, *Yes, California Is on the Verge of Banning Some Christian Books, Here's How*, NATIONAL REVIEW (April 23, 2018), https://www.nationalreview.com/corner/california-bill-threatens-christian-books-and-booksellers/ (last visited Sept. 16, 2018).

[191] Kiley Crossland, *Calif. bill threatens Bible-based therapy*, BAPTIST PRESS (March 19, 2018), http://www.bpnews.net/50547/calif-bill-threatens-biblebased-therapy (Sept. 16, 2018).

[192] Assemb. B. 2943, 2017-2018 Leg., Reg. Sess. (Cal. 2018), *available at* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB2943 (last visited Sept. 15, 2018).

[193] See *infra* Table II B.

governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[194] There are also concerns regarding recent staff changes to the Supreme Court and how those changes will affect upcoming LGBT+ cases, particularly in light of the landmark cases of *Obergefell v. Hodges*[195] and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*[196], of which both majority opinions were authored by now-retired Justice Anthony Kennedy. Finally, the 11th Circuit Court of Appeals recently struck down local bans on conversion therapy in Florida on the basis that such bans violate the First Amendment rights of therapists, thereby making future challenges to similar laws less certain.[197]

A. Religious Freedom Restoration Acts by State

Twenty-one states have enacted their own versions of the RFRA, many of which also now include provisions that expand protections to for-profit corporations.[198] These measures were a direct result of the case of *Burwell v. Hobby Lobby Stores, Inc.*[199], in which the Supreme Court recognized the corporation's claim for protection of its religious beliefs. While many of these states insist that their laws are not intended to discriminate against the LGBT+ community, some explicitly state their intention.

For example, in 2015, then-Governor Mike Pence of Indiana signed into law the Indiana Religious Freedom Restoration Act, which substantially broadened a person's or organization's

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[194] Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(b) (1993).
[195] 567 U.S. 644 (2015).
[196] 138 S. Ct. 1719 (2018).
[197] Alison Durkee, *Trump Judges Strike Down Bans on LGBTQ 'Conversion Therapy'*, Forbes (Nov. 20, 2020), https://www.forbes.com/sites/alisondurkee/2020/11/20/trump-judges-strike-down-bans-on-lgbtq-conversion-therapy/?sh=547722103d7e (last visited Dec. 5, 2020).
[198] See *infra* Table II B.
[199] 134 S. Ct. 2751 (2014).

right to free exercise of religion, even over laws of general applicability.[200] This Act, essentially, legalized discrimination against LGBT+ people for religious reasons, a model that other conservative states have attempted to emulate.[201]

The most infamous state law in this regard is Mississippi's Religious Liberty Accommodations Act, which specifically and without subterfuge states that the government will not "take discriminatory action" against any person or organization who, in any way, shape, or form discriminates against LGBT+ people for religious reasons.[202] The Act lays out in specific detail in Section 4 all of the ways in which anyone, on the basis of religion, can legally discriminate against another person, including: marriage ceremonies, employment, housing, and adoption.[203] Religious leaders who seek to enact similar bills in other states have referred to Mississippi's Religious Liberty Accommodations Act as "model legislation".[204]

Many states, therefore, will attempt to argue that outlawing conversion therapy, whether solely for minors, as part of each state's consumer protection statues, or federally through the Therapeutic Fraud Prevention Act, violates not only religious freedoms protected under the First Amendment but also the Religious Freedom Restoration Acts enacted by state governments.

The argument that conversion therapy bans in general—and the Therapeutic Fraud Prevention Act in particular—will infringe upon religious freedoms of individuals, as well as violating

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[200] S.B. 101, 119th Gen. Assemb., 1st Reg. Sess. (Ill. 2015), *available at http://iga.in.gov/legislative/2015/bills/senate/101#document-92bab197* (last visited Dec. 3, 2020). (*See* Religious Freedom Restoration Act, Ind. Code Ann., § 34-13-9-8 (LexisNexis 2015)).

[201] Joshua Sato, *Indiana's Religious Freedom Restoration Act Sparks Controversy*, AMERICAN BAR ASSOCIATION (Mar. 31, 2015), https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2015/indianas-religious-freedom-restoration-act-sparks-controversy/ (last visited Dec. 3, 2020).

[202] Religious Liberty Accommodations Act., H. 1523, 2016 Leg., Reg Sess. (Miss. 2016).

[203] *Id.* § 4.

