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## The Not-So-Straight First Amendment: Why Prohibitions on Conversion Therapy for Children Survive Strict Scrutiny

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# THE NOT-SO-STRAIGHT FIRST AMENDMENT: WHY PROHIBITIONS ON CONVERSION THERAPY FOR CHILDREN SURVIVE STRICT SCRUTINY

**Abstract:** In November 2020, the United States Court of Appeals for the Eleventh Circuit, in *Otto v. City of Boca Raton (Otto II)*, became the first federal appellate court to hold that bans on Sexual Orientation Change Efforts (“SOCE”) therapy, also known as conversion therapy, for minors are unconstitutional restrictions of freedom of speech. In reviewing the bans under the strict scrutiny standard, the Eleventh Circuit’s decision in *Otto* departs from the other circuits’ decisions not only in outcome but also in analysis. The Eleventh Circuit, following recent Supreme Court’s decisions, concluded that courts must apply strict scrutiny and that there was insufficient research suggesting that SOCE therapy was harmful toward children, thus invalidating the therapy bans. This Note reviews the Eleventh Circuit’s majority decision in *Otto II*, and argues that the court wrongly concluded that the anti-conversion therapy bans for minors fail strict scrutiny. Instead, this Note argues that anti-conversion therapy statutes are one of the rare governmental regulations that can withstand strict scrutiny analysis, and the courts must uphold them.

## INTRODUCTION

*“Their goal was to get us to hate ourselves for being LGBTQ . . . and they knew what they were doing . . . .”*<sup>1</sup>

—TC

These are the haunting words of TC, who endured conversion therapy at fifteen years of age when his parents learned he was gay.<sup>2</sup> TC attended conversion therapy each day after school for hours on end, where he would be “re-built” into a model non-gay individual.<sup>3</sup> This meant relearning how to eat, what to wear, how to behave, and instilling within himself the belief that he

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<sup>1</sup> James Michael Nichols, *A Survivor of Gay Conversion Therapy Shares His Chilling Story*, HUFFINGTON POST (Nov. 17, 2016), [https://www.huffpost.com/entry/realities-of-conversion-therapy\\_n\\_582b6cf2e4b01d8a014aea66](https://www.huffpost.com/entry/realities-of-conversion-therapy_n_582b6cf2e4b01d8a014aea66) [<https://perma.cc/Q3NE-29JN>]. TC is the anonymous individual who shared his story with the Huffington Post and who survived conversion therapy as a minor in 2012. *Id.*

<sup>2</sup> *Id.* (“They were able to turn us against ourselves . . . . This is what drew so many people to suicide. We all shared a sense of loathing towards who we were and who we loved. It wasn’t just your regular ‘I hate myself.’ It was a disgust with the person you were and you wanted to do anything you could to change . . . .” (second alteration in original) (quoting anonymous conversion therapy survivor TC)).

<sup>3</sup> *Id.* (“[T]hey ‘rebuilt us in their image.’ They removed us of everything that made us a unique person . . . . They retaught us everything we knew.” (quoting TC)).

was not gay.<sup>4</sup> TC, along with the other minors in the program, “all shared a sense of loathing towards” themselves and who they were as a result of the therapy.<sup>5</sup> The experiences that TC withstood in conversion therapy wore him down, and he “want[s] people to know that conversion therapy is literal torture.”<sup>6</sup>

The past few decades have seen a dramatic shift in the acceptance of the LGBTQ community,<sup>7</sup> and with this change a dismissal of Sexual Orientation Change Efforts (SOCE), also known as conversion therapy.<sup>8</sup> Within the past ten years, many states and localities have enacted statutes that prohibit licensed mental health professionals from administering SOCE therapy to minors.<sup>9</sup> In response, some mental health professionals and conservative law groups have raised legal challenges claiming that such laws are unconstitutional prohibitions on freedom of speech.<sup>10</sup> These lawsuits alleged that anti-SOCE legisla-

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<sup>4</sup> *Id.* (quoting TC).

<sup>5</sup> *Id.* (quoting TC). TC stated that several adolescents who suffered through the same program he was in committed suicide. *Id.*

<sup>6</sup> *Id.* (quoting TC). TC also stated, “I am gay, but I am not worthless . . . I am a human. Treat me like one.” *Id.*

<sup>7</sup> *What Is LGBTQ?*, THE CTR.: THE LESBIAN, GAY, BISEXUAL & TRANSGENDER CMTY. CTR. (2022), <https://gaycenter.org/about/lgbtq/> [<https://perma.cc/4Z6E-EN7U>] (stating that the LGBTQ acronym stands for “lesbian, gay, bisexual, transgender and queer or questioning,” and that “[t]hese terms are used to describe a person’s sexual orientation or gender identity”).

<sup>8</sup> Marie-Amélie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 ALA. L. REV. 793, 794–95 (2017) (exploring why gay rights advocates have spent much of their efforts fighting to ban SOCE therapy); Tiffany C. Graham, *Conversion Therapy: A Brief Reflection on the History of the Practice and Contemporary Regulatory Efforts*, 52 CREIGHTON L. REV. 419, 419, 421–23 (2019) (reviewing the origins of SOCE therapy and explaining that its purpose is to change an individual’s “sexual orientation, gender identity, or gender expression” (citing CHRISTY MALLORY, TAYLOR N.T. BROWN & KERITH J. CONRON, WILLIAMS INST., UCLA SCH. OF L., *CONVERSION THERAPY AND LGBT YOUTH* (2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Conversion-Therapy-Jan-2018.pdf> [<https://perma.cc/AYG3-6YQV>])).

<sup>9</sup> *See, e.g.*, CAL. BUS. & PROF. CODE §§ 865.1–2 (West 2013) (“Under no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age.”); MD. CODE ANN., HEALTH OCC. § 1-212.1(b) (West 2018) (“A mental health or child care practitioner may not engage in conversion therapy with an individual who is a minor.”); N.J. STAT. ANN. § 45:1-55(a) (West 2013) (“A person who is licensed to provide professional counseling . . . shall not engage in sexual orientation change efforts with a person under 18 years of age.”). Currently, twenty states, the District of Columbia, and dozens of municipalities have banned SOCE therapy. *See Equality Maps: Conversion “Therapy” Laws*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality-maps/conversion\\_therapy](https://www.lgbtmap.org/equality-maps/conversion_therapy) [<https://perma.cc/N8UM-FPRA>] (May 4, 2022) (showing an interactive map and table detailing state and local bans on conversion therapy). Currently, there is federal legislation pending that would ban SOCE therapy nationwide. *See Therapeutic Fraud Prevention Act of 2019*, H.R. 3570, 116th Cong. (proposing a resolution that would prohibit paying for SOCE therapy for both minors and adults as a fraudulent trade practice).

<sup>10</sup> *See, e.g.*, *Otto v. City of Boca Raton* (*Otto II*), 981 F.3d 854, 859 (11th Cir. 2020) (challenging the city’s and county’s ordinances banning SOCE therapy to minors as a violation of the first amendment freedom of speech); *Doyle v. Hogan*, 411 F. Supp. 3d 337, 341 (D. Md. 2019) (challenging Maryland’s anti-SOCE ban on minors), *rev’d and vacated*, 1 F.4th 249 (4th Cir. 2021). Groups looking to invalidate the laws prohibiting SOCE also contend that the laws unconstitutionally infringe on freedom of religion and “parents’ fundamental rights” to “make decisions regarding care, custody, and

tions violate mental health professionals' free speech rights because the laws single out a particular therapeutic speech because of its controversial content.<sup>11</sup>

The United States Court of Appeals for the Third and Ninth Circuits have both upheld SOCE therapy bans for minors, although each court relied on distinct analytical reasonings.<sup>12</sup> In January 2014, in *Pickup v. Brown (Pickup II)*, the Ninth Circuit upheld California's prohibition on SOCE therapy for minors because the law regulates conduct, not speech.<sup>13</sup> The court reasoned that the prohibition on SOCE therapy for minors regulates conduct because it only restricts mental health practitioners from administering the therapy without foreclosing their ability to advocate for and discuss the benefits of SOCE therapy to clients.<sup>14</sup> In contrast, in September 2014, the Third Circuit in *King v. Governor of New Jersey* upheld New Jersey's ban on SOCE therapy as a permissible regulation of speech because the ban targets "professional speech," which receives less protection than other forms of speech.<sup>15</sup>

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control of their children." See *Pickup v. Brown (Pickup II)*, 740 F.3d 1208, 1222, 1224, 1235 (9th Cir. 2014) (citing *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1204 (9th Cir. 2005) (addressing the plaintiff's other arguments about freedom of religion and parental freedom), *cert. denied*, 573 U.S. 945 (2014), *abrogated by* Nat'l Inst. of Fam. & Life Advoc. v. *Becerra (NIFLA)*, 138 S. Ct. 2361 (2018); see also Daniel Greene, *The Right to "Cure" A Child's Homosexuality?: A Constitutional Analysis of State Laws Banning Sexual Orientation Change Efforts on Minors*, 67 FLA. L. REV. F. 176, 185–93 (2016), [http://www.floridalawreview.com/wp-content/uploads/Greene\\_Published\\_Version1.pdf](http://www.floridalawreview.com/wp-content/uploads/Greene_Published_Version1.pdf) [<https://perma.cc/6EBY-C7XP>] (evaluating anti-SOCE legislation under the Free Exercise, Establishment, and Due Process Clauses and determining that these bans likely survive such constitutional challenges).

<sup>11</sup> See, e.g., *Otto II*, 981 F.3d at 859, 861 (arguing that the City of Boca Raton and Palm Beach County's anti-SOCE ordinances were unconstitutional prohibition on plaintiffs' free speech rights).

<sup>12</sup> See *King v. Governor of N.J.*, 767 F.3d 216, 246–47 (3d Cir. 2014) (upholding anti-SOCE statute after applying intermediate scrutiny because the statute regulates professional speech), *abrogated by NIFLA*, 138 S. Ct. at 2361; *Pickup II*, 740 F.3d at 1229, 1232, 1236 (upholding anti-SOCE statute after applying rational basis scrutiny because the bans prohibited conduct, not speech).

<sup>13</sup> 740 F.3d at 1229. The court held that the state of California could regulate conduct through its police powers—specifically conduct that affected the health of its citizens. *Id.*; see also Brian McGinnis, Note, *Not Strictly Speaking: Why State Prohibitions Against Practicing Sexual Orientation Change Efforts on Minors Are Constitutional Under First Amendment Speech Principles*, 67 RUTGERS U. L. REV. 243, 279 (2015) (arguing that anti-SOCE legislation regulates unprotected conduct rather than protected speech because therapy, "even though . . . delivered through spoken language," is a "course[] of conduct" (citing *Pickup II*, 740 F.3d at 1227)).

<sup>14</sup> *Pickup II*, 740 F.3d at 1229. The California statute only prohibited the conduct of administering SOCE therapy to minors, while allowing therapists to speak about SOCE therapy. BUS. & PROF. § 865.2; see also *Pickup II*, 740 F.3d at 1223 (listing what California's anti-SOCE statute does not prohibit, including: "communicating with the public about SOCE"; "expressing their views to patients . . . about SOCE"; "recommending SOCE to patients," including minors; "administering SOCE" therapy to individuals over the age of eighteen; and "referring minors to unlicensed" mental health practitioners "such as religious leaders"). California's SOCE ban only prohibited the actual practice of or administration of SOCE on minors. BUS. & PROF. § 865.2 ("Any sexual orientation change efforts attempted on a patient under 18 years of age by a mental health provider shall be considered unprofessional conduct and shall subject a mental health provider to discipline by the licensing entity for that mental health provider.").

<sup>15</sup> 767 F.3d at 229, 246–47 (finding that states have traditionally enjoyed broad police power to regulate professions, especially professions that could cause harm to the public through their services).

Recent Supreme Court cases, including *Reed v. Town of Gilbert* and *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*), however, have undermined and abrogated the reasonings behind the Third and Ninth Circuits' SOCE therapy decisions.<sup>16</sup> Following those cases, in November 2020, the Eleventh Circuit held in *Otto v. City of Boca Raton* (*Otto II*), that Boca Raton and Palm Beach County's anti-SOCE ordinances were unconstitutional restrictions on free speech.<sup>17</sup> Citing directly to the Supreme Court's decision in *NIFLA*, the majority decision held that the anti-SOCE ordinances were facially content-based and therefore the court needed to apply strict scrutiny.<sup>18</sup> Applying strict scrutiny, the Eleventh Circuit concluded both SOCE bans were unconstitutional prohibitions on mental health practitioner's freedom of speech.<sup>19</sup>

Although many states and municipalities have enacted anti-SOCE laws, courts have failed to apply a unified approach to tackle First Amendment challenges to these laws.<sup>20</sup> This Note reviews the three distinct paths taken by the Third, Ninth, and Eleventh Circuits in answering the freedom of speech claims brought against anti-SOCE legislation, and argues, in contrast to the Eleventh Circuit's finding in *Otto II*, that anti-SOCE legislation is one of the rare gov-

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Professional speech receives less protection, the court found, because professional speech is a commercial service and states have historically been able to regulate certain professions when the speech is personally styled to service a client. *Id.* at 232; *see also* *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449, 460 (1978) (noting the critical state interest in "maintaining standards among members of the licensed professions," and therefore determining that an attorney could receive discipline for advertising in a hospital, and that this did not violate the First Amendment (first citing *Williamson v. Lee Optical*, 348 U.S. 483 (1955); and then citing *Semler v. Oregon State Bd. of Dental Exam'rs*, 294 U.S. 608 (1935))); Erika Schutzman, *We Need Professional Help: Advocating for a Consistent Standard of Review When Regulations of Professional Speech Implicate the First Amendment*, 56 B.C. L. REV. 2019, 2022–24 (2015) (advocating for a consistent approach, using intermediate scrutiny, when laws invoke the First Amendment rights of professionals).

<sup>16</sup> *See NIFLA*, 138 S. Ct. at 2374–75 (abrogating the creation of "professional speech" as a separate category of speech subject to lesser protection under the First Amendment); *Reed v. Town of Gilbert*, 576 U.S. 155, 163–65 (2015) (holding that the Town of Gilbert's sign code provisions were content-based regulations of speech because they were based on the "communicative content of sign[s].") were therefore presumed unconstitutional, and the Court could only uphold them if the pass strict scrutiny analysis).

<sup>17</sup> *Otto II*, 981 F.3d 854, 859 (11th Cir. 2020).

<sup>18</sup> *Id.* at 861–64 (citing *NIFLA*, 138 S. Ct. at 2374–75) (finding that the ordinances regulated speech, not conduct, and that the Supreme Court in *NIFLA* had already barred giving professional speech less First Amendment protection, and therefore strict scrutiny had to apply because the ordinances regulated speech based on its content).

<sup>19</sup> *Id.* at 868–69 (finding a compelling governmental interest in protecting children, but that the scientific studies underlying the legislature's enactment of the law were not conclusive enough to support the ban on SOCE therapy to minors).

<sup>20</sup> *See King*, 767 F.3d at 240 (holding that New Jersey's anti-SOCE law was a constitutional regulation on professional speech); *Pickup II*, 740 F.3d 1208, 1229 (9th Cir. 2014) (holding that California's anti-SOCE law was a valid constitutional regulation on conduct), *abrogated by NIFLA*, 138 S. Ct. at 2361.

ernmental regulations of speech that survives strict scrutiny.<sup>21</sup> Part I of this Note reviews the history of SOCE therapy and the emergence of anti-SOCE legislation.<sup>22</sup> In addition, it examines relevant First Amendment jurisprudence, and the varying approaches that courts have employed to examine the freedom of speech challenges these anti-SOCE prohibitions have encountered.<sup>23</sup> Part II discusses the Eleventh Circuit's recent decision in *Otto II* where the majority applied the strict scrutiny standard to invalidate prohibitions on SOCE therapy for minors.<sup>24</sup> Part III accepts the premise that strict scrutiny review applies, but argues that the majority wrongly decided *Otto II* because anti-SOCE legislation withstands strict scrutiny review, and therefore the Court must uphold the ordinances.<sup>25</sup>

### I. A MUDDLED JUDICIARY—CONVERSION THERAPY, THE FIRST AMENDMENT, AND VARYING LEVELS OF SCRUTINY

California and New Jersey were the first two states to prohibit SOCE therapy for minors.<sup>26</sup> Following their footsteps, dozens of other states and municipalities have enacted their own bans on SOCE therapy for minors.<sup>27</sup> Section A of this Part discusses the history of SOCE therapy in the United States, and the current wave of anti-SOCE legislation.<sup>28</sup> With the enactment of anti-SOCE legislation, plaintiffs have filed numerous lawsuits challenging these prohibitions as violating therapists' First Amendment right to freedom of speech.<sup>29</sup> Section B provides a summary of First Amendment jurisprudence

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<sup>21</sup> See *Otto II*, 981 F.3d at 859 (applying strict scrutiny); *King*, 767 F.3d at 234–35 (applying intermediate scrutiny); *Pickup II*, 740 F.3d at 1231 (applying rational basis review); see also *infra* notes 80–122 and accompanying text (discussing the reasonings and holdings of *Pickup II* and *King*).

<sup>22</sup> See *infra* notes 26–47 and accompanying text.

<sup>23</sup> See *infra* notes 48–152 and accompanying text.

<sup>24</sup> See *infra* notes 153–209 and accompanying text.

<sup>25</sup> See *infra* notes 210–372 and accompanying text (arguing that anti-SOCE legislation has a compelling interest and is narrowly tailored to satisfy that interest).

<sup>26</sup> CAL. BUS. & PROF. CODE §§ 865.1–.2 (West 2013); N.J. STAT. ANN. § 45:1-55 (West 2013).

<sup>27</sup> See, e.g., COLO. REV. STAT. ANN. § 12-245-224(1)(t)(V) (West 2020) (prohibiting conversion therapy to minors); MASS. GEN. LAWS ANN. ch. 112, § 275(b) (West 2019) (“A health care provider shall not advertise for or engage in sexual orientation and gender identity change efforts with a patient who is less than 18 years of age.”); VA CODE ANN. § 54.1-2409.5(B) (West 2020) (“No person licensed pursuant to this subtitle or who performs counseling as part of his training for any profession licensed pursuant to this subtitle shall engage in conversion therapy with a person under 18 years of age.”); see also Devin Larsen, Recent Statute, *Striving for Change: California’s Attempt to Outlaw Conversion Therapy*, 50 U. PAC. L. REV. 285, 290 (2019) (providing a review of other states’ bans on SOCE therapy).

<sup>28</sup> See *infra* notes 33–47 and accompanying text.

<sup>29</sup> See, e.g., *Otto v. City of Boca Raton (Otto II)*, 981 F.3d 854, 859 (11th Cir. 2020) (challenging the city’s and county’s ordinances banning SOCE therapy to minors as a violation of First Amendment freedom of speech); *Doyle v. Hogan*, 411 F. Supp. 3d 337, 341 (D. Md. 2019) (challenging Maryland’s anti-SOCE ban on minors), *rev’d and vacated*, 1 F.4th 249 (4th Cir. 2021); *King v. Governor of N.J.*, 767 F.3d 216, 246–47 (3d Cir. 2014) (challenging New Jersey’s anti-SOCE ban on minors), *abrogated by Nat’l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA)*, 138 S. Ct. 2361 (2018);

that underlies many of the challenges to anti-SOCE legislation.<sup>30</sup> Section C reviews the federal appellate and Supreme Court decisions that have framed the question of whether anti-SOCE legislations violate the First Amendment.<sup>31</sup> Lastly, Section D concludes with the factual background surrounding the United States Court of Appeals for the Eleventh Circuit's recent decision in *Otto v. City of Boca Raton (Otto II)*.<sup>32</sup>

### *A. History of Sexual Orientation Change Efforts & the Rise of Anti-SOCE Legislation*

Sexual Orientation Change Efforts (SOCE) therapy, also known as reparative or conversion therapy, surfaced when the medical and psychological communities considered homosexuality a mental illness.<sup>33</sup> SOCE therapy practitioners used both aversive and non-aversive treatments on homosexual individuals, with the goal of changing their sexual orientation to heterosexual.<sup>34</sup> Today, the

Pickup v. Brown (*Pickup II*), 740 F.3d 1208, 1222 (9th Cir. 2014) (challenging California's anti-SOCE ban on minors), *abrogated by NIFLA*, 138 S. Ct. at 2361.

