



**TESTIMONY OF GLBTQ LEGAL ADVOCATES & DEFENDERS
IN SUPPORT OF H.140, AN ACT RELATIVE TO ABUSIVE PRACTICES TO CHANGE
SEXUAL ORIENTATION AND GENDER IDENTITY IN MINORS**

Massachusetts Joint Committee on Children, Families and Persons with Disabilities

Submitted by:
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March 5, 2019

GLBTQ Legal Advocates & Defenders works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation through strategic litigation, public policy advocacy, and education. GLAD strongly supports H.140, which prohibits licensed healthcare professionals from engaging in the discredited and harmful practice of seeking to change a minor's sexual orientation or gender identity. So-called "conversion therapy" is a remnant of our nation's shameful history of oppression of lesbian, gay, bisexual and transgender people. Its premise is that homosexuality is abnormal behavior and a mental disorder that must therefore be changed, a view that was rejected by the American Psychiatric Association and other authoritative mental health organizations in 1973. The Massachusetts legislature has a proud history of enacting laws that ensure the health, safety, and welfare of children. The passage of H.140 is a critical step to further that vital state interest.

Summary of Points

GLAD submits this testimony to highlight the following points:

(1) H. 140 is necessary to protect the health and welfare of minors in Massachusetts. So-called “conversion therapy” has been proven ineffective, is contrary to modern medicine, and subjects young people to the risk of suicide and other serious psychological harms.

Massachusetts should join California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and the District of Columbia, as well as over 30 municipalities, in leading the nation forward toward abolition of this antiquated practice. *See* Section I.

(2) H. 140 is well within the state’s established and long-standing authority to regulate the conduct of healthcare and medical treatment, especially with respect to minors. *See* Section II.

(3) Courts have upheld the constitutionality of bans on conversion therapy as within the state’s well-established power to regulate healthcare and legislate for the welfare of children. Importantly, H. 140 is narrowly crafted to prohibit only the *practice* of “conversion therapy,” and does not otherwise restrict speech by healthcare practitioners. In fact, a June 2018 United States Supreme Court case specifically referenced the state’s authority to regulate this type of professional conduct. *See* Section III.

I. “Conversion Therapy” has Been Discredited, is Contrary to Modern Medical Science, and Subjects Minors to Profound Harm.

The history of “conversion therapy” is a disgraceful chapter in our mistreatment of lesbian, gay, bisexual, and transgender people. The practice of “conversion therapy” dates to the mid-twentieth century when homosexuality was considered a mental disorder, and homosexual

conduct was criminalized. Homosexuality was removed from the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association in 1973. Nonetheless, some practitioners have continued to practice “conversion therapy,” most often under the guise of “talk therapy” aimed at eradicating same-sex desire and orientation or a person’s gender identity that is different from their sex designated at birth.

Today, there is a consensus among the medical and mental health professional groups that any such practices are ineffective and unethical and subject patients to significant harm. For example, the American Psychological Association concludes that conversion therapy “may pose serious risk of harm,” such as “confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, and suicidality.”¹ The American Psychiatric Association states that “the potential risks of reparative therapy are great, including depression, anxiety, and self-destructive behavior.”² In addition, the American Academy of Child and Adolescent Psychiatry has determined that there is “no evidence that sexual orientation can be altered through therapy,” and that there is no medically valid basis for attempting to prevent homosexuality, which is not an illness.”³ In October 2015, the federal Substance Abuse and Mental Health Services Administration (SAMHSA) of the United States Department of Health and Human Services,

¹ American Psychological Association. Report of the American Psychological Association Task Force on Appropriate Therapeutic Response to Sexual Orientation, 79, 50. Washington, DC, (2009). Retrieved from <http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>.

² Just the Facts Coalition. Just the Facts about Sexual Orientation and Youth: A Primer for Principals, Educators, and School Personnel, 6-7. Washington, DC: American Psychological Association, 2008. Retrieved from <http://www.apa.org/pi/lgbt/resources/just-the-facts.pdf>.

³ For a list of similar statements by medical and mental health organizations, *see* Human Rights Campaign, The Lies and Dangers of Efforts to Change Sexual Orientation or Gender Identity, <http://www.hrc.org/resources/entry/the-lies-and-dangers-of-reparative-therapy>.

issued a report entitled “Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth,” which included evidence substantiating the ineffectiveness and harm of conversion therapy.⁴ The legislature should enact H.140 in order to protect children and adolescents from those licensed healthcare professionals who subject minors to harm through a practice that has proven not to work, inflicts well-documented and profound suffering, and is far outside the bounds of any ethical or acceptable medical practice today.

