

Vermont Legislative Research Service

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Conversion Therapy Bans and Challenges to Them

This report delves into the legal complexities surrounding recent nationwide bans on conversion therapy. In it we examine scholarly literature on conversion therapy bans, analyze arguments related to free speech and informed consent, review recent ~~cases~~ ^{cases}, and compare existing policies prohibiting conversion therapy. The result is a report that provides insights into the factors influencing the success or failure of legal challenges to conversion therapy bans.

Conversion Therapy Definition

“Conversion therapies” (or “reparative therapies”) target homosexuality and diverse gender identities.¹ The American Academy of Child and Adolescent Psychology (AACAP) defines conversion therapy as, “interventions purported to alter ~~sexual~~ ^{sexual} attractions or an individual’s gender expression with the intent of promoting heterosexuality and/or cisgender as preferable outcomes.”² The AACAP adds that sexual orientation and gender expression are dimensions of human development and are therefore not pathological that conversion therapy is performed under the false pretenses that sexual orientation and ~~gender~~ ^{gender} expression are pathological.

Government Activity

Vermont

In May of 2016, Vermont became the eighth jurisdiction to ban conversion therapy for ³ minors. The law included protections from any mental health care providers seeking to change an individual’s sexual orientation or gender identity.⁴ Mental Health Care Providers are defined in the bill as anyone licensed to practice medicine in a range of fields related to psychology and mental health.⁵ Additionally, the bill covers any attempt at conversion therapy from physicians,

¹ American Academy of Child & Adolescent Psychology, “Conversion Therapy Policy Statement,” accessed December 11, 2016.

physician's assistants, social workers, and other workers who could influence a minor's sexual orientation or gender identity as unprofessional conduct.⁶

Minnesota

In April of 2023, Minnesota became the 20th state to pass a law banning conversion therapy.⁷ The practice had already been banned in the state through an executive order from Governor Tim Walz, but a new Democratic majority in the State Legislature led the bill into law.⁸ Minnesota HF 16 prohibits the advertisement of conversion therapy by mental health providers.⁹

Washington

Washington State passed SB 5722 in March of 2018 restricting the practice of conversion therapy. The bill maintained that the restrictions do not apply to religious practices and non-licensed practitioners operating under religious auspices.¹⁰ In 2021, the U.S. 9th Circuit Court of Appeals heard the case *Tingley Ferguson*, which attempted to overturn SB 5722 on the grounds that it violated the First Amendment freedom of speech and religion. The court upheld the law and found that it did not infringe upon these rights.¹¹

St. Louis, MO

In December of 2019, the City of St. Louis, Missouri became one of the first localities in the nation to pass a local ban on conversion therapy.¹² While Missouri had not passed any law or regulation regarding the practice of conversion therapy, the City passed an ordinance that banned mental health professionals from performing conversion therapy on minors.¹³ The ordinance borrows similar language from state laws across the nation restricting the practice of conversion therapy. It additionally

Legal Arguments Regarding Conversion Therapy Bans

Certain legal arguments have been identified as threats to conversion therapy bans. The most common argument against these bans claims that they are a violation of free speech under the First Amendment. In *Pickup et al. v. Brown*,¹⁴ anti-LGBTQ+ groups such as the National Association for Research and Therapy of Homosexuality have challenged bans on conversion therapy stating they are a violation of a practitioner's "restricting what they, as therapists and counselors, could say and prevented them from expressing their own viewpoints."¹⁵ This argument has become prominent in cases in several U.S. Appellate Court circuits, including in the case of *Tigley v. Ferguson* (decided by the 9th Circuit), and *Otto v. City of Boca Raton* (decided by the 11th Circuit).¹⁶