<sup>30</sup> See *infra* notes 48–79 and accompanying text.

<sup>31</sup> See *infra* notes 80–142 and accompanying text.

<sup>32</sup> See *infra* notes 143–152 and accompanying text.

<sup>33</sup> Graham, *supra* note 8, at 421; Larsen, *supra* note 27, at 299. Conversion therapy is a practice designed to change “an individual’s sexual orientation, gender identity, or gender expression.” Graham, *supra* note 8, at 419 (citing MALLORY ET AL., *supra* note 8). Physicians imported conversion therapy to the United States from Europe, and practitioners first implemented it as a medical solution that was thought to “cure” individuals, and “included castration . . . bladder washing, and rectal massage.” *Id.* at 421 (citing J. Seth Anderson, *Why We Still Haven’t Banished Conversion Therapy in 2018*, WASH. POST (Aug. 5, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/08/05/why-we-still-havent-banished-conversion-therapy-in-2018/> [<https://perma.cc/6YPV-5ZCC>]). Soon after, psychotherapy became more popular, and mental health practitioners initiated their own conversion therapy efforts, including “electroshock . . . lobotomies . . . [and] talk therapy.” *Id.* at 421–22 (citing JONATHAN KATZ, *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.* 170–73, 191–93 (1976)). These talk therapies included improving “dating skills with . . . the opposite sex; assertiveness training for men”; practicing “stereotypically masculine . . . behaviors”; and hypnosis. *Id.* at 422 (citing AM. PSYCH. ASS’N, *REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION* 22 (2009) [hereinafter *APA REPORT*], <http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf> [<https://perma.cc/DUG8-ZK7H>]). The mental health community classified and viewed homosexuality as a mental disorder. See AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (2d ed. 1968) (classifying homosexuality as a sexual deviation).

<sup>34</sup> Graham, *supra* note 8, at 422. Aversion therapy aims to change a certain behavior by having the individual correlate that behavior with a disagreeable stimulus, thus inducing an alteration or reduction in that behavior. *Aversion Therapy*, *APA DICTIONARY OF PSYCHOLOGY*, <https://dictionary.apa.org/aversion-therapy> [<https://perma.cc/K8UK-MDXU>]. Past aversive treatments included “nausea, vomiting, or paralysis; providing electric shocks; or having [an] individual snap an elastic band around the wrist when the individual became aroused to same-sex erotic images or thoughts.” *APA REPORT*, *supra* note 33, at 22. Non-aversive treatments included “assertiveness and affection training with physical and social reinforcement to increase other-sex sexual behaviors” or “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.” *Id.* Today, plaintiff mental health

vast majority of licensed mental health professionals who practice SOCE therapy only apply non-aversive, or self-described “talk therapy,” techniques.<sup>35</sup>

In 1973, the American Psychological Association (APA) reversed its previous stance on homosexuality.<sup>36</sup> The group found that homosexuality is not a mental illness, by which time the American Psychiatric Association had already extracted homosexuality from the Diagnostic and Statistical Manual of Mental Disorders.<sup>37</sup> Following this reversal, mental health providers and mainstream professional associations began to question and reject the appropriateness of SOCE therapy.<sup>38</sup> Today, virtually all mainstream mental health professionals reject any conversion efforts and instead support affirmative therapeutic approaches to sexual orientation for LGBTQ individuals.<sup>39</sup> Still, a small number of mental health providers continue to advocate for, and practice, non-aversive SOCE therapy.<sup>40</sup>

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providers who have challenged anti-SOCE laws contend that they only use non-aversive treatments. See, e.g., *Otto II*, 981 F.3d at 860 (noting that the plaintiff therapists only purport to practice talk therapy SOCE, a non-aversive form of therapy conducted “solely through speech”).

<sup>35</sup> See *King v. Governor of N.J.*, 767 F.3d 216, 221 (3d Cir. 2014) (“Plaintiffs describe sexual orientation change efforts (‘SOCE’) counseling as ‘talk therapy’ that is administered solely through verbal communication.”), *abrogated by Nat’l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA)*, 138 S. Ct. 2361 (2018); *Otto II*, 981 F.3d at 860 (“Plaintiffs characterize their counseling as ‘talk therapy’—that is, therapy conducted solely through speech.”). The Alliance for Therapeutic Choice and Scientific Integrity is one of the organizations that advocates for licensed mental health therapists to be able to conduct conversion therapy. See ALL. FOR THERAPEUTIC CHOICE & SCI. INTEGRITY, ALLIANCE STATEMENT ON SEXUAL ORIENTATION CHANGE (2012), [https://www.therapeuticchoice.com/\\_files/ugd/ec16e9\\_1d6108cfa05d4a73921e0d0292c0bc91.pdf](https://www.therapeuticchoice.com/_files/ugd/ec16e9_1d6108cfa05d4a73921e0d0292c0bc91.pdf) [<https://perma.cc/RH6S-XQ2T>] (“[T]he Alliance remains committed to protecting the rights of clients with unwanted same-sex attractions to pursue change as well as the rights of clinicians to provide such psychological care.”).

<sup>36</sup> See *The A.P.A. Ruling on Homosexuality: The Issue Is Subtle, The Debate Still On*, N.Y. TIMES, Dec. 23, 1973, at E5 (documenting two psychiatrists discussion over the APA’s decision no longer to consider homosexuality a mental disorder).

<sup>37</sup> See APA REPORT, *supra* note 33, at 11, 35, 38, 42–43 (investigating SOCE therapy, and concluding that it did not provide any measurable benefit, but rather constituted potential harm to recipients). See generally AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) (containing no mental disorder on homosexuality).

<sup>38</sup> APA REPORT, *supra* note 33, at 11–12 (mentioning, for example, the American Psychoanalytic Association, the American Counseling Association, and the American Psychiatric Association).

<sup>39</sup> See Comm. on Adolescence, Am. Acad. of Pediatrics, *Homosexuality and Adolescence*, 92 PEDIATRICS 631, 633 (1993) (finding that “[t]herapy directed specifically at changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation”); see also, e.g., Boca Raton, Fla., Ordinance 5407 (Oct. 10, 2017) (codified at BOCA RATON, FLA., CODE OF ORDINANCES ch. 9, art. VI (2017)) (listing psychology organizations that do not support conversion therapy, including, but not limited to, the American Psychiatric Association, American Psychological Association, and the American Psychoanalytic Association).

<sup>40</sup> See, e.g., *Pickup II*, 740 F.3d 1208, 1215 n.1, 1221 (9th Cir. 2014) (O’Scannlain, J., dissenting from the denial of rehearing en banc) (identifying and defining what constitutes a licensed state “mental health provider” in California who are prohibited from administering SOCE therapy to minors), *abrogated by NIFLA*, 138 S. Ct. at 2361.

To curb SOCE therapy directed toward minors, states and municipalities began to introduce prohibitory legislation.<sup>41</sup> Most of these statutes outlaw both aversive and non-aversive methods.<sup>42</sup> Legislatures have supported these prohibitions out of concern that SOCE therapy causes “physical and psychological” harms to minors.<sup>43</sup> In enacting these statutes, legislatures have analyzed findings from comprehensive reports, studies, and opinions from the “medical and psychological community” that SOCE is not only ineffective, but also poses a high probability of acute harms to patients.<sup>44</sup> For example, the APA, through the Task Force on Appropriate Therapeutic Responses to Sexual Orientation, created a report reviewing the scientific literature on SOCE.<sup>45</sup> The report found that SOCE practitioners have not demonstrated the efficacy of SOCE and that there are serious and alarming reports of harm and safety associated with this practice.<sup>46</sup> The report further concluded that SOCE is ineffective because it fails to change ho-

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<sup>41</sup> See, e.g., CAL. BUS. & PROF. CODE § 865.1 (West 2013) (prohibiting SOCE therapy); N.J. STAT. ANN. § 45:1-55 (West 2013) (same).

<sup>42</sup> See, e.g., BUS. & PROF. § 865.1 (prohibiting SOCE therapy in both aversive and non-aversive forms to minors); N.J. STAT. ANN. § 45:1-55 (same).

<sup>43</sup> S.B. 1172, 2012 Leg., Reg. Sess. § 1(n) (Cal. 2012) (stating that this legislation was to protect minors); *Pickup II*, 740 F.3d at 1223–24 (finding that the legislature’s reason for enacting the anti-SOCE legislation was to safeguard the welfare of minors, including LGBTQ youth, from the harms associated with SOCE therapy).

<sup>44</sup> *Pickup II*, 740 F.3d at 1223–24; see also COLO. REV. STAT. ANN. § 12-245-224(1)(t)(V) (West 2022) (proscribing a mental health care provider from engaging in “[c]onversion therapy with a client who is under eighteen years of age”); MASS. GEN. LAWS ANN. ch. 112, § 275(b) (West 2022) (“A health care provider shall not advertise for or engage in sexual orientation and gender identity change efforts with a patient who is less than 18 years of age.”); VA CODE ANN. § 54.1-2409.5(B) (West 2022) (“No person licensed pursuant to this subtitle or who performs counseling as part of his training for any profession licensed pursuant to this subtitle shall engage in conversion therapy with a person under 18 years of age.”); 2012—*Position Statement on Attempts to Change Sexual Orientation, Gender Identity, or Gender Expression*, AM. PSYCHOANALYTIC ASS’N (June 2012), <https://apsa.org/content/2012-position-statement-attempts-change-sexual-orientation-gender-identity-or-gender> [<https://perma.cc/8P5M-L279>] (“Psychoanalytic technique does not encompass purposeful attempts to ‘convert,’ ‘repair,’ change or shift an individual’s sexual orientation, gender identity or gender expression. Such directed efforts are against fundamental principles of psychoanalytic treatment and often result in substantial psychological pain by reinforcing damaging internalized attitudes.”); Stewart L. Adelson, *Practice Parameter on Gay, Lesbian, or Bisexual Orientation, Gender Nonconformity, and Gender Discordance in Children and Adolescents*, 51 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 957, 967 (2012) (“[T]here is no evidence that sexual orientation can be altered through therapy, and . . . attempts to do so may be harmful.”).

<sup>45</sup> APA REPORT, *supra* note 33, at 12–13. In 2009, the APA completed this two-year review of scientific literature and found 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.” *Id.* at abstract, 12–13.

<sup>46</sup> APA REPORT, *supra* note 33, at 2, 26, 42, 120 (finding that individuals reported being harmed as a result of SOCE therapy, but that there is limited data, and some of the studies reviewed had issues).

mosexual orientation into heterosexual orientation, and it is dangerous for minors because it can lead to depression and suicidal tendencies.<sup>47</sup>

### B. The Convoluted First Amendment

The First Amendment prohibits political restriction of speech in clear terms—“Congress shall make no law . . . abridging the freedom of speech.”<sup>48</sup> Still, the Supreme Court has wrestled with the challenges of drawing straightforward rules and doctrines around government restrictions on freedom of speech.<sup>49</sup> First Amendment jurisprudence makes clear that there is no absolute right to speech, and permits restrictions in limited subject matters that are of important governmental interest.<sup>50</sup>

Before the Court decides how to review a regulation in a freedom of speech challenge, it must first determine whether the regulation restricts

<sup>47</sup> See APA REPORT, *supra* note 33, at 3, 120–21 (finding that children are especially vulnerable to SOCE therapy which has not proven to provide benefits to recipients, and there is no scientific evidence that it is successful in “chang[ing] . . . an individual’s sexual orientation”); Nick Clair, Recent Statute, *Chapter 835: “Gay Conversion Therapy” Ban: Protecting Children or Infringing Rights?*, 44 MCGEORGE L. REV. 550, 551 (2013) (discussing California’s newly enacted anti-SOCE legislation and the concerns surrounding it regarding the freedom of speech rights of the therapists).

<sup>48</sup> U.S. CONST. amend. I. At the center of the First Amendment guarantee of the freedom of speech is the idea that each person can decide for themselves the beliefs that deserve expression and promotion. *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364, 377–78 (1984) (stating that the purpose of the First Amendment is “to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail” (quoting *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969))). In addition, the First Amendment also protects citizens’ freedom of religion, peaceful assembly, freedom of the press, and freedom to petition one’s government. U.S. CONST. amend. I. The Fourteenth Amendment incorporates the First Amendment right to freedom of speech to apply to the states. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925) (noting that the First Amendment right to freedom of speech is a “fundamental personal right[] and ‘libert[y]’ that is protected by the due process clause of the Fourteenth Amendment from impairment by the States”).

<sup>49</sup> *See Burson v. Freeman*, 504 U.S. 191, 198 (1992) (acknowledging the difficulty presented in interpreting the First Amendment right of freedom of speech); *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 295 (1984) (Marshall, J., concurring) (noting the “difficult tasks of giving shape to these First-Amendment rights and of assessing the state interests that might justify their abridgment”); DAVID L. HUDSON, JR., *LEGAL ALMANAC: THE FIRST AMENDMENT: FREEDOM OF SPEECH* § 2:1 (2012) (describing First Amendment jurisprudence as confusing and complicated); Kevin Francis O’Neill, *A First Amendment Compass: Navigating the Speech Clause with a Five-Step Analytical Framework*, 29 SW. U. L. REV. 223, 225 (2000) (stating that First Amendment jurisprudence has increasingly become a “labyrinth”).

<sup>50</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992) (finding that traditionally, society has allowed certain limited controls on speech, where the speech is of negligible social significance that “is clearly outweighed by the social interest in order and morality” (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942))). For example, one subject matter that has been elevated to the level of an important governmental interest is “fighting words,” or words that a speaker utters face-to-face with a listener and that would likely lead either party to respond via violence. *See Chaplinsky*, 315 U.S. at 571–72 (finding that the government can restrict “‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace”).

speech or conduct.<sup>51</sup> The line between conduct and speech, however, is often a blurry one.<sup>52</sup> When speech and conduct overlap, the Supreme Court has determined that restrictions on non-expressive conduct that “incidentally” curtail speech do not invoke freedom of speech protections.<sup>53</sup> Instead, only “expressive conduct,” like burning a draft card, receives moderate protections under the First Amendment.<sup>54</sup> The First Amendment then, is only applicable when there is a restriction on speech or expressive conduct.<sup>55</sup>

If the regulation restricts speech, a court next determines whether the challenged regulation is constitutionally permissible.<sup>56</sup> A Court makes this de-

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<sup>51</sup> See *Otto II*, 981 F.3d 854, 873 (11th Cir. 2020) (Martin, J., dissenting) (stating that the “key question” is whether an enacted regulation is prohibiting conduct or speech (citing *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011))); *Pickup II*, 740 F.3d 1208, 1225 (9th Cir. 2014) (stating that the “first step in our analysis is to determine whether SB 1172 is a regulation of conduct or speech”), *abrogated by Nat’l Inst. of Fam. & Life Advoc. v. Becerra (NIFLA)*, 138 S. Ct. 2361 (2018).

<sup>52</sup> See Aviva O. Wertheimer, Note, *The First Amendment Distinction Between Conduct and Content: A Conceptual Framework for Understanding Fighting Words Jurisprudence*, 63 FORDHAM L. REV. 793, 793–97 (1994) (reviewing the Supreme Court’s “incoheren[t]” approach in drawing distinctions between fighting word statutes that regulate speech or conduct); *Pickup II*, 740 F.3d at 1218 (O’Scannlain, J., dissenting from the denial of rehearing en banc) (finding that legislatures cannot avoid the First Amendment simply “by playing this labeling game” of designating speech as conduct); *Holder v. Humanitarian L. Project*, 561 U.S. 1, 26–27 (2010) (rebutting the government’s argument that the statute only regulates conduct, and holding instead that the statute engages speech based on its content).

<sup>53</sup> See *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 62, 66, 70 (2006) (“Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading ‘White Applicants Only’ hardly means that the law should be analyzed as one regulating the employer’s speech rather than conduct.” (citing *R.A.V.*, 505 U.S. at 389)); *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.” (first citing *Fox v. Washington*, 236 U.S. 273, 277 (1915); and then citing *Chaplinsky*, 315 U.S. at 568)); *United States v. Albertini*, 472 U.S. 675, 688 (1985) (“The First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests.” (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296–97 (1984))).

<sup>54</sup> See *United States v. O’Brien*, 391 U.S. 367, 372, 376 (1968) (finding constitutional a law banning the burning of draft cards, and rejecting the argument that any conduct can be relabeled as “speech” and therefore receive free speech protections); *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (“The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.” (first citing *O’Brien*, 391 U.S. at 376–77; then citing *Clark*, 468 U.S. at 293; and then citing *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989))). The First Amendment’s freedom of speech and expression is not just for verbal or written communications, but also for other nonverbal manifestations that convey a message or idea. U.S. CONST. amend. I; see SarahAnne L. Cutler & Leslie L. Lipps, *Expressive Conduct*, 1 GEO. J. GENDER & L. 285, 285–87 (2000) (explaining the complicated evaluation of whether conduct is expressive and therefore protected).

<sup>55</sup> HUDSON, *supra* note 49, § 2:9 (stating that the constitution “clearly protects . . . speech,” but also conduct that is “sufficiently expressive”).

<sup>56</sup> *Id.*

termination by applying varying standards of review.<sup>57</sup> An initial question of whether the government regulation is “content-based” or “content-neutral” controls which standard of review the Court applies.<sup>58</sup> A content-based restriction prohibits speech because of its underlying content.<sup>59</sup> A further subset of content-based laws is viewpoint discrimination, meaning the regulation discriminates against speech based upon agreement or disagreement with what the speaker is conveying, or because of the message itself.<sup>60</sup>

Content-based and viewpoint-based regulations of speech receive the highest level of scrutiny—strict scrutiny.<sup>61</sup> Under this standard, the challenged regulation is only constitutionally permissible if it is “narrowly tailored to serve [a] compelling [government] interest[.]”<sup>62</sup> This two-prong test first requires courts to determine if the underlying governmental objective is “compelling.”<sup>63</sup> What this means is that because the government is infringing upon a constitutional right, in this instance the freedom of speech, there must be an imperative and acute circumstance to justify the regulation.<sup>64</sup>

If the government’s interest satisfies the first prong, then the court will next determine if the law is narrowly tailored toward that interest.<sup>65</sup> First, to be

<sup>57</sup> *Id.* § 2.2. Often, what level of review the court applies is determinative as to whether the regulation will survive review. *See id.* (finding that the level of scrutiny applied is important because strict scrutiny is an incredibly difficult standard for the government to meet).

<sup>58</sup> *Id.*; *see Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015) (holding that the “first step” in a First Amendment challenge is to “determin[e] whether the [government regulation] is content neutral on its face”).

<sup>59</sup> HUDSON, *supra* note 49, § 2:2. The idea central to freedom of speech and the First Amendment is that government discrimination of content is unacceptable. *See Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (“But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

<sup>60</sup> HUDSON, *supra* note 49, § 2:2; *see Rosenberger v. Rector & Visitors*, 515 U.S. 819, 828–29 (1995) (stating that “[v]iewpoint discrimination is . . . an egregious form of content discrimination”).

<sup>61</sup> *See Reed*, 576 U.S. at 163 (holding that “[c]ontent-based laws . . . are presumptively unconstitutional” and are only valid if the government can show that the laws “are narrowly tailored to serve compelling state interests” (first citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992); and then citing *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991))); HUDSON, *supra* note 49, § 2:2 (discussing strict scrutiny analysis).