II. H. 140 is Well Within the Scope of the State’s Long-established Authority to Regulate Healthcare and Does Not Infringe on Therapists’ Free Speech Rights or Parental Rights.

States have a long-standing and well-established power to regulate healthcare and to ensure that healthcare practices are safe and effective. The state’s right to regulate healthcare is beyond cavil. *See Watson v. State of Maryland*, 218 U.S. 173, 176 (1910) (“There is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine.”); *Commonwealth v. Houtenbrink*, 235 Mass. 320, 323 (1920) (“the practice of medicine is subject to reasonable public regulation by the several states under the police power without offending any provision of the federal Constitution”). The “state’s authority over children’s activities is broader than over like actions of adults.” *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). In fact, Massachusetts invokes its broad regulatory powers in a variety of contexts affecting the health and safety of children. *See, e.g.*, M.G.L. c. 90, § 13A (fining drivers for children not wearing seat belts); M.G.L. c. 90, § 8M (prohibiting cell phone use by minors while driving); M.G.L. c. 270, § 6 (prohibiting sale or gift of tobacco to minors, parents

⁴ Substance Abuse and Mental Health Services Administration Pub. No. 15-4928. Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth (2015). Retrieved from <https://store.samhsa.gov/system/files/sma15-4928.pdf>.

excepted); M.G.L. c. 138 § 34 (prohibiting sale or gift of alcohol to minors under 21, parents and grandparents excepted).

The purpose of licensing and regulating healthcare professionals is to protect patients from harm and to ensure quality of care. For that reason, states can regulate the provider-patient relationship including, as the Supreme Court noted, speech that is “part of the practice of medicine.” *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion). As the Court explained, when speech is “part of the practice of medicine, it is subject to reasonable regulation and licensing by the State.” *Casey* at 884.

The United States Court of Appeals for the First Circuit explained in a constitutional challenge brought by a psychotherapist disciplined by a Massachusetts licensing board: “Simply because speech occurs does not exempt those who practice a profession from state regulation.” *Coggeshall v. Mass. Bd. Of Registration of Psychologists*, 604 F.3d 658, 667 (1st Cir. 2010). In its decision, the First Circuit favorably cited the case *Nat’l Ass’n for the Advancement of Psychoanalysis v. Cal. Bd. Of Psychology*, 228 F.3d 1043 (9th Cir. 2000) (*NAAP*). In that case, the U.S. Court of Appeals for the Ninth Circuit held that the purpose of therapy is not to provide the therapist with an opportunity to express personal views, but rather to benefit the patient by providing treatment. *NAAP*, 228 F.3d at 1054. The Court explained that “it has never been deemed an abridgement 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.” *See* 228 F.3d at 1053. As such, the Court rejected the view that because psychotherapy is the “talking cure,” a different constitutional standard should apply to the regulation of mental healthcare than to other types of medical treatment, 228 F.3d at 1054. *See also Shultz v. Wells*, No. 2:09cv646, 2010 WL 1141452 (M.D. Ala. March 3, 2010) (“[c]learly the state may reasonably regulate

speech in the doctor-patient relationship;” the First Amendment did not protect licensed chiropractor who advised a patient to stop taking certain medications).

The state’s interest in protecting the health, safety, and welfare of children also outweighs a parent’s constitutional right to direct the upbringing of a child, including protecting a minor from physical or emotional harm that may result from a parental decision. For a discussion of the state’s interest in protecting minors from harm vis a vis parental constitutional rights, *see* Letter to Representative Kay Khan from GLBTQ Legal Advocates & Defenders and Boston Bar Association, dated June 16, 2017, attached to this testimony.

Importantly, H. 140 prohibits only a “practice” that “seeks or purports to impose change of an individual’s sexual orientation or gender identity.” It does not penalize a healthcare professional for speaking in a public forum about “conversion therapy.” Nor would it subject a healthcare professional to discipline for recommending conversion therapy or even providing a patient with literature. It prohibits only conduct designed to change a minor’s sexual orientation or gender identity. H. 140 is thus narrowly tailored and consistent with the state’s authority to regulate healthcare without limiting provider speech outside the realm of actual treatment.

