

THE SUPREME COURT OF THE UNITED STATES

SPRING TERM, 2020

DOCKET NO. 16-1513

THOMAS SMITH, et al.,
Petitioners,
v.

JUDITH BELL, et al.,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

Brief for Respondent/Petitioner

Team #32

Issue #1

[REDACTED]

Issue #2

[REDACTED]

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Caitlin Ryan et al., *Parent-Initiated Sexual Orientation Change
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Conversion Therapy and LGBT Youth Update, WILLIAMS INST.,
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content/uploads/Conversion-Therapy-LGBT-Youth-Update-June-
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Equality Maps: Conversion Therapy Laws, MOVEMENT ADVANCEMENT PROJECT,
https://www.lgbtmap.org/equality-maps/conversion_therapy
(last visited Feb. 16, 2020). 15

Hunter Moyler, *Virginia Could Become the 20th State to Ban Gay
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*Report of the American Psychological Association Task Force on
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<i>Sophie Lewis, Former Conversion Therapy Leader Comes Out as Gay and Apologizes to Community</i> , CBS NEWS (Sept. 3, 2019, 5:35 PM), https://www.cbsnews.com/news/former-conversion-therapy-leader-comes-out-as-gay-and-apologizes-to-community/	20
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Questions Presented

1. Is the free speech clause of the First Amendment violated when states, in the interest of the public health of their minor citizens, ban licensed counselors from performing conversion therapy methods on minors?
2. Do parents have a fundamental right to subject children to conversion therapy under substantive due process in the Fourteenth Amendment?

Opinion Below

Smith v. Bell, No.16-1513 (13th Cir. 2019).

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Introduction

This Court should affirm the Thirteenth Circuit's ruling for two reasons: (1) A2211 is a constitutional regulation on a widely-disavowed medical practice, and (2) parents do not have a fundamental right to subject their children to conversion therapy by licensed counselors.

States have the right to regulate their medical communities in order to protect public health. Although A2211 regulates "talk therapy," in which licensed counselors administer treatment through language, it is a conduct regulation that

incidentally burdens speech, subjected to lessened scrutiny because it regulates conversion therapy as a medical procedure, not as expressive speech. Further, A2211 does not discriminate based on viewpoint because it allows conversion therapists to express their opinions, publicly and privately, on conversion therapy.

Even if this Court decides that A2211 is a content-based restriction, is not required to apply strict scrutiny. Although this Court rejected the "professional speech" doctrine in *National Institute of Family and Life Associates v. Becerra* that the Third and Ninth Circuits relied on in upholding conversion therapy bans, it did not foreclose the possibility that a category of speech related to professional conduct could receive lessened scrutiny. Conversion therapy bans present this Court a quintessential example of speech by professionals that should receive deferential review: states must be able to regulate the practices of their talk therapists just like they regulate the practices of their nurses, oncologists, and surgeons.

Finally, A2211 survives any standard of review. Its compelling interest in protecting its minor citizens from the dangers of conversion therapy is sufficiently narrowly-tailored in A2211 because it regulates only the practice of conversion therapy methods by licensed counselors on minors.

Furthermore, Texarkana did not violate parents' Fourteenth Amendment due process rights when it banned conversion therapy for minors. While parents have substantive due process rights to direct the upbringing of their children, that right is not unlimited. Laws that do not impact fundamental rights are subject to rational basis review. States must have reasonable control over parental decisions regarding children because the mental and physical health of children is part of a state's public health responsibility. Texarkana reasonably prohibited parents from seeking licensed counselors to perform conversion therapy on children.

Even if this Court finds that parents have a fundamental right to subject their children to conversion therapy, A2211 survives strict scrutiny. Texarkana has a compelling governmental interest in the welfare of children and is not substantially impeding on parental rights to direct their children's upbringing. The law is narrowly tailored because it does not outright ban parents from seeking the therapy through other means, it only bans licensed counselors from offering it to minors.

Statement of the Case

Respondent Judith Bell, Governor of Texarkana, passed Ta. Stat. Ann. 21:1-23-24 (hereinafter "A2211") in 2018 to protect

Texarkanan children from the dangers of conversion therapy. R. at 2-3. A2211 defines "conversion therapy" as any practice that seeks to change a person's sexual orientation. *Id.* at 3. In passing A2211, Texarkana cited a 2009 American Psychological Association report, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, AM. PSYCH. ASS'N 2-3 (2009) (hereinafter "2009 APA Report") that found efforts to change same-sex attractions are ineffective and pose "critical health risks." *Id.* at 2.

