



Vermont Legislative Research Service

<https://www.uvm.edu/cas/polisci/vermont-legislative-research-service-vlrs>



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 case precedents, 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 same-sex 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 and that conversion therapy is performed under the false pretenses that sexual orientation and non-cisgender expression are pathological.

Government Activity

Vermont

In May of 2016, Vermont became the eighth jurisdiction to ban conversion therapy for minors.³ 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, 2023, https://www.aacap.org/AACAP/Policy_Statements/2018/Conversion_Therapy.aspx.

² American Academy of Child & Adolescent Psychology, “Conversion Therapy.”

³ Human Rights Campaign, “Vermont bans conversion therapy in LGBT Kids,” accessed November 10, 2023, <https://www.hrc.org/press-releases/vermont-joins-growing-number-of-jurisdictions-protecting-lgbtq-kids-from-co>.

⁴ Vermont State Legislature, Senate, SB 132, 2016.

⁵ Vermont State Legislature, SB 132.

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 codified the bill into law.⁸ Minnesota HF 16 prohibits the advertisement of conversion therapy from 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 v. 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 offers an example of how local jurisdictions in states without conversion therapy bans can restrict the practice in their own area of authority.

⁶ Vermont State Legislature, SB 132.

⁷ Human Rights Campaign, "Human rights campaign celebrates Minnesota governor Tim Walz for signing statewide 'conversion therapy' ban into law," Human Rights Campaign, accessed November 10, 2023, <https://www.hrc.org/press-releases/human-rights-campaign-celebrates-minnesota-governor-tim-walz-for-signing-statewide-conversion-therapy-ban-into-law>.

⁸ Casey Quinlan, "Minnesota Becomes 21st State to Ban Dangerous 'Conversion Therapy,'" American Journal News, April 13, 2023, <https://americanjournalnews.com/minnesota-21st-state-ban-dangerous-conversion-therapy/>.

⁹ Minnesota State Legislature, House, HF 16, 2023.

¹⁰ Washington State Legislature, Senate, SB 5722, 2018.

¹¹ Brendan Pierson, "Conversion Therapy Ban Challenge Will Not Be Reheard by Appeals Court," Reuters, January 23, 2023, <https://www.reuters.com/legal/litigation/conversion-therapy-ban-challenge-will-not-be-reheard-by-appeals-court-2023-01-23/>.

¹² Dori Olmos, "St. Louis Bans Conversion Therapy on Minors," KSDK, December 23, 2019, <https://www.ksdk.com/article/news/local/conversion-therapy-st-louis-ban-minors/63-e5bc9149-c253-4bbc-b08a-783f8e8c7869>.

¹³ St. Louis Board of Aldermen, Board Bill 152, 2019.

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 practitioners' by “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 different U.S. Appellate Court circuits, including in the case of *Tingley 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. In 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.”¹⁷ 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 non-heterosexual desires and behaviors conflict with their religious teachings”¹⁸ to “fundamentalist Christian conversion programs.”¹⁹

The Supreme Court rejected the free speech argument in the case of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, determining that speech in conversion therapy procedures for both sexual reorientation and gender identity to be “part of the medical practice” and subsequently, “subject to reasonable licensing and regulation by the State.”²⁰ As a result, legal scholars generally perceive the practice of conversion therapy to be defined as “protected

¹⁴ *Pickup v. Brown*, No. 12-17681 (9th Cir. 2020), <https://cdn.ca9.uscourts.gov/datastore/opinions/2013/08/29/12-17681.pdf>.

¹⁵ Kathleen Stoughton, “Toxic Therapy: Examining the Constitutionality of Conversion Therapy Bans in Light of *Otto*,” *The American University Journal of Gender, Social Policy & the Law* 30, no. 1 (2022): 81-106, <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1840&context=jgspl>.

¹⁶ Jordan Hutt, “Anything but Prideful: Free Speech and Conversion Therapy Bans, State-Federal Action Plans, and Rooting out Medical Fraud,” *FLASH: The Fordham Law Archive of Scholarship and History*, 2023, <https://ir.lawnet.fordham.edu/flr/vol92/iss1/7/>.

¹⁷ Mason D. Bracken, “Torture Is Not Protected Speech: Free Speech Analysis of Bans on Gay Conversion Therapy,” *Washington University Journal of Law & Policy* 63 (2020): 325+, https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=2173&context=law_journal_law_policy.

¹⁸ Brian D. Earp, Anders Sandberg, and Julian Savulescu, “Brave New Love: The Threat of High-Tech “Conversion” Therapy and the Bio-Oppression of Sexual Minorities,” *Taylor & Francis*, January 30, 2014, <https://www.tandfonline.com/doi/full/10.1080/21507740.2013.863242>.