III. Courts Have Upheld the Authority of States to Regulate the Harmful Practice of Conversion Therapy.

The two federal appeals courts that have addressed this type of legislation have both upheld the constitutionality of bans on conversion therapy. In *Pickup v. Brown* and *Welch v. Brown* (consolidated on review), the U.S. Court of Appeals for the Ninth Circuit ruled that a California law prohibiting state-licensed therapists from trying to change the sexual orientation or gender expression of a patient under 18 years old could be enforced and did not infringe upon therapists’ rights to free speech or the rights of parents to direct the upbringing of their children.

Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014). In a subsequent decision, *Welch v. Brown*, No. 15-16598, 2016 U.S. App. LEXIS 15444 (9th Cir. Aug. 23, 2016), the Ninth Circuit once again considered a challenge to California’s conversion therapy law and rejected claims that the law violated the religion clauses of the United States Constitution. On May 1, 2017, the U.S. Supreme Court denied the therapist petitioner’s request to review that ruling. *Welch v. Brown*, 137 S. Ct. 2093 (2017). Similarly, in *King v. Governor of N.J.*, the U.S. Court of Appeals for the Third Circuit affirmed that a New Jersey law prohibiting conversion therapy was constitutional. *See King v. Governor of N.J.*, 767 F.3d 216 (3^d Cir. 2014).

Some opponents of laws that prohibit conversion therapy have posited that a June 2018 United States Supreme Court decision, *Nat’l Inst. Of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (referred to as “NIFLA”), provides grounds to challenge the constitutionality of conversion therapy bans. Any such conclusion is a distortion of the Supreme Court’s decision in that case and ignores the Court’s language and reasoning that, in fact, supports exactly the type of state regulation of medical treatment effectuated by laws such as H. 140.

At the outset, it is important to keep in mind that *NIFLA* involved a totally different type of legislation than laws, such as H. 140, that prohibit the practice of conversion therapy. Critically, *NIFLA* did not involve a statute that regulated professional conduct, such as the practice of medicine or psychology. *NIFLA* involved a California statute that applied to “pregnancy crisis centers” that are typically set up by pro-life organizations and discourage abortions. The law at issue mandated that these centers display notices stating the availability of publicly-funded family planning services, including for abortion. Holding that the California law violated the First Amendment’s free speech protections, the Supreme Court characterized the law

as a compelled speech regulation, which because of its content-based nature, had to be subject to strict scrutiny (the most rigorous level of constitutional review). *See NIFLA*, 138 S.Ct. at 2371.

Opponents of conversion therapy bans have latched on to comments of Justice Thomas, the author of the decision, suggesting that “professional speech” must be subject to the highest and most rigorous level of constitutional review applied to state laws that regulate the content of speech. The Court did not make such a ruling, however, and more importantly, Justice Thomas’s comments about the standard to be applied to “professional speech,” do not have the significance for conversion therapy laws that these opponents suggest. The *NIFLA* decision did not state or even suggest that states do not have the authority to prohibit the practice of conversion therapy, or any other medical practice.

To the contrary, clear language in the *NIFLA* case supports the state’s well-established authority to regulate professional conduct, including medical and mental health practices. The Court noted that a state may lawfully regulate professional conduct which only incidentally has an impact on the speech of the professional. *See NIFLA*, 138 S. Ct. at 2373 (“[T]his Court has upheld regulations of professional conduct that incidentally burden speech. The first Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.”).

As an example of the lawful state regulation of conduct that only incidentally burdens speech, the Court pointed out that “[l]ongstanding torts for professional malpractice ... fall within the traditional purview of state regulation of professional conduct.” *Id.* This statement provides a helpful lens through which to understand the lawfulness of conversion therapy laws. Here, the Supreme Court is indicating that the imposition of liability for malpractice against a psychiatrist or psychologist, for example, is well within the state’s authority to prevent harm, and

it does not matter that the medium of the medical practice is speech. Malpractice claims are aimed at the conduct of medical treatment and only incidentally burden speech, a permissible burden in that context. The same is true for laws that prohibit the practice of conversion therapy. Indeed, if the reasoning of opponents of conversion therapy laws prevailed, there could be no such thing as a medical malpractice claim against a psychiatrist or psychologist because, as they assert, such claims involve liability based on the practitioner's speech. The same would be true of disciplinary actions by the state boards regulating the practice of psychiatry or psychology. To the contrary, the legitimacy of medical malpractice claims against psychiatrists, psychologists, and other providers, as well as disciplinary actions by state regulatory boards, is beyond question in American law.