Petitioners are Drs. Smith, licensed counselors who perform non-aversive conversion therapy, and John and Jane Doe, who seek to subject their children to conversion therapy at the Smiths' practice. *Id.* at 2. Two days after A2211 was signed into law, Petitioners brought suit against Respondents, alleging that A2211 violated their First Amendment free speech rights, and their Fourteenth Amendment rights as parents to direct the upbringing of their children. *Id.* at 3. The District Court granted summary judgment for Respondents, and Petitioners appealed. *Id.* The Thirteenth Circuit affirmed, rejecting both Petitioners' First and Fourteenth Amendment arguments. *Id.*

In ruling in Respondents' favor on free speech, the Thirteenth Circuit analyzed A2211 as a regulation on the speech of medical providers. *Id.* at 4. The court determined intermediate scrutiny was the appropriate standard of review to

“strike the appropriate balance” between healthcare professionals’ First Amendment Rights and states’ rights to regulate the medical field to protect the health and welfare of its citizens. *Id.* A2211 survived intermediate scrutiny. *Id.*

The court then held that A2211 did not violate parents’ Fourteenth Amendment rights to direct the upbringing of their children. *Id.* at 5. Noting that parental rights are not without limit, the court stated that Petitioners did not have a constitutional right to one specific type of treatment for their children if the government has reasonably restricted that treatment. *Id.* Petitioner filed a timely appeal.

Argument

- I. A2211 is constitutional under the free speech clause of the First Amendment because states have a right to regulate medical malpractice, particularly in regard to minors.

The First Amendment, as applied to the states through the Fourteenth Amendment, U.S. CONST. amend. XIV, prohibits laws “abridging the freedom of speech.” U.S. CONST. amend I. It does not, however, prohibit laws that regulate ineffective, misleading, and dangerous medical procedures that the state has defined as malpractice. ROBERT C. POST, *DEMOCRACY, EXPERTISE, ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 45 (2012). In passing A2211, Texarkana, like nineteen other states and

counting,¹ banned conversion therapy on minors because the scientific community has refuted all forms of conversion therapy as ineffective, dangerous, and misleading, particularly when practiced on minors. *Conversion Therapy and LGBT Youth Update*, WILLIAMS INST., <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Conversion-Therapy-LGBT-Youth-Update-June-2019.pdf> (last visited Feb. 16, 2020).

In this case, this Court must consider the complexities that arise from talk therapy in the line between speech, which is afforded full First Amendment protection, and conduct that incidentally implicates speech, which receives lesser protection. *Pickup v. Brown*, 740 F.3d 1208, 1225 (9th Cir. 2014) (discussing the difference between speech and conduct). A2211 falls squarely into the first category of conduct regulation. This Court has found that laws which regulate medical professionals' speech as part of a medical procedure are conduct regulations that incidentally burden speech without violating

¹ Hunter Moyler, *Virginia Could Become the 20th State to Ban Gay Conversion Therapy After Bill Passes in State Senate*, NEWSWEEK (Jan. 22, 2020, 5:31 PM), <https://www.newsweek.com/virginia-could-become-20th-state-ban-gay-conversion-therapy-after-bill-passes-state-senate-1483540>.

the First Amendment. *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) (opinion of O'Connor, Kennedy, and Souter, J.J.).

If this Court considers A2211 a regulation of speech, it is viewpoint neutral because it merely restricts counselors from practicing conversion therapy, without restricting counselors' rights to privately or publicly express their personal opinions on it. *King v. Gov. of N.J.*, 767 F.3d 216, 237 (2014).

However, if this Court determines A2211 restricts speech, it is also likely to find that the law is content-based. *King*, 767 F.3d at 236. Even when courts consider conversion therapy bans content-based speech regulations, which are normally subject to strict scrutiny, those courts have been extremely reluctant to apply such a high standard because of the state's interest in regulating medical procedures. *See, e.g., id.*; *Hamilton v. City of Boca Raton*, 353 F. Supp. 3d 1237, 1258 (S.D. Fla. 2019).

Finally, A2211 survives any level of scrutiny because it is narrowly tailored and the least restrictive means of achieving Texarkana's compelling interest in protecting its minors from harmful medical treatments.

A state must be able to regulate the practice of medicine in order to safeguard the health of its citizens from harmful practices and practitioners. *Watson v. State of Maryland*, 218 U.S. 173, 176 (1910). Why, then, would treatments by conversion

therapists receive special First Amendment protections, merely because conversion therapists use language as a tool? This Court should apply a deferential standard to clarify that states may regulate harmful procedures by talk therapists in the same manner they can regulate harmful procedures by other health professionals.