The free speech argument put forward in these cases describes the ban on conversion therapy procedures as a restriction on religious freedom on the practice of talk therapy which maintains the intent of sexual reorientation or gender restoration. Some "counselors tell recipients that they are alone, unnatural, and "abominations" rejected by God." This aspect of some conversion therapy treatments serves to assign these procedures a religious nature, so plaintiffs can argue that banning conversion therapy limits religious freedom. This religious belief regarding the targets of conversion therapy exists within multiple religions, spanning from ultra-Orthodox Jewish Yeshiva students whose heterosexual desires and behaviors conflict with their religious teachings¹⁸ to "fundamentalist Christian conversion programs."¹⁹

The Supreme Court rejected the free speech argument in the case of

professional speech,²¹ which lowers the level of scrutiny required by the courts is considered the regulation of professional conduct and whose effects on speech are only incidental.²² This has led to a greater argument about what cons(hos)-1 (e)4euhos-51 (0cr)]TJ 3hatw9

protections are somewhat diminished when between a client and a professional, and at their lowest when limitations are regulating the conduct of the professional, which in this case is conversion therapy. The court also held that the law was not unconstitutionally vague, and therefore did not violate the

court was the conservative make-up of the bench, as well as their reliance on very different case precedent than the *Tingley vs. Ferguson* decision.³⁵

In 2012, the Supreme Court upheld a California law restricting conversion therapy³⁶ because there is now another Circuit split on the issue of whether the regulation of Conversion Therapy constitutes regulation of conduct or regulation of speech, the Supreme Court considered taking up this case, which could have had a profound impact on the ability of states to regulate this practice, as the case precedent it would create would apply to all Federal Circuit Courts.³⁷ December 1st, 2023, the Supreme Court Justices rejected an appeal from Tingley, upholding the 9th Circuit Court ruling in the *Tingley vs. Ferguson*. This leaves the circuit split in place as current precedent and this question up to the Circuits to decide for the time being.³⁸

Alliance Defending Freedom

The Alliance Defending Freedom (ADF) is a legal advocacy group created in 1994 by over thirty of the religious right's foremost policy leaders with a mission to counterbalance civil rights organizations such as the ACLU, and Lambda Legal. In 2016, the Southern Poverty Law Center designated the ADF as a hate group.³⁹ The primary objectives the ADF espouse as their legal agenda are religious freedom, free speech, sanctity of life, marriage and family, and parental rights.⁴⁰ These core tenants have allowed ADF to pursue litigation in many areas of law, and they have done so very successfully. ADF is at the forefront of the legal battle to curtail LGBTQIA+ rights advancements. They are key actors in many high-profile LGBTQ+ related court battles, in everything from *Lawrence v. Texas* where the ADF filed an amicus brief in support of the criminalization of gay sex, to more recent cases that attempt to dismantle school bullying protections for queer kids and bar trans women from participating in high school sports.⁴¹ The ADF is central to the religious right's social and legal agenda. This means that understanding their values and tactics is crucial to understanding legal challenges to LGBTQ+ friendly policies, including challenges to conversion therapy bans, which the ADF is currently litigating and pursuing across the country. Because of this, they will likely be of key importance in the Supreme Court during the current session.⁴²

³⁵ *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020); *Tingley V. Robert W. Ferguson*, 9th Circuit, 2022).

³⁶ Andrew Chung "U.S. Top Court Rejects 'Gay Conversion' Therapy Ban Challenge" Reuters, May 1, 2017 <https://www.reuters.com/article/us-a-court-gay-conversion/us-top-court-rejects-gay-conversion-therapy-ban-challengeidUSKBN17X1S>.

Conclusion

This report examines the complex legal landscape of nationwide bans on conversion therapy. It analyzes scholarly legal arguments focusing on those related to free speech and informed consent, explores recent case precedents, and compares existing policies. The insights provided serve as a foundation for understanding the nuanced factors influencing legal challenges against conversion therapy bans. Vermont can use these findings to enhance its current ban considering the current legal environment.

This report was completed on December 4, 2023, by Liz Fitzsimmons, Liam Johnson, and Zane Zupan under the supervision of VLRS Director, Professor Anthony “Jack” Gierzynski in response to a request from Representative Taylor Small

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