Conversion therapy laws are squarely within the state's authority to regulate the conduct of healthcare and are constitutional under longstanding legal doctrine, including the Supreme Court's recent decision in *NIFLA*.

Conclusion

H. 140 is narrowly tailored to prevent a well-documented risk of harm to minors and to eradicate a purported healthcare practice that is contrary to medical science and based on discredited views of sexual orientation and gender identity. GLAD strongly supports H.140.



June 16, 2017

Representative Kay Khan
House Chair
Joint Committee on Children, Families and Persons with Disabilities
Massachusetts House of Representatives
State House
24 Beacon Street
Room 146
Boston, MA 02133

RE: H.1190 and S.62 – Bills to Ban Conversion Therapy

Dear Representative Khan:

At the hearing on H.1190 and S.62 on June 6, 2017, Representative Hecht requested case law demonstrating that the state's interest in protecting the health, safety, and welfare of children outweighs a parent's constitutional right to direct their child's upbringing. GLBTQ Legal Advocates and Defenders (GLAD) and the Boston Bar Association are pleased to submit this letter in response to that request.

While the U.S. Supreme Court has found that parents have a constitutionally-protected right to direct the upbringing of their children, it has recognized that such a right must yield to the state's demonstrated interest in protecting the health, safety, and welfare of children. We will first describe the nature of the parental right and then describe how federal and Massachusetts courts have balanced it against vital state initiatives.

The Court has stated that the "right to bring up children" is part of the liberty protected by the Due Process Clause of the 14th Amendment.¹ This right is a "fundamental right of parents to make decisions concerning the care, custody, and control of their children."² Elsewhere, the Court has described the familial relationship as "sufficiently vital to merit constitutional protection in *appropriate cases*."³ Such appropriate cases—where the Court will uphold parents' rights—generally include a parent's right to direct their child's education and the right to bring a child up in the parents' faith.⁴

¹ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that statute prohibiting teaching foreign languages violated the Due Process Clause of the 14th Amendment).

² *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (striking down state law that permitted courts to order visitation for non-parents despite parental wishes).

³ *Lehr v. Robertson*, 463 U.S. 248, 256 (1983) (emphasis added) (finding that state had no obligation to notify parent of adoption proceedings where he failed to register to receive notice of any pending adoption proceedings).

⁴ *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 165-166 (1944) (citing *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*,

In the first such case, the Supreme Court upheld a parent's right to have his child taught the German language.⁵ There, the state prohibited the teaching of languages other than English and while the Supreme Court recognized that the state may "do much, go very far, indeed, in order to improve the quality of its citizens," the law in this case was "without reasonable relation to any end within the competency of the state."⁶ In another early case, the Supreme Court recognized a parent's right to "give [children] religious training and to encourage them in the practice of religious belief," but held that the state could prohibit a child from preaching the gospel in public as within "the rightful boundary of its [the state's] power."⁷

Thus while parental rights are constitutionally protected, they are not absolute. The "family itself is not beyond regulation in the public interest ... And neither rights of religion nor rights of parenthood are beyond limitation."⁸ In ruling that minors were entitled to due process protections in cases where their parents were attempting to involuntarily commit them to mental hospitals, the Supreme Court held that the state may exercise "constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."⁹ Indeed the state's power over minors is generally regarded as greater than its power over adults.¹⁰ States also have an acknowledged *parens patriae* interest in the well-being of their youth that can be asserted independent of parental interests.

This state interest has been upheld against parents' rights in three main contexts: compulsory education, prohibitions on child labor, and—of particular relevance to the bill banning conversion therapy—in healthcare decision-making.¹¹ However, the state also "has a wide range of power for limiting parental freedom and authority" in other contexts, including "to some extent, matters of conscience and religious conviction."¹² Regulation of matters that affect a broad public interest is one of the areas in which the state has the greatest powers.¹³ This power includes "constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."¹⁴ Interests of the state in protecting the physical or mental well-being of minors are deemed "compelling" in constitutional law and are usually upheld "even when the laws have operated in the sensitive area of constitutionally protected rights."¹⁵

262 U.S. 390 (1923)) (holding that while parents had the right to bring up children in their faith, state could regulate child labor).

⁵ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁶ *Id.* at 403.

⁷ *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 170 (1944).