A. A2211 is a regulation of conduct that incidentally burdens speech, which demands judicial deference and lessened scrutiny.

Courts have routinely given greater First Amendment deference to conduct regulations that incidentally burden speech. *See, e.g., Casey*, 505 U.S. at 884; *Pickup*, 740 F.3d at 1225. Furthermore, healthcare professionals have First Amendment rights, but when a law regulates a medical procedure, those rights are implicated as part of the practice of medicine, which is subject to regulation. *Casey*, 505 U.S. at 884 (citing *Wooley v. Maynard*, 430 U.S. 705 (1977)). Finally, speech is merely implicated rather than abridged by A2211 because conduct regulations do not run afoul of the First Amendment for the sole reason that the conduct is carried out through language. *See, e.g., Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949); *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. Of Psychology*, 228 F.3d 1043, 1054 (9th Cir.

2000) (holding that the First Amendment does not afford special protections to talk therapists).

A2211 is a regulation of medical conduct because conversion therapy is a form of “treatment” performed by licensed professionals, and it only incidentally burdens speech because the treatment is carried out through language. *Casey*, 505 U.S. at 884 (finding that an informed-consent requirement for abortion procedures was a conduct regulation that incidentally burdened speech because it regulated speech as part of the practice of medicine); *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. 2361, 2373 (2018) (distinguishing notice requirements for pregnancy crisis centers from the informed-consent requirement in *Casey* because the notice requirements were not tied to a procedure).

The Third Circuit and the Ninth Circuit both upheld conversion therapy bans in 2014. *King*, 767 F.3d 216, 237 (2014); *Pickup*, 740 F.3d at 1225. But this Court’s ruling in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. at 2373 (hereinafter *NIFLA*), refused to recognize a category of “professional speech” that both circuits had relied upon to justify regulating the speech of licensed counselors, throwing the precedent of conversion therapy bans into uncertainty. Since *NIFLA*, one district court has struck down a conversion therapy ban, *Vazzo v. Tampa*, 2019 U.S. Dist. LEXIS 35935, *18-19 (M.D.

Fla., Jan. 30, 2019), but two have upheld them. *Hamilton*, 353 F. Supp. 3d at 1258; *Christopher Doyle, LPC v. Hogan*, 2019 U.S. Dist. LEXIS 160709 (D. Md., Sept. 20, 2019).

Notably, in *NIFLA*, this Court cited *Casey* as an example of a conduct regulation with incidental burdens on speech because it regulated speech “as part of the *practice* of medicine, subject to reasonable licensing and regulation by the State.” *Nat’l Inst. of Family & Life Advocates*, 138 S. Ct. at 2373. *NIFLA* further suggested that regulations “tied to a [medical] procedure” would more likely fall in the category of conduct. *Id.* Under this Court’s construction in *NIFLA*, A2211 is a conduct regulation because it pertains to the practice of a medical procedure. *Id.*; R. at 2-3. Conversion therapy as defined by A2211 can only be performed during the provisioning of a medical treatment because the law only applies to practice by licensed counselors, R. at 3, which fits squarely within the conduct framework provided by *Casey* and *NIFLA*.

Further, A2211 only incidentally burdens speech rather than abridges it because it proscribes a medical treatment that uses language as a tool, without proscribing the language itself. R. at 3. Psychologists, psychiatrists, and counselors are medical professionals and are subject to licensing requirements accordingly. Talk therapy is undoubtedly a medical procedure used to treat mental health issues, R. at 2, n.1 (describing

non-aversive “talk” therapy as a treatment). Talk therapists use language as a tool to treat their patients like other licensed professionals use casts, gauze pads, or antibiotics. Treating a medical procedure solely as “speech” entirely ignores the actual purpose of the practice: to treat patients, not solely to convey a message. R. at 2 (stating that Petitioners’ purpose in conversion therapy is to “reduce or eliminate same-sex attraction.”) When states began banning lobotomies, they were not outlawing ice picks—they were banning licensed professionals from using ice picks in a harmful, dangerous medical procedure. Analogously, A2211 does not abridge speech itself, but instead the use of language by licensed counselors to practice conversion therapy on minors.