<sup>62</sup> *Reed*, 576 U.S. at 163 (first citing *R.A.V.*, 505 U.S. at 395; and then citing *Simon & Schuster, Inc.*, 502 U.S. at 115, 118); HUDSON, *supra* note 49, at § 2:2.

<sup>63</sup> *See Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 801 (2006) (discussing the evolution of strict scrutiny); HUDSON, *supra* note 49, § 2:2 (same).

<sup>64</sup> *See Wertheimer, supra* note 52, at 793 (explaining that freedom of speech is not an absolute right because there are circumstances where speech is restrained because of another, more urgent interest); *see also, e.g., Korematsu v. United States*, 323 U.S. 214, 216 (1944) (noting that constitutional rights are not absolute, but instead “[p]ressing public necessity” can warrant intrusion), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

<sup>65</sup> *See, e.g., Murdock v. Pennsylvania*, 319 U.S. 105, 116–17 (1943) (holding that the First Amendment’s guarantee of free speech requires that intrusive laws be “narrowly drawn”); HUDSON, *supra* note 49, § 2:2 (discussing the second-prong of strict scrutiny); Winkler, *supra* note 63, at 800 (stating that after a compelling interest is established then the narrowly tailored prong must be met).

narrowly tailored, the government regulation must be necessary to achieve the compelling interest that the government contends is the purpose of its law.<sup>66</sup> Next, a law must encompass “no more or no less of an” activity than is necessary to further the compelling government interest.<sup>67</sup> In other words, the law must be the least restrictive path available toward the government’s end.<sup>68</sup> Under the narrowly tailored prong of strict scrutiny, the court is determining the sincerity of the government’s compelling interest and the means through which it seeks to meet that interest.<sup>69</sup>

In practice, under strict scrutiny, the First Amendment requires the government “specifically [to] identify an ‘actual problem’” to solve (the compelling interest) and that the restriction on speech be “necessary to the solution” (narrowly tailored).<sup>70</sup> In the 2018 decision in *Brown v. Entertainment Merchants Ass’n*, the Supreme Court held that a California statute outlawing “violent video games” for minors violates the First Amendment because the state could not “show a direct causal link between” harm to children and playing such games.<sup>71</sup> *Brown* held that “ambiguous proof” is insufficient to meet the demanding standards of strict scrutiny.<sup>72</sup> As a result of this heavy standard, when the Court applies strict scrutiny, it almost always abrogates the challenged regulation.<sup>73</sup>

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<sup>66</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 146 (1980) (discussing strict scrutiny’s “demand for an essentially perfect fit”).

<sup>67</sup> See, e.g., Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2420 (1996) (stating that an under-inclusive law “fail[s] to reach all speech that implicates the [compelling government] interest” (citing *Fla. Star v. B.J.F.*, 491 U.S. 524, 542 (1989) (Scalia, J., concurring in part and in the judgment))); HUDSON, *supra* note 49, § 2:2 (expressing this prong as “the least . . . restrictive way” of impacting speech); Winkler, *supra* note 63, at 800.

<sup>68</sup> HUDSON, *supra* note 49, § 2:2; see, e.g., *Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981) (holding that for the government to inhibit religious liberty it must demonstrate that it is doing so through “the least restrictive means”).

<sup>69</sup> See Winkler, *supra* note 63, at 800–01 (discussing the compelling government interest doctrine).

<sup>70</sup> E.g., *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799 (2011) (first citing *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 822–23 (2000); and then citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992)).

<sup>71</sup> *Id.*; see also *United States v. Alvarez*, 567 U.S. 709, 725 (2012) (citing *Brown* and reiterating that “[t]here must be a direct causal link between the restriction imposed and the injury to be prevented”); *Playboy Ent. Grp.*, 529 U.S. at 822 (providing that the government need not assemble a “10,000-page record . . . in every case” but that it must elicit “more than [mere] anecdote and supposition”).

<sup>72</sup> 564 U.S. at 799–800.

<sup>73</sup> See *Playboy Ent. Grp.*, 529 U.S. at 818 (finding 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”); HUDSON, *supra* note 49, § 2:2 (“[G]enerally, when judges closely examine a law under strict scrutiny, the law is invalidated.”).

The Supreme Court only applies intermediate scrutiny to review content-neutral regulations that create incidental effects on speech.<sup>74</sup> Content-neutral laws engage every type of speech, regardless of their underlying content.<sup>75</sup> Under intermediate scrutiny, the Court only reviews a challenged regulation to determine whether it advances an important governmental interest and only burdens speech as much as is necessary to advance this governmental interest.<sup>76</sup>

Truly viewpoint-neutral and content-neutral regulation of speech receives the lowest level of review—rational basis scrutiny, which evaluates whether the governmental regulation might serve some legitimate governmental interest.<sup>77</sup> Moreover, the Court will apply this standard of review to examine regulations restricting conduct, and not speech.<sup>78</sup> Additionally, this standard of review also applies to certain speech that the Court considers to be outside the scope of the First Amendment’s coverage and thus are not entitled to constitutional protection, such as “fighting words,” verifiable threats, and provocation to commit immediate crimes.<sup>79</sup>

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<sup>74</sup> See *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (creating a four-part test for deciding whether “a government regulation is . . . justified”: “if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest”); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994) (finding that a regulation that is content-neutral does not have to be the “least speech-restrictive means of advancing the Government’s interest” but that it does need to be sufficiently narrowly tailored such that it does not “burden substantially more speech than is necessary to further the government’s legitimate interests” (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989))); HUDSON, *supra* note 49, § 2:2 (discussing the intermediate scrutiny standard).

<sup>75</sup> See HUDSON, *supra* note 49, § 2:2 (highlighting the difference between content-based and content-neutral regulations). An example of the differences between content-based and content-neutral regulations would be if a city implemented a statute that banned “all political billboards,” which would be a content-based regulation because it is targeting billboards on the basis of their content—that is, billboards employing political speech. *Id.* If, however, the city simply outlawed “all billboards” then that would more likely be permissible because it is not prohibiting billboards based on their content. *Id.*

<sup>76</sup> See *Holder v. Humanitarian L. Project*, 561 U.S. 1, 26–27 (2010) (quoting *Turner Broad.*, 520 U.S. at 189) (outlining the intermediate standard of review); HUDSON, *supra* note 49, § 2:2 (same).

<sup>77</sup> See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Saliency*, 117 HARV. L. REV. 1765, 1775 (2004) (explaining that rational basis scrutiny is an easy standard for the government to meet); *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322–26 (2002) (holding that Chicago’s permit scheme for groups of fifty or more to use a park was content-neutral because it applied to any gathering or speech that occurred in the park regardless of its message, and was therefore constitutional).

<sup>78</sup> See *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314–15 (1993) (stating that a statute under rational basis review “bear[s] a strong presumption of validity” (citing *Lyng v. Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 485 U.S. 360, 370 (1988))); *Virginia v. Hicks*, 539 U.S. 113, 123–24 (2003) (upholding as constitutional a trespass ordinance because it prohibits non-expressive conduct and not protected speech).

<sup>79</sup> See HUDSON, *supra* note 49, § 3.1 (explaining that the First Amendment jurisprudence has “distinguish[ed] between protected and unprotected speech” and speech is unprotected when histori-

### C. Case History: Anti-SOCE Laws & the First Amendment

From their enactment, anti-SOCE statutes have been met with lawsuits seeking to invalidate their provisions.<sup>80</sup> This Section reviews the initial First Amendment challenges to anti-SOCE legislation, and the Third and Ninth Circuits' different reasoning in upholding anti-SOCE statutes.<sup>81</sup> First, Subsection One reviews the Ninth Circuit's decision to apply rational basis review in *Pickup v. Brown (Pickup II)*, along with Justice O'Scannlain's dissent.<sup>82</sup> Next, Subsection Two discusses the Third Circuit's analysis of New Jersey's anti-SOCE legislation and determination that intermediate scrutiny is the correct level of review.<sup>83</sup> Lastly, Subsection Three explores the recent Supreme Court decisions that undermine and abrogate the reasoning underlying the Third and Ninth Circuits' decisions.<sup>84</sup>

#### 1. The Ninth Circuit

On September 30, 2012 California enacted Senate Bill 1172 (SB 1172) which banned mental health providers from offering SOCE therapy to minors.<sup>85</sup> In response, various mental health practitioners who provided SOCE therapy filed lawsuits challenging the constitutionality of the statute.<sup>86</sup> Two different federal judges in the district court of California split on the issue of whether SB 1172 was unconstitutional.<sup>87</sup> The Eastern District of California in *Welch v. Brown* granted the plaintiffs' preliminary injunction against SB

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cally and customarily the speech has essentially "no social value"); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (holding that protection of free speech is qualified and conditional and that historically courts have prohibited specific and narrow classes of speech without violating the Constitution).

<sup>80</sup> See, e.g., *Welch v. Brown*, 907 F. Supp. 2d 1102, 1105 (E.D. Cal. 2012) (finding SB 1172 unconstitutional), *rev'd*, *Pickup II*, 740 F.3d 1208 (9th Cir. 2014), *abrogated by* Nat'l Inst. of Fam. & Life Advocs. v. Becerra (*NIFLA*), 138 S. Ct. 2361 (2018); *Pickup v. Brown (Pickup I)*, 42 F. Supp. 3d 1347, 1362 (E.D. Cal. 2012) (upholding SB 1172 as constitutional), *aff'd*, 740 F.3d at 1208, *abrogated by NIFLA*, 138 S. Ct. at 2361.

<sup>81</sup> See *infra* notes 85–142 and accompanying text.

<sup>82</sup> See *infra* notes 85–106 and accompanying text.

<sup>83</sup> See *infra* notes 107–122 and accompanying text.

<sup>84</sup> See *infra* notes 123–142 and accompanying text.

<sup>85</sup> CAL. BUS. & PROF. CODE § 865.1 (West 2013).

<sup>86</sup> See, e.g., *Welch v. Brown*, 907 F. Supp. 2d 1102, 1105 (E.D. Cal. 2012) (finding SB 1172 unconstitutional), *rev'd*, *Pickup II*, 740 F.3d 1208 (9th Cir. 2014), *abrogated by* Nat'l Inst. of Fam. & Life Advocs. v. Becerra (*NIFLA*), 138 S. Ct. 2361 (2018); *Pickup v. Brown (Pickup I)*, 42 F. Supp. 3d 1347, 1362 (E.D. Cal. 2012) (upholding SB 1172 as constitutional), *aff'd*, 740 F.3d at 1208, *abrogated by NIFLA*, 138 S. Ct. at 2361.

<sup>87</sup> See *Welch*, 907 F. Supp. 2d at 1105 (granting the plaintiffs' preliminary injunction of SB 1172 because it did not pass strict scrutiny and was therefore an unconstitutional restriction on freedom of speech); *Pickup I*, 42 F. Supp. 3d at 1362 (denying the plaintiffs' preliminary injunction, holding that SB 1172 regulated conduct, not speech, and applying rational basis review to determine that SB 1172 did not violate constitutional protections).

1172.<sup>88</sup> The court concluded that the prohibition was content-based and viewpoint discriminatory, and applied strict scrutiny to review SB 1172, which the statute did not survive.<sup>89</sup> One day later, a different judge in the Eastern District of California reviewed a similar challenge to SB 1172 in *Pickup v. Brown* (*Pickup I*).<sup>90</sup> Here, the court came to a different conclusion—that SB 1172 regulated conduct, not speech, and therefore did not violate the First Amendment.<sup>91</sup> Even though practitioners conduct the therapy through spoken words, the government could still regulate it because “the key component of [therapy] is [that it is] treatment” and not “pure speech.”<sup>92</sup> As a result, the district court in *Pickup I* applied rational basis review, which SB 1172 easily passed.<sup>93</sup>

In 2014, the Ninth Circuit, in *Pickup II*, consolidated the two appeals from *Welch* and *Pickup I*, eventually affirming the *Pickup I* decision and over-

<sup>88</sup> 907 F. Supp. 2d at 1117, 1122.

<sup>89</sup> *Id.* Plaintiffs sought, and the court granted, a preliminary injunction against enforcement of SB 1172. *Id.* at 1105. The court held that because the law regulated “talk therapy” based on the message conveyed, the law was a content-based regulation. *Id.* at 1117. Specifically, the court found that the legislature engaged in content-based and viewpoint-based discrimination in enacting SB 1172 because they limited the subject matter in talk therapy by only regulating the viewpoint that homosexuality is changeable. *Id.* The court reasoned that because SB 1172 was facially content- and viewpoint-based, the court should apply strict scrutiny review. *Id.* The court determined that SB 1172 was likely to fail strict scrutiny review because the state did not have a compelling enough interest, and the law was under-inclusive because it only applied to mental health providers (as unlicensed SOCE practitioners, like religious leaders, could still administer SOCE to minors). *Id.* at 1119–21.

<sup>90</sup> 42 F. Supp. 3d at 1349.

<sup>91</sup> *Id.* at 1357–62. The court reasoned that the ban on SOCE only prohibited mental health professionals from practicing SOCE therapy, but still allowed them to talk about and endorse it to their clients. *Id.* at 1357–58. The court concluded that it was immaterial that practitioners conducted some, or all, of the therapy via speech. *Id.* at 1359–60. To support this decision, the district court relied on *National Ass’n for the Advancement of Psychoanalysis v. California Board of Psychology (NAAP)*. *Id.* (citing 228 F.3d 1043 (9th Cir. 2000)). In *NAAP*, the plaintiffs challenged California’s licensing scheme for psychoanalysts under the freedom of speech clause. 228 F.3d at 1049. Here, the court noted that the government may regulate a “course of conduct” even if the conduct is “in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.” *Id.* at 1053 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). The court rejected NAAP’s claims that psychoanalysis is “pure speech,” and quoted the district court’s conclusion 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 1053–54 (quoting *Nat’l Ass’n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, No. 97-CV-3913-WHO, \*13 (N.D. Cal. Jan. 8, 1999) (alteration in original)).

<sup>92</sup> *Pickup I*, 42 F. Supp. 3d at 1359 (quoting *NAAP*, 228 F.3d at 1054). Therefore, the court held that mental health providers did not enjoy special First Amendment protection merely because their conduct was through speech. *Id.* at 1359–60.

<sup>93</sup> *Id.* at 1362, 1376. Under rational basis review, the district court found that California had a legitimate, rational reason for banning SOCE therapy, and did so through appropriate means. *Id.* at 1375–76. The government had a clear interest in safeguarding the “physical and psychological well-being of [California] minors.” *Id.* at 1376 (quoting S.B. 1172, 2012 Leg., Reg. Sess. § 1(n) (Cal. 2012)). Therefore, the law survived a free speech challenge. *Id.* at 1376–77.

ruling *Welch*.<sup>94</sup> The Ninth Circuit adopted the reasoning from *Pickup I*, holding that SB 1172 regulated conduct, not speech, and therefore rational basis review was the correct standard to apply.<sup>95</sup> To support this decision, the Ninth Circuit noted that the law only prohibited the actual practice of SOCE, but still allowed mental health practitioners to express their opinion of SOCE and to recommend it.<sup>96</sup> The court concluded that anything beyond this approach could mean that “any prohibition of a particular medical treatment would raise First Amendment concerns because of its incidental effect on speech.”<sup>97</sup> Further, any other employment of the First Amendment could infringe upon the states’ recognized ability to monitor licensed healthcare professions.<sup>98</sup>

After concluding that SOCE therapy is conduct rather than speech, the Ninth Circuit then reviewed whether the legislature’s stated purpose for SB 1172 had rational support.<sup>99</sup> The court found unequivocal support for the legislature’s stated purpose of preventing harm to minors, and noted that the evidence on which the state relied was “well-documented.”<sup>100</sup> The evidence relied on by California’s legislature was profuse, and encompassed the prevailing opinion of the medical and psychological community that “SOCE was harmful and ineffective.”<sup>101</sup> Because California asserted a valid interest and the enactment of SB 1172 was directly related to this purpose, the Ninth Circuit rejected the free speech challenge.<sup>102</sup>

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<sup>94</sup> *Pickup II*, 740 F.3d 1208, 1222, 1236 (9th Cir. 2014), *abrogated by* Nat’l Inst. of Fam. & Life Advoc. v. Becerra (*NIFLA*), 138 S. Ct. 2361 (2018).

<sup>95</sup> *Id.* at 1229, 1231–32. The court held that the law banning SOCE therapy was a “regulation of professional conduct,” which was a valid state police power, even if the banning may have some “incidental effect on [therapists’] speech.” *Id.* at 1229 (emphasis omitted) (citing *Lowe v. S.E.C.*, 472 U.S. 181, 232 (1985) (White, J., concurring in the result)).

<sup>96</sup> *Id.* at 1223; *see supra* note 14 and accompanying text (listing out the actions and speech that SB 1172 does not prevent).

<sup>97</sup> *Pickup II*, 740 F.3d at 1229; *see Conant v. Walters*, 309 F.3d 629, 634–37 (9th Cir. 2002) (concluding that the government can prohibit a doctor from prescribing marijuana because the speech for a prescription is incidental to the conduct of authorizing a prescription, but holding that the government could not ban the doctor from recommending or discussing medical marijuana with patients because of First Amendment free speech protections).

<sup>98</sup> *Pickup II*, 740 F.3d at 1229; *see Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (holding that merely because a conduct effectuates entirely or partially through speech does not mean that it is violating the freedom of speech).

<sup>99</sup> *Pickup II*, 740 F.3d at 1230–32. SB 1172 states that “California has a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by sexual orientation change efforts.” S.B. 1172, 2012 Leg., Reg. Sess. § 1(n) (Cal. 2012).

<sup>100</sup> *Pickup II*, 740 F.3d at 1223, 1231–32; *see* S.B. 1172 § 1(b)–(m) (detailing the different associations that have commented on SOCE therapy).

<sup>101</sup> *Pickup II*, 740 F.3d at 1232. The evidence included reports and position papers from many professional mental health organizations. *See* S.B. 1172 § 1(b)–(m) (listing the numerous organizations on which the legislature relied in enacting the legislation).

<sup>102</sup> *Pickup II*, 740 F.3d at 1231–32.

Justice O’Scannlain of the Ninth Circuit wrote a strongly worded dissent, calling into question the Court’s decision to “avoid First Amendment judicial scrutiny by defining [SOCE therapy] as ‘conduct’” rather than speech.<sup>103</sup> He worried that the court was entering into a labeling game, and that the government could evade the First Amendment by simply labeling an action as conduct instead of speech.<sup>104</sup> The dissent was hesitant to believe that a court could determine when mental health professionals were administering treatment (conduct) versus purely engaging in protected speech.<sup>105</sup> Although Justice O’Scannlain took “no view as to the merits of SB 1172” or whether the law would survive intermediate or strict scrutiny, he was steadfast that the law should not evade First Amendment review.<sup>106</sup>

## 2. The Third Circuit

In contrast to the Ninth Circuit’s decision in *Pickup II*, the Third Circuit in September 2014 concluded in *King v. Governor of New Jersey* that anti-SOCE laws did not target conduct, but did in fact target speech.<sup>107</sup> The court rejected the Ninth Circuit’s reasoning that spoken words became conduct merely because they were the medium through which the therapy occurred.<sup>108</sup> Citing to the Supreme Court’s 2010 decision in *Holder v. Humanitarian Law Project*, the Third Circuit echoed Justice O’Scannlain’s dissent in *Pickup II*,

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<sup>103</sup> See *id.* at 1215 (O’Scannlain, J., dissenting from the denial of rehearing en banc) (“By labeling such speech as ‘conduct,’ the panel’s opinion has entirely exempted such regulation from the First Amendment. In so doing, the panel contravenes recent Supreme Court precedent, ignores established free speech doctrine, misreads our cases, and thus insulates from First Amendment scrutiny California’s prohibition—in the guise of a professional regulation—of politically unpopular expression.”).

