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Supreme Court Avoids Ruling on Conversion Therapy Bans

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Six members of the US Supreme Court opted against reviewing a lower court decision stipulating that a law banning conversion therapy does not violate the First Amendment.

FRED SCHILLING, COLLECTION OF THE SUPREME COURT OF THE UNITED STATES

Voting 6-3, the US Supreme Court announced on December 11 that it will not review a decision by the San Francisco-based Ninth Circuit Court of Appeals that had reaffirmed that court's earlier ruling that a law prohibiting the performance of "conversion therapy" on minors does not violate the First Amendment rights of licensed counselors who desire to provide such "therapy."

Under the Supreme Court's rules, a petition to review a lower court's decision will be granted if at least four of the justices vote to grant the petition. In this case, Justices Clarence Thomas, Samuel Alito, and Brett Kavanaugh voted to grant the petition. Chief Justice John Roberts and Justices Sonia Sotomayor, Elena Kagan, Neil Gorsuch, Amy Coney Barrett, and Ketanji Brown Jackson voted against granting the petition.

The court normally does not announce how justices vote regarding such petitions, but in this case Justices Thomas and Alito wrote dissenting opinions from the denial of review, and Justice Kavanaugh announced that he would grant the petition. Since it takes only four votes to grant a petition, this revealed that all the other justices voted against doing so.

The case is Brian Tingley v. Robert W. Ferguson. Tingley is a licensed family counselor who has practiced conversion therapy in the past, but who stopped doing so when the state of Washington passed its law, which imposes financial penalties and the possible revocation of licenses for violations. Represented by the religious anti-LGBTQ group Alliance Defending Freedom (ADF), Tingley claimed a violation of his First Amendment rights, citing his religious beliefs about sexuality and gender and asserting that his practice was limited to talk therapy. The lead defendant, Ferguson, is the attorney general of the State of Washington.

The US District Court in Washington was bound to follow an earlier Ninth Circuit precedent rejecting First Amendment challenges to California's ban on conversion therapy for minors. A three-judge panel of the Ninth Circuit affirmed the district court's dismissal of the case. A request for "en banc" review by an expanded panel of judges was rejected.

Tingley's petition posed two questions to the court: "Whether a law that censors conversations between counselors and clients as 'unprofessional conduct' violates the Free Speech Clause; Whether a law that primarily burdens religious speech is neutral and generally applicable, and if so, whether the court should overrule Employment Division v. Smith." Employment Division v. Smith is a 1990 Supreme Court decision holding that laws of general application that are neutral with respect to religion should be upheld if there is a rational basis for them, despite any burden they place on religious practice. Overruling this case has been a major goal of the religious right and is at the top of ADF's Supreme Court agenda. Several justices have suggested reconsidering that precedent in concurring or dissenting opinions over the past few years.

The first question posed by Tingley was a misrepresentation of the Washington law, which does not pertain to ordinary conversations between counselors and clients. It only forbids the actual practice of conversion therapy. Counselors remain free to talk about it and to advocate it, just not to practice the "therapy" on minors. The law also does not apply to religious counselors.

Under the court's rules, one of the strongest factors in determining to grant a petition is that the federal appeals courts are divided in their approach to the issues presented for review. In this case, as both Thomas and Alito argued in their dissents, there is such a split on this question, although Attorney General Ferguson advanced arguments against that conclusion based on distinctions between the laws at issue in these cases.

Conversion therapy, sometimes referred to as "sexual orientation change efforts," is a practice by which some psychiatrists and psychologists seek to alter the sexual orientation or gender identity of an individual. Leading professional organizations in the relevant medical fields have concluded that these practices, even when limited just to "talk therapy" (as opposed to more draconian practices that some practitioners have employed in the past, including surgical lobotomies and "aversion therapy" intended to induce nausea), do not alter sexual orientation or gender identity, while causing psychological injury. More than 20 states and several local governments have legislated against the performance of conversion therapy on minors.

Until relatively recently, courts have uniformly rejected arguments that these bans violate the First Amendment rights of licensed counselors to whom the laws apply, whether by restricting speech or burdening their religious beliefs. This unanimity was broken in 2022 when the Atlanta-based 11th Circuit Court of Appeals struck down a municipal ordinance passed by Boca Raton, Florida, finding that it imposed an unconstitutional restriction on the speech of practitioners who wished to perform this therapy. That court concluded that conversion therapy, as practiced by the plaintiffs in that case, was "pure speech" entitled to the highest level of constitutional protection. The Ninth Circuit panel in Tingley's case specifically disagreed with the 11th Circuit's ruling, standing by its earlier ruling that the state's traditional role of regulating medical practice through its licensing functions supported its authority to ban particular medical procedures that the state deemed to be ineffective or harmful. The Ninth Circuit said this is a regulation of conduct that incidentally burdens speech. Under Employment Division v. Smith, the Ninth Circuit ruled, the law survived any religious free exercise challenge.

Justice Thomas's dissenting opinion channels ADF's petition for Tingley and focuses more on gender identity and transition than on sexual orientation, which has traditionally been the main focus of both the conversion practice and the laws banning it. Many conservative states have recently banned gender-affirming care for minors, and are being sued by transgender minors, their parents, and practitioners, who argue that such bans violate the equal protection rights of minors and the due process liberty rights of their parents to provide such care for their transgender children. To anybody following the litigation over both kinds of laws, Thomas's dissent seems oddly focused, as he appears to conflate the kinds of laws and mix up the arguments about them.

Alito's shorter dissent is more to the point. He writes that the case "presents a question of national importance" as "20 states and the District of Columbia have adopted laws prohibiting or restricting the practice of conversion therapy. It is beyond dispute," he continues, "that these laws restrict speech, and all restrictions on speech merit careful scrutiny." Then he lists the conflicting lower court decisions and argues that Tingley's case "easily satisfies our established criteria" for granting review. This leaves the puzzle of what the three conservatives who voted against review are thinking about this issue.

Before December 11, it seemed like this case would put conversion therapy on the court's docket for decision this term. The court has still to rule on petitions involving "bathroom rules" for transgender students and state bans on gender-affirming care for minors. If the court acts quickly on the bathroom petition it is possible that case could be argued and decided before the court's term ends in June. The court has granted an extension of time for filing papers in the gender-affirming care cases, so a grant of review would most likely result in arguments during the court's next term, which starts in October 2024.