[204] Katherine Stewart, *A Christian Nationalist Blitz*, N.Y. TIMES (May 26, 2018), https://www.nytimes.com/2018/05/26/opinion/project-blitz-christian-nationalists.html (last visited Sept. 16, 2018).

individual states' Religious Freedom Restoration Acts, must be dismissed. As Professor Martina E. Cartwright stated in her 2016 article addressing these Acts:

> Historically, the Supreme Court held that the government may not accommodate religious belief by removing burdens on religious adherents if that means placing a burden on third parties. This ideal prohibits the government from imposing one group's beliefs on others, ultimately siding with one group over another in religious disputes among private parties.[205]

Not only have religious freedom arguments against conversion therapy bans historically been rejected by courts, but as stated by these prominent legal scholars, allowing the Religious Freedom Restoration Acts of individual states to override the individual rights of citizens to be protected against a harmful form of "therapy" that is proven not to produce the claimed results, would be allowing the government to take a side on this issue. In essence, by accepting these arguments, the government would be sanctioning the imposition of religious beliefs of some citizens on other citizens. LGBT+ citizens do not have less of a legal right to be free of laws respecting an establishment of religion as any other individual.

See below for a chart discussing the Religious Freedom Restoration Acts passed in each state and significant provisions in the acts that may relate to a ban on conversion therapy.

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[205] Martina E. Cartwright, *The Rise and Rise of The Freedom of Conscience Movement Post-Windsor and Obergefell CAN VIABLE COMPROMISES BE FOUND BETWEEN LGBT RIGHTS AND LEGITIMATE RELIGIOUS EXPRESSION? OR WILL ADVANCES IN RELIGIOUS LIBERTY BE AT THE EXPENSE OF THE LGBT AND VICE VERSA*?, 23 CARDOZO J. EQUAL RTS. & SOC. JUST. 39, 46-47 (2016).

B. STATE RELIGIOUS FREEDOM RESTORATION ACTS

State/Territory	Effective Date	Significant Provisions
Alabama[206]	December 1, 2014	(a) Government shall not burden a person's freedom of religion even if the burden results from a rule of general applicability, except as provided in subsection (b). (b) Government may burden a person's freedom of religion only if it demonstrates that application of the burden to the person: (1) Is in furtherance of a compelling governmental interest; and (2) Is the least restrictive means of furthering that compelling governmental interest."
Arizona[207]	May 11, 2012	"A. Government shall not deny, revoke or suspend a person's professional or occupational license…for any of the following and the following are not unprofessional conduct: . . . 3. Expressing sincerely held religious beliefs in any context, including a professional context as long as the services provided otherwise meet the current standard of care or practice for the profession. 4. Providing faith-based services that otherwise meet the current standard of care or practice for the profession."
Connecticut[208]	June 29, 1993	"For the purposes of this section, "state or any political subdivision of the state" includes any agency, board, commission, department, officer or employee of the state or any political subdivision of the state, and "demonstrates" means meets the burdens of going forward with the evidence and of persuasion."

[206] Ala. CONST. a rt. I, § 3.01(a) – (b)(1), (2).
[207] ARIZ. REV. STAT. ANN. § 41-1493.04 (2012).
[208] CONN. GEN. STAT. ANN. § 52-571b (West 1993).

Florida[209]	June 17, 1998	(1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (a) Is in furtherance of a compelling governmental interest; and (b) Is the least restrictive means of furthering that compelling governmental interest. (2) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief.
Idaho[210]	February 1, 2001	(1) This chapter applies to all state laws and local ordinances and the implementation of those laws and ordinances, whether statutory or otherwise, and whether enacted or adopted before, on or after the effective date of this chapter. (2) State laws that are enacted or adopted on or after the effective date of this chapter are subject to this chapter unless the law explicitly excludes application by reference to this chapter.
Illinois[211]	December 2, 1998	"'Exercise of religion' means an act or refusal to act that is substantially motivated by religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief." "The compelling interest test, as set forth in Wisconsin v. Yoder[212], and Sherbert v. Verner[213], is a workable test for striking sensible balances between religious liberty and competing governmental interests."

[209] FLA. STAT. ANN. § 761.03(1)(a), (b) – (2) (West 1998).
[210] IDAHO CODE § 73-403 (1)-(2).
[211] Ch. 775 ILL. COMP. STAT. ANN. Act 35 / §§ 5, 10 (West 1998).
[212] 406 U.S. 205 (1972).
[213] 374 U.S. 398 (1963).

