TORTURE IS NOT PROTECTED SPEECH: FREE SPEECH ANALYSIS OF BANS ON GAY CONVERSION THERAPY

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INTRODUCTION

Approximately seven hundred thousand Americans have received conversion therapy at some point during their lives.[1] Such sexual orientation change efforts (SOCE) seek to change sexual orientation or gender identity from homosexual, bisexual, queer, or transgender to straight and cisgender.[2] Some recipients describe the experience as "torture."[3] In its "talk therapy" forms, counselors tell recipients that they are alone, unnatural, and "abomination[s]" rejected by God.[4] In its "aversion therapy" forms, counselors apply ice, heat, and electricity to recipients while showing them pictures of gay people holding hands, hugging, and having sex so that they

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* J.D. (2020), Washington University in St. Louis. I want to give a special thanks to Professor Gregory P. Magarian for his inestimably valuable advice, encouragement, and critiques in the development of this project. I am very grateful.

1. *More than 20,000 LGBT Teens in the U.S. will be Subjected to Conversion Therapy*, WILLIAMS INST.: UCLA SCH. L. (Jan. 24, 2018), https://williamsinstitute.law.ucla.edu/press/conversion-therapy-release/ [https://perma.cc/4NNJ-74T6].

2. *Id.*

3. Sam Brinton, *I Was Tortured in Gay Conversion Therapy. And It's Still Legal in 41 States*, N.Y. TIMES (Jan. 24, 2018), https://www.nytimes.com/2018/01/24/opinion/gay-conversion-therapy-torture.html [https://perma.cc/TW6B-LBNV].

> For over two years, I sat on a couch and endured emotionally painful sessions with a counselor. I was told that my faith community rejected my sexuality; that I was the abomination we had heard about in Sunday school; that I was the only gay person in the world; that it was inevitable I would get H.I.V. and AIDS.

Id.

4. *Id.* In their job at the Trevor Project, the world's largest suicide prevention organization for LGBTQ youth, Sam Brinton "constantly hear[s] from survivors of conversion therapy who have been so hurt that they are contemplating suicide." *Id.* "They" and its iterations are common pronouns for gender-nonbinary people, recognized by Merriam-Webster dictionary and the American Psychological Association in 2019. *See* Anna North, *The Past, Present, and Future of the Singular "They"*, VOX (Dec. 13, 2019), https://www.vox.com/2019/12/13/21011537/they-merriam-webster-pronouns-nonbinary-word-year [https://perma.cc/N75N-BXJV].

fulwill associate pain with same-sex contact and recoil.[5] As attitudes have dramatically shifted over the past few decades towards acceptance of lesbian, gay, bisexual, transgender, and queer (LGBTQ) people,[6] conversion therapy has fallen into disrepute both professionally[7] and publicly.[8] In 2018, Hollywood, driven by rising public awareness, released two movies about conversion therapy—*Boy Erased* and *The Miseducation of Cameron Post*.[9] The movies themselves will further increase awareness of the practice.

As attitudes have changed, nineteen states, the District of Columbia, Puerto Rico, and dozens of municipalities have banned conversion therapy

5. WILLIAMS INST.: UCLA SCH. L., *supra* note 1; JUDITH M. GLASSGOLD ET AL., AM. PSYCHOLOGICAL ASS'N, REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION 22 (2009), https://www.apa.org/pi/lgbt/ resources/therapeutic-response.pdf [https://perma.cc/MY7Y-MZFP].

6. Sixty-seven percent of Americans support same-sex marriage, up forty points from twenty-seven percent support in 1996. Justin McCarthy, *Two in Three Americans Support Same-Sex Marriage*, GALLUP (May 23, 2018), https://news.gallup.com/poll/234866/two-three-americans-support-sex-marriage.aspx?g_source=link_newsv9&g_campaign=item_234848&g_medium=copy [https://perma.cc/5J4U-8JG2]. Fifty percent of Americans (rising ten points from just a decade ago) say gay and lesbian people are "born that way," thirty percent attribute sexuality to "upbringing or environment," while ten percent attribute it to both. People who believe gay and lesbian people are "born that way" are far more supportive of gay rights than people who do not. Lydia Saad, *More Say 'Nature' Than 'Nurture' Explains Sexual Orientation*, GALLUP (May 24, 2018), https://news.gallup.com/poll/234941/say-nature-nurture-explains-sexual-orientation.aspx?g_source=link_newsv9&g_campaign=item_234848&g_medium=copy [https://perma.cc/KK5V-CQRK].

7. *Conversion Therapy*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (Feb. 2018), https://www.aacap.org/AACAP/Policy_Statements/2018/Conversion_Therapy.aspx [https://perma.cc/8T4H-BGXH] ("[T]here is evidence that [conversion therapies] are harmful. As a result, 'conversion therapies' should not be part of any behavioral health treatment of children and adolescents."). Significantly, the American Psychological Association concluded from its systematic review of the peer-reviewed journal literature on SOCE "that efforts to change sexual orientation are unlikely to be successful and involve some risk of harm, contrary to the claims of SOCE practitioners and advocates." GLASSGOLD ET AL., *supra* note 5, at v.

8. Eight percent of Americans believe that gay conversion therapy can change a person's sexual orientation from gay to straight. Sixty-three percent of people think conversion therapy cannot change someone's sexuality. Twenty-eight percent are not sure. Peter Moore, *Only 8% of Americans Think Gay Conversion Therapy Works,* YOUGOV (June 12, 2014), https://today.yougov.com/topics/lifestyle/articles-reports/2014/06/12/gay-conversion-therapy [https://perma.cc/GEF6-MR6S].

9. *See* Patrick Ryan, *What Happens in Gay Conversion Therapy? 'Cameron Post,' 'Boy Erased' Show Scary Reality*, USA TODAY (July 31, 2018), https://www.usatoday.com/story/life/movies/2018/07/31/gay-conversion-therapy-new-films-show-scary-reality/838633002/ [https://perma.cc/XBD5-NEWL].

as of March 2020.[10] Pending federal legislation—the Therapeutic Fraud Prevention Act—would outlaw SOCE nationwide.[11] The Third and Ninth Circuits both have upheld states' bans on conversion therapy for minors by licensed professionals but relied on very different reasoning.[12] The Third Circuit in *King v. Governor of New Jersey* upheld New Jersey's ban on conversion therapy as a permissible regulation of *speech*, reasoning that because conversion therapy constitutes "professional speech," it receives lesser value protection than other types of speech.[13] The Ninth Circuit in *Pickup v. Brown* upheld California's ban on conversion therapy as a permissible regulation of *conduct*.[14] The Ninth Circuit found that conversion therapy was conduct because it only banned the performance of the therapy; it left open the ability for people to advocate and debate conversion therapy and allowed practitioners to discuss it with their patients as long as they did not practice it.[15] The Supreme Court denied certiorari on both cases.[16]

In 2018, however, the Supreme Court greatly unsettled the law on free speech challenges to bans on conversion therapy. Although the Supreme Court has yet to invalidate a ban on conversion therapy or take up a case

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10. Michael Gold, *New York Passes Ban on 'Conversion Therapy' After Years-Long Efforts*, N.Y. TIMES (Jan. 21, 2019), https://www.nytimes.com/2019/01/21/nyregion/conversion-therapy-ban.html [https://perma.cc/5FGD-7MYE]. The following states have banned conversion therapy: Washington, Oregon, California, Nevada, Utah, New Mexico, Colorado, Illinois, New York, Vermont, New Hampshire, Maine, Massachusetts, Rhode Island, Connecticut, New Jersey, Delaware, Maryland, and Hawaii. *See Conversion Therapy Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/conversion_therapy [https://perma.cc/X9N9-WBUV]. Additionally, North Carolina's governor partially banned conversation therapy when he banned the use of taxpayer dollars for conversion therapy practices. *Id*. Some counties and municipalities have also taken the lead. For example, on December 23, 2019, St. Louis banned conversion therapy on minors by licensed professionals. Dori Olmos, *Conversion Therapy on Minors Now Banned in St. Louis*, KSDK-TV (Dec. 23, 2019), https://www.ksdk.com/article/news/local/conversion-therapy-st-louis-ban-minors/63-e5bc9149-c253-4bbc-b08a-783f8e8c7869 [https://perma.cc/98EP-9JCA].

11. Therapeutic Fraud Prevention Act of 2019, H.R. 3570, 116th Cong. (2019) (banning as a fraudulent trade practice accepting payment for practicing SOCE on both adults and minors).

12. *See* King v. Governor of N.J., 767 F.3d 216 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 2048 (2015), *cert. denied*, 139 S. Ct. 1567 (2019) (petitioners had asked the Supreme Court to reconsider the petition in light of *NIFLA*); Pickup v. Brown (*Pickup II*), 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, 134 S. Ct. 2871 (2014).

13. *King*, 767 F.3d at 312–20.

14. *Pickup II*, 740 F.3d at 1223.

15. *Id*. The words "practitioner" and "patient" are both distant and clinical descriptors which unfortunately legitimize SOCE through implicit comparison to proper medical practices.