<sup>104</sup> *Id.* at 1216 (“In other words, the government’s *ipse dixit* cannot transform ‘speech’ into ‘conduct’ that it may more freely regulate.”).

<sup>105</sup> *Id.* at 1215–16 (criticizing the majority as not putting forth any adequate process for determining when the therapist is using speech that is treatment, or conduct, and when their talking is merely speech).

<sup>106</sup> *Id.* at 1221.

<sup>107</sup> *King v. Governor of N.J.*, 767 F.3d 216, 224–25 (3d Cir. 2014), *abrogated by* Nat’l Inst. of Fam. & Life Advoc. v. Becerra (*NIFLA*), 138 S. Ct. 2361 (2018). The district court in *King* originally had ruled that New Jersey’s anti-SOCE provision regulated conduct, not speech, relying heavily on the Ninth Circuit’s decision in *Pickup II*. *King v. Christie*, 981 F. Supp. 2d 296, 303, 312–14 (D.N.J. 2013), *aff’d sub nom. King*, 767 F.3d at 216. The district court found that the words spoken during therapy were merely the tool employed by mental health professionals to administer treatment. *Id.* at 319. New Jersey’s ban was substantially similar to California’s anti-SOCE legislation. *Id.* at 313–14. The law only banned the practice of SOCE, while allowing licensed mental health professionals to speak publicly and privately about SOCE, discuss it as an option for their clients, and refer people to religious leaders who could perform the therapy. *Id.*; see also CAL. BUS. & PROF. CODE § 865.1 (West 2022) (prohibiting SOCE therapy); N.J. STAT. ANN. § 45:1-55 (West 2021) (same).

<sup>108</sup> *King*, 767 F.3d at 228 (noting that *Holder v. Humanitarian Law Project* disagreed with the idea that “communications [are] ‘conduct’ when . . . used [for] professional services”). Additionally, the court found that the process of categorizing certain communications as conduct or speech was no easy process and could be a ripe target for manipulation). *Id.*

concluding that the court could not adequately distinguish between communications that were speech and others that were conduct, as this process was highly “susceptible to manipulation.”<sup>109</sup> In *Humanitarian Law Project*, the Supreme Court determined that a federal statute prohibiting the provision of “material support” to designated terrorist organizations was a regulation on speech.<sup>110</sup> The government argued that the law regulated conduct because the statute expressly prohibited providing aid to terrorist organizations.<sup>111</sup> The Supreme Court rejected the government’s argument, holding instead that the statute regulated speech because the plaintiffs were “communicating a message,” which did not change simply because of the function the speech served.<sup>112</sup>

The Third Circuit applied the reasoning of *Humanitarian Law Project* to the anti-SOCE law in *King*, holding that it regulated speech.<sup>113</sup> The court only applied intermediate review, however, because the law regulated “professional speech.”<sup>114</sup> The court made this conclusion because of the historical understanding that the state has the power “to regulate . . . certain professions.”<sup>115</sup> It follows then, the court reasoned, that a professional’s speech experiences reduced protection when the professional is providing services to a client on the foundation of the professional’s expertise.<sup>116</sup> If, however, the “professional is

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<sup>109</sup> *Id.* at 227–28 (quoting *Pickup II*, 740 F.3d at 1215–16 (O’Scannlain, J., dissenting from the denial of rehearing en banc)) (pointing out the difficulty in determining when the speech by therapists is truly speech and when it is treatment); *Holder v. Humanitarian L. Project*, 561 U.S. 1, 27 (2010) (concluding that the statute under review was a content-based regulation of speech).

<sup>110</sup> 561 U.S. at 25–28, 36–38, 39 (finding that the statute regulates speech, specifically a certain viewpoint, but the statute does not violate the First Amendment freedom of speech because the support provided to terrorist groups is dangerous and could lead to helping the terrorist groups in their illegal and dangerous endeavors).

<sup>111</sup> *Id.* at 26.

<sup>112</sup> *Id.* at 26–28.

<sup>113</sup> *King*, 767 F.3d at 225, 235.

<sup>114</sup> *Id.* (stating that under the Supreme Court’s holding in *Humanitarian Law Project*, the present court should have no trouble concluding that the statute regulates speech); see also *Humanitarian L. Project*, 561 U.S. at 26–28 (holding that the statute regulates speech because the plaintiffs want to speak to the designated terrorist organizations about international law).

<sup>115</sup> *King*, 767 F.3d at 229 (stating that the idea that a state could “regulate . . . certain professions is deeply rooted in our nation’s jurisprudence”). The court then described how these two concepts, freedom of speech and government regulation of professions, sometimes butt heads. *Id.* at 229–30. Consequently, our legislative history developed such that certain state regulations of professions could entail regulation of speech, and therefore by extension the state could regulate some professional speech. *Id.* at 230.

<sup>116</sup> *Id.* at 232. The fact that the state licenses these professionals establishes or perhaps bolsters the trust in them because these individuals have expertise that the general public does not. *Id.* It is in the state’s interest then to regulate these professions, especially those related to public health. *Id.* Most professionals, medical and mental health practitioners especially, engage in communication with their clients; the court therefore concluded that not allowing the state to regulate any of this speech, merely because it is speech, would “handcuff” the state and its interest in regulating professionals. See *id.* (“The practice of medicine, like all human behavior, transpires through the medium of speech. In regulating the practice, therefore, the state must necessarily also regulate professional speech.” (quot-

speaking to the public . . . or offering [a] personal opinion to a client,” then complete First Amendment safeguards will apply because such communication is not professional speech.<sup>117</sup>

Based on this reasoning, the Third Circuit held that SOCE therapy is professional speech because when speaking, the mental health practitioner is providing a service to the client.<sup>118</sup> Thus, the court concluded that it should apply intermediate review.<sup>119</sup> Under intermediate review, the prohibitions on professional speech are constitutional only if they limit speech to the degree necessary to effectuating the state’s important interest in safeguarding its citizens.<sup>120</sup> The Third Circuit found that New Jersey’s anti-SOCE legislation survived intermediate review because the state had a strong and valid interest in protecting minors from harmful psychiatric procedures.<sup>121</sup> Moreover, the means by which New Jersey protected these minors was directly advanced by the statute, and the statute was not more extensive than necessary to protect the minors’ well-being.<sup>122</sup>

### 3. The Supreme Court

The Supreme Court thus far has not addressed the constitutionality of anti-SOCE legislations under the First Amendment.<sup>123</sup> But, in *Reed v. Town of*

ing Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. Rev. 939, 950)).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 233.

<sup>119</sup> *Id.* The Third Circuit also supported the professional speech distinction by drawing parallels to the commercial speech doctrine. *Id.* Commercial speech is “truthful, non-misleading speech that proposes a legal economic transaction,” and it “enjoys diminished protection under the First Amendment.” *Id.* (citing *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 454–59 (1978)). The Supreme Court has recognized that “commercial speech [does have] value because it facilitates the ‘free flow of commercial information,’ in which both the intended recipients and society at large have a strong interest.” *Id.* (first citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763–64 (1976); and then citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561–62 (1980))). Although commercial speech has value, the Supreme Court has still not hesitated to recognize that it is different from speech typically protected under the First Amendment because commercial activity is an area that states have traditionally regulated. *Id.* at 234. Therefore, courts evaluate commercial speech according to a lower level of review than strict scrutiny, specifically intermediate scrutiny. *Id.* Commercial and professional speech are similar in that they both have value to individuals and the public at large, but are both areas that the state has traditionally regulated; therefore, the Third Circuit concluded that it should also evaluate professional speech according to intermediate scrutiny. *Id.* at 235.

<sup>120</sup> *Id.* at 233, 235. Intermediate scrutiny means that that a government regulation is “constitutional only if [it] directly advance[s] the State’s interest in protecting its citizens from harmful or ineffective professional practices and [is] no more extensive than necessary to serve that interest.” *Id.* at 233.

<sup>121</sup> *Id.* at 237–40.

<sup>122</sup> *Id.*

<sup>123</sup> See *Nat’l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2369, 2371, 2375 (2018) (abrogating only the reasoning underlying *Pickup II* and *King*, but leaving intact the holdings that California’s and New Jersey’s anti-SOCE laws are valid).

*Gilbert* and *National Institute of Family and Life Advocates v. Becerra* (NIFLA), the Court undermined and abrogated the majority of the Ninth and Third Circuit's reasoning in *Pickup II* and *King*.<sup>124</sup> First, in 2015, the Supreme Court held in *Reed* that "[c]ontent-based laws . . . are presumptively unconstitutional" and must satisfy strict scrutiny.<sup>125</sup> Here, the Supreme Court was reviewing the Town's sign code provisions and found them to be content-based regulations of speech because the provisions targeted the "communicative content of the sign[s]."<sup>126</sup> In rendering this decision, the Supreme Court essentially mandated that strict scrutiny applies "regardless of the government's . . . motive."<sup>127</sup>

The primary imperative, the Court concluded, is figuring out whether the regulation is facially content-based; if so, the reviewing court must deploy strict scrutiny.<sup>128</sup> If the law is content-based on its face then a court must evaluate it under strict scrutiny despite the government's motive, lack of hostility to the underlying content, or any "content-neutral justification."<sup>129</sup> Stated differently, "an innocuous justification" does not change the analysis of a "facially content-based law into one that is content-neutral."<sup>130</sup>

*Reed's* jurisprudence thus undercuts the Ninth Circuit's reasoning in *Pickup II* because a facial review of California's anti-SOCE statute would reveal that it is facially content-based, and *Reed* therefore mandates strict scrutiny review.<sup>131</sup> Instead of labeling California's anti-SOCE statute as conduct that a court may analyze under rational basis review, courts post-*Reed* would classi-

<sup>124</sup> See, e.g., *id.* at 2371–75 (abrogating the reasoning under *King* and *Pickup II*); *King*, 767 F.3d at 233, 237 (holding that anti-SOCE legislation is professional speech subject to intermediate scrutiny); *Pickup II*, 740 F.3d 1208, 1225–32, 1236 (9th Cir. 2014) (upholding California's SOCE prohibition as a constitutional restriction on conduct because the actual administration of SOCE therapy is a professional service), abrogated by *NIFLA*, 138 S. Ct. at 2361.

<sup>125</sup> *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

<sup>126</sup> *Id.* at 164. The Supreme Court was reviewing the Town's ordinance that regulated "[t]emporary [d]irectional [s]igns," ruling that they facially regulated content (temporary directions) and therefore were subject to a strict scrutiny analysis. *Id.* Applying strict scrutiny, the court concluded that the signs were not narrowly tailored to serve a compelling state interest. *Id.* at 171.

<sup>127</sup> *Id.* at 165–66.

<sup>128</sup> *Id.* "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* at 163–64 (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011)).

<sup>129</sup> *Id.* at 165 (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)).

<sup>130</sup> *Id.* at 166.

<sup>131</sup> See *id.* (mandating strict scrutiny where a statute is facially content-based); *Pickup II*, 740 F.3d 1208, 1225–30 (9th Cir. 2014) (applying rational basis review after determining that California's statute regulates conduct rather than speech), abrogated by *Nat'l Inst. of Fam. & Life Advocs. v. Becerra* (*NIFLA*), 138 S. Ct. 2361 (2018).

fy the California statute as facially content-based, and inspected under the more stringent standard of strict scrutiny.<sup>132</sup>

In 2018, the Supreme Court in its decision in *NIFLA* invalidated a California law that required licensed crisis pregnancy centers to display a notice about the availability of state-funded contraceptive and abortion services.<sup>133</sup> The law also required unlicensed facilities providing pregnancy-related services to display a notice that the state had not issued them a license.<sup>134</sup> Prior to the Supreme Court's review of the case, the Ninth Circuit had upheld the notice requirements as the state's valid regulations of professional speech and applied a lower level of scrutiny.<sup>135</sup> The Supreme Court rejected the Ninth Circuit reasoning and invalidated the notice requirement for licensed centers.<sup>136</sup> The Court held that the licensed notice requirement was a content-based regulation of speech because it compelled speech (the notices) which changed the content of the practitioner's speech by requiring pro-life medical facilities to provide clients information about abortion, which was inherently against their stated mission and beliefs.<sup>137</sup>

In so holding, the Supreme Court expressly rejected the professional speech category that the lower courts had concocted.<sup>138</sup> The Court was clear that it was hesitant to give novel classifications of speech lower levels of First Amendment protection.<sup>139</sup> The Court stated that the judiciary could not create new categories to exempt improperly content-based regulations of speech to lower levels of judicial scrutiny.<sup>140</sup> The Court's opinion, however, did not state

<sup>132</sup> See *Reed*, 576 U.S. at 165–67 (requiring strict scrutiny for facially content-based government restrictions on the freedom of speech); *Pickup II*, 740 F.3d at 1225–30 (applying rational basis review to California's anti-SOCE legislation).

<sup>133</sup> 138 S. Ct. at 2369–70; CAL. HEALTH & SAFETY CODE § 123472(a)(1) (West 2016), held unconstitutional by *NIFLA*, 138 S. Ct. at 2361.

<sup>134</sup> HEALTH & SAFETY § 123472(b)(1); *NIFLA*, 138 S. Ct. at 2369–70.

<sup>135</sup> Nat'l Inst. of Fam. & Life Advoc. v. Harris, 839 F.3d 823, 829, 839–40, 845 (9th Cir. 2016) (applying intermediate scrutiny and finding that both notices are valid), *rev'd sub nom. NIFLA*, 138 S. Ct. at 2361.

<sup>136</sup> See *NIFLA*, 139 S. Ct. at 2371 (finding that the notice requirement is unconstitutional).

<sup>137</sup> *Id.* at 2376 (stating that “California cannot co-opt the licensed facilities” into speaking particular speech).

<sup>138</sup> *Id.* at 2371–72. The Supreme Court has at no point acknowledged “professional speech” as a unique class of speech that is subject to a lower standard of review. *Id.* Justice Thomas, writing for the majority, added that there is no “tradition” of providing a lower level of protection for professional speech. *Id.* at 2372.

<sup>139</sup> *Id.* at 2372. The Supreme Court repeatedly rejected the state's attempts to create new categories of exempt speech. See *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 794–95 (2011) (holding that violent video games were not an exempt category of speech); *United States v. Stevens*, 559 U.S. 460, 472 (2010) (holding that depictions of animal cruelty were not an unprotected category of speech), superseded by statute, 18 U.S.C. § 48 (2010).

<sup>140</sup> *NIFLA*, 138 S. Ct. at 2372.

that the First Amendment covers or protects SOCE therapy, or note which level of protection applies.<sup>141</sup>

Even though the Supreme Court undermined and abrogated the underlying reasoning upholding both California's and New Jersey's anti-SOCE laws, *Reed* and *NIFLA* did not invalidate California's or New Jersey's laws themselves; this left anti-SOCE legislation on unsettled ground.<sup>142</sup>

#### *D. Boca Raton and Palm Beach County Enact Anti-SOCE Legislation*

In 2017, the City of Boca Raton along with Palm Beach County, Florida enacted ordinances prohibiting licensed mental health professionals from engaging in SOCE therapy with minors.<sup>143</sup> Both the city and county enacted the ordinances based on legislative findings that SOCE was a serious threat to the health of minors.<sup>144</sup> In support of this conclusion, both legislatures cited to the

<sup>141</sup> See *id.* at 2371–72, 2375 (stating that the underlying analysis regarding professional speech was invalid, but leaving in place the holding that SOCE therapy bans are valid).

<sup>142</sup> *Id.*; see also Claudia E. Haupt, *The Limits of Professional Speech*, 128 YALE L.J.F. 185, 188–89 (2018), [https://www.yalelawjournal.org/pdf/Haupt\\_mhoq9r69.pdf](https://www.yalelawjournal.org/pdf/Haupt_mhoq9r69.pdf) [<https://perma.cc/88ES-TWZQ>] (noting that courts treat professional speech differently from normal speech in many respects, but that there is a limit to this difference).

<sup>143</sup> See BOCA RATON, FLA., CODE OF ORDINANCES ch. 9, art. VI, § 9-106 (2017) (“It shall be unlawful for any provider to practice conversion therapy on any individual who is a minor regardless of whether the provider receives monetary compensation in exchange for such services.”), held *unconstitutional* by *Otto II*, 981 F.3d 854 (11th Cir. 2020); PALM BEACH COUNTY, FLA., CODE OF LAWS AND ORDINANCES ch. 18, art. V, § 18-125 (2017) (“It shall be unlawful for any Provider to engage in conversion therapy on any minor regardless of whether the Provider receives monetary compensation in exchange for such services.”), held *unconstitutional* by *Otto II*, 981 F.3d at 854. The city ordinance defines conversion therapy as: “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.” § 9-105. Similarly, the county ordinance defines conversion therapy to mean: “the practice of seeking to change an individual’s sexual orientation or gender identity, including but not limited to efforts to change behaviors, gender identity, or gender expressions or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender or sex.” § 18-124. Both ordinances provide a carveout for services that provide “support and assistance to a person undergoing gender transition, or . . . provides acceptance, support, and understanding of a person . . . [or] does not seek to change an individual’s sexual orientation or gender identity.” *Id.*; see also § 9-105 (providing same). These ordinances are substantively similar, with the main difference being the penalty involved for violations. See § 9-107 (stating that the city penalizes violations under section 1-16 of Boca Raton’s ordinances, with a fine not to exceed \$500); § 18-126 (stating that the county penalizes first time violations with a \$250 fine, and subsequent violations with \$500 fines); see also BOCA RATON, FLA., CODE OF ORDINANCES ch. 1, § 1-16 (1966) (providing the city’s general penalty for violations of ordinances).

<sup>144</sup> § 9-104 (stating that the intent of the ordinance “is to protect the physical and psychological well-being of minors, including but not limited to lesbian, gay, bisexual, transgender and/or questioning youth, from exposure to the serious harms and risks caused by conversion therapy or reparative therapy by licensed providers, including but not limited to licensed therapists”); § 18-121 (“The intent of this Article is to protect the physical and psychological well-being of minors, including but not

numerous studies and position papers from public health and mental health organizations advocating against SOCE therapies.<sup>145</sup> Similar to anti-SOCE legislation in other jurisdictions, neither the city nor the county ordinances ban mental health providers from speaking about or expressing their views regarding SOCE therapy, speaking to minor patients about SOCE therapy, or referring minors to licensed therapists outside the county who can administer the therapy.<sup>146</sup> Additionally, the ordinances do not ban unlicensed mental health providers, like religious leaders, from providing SOCE therapies to minors or adults.<sup>147</sup>

Plaintiffs Robert Otto and Julie Hamilton are state-licensed marriage and family therapists who provide SOCE therapy in Palm Beach County.<sup>148</sup> Otto and Hamilton's practices are "exclusively talk therapy," comprised entirely of speech, and neither contains "any form of aversive treatment."<sup>149</sup> In June 2018, the plaintiffs filed a lawsuit against the city and the county seeking to enjoin enforcement of the ordinances.<sup>150</sup> The plaintiffs alleged that the government

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limited to lesbian, gay, bisexual, transgender and/or questioning youth, from exposure to the serious harms and risks caused by conversion therapy or reparative therapy by licensed providers . . .").

<sup>145</sup> See Boca Raton, Fla., Ordinance 5407 (Oct. 10, 2017) (codified at BOCA RATON, FLA., CODE OF ORDINANCES ch. 9, art. VI (2017)) (stating "[w]hereas, as recognized by major professional associations of mental health practitioners and researchers in the United States and elsewhere for nearly 40 years, being lesbian, gay, bisexual, transgender or gender nonconforming, or questioning (LGBTQ) is not a mental disease, disorder or illness, deficiency or shortcoming"), *held unconstitutional by Otto II*, 981 F.3d at 854; Palm Beach County, Fla., Ordinance 2017-046 (Dec. 21, 2017) (codified at PALM BEACH COUNTY, FLA., CODE OF LAWS AND ORDINANCES ch. 18, art. V (2017)) (stating same), *held unconstitutional by Otto II*, 981 F.3d at 854. Both the city and county ordinances cited to the articles and papers by the American Academy of Pediatrics, American Psychiatric Association, American Psychological Association, the American Psychoanalytic Association, American Academy of Child & Adolescent Psychiatry, and many more. Boca Raton, Fla., Ordinance 5407; Palm Beach County, Fla., Ordinance 2017-046.