B. A2211 is viewpoint neutral because it permits counselors to express their opinion on conversion therapy.

Viewpoint discrimination is particularly offensive to the First Amendment, and occurs when the government regulates speech based on the particular views of the subject. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). However, A2211 does not prohibit licensed counselors who are proponents of conversion therapy, such as Petitioners, from expressing their viewpoints on conversion therapy, even to their minor clients. R. at 2-3. Instead, A2211 only prohibits

counselors from practicing conversion therapy on those clients: counselors can discuss their viewpoint to their minor clients and to the public that they believe conversion therapy is effective. *Id.* A counselor could even state to the patient, "it is my opinion that conversion therapy would help you," without running afoul of the statute. *Id.*

Although a counselor who practices conversion therapy is "implicitly communicating the viewpoint that such practice is effective and beneficial," *King*, 767 F.3d at 237, this implicit communication is insufficient to amount to viewpoint discrimination. If banning a medical treatment discriminated against the viewpoint that the treatment is beneficial, then every law banning lobotomies, bloodletting, leeching, or trepanation would be unconstitutional. *King*, 767 F.3d at 237. A2211, like any other law regulating malpractice, is viewpoint-neutral because it prohibits only the practice of conversion therapy, while unaffected the ability of licensed counselors to engage in public and private sharing of their viewpoints.

C. If this Court determines A2211 is a content-based regulation, it should apply rational basis or intermediate scrutiny in order to allow states to regulate medical conduct by licensed counselors.

A content-based law is not automatically subject to strict scrutiny. *King*, 767 F.3d at 246. In fact, applying strict

scrutiny to conversion therapy would create the absurd result of effectively deregulating the entire practice of talk therapy.

Id. The only court that has applied strict scrutiny to a conversion therapy ban, a district court in Florida, only did so because it felt compelled by its binding precedent from the Eleventh Circuit's decision in *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293 (2017) and this Court's decision in *NIFLA*, and did not decide the case on the free speech issue. *Vazzo*, 2019 U.S. Dist. LEXIS 35935 at *18-19. Other courts that held conversion therapy bans were content-based, and thus typically subject to strict scrutiny, have taken great lengths to apply intermediate scrutiny instead in order to allow states to regulate the medical field to protect public health. *See, e.g., King*, 767 F.3d at 246; *Hamilton*, 353 F. Supp. at 1258; *Christopher Doyle, LPC*, 2019 U.S. Dist. LEXIS 160709, at *11.

Although this Court refused in *NIFLA* to recognize professional speech as a lesser-protected category of speech, it only did so because the arguments given in that case were unpersuasive. *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2375. Further, this Court noted that it "d[id] not foreclose the possibility that some such reason exists" to recognize professional speech. *Id.* Conversion therapy bans provide a strong basis for this Court to recognize professional speech, or possibly even "talk therapy" speech, because talk therapists use

speech as a tool to treat patients and states must be able to regulate licensed counselors in the course of their practice.

Even after this Court's decision in *NIFLA*, courts have still refused to apply strict scrutiny, preferring instead to distinguish *NIFLA* because the compelled speech at issue in that case was unrelated to a treatment, unlike conversion therapy bans, which are directly related to a treatment. See, e.g., *Hamilton*, 353 F. Supp. at 1256-57; *Christopher Doyle, PLC*, 2019 U.S. Dist. LEXIS 160709, at *10). Further, this Court refused to grant certiorari to both *Pickup* and *King*, leaving both rulings intact, even after the Ninth Circuit refused to recall its decision in *Pickup* after *NIFLA*. *Pickup v. Newsom*, 139 S. Ct. 2622 (2019) (denying certiorari), see also *King v. Murphy*, 139 S. Ct. 1567 (2019) (denying certiorari). By leaving the rulings of the Third and Ninth Circuit intact, this Court left open the possibility that conversion therapy bans could be analyzed under a lesser standard of scrutiny. Ultimately, applying strict scrutiny to A2211 would also have the absurd effect of potentially deregulating the entire profession of talk therapy merely because speech is the tool with which they treat their patients.

D. Under any level of scrutiny, A2211 is constitutional.

- i. Protecting minors from harm is a widely-recognized compelling state interest.

All levels of scrutiny require that the state have a compelling interest. Texarkana has a compelling interest in protecting its children. *Sable Commc'ns of Calif., Inc. v. FCC*, 492 U.S. 115, 126 (1989). The dangers of conversion therapy are "real, not merely conjectural," and A221 "will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys. Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994) (citations omitted); see also 2009 APA Report at 2-3. Nineteen other states, the District of Columbia, Puerto Rico, and dozens of municipalities have passed similar laws regulating conversion therapy.² Nearly every psychiatric and psychological association discourages its use.³ Although Texarkana only prohibits licensed counselors from practicing conversion therapy, and unlicensed counselors might

² *Equality Maps: Conversion Therapy Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/conversion_therapy (last visited Feb. 16, 2020).