Indiana[214]	March 26, 2015	Sec. 10 (b) Relief against the governmental entity may include any of the following:(1) Declaratory relief or an injunction or mandate that prevents, restrains, corrects, or abates the violation of this chapter. (2) Compensatory damages. (c) In the appropriate case, the court or other tribunal also may award all or part of the costs of litigation, including reasonable attorney's fees, to a person that prevails against the governmental entity under this chapter.
Kansas[215]	April 10, 2013	"In determining whether a compelling governmental interest is sufficient to justify a substantial burden on a person's exercise of religion…only those interests of the highest order and not otherwise served can overbalance the fundamental right to the exercise of religion . . . In order to prevail . . . , the government shall demonstrate that such standard is satisfied through application of the asserted violation to the particular claimant whose exercise of religion has been burdened. The religious liberty interest… occupies a preferred position, and no encroachments upon this liberty shall be permitted, whether direct or indirect, unless required by clear and compelling governmental interests of the highest order."
Kentucky[216]	July 1, 2013	"A 'burden' shall include indirect burdens such as withholding benefits, assessing penalties, or an exclusion from programs or access to facilities."
Louisiana[217]	August 15, 2010	(2) "'Burden' means that the government, directly or indirectly, does any of the following: (a) Constrains or inhibits conduct or expression mandated by a person's sincerely held religious tenet or belief. (b) Significantly curtails a person's ability to express adherence to the person's religious faith." (3) "'Compelling state interest' includes the interest of the state to protect the best interest of a child and the health, safety, and welfare of a child."

[214] 2015 Ind. SEA 101.
[215] KAN. STAT. ANN. § 60-5304 (West 2013).
[216] KY. REV. STAT. ANN. § 446.350 (West 2013).
[217] LA. STAT. ANN. § 13:5234(2)-(3) (2010).

Mississippi[218]	July 1, 2016	"The sincerely held religious beliefs or moral convictions protected by this act are the belief or conviction that: . . . Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth." (2) "The state government shall consider accredited, licensed or certified any person that would otherwise be accredited, licensed or certified, respectively, for any purposes under state law but for a determination against such person wholly or partially on the basis that the person believes, speaks or acts in accordance with a sincerely held religious belief or moral conviction."
Missouri[219]	July 9, 2003	"Nothing in section 1.302 and this section shall be construed as allowing any person to cause physical injury to another person, to possess a weapon otherwise prohibited by law, to fail to provide monetary support for a child or to fail to provide health care for a child suffering from a life-threatening condition."
New Mexico[220]	April 12, 2000	A. "A person whose free exercise of religion has been restricted by a violation of the New Mexico Religious Freedom Restoration Act may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government agency, including: (1) injunctive or declaratory relief against a government agency that violates or proposes to violate the provisions of the New Mexico Religious Freedom Restoration Act and (2) damages pursuant to the Tort Claims Act [41-4-1 NMSA 1978], reasonable attorney fees and costs."
Oklahoma[221]	November 1, 2000	"Nothing in this act shall be construed to: 1. Authorize any government entity to substantially burden any religious belief; 2. Authorize same sex marriages, unions, or the equivalent thereof; or 3. Affect, interpret, or in any way address those portions of Article 1, Section 2, and Article 2, Section 5, of the Constitution of the State of Oklahoma, the Oklahoma Religious

[218] MISS. CODE. ANN. §§ 11-62-3, 11-62-7 (West)
[219] MO. REV. STAT. ANN. § 1.307 (West 2013).
[220] N.M. STAT. ANN. § 28-22-4.
[221] OKLA. STAT. ANN. tit. 51, § 255.

		Freedom Act, or the First Amendment to the Constitution of the United States that prohibit laws respecting the establishment of religion."
Pennsylvania[222]	December 9, 2002	"'Substantially Burden.' An agency action which does any of the following: (1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs. (2) Significantly curtails a person's ability to express adherence to the person's religious faith. (3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion. (4) Compels conduct or expression which violates a specific tenet of a person's religious faith."
Rhode Island[223]	July 22, 1993	"In any civil action alleging a violation of this chapter, the court may: (1) Afford injunctive and declaratory relief against any governmental authority which commits or proposes to commit a violation of this chapter, and; (2) Award a prevailing plaintiff damages."
South Carolina[224]	May 26, 1999	"Granting state funding, benefits, or exemptions, to the extent permissible under the constitutional provisions enumerated in subsection (C)(1) and (2), does not constitute a violation of this chapter. As used in this subsection, "granting", with respect to state funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions."
Tennessee[225]	April 9, 2018	"Nothing in this section shall create or preclude a right of any religious organization to receive funding or other assistance from a government or of any person to receive government funding for a religious activity."