⁸ *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1944).

⁹ *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972); *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1944)).

¹⁰ *E.g. Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 168-169 (1944); *New York v. Ferber*, 458 U.S. 747, 757 (1982).

¹¹ *See Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166 (1944).

¹² *Id.* at 167.

¹³ *See e.g., Wisconsin v. Yoder*, 406 U.S. 205, 215-216 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

¹⁴ *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (requiring additional process before minors can be voluntarily admitted to mental hospitals by parents or guardians).

¹⁵ *New York v. Ferber*, 458 U.S. 747, 757 (1982).

The U.S. Court of Appeals for the First Circuit, which includes Massachusetts, has also acknowledged the power of the state to check parental authority over minors. Familial integrity as a right is neither “absolute [n]or unqualified” and indeed is not even clearly established.¹⁶ Rather, the liberty interest in familial relationships is “amorphous” and “must always be balanced against the governmental interest involved.”¹⁷

Applying this doctrine, the Massachusetts Supreme Judicial Court has also recognized limits on parental control over children. In protecting youth, “it is not the rights of the parents that are chiefly to be considered” but rather the Commonwealth’s “first and paramount duty is to consult the welfare of the child.”¹⁸ A parent in Massachusetts does not have the right to deny their child life-saving care—in this case, the court ordered a child be treated with blood transfusions, over the parents’ religious objections—as parental rights are not unlimited and “do not clothe parents with life and death authority over their children.”¹⁹ The Commonwealth may overrule the parents’ decisions in any context “where necessary to protect a child’s well-being” and where it appears a parental decision will “jeopardize the health or safety of [a] child.”²⁰

In the medical treatment context, the SJC has recognized three competing interests: the “natural rights” of parents, the interests of the child, and the interests of the state.²¹ This second interest is “of considerable magnitude” and should be asserted by the state for “protecting third parties, particularly minor children, from the emotional and financial damage which may occur as a result of the decision of a competent adult.”²² The state’s interests in this context are twofold: first, in maintaining the health and safety of the minor and second in “maintaining the ethical integrity of the medical profession.”²³ The state’s first interest, in protecting the health and well-being of minors, is a compelling state interest and thus will generally survive even strict scrutiny—the most challenging level of review by a court.²⁴ For example, in *Custody of a Minor*, a child’s parents refused to allow their child to undergo chemotherapy for his leukemia, preferring to treat him with vitamins.²⁵ The Supreme Judicial Court found that the parents were not acting “with the type of care necessary for [their child’s] physical well-being” and that ordering medical care was “consistent with both the best interests of the child and the applicable interests of the State.”²⁶

¹⁶ *Frazier v. Bailey*, 957 F.2d 920, 929-930 (1992) (rejecting claim of denial of substantive Due Process and finding no clearly established constitutional right in case in which children were removed from family).

¹⁷ *Id.* at 931.

¹⁸ *Matter of McCauley*, 565 N.E.2d 411, 413 (Mass. 1991) (citation omitted).

¹⁹ *Id.*

²⁰ *Commonwealth v. Robinson*, 910 N.E.2d 911, 917-918 (2009) (citation omitted); see also *Matter of McCauley*, 565 N.E.2d 411, 413 (Mass. 1991).

²¹ *Commonwealth v. Robinson*, 910 N.E.2d 911, 917-918 (2009) (quoting *Custody of a Minor*, 375 Mass. 733 (1978)); *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417, 425 (Mass. 1977).

²² *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417, 426 (Mass. 1977).

²³ *Matter of McCauley*, 565 N.E.2d 411, 413-414 (Mass. 1991) (citations omitted); see also *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417, 425-426 (Mass. 1977).

²⁴ *Blixt v. Blixt*, 774 N.E.2d 1052, 1059 (Mass. 2002) (upholding grandparent visitation statute against due process and equal protection claims based on parental rights where grandparent visitation was in the best interests of the child’s health, safety, and welfare).

²⁵ *Custody of a Minor*, 375 Mass. 733 (1978).

²⁶ *Custody of a Minor*, 375 Mass. 733, 747 (1978).

In the case of conversion therapy, both the child's interests and the state's interests weigh in favor of a ban. While parents have a constitutional right to direct the upbringing of their children, this right is limited and subject to state regulation. The record of the harms—both physical and mental—of conversion therapy on minors permits the Commonwealth to act to protect the welfare of its children.

Sincerely,

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