<sup>146</sup> Palm Beach County, Fla., Ordinance 2017-046 ("Palm Beach County does not intend to prevent mental health providers from speaking to the public about SOCE; expressing their views to patients; recommending SOCE to patients; administering SOCE to any person who is 18 years of age or older; or referring minors to unlicensed counselors, such as religious leaders."); Boca Raton, Fla., Ordinance 5407 (same); see Gainesville, Fla., Ordinance 160200 (April 5, 2018) (codified at GAINESVILLE, FLA., CODE OF ORDINANCES ch. 17, art. IV (2018)) (stating that the ordinance bans the practice of SOCE, but not prohibiting therapists from expressing their views or opinions of SOCE).

<sup>147</sup> Boca Raton, Fla., Ordinance 5407 ("This ordinance does not prevent unlicensed providers, such as religious leaders, from administering SOCE to children or adults; nor does it prevent minors from seeking SOCE from mental health providers in other political subdivisions or states outside of [this jurisdiction] . . ."); Palm Beach County, Fla., Ordinance 2017-046 (stating same).

<sup>148</sup> *Otto v. City of Boca Raton (Otto I)*, 353 F. Supp. 3d 1237, 1242–43 (S.D. Fla. 2019), *rev'd*, 981 F.3d at 854.

<sup>149</sup> *Id.* at 1243. Otto practiced talk therapy that is directed by the client. *Id.* Otto's talk therapy practice did not use treatments containing any forms of punishment in order to change an individual's behavior or thinking. *Id.* Hamilton maintained that she did not force her clients into any particular form of therapy, and only administered SOCE therapy with consenting clients who sought it. *Id.*

<sup>150</sup> *Id.* at 1245. The party seeking a preliminary injunction bears the burden of establishing that all four prerequisites are met: "(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunc-

was infringing upon their federal and state constitutional rights, chief among them their First Amendment right to freedom of speech.<sup>151</sup> The plaintiffs asserted that the ordinances target viewpoint, and as a result are “per se unconstitutional,” or alternatively are content-based restrictions that cannot withstand strict scrutiny analysis.<sup>152</sup>

## II. STRICT SCRUTINY: STRIKING DOWN BOCA RATON’S AND PALM BEACH COUNTY’S ANTI-SOCE THERAPY PROVISIONS

With this complex history, the Eleventh Circuit Court of Appeals, in 2020, decided in *Otto v. City of Boca Raton (Otto II)* that the two anti-SOCE ordinances the localities enacted were both content-based and viewpoint discriminatory, and therefore courts must evaluate them under strict scrutiny.<sup>153</sup> The majority then concluded that the anti-SOCE ordinances did not pass constitutional muster or strict scrutiny, were invalid prohibitions on the therapists’ First Amendment right to freedom of speech, and held that the circumstances satisfied all four requirements to grant the plaintiffs’ preliminary injunction.<sup>154</sup> The dissent, in contrast, came to the opposite conclusion—that the statutes were narrowly tailored to serve a compelling state interest, and thus should survive strict scrutiny.<sup>155</sup> Section A of this Part reviews the reasoning the majority uses to support its conclusion in striking down the ordinances.<sup>156</sup> Section B highlights the arguments the dissent puts forth in rebuttal.<sup>157</sup>

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tion would not be adverse to the public interest.” *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1247 (11th Cir. 2016) (quoting *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000)) (citing *Levi Strauss & Co. v. Sunrise Int’l Trading Inc.*, 51 F.3d 982, 985 (11th Cir. 1995)).

<sup>151</sup> *Otto I*, 353 F. Supp. 3d at 1245. In total, the plaintiffs brought eight counts against the City and County: (1) violation of First Amendment right of free speech; (2) violation of the client’s First Amendment right to receive information; (3) violation of First Amendment right to free exercise; (4) violation of Florida constitutional right to free speech; (5) violation of Florida constitutional right to free exercise; (6) the ordinances are *ultra vires*; (7) violation of Florida’s Patient Bill of Rights and Responsibilities; (8) violation of Florida’s Religious Freedom Restoration Act (FRFRA), FLA. STAT. ANN. § 761.03 (West 2022). *Id.*; see also Verified Complaint for Declaratory, Preliminary and Permanent Injunctive Relief, and Damages at 36–55, *Otto I*, 353 F. Supp. 3d at 1237 (No.18-cv-80771) (describing in full each count of the lawsuit).

<sup>152</sup> *Otto I*, 353 F. Supp. 3d at 1245. Additionally, the plaintiffs claimed “that the ordinances are unconstitutional prior restraints on their expression . . . unconstitutionally vague . . . and outside of the . . . authority” of the City and County. *Id.*

<sup>153</sup> 981 F.3d 854, 867–70 (11th Cir. 2020) (applying strict scrutiny to the ordinances).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 872–80 (Martin, J., dissenting) (stating that the local governments had a compelling interest in child welfare that was narrowly tailored by only banning the application of SOCE therapy).

<sup>156</sup> See *infra* notes 158–191 and accompanying text.

<sup>157</sup> See *infra* notes 192–209 and accompanying text.

### A. Majority—Strict Scrutiny Dooms Another Regulation

The Eleventh Circuit’s majority opinion in *Otto II* first noted that the Supreme Court has already dealt with and dismissed the reasonings underpinning the Ninth and Third Circuits’ decisions that upheld anti-SOCE legislation.<sup>158</sup> The majority explained that the City of Boca Raton and Palm Beach County cannot evade strict scrutiny by reclassifying the therapists’ speech as “professional speech,” because the Supreme Court had already rejected this argument in *National Institute of Family and Life Advocates v. Becerra (NIFLA)*.<sup>159</sup> The majority noted that the *NIFLA* decision expressly rejected the carveout of professional speech from First Amendment protection.<sup>160</sup> The majority stated that under *NIFLA* the First Amendment protects the speech of licensed mental health professionals, like other forms of speech.<sup>161</sup>

In addition, the majority, following in the footsteps of *Reed v. Town of Gilbert*, and citing to prior circuit precedent, stated that the localities cannot attempt to recharacterize the ordinances as regulating conduct.<sup>162</sup> Citing to the Eleventh Circuit’s 2017 decision in *Wollschlaeger v. Governor of Florida*, the majority rejected the localities’ label of SOCE therapy as conduct because practitioners execute SOCE treatment entirely through speech.<sup>163</sup> The majority reasoned that if SOCE therapy constitutes conduct rather than speech, then teaching, debating, and even engaging in book clubs might not constitute speech either.<sup>164</sup> The majority also noted that the localities’ attempt to recast “controversial speech” as conduct in order to evade First Amendment protection was invalid and unconstitutional.<sup>165</sup>

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<sup>158</sup> 981 F.3d at 867–68 (rejecting the arguments the Ninth and Third Circuits used when evaluating SOCE prohibitions); see also *King v. Governor of N.J.*, 767 F.3d 216, 229–33 (3d Cir. 2014) (upholding anti-SOCE statute on a “professional speech” basis), *abrogated by Nat’l Inst. of Fam. & Life Advoc. v. Becerra (NIFLA)*, 138 S. Ct. 2361 (2018); *Pickup v. Brown (Pickup II)*, 740 F.3d 1208, 1225–29 (9th Cir. 2014) (upholding an anti-SOCE statute because the statute regulated conduct rather than speech), *abrogated by NIFLA*, 138 S. Ct. at 2361.

<sup>159</sup> *NIFLA*, 138 S. Ct. at 2375; *Otto II*, 981 F.3d at 861 (discussing Supreme Court case law which has “consistently rejected attempts to set aside the dangers of content-based speech regulation in professional settings: ‘As with other kinds of speech, regulating the content of professionals’ speech ‘pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information’” (quoting *NIFLA*, 138 S. Ct. at 2374)).

<sup>160</sup> *Otto II*, 981 F.3d at 867.

<sup>161</sup> *Id.* at 861 (quoting *NIFLA*, 138 S. Ct. at 2374).

<sup>162</sup> *Id.* at 861–62.

<sup>163</sup> *Id.*; see *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1308 (2017) (en banc) (striking down a statute that prohibited doctors from asking patients if they owned a gun as violating the First Amendment).

<sup>164</sup> *Otto II*, 981 F.3d at 865.

<sup>165</sup> *Id.* at 861 (noting that the Eleventh Circuit has previously made clear that local governments cannot evade the First Amendment merely by branding the plaintiff’s speech as conduct (quoting *Wollschlaeger*, 848 F.3d at 1308)).

Because the challenged ordinances targeted speech, the majority then considered whether the regulations were content-based or content-neutral to determine which level of review was most appropriate.<sup>166</sup> The majority found that because the ordinances' application depended on what a therapist says, the ordinances were content-based and thus strict scrutiny was required.<sup>167</sup> While providing examples of content-based restrictions, the majority also noted that the anti-SOCE prohibitions in the City of Boca Raton and Palm Beach County restricted therapists from imparting certain messages to their clients.<sup>168</sup> The court reasoned that the First Amendment protects unpopular speech itself, not merely the right to talk about unpopular speech.<sup>169</sup>

The majority further reasoned that the ordinances "discriminate on the basis of viewpoint."<sup>170</sup> Underlining the viewpoint discrimination inherent in the ordinances were the carveouts both ordinances contained, which allowed counseling that aids individuals who are undergoing a gender transition.<sup>171</sup> According to the majority, these carveouts for affirmative therapy "codif[ied] [the] particular viewpoint" that "sexual orientation is immutable, but gender is not" and prevented therapists from speaking and promoting their own beliefs when treating patients.<sup>172</sup> They warned that the Supreme Court has been clear

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 861–63; *see also* *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (stating "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed" (first citing *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 565 (2011); then citing *Carey v. Brown*, 447 U.S. 455, 462 (1980); and then citing *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972))). The majority then cited various tests and cases where the Supreme Court laid out how to determine if a restriction on speech was content-based or content-neutral. *Otto II*, 981 F.3d at 862; *see also Reed*, 576 U.S. at 163 (defining content based laws as those that engage speech based on what the speech says or means); *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (stating that if one must "examine the content of the message that is conveyed" then it is content-based (quoting *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984))).

<sup>168</sup> *Otto II*, 981 F.3d at 862–64.

<sup>169</sup> *Id.* at 862 (stating that the First Amendment "forbid[s] the government from choosing favored [messages over] disfavored messages" (citing *Mosley*, 408 U.S. at 96)).

<sup>170</sup> *Id.* at 864 (stating that the "plaintiffs' counseling practices" depend upon "particular viewpoint[s] about sex, gender, and sexual ethics"). The majority took the position that SOCE therapy is a particular viewpoint of the therapist (sexual, gender) and therefore limiting the therapy is an attack on a specific viewpoint. *Id.*

<sup>171</sup> *Id.* The City of Boca Raton ordinance provides for exclusions from the prohibition:

Conversion therapy does not include counseling that provides support and assistance to a person undergoing gender transition or counseling that provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices, as long as such counseling does not seek to change sexual orientation or gender identity.

BOCA RATON, FLA., CODE OF ORDINANCES ch. 9, art. VI, § 9-105 (2017), *held unconstitutional by Otto II*, 981 F.3d at 854.

<sup>172</sup> *Otto II*, 981 F.3d at 864. This must be part of the "homosexual agenda" that Justice Scalia so "bravely" warned about. *See Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting)

that viewpoint discrimination is an “egregious form” of restriction on speech, and suggested that such prohibitions may be unconstitutional *per se*.<sup>173</sup> Because the majority found that the ordinances were regulating speech, and did so in a content-based and viewpoint discriminatory manner, the majority held that it must review the ordinances under strict scrutiny.<sup>174</sup>

Under strict scrutiny, a government restriction on speech must be “narrowly tailored to serve [the intended] compelling [government] purpose.”<sup>175</sup> In enacting legislation, the government has the burden of proving that the law meets the demanding requirements of strict scrutiny.<sup>176</sup> The majority agreed that the city and county governments have a compelling interest in protecting children from physical and mental harm, but limited this by noting that there was no compelling interest in merely protecting children from contact with unpopular ideas.<sup>177</sup>

In building this argument, the majority noted that all of the studies and research about SOCE therapy, and specifically non-aversive forms (talk therapy), only amount to assertions, not actual proof.<sup>178</sup> The majority focused largely on the American Psychological Association (APA) 2009 Task Force Report (APA Report), which reviewed all the research and studies that researchers had conducted on SOCE therapy up to that point.<sup>179</sup> In particular, the majority focused on one sentence within the report that states that researchers have not yet rigorously evaluated SOCE therapy.<sup>180</sup> The majority further concluded that the report was even less conclusive when it came to non-aversive SOCE talk therapy.<sup>181</sup>

(bemoaning the majority opinion as being “the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct”).

<sup>173</sup> *Otto II*, 981 F.3d at 864 (“[G]overnment must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” (quoting *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 829 (1995))).

<sup>174</sup> *Id.* at 868–69.

<sup>175</sup> *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 171 (2015) (stating that the compelling interest must be narrowly tailored to the government’s compelling interest).

<sup>176</sup> *Otto II*, 981 F.3d at 868 (stating that “ambiguous proof” is inadequate to meet the “demanding standard” that strict scrutiny requires (quoting *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799–800 (2011))).

<sup>177</sup> *Id.* (stating that there is an interest in protecting children, but this “does not include a free-floating power to restrict the ideas to which children may be exposed” (quoting *Brown*, 564 U.S. at 794–95)). The majority noted that although protection of children was itself a compelling interest, the majority was stern to the fact that “speech ‘cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.’” *Id.* (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213–14 (1975)).

<sup>178</sup> *Id.* at 868–69 (finding that the evidence the localities presented only “offer[ed] assertions rather than [causal] evidence” that SOCE therapy caused harm to children).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 869 & n.8 (“We focus our attention on the APA’s 2009 task force report because it ‘performed a systematic review of the peer-reviewed literature’ to assess SOCE.” (quoting APA REPORT,

Second, the majority dismissed the consensus among major professional mental health organizations that SOCE therapy is harmful toward minors and does not provide any proven therapeutic value.<sup>182</sup> The majority stated that this consensus does not amount to much because mental health and medical communities have held different opinions over time.<sup>183</sup> The majority observed that mental health and medical organizations had previously shared the opposite position that homosexuality was a mental disorder.<sup>184</sup> Because consensus has changed on the question of whether homosexuality is a mental disorder, the majority reasoned that it cannot consider the new consensus against SOCE therapy sufficiently definitive to warrant any free speech restrictions.<sup>185</sup>

Finally, the majority reasoned that the First Amendment has always protected against majority preference repressing unpopular ideas.<sup>186</sup> This is part of the First Amendment's purpose in facilitating an "uninhibited marketplace of ideas" where "the truth will . . . prevail."<sup>187</sup> In this instance, the majority concluded that the government could not rely on the consensus opinion of medical and psychological organizations or the evidence of SOCE therapy causing harm to patients to suppress the free speech right of the minority of mental health professionals who believe otherwise.<sup>188</sup> Although the majority paused to note that it understands how difficult making this decision is, it acknowledged

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*supra* note 33, at 2)). The APA Task Force's Report "found that nonaversive and recent approaches to SOCE have not been rigorously evaluated." APA REPORT, *supra* note 33, at 43.

<sup>181</sup> *Otto II*, 981 F.3d at 868–69 (stating that the APA Task Force Report is even less conclusive on talk therapy SOCE, and the majority of studies reviewed dealt with aversive therapies).

<sup>182</sup> *Id.* at 869. The majority quoted the district court, which noted that even if the scientific evidence and research were not enough, the consensus among the professional mental health organizations that SOCE is dangerous adds more support to the determination that SOCE therapy is harmful to minors. *Id.* But, the majority took this point and twisted it into an argument by the district court that evidence is not needed when there is a majority opinion. *See id.* ("In other words, evidence is not necessary when the relevant professional organizations are united. But that is, really, just another way of arguing that majority preference can justify a speech restriction.").

<sup>183</sup> *See id.* at 869–70 (noting that professional organizations routinely get things wrong, and mental health organizations have done just that with their past classification of homosexuality as a mental disorder).

<sup>184</sup> *See id.* (casting a critical eye on the opinions of professional organizations because "[i]t is not uncommon for [these] organizations to do an about-face in response to new evidence")

<sup>185</sup> *See id.* at 869–70 (warning that considering a professional industry consensus on a particular topic is another way of "justify[ing] a speech restriction" on the grounds of a "majority preference").

<sup>186</sup> *Id.* at 864

<sup>187</sup> *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364, 377–78 (1984) (describing the First Amendment's purpose as "preserv[ing] an uninhibited marketplace of ideas in which the truth will ultimately prevail" (quoting *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969))); *Otto II*, 981 F.3d at 864 (describing the First Amendment as allowing all ideas into society without needing government permission to express them).

<sup>188</sup> *Otto II*, 981 F.3d at 869–70 (noting that "[p]rofessional opinions and cultural attitudes may have changed, but the First Amendment has not").

that individuals who “actually hurt children” can still be held liable.”<sup>189</sup> The majority maintained, however, that the First Amendment right to free speech is simply too important that not even a valid interest in protecting children could justify the state’s trampling of that right.<sup>190</sup> The majority concluded that the First Amendment is a reflection of the value that Americans place on their freedom of speech rights, and that the government is therefore limited in hampering this right even if that speech could be dangerous to children.<sup>191</sup>

### *B. Dissent—Anti-SOCE Legislation Withstands Strict Scrutiny*

In contrast, the dissent concluded that the City of Boca Raton’s and Palm Beach County’s anti-SOCE ordinances satisfy strict scrutiny, and therefore the court should deny plaintiff-therapists’ motion for preliminary injunction.<sup>192</sup> First, the dissent acknowledged that although the ordinances are content-based restrictions, they do not venture further to viewpoint discrimination.<sup>193</sup> The dissent noted that the ordinances did not express any preference for one type of speech over another, nor did the ordinances require any therapist to embrace a particular message or belief.<sup>194</sup>

The dissent explained that a “content-based [governmental] restriction” will pass strict scrutiny if it “further[s] a compelling government interest” via “the least restrictive means.”<sup>195</sup> The dissent agreed with the majority that the

<sup>189</sup> *Id.* at 870. The majority believed that prosecutors and plaintiffs can use “torts for professional malpractice and “other state-law penalties for bad acts that produce actual harm” to hold harmful speech accountable. *Id.* (citing Nat’l Inst. of Fam. & Life Advoc. v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2373 (2018)).

<sup>190</sup> *Id.* The majority noted that the system can still attach liability to individuals who render *actual harm* to children. *Id.* (“People who actually hurt children can be held accountable, but “[b]road prophylactic rules in the area of free expression are suspect.” (alteration in original) (quoting NAACP v. Button, 371 U.S. 415, 438 (1963))). The majority states that “[e]ven where the protection of children is the object” of the law, the constitution and its protections still apply. *Id.* (alteration in original) (quoting *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 804–05 (2011)); *see also* *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“[F]reedom of speech . . . protected by the First Amendment from abridgment by Congress . . . [is] among the fundamental personal rights and ‘liberties . . .’”).

<sup>191</sup> *Otto II*, 981 F.3d at 870 (“The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.” (quoting *United States v. Stevens*, 559 U.S. 460, 470 (2010), *superseded by statute*, 18 U.S.C. § 48 (2010))).