¹⁹ Douglas C. Haldeman, “The Practice and Ethics of Sexual Orientation Conversion Therapy,” *American Psychological Association*, 1994, <https://psycnet.apa.org/record/1994-34347-001>.

²⁰ Harvard Law Review Association, “First Amendment - Professional Speech - Eleventh Circuit Invalidates Minor Conversion Therapy Bans,” *Harvard Law Review* 134, no. 8 (2021): 2863+, <https://harvardlawreview.org/print/vol-134/otto-v-city-of-boca-raton/#:~:text=Eleventh%20Circuit%20Invalidates%20Minor%20Conversion%20Therapy%20Bans.&text=Conversion%20therapy%2C%20also%20known%20as,sexual%20orientation%20or%20gender%20identity>.

professional speech,”²¹ which lowers the level of scrutiny required by the court, as it 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 constitutes conduct versus what constitutes speech under the medical practice.

Another legal issue at stake in conversion therapy is the violation of informed consent. Informed consent is defined as “the process in which a health care provider educates a patient about the risks, benefits, and alternatives of a given procedure or intervention.”²³ This is both an “ethical and legal obligation”²⁴ for providers, as it provides a more direct ability for a patient to regulate what happens to their body. A key element of informed consent is the “collaborative process allowing patients and healthcare providers to make decisions together,”²⁵ designed to give the patient a choice in their treatment. Informed consent becomes difficult to obtain in procedures involving conversion therapy as the information shared by practitioners may be inaccurate in some cases, such as conversion therapy procedures during which practitioners tell “patients that homosexuality is a mental disorder because of practitioner beliefs.”²⁶ This belief is not scientifically supported, as represented by the removal of homosexuality as a diagnosis in the second edition of the American Psychological Association’s Diagnostic and Statistical Manual.²⁷ As a result, the presentation of this opinion as medical information can be marked as inaccurate and may ultimately serve to skew a patient's perspective of the procedure to which they are consenting.

Case Precedent

The constitutionality of conversion therapy bans is being considered in the 2023-2024 Supreme Court session in a case called *Tingley v. Ferguson*. In this case, the plaintiff challenged Washington’s conversion therapy ban under the First and Fourteenth Amendment.²⁸ This case was appealed from the 9th Circuit Federal Court, where the court held that the regulation of conversion therapy ban may have on speech is merely incidental. The justices in this case used case precedent from *Pickup v. Brown*, where it was held by the 9th Circuit that professional speech is most safeguarded by First Amendment protections when it is public facing. These

²¹ Harvard Law Review Association, "First Amendment - Professional Speech - Eleventh Circuit Invalidates Minor Conversion Therapy Bans."

²² James Hampton, “The First Amendment and the Future of Conversion Therapy Bans in Light of National Institute of Family and Life Advocates v. Harris,” *Berkeley Journal of Gender, Law and Justice* 35 (2020): 169-193, https://heinonline.org/HOL/Page?handle=hein.journals/berkwolj35&div=8&g_sent=1&casa_token=&collection=journals.

²³ Parth Shah, Imani Thornton, Danielle Turrin, and John E Hipskind, “Informed Consent,” *National Library of Medicine*, June 5, 2023, <https://www.ncbi.nlm.nih.gov/books/NBK430827/>.

²⁴ Shah et. al., “Informed Consent.”

²⁵ Shah et. al., “Informed Consent.”

²⁶ Jack Drescher, Alan Schwartz, Flávio Casoy, Christopher A McIntosh, Brian Hurley, Kenneth Ashley, Mary Barber, et al., “The Growing Regulation of Conversion Therapy,” *Journal of Medical Regulation*, 2016, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5040471/>.

²⁷ Jack Drescher, “Out of DSM: Depathologizing Homosexuality,” *Behavioral Sciences*, December 4, 2015, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4695779/>.

²⁸ SCOTUSblog, “Tingley v. Ferguson,” SCOTUSblog, accessed November 11, 2023, <https://www.scotusblog.com/case-files/cases/tingley-v-ferguson/>.