[222] Tit. 71 PA. STAT. AND CONS. STAT. ANN. § 2403 (West 2009).
[223] Tit. 42 R.I. GEN. LAWS ANN. § 42-80.1-4.
[224] S.C. CODE ANN. § 1-32-60 (1999).
[225] TENN. CODE ANN. § 4-1-407 (West 2018).

Texas[226]	August 30, 1999	"In determining whether an act or refusal to act is substantially motivated by sincere religious belief under this chapter, it is not necessary to determine that the act or refusal to act is motivated by a central part or central requirement of the person's sincere religious belief." "In determining whether an interest is a compelling governmental interest under Section 110.003, a court shall give weight to the interpretation of compelling interest in federal case law relating to the free exercise of religion clause of the First Amendment of the United States Constitution."
Virginia[227]	July 1, 2009	"Nothing in this section shall prevent any governmental institution or facility from maintaining health, safety, security or discipline."

[226] TEX. CIV. PRAC. & REM. CODE ANN. § 110.001(a)(1)-(b) (West 1999).
[227] VA. CODE ANN. § 57-2.02 (West 2009).

C. *OBERGEFELL* AND SUBSEQUENT CHANGES TO THE SUPREME COURT

On June 26, 2015, the Supreme Court decided the case of *Obergefell v. Hodges*. James Obergefell, along with several gay couples and other surviving partners, brought suit arguing that marriage between two people of the same gender should be recognized.[228] In a 5-4 decision, the Court ruled that marriage is a fundamental right and that denying that right to same-sex couples without due process of law violates the Fourteenth Amendment.[229] It was a landmark case that legalized same-sex marriages nationwide and legitimized partnerships and adoptions that were previously unrecognized.[230] The majority opinion was written by Justice Anthony Kennedy, who, though conservative, was generally "viewed as a moderate conservative and a swing vote . . . who often cast the deciding vote in 5-4 cases."[231]

On June 21, 2018, Justice Kennedy announced that he would be retiring from the Supreme Court, opening a vacancy to be filled by President Donald Trump.[232] Trump nominated then D.C. Circuit Court Judge Brett Kavanaugh to take the place of Justice Kennedy.[233] After contentious hearings, Kavanaugh was confirmed by the Senate and took his place on the Supreme Court beginning October 6, 2018.[234] While Kavanaugh has been infamously vague regarding his views

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[228] 135 S. Ct. 2584, 2594-95 (2015).
[229] *Id.* at 2600.
[230] *Id*. at 2607-08.
[231] Thelma L. Harmon, *Young v. United Parcel Services, Inc.: The Equal Treatment Fallacy*, 20 J. GENDER RACE & JUST. 97, 115 (2017).
[232] *Kennedy's Retirement: Legacy, Fallout & The Battle Ahead*, LAW360 (June 29, 2018), https://www.law360.com/articles/1058381/kennedy-s-retirement-legacy-fallout-the-battle-ahead (last visited Jan. 27, 2019).
[233] Elliott Ash & Daniel L. Chen, *What Kind of Judge is Brett Kavanaugh?: A Quantitative Analysis*, 2018 CARDOZO L. REV. DE NOVO 70, 71 (2018).
[234] Mikayla Foster, *"Gobbledygook" Or Unconstitutional Redistricting?: Floterial Districts and Partisan Gerrymandering*, 98 B.U.L. REV. 1739, 1757 (2018).

on LGBT+ rights, his judicial record shows that he aligns strongly with a more conservative interpretation of the Constitution and maintains a personal emphasis on religious liberty.[235]

For example, in the case of *Priests for Life v. United States HHS*[236], the D.C. Circuit Court—on which Kavanaugh presided at the time—denied a petition for rehearing en banc to determine whether, as in the *Hobby Lobby* case, an employer must provide contraception to its employees, even if it conflicts with sincerely held religious beliefs. The majority concluded that the plaintiffs complained of a non-existent constraint on their religious liberty, particularly in light of the Affordable Care Act accommodation that an employer may "notify their insurers of their sincere religious objection to contraception, and arrange for contraception to be excluded from the health insurance coverage they provide."[237] As such, a rehearing was not necessary.[238]

In his dissent, Judge Kavanaugh concluded that "under *Hobby Lobby*, the regulations substantially burden the religious organizations' exercise of religion because the regulations require the organizations to take an action contrary to their sincere religious beliefs (submitting the form) or else pay significant monetary penalties."[239] The form to which Kavanaugh refers is one that employers who oppose the contraception mandate must submit to the Department of Health and Human Services stating their religious objection.[240] After submission of the form, the employer's insurer will continue to provide contraceptive coverage to employees with separate funds rather than those received from the employer itself, and if the employer does not submit the form, it is subject to a monetary penalty.[241] Kavanaugh agreed with the plaintiffs' contention that

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[235] Brendan T. Beery, *Prophylactic Free Exercise: The First Amendment and Religion in A Post-Kennedy World*, 82 ALB. L. REV. 121, 133 (2018).
[236] 808 F.3d 1 (2015).
[237] Priests for Life v. United States HHS, 808 F.3d 1, 3 (2015).
[238] *Id.* at 4.
[239] *Id.* at 15.
[240] *Id.* at 14.
[241] *Id.* at 15.

submitting such a form makes them complicit in giving their employees contraception, against their sincerely held religious beliefs, and that being subject to a penalty for failure to submit the form substantially burdens the exercise of those beliefs.[242]

It is important to reiterate that sending the form to the Department of Health and Human Services ensures that no funds from the employer are used for contraception coverage. While an employer has the right to object to providing contraception themselves on the basis of a sincerely held religious belief that doing so would be immoral, the employer does not have the right to police its employees' other insurance policies not provided by them. It is, therefore, a significant exaggeration to suggest that allowing an insurance company to provide contraception for employees out of its own pocket would still violate the employer's free exercise of religion. While it is true, as Judge Kavanaugh points out, "that a direct monetary penalty on the exercise of religion constitutes a 'substantial burden'"[243], the employers have the option of submitting the form, thereby ensuring that they are not providing contraception. To suggest that the submission of this form is comparable to an encroachment on the free exercise as was the monetary penalty from *Hobby Lobby,* is disingenuous at best.

In reviewing Kavanaugh's history of upholding religious liberty above all else, one legal scholar for the Albany Law Review suggested that:

> [T]he Supreme Court, with Justice Kavanaugh replacing Justice Kennedy, is almost sure to move away from the notion of dynamic and toward the notion of prophylactic free exercise; it will protect religion from non-religion, and only belief

[242] *Id.* at 19.
[243] *Id.* at 16.

rather than mere attitudes or disbelief will likely be eligible for First-Amendment protection.[244]

It is unlikely that, were the Court to grant certiorari for a case regarding same-sex marriage, conversion therapy, or LGBT+ rights in general, Kavanaugh would take up Justice Kennedy's traditional role of the "swing vote" in favor of civil rights over supposed religious liberty. As such, this addition to the Justices will likely constitute its own substantial burden on any party wishing to bring a case for the unconstitutionality of conversion therapy.

D. *MASTERPIECE CAKESHOP* AND FREE EXERCISE CONCERNS BY SCOTUS

Another recent case regarding the rights of the LGBT+ community, in which supporters of both sides have placed great import, is *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*[245]. On June 4, 2018, the Supreme Court issued its decision that the Colorado Civil Rights Commission violated the First Amendment free exercise right of Masterpiece Cakeshop when it ordered the shop to cease and desist its refusal to bake and sell cakes for same-sex weddings.[246] In 2012, Charlie Craig and Dave Mullins entered Masterpiece Cakeshop, run by Jack Phillips, in order to purchase a cake for their wedding reception.[247] Phillips told Craig and Mullins that he would not make a wedding cake for a same-sex marriage because of his religious belief that such marriages are immoral.[248]

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[244] Foster, *supra* note 219. ("Justice Kavanaugh agreed: '[U]nder Hobby Lobby, the regulations substantially burden the religious organizations' exercise of religion because the regulations require the organizations to take an action contrary to their sincere religious beliefs (submitting the form) or else pay significant monetary penalties.' Under this reasoning, free exercise is decidedly prophylactic: it is a substantial burden on the exercise of religion to cause a religious believer the pique of having to submit to a bureaucratic certification that would allow the believer to opt out of having to comply with a neutral and even-handed law that would, allegedly, entangle the believer in the areligious private choice of an employee to access contraceptives under an insurance policy written and administered by a third-party insurance carrier." *Id*.).

[245] 138 U.S. 1719 (2018).

[246] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n., 138 U.S. 1719, 1724 (2018).