<sup>192</sup> *Id.* at 873 (Martin, J., dissenting). The dissent did not decide whether the ordinances regulated speech or conduct, but instead concluded that this distinction did not matter because the ordinances passed strict scrutiny. *Id.*

<sup>193</sup> *Id.* at 873–74.

<sup>194</sup> *Id.* at 874 (noting that the majority asserted that the ordinances constituted viewpoint discrimination because they did allow for gender-conforming therapy to occur).

<sup>195</sup> *Id.* (citing *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1258 (11th Cir. 2005)). The dissent noted that very few cases survive the rigors of strict scrutiny, but the anti-SOCE legislation in this case is one of those cases. *Id.*; *see* *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015)

protection of minors is a compelling governmental interest.<sup>196</sup> The dissent, however, stated that the majority's decision mis-framed the compelling interest as protecting children from unpopular ideas, rather than protecting them from real harms that SOCE therapy poses.<sup>197</sup> The dissent noted that the ordinances still allowed therapists to give their opinion on SOCE, as well as any information about SOCE, and only prohibited the administration of SOCE therapy itself.<sup>198</sup> Thus, the dissent reasoned that the only governmental interest that the ordinances served was the prohibition of a harmful therapy and not the limitation of minors' exposure to certain ideas.<sup>199</sup>

The dissent then addressed the majority's argument that there was no real compelling state interest of preventing harm to children because there was "insufficient evidence" to support the theory that SOCE therapy is harmful.<sup>200</sup> In support, the dissent recounted the APA Report's findings that described the negative and harmful impacts of SOCE on those who underwent the therapy.<sup>201</sup> The dissent critiqued the majority as merely glossing over the APA Report's findings, and instead focusing on single lines from the report that observed that the research available on SOCE therapy has not been rigorous.<sup>202</sup> Additionally, the dissent admonished the majority for calling for professionals to conduct more research and studies because this ignores the reality that harm might oc-

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(noting that the extraordinary case does occur where the state has sufficiently shown that a limitation on speech aids a compelling interest and is narrowly tailored).

<sup>196</sup> See *Otto II*, 981 F.3d at 874–75 (Martin, J., dissenting) (quoting a number of Supreme Court and Eleventh Circuit cases stating that protecting minors is a compelling state interest); see also *id.* at 868–69 (majority opinion) (finding a compelling governmental interest in protecting children, but holding that the scientific studies underlying the legislature's enactment of the law were not conclusive enough to support the ban on SOCE therapy to minors).

<sup>197</sup> *Id.* at 875 (Martin, J., dissenting). The dissent noted that this is "inexact," and that the ordinances were not stopping minors from hearing "any information or ideas" because the therapists are allowed to give their opinion and to discuss "perceived benefits of SOCE," and the ordinances only prohibited therapists from actually administering the therapy. *Id.*

<sup>198</sup> *Id.* The dissent argued that the localities were not proscribing practitioners from educating minor patients on SOCE, but instead the localities were merely prohibiting the administration of "a particular medical practice"—SOCE therapy. *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 875–76. The majority observed that without sufficient underlying evidence that SOCE therapy is harmful to minors, especially non-aversive talk-therapy, the localities could not rightfully enact the regulation. *Id.* at 868–69 & n.7. (majority opinion).

<sup>201</sup> See *id.* at 875–76 (Martin, J., dissenting) (stating that the APA Task Force Report found that "patients who [underwent] SOCE [therapy] experience[d] 'anger, anxiety, confusion, depression, grief, guilt, hopelessness, deteriorated relationships with family, loss of social support, loss of faith, poor self-image, social isolation, intimacy difficulties, intrusive imagery, suicidal ideation, self-hatred, and sexual dysfunction'" (quoting APA REPORT, *supra* note 33, at 42)).

<sup>202</sup> *Id.* at 876. The dissent stated that this cherry picking of lines from the APA Report and the ignoring of all the other reports and studies shows that the research that *has* been done "supports the Localities' conclusion that SOCE" therapy for minors is dangerous and therefore rightfully banned. *Id.*; see also APA REPORT, *supra* note 33, at 42–43 (finding that there is already "evidence to indicate that individuals experienced harm from SOCE").

cur to minors with further study of SOCE therapy.<sup>203</sup> The dissent stated that further research in the form of a controlled study was not ethically permissible, as any study would put minors in harm's way.<sup>204</sup>

Next, the dissent established that the ordinances prohibiting SOCE therapy were the "least restrictive means of [satisfying the] compelling . . . interest" of protecting minors.<sup>205</sup> The dissent found that the ordinances were neither under- nor over-inclusive in their protection of minors.<sup>206</sup> The dissent found that the ordinances were narrowly tailored because they only banned the administration of the therapy by state licensed professionals.<sup>207</sup> Therapists could still talk about the therapy, opine about the therapy, and discuss its benefits with their clients.<sup>208</sup>

Although most government regulations do not survive strict scrutiny, the dissent in *Otto II* concluded that the ordinances were one of the rare regula-

<sup>203</sup> See *Otto II*, 981 F.3d at 876–77 (Martin, J., dissenting) (restating the APA's contentions that institutional review boards would not condone conducting a controlled study on SOCE therapy that "has not been determined to be safe[,] is not ethically permissible[,] and would involve as subjects "minors who cannot themselves provide legal consent" (quoting Brief of American Psychological Association, Florida Psychological Association, National Association of Social Workers, National Association of Social Workers Florida Chapter, and American Association for Marriage and Family Therapy as *Amici Curiae* in Support of Defendants-Appellees and Affirmance at 8–9, *Otto II*, 981 F.3d at 854 (No. 19-10604) [hereinafter Brief of *Amici Curiae*])).

<sup>204</sup> *Id.* First Amendment jurisprudence does not require unethical research. *Id.* at 877. With professional organizations of "science, research, and practice" already preliminarily finding that SOCE therapy poses a risk to minors, and therefore declining to study it further, the dissent stated it was sensible for the government to rely on the existing evidence suggesting that SOCE therapy is harmful. *Id.*

<sup>205</sup> *Id.* at 879–80 (quoting *McCullen v. Coakley*, 573 U.S. 464, 478 (2014)). The dissent argued that the ordinances are the least restrictive option, and are not under- nor over-inclusive, meaning that they neither fail to "regulate enough conduct" nor succeed in "regulat[ing] too much conduct." *Id.*; *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 448 (2015) (determining that a statute that is under-inclusive prompts "doubts about whether the government is in fact pursuing [its compelling interest]" or instead if it is merely "disfavoring a particular speaker or viewpoint" (quoting *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 802 (2011))). Similarly, a law that "restricts too much" speech might not be the "least restrictive means" to advance the State's compelling interest. *Williams-Yulee*, 575 U.S. at 452.

<sup>206</sup> See *Otto II*, 981 F.3d at 879 (Martin, J., dissenting) (concluding that the ordinances were narrowly tailored and neither over nor under-inclusive). The therapists claimed that the ordinances were under-inclusive because they allowed for other individuals to administer SOCE therapy, such as religious counselors like priests. *Id.* The dissent rejected this argument, stating that the ordinances were not under-inclusive for allowing religious counselors to administer SOCE therapy because any regulation limiting religious administration of SOCE would "run into Establishment Clause issues." See *id.* (noting that the city and county's decisions to exempt religious figures from the SOCE prohibitions was reasonable). The dissent also rejected the plaintiffs' argument that the ordinances were over-inclusive because they banned both aversive and non-aversive forms of SOCE. *Id.* at 879–80. The dissent noted that the underlying evidence on SOCE therapy sufficiently supported the conclusion that both forms of SOCE therapy could be harmful to minors and therefore the localities should prohibit them. *Id.* at 878 n.6, 879–80.

<sup>207</sup> *Id.* at 879.

<sup>208</sup> See *id.* (explaining that it would be unconstitutional to ban all discussions regarding SOCE).

tions that met strict scrutiny's requirement because the ordinances were "narrowly tailored to serve a compelling [government] interest."<sup>209</sup>

### III. ANTI-SOCE LEGISLATION SURVIVES STRICT SCRUTINY

The majority and dissent reviewed the City of Boca Raton's and Palm Beach County's ordinances under strict scrutiny and came to opposite conclusions.<sup>210</sup> This Part argues that the majority was wrong in concluding that the ordinances do not survive strict scrutiny; on the contrary, the ordinances sufficiently meet strict scrutiny's two-prong test.<sup>211</sup> For the analysis in this Part, this Note accepts that the ordinances are restrictions on speech, and therefore strict scrutiny review applies, despite valid arguments to the contrary that strict scrutiny is inappropriate.<sup>212</sup>

Section A of this Part first challenges the majority's conclusion that the ordinances are not merely content-based, but in fact constitute viewpoint discrimination.<sup>213</sup> This section counters the majority's conclusory framing of the ordinances as limiting children's access to ideas and information, and explains that the nature of psychotherapy as a medical treatment does not favor any particular viewpoint.<sup>214</sup> Section B of this Part argues that the anti-SOCE ordinances do indeed meet the government's burden of articulating a compelling state interest.<sup>215</sup> In particular, this section argues that the *Otto v. City of Boca Raton* (*Otto II*) majority mischaracterizes the evidence surrounding SOCE therapy, and that the combination of available scientific research and the lack of a safe or ethical opportunity upon which to further test SOCE therapy on minors suf-

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<sup>209</sup> *Id.* at 880 (concluding that the ordinances constitute "narrow regulation" aimed at protecting vulnerable children from "a harmful medical practice" and therefore are constitutional restrictions that survive strict scrutiny review).

<sup>210</sup> Compare *id.* at 859 (majority opinion) (holding that the ordinances do not survive strict scrutiny), with *id.* at 873 (Martin, J., dissenting) (finding that the ordinances do survive strict scrutiny).

<sup>211</sup> See *infra* notes 218–372, and accompanying text (arguing that the ordinances have a compelling interest and are narrowly tailored).

<sup>212</sup> See *Otto v. City of Boca Raton* (*Otto II*), 981 F.3d at 873 (Martin, J., dissenting) (following the dissent's assumption that the ordinances regulate speech and are content-based, and therefore that strict scrutiny applies). Some argue that the *Otto II* majority's conclusion that strict scrutiny applies is incorrect based on the Supreme Court's "framework for differentiating constitutionally protected speech from speech incidental to professional conduct." Recent Case, *First Amendment—Professional Speech—Eleventh Circuit Invalidates Minor Conversion Therapy Bans*—*Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020), 134 HARV. L. REV. 2863, 2866–70 (2021) (arguing that the Supreme Court's decisions in *National Institute of Family & Life Advocates v. Becerra* (NIFLA) and *Planned Parenthood of Southeastern Pennsylvania v. Casey* "carefully differentiated between professional speech that receives complete free speech protection (strict scrutiny) and professional speech that is "incidental to conduct" that does not trigger strict scrutiny).

<sup>213</sup> See *infra* notes 218–244, and accompanying text.

<sup>214</sup> See *infra* notes 218–244, and accompanying text.

<sup>215</sup> See *infra* notes 245–316, and accompanying text.

ficiently demonstrates a compelling government interest.<sup>216</sup> Section C of this Part then addresses the second prong of strict scrutiny, narrow tailoring, and argues that the ordinances are narrowly drawn to accomplish their compelling purpose of protecting children from the harms of SOCE therapy.<sup>217</sup>

#### *A. Anti-SOCE Is Content-Based, but Not Viewpoint Discriminatory*

Before addressing whether the localities' ordinances survive the dual prongs of strict scrutiny, it is important to address the *Otto II* majority's conclusion that barring SOCE therapy is not just a content-based restriction, but goes further in being viewpoint discrimination.<sup>218</sup> Viewpoint discrimination happens when the government seeks to restrict speech based on its disagreement with the ideas the speech expresses.<sup>219</sup> The *Otto II* majority states that the ordinances single out speakers (the therapists) and specific speech (SOCE therapy) and therefore the restrictions are targeting specific viewpoints and ideas.<sup>220</sup> The majority believes that the government is targeting SOCE therapy because SOCE therapy is a disfavored idea and a minority-based view with which the localities do not agree.<sup>221</sup> The prohibitions are also viewpoint discriminatory, according to the majority, because the therapists' "counseling practices are grounded in a particular viewpoint about sex, gender, and sexual ethics."<sup>222</sup> The First Amendment, the majority notes, does not simply allow the government to restrict speech merely because the speech is disfavored.<sup>223</sup>

The majority's conclusion that the ordinances are viewpoint discriminatory, however, ignores the very nature of what psychotherapy is.<sup>224</sup> Psychotherapy is medical treatment.<sup>225</sup> Therapists use psychotherapy to address a patient's

<sup>216</sup> See *infra* notes 245–316, and accompanying text.

<sup>217</sup> See *infra* notes 317–372, and accompanying text (arguing that the ordinances were carefully written by both legislatures to ensure that they are neither over- nor under-inclusive).

<sup>218</sup> See *Otto II*, 981 F.3d 854, 862 (11th Cir. 2020) (stating that the Constitution “[f]orbid[s] the government from choosing favored [over] disfavored messages” (citing *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 96 (1972))).

<sup>219</sup> See *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 829–31 (1995) (observing that viewpoint discrimination, the restraint of a specific view or idea, is a “subset” of content-based discrimination that is especially egregious (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992))).

<sup>220</sup> *Otto II*, 981 F.3d at 863.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 864.

<sup>223</sup> *Id.*

<sup>224</sup> See APA Dictionary of Psychology, *Psychotherapy*, AM. PSYCH. ASS’N, <https://dictionary.apa.org/psychotherapy> [<https://perma.cc/K56F-8U6K>] (defining psychotherapy as “any psychological service provided by a trained professional that primarily uses forms of communication and interaction to assess, diagnose, and treat dysfunctional emotional reactions, ways of thinking, and behavior patterns”).

<sup>225</sup> See *id.* (discussing how psychotherapy is a medical service to treat individuals with mental disorders).

mental condition.<sup>226</sup> Psychotherapy is not, as the majority suggests, an exchange of ideas or beliefs between the patient and the therapist.<sup>227</sup> Therapists who engage in SOCE therapy are not conversing with their patients about ideas, they are engaging in an alleged therapy (medical treatment) designed to change their patients' sexual orientation.<sup>228</sup> SOCE therapists are actively engaging in a therapy that aims to modify their patients' mental state regarding their sexual orientation.<sup>229</sup> Based on the nature of psychotherapy, anti-SOCE legislation is not restricting any ideas or viewpoints, but instead is regulating a medical treatment.<sup>230</sup>

The majority in *Otto II* tries to evade the reality that SOCE therapy is a medical treatment and not an expression or idea by committing to the theory that courts should interpret freedom of speech under the First Amendment literally.<sup>231</sup> Under this interpretation, because SOCE therapy is “talk therapy,” only employing words, the majority concludes that it is viewpoint-based.<sup>232</sup> Although SOCE therapy may use speech, it is speech that is “not expressive,” but rather speech practitioners use to “serve a function”—therapy to minor clients.<sup>233</sup> This is different from the kind of speech that the Founders intended the First Amendment to protect, such as speech in the marketplace of ideas.<sup>234</sup> Prohibiting a specific talk therapy that takes place directly between a therapist and a minor patient does not inhibit the marketplace.<sup>235</sup>

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<sup>226</sup> See *id.* (defining psychotherapy not as the act of expressing ideas or opinions, but as a method of communication that practitioners use to diagnose and remedy a mental disorder).

<sup>227</sup> Compare *Otto II*, 981 F.3d at 868 (majority opinion) (finding that the ordinances ban the exchange of ideas), with *id.* at 875 (Martin, J., dissenting) (stating that the ordinances only prohibit the therapists from administering a specific medical treatment).

<sup>228</sup> See Graham, *supra* note 8, at 419 (defining SOCE therapy as a therapy intended to change “an individual’s sexual orientation, gender identity, or gender expression” (citing MALLORY ET AL., *supra* note 8)).

<sup>229</sup> *Id.*

<sup>230</sup> See *Otto II*, 981 F.3d at 875 (Martin, J., dissenting) (noting that the localities’ ordinances allow for therapists to distribute ideas to their clients, but the therapists cannot perform a specific therapeutic practice).

<sup>231</sup> See *id.* at 865–66 (majority opinion) (stating that “[s]peech is speech” and that the therapy here is “entirely speech,” and therefore the court cannot simply label the therapy as conduct merely because therapy is a professional service (first quoting *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1307 (2017) (en banc); and then quoting *Otto v. City of Boca Raton (Otto I)*, 353 F. Supp. 3d 1237, 1251 (S.D. Fla. 2019), *rev’d*, 981 F.3d at 854)).

<sup>232</sup> See *id.* at 866 (“If speaking to clients is not speech, the world is truly upside down. These ordinances sanction speech directly, not incidentally—the only ‘conduct’ at issue is speech.”).

<sup>233</sup> See *Otto I*, 353 F. Supp. 3d at 1257 (finding that SOCE talk therapy is an “act of therapy,” and although it uses words, the words merely serve as the medium through which practitioners administer the therapy to the minor children (emphasis omitted)).

<sup>234</sup> See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .”); see also U.S. CONST. amend I (stating an individual’s right to freedom of speech).

<sup>235</sup> See *Nat’l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2375 (2018) (“[T]he people lose when the government is the one deciding which ideas should prevail.”). However,

Lastly, the *Otto II* majority tries to support its position that the ordinances are viewpoint discriminatory by pointing out there are “exceptions” contained in the ordinances for counseling that “support[s] and assist[s] [individuals who are] undergoing a gender transition.”<sup>236</sup> These “exceptions,” the majority states, “codify a particular viewpoint [that] sexual orientation is immutable, but gender is not” because “[n]o such carveout exists for sexual orientation.”<sup>237</sup> As such, the localities are preventing mental health practitioners from providing any alternative point of view to their clients.<sup>238</sup> Again, the majority misses the point.<sup>239</sup> First, there is a difference between sexual orientation and gender identity.<sup>240</sup> Second, this “exception” simply allows for a minor to obtain therapy or counseling as they go through a gender transition.<sup>241</sup> This also means that a child who previously transitioned can obtain counseling if they want to transition back.<sup>242</sup> As such, the ordinances only restrict a specific form of therapy, one with the purpose of “convincing minor[s] . . . to *change* their sexuality or gender identity.”<sup>243</sup>

Under the Supreme Court’s reasoning in *Reed v. Town of Gilbert*, it may be required for a court to find that the ordinances are content-based, but it does not follow, as the *Otto II* majority suggests, that the ordinances venture further into being viewpoint discriminatory.<sup>244</sup>

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the facts in *Otto* are different from *NIFLA* because the *Otto* conversation is private and takes place between the therapist and the client. See *Otto I*, 353 F. Supp. 3d at 1256 (finding that the speech the ordinances regulate is not speech out in society, but a direct medical treatment that practitioners deliver using speech).

<sup>236</sup> *Otto II*, 981 F.3d at 864.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> See *id.* at 874 (Martin, J., dissenting) (disagreeing with the majority that the ordinances’ “exceptions” for affirmative therapy do not constitute viewpoint discrimination).

<sup>240</sup> See generally DIV. 16 (SCH. PSYCH.) & DIV. 44 (SOC’Y FOR THE PSYCH. STUDY OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER ISSUES), AM. PSYCH. ASS’N, PAMPHLET NO. 05, KEY TERMS AND CONCEPTS IN UNDERSTANDING GENDER DIVERSITY AND SEXUAL ORIENTATION AMONG STUDENTS (2015), <https://www.apa.org/pi/lgbt/programs/safe-supportive/lgbt/key-terms.pdf> [<https://perma.cc/U3TU-WJ7J>] (defining various terms and concepts). The APA defines gender identity as “[a] person’s deeply-felt, inherent sense of being a boy, a man, or male; a girl, a woman, or female; . . . or an alternative gender, which may or may not correspond to a person’s sex assigned at birth . . . .” *Id.* at 20. Conversely, the APA defines Sexual Orientation as “[a] component of identity that includes a person’s sexual and emotional attraction to another person and the behavior that may result from this attraction.” *Id.* at 22.

<sup>241</sup> See BOCA RATON, FLA., CODE OF ORDINANCES ch. 9, art. VI, § 9-105 (2017) (“Conversion therapy does not include counseling that provides support and assistance to a person undergoing gender transition or counseling that provides acceptance, support, and understanding of a person . . . .”), held unconstitutional by *Otto II*, 981 F.3d at 854.

<sup>242</sup> *Otto II*, 981 F.3d at 874 (Martin, J., dissenting).

<sup>243</sup> *Id.* (emphasis added).

<sup>244</sup> See *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 171 (2015) (requiring courts first to review restrictions facially to determine whether they are content-based, and then if so, to review whether

### B. A Compelling Interest—Protecting Children from Harm

Although First Amendment jurisprudence recognizes the importance of freedom of speech, it also acknowledges that occasional and limited restrictions are necessary when vital and compelling governmental interests are on hand.<sup>245</sup> For a proscription on speech to be valid under strict scrutiny review, the speech first needs to serve a compelling governmental objective.<sup>246</sup> One point on which all parties in the various SOCE lawsuits agree is that the state has a compelling interest in protecting the physical and mental health of minors.<sup>247</sup> Where the parties disagree, however, is on whether there is an actual problem—that SOCE therapy causes harm to minors—that the government must address with regulation.<sup>248</sup> More specifically, the disagreement at issue in *Otto II* is whether there is enough evidence to show a causal connection between SOCE therapy and harm to minors.<sup>249</sup> The central tenant of the *Otto II*'s majority opinion is that there is no actual problem with SOCE therapy because the localities have failed to present sufficient evidence that this therapy actually causes harm to minors.<sup>250</sup> To support their holding, the majority explains that there is a lack of evidence supporting the state's position that SOCE thera-

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courts should subject such restrictions to strict scrutiny regardless of the underlying motive); *Otto II*, 981 F.3d at 862 (holding that the ordinances are viewpoint discriminatory).

<sup>245</sup> See, e.g., *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28, 32 (2010) (holding that the government can restrict speech when such speech only serves the purpose of teaching terrorist organizations about international law because the government has a compelling interest in prohibiting support for terrorism).

<sup>246</sup> See *Reed*, 576 U.S. at 163 (holding that in order for a restriction on speech to survive strict scrutiny it must have a compelling state interest).

<sup>247</sup> See *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) (“It is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling.’” (quoting *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607 (1982))); *Otto II*, 981 F.3d at 874 (Martin, J., dissenting) (agreeing with the majority that protecting the welfare of children is a compelling government interest). States also have a compelling interest in regulating professions. *Otto II*, 981 F.3d at 874 (Martin, J., dissenting) (quoting *Locke v. Shore*, 634 F.3d 1185, 1196 (11th Cir. 2011)); see *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) (finding that “[s]tates have a compelling interest in the practice of professions within their boundaries, and . . . they have broad power to establish standards for licensing practitioners and regulating the practice of professions”). This interest is especially sincere for medical professions. *Otto II*, 981 F.3d at 874 (Martin, J., dissenting); *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1316 (11th Cir. 2017) (en banc) (finding that the state has a compelling interest in the regulation of professional medicine).

<sup>248</sup> See, e.g., *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799 (2011) (dictating that under strict scrutiny the state specifies an “‘actual problem’ in need of solving” (quoting *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 822–23 (2000))).

<sup>249</sup> Compare *Otto II*, 981 F.3d at 868–70 (majority opinion) (finding that there was insufficient evidence that SOCE therapy actually causes harm to minors), with *id.* at 878 (Martin, J., dissenting) (stating that there is a “mountain of rigorous evidence” that SOCE therapy is harmful to children). See *Brown*, 564 U.S. at 799 (requiring an “‘actual problem’” in need of solving” (quoting *Playboy*, 529 U.S. at 822–23)).

<sup>250</sup> See *Otto II*, 981 F.3d at 868 (majority opinion) (finding that the studies only “offer assertions rather than evidence, at least regarding the effects of purely speech-based SOCE”).

py causes harm to minors, that the evidence currently available is merely anecdotal, and lastly that the present consensus among professional mental health organizations that SOCE therapy causes harm is inconsequential because the consensus once held the opposite position that homosexuality was a mental illness.<sup>251</sup>

The majority rests much of its finding that SOCE therapy does not cause harm on its flawed interpretation that there is insufficient research and evidence, especially with recent studies, to support the opposite conclusion.<sup>252</sup> The reality surrounding this argument is much more complex.<sup>253</sup> Although the APA Report does acknowledge that scientifically-valid efficacy research on SOCE therapy is indeed somewhat limited, the majority, however, completely ignores the research that is actually available.<sup>254</sup> The majority, instead, cherry-picked one line from the APA Report that there was a “dearth” of evidence supporting the conclusion that SOCE therapy causes harm.<sup>255</sup>

The lack of recent studies and research that the *Otto II* majority highlights may in fact be the result of the harms that SOCE therapy itself can cause.<sup>256</sup> Early studies on SOCE contained “[h]igh dropout rates” for participants, which researchers believe was because of the harms participants endured during these

<sup>251</sup> *Id.* at 868–70.

<sup>252</sup> *See id.* at 868–69 (stating that the APA Report acknowledges that researchers have not scrupulously tested non-aversive forms of SOCE therapy).

<sup>253</sup> *See infra* notes 256–282 and accompanying text (explaining that although there may be a limited amount of efficacy-based research, some consider this to be the result of participants in studies who have endured SOCE therapy dropping out, potentially because of the harm SOCE therapy produces, and because it is unethical to conduct a study to prove that a therapy causes harm to children).

<sup>254</sup> APA REPORT, *supra* note 33, at abstract (concluding that research has not shown any benefits from SOCE therapy, and that individuals who undergo SOCE experience a wide arrange of potential harm); *see Otto II*, 981 F.3d at 876 (Martin, J., dissenting) (noting that the majority relies on a single statement from the APA Report).

<sup>255</sup> *See Otto II*, 981 F.3d at 868 (finding that the “documents offer assertions rather than evidence,” particularly with respect to the “purely speech-based SOCE” therapy); *id.* at 876 (Martin, J., dissenting) (explaining that the majority’s suspicion of the data on SOCE derives from a “single statement in the Task Force Report”); APA REPORT, *supra* note 33, at 42 (noting the “dearth” of evidence “on the safety of SOCE”). The majority further latched onto the APA Task Force’s statement that “rigorous recent prospective research” is missing. *Otto II*, 981 F.3d at 868 (majority opinion); APA REPORT, *supra* note 33, at 42 (“The limited number of rigorous early studies and complete lack of rigorous recent prospective research on SOCE limits claims for the efficacy and safety of SOCE.”). This snippet of a quote that the majority uses to determine why there is no compelling interest—that there is a lack of “rigorous recent prospective research”—is actually included in the APA Report to limit claims by SOCE proponents that it safe or effective. *See* APA REPORT, *supra* note 33, at abstract (noting the origin of support for SOCE therapy). In other words, the APA Report was observing that there is a dearth of evidence supporting the claim that SOCE therapy actually works and that it is indeed safe to subject minors to it. *See id.* (concluding that research has not shown any benefits from SOCE therapy, and that individuals who undergo SOCE experience a wide arrange of potential harm).

<sup>256</sup> APA REPORT, *supra* note 33, at 42 (suggesting that the reason there is a lack of rigorous studies is *because SOCE causes harm*).

treatments.<sup>257</sup> For example, a 1973 study on SOCE therapy had six participants drop out for some form of depression.<sup>258</sup> One participant from that study stated that he resigned because he “lost all sexual feeling.”<sup>259</sup> In addition, the APA Report found that after the American Psychiatric Association deleted homosexuality from the DSM, the number of studies on SOCE significantly shrank.<sup>260</sup> One reason for this change is that numerous licensed mental health professionals, researchers, and professional organizations have found that providing and studying SOCE therapy was inappropriate because it may cause harm to its recipients.<sup>261</sup>

The *Otto II* majority also completely ignored the research that is actually available.<sup>262</sup> The APA Report explained that it found evidence which indicates that individuals suffered harm as a result of SOCE therapy.<sup>263</sup> Even with the “limited number of rigorous” and efficacy studies regarding the safety of SOCE therapy, the best research available led the APA Report to the conclusion that SOCE therapy can cause harm.<sup>264</sup> Since the APA Report’s release, further peer-reviewed studies have documented the harmful results associated with SOCE therapy to minors, including findings that LGBTQ youth who underwent conversion therapy were twice as likely to have attempted suicide and two and a half times as likely to have attempted suicide more than once compared to individuals who did not undergo SOCE.<sup>265</sup>

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<sup>257</sup> *Id.* (suggesting that the reason there is a lack of rigorous studies might be because “research participants experience these treatments as harmful”); see also Scott O. Lillienfeld, *Psychological Treatments That Cause Harm*, 2 PERSPS. ON PSCYH. SCI. 53, 53–55 (2007) (same). “High dropout rates [of participants] characterize early treatment studies and may be an indicator that research participants experience these treatments as harmful.” APA REPORT, *supra* note 33, at 42. “Behavior therapists became increasingly concerned that aversive therapies designed as SOCE for homosexuality were inappropriate, unethical, and inhumane.” *Id.* at 24.

<sup>258</sup> APA REPORT, *supra* note 33, at 41; see Neil McConaghy & R.F. Barr, *Classical, Avoidance and Backward Conditioning Treatments of Homosexuality*, 122 BRIT. J. PSYCHIATRY 151, 151–53 (1973) (studying SOCE therapy).

<sup>259</sup> APA REPORT, *supra* note 33, at 41; McConaghy & Barr, *supra* note 258, at 151–53.

<sup>260</sup> APA REPORT, *supra* note 33, at 24.

<sup>261</sup> *Id.* at 91.

<sup>262</sup> See *Otto II*, 981 F.3d 854, 868–69 (11th Cir. 2020) (evaluating only one line from the APA Report, but otherwise ignoring all the other research and studies on SOCE therapy).

<sup>263</sup> APA REPORT, *supra* note 33, at 43 (explaining that there is “evidence to indicate that individuals experienced harm from SOCE”).

<sup>264</sup> *Id.* at 42–43.

<sup>265</sup> Amy E. Green, Myeshia Price-Feeney, Samuel H. Dorison & Casey J. Pick, *Self-Reported Conversion Efforts and Suicidality Among US LGBTQ Youths and Young Adults*, 2018, 110 AM. J. PUB. HEALTH 1221, 1224, 1225 Tbl.2 (2020). Another 2020 study found that being exposed to SOCE therapy could double “the odds of lifetime suicidal ideation,” “increased [the] odds of planning to attempt suicide” by 75%, and “increased [the] odds of attempting suicide resulting in no or minor injury” by 88%. Robert R. Blosnich et al., *Sexual Orientation Change Efforts, Adverse Childhood Experiences, and Suicide Ideation and Attempt Among Sexual Minority Adults, United States, 2016–2018*, 110 AM. J. PUB. HEALTH 1024, 1027 (2020). According to a November 2018 study, attempted suicide rates by LGBTQ young adults whose parents attempted to change their sexual orientation

Besides the efficacy and peer-reviewed studies, there was a large amount of research and studies that the APA Task Force also reviewed.<sup>266</sup> These studies found that some participants of SOCE therapy reported harms retrospectively.<sup>267</sup> The APA Report described a number of these studies in detail, and observed both direct and indirect harms to participants.<sup>268</sup> The direct harms included mental health issues (including depression, anger, and suicidal ideation), sexual dysfunction, substance abuse, and physical ailments.<sup>269</sup> The Report also found that SOCE therapy can cause indirect harms, including loss of time, money, and energy.<sup>270</sup> Researchers observed additional indirect harm stemming from SOCE therapy in the form of psychological damage, such as disappointment and stress that occurred because the therapy did not work as the participant imagined it would.<sup>271</sup> To suggest that the APA Report, and its finding only amount to “mere assertions” is wrong.<sup>272</sup>

Further reading of the APA Report reveals two central findings by the Task Force.<sup>273</sup> The first finding was that there was insufficient evidence to suggest that SOCE therapy can accomplish what it purports to do—alter sexual orientation.<sup>274</sup> There was “little evidence” to suggest that SOCE therapy had any effect in altering sexual orientation for minors.<sup>275</sup> In other words, SOCE therapy does not work.<sup>276</sup>

Not only did the APA Report find that SOCE therapy does not accomplish what its proponents state it does (changing an individual’s homosexuality), but it also found that SOCE therapy can cause harm.<sup>277</sup> These two findings by the

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during childhood were more than double (48%) the rate of LGBTQ young adults who did not report undergoing SOCE therapy experiences (22%). Caitlin Ryan, Russell B. Toomey, Rafael M. Diaz & Stephen T. Russell, *Parent-Initiated Sexual Orientation Change Efforts with LGBT Adolescents: Implications for Young Adult Mental Health and Adjustment*, 67 J. HOMOSEXUALITY 159, 168 Tbl.3 (2020). The study also concluded that rates of attempted suicide were almost triple for LGBTQ youth who reported home-based efforts to change their sexual orientation by their parents, SOCE therapies by therapists, and change efforts by religious leaders (63%). *Id.*

<sup>266</sup> See APA REPORT, *supra* note 33, at 42–43 (discussing the studies that were reviewed by the APA Task Force).

<sup>267</sup> *Id.* at 27, 42, 81.

<sup>268</sup> *Id.* at 42.

<sup>269</sup> *Id.* at 42, 68, 85.

<sup>270</sup> *Id.* at 85.

<sup>271</sup> *Id.*

<sup>272</sup> See *Otto II*, 981 F.3d 854, 868 (11th Cir. 2020) (examining the APA Report closely and concluding that it only offers “mere assertions” that SOCE causes harm to children).

<sup>273</sup> See APA REPORT, *supra* note 33, at abstract (concluding that SOCE is “unlikely to be successful” in altering an individual’s sexual orientation, and second, that SOCE can cause harm).

<sup>274</sup> *Id.* at 35 (noting that evidence of “the outcomes of efforts to alter sexual orientation provides little evidence of efficacy”).

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> See *id.* at 3 (documenting “negative side effects” from those who underwent SOCE therapy to “include[] loss of sexual feeling, depression, suicidality, and anxiety”).

APA Report provide ample support that SOCE therapy is a worthy and compelling problem for a legislature to address.<sup>278</sup> The localities are attempting to regulate a therapy that research has proven lacks any and all effect,<sup>279</sup> and suggests may cause harm.<sup>280</sup> The majority, instead, would rather let this unsubstantiated and unproven “medical treatment” stay intact until there is essentially indisputable evidence gathered that indicates harm.<sup>281</sup> This is dangerous, and could prove fatal to vulnerable children whom practitioners will continue to subject to this sham therapy in the jurisdictions that this decision covers.<sup>282</sup>

The majority’s assertion that rigorous efficacy studies are required in order for the localities to “prove” that SOCE therapy causes harm to minors departs from Supreme Court precedent.<sup>283</sup> Although the Supreme Court in *Brown v. Entertainment Merchants Ass’n* held that there must be a causal link between the speech and harm, that does not mean that rigorous empirical evidence is the only sufficient means to accomplish this.<sup>284</sup> A “10,000-page record” is not required either.<sup>285</sup> In fact, the Supreme Court has held that for “some propositions” it is natural that empirical evidence would be sparse.<sup>286</sup> For example, the Supreme Court concluded that it would be inappropriate to conduct “a multi-year controlled study” on children to determine if profanity-laced television broadcasts had any harmful effects.<sup>287</sup> Because of the nature of some propositions, such as profanity-laced television programming or similarly SOCE ther-

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<sup>278</sup> See Wertheimer, *supra* note 52, at 793 (explaining that the government can limit speech when there is another compelling interest at stake); *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799 (2011) (requiring the state to identify a problem that it needs to address and requiring that the restriction on speech be necessary to solving that problem).

<sup>279</sup> See APA REPORT, *supra* note 33, at 35 (stating there is little evidence of efficacy).

<sup>280</sup> See *id.* at 42 (listing out the number of harms that research has found SOCE therapy to cause).

<sup>281</sup> See *id.* at 35, 42 (noting the lack of efficacy and the harm SOCE therapy can cause); *Otto II*, 981 F.3d 854, 868 (11th Cir. 2020) (stating that SOCE therapy can continue until researchers “prove” that SOCE therapy causes harm to minors).

<sup>282</sup> See APA REPORT, *supra* note 33, at 3 (stating that SOCE therapy can lead to suicidal intentions).

<sup>283</sup> See *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009) (holding that “[t]here are some propositions for which scant empirical evidence can be marshaled”).

<sup>284</sup> See *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799 (2011) (invalidating California’s statute restricting video games to minors because the state could not “show a . . . causal link between . . . harm to minors” and playing video games); *Fox Television Stations*, 556 U.S. at 519 (noting that for “some propositions” it is natural that there is limited empirical data).

<sup>285</sup> See *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 822 (2000) (finding that a “10,000-page record” does not need to “be compiled in every case or that the Government must delay in acting to address a real problem” until it does compile such a record).

<sup>286</sup> See *Fox Television Stations*, 556 U.S. at 519 (finding that broadcast profanity having harmful effects on children is one such proposition where lack of empirical evidence would be understandable because collecting it would require subjecting some children to “broadcast profanity”).

<sup>287</sup> *Id.*

apy, empirical studies are not required for states to act to protect children from harm.<sup>288</sup>

Regardless, the evidence that the localities put forth is exactly the sort of record that the Supreme Court has deemed sufficient to establish a compelling interest in protecting a party, especially children, from harm under strict scrutiny.<sup>289</sup> The evidence supporting the localities' determination that SOCE therapy causes harm to minors was not anecdotal or merely based on assertions, as the *Otto II* majority concludes, and it is drastically different from the evidence Supreme Court cases have found to be insufficient to support other statutes.<sup>290</sup> The *Otto II* majority improperly discounts the copious record of evidence demonstrating and finding a connection between SOCE therapy and harm.<sup>291</sup>

Another problem with the *Otto II* majority's finding that there is no compelling interest is how it simply ignores and dismisses the fact that researchers cannot perform further studies because of the safety and ethical issues such studies would entail.<sup>292</sup> Thus, the question becomes, how do you further study a therapy in which previous studies indicate harmful effects, and where participants won't stay in the study long enough to complete the research because of the harm incurred?<sup>293</sup> The majority simply ignores this question.<sup>294</sup> The answer, however is straightforward—it is neither safe nor ethical to study SOCE

<sup>288</sup> See *id.* (holding that such a study that subjected some children to profanity-laced broadcasts while others remained sheltered from such content is not required).

<sup>289</sup> See *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (holding that courts can justify regulations of free speech “even, in a case applying strict scrutiny . . . based solely on history, consensus, and ‘simple common sense’” (quoting *Burson v. Freeman*, 504 U.S. 191, 211 (1992))).

<sup>290</sup> See *Otto II*, 981 F.3d 854, 868 (11th Cir. 2020) (providing the *Otto II* majority's view on the evidence presented on the harms of SOCE therapy); *Playboy Ent. Grp.*, 529 U.S. at 822–23 (holding that a “sole conclusory statement” from a sponsor of a bill insufficient to meet strict scrutiny); *Edenfield v. Fane*, 507 U.S. 761, 768–71 (1993) (striking down an anti-solicitation regulation targeting public accountants because zero studies, or even anecdotal evidence, existed to support the State Board's worry that advertising would be a danger to the public); *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1312–13 (11th Cir. 2017) (en banc) (holding that the state's evidence to support a law that restricted doctor's conversations with their patients about firearms was based upon “six anecdotes and nothing more”).

<sup>291</sup> See *supra* notes 262–282 and accompanying text (documenting the large record of studies and research showing the causal connection between SOCE therapy and harms to minors).

<sup>292</sup> See *Otto II*, 981 F.3d at 868–70 (ignoring the question of how researchers can conduct scientifically rigorous studies safely and ethically).

<sup>293</sup> See APA REPORT, *supra* note 33, at 42, 120–21 (noting the “[h]igh dropout rates” of past SOCE studies and memorializing several professional organizations' distancing from SOCE treatment). The APA Task Force found that in recent studies of SOCE therapy patients experienced “anger, anxiety, confusion, depression, grief, guilt, hopelessness, deteriorated relationships with family, loss of social support, loss of faith, poor self-image, social isolation, intimacy difficulties, intrusive imagery, suicidal ideation, self-hatred, and sexual dysfunction.” *Id.* at 42.

<sup>294</sup> See *Otto II*, 981 F.3d at 868–69 (failing to address how researchers can conduct more work on SOCE therapy given the safety and ethical concerns inherent in further study).

therapy when initial studies have shown that it can lead to harm.<sup>295</sup> In addition, professional mental health agencies have also commented that no review board would ever approve of such a study, especially on a vulnerable population like children.<sup>296</sup> Instead of acknowledging this rational conclusion, the *Otto II* majority simply shrugs its shoulders and says that this is the price society pays for free speech.<sup>297</sup> Given the APA's conclusion that further study of SOCE therapy is too dangerous to conduct, the majority's call for further studies to take place to establish a definitive causal connection in order for anti-SOCE laws to pass strict scrutiny defies scientific and common sense.<sup>298</sup>

The *Otto II* majority is attempting to have its cake and eat it too.<sup>299</sup> The majority is, on one hand, saying there is not enough evidence to establish that SOCE therapy is an actual problem.<sup>300</sup> On the other hand, the majority fails to consider the fact that safe and ethical research on SOCE therapy is not possible.<sup>301</sup> Even more audaciously, the majority writes that even if researchers conducted another fully developed, "blind," and "peer-reviewed study" and that study found that SOCE therapy caused harm, that study still would not

<sup>295</sup> See APA REPORT, *supra* note 33, at 90–91 (discussing how further use of SOCE therapy even under controlled conditions would still require subjecting children to harm). The APA Report is direct in stating that "safety issues" are prevalent when it comes to studying SOCE. *Id.* at 91. The APA has specifically cautioned that "[t]o conduct a random controlled trial of a treatment that has not been determined to be safe is not ethically permissible and to do such research with vulnerable minors who cannot themselves provide legal consent would be out of the question for institutional review boards to approve." Brief of *Amici Curiae*, *supra* note 203, at 8–9; *Otto II*, 981 F.3d at 877 (Martin, J., dissenting) (quoting same).

<sup>296</sup> See APA REPORT, *supra* note 33, at 86 (noting that future study of SOCE therapy would put children at risk); Brief of *Amici Curiae*, *supra* note 203, at 8–9.

<sup>297</sup> See 981 F.3d at 870 (finding that the First Amendment leads to difficult and potentially harmful effects but this is the price we must pay for having freedom of speech).

<sup>298</sup> See Brief of *Amici Curiae*, *supra* note 203, at 8–9 (purporting that "[t]o conduct a random controlled trial of a treatment that has not been determined to be safe is not ethically permissible and to do such research with vulnerable minors who cannot themselves provide legal consent would be out of the question for institutional review boards to approve"); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009) ("There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts . . . and others are shielded from all indecency.").

<sup>299</sup> See *Have One's Cake and Eat It Too*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/have%20one%27s%20cake%20and%20eat%20it%20too#:~:text=Definition%20of%20have%20one's%20cake,son%20without%20paying%20high%20taxes>. [<https://perma.cc/3VT5-DK7U>] (defining the phrase "have one's cake and eat it too" as "to have or enjoy the good parts of something without having or dealing with the bad parts").

<sup>300</sup> See *Otto II*, 981 F.3d at 868–69 (observing that all the studies and research on SOCE therapy amounts to "assertions rather than evidence").

<sup>301</sup> See *supra* notes 292–298 and accompanying text (noting the lack of an answer from the majority to questions regarding the dangers of further study of SOCE therapy).

persuade the court that there is a compelling interest at stake.<sup>302</sup> The majority is creating a “moving target” for the compelling interest prong.<sup>303</sup>

As a result, the state is stuck between a rock and a hard place.<sup>304</sup> By concluding that the current state of evidence is lacking regarding SOCE therapy causing harm, while simultaneously ignoring that further study of SOCE therapy would be unsafe, the court has delayed the state in addressing a real and compelling problem.<sup>305</sup> The *Otto II* majority is creating an impossible and moving standard for the state to meet, and its decision essentially allows any court to strike down anti-SOCE legislation.<sup>306</sup> As a result, SOCE therapy continues unabated.<sup>307</sup> With SOCE therapy allowed to continue, the state has a compelling problem—it must allow a “therapy” that research has proven ineffective to continue, while that same “therapy” continues to cause depression, substance abuse, and suicidal ideation upon those who receive it.<sup>308</sup>

Lastly, another fallacy inherent in the majority’s reasoning in *Otto II* is that the court should not give weight to mental health organizations’ professional determinations regarding SOCE therapy because those same organizations once supported the opposite view by labeling homosexuality as a mental sickness.<sup>309</sup> Legislatures and courts continuously rely on professional organizations and their expertise in supporting regulations.<sup>310</sup> The reversal in position by professional mental health organizations on SOCE therapy, however, resulted from mounting evidence and studies of SOCE therapy which over time

<sup>302</sup> See *Otto II*, 981 F.3d at 870 n.12 (“None of this is meant to suggest that the ordinances could necessarily be saved with just one more appropriately scoped, double-blind, peer-reviewed study.”).

<sup>303</sup> See *id.* at 878 n.6, 879 (Martin, J., dissenting) (questioning when there would ever be enough evidence for the court to conclude that the localities here have met strict scrutiny).

<sup>304</sup> See *id.* at 877 (realizing that under the majority’s decision to ignore the dangers in further studying SOCE, practitioners can still administer it to children).

<sup>305</sup> See *id.* (concluding that the only alternative for the localities would be to “invit[e] unethical research” and to cause harm to minors).

<sup>306</sup> See *id.* at 878 n.6, 879 (questioning when there would ever be enough evidence for the court to conclude that the localities here have met strict scrutiny).

<sup>307</sup> See *id.* at 871 (majority opinion) (noting that the majority’s decision “allows [for] speech that many find . . . dangerous”).

<sup>308</sup> See *id.* at 872 (Martin, J., dissenting) (pointing out that the result of the majority’s decision is that it halts the localities’ “efforts to regulate” a practice that is “known to be harmful”); APA REPORT, *supra* note 33, at 42 (“The limited number of rigorous early studies and complete lack of rigorous recent prospective research on SOCE limits claims for the efficacy and safety of SOCE.”).

<sup>309</sup> See *Otto II*, 981 F.3d at 869–70 (majority opinion) (stating that professional societies’ conclusions by themselves cannot satisfy strict scrutiny). The majority found especially relevant the APA’s “about-face” in regards to including homosexuality in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM). *Id.* (noting that homosexuality remained in the DSM until 1987).

<sup>310</sup> See *Hall v. Florida*, 572 U.S. 701, 710 (2014) (stating that the “[Supreme] Court, state courts, and state legislatures consult and are informed by the work of medical experts” and that it is “proper to consult the medical community’s opinions”); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (noting that the death penalty for minor defendants who are under the age of sixteen is offensive to “civilized standards of decency . . . [and] is consistent with the views that have been expressed by respected professional organizations”).

painted a consistent picture of the harms to which these treatments subject individuals.<sup>311</sup> The point of scientific research is to discover new information.<sup>312</sup> Once new information emerges, medical and psychological practitioners might need to change their views and practice to conform to this new information.<sup>313</sup> Thus, the *Otto II* majority's suggestion that courts should ignore medical and psychological experts simply because they changed their opinions based on new information lacks common sense.<sup>314</sup>

The volume of recorded evidence regarding the harms SOCE causes and with which it is associated, combined with the fact that researchers cannot safely and ethically test SOCE therapy on children, creates a compelling problem that the localities are seeking to address: the localities must let SOCE therapy continue unabated on children, with the potential for harm, despite not being able to study SOCE therapy safely or ethically.<sup>315</sup> The sheer amount of evidence demonstrating harm, the inability to study SOCE safely, and the consensus of industry organizations and their experts combine to demonstrate a clear compelling interest for the localities to prohibit SOCE therapy in order to protect children's well-being and safety.<sup>316</sup>

### C. Narrowly Tailored to Protect Children from Harm

Even after identifying a legitimate problem in need of solving, anti-SOCE legislation still needs to be narrowly tailored in order to survive strict scrutiny.<sup>317</sup> In other words, the restriction must be the "least restrictive" process than

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<sup>311</sup> See *Pickup v. Brown (Pickup II)*, 740 F.3d 1208, 1222 (9th Cir. 2014) (noting that the major mental health organizations "began questioning and rejecting the efficacy and appropriateness of SOCE therapy"), *abrogated by Nat'l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA)*, 138 S. Ct. 2361 (2018); APA REPORT, *supra* note 33, at 11–12 (explaining that the major mental health organizations began to reject the idea that homosexuality was a mental disorder, and that emerging studies and research showed that SOCE therapy does not work and that it is potentially dangerous).

<sup>312</sup> See APA REPORT, *supra* note 33, at 23–24 (noting changes in the understanding of homosexuality as a disease over the past several decades and that it is no longer considered a mental disorder).

<sup>313</sup> See *id.* (illustrating how it is reasonable for an industry to change its position on a subject through further research).

<sup>314</sup> See *Otto II*, 981 F.3d at 869 ("But the change [in opinion] itself shows why we cannot rely on professional organizations' judgments . . ."); *King v. Governor of N.J.*, 767 F.3d 216, 238 (3d Cir. 2014) ("Legislatures are entitled to rely on the empirical judgments of independent professional organizations that possess specialized knowledge and experience concerning the professional practice under review, particularly when this community has spoken with such urgency and solidarity on the subject."), *abrogated by NIFLA*, 138 S. Ct. at 2361; see also *Hall*, 572 U.S. at 710 (stating that it is proper for a legislature to rely on professional organizations and communities when enacting policy).

<sup>315</sup> See *supra* notes 256–308 and accompanying text (describing the conundrum that the localities face in order for their ordinances to pass constitutional muster according to the Eleventh Circuit).

<sup>316</sup> See *supra* notes 245–314 and accompanying text (arguing that the ordinances present a compelling interest).

<sup>317</sup> See, e.g., *McCullen v. Coakley*, 573 U.S. 464, 478 (2014) (describing the narrowly tailored prong as requiring the restriction to be the "least restrictive means of achieving a compelling state interest" (citing *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000))).

can address the identified compelling interest.<sup>318</sup> A restriction is not narrowly tailored if it is either under-inclusive (it does not regulate enough) or over-inclusive (it regulates too much).<sup>319</sup> Narrowly tailored, however, does not mean a restriction needs to be “perfectly tailored.”<sup>320</sup>

The City of Boca Raton’s and Palm Beach County’s ordinances are narrowly tailored because they only ban the actual administration of SOCE therapy, and therefore do not infringe upon expressive speech.<sup>321</sup> Both ordinances are narrowly drawn to address the localities’ compelling interest in protecting children from the harms of SOCE.<sup>322</sup> The ordinances accomplish this by specifically proscribing only the administration of SOCE therapy.<sup>323</sup> The ordinances go no further.<sup>324</sup> As a result of only targeting the SOCE therapy itself,

<sup>318</sup> See, e.g., *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (noting that there must not be an alternative to a restriction that is “at least as effective in achieving the legitimate purpose that the statute was enacted to serve” in order for the restriction to meet strict scrutiny).

<sup>319</sup> See, e.g., *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 435, 448 (2015).

<sup>320</sup> See, e.g., *Burson v. Freeman*, 504 U.S. 191, 191 (1992).

<sup>321</sup> See BOCA RATON, FLA., CODE OF ORDINANCES ch. 9, art. VI, § 9-106 (2017) (prohibiting the practice of SOCE therapy on minors, but allowing opinions regarding such therapy), *held unconstitutional by Otto II*, 981 F.3d 854 (11th Cir. 2020); PALM BEACH COUNTY, FLA., CODE OF LAWS AND ORDINANCES ch. 18, art. V, § 18-125 (2017) (stating same), *held unconstitutional by Otto II*, 981 F.3d at 854.

<sup>322</sup> § 9-104 (stating that the intent of the ordinance “is to protect the physical and psychological well-being of minors, including but not limited to lesbian, gay, bisexual, transgender and/or questioning youth, from exposure to the serious harms and risks caused by conversion therapy or reparative therapy by licensed providers, including but not limited to licensed therapists”); § 18-121 (“The intent of this Article is to protect the physical and psychological well-being of minors, including but not limited to lesbian, gay, bisexual, transgender and/or questioning youth, from exposure to the serious harms and risks caused by conversion therapy or reparative therapy by licensed providers . . .”).

<sup>323</sup> See § 9-106 (“It shall be unlawful for any provider to practice conversion therapy on any individual who is a minor regardless of whether the provider receives monetary compensation in exchange for such services.”); § 18-125 (“It shall be unlawful for any Provider to engage in conversion therapy on any minor regardless of whether the Provider receives monetary compensation in exchange for such services.”). The city ordinance defines conversion therapy as “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.” § 9-105. Similarly, the county ordinance defines conversion therapy to mean “the practice of seeking to change an individual’s sexual orientation or gender identity, including but not limited to efforts to change behaviors, gender identity, or gender expressions or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender or sex.” § 18-124.

<sup>324</sup> See Palm Beach County, Fla., Ordinance 2017-046, at 3–4 (Dec. 21, 2017) (codified at PALM BEACH COUNTY, FLA., CODE OF LAWS AND ORDINANCES ch. 18, art. V (2017)) (“Palm Beach County does not intend to prevent mental health providers from speaking to the public about SOCE; expressing their views to patients; recommending SOCE to patients; administering SOCE to any person who is 18 years of age or older; or referring minors to unlicensed counselors, such as religious leaders.”); Boca Raton, Fla., Ordinance 5407, at 4 (Oct. 10, 2017) (codified at BOCA RATON, FLA., CODE OF ORDINANCES ch. 9, art. VI (2017)) (stating same for the City of Boca Raton); see also Gainesville, Fla., Ordinance 160200, at 3 (Apr. 5, 2018) (codified at GAINESVILLE, FLA., CODE OF ORDINANCES ch. 17, art. IV (2018)) (stating that the ordinance bans the practice of SOCE, but not prohibiting therapists from expressing their views or opinions of SOCE).

the ordinances are directly addressing the problem they are seeking to resolve—that is, SOCE therapy causing harm.<sup>325</sup>

The ordinances are narrowly written in order not to wade into the therapists' obviously constitutionally-protected speech.<sup>326</sup> That is, the therapists' opinions, ideas, and beliefs.<sup>327</sup> Under the ordinances, mental health professionals are free to speak to the public about the alleged benefits of SOCE therapy, "express[] their views to patients" about the therapy, recommend the therapy, and even refer minors to religious leaders or mental health professionals in other counties or states for the administration of SOCE therapy.<sup>328</sup> This carefully-crafted language demonstrates that the ordinances neither stifle nor burden the marketplace of ideas.<sup>329</sup> The therapists have free reign to express their ideas and beliefs about SOCE therapy to their minor patients.<sup>330</sup> Instead, the ordinances only restrict a medical treatment—SOCE therapy itself.<sup>331</sup>

<sup>325</sup> See § 9-104 (stating that the intent of the ordinance "is to protect the physical and psychological well-being of minors, including but not limited to lesbian, gay, bisexual, transgender and/or questioning youth, from exposure to the serious harms and risks caused by conversion therapy or reparative therapy by licensed providers, including but not limited to licensed therapists"); § 18-121 ("The intent of this Article is to protect the physical and psychological well-being of minors, including but not limited to lesbian, gay, bisexual, transgender and/or questioning youth, from exposure to the serious harms and risks caused by conversion therapy or reparative therapy by licensed providers . . .").

<sup>326</sup> See § 9-106, (banning only the actual application of SOCE therapy, not the therapists' opinions regarding it); § 18-125 (stating same).

<sup>327</sup> See Palm Beach County, Fla., Ordinance 2017-046, at 3–4 ("Palm Beach County does not intend to prevent mental health providers from speaking to the public about SOCE; expressing their views to patients; recommending SOCE to patients; administering SOCE to any person who is 18 years of age or older; or referring minors to unlicensed counselors, such as religious leaders."); Boca Raton, Fla., Ordinance 5407, at 4 (stating same for the City of Boca Raton); see also *Pickup II*, 740 F.3d 1208, 1223 (9th Cir. 2014) (listing what California's anti-SOCE statute does not prohibit, including "communicating with the public about SOCE"; "expressing [opinions] to patients . . . about SOCE"; "recommending SOCE to [both adult and minor] patients"; "administering SOCE therapy" to individuals over the age of eighteen, and "referring minors to unlicensed" mental health practitioners, "such as religious leaders"), *abrogated by* Nat'l Inst. of Fam. & Life Advoc. v. Becerra (*NIFLA*), 138 S. Ct. 2361 (2018).

<sup>328</sup> See, e.g., Boca Raton, Fla., Ordinance 5407, at 4 (listing as examples the actions and speech that the ordinances do not prohibit).

<sup>329</sup> See *Otto v. City of Boca Raton* (*Otto I*), 353 F. Supp. 3d 1237, 1257–58 (S.D. Fla. 2019) ("The public marketplace of ideas is not limited in any way. What *is* limited, is the therapy (delivered through speech and/or conduct) by a licensed practitioner to his or her minor patient, within the confines of a therapeutic relationship."), *rev'd*, 981 F.3d 854 (11th Cir. 2020). The First Amendment purpose of "an uninhibited marketplace of ideas in which truth will ultimately prevail" does not, and was not meant to, apply to private therapy. See *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364, 377–78 (1984) (finding that neither Congress nor the FCC can prohibit the public's ability to "receive suitable access to social, political, esthetic, moral, and other ideas and experiences" through broadcasting (quoting *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969))).

<sup>330</sup> See *Otto I*, 353 F. Supp. 3d at 1257–58 (arguing that since plaintiff therapists' talk therapy "serve[s] a function," these words "constitute an act," which distinguishes the speech that the First Amendment typically protects in the "public square" (emphasis omitted)).

<sup>331</sup> See § 9-106 (banning only the actual application of SOCE therapy, not the therapists' opinions regarding it); § 18-125 (same).

An analogous example would be if a school or locality decided to prohibit teachers from teaching creationism, but still allowed them to express positive opinions of it or recommend it.<sup>332</sup> Teaching, or speech used in a classroom to educate students, is not beyond restriction merely because it is delivered through words.<sup>333</sup> Courts have held that despite the fact that teachers operate exclusively through speech, the restrictions are constitutionally valid.<sup>334</sup> Similar to the teachers, the therapists' administration of SOCE therapy is subject to regulation, even when conducted entirely through speech, and that regulation is constitutional.<sup>335</sup>

The majority attempts to rebut this argument by framing the ordinances as barring mental health practitioners from exposing minors to particular ideas or information.<sup>336</sup> To support this position, the *Otto II* majority compares the anti-SOCE ordinances to the Supreme Court's 2011 decision in *Brown v. Entertainment Merchants Ass'n*, where the Court invalidated California's restriction on violent video games targeting minors.<sup>337</sup> In *Brown*, the Court held that California's restriction on video games unconstitutionally barred public circulation of, and restricted minors' access to, protected information.<sup>338</sup> The *Otto II* majority believes that similar to California's ban on video games to minors in

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<sup>332</sup> See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding that teaching is not entitled to full First Amendment protection); *Freshwater v. Mt. Vernon Sch. Dist. