On Monday, New Jersey Gov. Chris Christie signed a ban on gay conversion therapy. Immediately, anti-gay forces condemned him in vile terms, none more strongly than Mat Staver, the founder of a conservative legal association called Liberty Counsel. “This bill is so broad,” Staver said, “that parents would be prohibited from seeking help for their son who developed unwanted same-sex attractions after being molested by the likes of Jerry Sandusky. ... This is absurd and dangerous.” Staver continued that Liberty Counsel would not take the ban lying down—and that in short order, his organization would be suing for New Jersey therapists’ First Amendment rights.

A sympathetic judge is certainly the last, best option for reparative therapy advocates, who find themselves (if Staver didn’t tip you off) facing ever worsening odds in the court of public opinion. Evidence is mounting that the practice of trying to “convert” gay individuals—usually children—into straight ones can be emotionally devastating. Particularly since a series of gut-wrenching personal accounts by former patients appeared, calls to ban gay reparative therapy have become ceaseless. New Jersey is now the second state, after California, to prohibit the practice for people under the age
And all things being equal, Liberty Counsel's claims wouldn’t have a prayer in court. “Frankly, there should not be a serious First Amendment issue,” said Geoffrey Stone, a law professor at the University of Chicago. Stone said that laws regulating professional speech are distinct from laws regulating political speech—what we normally think of as First Amendment violations. The bar is set high for regulating political speech—in order to do that, a state must prove it has a compelling reason. But to regulate the professional speech and conduct of say, doctors and lawyers, states only have to prove that they have a rational reason for doing so. And of course, as Christie intoned yesterday, the state of New Jersey has a very good reason for prohibiting conversion therapy: the most comprehensive review of reparative therapy links it to suicide risks and substance abuse. A therapist exposing a minor to a junk therapy regimen designed to “cure” something that hasn’t been considered a malady for 40 years is not political speech—it’s malpractice.

“New Jersey and California’s laws prevent a professional from performing a certain activity under the auspices of their license, no more”, Stone said—no different than a law preventing lawyers from lying in court. “I’m a big First Amendment guy, and even I would be very hard pressed to make what I would find a convincing argument.”
Shiffrin, a First Amendment expert at Cornell Law, agreed. (Last year, he filed an amicus brief in California’s Ninth Circuit opposing the free speech challenge to the law.) “I’m not saying professionalism is a talisman keeping away all First Amendment issues,” Shiffrin said. “I just don’t see any significant First Amendment issues involved.”

Staver, reached by phone yesterday, said that Liberty Counsel is prepared to argue that as a professional regulation, New Jersey’s law is too broad. “It goes far beyond anything in existence in regards to regulating professional speech,” he said. “Like we did in California, we will argue that this violates counselors’ First Amendment rights, and patients’ and parents’ rights to receive information.” But Ira Lupu, a law professor at George Washington University, said that Liberty Counsel’s California lawsuit was clearly aimed at convincing a judge to apply the rigorous standards for political speech to the law. And one California judge has already been persuaded to do so. In December, in reply to a lawsuit filed by a Liberty Counsel ally, Pacific Justice Institute, federal judge William B. Shubb issued a ruling that blocked California’s law on the grounds that it could prevent a mental health provider “from expressing his or her viewpoints about homosexuality.”

None of the legal experts I spoke with agreed that the law barred therapists from expressing opinions. What is creating that confusion, said Lupu, is that practitioners of conversion therapy don’t use the physically abusive tools of their predecessors, like electroshock therapy and nausea-inducing drugs—today’s therapy is literally just speech. “When it’s just talk, the First Amendment issues can seem much more difficult,” he said. (Staver, by the way, said that the history of gay reparative therapy shouldn’t have any bearing on how we view it today. “Just because people used to get holes drilled in their skulls and it was called therapy doesn’t mean we should ban therapy today.”)
But Staver and his allies are also benefitting from a political climate that automatically
treats anything related to gay rights as controversial and subject to opinion—as political
speech. To Shannon Minter, the legal director of the National Center for Lesbian Rights
who represented Equality California before the district and circuit courts, this is absurd
on its face. “If [Shubb's] analysis were accepted, any regulation of therapy
automatically triggers heightened First Amendment protections, which would
fundamentally change the regulatory framework,” he said. For that very reason, a
second judge disagreed with Shubb in the suit filed by the Liberty Counsel. This sent
the matter before a three-judge panel from the Ninth Circuit. They heard arguments in
April and ought to hand down their ruling any day now. But Liberty Counsel will get a
second chance to air its argument in New Jersey, and Lupu thinks they can be
successful again. “It wouldn’t surprise me if three years from now, this set of issues is
in the Supreme Court,” he said.

There is reason, though, to hope that he is wrong. Whatever success gay conversion
therapy defenders have in court will be linked to the notion that gayness is a
controversial political issue—an idea that is rapidly becoming part of the mainstream,
and less relevant to the judiciary with every passing day. For Minter, that would be a
relief. “It becomes very frustrating when you have to defend these laws that, if they
were passed to protect any other group, no one would ever think the state doesn’t have a right to pass them,” he said. “Just because the law is about gay young people, suddenly it becomes a charged issue—it’s a little heartbreaking.”

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