[247] *Id.*

[248] *Id.*

The couple filed a complaint with the State of Colorado against Masterpiece Cakeshop for violations of the Colorado Anti-Discrimination Act ("CADA"), which states that "[i]t is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of . . . sexual orientation . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation."[249] After a thorough investigation, the Colorado Civil Rights Division found that Masterpiece Cakeshop had violated CADA and recommended the case to the Colorado Civil Rights Commission.[250] An Administrative Law Judge reviewed the case and determined that demanding that Phillips make cakes for same-sex weddings was not a violation of his free speech or of the free exercise of his religion.[251] The full Commission affirmed the decision and ordered, among other measures, that Phillips immediately cease and desist his refusal to make cakes for same-sex weddings.[252] Phillips appealed the decision to the Colorado Court of Appeals which affirmed the Commission's ruling, and the Supreme Court granted certiorari.[253]

The opinion of the Court was once again written by Justice Kennedy, who engaged in a discussion of Colorado's right to protect its most vulnerable citizens. Kennedy reiterated that "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth."[254] The violation, for the Court, was the fact that Phillips would not provide a service to a homosexual couple that he would have gladly provided to a heterosexual couple, and had Phillips refused to sell wedding cakes at all, his declining to do

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[249] *Id.* at 1725.
[250] *Id.* at 1726.
[251] *Id.*
[252] *Id.*
[253] *Id.* at 1727.
[254] *Id.*

so for Craig and Mullins would not have been a violation of CADA.[255] The Court then goes far afield and suggests that, despite the clear violation of CADA and discrimination against a same-sex couple, Masterpiece Cakeshop should, in this case, be excused because of its treatment by the Commission.[256]

The Court analyzed the transcript of two meetings of the Commission, in which the members discussed the Masterpiece Cakeshop case specifically. The Court concluded that the members used language clearly hostile to Phillips's religion, including one commissioner's statement that "[f]reedom of religion and religion has been used to justify all kinds of discrimination throughout history . . . [a]nd to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others."[257] Because the Court viewed these exchanges as clearly biased, it ruled that "the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint."[258] Therefore, the majority reversed the decision of the Colorado Court of Appeals and held that "[t]he Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion."[259]

In essence, Masterpiece Cakeshop was allowed to continue its clearly illegal policy of discrimination against same-sex couples solely because the Colorado Civil Rights Commission did not approach its decision with what the Court deemed a proper level of neutrality. As Justice Ginsburg wrote in her dissent, which was joined by Justice Sotomayor, "[t]he different outcomes the Court features do not evidence hostility to religion of the kind we have previously held to signal

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[255] *Id.* at 1728.
[256] *Id.* at 1729.
[257] *Id.* at 1729-31.
[258] *Id.* at 1731.
[259] *Id.* at 1732.

a free-exercise violation, nor do the comments by one or two members of one of the four decisionmaking entities considering this case justify reversing the judgment below."[260] Ginsburg further reasoned that "[t]he proceedings involved several layers of independent decisionmaking, of which the Commission was but one" and that comments by a couple of members of one step of the process should not be dispositive of a clear case of illegal discrimination.[261]

Because of the extremely narrow ruling of *Masterpiece Cakeshop*, it is unlikely that the decision will affect an effort to outlaw conversion therapy. To consider only the discriminatory element of the case, separate from the neutrality issue, the Court agrees that places of public accommodation should not be allowed to discriminate on the basis of sexual identity and refuse a good or service that it would provide to a heterosexual person. While conversion therapy could be considered a service that is provided, because it is generally performed either by a religious organization or a church-sanctioned organization, it does not meet the requirements for public accommodation defined as: "any place of business engaged in any sales to the public and any place offering services . . . to the public, exclude[ing] a church, synagogue, mosque, or other place that is principally used for religious purposes."[262] Furthermore, it is ostensibly a service that could and would be provided to anyone without discrimination, but its use is solely for LGBT+ individuals making it obsolete for anyone else.

Therefore, the only consideration must be that in cases determining whether bans on conversion therapy violate the First Amendment, (whether free speech or free exercise), judges must be careful to use language that does not directly incriminate religion or express disdain for religious practices if they are to uphold the bans. Judges must approach the bans, and violators of

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[260] *Id.* at 1749.
[261] *Id.* at 1751.
[262] *Id.* at 1725.

those bans, with the neutrality of assessing a law of general applicability. Other than this very specific concern, *Masterpiece Cakeshop* should hold no real significance in considering a federal ban on conversion therapy.

E. *OTTO V. CITY OF BOCA RATON*, THE FIRST STRIKE TO CONVERSION THERAPY BANS

On November 20, 2020, the 11th Circuit Court of Appeals decided the case of *Otto v. City of Boca Raton*[263], brought by two licensed therapists who "provide counseling to minors who have unwanted same-sex attraction or unwanted gender identity issues."[264] The plaintiffs in that case argued that, because their form of SOCE consists entirely of talk therapy, the bans instituted by the city of Boca Raton, Florida and the county of Palm Beach, Florida, were an unreasonable restriction on their First Amendment right to freedom of speech.[265] The Court spends a considerable amount of time analyzing whether SOCE bans are a content-based restriction of free speech and, therefore, whether strict scrutiny should apply to these laws.[266] The Court goes so far as to explain that there are certain classifications of speech not protected by the First Amendment, including some types of professional speech, but despite the nearly 15 pages spent on discussing what constitutes protected speech under the First Amendment, the Court quickly addresses and dismisses the argument that speech that is proven to be harmful falls into any unprotected category.[267] "No one has argued that the ordinances fall into these categories of unprotected speech, and we do not see how they could."[268]

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[263] No. 19-10604 (11th Cir. Nov. 20, 2020), *available at* https://media.ca11.uscourts.gov/opinions/pub/files/201910604.pdf.
[264] *Id.* at 3.
[265] *Id.* at 6.
[266] *Id.* at 5-19.
[267] *Id.* at 14.
[268] *Id.*

Upon deciding that the local SOCE bans are content-based speech restrictions, the Court turns its attention to whether the ordinances serve a compelling government interest such that the restriction is acceptable.[269] The Court concedes that "protecting children is a crucial government interest," but states that "speech 'cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.'"[270] While berating the local governments of Boca Raton and Palm Beach for passing laws based on their personal beliefs, the Court proves that its own motivations are less than purely constitutional by forcing the facts to fit the conclusion it desired to reach.[271] Nowhere is this clearer than when the Court claims that the myriad studies that have proven the ineffectiveness and outright harmfulness of SOCE are merely the idea of the day and that such studies could conceivably be found erroneous in the future.[272] "It is not uncommon for professional organizations to do an about-face in response to new evidence or new attitudes," as the Court states.[273] However, the example that it uses to prove this point is the fact that the American Psychiatric Association at one time considered homosexuality to be a mental disorder before permanently removing it from the *Diagnostic and Statistical Manual of Mental Disorders* in 1987.[274] This section concludes with, "the change itself shows why we cannot rely on professional organizations' judgments,"[275] proving the disingenuousness of the Court's argument, if it hadn't necessarily been clear from the moment the Court compared SOCE bans to a pro-Nazi parade.[276]

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[269] *Id.* at 20.
[270] *Id.* (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 213–14 (1975)).
[271] *Id.*
[272] *Id.* at 23.
[273] *Id.*
[274] *Id.*
[275] *Id.*
[276] *Id.* at 11.

Inevitably, based upon its skewed analysis and parade of horribles if these local speech restrictions are allowed to stand,[277] the Court concludes that the SOCE bans passed in the city of Boca Raton and the county of Palm Beach are an unreasonable restriction on freedom of speech that do not serve a compelling government interest and, therefore, should be enjoined.[278]

In her dissent, Judge Beverly B. Martin counters the majority opinion that the local SOCE restrictions do not pass strict scrutiny, saying that "[w]hen ascertaining the proper level of constitutional scrutiny for the Ordinances, the key question is whether they regulate conduct or speech . . . This case does not require us to resolve this difficult question."[279] She explains that this question need not be answered simply because the ordinances in question pass strict scrutiny either way.

> Here, the Localities have prevented no information from being distributed from therapists to their minor patients. The only thing the Therapists may not do is perform a particular medical practice on their minor patients. In my view, the Localities have validly identified a compelling government interest in protecting minors from a harmful medical practice.[280]

Judge Martin goes on to reiterate the findings of the American Psychiatric Association's 2009 study, as well as the fact that the American Academy of Pediatrics, the American Psychological Association Council of Representatives, the American Psychoanalytic Association, the American Academy of Child and Adolescent Psychiatry, the American School Counselor

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[277] *Id.* at 27. ("Local communities could prevent therapists from validating a client's same-sex attractions if the city council deemed that message harmful. And the same goes for gender transition—counseling supporting a client's gender identification could be banned." *Id.*).
[278] *Id.*
[279] *Id.* at 31.
[280] *Id.* at 35.