³ *The Lies and Dangers of Efforts to Change Sexual Orientation or Gender Identity*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/the-lies-and-dangers-of-reparative-therapy> (last visited Feb. 16, 2020).

still try to change the same-sex attractions of Texarkanan minors, Texarkana's interest in creating laws to regulate harm to its children is not subverted. "[The Court] will not punish [a government] for leaving open more, rather than fewer, avenues of expression, especially when there is no indication that the selective restriction of speech reflects a pre-textual motive." *Williams Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1670 (2015). Thus, Texarkana clearly has a compelling interest in banning conversion therapy's practice on minors.

ii. A2211 survives rational basis review.

Rational basis review requires that a law be rationally related to a legitimate government interest. *Pickup*, 740 F.3d at 1231. A2211 is rationally related to Texarkana's compelling interest in protecting minors from being harmed by conversion therapy. R. at 3. The Ninth Circuit in *Pickup* held that a similar ban to A2211 easily survived rational basis review in part because it relied on the same 2009 APA Report that Texarkana relied upon. *Id.* at 1224. Further, "[u]nder rational basis review, '[w]e ask only whether there are plausible reasons for [the legislature's] action, and if there are, our inquiry is at an end.'" *Id.* at 1232 (quoting *Romero-Ochoa v. Holder*, 712 F.3d 1328, 1331 (9th Cir. 2013)). Thus, the Texarkana legislature need only have a plausible reason to ban conversion

therapy. The Third Circuit in *King* noted, “[i]t is not too far a leap in logic to conclude that a minor client might suffer psychological harm if repeatedly told by an authority figure that her sexual orientation—a fundamental aspect of her identity—is an undesirable condition.” *King*, 767 F.3d at 239. Thus, A2211 is rationally related to Texarkana’s interest in protecting Texarkanan children from conversion therapy.

- iii. A2211 is narrowly tailored and survives intermediate scrutiny.

When applying intermediate scrutiny, no federal court has found that a conversion therapy ban was unconstitutional. *King*, 767 F.3d at 240; *Hamilton*, 353 F. Supp. 3d at 1267; *Christopher Doyle, LPC*, 2018 U.S. Dist. LEXIS at *18). Intermediate scrutiny requires that the law be narrowly tailored to serve a state’s compelling interest. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Thus, Texarkana was required to craft a law “whose scope is in proportion to the interest served.” *King*, 767 F.3d at 239. A2211 is narrowly tailored to serve the compelling interest of protecting LGB minors from conversion therapy because the scope of the ban proportionally prohibits only conversion therapy performed by licensed counselors on minors—the direct source of the harm to Texarkanan children.

Further, Texarkana limited A2211 to licensed counselors. R. at 3. It is entirely within a state's purview to regulate its professionals from performing malpractice. *Ohralik v. Ohio St. Bar Ass'n*, 436 U.S. 447, 467 (1978). Texarkana has every right to remove the source of the harm caused to minors through conversion therapy by banning the therapy itself, just like states have banned electro-convulsion therapy for minors under sixteen. 25 TEX. ADMIN. CODE § 405.103 (2019). A2211 is tailored so that it does not prohibit public speech by licensed counselors, only their actions in private with their clients. "There is a difference, for First Amendment purposes, between regulating professionals' speech to the public at large versus their direct, personalized speech with clients." *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011); see also *Wollschlaeger*, 848 F.3d at 1335 (Tjoflat, J., concurring). In addition, Texarkana limited the law only to minors and not all individuals. Adults are allowed to choose whether they wish to undergo conversion therapy because adults are more likely to be secure in their understanding of their own wants and desires. Thus, A2211 is narrowly tailored to suit Texarkana's compelling state interest.

- iv. Texarkana's outstanding interest in ensuring the health of its LGB children survives even strict scrutiny.

Strict scrutiny, like intermediate scrutiny, requires that a law be narrowly tailored and serve a compelling government interest, but has the additional hurdle that this be achieved through the least-restrictive means available to the government. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). A2211 is the least-restrictive means of preventing the harm to minors caused by conversion therapy. Conversion therapy's harm is caused inherently by the therapy itself because minors who are subjected to conversion therapy have higher rates of depression and suicidality.