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 Fourteenth Amendment. Because of the use of the Professional Speech Doctrine introduced in *NIFLA v. Becerra*, the court denied an elevated First Amendment review, thus *Pickup v. Brown* remained binding law and controlled the outcome of this case.²⁹ The outcome of this case was supported not only by the Circuit precedent, but also the longstanding tradition of constitutional regulation of medical practices. *Tingley v. Ferguson* has been appealed to the Supreme Court, asking the Justices to consider if this ruling violates the free speech clause of the First Amendment, and whether a law that primarily burdens religious speech is neutral, and if so, whether the court should overrule *Employment Division v. Smith*, where the court held that consuming peyote in violation of employment policies could be punished even if the use of this drug was for the purpose of religion.³⁰

In the 11th Circuit case *Otto v. City of Boca Raton*, the 11th Circuit's ruling differed from the 9th Circuit's ruling in *Tingley v. Ferguson*, stating that the conversion therapy restrictions in question constituted both viewpoint and content discrimination, thus triggering heightened scrutiny. This means that the threshold for proving that these laws are constitutional is higher, and that the impetus for proving this is on the governing body.³¹ Citing *National Institute for Family and Life Advocates v. Becerra*, the 11th Circuit Court held that professional speech, like other forms of speech, is protected under the free speech clause of the First Amendment.³² This case further cited *Wollschlaeger v. Governor of Florida*, a case in the 11th Circuit which ruled a law restricting doctors' ability to discuss gun safety with their patients was a violation of the First Amendment's free speech clause, as the entirety of the professional conduct under scrutiny consisted of speech, much like the entirety of the professional conduct in question in *Otto v. Boca Raton* – conversion therapy – consists solely of speech.³³

The Boca Raton ordinance that was overturned in *Otto v. Boca Raton* went to extensive lengths explaining both the evidence of the harms of conversion therapy, as well as the constitutionality of a ban on conversion therapy in the original ordinance itself. The city cited numerous medical studies and *Pickup V. Brown* to justify the ordinance. They even went as far as to stipulate that they are not attempting to restrict practitioners from any action other than the explicit treatment of conversion therapy on minors.³⁴ It seems the primary factor that undermined this ordinance in

²⁹ *Brian Tingley V. Robert W. Ferguson*, (9th Circuit, 2022).

³⁰ SCOTUSblog, "Tingley v. Ferguson," SCOTUSblog, accessed November 11, 2023, <https://www.scotusblog.com/case-files/cases/tingley-v-ferguson/>.

³¹ *Otto v. City of Boca Raton*, No. 19-10604 (11th Cir. 2020), <https://law.justia.com/cases/federal/appellate-courts/ca11/19-10604/19-10604-2020-11-20.html>; *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020).

³² Harvard Law Review, "Otto v. City of Boca Raton," *Harvard Law Review*, March 24, 2023, <https://harvardlawreview.org/print/vol-134/otto-v-city-of-boca-raton>.

³³ Rodney A. Smolla, "Professional speech and the First Amendment," *West Virginia Law Review*, accessed November 14, 2023, <https://wvlawreview.wvu.edu/files/d/334f2689-85bb-450f-ad94-3094f1f39cc3/post-pp-smolla-monteleone.pdf>.

³⁴ Boca Raton City Council, Ordinance 5407, 2017.

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 therapy,³⁶ but 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've 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 On December 11th, 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 the ADF to pursue litigation in many areas of law, and they have done so very successfully. The 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); *Brian 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-usa-court-gayconversion/u-s-top-court-rejects-gay-conversion-therapy-ban-challenge-idUSKBN17X1SJ>.

³⁷ C. McMillion, & K. Vance, "Criticism from Below: The Supreme Court's Decision to Revisit Cases," *Journal of Law and Courts* 5, no.1 (2017): 81-103, doi:10.1086/690086.

³⁸ Howe, Amy. "Justices Won't Hear 'Conversion Therapy' Case," SCOTUSblog, December 11, 2023, <https://www.scotusblog.com/2023/12/justices-wont-hear-conversion-therapy-case/>.

³⁹ Southern Poverty Law Center, "Why Is Alliance Defending Freedom a Hate Group?" Southern Poverty Law Center, April 10, 2020, <https://www.splcenter.org/news/2020/04/10/why-alliance-defending-freedom-hate-group>.

⁴⁰ Alliance Defending Freedom, "Issues," Alliance Defending Freedom, September 18, 2023, <https://adfllegal.org/issues/overview>.

⁴¹ Southern Poverty Law Center, "Alliance Defending Freedom," Southern Poverty Law Center, accessed November 14, 2023, <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom>.

⁴² Arthur S. Leonard, "Alliance Defending Freedom Asks Scotus to Strike down Conversion Therapy Bans," Gay City News, March 30, 2023, <https://gaycitynews.com/alliance-defending-freedom-supreme-court-strike-down-laws-conversion-therapy/>.

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 14, 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.

Contact: Professor Anthony “Jack” Gierzynski, 517 Old Mill, The University of Vermont, Burlington, VERMONT 05405, phone 802-656-7973, email agierzyn@uvm.edu.

Disclaimer: The material contained in the report does not reflect the official policy of the University of Vermont.