Association, the World Health Organization, and the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration all rebuke SOCE as an effective practice.[281] "At the same time," she notes, "it seems as though no study (or studies) would satisfy the majority."[282] She further admonishes, "[i]ndeed, the majority entirely discounts 'professional organizations' judgments' in this case. When it comes to regulation of allegedly harmful medical practices, the judgment of professional organizations strikes me as quite relevant."[283]

Judge Martin concludes:

> The majority is correct to say this case implicates sensitive considerations about when and how government bodies may regulate speech. Instances in which a speech restriction is narrowly tailored to serve a compelling interest are deservedly rare. But they do exist. I believe the Localities' narrow regulation of a harmful medical practice affecting vulnerable minors falls within the narrow band of permissibility. I would therefore affirm the District Court's denial of a preliminary injunction on the Therapists' free speech claim.[284]

Hopefully, future courts will discount the majority opinion for the clearly erroneous decision that it is and will follow the lead of Judge Martin in her dissent, wherein she correctly demonstrates that restricting whatever speech is necessary to attempt to change a person's sexual orientation or gender identity is necessary to serve the compelling government interest of

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[281] *Id.* at 40.
[282] *Id.*
[283] *Id.* at 41-42.
[284] *Id.* at 46.

protecting our LGBT+ youth from an ineffective and actively harmful practice, as demonstrated by the multiple studies conducted by both national and international health organizations.

CONCLUSION

Many states have passed laws outlawing conversion therapy for minors, and California, ever the pioneer, is leading the way in outlawing the practice entirely as consumer fraud. Conversion therapy is a practice that claims to "cure" homosexuality and transgenderism, but it does not produce the desired result.[285] Indeed, as the American Psychiatric Association has carefully determined, neither of these are illnesses or diseases that can or should, be cured.[286] Furthermore, conversion therapy has been proven to produce extreme feelings of self-loathing and depression, creating a sharp increase in instances of suicide and attempted suicide in those who experience it. Because the practice of sexual orientation change efforts is not only fraudulent but actively harmful, Congress should pass the Therapeutic Fraud Prevention Act[287], outlawing this method of "therapy" nationwide.

Historically, the passage of bills similar to the TFPA have resulted in calls for injunctive relief from those who practice conversion therapy, specifically religious organizations who claim that the procedure is protected under the freedom of speech and religion of the First Amendment. However, these cases have traditionally ruled against the plaintiffs and upheld the bans on the basis that they are laws of general applicability and thus do not infringe upon a First Amendment right. Moreover, though some states may attempt to argue that their Religious Freedom Restoration Acts overrule the TFPA, the courts cannot overlook the compelling argument that allowing the

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[285] *About conversion therapy*, *supra* note 16.
[286] *See Position Statement on Conversion Therapy*, *supra* note 169.
[287] Therapeutic Fraud Prevention Act of 2017, H.R. 2119, 115th Cong. (2017).

continuation of conversion therapy under the guise of religious freedom would necessarily be imposing the religious beliefs of some onto others.

Congress is uniquely situated to outlaw the barbaric practice of conversion therapy nationwide and has a responsibility to act to protect those who would be harmed by the continuation of the practice. The House of Representatives should take this opportunity to dismiss religious dogma and protect the already marginalized LGBT+ community from further victimization.

Furthermore, as discussed here, all but the local Florida bans on conversion therapy have been upheld by the courts and challenges have thereby been dismissed. And each ban that has been challenged has been upheld as a neutral law of general applicability, satisfying the standard set forth in the *Smith*[288] case, as well as satisfying a compelling government interest by the least restrictive means, which also passes the standard of most Religious Freedom Restoration Acts. While it is true that the 11th Circuit Court of Appeals has rendered a decision that SOCE bans are an unconstitutional restriction of freedom of speech, the arguments made by the majority in that opinion are so tenuous as to be easily discounted by similarly situated courts.[289] As such, the policy reasons for passing a federal ban on conversion therapy far outweigh the potential for challenges to such a law. It should also be noted of course, that the Supreme Court is now comprised of a majority of Justices who are considered "conservative" by the public, and though it is impossible to predict how the Court would rule on challenges to a federal conversion therapy ban—were it to accept the case at all—any potential bill should be drafted with special care to avoid implications of trampling verbal or religious freedoms.

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[288] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

[289] *Otto v. City of Boca Raton*, No. 19-10604 (11th Cir. Nov. 20, 2020), *available at* https://media.ca11.uscourts.gov/opinions/pub/files/201910604.pdf.