Further, the lack of research surrounding non-aversive conversion therapy cannot be construed to mean that conversion therapy is harmless. "A state legislature is not constitutionally required to wait for conclusive scientific evidence before acting to protect its citizens from serious harm." *King*, 767 F.3d at 239 (citing *Playboy Entm't Grp.*, 529 U.S. at 822). Further, overwhelming scientific evidence is not required when a legislature's conclusion based on its judgment is highly plausible. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). The difficulty in researching conversion therapy lies within the incredibly harmful nature of subjecting a child to either aversive or non-aversive forms of conversion therapy. The common understanding that conversion therapy is harmful arises instead from first-hand accounts of survivors.

One former conversion therapist, McKrae Game, even publicly denounced conversion therapy practices, apologized, and came out as gay himself.⁴ States are not required to wait until scientific research is "complete" in order to legislate an issue that it, and society, finds abhorrent. *Nixon*, 528 U.S. at 391. As Justice Thomas stated in *NIFLA*, "[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market," - and the people lose when the government is the one deciding which ideas should prevail." *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2375 (quoting *Abrams v. United States* 250 U.S. 616, 630 (Holmes, J., dissenting)). The "test of truth" that conversion therapy is an outdated and harmful treatment has clearly "[gotten] itself accepted" by the public well before Texarkana chose to regulate it. *Id.* No less-restrictive means exists to protect Texarkana's goal of protecting children from conversion therapy than removing the source of the harm.

⁴ Sophie Lewis, *Former Conversion Therapy Leader Comes Out as Gay and Apologizes to Community*, CBS NEWS (Sept. 3, 2019, 5:35 PM), <https://www.cbsnews.com/news/former-conversion-therapy-leader-comes-out-as-gay-and-apologizes-to-community/>.

Ultimately, Texarkana must have the same ability to ban harmful forms of talk therapy as it does to ban other harmful “treatments” like bloodletting, leeching, or cocaine. Even if these treatments might be “successful” at times, like bloodletting or leeching might reduce fevers or cocaine might numb a toothache, states must be able to regulate them because they harm more than they heal. 2009 APA Report at 3. And even if conversion therapy might have some “success” stories, those successes pale in comparison to the higher rates of depression, isolation, and suicidality in children who have been told their same-sex attractions are wrong, unnatural, and should be repressed. *Id.* The First Amendment prohibits the abridgement of expressive speech, not a state’s ability to prevent harm to minors. For these reasons, this argument must fail.

II. Texarkana's A2211 is a constitutional ban on conversion therapy that does not violate the Fourteenth Amendment.

A. Parents do not have Fourteenth Amendment rights to subject minors to conversion therapy, a psychological treatment proven to be harmful.

Substantive due process requires that the government cannot unjustifiably deprive a person of "life [or] liberty . . . without due process of law." U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides parents with substantive due process rights regarding the care, custody, and control of their children, *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). The right of parents to direct the upbringing of their children is not unlimited and a state must be able to intervene with parental rights when children are not given the opportunity to mature "into free and independent well-developed men and citizens." *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 165 (1944).

A state government has have some control over parents' decisions when children's physical or mental health is jeopardized. *Parham v. J.R.*, 442 U.S. 584, at 603 (1979). Recognizing that "parents generally do act in the child's best interests," the Court in *Parham* stressed that some parents may not, and this "creates a basis of caution." *Id.* at 602-03.

Through its conversion therapy ban, Texarkanan children are less vulnerable to mental distress and parents who seek licensed conversion therapists are permissibly regulated.

Texarkana is engaging in a public health strategy by limiting conversion therapy. A study from 2018 concluded that adolescents subjected to conversion efforts had increased rates of attempted suicide compared to the rate of LGB youth who had not.⁵ Texarkana wants its minor residents to grow into healthy, well-adjusted, and confident adults who can contribute to Texarkana's communities. Any child who dies by suicide after a therapist told them their feelings were wrong does not have the opportunity to grow into a healthy, well-adjusted, and confident adult. Texarkana can and should place limits on parental power regarding conversion therapy to secure a healthy generation of LGB Texarkanans.

Texarkana can prohibit parents from choosing a treatment if that treatment has a higher potential to harm children than it does to benefit children. People do not have the right to choose a harmful treatment or provider for themselves. *Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993). Because someone does not have the right to choose a harmful treatment for themselves,

⁵ Caitlin Ryan et al., *Parent-Initiated Sexual Orientation Change Efforts*, 67 J. HOMOSEXUALITY 159, 166 (2018).

it follows that someone does not have the right to choose a harmful treatment for another. In one case, the Ninth Circuit ruled patients did not have substantive due process rights to choose an unregulated cancer treatment called Laetrile because it caused cyanide poisoning. *Carnohan v. United States*, 616 F.2d 1120, 1122 (9th Cir. 1980). Just as a person does not have a substantive due process right to use a cancer treatment linked to cyanide poisoning, parents do not have a substantive due process right to subject their children to a therapy linked to depression and increased suicide rates. 2009 APA Report at 22, 77. Parents do not have unlimited decision-making authority in children's lives, and no fundamental right exists to subject youth to a treatment that has the capability of causing depression, anxiety, insomnia, guilt, shame, and suicide.⁶ The mental health of Texarkana's LGB youth should not lie solely in the hands of parents who want to change them using harmful means.

Parents do not have the right to abuse their children, or knowingly subject their children to abuse. There is no federal definition of child abuse in the federal Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C.S. § 5101(g) (providing definitions for CAPTA), but The National Center for Injury

⁶ *Id.*

Prevention and Control defines abuse as any maltreatment of youth under eighteen by a parent, clergy, coach, or teacher, "that results in harm, potential for harm, or threat of harm to a child." *Preventing Child Abuse and Neglect: A Technical Package for Policy, Norm, and Programmatic Activities*, NAT'L CTR. FOR INJURY PREVENTION & CONTROL 8 (2016). Abuse can be verbal, physical, or both. LGB children are more likely to be abused, verbally and physically, by their families. 2009 APA Report at 22, 77. In some courts, a parent who verbally belittles their child about the child's sexual orientation can be convicted of child abuse. *In re T.*, 453 N.Y.S.2d 590, 591-92 (N.Y. Fam. Ct. 1982) (ruling that homophobic verbal abuse still constitutes abuse). When a parent places a child in conversion talk therapy, they are essentially subjecting the child to verbal abuse by exposing them to the potential or actual harms conversion therapy has been proven to cause, including depression, anxiety, insomnia, guilt, shame, and suicide.⁷ Verbal abuse is still abuse, so the act of putting a minor into the hands of a therapist who is trying to verbally "convert" the minor's sexual

⁷ "Cures" For an Illness That Does Not Exist 1 (May 17, 2012), PAN AM. HEALTH ORG., <https://www.paho.org/hq/dmdocuments/2012/Conversion-Therapies-EN.pdf>.

orientation is an act of abuse and will have the effect of abuse on children.

The state intervenes in parents' decision-making authority in many aspects of the law without violating the Fourteenth Amendment. For example, all states require minor occupants in automobiles to have a restraint, booster seat, or car seat depending on the age and size of the child. Lauren Jones, Nicolas Ziebarth, *U.S. Child Safety Seat Laws: Are They Effective and who Complies?*, 36 J. of POL'Y ANALYSIS & MGMT. 584, 593 (2017). A parent could choose put their child in a car unrestrained, but no fit parent would risk the harm that choice may cause if an accident occurs. Petitioners argued below that parents, not the states, should decide whether to subject a child to conversion therapy, a treatment known to put children's mental health at risk. However, the same argument could be extended to child restraint laws. Regardless of whether a parent chooses to ensure their minor occupants are buckled-up, the state mandates parents buckle children up anyway, and any fit parent would recognize the safety of their child mattered more than the minor infringement upon their parental right. A conversion therapy ban is analogous to child restraint laws because it prioritizes child safety over parental choice, and any fit parent would recognize that their child's safety is more important than the "risk" the child might be gay.

When parents prove they have the best interest of their children in mind, the state must “yield to the right of parents.” *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). In *Yoder*, Amish parents were concerned their children would face psychological damage from the hostile environment of traditional school and be susceptible to “pressure to conform to the styles, manners, and ways” of their classmates. *Id.* at 211. The *Yoder* parents were attempting to prevent psychological harm to their children and the community as a whole. *Id.* The parents in the case at bar have the potential of inflicting harm on children by choosing conversion therapy, not preventing it. Children who have undergone conversion therapy report issues including shame and self-harm.⁸ This Court yielded to parents rights in *Yoder* because the parents sought to prevent harm, but the parents in this case wish to inflict potential harm by choosing conversion therapy. This Court cannot “yield to the rights of parents” who may subject their children to harm. *Yoder*, 406 U.S. at 213.

B. Texarkana and A2211 prevail under rational basis because there is no fundamental right at stake and the ban is rationally related to the State’s need to protect minors.

The Thirteenth Circuit correctly ruled in favor of Texarkana and A2211. The Court today should apply rational basis

⁸ *Id.*

as the Ninth Circuit did in *Pickup v. Brown* to Texarkana's boundary on parental rights regarding conversion therapy. 740 F.3d 1208, 1236 (9th Cir. 2014). This Court decided *Meyer* and *Pierce* well before it formulated modern levels of scrutiny, and therefore has never decided whether parents' rights are fundamental. *Meyer*, 262 U.S. at 399-400 (1923). When no deprivation of a fundamental right is at stake, the court must apply rational basis review. *Reno v. Flores*, 507 U.S. 292, 302 (1993) (citations omitted). Under rational basis, a statute is presumed constitutional and the challenger carries the burden of demonstrating the government overstepped its power. *Williamson v. Lee Optical*, 348 U.S. 483, 487-89 (1955). To show the government has overstepped, the challenger must prove the law is not rationally related to a legitimate government interest. *Id.*

Texarkana has a legitimate interest in passing A2211 because governments have an interest in protecting the physical and mental health of youth. Conversion therapy has not only been found to be an ineffective therapy technique, but has proven to be a dangerous treatment, particularly for children. 2009 APA Report at 22. The state must place a limit on parents' rights to protect the welfare of youth in Texarkana and ensure they do not undergo conversion therapy.

C. A2211 even satisfies strict scrutiny because it has a compelling governmental interest in the welfare of children.

Texarkana and A2211 still prevail if the Court wishes to apply strict scrutiny by ruling that parents do in fact have a fundamental right to subject children to conversion therapy. When a state deprives its residents of a fundamental right, strict scrutiny applies. *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977); *Yoder*, 406 U.S. at 215. Under strict scrutiny, a restriction of a fundamental right must be necessary to promote compelling government interests. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

Texarkana is not infringing substantially or directly on parental rights, and it has a compelling interest in the public health of minors to enact A2211. In *Curtis v. School Committee of Falmouth*, the Supreme Judicial Court of Massachusetts ruled that while religious parents did not want teens to have access to condoms at school, the interests of public health prevailed over parental rights. 420 Mass. 749, 757 (1995). If A2211 required parents to accept homosexuality regardless of whether it contravened their religion, Petitioners could argue the law infringes substantially and directly. However, A2211 does not require parents change their beliefs—instead, A2211 merely restricts parents from taking their children to a licensed counselor for conversion therapy. This indirectly affects

parents' rights to make choices for their children because the law was not enacted to infringe upon religious or parental rights, only to prevent mental health issues in young LGB Texarkanans.

If Petitioners in this case could prove their rights are substantially and directly infringed upon by A2211, the burden then falls on Texarkana to prove A2211 is narrowly tailored and there is a compelling government interest to ensure minors do not receive conversion therapy. *Flores*, 507 U.S. at 319. In this case, parents and minors can still seek conversion therapy through means other than state-licensed counselors. R. at 3. Parents can discuss same-sex attractions with their children themselves, find non-licensed religious leaders who offer conversion therapy, or even enroll their children in a religious conversion therapy summer camp. The bill does not add criminal sanctions for parents who seek conversion therapy for their children. R. at 3. Ultimately, parents who want to change their children's same-sex attractions are minimally affected because other options exist for those parents to raise their children. A2211 leaves parents with the option to raise their child as they see fit without subjecting that child to conversion therapy from a licensed counselor, removing Texarkana-licensed counselors from the decision. The law applies to minors, but does not affect anyone who is over the age of eighteen who seeks

conversion therapy from a state-licensed counselor. R. at 3.
Texarkana would be hard-pressed to find other ways to limit the
effects of A2211.

When enacting A2211, Texarkana decided, within its
constitutional rights, that the health and safety of LGB youth
outweighed parental rights. A2211 survives rational basis
because a parent does not have a fundamental right to direct his
or her child to harm and second, because Texarkana is mandated
to protect the health of children. If this Court requires,
Texarkana can also satisfy strict scrutiny because the law is
narrowly tailored to only ban conversion therapy from state-
licensed health professionals.

Conclusion

For the foregoing reasons, Respondent respectfully requests
this Court affirm the judgement of the Thirteenth Circuit.

Respectfully submitted,

/s/ 

Partner 1

/s/ 

Partner 2

Attorneys for Respondent