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REVITALIZING THE BAN ON CONVERSION THERAPY:  
AN AFFIRMATION OF THE CONSTITUTIONALITY OF  
CONVERSION THERAPY BANS

*Logan Kline*

INTRODUCTION

The First Amendment's Freedom of Speech Clause stands as a foundational pillar of the United States legal system.<sup>1</sup> The First Amendment decrees that "Congress shall make no law... abridging the freedom of speech."<sup>2</sup> But how far does this right extend? This question has fueled one of the most hotly contested and time-honored legal debates in American jurisprudence.<sup>3</sup> While freedom of speech is granted expansive protections, the Supreme Court of the United States has unquestionably defined its limitations.<sup>4</sup> As far back as 1919, Justice Oliver Wendell Holmes famously explained that as expansive as the First Amendment is, it still does not protect a man who falsely shouted fire in a theatre to cause a frenzy.<sup>5</sup> Although the Supreme Court has answered a variety of major free speech questions in the intervening century since Holmes' opinion, the debate over freedom of speech limitations in more nuanced contexts rages on the modern judicial stage. Put plainly, American jurisprudence has yet to reach consensus on when an individual's freedom of speech rights end and the government's interest in regulating speech begins.<sup>6</sup>

Engaging with this time-honored debate, this Article examines one such split among the Federal Circuit Courts: whether freedom of speech protections extend into the office of a therapist. Specifically, that split centers on whether state laws prohibiting licensed therapists from providing conversion therapy violate those therapists' First Amendment freedom of speech rights. The speech at issue—conversion therapy—is a

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1. U.S. Const. amend I.

2. *Id.*

3. *See generally* *Abrams v. United States*, 250 U.S. 616 (1919); *Gitlow v. New York*, 268 U.S. 652 (1925); *Dennis v. United States*, 341 U.S. 494 (1951); *Whitney v. California*, 274 U.S. 357 (1927); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503 (1969).

4. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

5. *Id.*

6. *See King v. Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014), *abrogated by* *Natl. Inst. of Fam. and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), *abrogated by* *Natl. Inst. of Fam. and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854 (C.A.11 (Fla.), 2020). These cases exemplify the dissonance within the federal judiciary surrounding the line where personal liberties give way to state interests, specifically with reference to the content of this Article.

practice that attempts to change the sexual orientation or gender identity of an LGBTQ+ individual, often a minor.<sup>7</sup> Until recently, the Third and Ninth Circuits had consistently upheld such restrictions.<sup>8</sup> However, the Supreme Court in *National Institute of Family and Life Advocates v. Becerra* signaled a potential jurisprudential shift when it struck down an exception to free speech called “professional speech,” which the Third and Ninth Circuits had relied on in their opinions.<sup>9</sup> Subsequently, in 2020, the Eleventh Circuit in *Otto v. City of Boca Raton* split with the Third and Ninth Circuits, holding that a statutory ban on conversion therapy violated the First Amendment, because even if the speech was controversial, it was protected from government regulation.<sup>10</sup>

Part I of this Note examines the scientific landscape as well as the legal and real-world implications of the controversial practice of conversion therapy. Next, Part II addresses the legal reasoning in support of bans on conversion therapy by analyzing the decision of the Ninth Circuit in *Pickup v. Brown* and of the Third Circuit in *King v. Governor of N.J.*<sup>11</sup> From there, Part III presents the opposing argument that bans on conversion therapy are unconstitutional and violate the First Amendment’s Freedom of Speech Clause. Part III first examines the Supreme Court’s decision in *National Institute of Family and Life Advocates v. Becerra* and then analyzes the Eleventh Circuit’s recent decision in *Otto v. City of Boca Raton*.<sup>12</sup> Finally, Part IV argues that even in light of the Supreme Court’s holding in *Becerra*, the ban on conversion therapy should be deemed constitutional because therapy is a mental health treatment rather than speech, and a ban on conversion therapy constitutes a government interest sufficient to satisfy strict scrutiny.

## I. ISSUE BACKGROUND AND STAKES

Before diving into the legal analysis surrounding whether conversion therapy qualifies as protected speech under the First Amendment, an understanding of the scientific landscape of the therapy is necessary. In freedom of speech analyses, the context of the speech is vital to a court’s

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7. Christy Mallory et al., *Conversion Therapy and LGBT Youth*, UCLA WILLIAMS INST. (June 2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Conversion-Therapy-Update-Jun-2019.pdf>.

8. *King v. Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014), *abrogated by* Natl. Inst. of Fam. and Life Advocates v. *Becerra*, 138 S. Ct. 2361 (2018); *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), *abrogated by Becerra*, 138 S. Ct. 2361.

9. *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2371-73 (2018).

10. *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854 (C.A.11 (Fla.), 2020).

11. *King*, 767 F.3d 216; *Pickup*, 740 F.3d 1208.

12. *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2371-73 (2018); *Otto*, 981 F.3d 854.

determination of the extent of protection that should be afforded to that speech.<sup>13</sup> This Part first defines conversion therapy, providing statistics on both the number of individuals subjected to it and states that have banned the practice. Then, this Part explains the scientific community's consensus regarding conversion therapy.

Conversion therapy is a controversial practice which seeks to change the sexual orientation or gender identity of an individual, often a minor.<sup>14</sup> Conversion therapy is grounded in the belief that LGBTQ+ is abnormal and that treatment can change the orientation or gender identity of an LGBTQ+ individual.<sup>15</sup> Twenty states, Washington DC, and Puerto Rico have banned or restricted healthcare professionals from using conversion therapy on minors.<sup>16</sup> Research shows that as of 2019, 698,000 adults in the United States have been exposed to conversion therapy and about half of those adults were subjected to the practice during adolescence.<sup>17</sup>

Throughout the extensive history of conversion therapy in the United States, a variety of techniques have been employed by both healthcare professionals and religious advisors.<sup>18</sup> While talk therapy is currently the most common type of conversion therapy, other more gruesome and dangerous tactics are still employed by some practitioners.<sup>19</sup> Conversion therapy can generally be divided into two categories: aversive and non-aversive.<sup>20</sup> Aversive “therapies” can include torturous practices such as inducing nausea, vomiting, or paralysis, providing electric shocks, or having the individual snap an elastic band around their wrist when aroused by same-sex thoughts.<sup>21</sup> Meanwhile, non-aversive techniques include hypnosis, reframing, and redirecting thoughts.<sup>22</sup>

While twenty states have banned conversion therapy, thirty others still

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13. See generally *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503 (1969) (establishing the test for student speech in public schools); *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015) (evaluating government speech for a free speech analysis); *C. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n. of N.Y.*, 447 U.S. 557 (1980) (establishing a First Amendment analysis for commercial speech restrictions).

14. Mallory, *supra* note 7.

15. *Id.*

16. *The Lies and Dangers of Efforts to Change Sexual Orientation or Gender Identity*, HUMAN RIGHTS CAMPAIGN, (last accessed February 20, 2021) (listing the states that have banned conversion therapy: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Virginia, Vermont, and Washington).

17. Mallory, *supra* note 7. This range only includes adults between the ages of eighteen and fifty-nine. There are likely even more adults above this age range, and there are thousands of youths currently be subjected to conversion therapy.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

allow the practice, despite the myriad of national organizations that openly oppose conversion therapy and support legislative prohibitions of it.<sup>23</sup> According to the American Academy of Child and Adolescent Psychiatry:

[There is] no evidence to support the application of any ‘therapeutic intervention’ operating under the premise that a specific sexual orientation, gender identity, and/or gender expression is pathological. Furthermore, based on the scientific evidence, the AACAP asserts that such ‘conversion therapies’ (or other interventions imposed with the intent of promoting a particular sexual orientation and/or gender as a preferred outcome) lack scientific credibility and clinical utility. Additionally, there is evidence that such interventions are harmful. As a result, ‘conversion therapies’ should not be part of any behavioral health treatment of children and adolescents.<sup>24</sup>

The American Academy of Child and Adolescent Psychiatry is far from alone in this stance. In fact, the vast majority of medical and psychiatric associations condemn conversion therapy and support legal prohibitions of the practice.<sup>25</sup>

In short, the national scientific community has reached a near consensus: conversion therapy is not only ineffective in achieving its stated purpose but also can be extremely harmful to those subjected to it.<sup>26</sup> People who have undergone conversion therapy report higher rates of anxiety, depression, and other mental health conditions.<sup>27</sup> Therefore, the discussion of whether a state can ban licensed therapists from practicing conversion therapy has greater stakes than the academic discourse constrained to the halls of a law school building. In states without conversion therapy bans, thousands of people are subjected to this

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23. *Conversion Therapy Bans by U.S. State*, BORN PERFECT (Last accessed April 18, 2021), <https://bornperfect.org/facts/conversion-therapy-bans-by-state/>.

24. *The AACAP Policy on “Conversion Therapies*, AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY (2018).

25. *Policy and Position Statements on Conversion Therapy*, HUMAN RIGHTS CAMPAIGN (last accessed Feb. 20, 2021), <https://www.hrc.org/resources/policy-and-position-statements-on-conversion-therapy>. Other national organizations that have condemned the practice and/or openly supported legislative restraint of conversion therapy include: the American Academy of Pediatrics, the American Association for Marriage and Family Therapy, the American College of Physicians, the American Counseling Association, the American Medical Association, the American Psychiatric Association, National Association of Social Workers, the American Psychological Association, and many more.

26. *The Lies and Dangers of Efforts to Change Sexual Orientation or Gender Identity*, HUMAN RIGHTS CAMPAIGN (last accessed February 20, 2021); *Conversion Therapy*, SOUTHERN POVERTY LAW CENTER (last accessed Feb. 20, 2021), <https://www.splcenter.org/issues/lgbt-rights/conversion-therapy> (“People who have undergone conversion therapy have reported increased anxiety, depression, and in some cases, suicidal ideation. It can also strain family relationships, because practitioners frequently blame a parent for their child’s sexual orientation.”).

27. *Id.*

emotionally abusive practice each year.<sup>28</sup> In light of these high stakes, several Federal Circuit Courts have considered arguments for and against conversion therapy bans in recent years, leading to divergent holdings regarding the legality of such bans between circuits.

## II. LEGAL POSITION IN SUPPORT OF BAN ON CONVERSION THERAPY

In 2014, the Ninth and the Third Circuits upheld as constitutional statewide bans on the use of conversion therapy by licensed therapists.<sup>29</sup> This Part first outlines the Ninth Circuit's decision in *Pickup v. Brown* that upheld California's ban on conversion therapy.<sup>30</sup> This Part then turns to the Third Circuit's holding in *King v. Governor of New Jersey*, where the Third Circuit also upheld New Jersey's ban on conversion therapy, albeit based on a different rationale.<sup>31</sup>

In *Pickup v. Brown*, plaintiffs sought to enjoin enforcement of California Senate Bill 1172, a statewide ban on state-licensed mental health providers engaging in "sexual orientation change efforts" (SOCE) with patients younger than eighteen-years-old.<sup>32</sup> The plaintiffs argued that the ban violated the First Amendment and infringed on several other constitutional rights.<sup>33</sup> The Ninth Circuit first noted that the practice of conversion therapy, or SOCE, began in a time when homosexuality was considered an illness, which has since been debunked by the scientific community for nearly half a century.<sup>34</sup> Then, the Ninth Circuit identified a wide array of topics the legislation did *not* restrict, noting specifically that licensed therapists were free to say whatever they wanted about the therapy in public or even recommend it to their patients.<sup>35</sup> Further,

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28. Mallory, *supra* note 7.

29. *King v. Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014), *abrogated by* Natl. Inst. of Fam. and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018); *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), *abrogated by* Natl. Inst. of Fam. and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

30. *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), *abrogated by* Natl. Inst. of Fam. and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

31. *King v. Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014), *abrogated by* Natl. Inst. of Fam. and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

32. *Pickup v. Brown*, 740 F.3d 1208, 1221 (9th Cir. 2014), *abrogated by* Natl. Inst. of Fam. and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

33. *Id.*

34. *Id.*

35. *Id.* at 1223. (writing that SB 1172 did *not* do any of the following: "Prevent mental health providers from communicating with the public about SOCE; Prevent mental health providers from expressing their views to patients, whether children or adults, about SOCE, homosexuality, or any other topic; Prevent mental health providers from recommending SOCE to patients, whether children or adults; Prevent mental health providers from administering SOCE to any person who is 18 years of age or older; Prevent mental health providers from referring minors to unlicensed counselors, such as religious leaders; Prevent unlicensed providers, such as religious leaders, from administering SOCE to children or adults; or Prevent minors from seeking SOCE from mental health providers in other states.").

unlicensed counselors could still practice SOCE, and therapists could refer their patients for this treatment.<sup>36</sup> The court framed the ban's scope as follows:

SB 1172 does just one thing: it requires licensed mental health providers in California who wish to engage in “practices ... that seek to change a [minor's] sexual orientation” either to wait until the minor turns 18 or be subject to professional discipline. Thus, SB 1172 regulates the provision of mental treatment, but leaves mental health providers free to discuss or recommend treatment and to express their views on any topic.<sup>37</sup>

The legislature enacted the bill to protect minors and LGBTQ+ individuals from the “serious harms caused by sexual orientation change efforts.”<sup>38</sup>

The Ninth Circuit then moved on to its free speech analysis of the bill.<sup>39</sup> First, the court looked to precedent and determined that, while *communication* about treatment is protected by the First Amendment, the government has more power to regulate the *act* of administering the treatment.<sup>40</sup> Further, the Ninth Circuit held that therapists do not receive special First Amendment protections merely because they deliver their treatment through speech. The Court explained that while speech made during therapy does receive some protection, it is not immune from state regulation.<sup>41</sup> The Ninth Circuit then established a continuum of medical professional speech regulation, with complete protection of speech afforded to medical professionals on one end, and no protection of speech afforded on the other.<sup>42</sup> The court's task was to determine where along this continuum of First Amendment protection the facts of the case appropriately fit.<sup>43</sup>

On one end of the continuum was speech that is undoubtedly protected, such as when a doctor publicly advocates a treatment.<sup>44</sup> This type of speech is entirely protected, as it falls within the heart of the First

36. *Id.*

37. *Id.*; see also CAL. BUS. & PROF. CODE § 865.1 (West 2021).

38. Pickup, 740 F.3d at 1223. (citing 2012 Cal. Legis. Serv. ch. 835, § 1(n)).

39. *Id.*

40. *Id.* at 1226-27 (citing Nat'l Ass'n for the Advancement of Psychoanalysis v. California Bd. of Psych., 228 F.3d 1043 (9th Cir. 2000) and Conant v. Walters, 309 F.3d 629 (9th Cir. 2002)).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*; See *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring) (“Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that ‘Congress shall make no law ... abridging the freedom of speech, or of the press.’”).

Amendment's intended scope—issues of public concern communicated to the masses.<sup>45</sup> At the midpoint of this continuum was speech that occurs within the doctor-patient professional relationship.<sup>46</sup> Protection for this speech is not absolute, as the state can prevent doctors from giving false information or performing “quack medicine” with the threat of revoking medical licenses.<sup>47</sup> Therefore, the court explained that while some protection is afforded to speech in the doctor-patient relationship, the First Amendment tolerates much more speech regulation in this context.<sup>48</sup> The court defended a higher degree of regulation as appropriate under the First Amendment because “[w]hen professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate.”<sup>49</sup>

Conversely, professional *conduct* falls on the opposite end of the continuum, where speech is afforded the least amount of First Amendment protection.<sup>50</sup> According to the Ninth Circuit, the California law fell at this end of the First Amendment protection continuum.<sup>51</sup> This meant the state's power to regulate professional conduct was considerable, even if that regulation resulted in an incidental effect on the professional's speech.<sup>52</sup> Therefore, even though all medical treatments utilize speech in some capacity during implementation, the state has the power to ban a medical treatment without risk of violating the First Amendment.<sup>53</sup> The court analogized conversion therapy to medication and explained that “[w]hen a drug is banned, for example, a doctor who treats patients with that drug does not have a First Amendment right to speak the words necessary to provide or administer the banned drug.”<sup>54</sup> The speech that facilitates the banned act is also allowed to be regulated in this context.<sup>55</sup>

The Ninth Circuit applied the continuum to the law in question and concluded that SB 1172 addressed the conduct of licensed therapists and fell into the professional conduct category—under which the government

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45. Pickup, 740 F.3d at 1226-27.; See *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (“Speech on matters of public concern is at the heart of the First Amendment's protection.”).

46. Pickup, 740 F.3d at 1228.

47. *Id.*; See *Conant v. McCaffrey*, 2000 WL 1281174, at \*13 (N.D. Cal. Sept. 7, 2000).

48. *Id.*

49. *Id.*

50. *Id.* at 1229.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

has the most power to regulate speech.<sup>56</sup> Therefore, the court held that California possessed the authority through its police power to regulate the administration of certain harmful therapies by licensed therapists.<sup>57</sup> In short, the conversion therapy ban was upheld as constitutional.

That same year, the Third Circuit reached the same conclusion in evaluating the constitutionality of New Jersey's ban on conversion therapy in *King v. Governor of N.J.*<sup>58</sup> Like in California, New Jersey's ban prohibited licensed therapists from engaging in conversion therapy with persons under the age of eighteen.<sup>59</sup> However, the Third Circuit's reasoning in *King* diverged from the Ninth Circuit's analysis in *Pickup*.<sup>60</sup> In *King*, the Third Circuit expressly rejected the argument that conversion therapy qualified as unprotected conduct.<sup>61</sup> Instead, the court held that "the verbal communication that occurs during SOCE counseling is speech that enjoys some degree of protection under the First Amendment."<sup>62</sup> According to the court, this level of protection is diminished "[b]ecause [p]laintiffs are speaking as state-licensed professionals within the confines of a professional relationship."<sup>63</sup> Based on this conclusion, the Third Circuit applied a more conventional constitutional test.<sup>64</sup> If the New Jersey law advanced a substantial state interest in protecting residents from harmful professional practices and did so in the least invasive way to serve that interest, then the prohibition would survive.<sup>65</sup>

The Third Circuit determined that the verbal communication in a conversion therapy session was speech and that to find otherwise would be counterintuitive and contrary to the United States Supreme Court's holding in *Holder v. Humanitarian Law Project*.<sup>66</sup> In *Holder*, the Court held that when communication of a message was at issue, the verbal communication—such as the verbal communication in a conversion therapy session—was considered speech rather than conduct.<sup>67</sup> According to the Court, the nature of the communication did not change the verbal communication from speech to conduct.<sup>68</sup>

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56. *Id.*

57. *Id.*

58. *King v. Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014), *abrogated by* Natl. Inst. of Fam. and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

59. *Id.* at 221.

60. *King*, 767 F.3d 216; *Pickup*, 740 F.3d 1208.

61. *King*, 767 F.3d at 224.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*; *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

67. *Holder*, 130 S. Ct. 2705.

68. *Id.*

Next, the Third Circuit distinguished its analysis from the Ninth Circuit's decision in *Pickup*.<sup>69</sup> The Third Circuit criticized the Ninth Circuit's holding in *Pickup* for never explaining how to actually apply its continuum to determine whether a statute regulates speech or conduct.<sup>70</sup> Further, the Third Circuit explained that because the Ninth Circuit's test provided no criteria for how to decide whether verbal communication is speech or conduct, the test is susceptible to manipulation and abuse.<sup>71</sup> According to the Third Circuit, "[t]o classify some communications as 'speech' and others as 'conduct' is to engage in nothing more than a 'labeling game.'" <sup>72</sup> The court explained that speech should be evaluated as such under the First Amendment rather than being twisted into conduct through mental gymnastics.<sup>73</sup> However, the court noted that merely because something is speech does not automatically entitle that speech to the First Amendment's protections.<sup>74</sup>

After determining that the communication that occurs within a conversion therapy session is speech, the Third Circuit addressed the appropriate level of protection for this professional speech.<sup>75</sup> Similar to the Ninth Circuit's discussion of the midpoint of its continuum analysis, the Third Circuit reasoned that New Jersey's police power granted it the right to regulate certain trades, particularly those related to public health.<sup>76</sup> The Third Circuit relied on the United States Supreme Court's pronouncement in *Goldfarb v. Va. State Bar* that states have "broad power to establish standards for licensing practitioners and regulating the practice of professions."<sup>77</sup> The Third Circuit ultimately concluded that the speech involved in a conversion therapy session can be classified as "professional speech" and is therefore entitled to a lower degree of First Amendment protection.<sup>78</sup> The court explained its reasoning by noting that

69. King, 767 F.3d at 226-28.

70. *Id.* at 228. See *Pickup*, 740 F.3d at 1215-16 (O'Scannlain, J., dissenting from denial of rehearing en banc) ("[B]y what criteria do we distinguish between utterances that are truly 'speech,' on the one hand, and those that are, on the other hand, somehow 'treatment' or 'conduct'?").

71. King, 767 F.3d at 228.

72. *Id.* quoting *Pickup*, 740 F.3d at 1218 (O'Scannlain, J., dissenting from denial of rehearing en banc).

73. *Id.* ("Simply put, speech is speech, and it must be analyzed as such for purposes of the First Amendment. Certain categories of speech receive lesser protection, or even no protection at all... But these categories are deeply rooted in history, and the Supreme Court has repeatedly cautioned against exercising 'freewheeling authority to declare new categories of speech outside the scope of the First Amendment.'").

74. *Id.* at 229; see, e.g., *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978); *Roth v. United States*, 354 U.S. 476, 483 (1957).

75. *Id.*

76. *Id.* citing *Watson v. Maryland*, 218 U.S. 173, 176 (1910).

77. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975).

78. King, 767 F.3d at 232.

most professions inevitably include communications between the client and the professional.<sup>79</sup> Mental health counselors in particular communicate with their clients by necessity of their position.<sup>80</sup> So, “[t]o handcuff the State's ability to regulate a profession whenever speech is involved would therefore unduly undermine its authority to protect its citizens from harm.”<sup>81</sup>

Therefore, despite the Third Circuit’s disagreement with the Ninth Circuit’s characterization of communication made during conversion therapy as conduct rather than speech, the Third Circuit concluded that, as professional speech, such communication was not afforded full First Amendment protection.<sup>82</sup> Unlike non-expressive conduct, which receives no First Amendment protection, professional speech merely receives diminished protection.<sup>83</sup>

In reviewing professional speech, the Third Circuit applied intermediate scrutiny, whereas other forms of speech would normally trigger strict scrutiny.<sup>84</sup> In applying intermediate scrutiny, the court held “a prohibition of professional speech is permissible only if it ‘directly advances’ the State’s ‘substantial’ interest in protecting clients from ineffective or harmful professional services, and is ‘not more extensive than necessary to serve that interest.’”<sup>85</sup> Under intermediate scrutiny, New Jersey’s interest in protecting its citizens from ineffective and potentially dangerous professional practices was found to be sufficient to justify the state’s ban on conversion therapy.<sup>86</sup>

Despite disagreements regarding the proper First Amendment analysis of state laws regulating conversion therapy, both the Ninth and Third Circuit ultimately upheld the constitutionality of the ban.<sup>87</sup>

### III. LEGAL POSITION BARRING BAN ON CONVERSION THERAPY

In the Ninth and Third Circuit opinions that upheld bans on conversion

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 233.

84. *Id.* at 234-35 (comparing professional speech to commercial speech, concluding that just as intermediate scrutiny is applied to commercial speech, it should similarly be applied to professional speech. The court concluded that A3371 falls within a category of permissible content discrimination similar to the court’s analysis in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992). The *R.A.V.* court wrote that a statute does not trigger strict scrutiny “[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable.”).

85. *Id.* at 235 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm. Of New York*, 447 U.S. 557, 566 (1980)).

86. *Id.* at 237.

87. *King*, 767 F.3d 216; *Pickup*, 740 F.3d 1208.

therapy performed by state-licensed therapists, both courts relied on a “professional speech” exception that allowed for lesser First Amendment protection for therapists in their professional capacity.<sup>88</sup> However, these holdings were abrogated by the United States Supreme Court’s holding in *National Institute of Family and Life Advocates v. Becerra*, which rejected the “professional speech” exception.<sup>89</sup> Based on *Becerra*, the Eleventh Circuit struck down Boca Raton and Palm Beach County, Florida’s bans on conversion therapy in *Otto v. City of Boca Raton, Florida*.<sup>90</sup>

In *Becerra*, the Supreme Court struck down the professional speech exemption that was previously asserted by the Ninth and Third Circuits.<sup>91</sup> This case evaluated the constitutionality of a California law requiring: 1) licensed pregnancy-related clinics to give notice of publicly-funded family planning services, and 2) unlicensed pregnancy-related clinics to provide notice of their lack of licensure.<sup>92</sup> Two crisis pregnancy centers and an organization of crisis pregnancy centers brought this action, alleging that both notice requirements violated their First Amendment freedom of speech rights.<sup>93</sup> Justice Clarence Thomas delivered the opinion of the Court, rejecting professional speech as a separate category entitled to a different level of protection.<sup>94</sup> Justice Thomas began by laying out the form of freedom of speech analysis that the Court *does* recognize.<sup>95</sup> He first noted that precedent distinguished between enforcing prohibitions on content-based and content-neutral regulation of speech.<sup>96</sup> If a regulation is found to be content-based, or based on communicative content, it is presumptively unconstitutional unless the state can prove that the law has been “narrowly tailored to serve compelling state interests.”<sup>97</sup>

The Court then directly addressed the Ninth and Third Circuit opinions that recognized professional speech as an exception to the strict scrutiny that accompanies content-based regulations.<sup>98</sup> However, Justice Thomas

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88. King, 767 F.3d 216; Pickup, 740 F.3d 1208.

89. Natl. Inst. of Fam. and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

90. Otto v. City of Boca Raton, 981 F.3d 854 (11th Cir. 2020).

91. Becerra, 138 S. Ct. 2361.

92. *Id.* at 2365.

93. *Id.*

94. *Id.* at 2372-73.

95. *Id.* at 2371.

96. *Id.*; *See also* Reed v. Town of Gilbert, 576 U.S. 155 (2015) (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”).

97. Becerra, 138 S. Ct. at 2371. (*quoting* Reed, 576 U.S. at 163).

98. *Id.*

noted that the Supreme Court had never recognized this professional speech exception and thus was unwilling to exempt this category of speech from the strict scrutiny analysis.<sup>99</sup>

While professional “[s]peech is not protected merely because it is uttered by ‘professionals,’” the Court identified two situations in which professional speech has been afforded less protection.<sup>100</sup> First, a more deferential review has been afforded to laws that require professionals to disclose factual information.<sup>101</sup> Second, states may regulate professional conduct, even if that conduct incidentally involved speech.<sup>102</sup> However, the Court noted that neither of these two potential exceptions applied in *Becerra*.<sup>103</sup> In sum, the Court ruled that professional speech does not trigger a lower level of scrutiny, and while there are two exceptions where lower protection of speech is justified, neither were implicated in *Becerra*.<sup>104</sup>

Two years after the Court’s decision in *Becerra*, the Eleventh Circuit in *Otto* relied on that decision when it struck down conversion therapy bans from the city of Boca Raton and Palm Beach County.<sup>105</sup> In *Otto*, two therapists alleged that the restrictions imposed by these laws, which applied even to purely speech-based therapy, unconstitutionally restricted their speech while interacting with their clients.<sup>106</sup> The city and county bans were largely identical, barring covered therapists from treating minors with:

any counseling, practice or treatment performed with the goal of changing an individual’s sexual orientation or gender identity, including, but not limited to, efforts to change behaviors, gender identity, or gender expression, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender or sex.<sup>107</sup>

Both ordinances also contained an exception for counseling to assist those undergoing a gender transition.<sup>108</sup> The two plaintiffs in this case were state-licensed therapists who, among other services, provided talk-therapy counseling for minors “who [had] unwanted same-sex attraction

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99. *Id.*

100. *Id.*

101. *Id.*; see also *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010); *Ohralik v. Ohio State Bar Ass’n.*, 436 U.S. 447, 455–456 (1978).

102. *Becerra*, 138 S. Ct. at 2371.; See also *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992).

103. *Id.*

104. *Id.*

105. *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020).

106. *Id.* at 859.

107. *Id.* at 859-60.

108. *Id.* at 860.

or unwanted gender identity issues.”<sup>109</sup> According to the plaintiffs, the therapy sessions consisted entirely of speech, with no physical element.<sup>110</sup> Further, the plaintiffs alleged that the ordinances banning SOCE were content-based restrictions because they targeted specific communications the local government disagreed with.<sup>111</sup>

First, the Eleventh Circuit determined whether the city and county ordinances constituted content-based regulations.<sup>112</sup> If so, that finding would mandate strict scrutiny.<sup>113</sup> Otherwise, intermediate or rational basis scrutiny could serve as more deferential standards of review.<sup>114</sup> However, the Eleventh Circuit disposed of this question rather quickly, stating that “because the ordinances depend on what is said, they are content-based restrictions that must receive strict scrutiny.”<sup>115</sup> The court noted that the desirability of the content being restricted is immaterial, writing that if favorable content is allowed and horrifying content is restricted, this constitutes content-based regulation regardless of how desirable the outcome may be.<sup>116</sup> The Eleventh Circuit noted that this determination was straightforward, because the regulations limited a category of people—therapists—from communicating a message, SOCE.<sup>117</sup> Finally, the court noted that the content-based nature of the ordinance is codified by the exception outlined in both ordinances for those undergoing a gender transition.<sup>118</sup> This exception specifically applied to gender transition and not sexual orientation, which the court took as evidence that the ban was not only content-based but also viewpoint-based, which is “an egregious form of content discrimination.”<sup>119</sup>

The Eleventh Circuit rejected the local government’s contention that the ordinances regulated conduct rather than speech.<sup>120</sup> The court reasoned that relabeling controversial speech as conduct is impermissible and quoted the Third Circuit’s decision in *King*, noting that “the enterprise of labeling certain verbal or written communications ‘speech’ and others ‘conduct’ is unprincipled and susceptible to manipulation.”<sup>121</sup> However,

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109. *Id.*

110. *Id.*

111. *Id.* at 861.

112. *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 861 (11th Cir. 2020).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 862.

117. *Id.* at 863.

118. *Id.* at 864.

119. *Id.* quoting *Rosenberger v. Rector of U. of Va.*, 515 U.S. 819, 829 (1995). The Eleventh Circuit also noted that a strong argument exists that viewpoint discrimination is *per se* unconstitutional, and these bans are thus unconstitutional on their face. *Id.*

120. *Id.*

121. *Id.* at 861 (quoting *King v. Governor of N.J.*, 767 F.3d 216, 228 (3d Cir. 2014)).

beyond this point of agreement, the Eleventh Circuit's analysis diverged from the Third Circuit's decision in *King*, relying in part on the Supreme Court's holding in *Becerra*, which was decided after *King*.<sup>122</sup> The Eleventh Circuit identified *Becerra* as precedent for its rejection of an attempt to regulate speech by reframing it as professional conduct and stated that "local governments cannot rescue their ordinances by calling the plaintiff's speech conduct."<sup>123</sup>

Finally, the Eleventh Circuit addressed the exception to strict scrutiny for incidental speech entangled with regulated professional conduct.<sup>124</sup> States have the right to regulate professional conduct, even if that conduct involves some speech.<sup>125</sup> However, the Eleventh Circuit rejected the argument that the exception applied in this case and instead asserted that the therapy is carried out entirely through speech.<sup>126</sup> Therefore, it cannot be accurately described as conduct just to trigger a lower degree of scrutiny.<sup>127</sup> The court summarized its position on this issue succinctly, writing that "the ordinances are direct, not incidental, regulations of speech... they are not connected to any regulation of separately identifiable conduct."<sup>128</sup>

Further, the Eleventh Circuit relied heavily on its opinion from three years earlier in *Wollschlaeger v. Governor of Florida*.<sup>129</sup> In *Wollschlaeger*, the Eleventh Circuit ruled that the state could not restrict a doctor's ability to discuss firearms and firearm safety with their patients.<sup>130</sup> The *Otto* court reasoned that, just as a law cannot restrict whether a doctor can discuss guns with their patient, a law cannot limit a therapist's ability to employ conversion therapy.<sup>131</sup>

Once the Eleventh Circuit decided that strict scrutiny was the appropriate standard of review, the court then evaluated whether the ordinances were narrowly tailored to serve a compelling government interest.<sup>132</sup> Here, the court conceded that the state indisputably had a compelling interest "in safeguarding the physical and psychological well-

122. Natl. Inst. of Fam. and Life Advocates v. *Becerra*, 138 S. Ct. 2361 (2018); *King v. Governor of N.J.*, 767 F.3d 216, 228 (3d Cir. 2014), *abrogated by* Natl. Inst. of Fam. and Life Advocates v. *Becerra*, 138 S. Ct. 2361 (2018).

123. *Otto*, 981 F.3d at 861; *see generally* Natl. Inst. of Fam. and Life Advocates v. *Becerra*, 138 S. Ct. 2361 (2018).

124. *Id.*

125. *Id.*; *see Becerra*, 138 S. Ct. at 2372.

126. *Otto*, 981 F.3d at 861.

127. *Id.*

128. *Id.* at 865.

129. *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854 (11th Cir. 2020); *Wollschlaeger v. Gov., Fla.*, 848 F.3d 1293 (11th Cir. 2017).

130. *Wollschlaeger*, 848 F.3d 1293.

131. *Otto*, 981 F.3d 854; *See generally* *Wollschlaeger*, 848 F.3d 1293.

132. *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854 (11th Cir. 2020).

being of a minor.”<sup>133</sup> However, the Eleventh Circuit asserted that this compelling interest did not include the power to restrict ideas the government deemed unsuitable for children.<sup>134</sup> According to the court, even if preventing conversion therapy satisfied a compelling government interest, the government still had the burden to prove the law was narrowly tailored to that end.<sup>135</sup> At this point, the Eleventh Circuit noted that the burden of proof under strict scrutiny is nearly impassable, and adequate justification is exceedingly rare under the standard.<sup>136</sup> Even in light of a series of studies and reports presented by the defendants and various amici, the court found no compelling interest sufficient to justify the bans on conversion therapy and thus struck down the bans.<sup>137</sup>

By refusing to apply a lower level of scrutiny in its First Amendment analysis of professional speech in *Becerra*, the United States Supreme Court set the stage for the Eleventh Circuit’s decision in *Otto*.<sup>138</sup> Absent the professional speech exception, *Otto* struck down bans on conversion therapy as unconstitutional violations of therapists’ freedom of speech.<sup>139</sup>

#### IV. DISCUSSION

At first glance, the Supreme Court’s decision in *Becerra* seems to signal the end of state bans of conversion therapy.<sup>140</sup> In fact, the Eleventh Circuit seems to have come to that same conclusion in *Otto*.<sup>141</sup> However, this understanding of the *Becerra* opinion assumes that the viability of state bans on conversion therapy is entirely interwoven with the existence of an exception for professional speech. On the contrary, there are two primary arguments in a post-*Becerra* jurisprudence for a conversion therapy ban to be upheld. This Part first argues that conversion therapy is not protected by the First Amendment because it is a mental health treatment. Therefore, it should be susceptible to regulation in the same way that prescription of a medication may be regulated. Second, it argues that even if conversion therapy is speech that would normally be protected, the government has a compelling interest in protecting the wellbeing of minors to justify a ban and satisfy the strict scrutiny standard.

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133. *Id.* at 868 (quoting *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) (internal quotation marks omitted)).

134. *Id.* (citing *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 794–95 (2011)).

135. *Id.* (citing *Reed v. Town of Gilbert*, 576 U.S. 155 at 171 (2015)).

136. *Id.*

137. *Id.*

138. *Natl. Inst. of Fam. and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020).

139. *Otto*, 981 F.3d at 872.

140. See *infra* notes 91-104 and accompanying text.

141. See *infra* notes 105-137 and accompanying text.

Finally, this Part identifies potential statutory language for drafting a post-*Becerra* conversion therapy ban that would have a strong chance of being upheld as constitutional.

*A. Conversion Therapy is a Medical Procedure Rather than Speech*

First, when the Eleventh Circuit characterized conversion therapy as a form of speech rather than a medical procedure, it oversimplified the therapy to fit a traditional First Amendment analysis. The *Otto* court even acknowledged this, stating that “[t]he local governments are not entirely wrong when they characterize speech-based SOCE as a course of conduct. SOCE, after all, is a therapy, and plaintiffs say they want to ‘engage’ in it.”<sup>142</sup> The Ninth Circuit also recognized this reality in *Pickup*, reasoning that the state has a right to regulate professional conduct even if that regulation has an effect on the therapist’s speech.<sup>143</sup> The Ninth Circuit addressed this point and explained that a physician does not have a First Amendment right to prescribe an illegal substance just because he says it in words rather than jots it down.<sup>144</sup> In that situation, the state’s regulation of speech is incidental to the policy behind the ban—to prohibit doctors from prescribing illegal substances.<sup>145</sup>

Administering therapy is a form of professional conduct that takes a variety of forms, and the practice should not be shielded by the First Amendment simply because most of the therapy manifests as speech. In analyzing conversion therapy, the Eleventh Circuit in *Otto* missed the forest for the trees.<sup>146</sup> Certainly, the implementation of conversion therapy is mostly verbal, but applying the veneer of First Amendment protection to the words said in a conversion therapy session makes no more sense than protecting the words of the doctor prescribing a banned medication.<sup>147</sup> The banned drug or conversion therapy are the aim of the ban, while the speech that implements the treatment is incidentally banned as well.

Part of the disconnect seems to stem from a reluctance to recognize mental health as a legitimate condition that is medically treatable through

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142. *Otto*, 981 F.3d at 865-866.

143. *Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2014), *abrogated by* Natl. Inst. of Fam. and Life Advocates v. *Becerra*, 138 S. Ct. 2361 (2018).

144. *Id.*

145. *Id.*

146. An idiomatic phrase that indicates a person has become so engrossed in the details of a situation that they have missed the bigger picture.

147. *Pickup*, 740 F.3d at 1228 (“When a drug is banned, for example, a doctor who treats patients with that drug does not have a First Amendment right to speak the words necessary to provide or administer the banned drug.”).

therapy.<sup>148</sup> When a professional engages in conversion therapy, they are not simply talking to their client. Instead, they are purporting to engage in a mental health treatment. Even if this treatment is not as tangible as a pill or narcotic, the state has an equal interest in its regulation.

*B. The Government's Interest Should Have Passed Strict Scrutiny*

The Eleventh Circuit should have recognized in *Otto* that the conversion therapy ban was supported by a compelling government interest because it aimed to protect the wellbeing of children, thus overcoming the admittedly stringent strict scrutiny standard.<sup>149</sup> Early in the opinion, the Eleventh Circuit indicated that “whether the government's disagreement is for good reasons, great reasons, or terrible reasons has nothing at all to do with [the analysis].”<sup>150</sup> This recognition, paired with the court's characterization that strict scrutiny is seldom overcome, showed the court's unwillingness to engage in a true strict scrutiny analysis.<sup>151</sup> Even if one were to concede that conversion therapy is speech and warrants strict scrutiny, the strict scrutiny analysis should be applied as an unbiased test. Just because strict scrutiny often stands as an impassable challenge does not mean that a court should write the analysis off as a formality.<sup>152</sup> The strict scrutiny standard is by no means meant to be a forgone conclusion, but the Eleventh Circuit seems to treat it as the death knell of the defense's argument.<sup>153</sup>

The Eleventh Circuit rejected the defense's argument that the conversion therapy ban constituted a compelling government interest with circular logic and ignored the merits of the evidence presented to the court. The court acknowledged that the psychological and physical safety of children is undeniably a compelling governmental interest that satisfies strict scrutiny.<sup>154</sup> The municipalities presented numerous reports and studies establishing the real harm posed by conversion therapy.<sup>155</sup> Further, countless professional organizations supported the defense's position

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148. *Psychotherapy Works*, AMERICAN PSYCHOLOGICAL ASSOCIATION (Nov. 1, 2013), <https://www.apa.org/topics/psychotherapy/works>.

149. *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 880 (11th Cir. 2020) (Martin, J. dissenting) (“Instances in which a speech restriction is narrowly tailored to serve a compelling interest are deservedly rare. But they do exist.”).

150. *Otto*, 981 F.3d at 863.

151. *Id.*

152. *Johnson v. California*, 543 U.S. 499, 514-15 (2005) (“Strict scrutiny is not ‘strict in theory, but fatal in fact’...The fact that strict scrutiny applies ‘says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny.’” (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229-30 (1995))).

153. *Id.*

154. *Otto*, 981 F.3d at 868.

155. *Id.* at 868-69.

with amici and their own research.<sup>156</sup> However, the court rejected this evidence as empirically insufficient proof that conversion therapy caused harm.<sup>157</sup> The Eleventh Circuit substituted its own scientific judgment for the countless organizations that filed amici as well as the government defendant who presented evidence when it reached that conclusion, constituting a major abuse of judicial discretion by the court. While Eleventh Circuit judges are undoubtedly capable of interpreting scientific information, the actual organizations comprising the vast majority of the relevant professional field are infinitely more qualified to interpret this data, and in this case, such professionals stated unequivocally that conversion therapy is a harmful practice for minors.<sup>158</sup> In the words of Judge Martin, who dissented in *Otto*, a state's interest in banning conversion therapy is not only supported by the opinions of numerous professional organizations but also "backed up by a mountain of rigorous evidence."<sup>159</sup> If a scientific consensus regarding a practice's harmfulness cannot constitute proof of a legitimate government interest, then it is difficult to conceive of a scenario where science could ever suffice to support a compelling government interest.

To discredit the weight of the scientific and professional community, the Eleventh Circuit argued that the collective judgment of professional organizations could not be allowed to silence speech.<sup>160</sup> The court dubiously asserted that the First Amendment was written to prevent majorities from silencing less powerful voices based on the content of the latter's message.<sup>161</sup> In a general sense, this is of course true. The First Amendment is meant to protect the less powerful voices from being squashed by an authoritarian majority.<sup>162</sup> That said, the Eleventh Circuit used this argument as a rationale for ignoring the overwhelming evidence offered by the scientific community regarding whether the state had established that minors actually face real danger by undergoing conversion therapy. Here, the majority in question is that of the scientific consensus in opposition to conversion therapy.<sup>163</sup> The court also justified its decision that no compelling interest was established by noting that

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156. *Id.*

157. *Id.*

158. *Id.* at 858. Amicus briefs supporting this conclusion were filed by the National Center for Lesbian Rights, the Southern Poverty Law Center, The Trevor Project, American Psychological Association, Florida Psychological Association, National Association of Social Workers, National Association of Social Workers Florida Chapter, American Association for Marriage and Family Therapy, and many more organizations. *Id.* at 872-80 (Martin, J. dissenting).

159. *Id.* at 878 (Martin, J. dissenting).

160. *Id.* at 869.

161. *Id.*

162. Tom C. Clark, *The First Amendment and Minority Rights*, 36 U. CHI. L. REV. 257 (1969).

163. *Policy*, *supra* note 25.

professional organizations change their mind on topics over time.<sup>164</sup> Again, this flawed reasoning ignores that legislation and policy have always evolved in conjunction with science. For instance, as the scientific community developed a greater understanding of the harmful effects of cigarette use, the production and sale of cigarettes became increasingly regulated.<sup>165</sup> While it is true that scientific organizations change positions on topics over time, this alone is an irrational and anti-scientific justification for ignoring the vast majority of the scientific community.<sup>166</sup> This assertion, if drawn to its logical implication, would suggest that a compelling interest can never be established through science, because science is an ever-evolving field.

The Eleventh Circuit acknowledged that protecting the psychological and physical wellbeing of children is undeniably a compelling government interest.<sup>167</sup> However, even in light of what the dissent characterized as “a mountain of rigorous evidence” confirming the negative effects of conversion therapy, the court held that the government interest failed strict scrutiny.<sup>168</sup> The court pre-ordained that this ban would not pass strict scrutiny based on the stringent nature of this review, and no evidence could dissuade it from its conviction.

### *C. States Should Look to These Decisions to Draft New, Conforming Conversion Therapy Bans*

Finally, in light of the Supreme Court’s holding in *Becerra* and the Eleventh Circuit’s *Otto* decision, state legislatures seeking to protect LGBTQ+ children should draft conversion therapy restrictions that narrowly define the treatment to ensure the constitutionality of the law.

In order for a conversion therapy ban to survive the standards set forth in these cases, such a law cannot limit how therapists can speak to their clients *about* conversion therapy.<sup>169</sup> A law banning all discussion relating to conversion therapy would be plainly unconstitutional, as it would be regulating speech rather than treatment.<sup>170</sup> Instead, the legislation should be drafted as narrowly as possible, banning the *application* of conversion therapy to minors by state-licensed professionals.<sup>171</sup> Therapists can

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164. *Otto*, 981 F.3d at 869.

165. *Cigarettes*, FDA (last visited April 27, 2021), <https://www.fda.gov/tobacco-products/products-ingredients-components/cigarettes#regs>.

166. *Lies and Dangers*, *supra* note 16.

167. *Id.*

168. *Otto*, 981 F.3d at 878 (Martin, J. dissenting).

169. See discussion *supra* Part II and III.

170. *Otto*, 981 F.3d at 879 (Martin, J. dissenting) (“[A] law banning all discussion relating to SOCE would plainly be unconstitutional.”).

171. See *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) (explaining that states have “broad

therefore *talk* to their minor patients about conversion therapy and even recommend conversion therapy from a non-licensed individual.<sup>172</sup> Similar to a doctor discussing illegal drug use with a patient during a diagnosis, therapists would be allowed to discuss conversion therapy with minors.<sup>173</sup> However, they would not be able to administer the therapy through any means, including speech.

In *Otto*, the plaintiffs argued that the conversion therapy bans were over-inclusive because they banned both aversive and non-aversive therapies.<sup>174</sup> On one hand, a ban strictly on aversive techniques would outlaw the most abhorrent practices utilized in some forms of conversion therapy. Aversive conversion therapy bans would almost certainly be upheld as constitutional, as these techniques not only extend far beyond speech but also clearly and obviously endanger the wellbeing of minors.<sup>175</sup> On the other hand, the harmful effects of non-aversive conversion therapy are well-documented and clearly backed by the weight of the professional community.<sup>176</sup> Therefore, legislation banning conversion therapy would be best-served by an overall prohibition including a subsection that is separable from the larger legislation specifically banning aversive conversion therapy.<sup>177</sup> In this way, even if the overarching ban is struck down as unconstitutional, the ban on aversive techniques could still be upheld. As these aversive techniques largely consist of physical tortuous practices such as electrical shocks or forcibly induced vomiting, they are very unlikely to be afforded First Amendment freedom of speech protections.<sup>178</sup>

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power to establish standards for licensing practitioners and regulating the practice of professions.”); *see generally* King v. Governor of N.J., 767 F.3d 216 (3d Cir. 2014), *abrogated by* Natl. Inst. of Fam. and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018); Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014), *abrogated by* Natl. Inst. of Fam. and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

172. The fact that unlicensed professionals may still practice conversion therapy lends itself to the “narrowly tailored” requirement set forth in a strict scrutiny analysis.

173. Rachael McGuiirk, *Should You Tell Your Doctor About Your Drug Use?*, THE OHIO STATE UNIVERSITY WEXNER MEDICAL CENTER (Aug. 19, 2020), <https://wexnermedical.osu.edu/blog/should-you-tell-your-doctor-about-your-drug-use>.

174. *Lies and Dangers*, *supra* note 16. Aversive “therapies” include inducing nausea, vomiting, or paralysis; providing electric shocks; or having the individual snap an elastic band around their wrist when aroused by same-sex thoughts. In contrast, non-aversive “therapies” include hypnosis and talk therapy.

175. *Id.*

176. *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 879-80 (11th Cir. 2020) (Martin, J. dissenting) (“[T]he harmfulness of nonaversive SOCE is established by the record. The Localities therefore did not have to limit themselves to regulating aversive SOCE.”).

177. Another potential drafting solution would be to separate aversive and non-aversive therapy bans into their own sections of the statute. The primary advantage of this approach is that the aversive therapy ban unambiguously stands alone and thus will almost certainly be upheld if faced with a First Amendment challenge. However, one downside to this approach is that it would be practically difficult to draft a section banning only non-aversive therapy that would not become a target of First Amendment challenges quickly.

178. Pickup, 740 F.3d at 1226-27 (*citing* Nat’l Ass’n for the Advancement of Psychoanalysis v.

Next, potential legislation should not regulate the ability of clergy or religious counselors to administer conversion therapy.<sup>179</sup> A law regulating religious administrations in this way would almost assuredly face Establishment Clause challenges.<sup>180</sup>

Finally, the ban must be drafted to apply only to minors, whose protection weighs more heavily in favor of a legitimate state interest.<sup>181</sup> Legislation applying to all ages would almost certainly be found to be overly broad, but the government interest in protecting the wellbeing of children is well-established.<sup>182</sup>

While the above-outlined drafting guidelines far from guarantee that a conversion therapy ban would be upheld as constitutional, they provide the best opportunity for drafting a lawful ban under current First Amendment freedom of speech precedent.

## V. CONCLUSION

The safety and wellbeing of the nation's youth must be placed ahead of a conversion therapist's right to practice a scientifically debunked treatment. While the First Amendment's Freedom of Speech Clause is vital to America's lifeblood, the Supreme Court has long acknowledged exceptions to its protections, and a ban on conversion therapy should undoubtedly occupy one such exception.<sup>183</sup> A near scientific consensus has confirmed the serious danger conversion therapy poses to minors.<sup>184</sup> In light of the overwhelming interest in protecting children from a harmful, outdated form of therapy, courts should uphold state laws that prohibit state-licensed professionals from administering conversion therapy to minors.

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California Bd. of Psych., 228 F.3d 1043 (9th Cir. 2000); and *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002)) (stating that the government has more power to regulate the conduct that facilitates the treatment than the speech).

179. Harry Farley, *Gay Conversion Therapy: Hundreds of Religious Leaders Call for Ban*, BBC NEWS (Dec. 16, 2020), <https://www.bbc.com/news/uk-55326461>. Interestingly, many religious leaders and groups around the world have recently come out in support of conversion therapy bans in the United States and United Kingdom.

180. *Id.* The potential Establishment Clause facet of such potential legislation is a broader issue but is not the focus of this analysis.

181. *Id.*

182. *Id.*

183. See *supra* notes 3-5 and accompanying text.

184. *Policy, supra* note 25.