16. *See supra* note 12.

squarely on conversion therapy, the Court did abrogate what it characterized as the reasoning of the Third and Ninth Circuits, severely undercutting the current legal justifications for upholding bans on SOCE.[17] The Court in *National Institute of Family and Life Advocates v. Becerra* (*NIFLA*), expressly rejected efforts by lower courts to create a new category of speech—"professional speech"—entitled to lower value protection than other speech.[18]

The ruling in *NIFLA* prompted several legal challenges to SOCE bans around the country.[19] In January 2019, a federal judge granted a preliminary injunction prohibiting Tampa, Florida, from enforcing its ban on SOCE, citing the ruling in *NIFLA* as support.[20] The legal validity of bans on SOCE against free speech challenges remains uncertain.[21]

Free speech challenges rise and fall on the standard of review. Viewpoint-based and content-based regulations of speech receive strict

17. Nat'l Inst. of Family and Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361 (2018) (holding unconstitutional compelled notices at clinics providing pregnancy-related services that stated the clinics were unlicensed and gave directions to places where people could receive publicly funded contraceptive and abortion services). At least one federal court has acknowledged this possible abrogation, stating, "These two cases, from the U.S. Ninth and Third Circuit Courts of Appeals, were criticized by name and possibly abrogated on First Amendment grounds." Vazzo v. City of Tampa, No. 8:17-cv-2896-T-02AAS, 2019 WL 4919302, at *2 (M.D. Fla. Oct. 4, 2019).

18. *NIFLA*, 138 S. Ct. at 2371–72. The so-called "professional speech" category would have provided lower value protection and applied intermediate scrutiny, analogous to the "commercial speech" category. *Id.*

19. Zack Ford, *Orthodox Jewish Therapist Claims NYC's Conversion Therapy Ban Violates His Rights*, THINK PROGRESS (Jan. 29, 2019), https://thinkprogress.org/conversion-therapy-lawsuits-4fa36d5cb4de/ [https://perma.cc/S63W-2BZ3]. Lawsuits that challenge New York City's and Maryland's bans on SOCE are pending. *Id.*

20. *Vazzo*, No. 8:17-cv-2896-T-02AAS, slip op. at 2, 26 (M.D. Fla. Jan. 30, 2019), https://thinkprogress.org/wp-content/uploads/2019/01/Tampa-conversion-therapy-opinion.pdf [https://perma.cc/T4BL-VE8M] (ruling that communication during SOCE talk therapy is speech, not conduct, subject to strict scrutiny as content-based regulation of speech); Zack Ford, *Federal Judge Says Harmful Conversion Therapy is Just "Speech" and Shouldn't be Restricted*, THINKPROGRESS (Jan. 31, 2019), https://thinkprogress.org/federal-judge-florida-halt-ban-conversion-therapy-free-speech-6e98a2d3a2ea/ [https://perma.cc/H8KU-4VQD].

21. Warren G. Tucker, Note, *It's Not Called Conduct Therapy; Talk Therapy as a Protected Form of Speech Under the First Amendment*, 23 WM. & MARY BILL RTS. J. 885, 886 (2015) (arguing that "the Supreme Court may grant certiorari if this issue appears before it again, especially if one of the other circuits decides the case differently").

scrutiny,[22] and courts almost always invalidate them.[23] Content-neutral regulations with incidental effects on speech receive a form of intermediate scrutiny under *United States v. O'Brien*.[24] Truly viewpoint-neutral and content-neutral regulations of speech receive rational basis scrutiny.[25] Conduct-based regulations receive rational basis scrutiny and "bear[] a strong presumption of validity."[26] There are, of course, a coterie of kinds of communications which are entirely outside the scope of the First Amendment's coverage—including antitrust law, securities regulation, and criminal solicitation—and that have traditionally received no protection at all.[27] The Third Circuit found New Jersey's ban a speech regulation while the Ninth Circuit found California's ban a conduct regulation.[28] However, the Supreme Court's decision in *NIFLA* generated a lot of uncertainty and muddied the water about whether bans on SOCE regulate speech, conduct, a mixture, or whether a First Amendment free speech analysis even applies to SOCE.

There is a diverse range of scholarly interpretations on how to conceptualize SOCE and the constitutionality of such bans. Eugene Volokh argues that SOCE needs to be analyzed as "speech" and rejects the

22. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) (explaining that content-based regulations "target speech based on its communicative content").

23. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 818 (2000) (stating that strict scrutiny is a "demanding standard" and "[i]t is rare that a regulation restricting speech because of its content will ever be permissible").

24. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968). The four-part *O'Brien* test says that the government regulation is sufficiently justified if it is "within the constitutional power of the government, if it furthers an important or substantial government interest, if the government interest is unrelated to the suppression of speech, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.*

25. *See* Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994).

26. *See* FCC v. Beach Communications, Inc., 508 U.S. 307, 314-15 ("On rational basis review, a classification in a statute . . . comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'"(citations omitted)). Additionally, the Free Speech Clause of the First Amendment is incorporated against the states. *See* Stromberg v. California, 283 U.S. 359 (1931); Gitlow v. New York, 268 U.S. 652 (1925) (dicta).

27. *See generally* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2003).

28. King v. Governor of N.J., 767 F.3d 216 (3d Cir. 2014); *Pickup II*, 740 F.3d 1208, 1229 (9th Cir. 2014).

application of *O'Brien* intermediate scrutiny.[29] Using *Holder v. Humanitarian Law Project*,[30] he argues that just as the Court held that offering advice to terrorist groups counted as speech, so too must the words exchanged in conversion therapy count as speech subject to strict scrutiny for the First Amendment.[31] Others argue that courts should subject the bans (and other regulations of psychotherapy) to intermediate scrutiny analogous to *O'Brien* and uphold them as long as long as there is a significant government interest with means which avoid restricting substantially more speech than necessary.[32] Still others argue that SOCE is "professional speech," which as a category should have lower value protection.[33] Another author, Professor Calvert, rejects the traditional levels of scrutiny entirely, arguing that Justice Breyer's "proportionality approach" is the best methodology to handle speech cases of this kind; Calvert argues that Breyer's approach is consequentialist, weighing the negative effects on free expression against the societal benefits.[34]

Conversely, it is argued that bans on conversion therapy fail to distinguish between different kinds of conversion therapy—i.e., between aversion therapy and talk therapy—and that these prohibitions interfere with

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29. Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981, 1046 (2016) (arguing that the speech-and-action distinction is "unprincipled and subject to manipulation"); *see also* Tucker, *supra* note 21, at 886 (arguing that SOCE, particularly talk therapy, must be analyzed as speech for First Amendment purposes, fearful of the chilling effect on therapist-client communication and government overreach).

30. 561 U.S. 1 (2010).

31. Volokh, *supra* note 29, at 1046. Even so, Volokh concedes that "[s]ome restrictions on professional-client speech may well be constitutional," reasoning the government asserts a valid interest "because clients are particularly likely to put their physical, psychological, or financial well-being at risk when relying on the expertise of professionals." *Id.* at 1048.

32. Marc Jonathan Blitz, *Free Speech, Occupational Speech, and Psychotherapy*, 44 HOFSTRA L. REV. 681, 708-09; 749-52 (2016).

33. *Id.* at 689–90; Claudia E. Haupt, *Unprofessional Advice*, 19 U. PA. J. CONST. L. 671 (2017) (arguing that SOCE would not be entitled to "professional speech" protection because its practitioners are "external outliers" to what the expert community recognizes as proper medical treatment).

34. Clay Calvert, *Testing the First Amendment Validity of Laws Banning Sexual Orientation Change Efforts on Minors: What Level of Scrutiny Applies After* Becerra *and Does a Proportionality Approach Provide a Solution?*, 47 PEPP. L. REV. 1, 30-42 (2019).

> Is the injury done by a statute to a constitutional right such as freedom of expression—more specifically, the negative consequences to the purposes and core values served by protecting speech under the First Amendment—disproportionate to the beneficial outcomes brought by the statute in serving the government's purported regulatory interest?

Id. at 32 (citations omitted).

the autonomy and self-determination of LGBTQ individuals who want to live in accordance with their religious beliefs.[35] Much of the legal scholarship improperly ignores the important distinction between aversion therapy and talk therapy.[36] It is a huge conceptual and empirical mistake to fail to distinguish between aversion therapy and talk therapy, as this distinction is critical for analyzing the free speech claims.[37]

Other authors consider statutory bans on SOCE "particularly amenable to First Amendment challenges" and instead advocate applying already existing laws, which prevent licensed professionals from engaging in deceptive or misleading practices, to stop SOCE.[38] Indeed, one author wrote that consumer fraud "litigation continues to be the best route towards national cessation of conversion therapy."[39] Others remain skeptical of the consumer fraud approach, arguing that "major weaknesses exist within state consumer protection laws that frustrate the ability to ensure that SOCE practitioners are liable for deceptive trade practices."[40]

The fundamental failure of current scholarship on the topic and the approach taken by the Third Circuit in *King* and the Ninth Circuit in *Pickup II* is that they fall into the trap of the speech-and-action distinction. This kind of analysis focuses heavily on distinguishing between kinds of activities to determine where they fall on the scale between noncommunicative conduct and communicative expression. This can be characterized as "unprincipled and subject to manipulation."[41] Opponents of SOCE conceptualize it as conduct or invent the "professional speech" category while those opposed to the bans call SOCE's "talk therapy" a form

35. Marie-Amélie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 ALA. L. REV. 793 (2017).

36. For a rare exception, see Tucker, *supra* note 21, at 909–10, acknowledging in a short comment that several kinds of conversion therapy "do not have a speech element, such as aversion therapy and conditioning" and admitting that "[w]ith these therapies, along with those where speech is not as deeply imbedded as it is in talk therapy, a state has a lot more leeway for prohibitions."

37. *See infra* Section I.A.

38. Jacob M. Victor, Note, *Regulating Sexual Orientation Change Efforts: The California Approach, Its Limitations, and Potential Alternatives*, 132 YALE L.J. 1532, 1536 (2014).

39. Peter R. Dubrowski, *The* Ferguson v. JONAH *Verdict and a Path Towards National Cessation of Gay-To-Straight "Conversion Therapy,"* 110 NW. U. L. REV. ONLINE 77, 98 (2015).

40. John M. Satira, Note, *Determining the Deception of Sexual Orientation Change Efforts*, 58 WM. & MARY L. REV. 641, 644–45 (2016) (examining *Ferguson v. JONAH*, a New Jersey state-level case, where the plaintiffs won their consumer fraud claim against their former SOCE therapists).

41. Volokh, *supra* note 29, at 1046.

of speech which requires strict scrutiny. It is necessary to shift the frame of focus entirely.

The paradigm shift should be this: conversion therapy is not covered by the First Amendment. The distinction between First Amendment "coverage" and "protection" is admirably laid out by Frederick Schauer.[42] In many cases, there is an undiscussed threshold question: does the First Amendment *cover* this kind of speech?[43] There are many kinds of communications which are outside free speech coverage: securities regulations, antitrust law, the National Labor Relations Act, the Uniform Commercial Code and the law of contracts, fraud, conspiracy law, and the law of evidence, to name a few.[44] All of these laws, if they were treated as within First Amendment coverage, would constitute content-based regulations of speech and fail strict scrutiny.[45] Once a kind of communication is considered to rest within First Amendment coverage, then it is necessary to determine what kind of *protection* it receives.[46] These are the myriad legal rules for incitement,[47] libel,[48] or nonmisleading commercial advertising.[49] The courts in *Pickup II* and *King* made a fatal error when they jumped the gun by failing to consider the threshold question: Is this speech within the *coverage* of the First Amendment?

This note argues that conversion therapy is not covered by First Amendment. First, aversion therapy is conduct and survives rational basis review, as the ban rationally serves the legitimate purpose of protecting minors from incredibly harmful therapy.[50] Second, talk therapy forms of SOCE, while they are communications, are outside the coverage of the First Amendment. SOCE is analogous to fraud, as it is a demonstrably harmful

42. Schauer, *supra* note 27, at 1765 (arguing that legal doctrine and free speech theory usually explain what is *protected* within First Amendment boundaries but that the boundaries of *coverage* the First Amendment provides are dictated more by an "often serendipitous array of political, cultural, and economic factors").

43. *See id.* at 1766.

44. *Id.* at 1768.

45. *Id.*

46. *Id.* at 1769.

47. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969).

48. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

49. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

50. "In the past, aversive treatments included inducing nausea, vomiting, or paralysis; providing electric shocks; or having an individual snap an elastic band around the wrist when aroused by same-sex erotic images or thoughts. Even more drastic methods, such as castration, have been used." *Pickup II*, 740 F.3d 1208 (9th Cir. 2014) (emphasis added) (citing GLASSGOLD ET AL., *supra* note 5, at 22).

and failed practice.[51] It is like medical and professional malpractice, which are well within the power of governments to regulate.[52] Further, under their police powers, states possess extensive powers to regulate medical professionals to protect the health, safety, and well-being of their citizens.[53] In the context of statutory construction, the Court has held that in "general usage and modern understanding. . . health . . . includes psychological as well as physical well-being."[54] Bans on SOCE by licensed medical professionals are consistent with the underlying philosophical and social justifications for First Amendment protection.[55]

Part I—History—lays out the relevant background. Section I.A surveys the history of SOCE and the rise of laws prohibiting the practices. Section I.B examines the free speech challenges to bans on SOCE. This examination also illuminates the futility of the speech-and-action distinction and why these approaches fail to provide a satisfactory answer. Section I.C discusses the Supreme Court's decision in *NIFLA v. Becerra*, focusing solely on its implications for the speech of professionals and bans on SOCE.[56] This section examines the failure of the so-called "professional speech" category to take hold as a category of speech with lower value protection analogous to "commercial speech." Section I.D covers the law regarding free speech challenges by professionals like doctors and lawyers to licensing schemes and professional regulations. This reveals how the Court considers novel arguments of free speech coverage and the propriety of government regulation for the public's health and safety.

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51. *See* Victor, *supra* note 38; Satira, *supra* note 40; Ferguson v. JONAH, No. HUD-L-5473-12, 2015 WL 609436 (N.J. Super. Ct. Law Div. Feb. 5, 2015).

52. *See* Haupt, *supra* note 33, at 679–82.

53. *See* Jacobson v. Massachusetts, 197 U.S. 11, 24-25 (1905) ("According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.").

54. United States v. Vuitch, 402 U.S. 62, 72 (1971).

55. KATHLEEN M. SULLIVAN & NOAH FELDMAN, FIRST AMENDMENT LAW 5 (Foundation Press, 6th ed. 2016). There are three principal reasons to protect freedom of speech: advancing truth in the marketplace of ideas, facilitating representative democracy and self-government, and promoting individual autonomy, self-expression, and self-fulfillment. *Id.* at 5–10. *See infra* notes 214-23.

56. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) (abrogating King v. Governor of N.J., 767 F.3d 216 (3d Cir. 2014)); *Pickup II*, 740 F.3d 1208 (9th Cir. 2014); Moore-King v. Cty. of Chesterfield, 708 F.3d 560 (9th Cir. 2013). All three of these cases, in the Court's view, improperly accorded speech lower value protection because it was "professional speech," a categorical approach unrecognized in First Amendment jurisprudence. *Id.* at 2371–72.

In Part II—Analysis & Proposal—it is argued that SOCE must be conceptually divided between aversion therapy and talk therapy. Aversion therapy is conduct, surviving rational basis review. It is further necessary to shift the paradigm away from the speech-and-action distinction to determine the protection talk therapy receives and explain why SOCE should not be covered by the First Amendment. To protect the health and safety of their citizens, states have extensive police powers to regulate medical professionals.[57] Part II concludes that courts and First Amendment scholars must take more seriously the threshold question of whether a kind of communication belongs within the coverage of the First Amendment. It also advocates the passage of the pending federal legislation that would ban SOCE nationwide.[58]

I. HISTORY

A. The Gruesome History of Conversion Therapy and State Prohibitions

SOCE developed from the science of sexuality beginning in the mid-nineteenth century when homosexuality was viewed as a criminal and medical problem.[59] There are many kinds of SOCE. The earliest were based on psychoanalytic theory, influenced by Sigmund Freud, which viewed homosexuality as a "developmental arrest" on the path to the adult norm of heterosexuality.[60] Other approaches more loosely based on psychoanalytic ideas "advocated altering gender-role behaviors to increase conformity with traditional gender roles."[61] Behavior therapy emerged in the 1960s, consisting of both aversive and nonaversive treatments.[62]

> Behavior therapists tried a variety of aversion treatments, such as inducing nausea, vomiting, or paralysis; providing electric shocks; or having the individual snap an elastic band around the wrist when the individual became aroused to same-sex erotic images or thoughts. Other examples of

57. *See Vuitch*, 402 U.S. at 72.
58. Therapeutic Fraud Prevention Act of 2019, H.R. 3570, 116th Cong. (2019).
59. GLASSGOLD ET AL., *supra* note 5, at 21.
60. *Id*.
61. *Id*. at 22.
62. *Id*.

> aversive behavioral treatments included covert sensitization, shame aversion, systematic desensitization, orgasmic reconditioning, and satiation therapy. Some nonaversive treatments used an educational process of dating skills, assertiveness, and affection training with physical and social reinforcement to increase other-sex sexual behaviors.[63]

Aversion therapy is very invasive, as "[e]ven more drastic methods, such as castration, have been used."[64]

Cognitive therapists also practiced SOCE; they sought "to change gay men's and lesbians' thought patterns by reframing desires, redirecting thoughts, or using hypnosis, with the goal of changing sexual arousal, behavior, and orientation."[65] Participation in SOCE is often involuntary.[66] Many participants in the early studies on SOCE "were court-mandated to receive treatment."[67] American eugenicists in the late nineteenth through the late twentieth century were deeply anxious about queer sexuality and ostracized menaces to their heteronormative mold.[68] Psychiatrists, allies of the eugenics movement, advocated sterilization and vasectomies to convert people from gay to straight.[69] A similar procedure for women, severing the oviduct, would cure them of any same-sex attraction.[70] Dozens of states adopted eugenic sterilization laws. Over sixty thousand people were sterilized in the name of eugenics in the United States.[71] It is difficult to know how many of these people were queer, but Peter Boag documented how in Washington and Oregon men caught in homosexual acts were

63. *Id*. (citations omitted).
64. *Pickup II*, 740 F.3d 1208, 1222 (9th Cir. 2014).
65. GLASSGOLD ET AL., *supra* note 5, at 22 (citations omitted).
66. *Id.* at 3.
67. *Id*.
68. Mason D. Bracken, *Queers, Quacks, and the Quest for the Perfect Family: Eugenicists' Attitudes Towards Members of the LGBTQ Community*, 23 APPRENTICE HISTORIAN 17, 17, 22 (2017); *see, e.g.,* NANCY ORDOVER, AMERICAN EUGENICS: RACE, QUEER ANATOMY, AND THE SCIENCE OF NATIONALISM (2003) xiii-xv; ALEXANDRA MINNA STERN, EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN MODERN AMERICA (2005) 18-23, 184-85, 196-97.
69. Bracken, *supra* note 68, at 22, 26-34.
70. *Id.* at 30.
71. *Id.* at 33.

labelled sexual deviants and forcibly sterilized as a method of sexual regulation.[72]

Practitioners of SOCE include licensed and unlicensed mental health professionals as well as religious counselors.[73] Since the American Psychiatric Association removed homosexuality from the listing of psychiatric disorders in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) in 1973,[74] an increased number of religious organizations offered SOCE.[75] Wyatt-Nichol argued that this "represents a shift back from the medical model to religious organizations" providing "an institutional control of homosexuality in society."[76] Moreover, many psychiatrists dissented from these changes, and in 1992, mental health professionals who continued to view homosexuality as a mental disorder founded the National Association for the Research and Therapy of Homosexuality (NARTH), an organization that believes in the efficacy of conversion therapy and is aligned with numerous right-wing Christian groups with an anti-LGBTQ agenda.[77]

Since removing homosexuality from the DSM, the American Psychiatric Association has taken various incremental steps towards destigmatization of gay and lesbian people.[78] In total, these steps constitute a radical change in the profession which today rejects SOCE as scientifically unsound and potentially harmful.[79] In 1998, the American Psychiatric Association issued a position statement which that said reparative and conversion therapies "[were] at odds with [their] scientific position."[80] Seeking a comprehensive answer, the American Psychological Association conducted a systematic review of the peer-reviewed journal

72. PETER BOAG, SAME-SEX AFFAIRS: CONSTRUCTING AND CONTROLLING HOMOSEXUALITY IN THE PACIFIC NORTHWEST (2003).

73. Heather Wyatt-Nichol, *Sexual Orientation and Mental Health: Incremental Progression or Radical Change?*, 37 J. HEALTH & HUM. SERVS. ADMIN. 225, 233 (2014).

74. GLASSGOLD ET AL., *supra* note 5, at 11. In December 1974, the American Psychological Association passed a resolution which affirmed the American Psychiatric Association's decision and urged all mental health professionals to work to remove the stigma against homosexuality. *Id.* at 23–24.

75. Wyatt-Nichol, *supra* note 73, at 233.

76. *Id.*

77. *Id.* (these include the Traditional Values Coalition, Concerned Women for America, Focus on the Family, the Family Research Council, and the 700 Club).

78. *Id.* at 230, 234.

79. *Id.* at 234.

80. *Id.* at 233.

literature on SOCE and concluded "that efforts to change sexual orientation are unlikely to be successful and involve some risk of harm, contrary to the claims of SOCE practitioners and advocates."[81] In a separate survey, the vast majority of about four hundred people who experienced SOCE said it caused them shame, emotional harm, and depression.[82] Some developed drug or alcohol abuse, 158 felt suicidal, and seventy-two attempted suicide.[83] Seven hundred thousand Americans have received SOCE.[84] An estimated twenty thousand LGBTQ youth will undergo conversion therapy from a licensed health care professional before the age of eighteen.[85] Approximately fifty-seven thousand minors will receive treatment from a religious or spiritual advisor.[86]

The first two states to ban conversion therapy for minors by licensed medical professionals were California and New Jersey.[87] On September 29, 2012, California's governor signed a bill which banned mental health providers from practicing SOCE on minors. The law defines SOCE as "any practices by mental health providers that seek to change an individual's sexual orientation. This includes efforts to change behaviors of gender expressions, or to eliminate or reduce romantic attractions or feelings toward individuals of the same sex."[88] New Jersey banned licensed medical professionals from engaging in "sexual orientation change efforts" with a minor.[89]

81. GLASSGOLD ET AL., *supra* note 5, at v.

82. Jallen Rix, *The Ex-Gay Survivor's Survey Results*, BEYOND EXGAY (2013), https://beyondexgay.com/survey/results/q10.html [https://perma.cc/XA7Q-2D52].

83. *Id.* Question 10 asked, "If you feel that you were harmed, please check the below boxes that describe the kinds of harm you experienced: (check as many as applicable)." *Id.*

84. WILLIAMS INST.: UCLA SCH. L., *supra* note 1.

85. *Id.*

86. *Id.*

87. *Gov. Jerry Brown bans gay-to-straight therapy for minors*, L.A. TIMES (Sept. 30, 2012), https://latimesblogs.latimes.com/california-politics/2012/09/governor-jerry-brown-gay-therapy-minors.html [https://perma.cc/9ABL-FZDC] ("These practices have no basis in science or medicine and they will now be relegated to the dustbin of quackery."); *Christie Signs Ban on Gay Conversion Therapy*, N.J. MONTHLY (Aug. 19, 2013), https://njmonthly.com/articles/from-the-editors/christie-signs-ban-on-gay-conversion-therapy/ [https://perma.cc/X8Y6-FQWP].

88. CAL. BUS. & PROF. CODE § 865(b)(1) (West 2013).

89. N.J. STAT. ANN. § 45:1-55 (West 2018).

B. Free Speech Challenges to Bans on SOCE

Courts inconsistently apply the speech-and-action distinction to SOCE. In California, two district courts split on the issue of whether to strike down the state's ban on SOCE. In *Welch v. Brown*, SOCE practitioners sought a declaratory judgment to find the law unconstitutional and a preliminary injunction against enforcement.[90] The court only ruled on their free speech challenge, avoiding the arguments that the law violated the right to privacy as well as the religion clauses of the First Amendment, and that it was unconstitutionally vague and overbroad.[91] The court ruled that because the law regulated talk therapy based on the message conveyed, the law regulated speech based on its content.[92] The legislature engaged in content-based and viewpoint-based discrimination by limiting the subject matter in talk therapy under discussion and only regulating the viewpoint that homosexuality can and should be changed.[93] The state failed strict scrutiny review because it failed to assert a compelling interest, and the law was underinclusive because it only applied to mental health providers.[94] Therefore, the court issued a preliminary injunction against the law's enforcement.[95]

Separately, in *Pickup v. Brown* (*Pickup I*), the plaintiffs argued the law violated their First Amendment rights.[96] This court, however, found that the law regulated conduct, not speech. The law prevented mental health professionals from engaging in the therapy itself but still allowed them to publicly discuss SOCE and recommend it to their patients.[97] The court considered it immaterial that some of the therapy was conducted via speech, relying on *National Ass'n for the Advancement of Psychoanalysis v. California Board of Psychology* (*NAAP*).[98] In *NAAP*, the plaintiffs

90. 907 F. Supp. 2d 1102, 1107 (E.D. Cal. 2012).
91. *Id.* at 1105 n.1.
92. *Id.* at 1117.
93. *Id.*
94. *Id.* at 1121.
95. *Id.* at 1122.
96. 42 F. Supp. 3d 1347, 1350 (E.D. Cal. 2012).
97. *Id.* at 1358–62.
98. 228 F.3d 1043 (9th Cir. 2000). In *NAAP*, the plaintiffs challenged California's licensing scheme for psychoanalysts under the First Amendment. The court noted that a course of conduct may be regulated even if it is "in part initiated, evidenced, or carried out through means of language, either spoken, or written, or printed." *Id.* at 1053 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490,

challenged California's licensing scheme for psychoanalysts under the First Amendment. The court noted that a course of conduct may be regulated even if it is "in part initiated, evidenced, or carried out through means of language, either spoken, or written, or printed."[99] The *NAAP* court rejected the claim that psychoanalysis is "pure speech" because "the key component of psychoanalysis is the treatment of emotional suffering and depression, *not* speech. . . . That psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection."[100] Using this precedent, the court in *Pickup I* found that California's SOCE law regulated conduct; therefore, rational basis review applied.[101] The court found that California had a legitimate, rational reason for prohibiting this practice and it chose appropriate means.[102] Therefore, the law survived a free speech challenge.[103]

The Ninth Circuit consolidated the two appeals in *Pickup II*, affirming *Pickup I* and overruling *Welch*.[104] The court followed *Pickup I*'s reasoning that the law regulated conduct, not speech, and thus was subject to rational-basis review.[105] The court emphasized the narrowness of the law which only prohibited therapists from conducting the therapy while still allowing them to publicly advocate for SOCE, inform their patients of SOCE, recommend SOCE, administer SOCE to any consenting person eighteen years of age or older, refer minors to unlicensed counselors, allow religious leaders to administer SOCE to minors and adults, and encourage minors to seek SOCE in other states.[106] The court reasoned that this approach is necessary because, otherwise, "any prohibition of a particular medical treatment would raise First Amendment concerns because of its incidental effect on

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502 (1949)). The court rejected the claim that psychoanalysis is "pure speech," quoting the district court's determination that "the key component of psychoanalysis is the treatment of emotional suffering and depression, *not* speech. . . . That psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection." *Id.* at 1054.

99. *Id.* at 1053 (quoting *Giboney*, 336 U.S. at 502).

100. *Id.* at 1054.

101. *Pickup I*, 42 F. Supp. 3d at 1362, 1376.

102. *Id*.

103. *Id.* at 1376–77.

104. *Pickup II*, 740 F.3d 1208 (9th Cir. 2014).

105. *Id.* at 1229 (concluding that the law banning SOCE "is the regulation of professional *conduct*, where the state's power is great, even though such regulation may have an incidental effect on speech").

106. *Id.* at 1223.

speech."[107] Such an application of the First Amendment would unduly restrict the states' power to regulate licensed professions and would be inconsistent with the principle 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, either spoken, written, or printed."[108]

The court found support for the legislature's stated purpose of preventing harm to minors, noting that "[t]he legislature relied on the well-documented, prevailing opinion of the medical and psychological community" that SOCE is ineffective and harmful, such as reports from many professional mental health organizations including the American Psychological Association and American Psychiatric Association.[109] The court found that the government asserted a valid interest and the means chosen to do so were related to the government's purpose, so the Ninth Circuit rejected the free speech challenge.[110] The Supreme Court denied certiorari.[111]

The Third Circuit also upheld New Jersey's ban on SOCE but for different reasons than the Ninth Circuit. The district court in *King v. Christie*, considering the free speech challenge, ruled that the law regulated conduct, not speech, relying heavily on the Ninth Circuit's decision in *Pickup II*.[112] New Jersey's ban was substantially similar to California's because it only prevented licensed practitioners from engaging in the therapy itself on minors, but it did not prevent them from publicly or privately opining on SOCE, discussing it as an option with their clients, or referring people to unlicensed counselors, such as religious leaders.[113]

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107. *Id.* at 1229 (citing Conant v. Walters, 309 F.3d 629 (9th Cir. 2002) (holding that while the government cannot prohibit a doctor from recommending or discussing medical marijuana with patients because of the Free Speech Clause, the government may ban the prescription of marijuana without violating doctors' speech rights because the words spoken or written for a prescription are incidental to the conduct of authorizing a prescription)).

108. *Id.* at 1229 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)).

109. The others were "the American School Counselor Association, the American Academy of Pediatrics, the American Medical Association, the National Association of Social Workers, the American Counseling Association, the American Psychoanalytic Association, the American Academy of Child and Adolescent Psychiatry, and the Pan American Health Organization." *Id.* at 1223–24.

110. *Id.* at 1232.

111. Pickup v. Brown, 134 S. Ct. 2871 (2014).

112. King v. Christie, 981 F. Supp. 2d 296, 303 (D.N.J. 2013), *aff'd sub. nom.* King v. Governor of N.J., 767 F.3d 216 (3d Cir. 2014).

113. *King*, 981 F. Supp. 2d at 313–14.

Further, the district court reasoned that the words spoken during therapy were merely the "tool" employed by therapists to administer treatment. The district court stated that

> the line of demarcation between conduct and speech is whether the counselor is attempting to communicate information or a particular viewpoint to the client or whether the counselor is attempting to apply methods, practices, and procedures to bring about a change in the client—the former is speech and the latter is conduct.[114]

The district court also rejected the plaintiffs' claim that, because they exclusively practiced SOCE through talking, the law had incidental effects on speech which would have triggered intermediate scrutiny under the *O'Brien* test, ruling that the plaintiffs failed to "show that their conduct is inherently expressive."[115] To show that they were engaged in "inherently expressive conduct," the plaintiffs needed to but failed to show "that talk therapy (1) is intended to be communicative, and (2) would be understood as such by their clients."[116] The court found that "SOCE counseling is not like other forms of conduct traditionally found to be 'inherently expressive,' such as the burning of a draft card in *O'Brien* or the burning of a flag in *Texas v. Johnson*."[117] The court was concerned that if it found that the counseling was expressive conduct, then many laws regulating professionals (like doctors and therapists) would face heightened scrutiny and thus likely be invalidated.[118] As a regulation of conduct, the law needed only to survive rational basis review, and the state asserted a valid interest in protecting minors from demonstrably harmful conduct.[119]

The Third Circuit affirmed the district court's rejection of the free speech challenge, but unlike the district court and the Ninth Circuit, found that the law regulated speech, not conduct: "speech is speech, and it must be analyzed as such for purposes of the First Amendment."[120] Rejecting the argument of the district court that the spoken words became conduct

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114. *Id.* at 319.
115. *Id.* at 321.
116. *Id.* at 322.
117. *Id.* at 323.
118. *Id.* at 319.
119. *Id.* at 325.
120. King v. Governor of N.J., 767 F.3d 216, 229 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 2048 (2015).

because they were merely the "tool" by which the therapy happened, the court said, "the argument that verbal communications become 'conduct' when they are used to deliver professional services was rejected by *Humanitarian Law Project*. Further, the enterprise of labelling certain verbal or written communications 'speech' and others 'conduct' is unprincipled and susceptible to manipulation."[121] The Third Circuit elaborated that in *Humanitarian Law Project*, the Supreme Court addressed a federal statute prohibiting the provision of "material support" to designated terrorist organizations.[122] The plaintiffs argued that the statute violated their free speech rights by preventing them from providing legal training and advice on conflict resolution.[123] The government argued this was conduct because the statute was targeted at conduct—providing aid to terrorist organizations. The Court held that the law inescapably regulated speech because the plaintiffs were "communicating a message" and that did not change "based on the nature or function" the speech served.[124]

Even so, although the Third Circuit held that the law regulated speech, the court reasoned that only intermediate scrutiny applied because the law regulated "professional speech."[125] The court argued, "The authority of the States to regulate the practice of certain professions is deeply rooted in our nation's jurisprudence."[126] The court tracked what it identified as the historical development of the professional speech doctrine.[127] The court held that

> a professional's speech warrants lesser protection only when it is used to provide personalized services to a client based on the professional's expert knowledge and judgment. By contrast, when a professional is speaking to the public at large or offering her personal opinion to a

121. *Id*. at 228 (citing Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) (holding that the "material support statute" was a content-based regulation of speech, but nevertheless upholding the law under application of strict scrutiny)).
122. *Id.* at 225.
123. *Id.*
124. *Id.*
125. *Id.* at 237.
126. *Id.* at 229.
127. *Id*. at 229–32.

> client, her speech remains entitled to the full scope of protection afforded by the First Amendment.[128]

The court held that SOCE counseling is professional speech because by speaking, SOCE practitioners provide specialized services to clients.[129] Drawing on the commercial speech doctrine, the court held that intermediate scrutiny applied: "professional speech receives diminished protection, and, accordingly, [ ] prohibitions of professional speech are constitutional only if they directly advance the State's interest in protecting its citizens from harmful or ineffective professional practices and are no more extensive than necessary to serve that interest."[130] The Third Circuit held the law survived intermediate scrutiny because of the state's strong interest in protecting minors from practices demonstrated by psychologists and psychiatrists to be harmful,[131] and the state's means directly advanced the asserted interest without being overly restrictive.[132] It is significant that the only two federal appeals court cases directly on point rejected free speech challenges to bans on licensed medical professionals practicing SOCE on minors.

C. National Institute of Family and Life Advocates v. Becerra

The Supreme Court has not directly addressed the constitutionality of SOCE prohibitions. However, in *NIFLA v. Becerra*, the Court abrogated the Third and Ninth Circuit's reasonings which upheld the laws against free speech challenges.[133]

The Supreme Court invalidated a California law requiring licensed crisis pregnancy centers—nearly all run by religious organizations—to display a notice about the availability of state-funded contraceptive and abortion services.[134] The law also required unlicensed facilities providing

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128. *Id*. at 232 (citations omitted).
129. *Id*. at 233.
130. *Id*.
131. *Id*. at 237.
132. *Id*. at 240.
133. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) (abrogating King v. Governor of N.J., 767 F.3d 216 (3d Cir. 2014); *Pickup II*, 740 F.3d 1208 (9th Cir. 2014); Moore-King v. Cty. of Chesterfield, 708 F.3d 560 (9th Cir. 2013) (upholding a law regulating fortune tellers as valid regulation of "professional speech")).
134. *Id*. The statute required this notice at licensed, covered facilities: "California has public programs that provide immediate free or low-cost access to comprehensive family planning services

pregnancy-related services to display a notice that they were unlicensed by the state.[135] The Ninth Circuit upheld the licensed notice as valid regulations of speech under the "lower level of scrutiny" it applied to "professional speech" and upheld the unlicensed notice as valid under any level of scrutiny.[136] Justice Thomas, writing for the Court divided 5-4,[137] held that the licensed notice was a "content-based regulation of speech" because the compelled notices "alte[r] the content of [their] speech" in that they require pro-life organizations to provide women with information about how to get abortions, antithetical to their stated mission.[138] The Court expressly rejected the "professional speech" category as a kind of speech entitled to lower-value protection.[139] Justice Thomas added, "This Court has 'been reluctant to mark off new categories of speech for diminished constitutional protection.'"[140] In so holding, the Court expressly abrogated the reasoning in *King v. Governor of New Jersey* of the Third Circuit and *Pickup II* of the Ninth Circuit.[141] These cases, in the Court's view, improperly "except[ed] professional speech from the rule that content-based regulations of speech are subject to strict scrutiny."[142] The Court never said that conversion

(including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." *Id.* at 2369 (citing CAL. HEALTH & SAFETY CODE ANN. § 123472(a)(1)).

135. *Id.* at 2369–70. The statute required this notice at unlicensed, covered facilities: "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." *Id.* at 2370 (citing CAL. HEALTH & SAFETY CODE ANN. § 123472(b)(1)).

136. *Id.* at 2370 (citing Nat'l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823 (9th Cir. 2016)).

137. Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kennedy were in the majority. Justice Kennedy filed a concurrence, and Justice Breyer dissented, joined by Justices Ginsburg, Kagan, and Sotomayor.

138. *NIFLA*, 138 S. Ct. at 2371 (citing Riley v. Nat'l Fed'n of Blind of N.C., Inc., 487 U.S. 781, 795 (1988)).

139. *Id.* at 2371–72. "[T]his Court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by 'professionals.'" *Id*. Justice Thomas added, "This Court's precedents do not recognize such a tradition for a category called 'professional speech.'" *Id.* at 2372.

140. *Id.* at 2372 (citing Denver Area Ed. Telecomm. Consortium, Inc. v. FCC, 518 U.S.727, 804 (1996) (Kennedy, J., concurring in part, concurring in judgment in part, and dissenting in part)); *see, e.g.*, Brown v. Entm't Merch. Ass'n, 564 U.S. 786 (2011) (refusing to make violent video games unprotected category of speech); United States v. Stevens, 559 U.S. 460 (2010) (refusing to make depictions of animal cruelty unprotected category of speech).

141. *Id.* at 2371–72. The Court also abrogated Moore-King v. Cty. of Chesterfield, 708 F.3d 560 (9th Cir. 2013).

142. *NIFLA*, 138 S. Ct. at 2371.

therapy is speech that it is covered by the First Amendment, or what level of protection applies to conversion therapy, nor did it invalidate state laws banning conversion therapy.[143] Even so, taking a scythe to the root of the reasoning upholding these bans greatly unsettles the law on SOCE.[144]

D. First Amendment Challenges by Professionals to Licensing Schemes and Professional Conduct

Courts are often faced with cases presenting at least incidental free speech interests or situations of novel First Amendment application. An analysis of a couple cases reveals the flexible approach taken in these contexts. In *NAAP*,[145] the Ninth Circuit upheld against a free speech challenge California's requirements that psychologists receive a license to practice. An organization of psychoanalysts alleged that California's mental health licensing laws abridged their Fourteenth Amendment substantive due process and equal protection rights and their First Amendment rights of speech and association.[146] The court rejected the Fourteenth Amendment claim because they concluded the licensing scheme did not implicate a fundamental right and "there is no fundamental right to choose a mental health professional with specific training."[147] Addressing the free speech claim, the court explained that merely because psychoanalysis is speech, it does not constitute "pure speech" entitled to the highest protection. The court stated that "the key component of psychoanalysis is the treatment of emotional suffering and depression, *not* speech. . . . That psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection."[148] The court noted that the Supreme Court has ruled that "an attorney's in-person solicitation of clients is 'entitled to some constitutional protection,' but 'is subject to regulation in

143. *Id.* at 2371–72.

144. *See generally* Claudia E. Haupt, *The Limits of Professional Speech*, 128 YALE L.J.F. 185, 186 (2018).

145. Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043 (9th Cir. 2000).

146. *Id*. at 1049.

147. *Id*. at 1049–50.

148. *Id*. at 1054.

furtherance of important state interests.'"[149] Then, the court cited "'numerous' examples of communications 'that are regulated without offending the First Amendment,'" such as "the exchange of securities information, corporate proxy statements, exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees."[150] The court added that "[i]t is properly within the state's police power to regulate and license professions, especially when public health concerns are affected."[151] The court held that the state's interest in regulating mental health was compelling and rejected the First Amendment challenge.[152]

In *Ohralik v. Ohio State Bar Ass'n*, the Supreme Court held that the state "may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent."[153] The Ohio Bar Association determined that the attorney violated professional ethics and rules of responsibility because he solicited a potential client in person and then sued her when she fired him.[154] The attorney alleged that his in-person solicitation was indistinguishable from "truthful, 'restrained' advertising concerning 'the availability and terms of routine legal services,'" which the Court already had held that the First Amendment protects.[155] The Court stated, after surveying several cases, "Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity."[156] The Court acknowledged the marginal First Amendment interest at stake, declined to treat this as a commercial speech case with intermediate scrutiny, and approached it as a case *sui generis*.[157] The "legitimate and important state interest" in protecting

149. *Id*. (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 459 (1978)).
150. *Id*.
151. *Id*.
152. *Id*. at 1054–55.
153. 436 U.S. 447, 448 (1978).
154. *Id.* at 450–53.
155. *Id.* at 454–55 (citing Bates v. State Bar of Ariz., 433 U.S. 350, 384 (1977); Va. Pharmacy Bd. v. Va. Citizens Consumer Council, 425 U.S. 748 (1976)).
156. *Id.* at 456.
157. *Id.* at 459 ("A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation. While entitled to some constitutional protection, appellant's conduct is subject to regulation in furtherance of important state interests." (citations omitted)).

consumers and maintaining standards among professionals justified the regulation, and the plaintiff even conceded these were "compelling" interests when the solicitation involved "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct.'"[158] The Court held that the prophylactic measure passed constitutional muster and the state or bar association need not show injury to the client first before taking disciplinary action.[159] *Ohralik* and *NAAP* illustrate how the Court handles cases in which it must consider whether uncovered communications previously uncovered by the First Amendment should be brought within the ambit of the First Amendment. They are treated as novel situations which are ill-suited to rigid categorical rules like the speech-and-action distinction and usual standards of scrutiny. Indeed, in *Ohralik*, the Court did not apply a specific standard of scrutiny. *Ohralik* shows the creative flexibility available in unique free speech contexts.

II. ANALYSIS AND PROPOSAL

A few things are clear from the preceding cases. First, the new categorical approach of "professional speech" is dead on arrival.[160] Justice Kennedy's concurrence and Justice Breyer's dissent in *NIFLA* did not disagree with the majority's dismissal of professional speech; the concurrence and dissent did not even mention professional speech. This direct refusal combined with the Court's general "reluctan[ce] to mark off new categories of speech for diminished constitutional protection" mean that the bans on SOCE must stand on distinct legal footing.[161]

The Third Circuit could not have been more wrong in *King* when it wrote that, "speech is speech, and it must be analyzed as such for purposes

158. *Id.* at 460.

159. *Id.* at 466–67.

160. *But see* Haupt, *supra* note 144, at 186 (arguing that the Ninth Circuit mischaracterized *NIFLA* as a professional speech case, that doctrinally there remains a narrow professional speech category of lower value protection, and that a narrowly defined professional speech category is proper jurisprudence).

161. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2372 (2018) (citing Denver Area Ed. Telecommunications Consortium, Inc. v. FCC, 518 U.S.727, 804 (1996) (Kennedy, J., concurring in part, concurring in judgment in part, and dissenting in part)); *e.g.*, Brown v. Entm't Merch. Ass'n, 564 U.S. 786 (2011) (refusing to make violent video games unprotected category of speech); United States v. Stevens, 559 U.S. 460 (2010) (refusing to make depictions of animal cruelty unprotected category of speech).

of the First Amendment."[162] It was correct in *King* to reject the argument that the spoken words became conduct because they were merely the "tool" by which the therapy happened, properly relying on *Humanitarian Law Project*.[163] However, speech itself is no talisman which grants First Amendment protection. Merely because the therapy is conducted using speech does not make it protected speech.[164] The Court in *Ohralik* properly considered the lawyer's in-person solicitation of clients as outside the scope of free speech protection, even though that solicitation was undertaken through speech.[165] Additionally, some conduct gets First Amendment protection when it is "expressive conduct"—those actions that the speaker intends to have an expressive meaning and would be understood as such by the audience.[166] Clearly, a searching inquiry into the nature and context of the actions and words is necessary to determine whether the communications fall within the coverage of the First Amendment, much less receive First Amendment protection. Additionally, the words exchanged during conversion therapy for minors meet none of the purposes behind First Amendment protection: seeking truth, promoting self-government, and individual autonomy.[167]

Bans on SOCE directed at minors should survive free speech challenges. Aversion therapy is conduct, a particularly horrific form of torture.[168] Regulation of conduct need only survive a rational basis review.[169] The difficulty lies in addressing what to do with talk therapy, which has been considered First Amendment protected speech, unprotected

162. King v. Governor of N.J., 767 F.3d 216, 229 (3d Cir. 2014).

163. *Id.* at 228 (citing Holder v. Humanitarian Law Project, 561 U.S. 1 (2010)).

164. *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgment 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, either spoken, written, or printed.").

165. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

166. Spence v. Washington, 418 U.S. 405, 410–11 (1974) ("An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."); *see, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (applying strict scrutiny to invalidate conviction because state law flag-burning prohibition was content-based regulation of speech); United States v. Eichman 496 U.S. 310 (1990) (applying strict scrutiny to invalidate conviction because federal flag-burning prohibition was content-based regulation of speech).

167. SULLIVAN & FELDMAN, *supra* note 55, at 5-10.

168. WILLIAMS INST.: UCLA SCH. L., *supra* note 1; *Pickup II*, 740 F.3d 1208, 1222 (9th Cir. 2014) ("Even more drastic methods, such as castration, have been used.").

169. *See* FCC v. Beach Communications, Inc., 508 U.S. 307, 314-15 (1993).

professional speech, and unprotected conduct. The fundamental failure of the Third and Ninth Circuits was to fall into the trap of the speech-and-action distinction, which has been called "unprincipled and subject to manipulation."[170] This venture has been an abject failure, seen in the inconsistency of the opinions on the topic. One recent case to address the topic granted a preliminary injunction against Tampa, Florida's ban on SOCE, ruling it a content-based regulation of speech.[171] In *NIFLA*, the Supreme Court essentially signaled that courts should not apply lower value protection to "professional speech."[172] It is necessary to shift the paradigm of the whole inquiry and address a fundamental, threshold question about First Amendment protection and coverage to finally provide an answer about where SOCE stands.[173]

SOCE should be outside the scope of First Amendment coverage for several reasons. Fraudulent practices are outside the First Amendment's coverage, and SOCE should also be as it is a demonstrably harmful and failed practice.[174] In *Ferguson v. JONAH*, a jury found SOCE practitioners liable to their former clients for damages because of the expense they paid and trauma they incurred in violation of New Jersey consumer protection law.[175] Benjy Unger, a nineteen year-old deeply devout Orthodox Jew, sought out conversion therapy at the advice of his parents.[176] He reached "Rabbi Arthur Goldberg" (who was in fact not a rabbi but a disbarred attorney convicted of conspiring to defraud the United States) who ran Jews Offering New Alternatives for Healing ("JONAH"). "Rabbi Goldberg" promised Benjy he could help; he had assisted hundreds of young men deal with "unwanted same-sex attraction" through "his *proven, scientific*

170. Volokh, *supra* note 29.

171. Vazzo v. City of Tampa, No. 8:17-cv-2896-T-02AAS, slip op. at 2, 26 (M.D. Fla. Jan. 30, 2019), https://thinkprogress.org/wp-content/uploads/2019/01/Tampa-conversion-therapy-opinion.pdf [https://perma.cc/4Y6J-D7RT]. However, in a later ruling on the case, the court abandoned its First Amendment ruling, deciding the case only on the grounds that Florida state law impliedly preempted municipalities from regulating mental health professionals. Vazzo v. City of Tampa, No. 8:17-cv-2896-T-02AAS, 2019 WL 4919302, at *1 (M.D. Fla. Oct. 4, 2019).

172. *See* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

173. Schauer, *supra* note 27, at 1765.

174. *See* Victor, *supra* note 38; Satira, *supra* note 40.

175. *See* Olga Khazan, *The End of Gay Conversion Therapy*, ATLANTIC (June 26, 2015), https://www.theatlantic.com/health/archive/ 2015/06/the-end-of-gay-conversion-therapy/396953/ [https://perma.cc/5NVA-JMRX].

176. Dubrowski, *supra* note 39, at 77 (quoting and summarizing the Transcript of Trial, Ferguson v. JONAH, No. L-5473-12 (N.J. Super. Ct. Law Div. June 3-4, 2015)).

program" which could turn Benjy straight in two to four years.[177] After Benjy wrote a check, he sent him to Alan Downing, a so-called "ex-gay counselor" (that is, a conversion therapy "success story") who possessed no academic qualifications other than an undergraduate degree in music and theater. Peter Dubrowski described Benjy's "treatment" based on the trial transcript as such:

> Benjy was indeed harmed. Under the guise of treatment, Benjy's "therapist" Alan Downing—himself "ex-gay"—convinced the young man to undress in one-on-one counseling sessions, while Downing stood so close that Benjy could feel the older man's breath on the back of his neck. In group sessions with other "journeyers," the term given to other clinic patients, Benjy was instructed to slam a tennis racket into a pillow representing his mother until his hands bled, while screaming at her for causing him to be gay. He received what JONAH called "healthy touch," when he would be cradled by other "ex-gay" men decades his senior for up to half an hour at a time. This "treatment" cost $100 per one-hour session, with occasional $650 "weekend retreats." By the time he left JONAH, Benjy's relationship with his parents was all but destroyed. Depression rendered him nonfunctional for months. And yes, he was still gay.[178]

The jury unanimously found in favor of the plaintiffs.[179] Additionally, in a landmark pretrial ruling, the "[c]ourt declared—for the first time in American history—that homosexuality was not a mental disease, disorder, or equivalent thereof *as a matter of law*."[180] The judge rejected the defense's pretrial argument that the First Amendment's Free Speech and Free Exercise clauses entitled them to a dismissal as a matter of law.[181] Although this was only one trial court decision and verdict, the case represents a model for demonstrating the fraudulent nature of conversion therapy in

177. *Id.* (emphasis in original).
178. *Id.* at 78.
179. *Id.* at 79.
180. *Id.*
181. Order Granting Plaintiffs' Motion for Partial Summary Judgment, Ferguson v. JONAH, No. L-5473-12, at 11-12 (N.J. Super. Ct. Law Div. Feb. 10, 2015).

future litigation. The court in *Pickup II* correctly noted "the well-documented, prevailing opinion of the medical and psychological community" that SOCE is ineffective and harmful.[182] The consensus of the medical community is evident, as all major American medical organizations denounce the practice.[183]

SOCE should also be outside the scope of the First Amendment because the state has authority to regulate professional and medical malpractice through its traditional police power, areas themselves outside the coverage of the First Amendment.[184] SOCE is analogous to regulations of these kinds of communications; if doctors violate their duty of care to provide their clients with adequate medical treatment by giving their client bad advice, they should not escape liability because their medical treatment took the form of the spoken word. Further, the police power allows states to regulate to protect their citizens' health, which is understood to "include [] psychological as well as physical well-being."[185] The Ninth Circuit in *NAAP* correctly stated when it upheld California's licensing scheme for psychoanalysts, "[t]hat psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection."[186] As a policy matter, it is sensible to agree with concern of the Third Circuit in *King* that if SOCE is considered speech protected by the First Amendment, that argument could extend to place many laws regulating doctors and therapists under heightened scrutiny and thus cause the unravelling of traditional, reasonable state regulations.[187]

It should be uncontroversial to place SOCE outside the coverage of the First Amendment as there are numerous categories of unprotected speech as well as dozens of kinds of communications that do not even come under First Amendment coverage.[188] Incitement to imminent lawless action,[189]

182. *Pickup II*, 740 F.3d at 1223-24 (9th Cir. 2014).

183. *Id.* at 1232.

184. Haupt, *supra* note 33, at 681–82.

185. *See* United States v. Vuitch, 402 U.S. 62, 72 (1971) (defining "health" in a statutory context using standard plain meaning analysis, including reliance on dictionary definitions).

186. Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. Of Psychology, 228 F.3d 1043, 1053 (9th Cir. 2000).

187. King v. Christie, 981 F. Supp. 2d 296, 319 (D.N.J. 2013).

188. *See* Schauer, *supra* note 27, at 1765.

189. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (speech can be prohibited "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

fighting words,[190] true threats,[191] obscenity,[192] defamation,[193] and sometimes group libel as "hate speech"[194] are all categories of speech outside of First Amendment protection. Other kinds of communications outside the coverage of the First Amendment are deceptive or fraudulent speech,[195] the law of contracts,[196] speech in the context of professional malpractice,[197] speech integral to criminal conduct—like blackmail and planning a conspiracy,[198] the exchange of information about securities,[199] corporate proxy statements,[200] the exchange of price and production information among competitors—violating antitrust laws,[201] and employers' threats of retaliation for the labor activities of employees.[202] SOCE should join this list.

The narrowness of the SOCE bans supports the argument that conversion therapy is outside the scope of the First Amendment. The Court wrote in *R.A.V. v. City of St. Paul*, "Where the government does not target

190. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

191. Virginia v. Black, 538 U.S. 343, 344 (2003) ("'True threats' encompass those statements when the speaker means to communicate a serious intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat.") The Court held that cross burning done with the intent to threaten or intimidate constitutes a "true threat" and is unprotected by the First Amendment. *Id.*

192. Roth v. United States, 354 U.S. 476, 487 n.20 (1957) ("obscene material is material which deals with sex in a manner appealing to prurient interest," i.e., "material having a tendency to excite lustful thoughts"); s*ee also* Miller v. California, 413 U.S. 15, 24 (1973).

193. *See generally* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

194. Beauharnais v. Illinois, 343 U.S. 250 (1952) (holding that as a government may proscribe libel and defamation, so too may the government punish group libel, and the "clear and present danger" test is inappropriate because libel is categorically outside First Amendment protection). *But see* Collin v. Smith (*The Skokie Case*), 578 F.2d 1197, 1204 (7th Cir. 1978) (invalidating ordinances targeted against the hate speech of the Nazis planning to march through Skokie, Ill., and expressly saying that the Seventh Circuit no longer regarded *Beauharnais* as good law).

195. Schauer, *supra* note 27, at 1768.

196. *Id.*

197. Haupt, *supra* note 33, at 681–82.

198. Volokh, *supra* note 29, at 989.

199. *See* SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). What is key here is that the Court did not discuss a First Amendment issue at all. That is, neither party nor the Court thought it merited any discussion.

200. *See* Mills v. Elec. Auto-Lite Co., 396 U.S. 375 (1970) (lacking any First Amendment analysis, akin to *Texas Gulf Sulphur Co.*).

201. Am. Column & Lumber Co. v. United States, 257 U.S. 377 (1921).

202. NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969).

conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."[203] There are many kinds of expression and action still allowed under bans on SOCE.[204] They do not prohibit someone advocating the efficacy of conversion therapy. They do not mandate the contours of public debate. They do not require people to publicly profess their faith in the wisdom of the states' decisions, nor do they require doctors to publicly reject SOCE. The laws do not even prevent practitioners from discussing conversion therapy with their patients, recommending SOCE, or referring them to unlicensed practitioners, organizations, or religious leaders. The laws do not even prevent unlicensed practitioners from practicing or advocating SOCE. The laws do not tell ministers what they can preach from the pulpit about the moral implications of homosexuality, ban rabbis from ruminating about gender fluidity, or mandate imams inculcate their faithful with a socially progressive agenda.

Rather, the laws are quite narrow. They prevent licensed medical professionals from exacting extraordinary harm on minors by conducting demonstrably harmful therapy.[205] Doctors should not be able to use their licenses to masquerade quackery as competence. These laws are necessary to protect minors.

It is worth explaining why it would be doctrinally incorrect to uphold bans on conversion therapy based on *O'Brien* scrutiny. The argument would go that because the Third and Ninth Circuits analyzed conversion therapy along the speech-and-action distinction, and *NIFLA* rejected the "professional speech" category, that *O'Brien* scrutiny remains the only route to uphold bans on SOCE. This proponent would argue that regulations of "talk therapy" are at most regulations of conduct with an incidental effect on speech. This analysis would lean heavily on arguing that the speech is just the "tool" used to undertake the conduct of therapy, similar to the district court's argument in *King v. Christie*.[206] "[T]he incidental restriction on alleged First Amendment freedoms" by a ban on SOCE would be "no greater than is essential to the furtherance of" the government interest.[207]

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203. R.A.V. v. City of St. Paul, 505 U.S. 377, 390 (1992).

204. *Pickup II*, 740 F.3d at 1223 (9th Cir. 2014). *See generally* CAL. BUS. & PROF. CODE § 865(b)(1) (West 2013); N.J. STAT. ANN. § 45:1-55 (2013).

205. *See* GLASSGOLD ET AL., *supra* note 5.

206. King v. Christie, 981 F. Supp. 2d 296, 319 (D.N.J. 2013).

207. United States v. O'Brien, 391 U.S. 367, 377 (1968).

The bans affect only a limited range of conduct between the practitioner and the patient while allowing the practitioner to still recommend it to patients, refer them to other resources, and advocate it as good policy.[208]

However, this approach fails the threshold requirement of *O'Brien*: that "the government interest is unrelated to the suppression of speech."[209] When SOCE is conceptualized as speech, banning it becomes an impermissible content-based regulation of speech.[210] This is because the government bans a particular form of therapy because it disagrees with its content—i.e., that gay people can and should be made straight. It would also be viewpoint-based discrimination;[211] the ban would still allow doctors to practice gender-transition and gender-affirming therapies. Still, as this note has extensively demonstrated, obsession with levels of scrutiny and the speech versus action distinction fail to address the fundamental, threshold question: What kinds of communications *should* be covered under the First Amendment? The court in *Ferguson v. JONAH* was correct to hold SOCE fraud and outside the scope of the First Amendment.[212]

First Amendment values are essential to any thorough discussion of free speech. Bans on conversion therapy and other sexual orientation change efforts are consistent with the underlying values and principles of the First Amendment. First, bans on SOCE are consistent with First Amendment values because the bans are narrow. A principal purpose the First Amendment is to support self-government.[213] Nothing in the bans prevents SOCE advocates from going to their state legislatures and arguing that the bans should be repealed as bad policy—and nothing should stop this kind of political advocacy.[214] Such a ban could still be overturned by a

208. *Pickup II*, 740 F.3d at 1223 (9th Cir. 2014); *see generally* CAL. BUS. & PROF. CODE § 865(b)(1) (West 2013); N.J. STAT. ANN. § 45:1-55 (2013).

209. *O'Brien*, 391 U.S. at 377.

210. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015).

211. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

212. Order Granting Plaintiffs' Motion for Partial Summary Judgment, Ferguson v. JONAH, No. L-5473-12, at 11-12 (N.J. Super. Ct. Law Div. Feb. 10, 2015).

213. SULLIVAN & FELDMAN, *supra* note 55, at 6-8.

214. Justice Brandeis wrote that the Framers believed

> that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

democratic majority. This is analogous to the Ninth Circuit holding in *Conant v. Walters* that the government may prohibit doctors from writing prescriptions for marijuana, but that the Free Speech clause prevents the state from prohibiting doctors from recommending or discussing medical marijuana with their patients.[215] The doctors remain free to advocate medical marijuana as good public policy just as SOCE bans allow the practitioners to lobby their representatives for a change in the law.

Additionally, the bans do not interfere with the "marketplace of ideas."[216] SOCE practitioners remain free to advocate the efficacy of the practice and moral fortitude of their cisgender, heteronormative mold from any place they like: the pulpit, the opinion column, leaflets, the town square, and any place else.[217] The truth of conversion therapy's depravity can win out without suppression of its advocacy.[218] People will still have the opportunity to see the collision of truth, falsity, and partial truth which leads society to a fuller understanding of the Truth.[219]

Finally, the ban on SOCE for minors is also consistent with the principle that the First Amendment protects individual autonomy.[220] If adults, in their process of self-determination, decide that they want to undergo conversion therapy, they should be free to do so.[221] It is consistent with a negative theory of the state that government not interfere when a consenting adult wants to pursue their self-determination, as long as those actions do not harm others. There are queer, religious people who want to live consistent with their faith, and even though most LGBTQ individuals would never voluntarily undergo conversion therapy, each individual in this country should remain free to choose their own path.[222]

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215. Conant v. Walters, 309 F.3d 629 (9th Cir. 2002).

216. SULLIVAN & FELDMAN, *supra* note 55, at 5. This argument is instrumental, that is, speech is in service of the truth.

217. *See generally* CAL. BUS. & PROF. CODE § 865(b)(1) (West 2013); N.J. Stat. Ann. § 45:1-55 (2013).

218. *See* SULLIVAN AND FELDMAN, , *supra* note 55, at 5 (citing JOHN MILTON, AEROPAGITICA—A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING (1644)). Milton argued, "Let [Truth] and Falsehood grapple; who ever knew Truth put to the worst, in a free and open encounter?" *Id.*

219. *See id.* (citing JOHN STUART MILL, ON LIBERTY (1859)).

220. *Id.* at 8-9; *see also* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

221. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[T]hose who won our independence believed that the final end of the State was to make men free to develop their faculties; [they] valued liberty both as an ends and a means.").

222. *See* George, *supra* note 35.

CONCLUSION

Under this analysis, the bans on conversion therapy are outside the coverage of the First Amendment. The ruling in *NIFLA* that "professional speech" has no place in First Amendment jurisprudence is no obstacle to this approach. Courts and commentators are wrong to cite *NIFLA* as evidence that the Supreme Court opposes bans on SOCE. The Court already denied the opportunity to directly overturn California's and New Jersey's bans on SOCE. Bans on SOCE are consistent with First Amendment values: seeking truth, promoting self-government, and individual autonomy.

It is time for Congress to pass the proposed national ban on "provid[ing] conversion therapy to any individual if such person receives compensation in exchange for such services."[223] This exceedingly harmful therapy has already wrought its suffering on hundreds of thousands of Americans. Outlawing conversion therapy by licensed medical professionals is not only proper under the First Amendment, but also the right thing to do. We in the gay, lesbian, bisexual, transgender, and queer community should no longer suffer under quackery masquerading as competence. Diversity strengthens America. This country is at its best when it lives up to its aspirational founding as the home of freedom and equality. Taking steps to end these horrible practices will affirm the nation's commitment to provide a foundation for a pluralistic society where people are free to live joyfully as they are.

223. Therapeutic Fraud Prevention Act of 2019, H.R. 3570, 116th Cong. (2019).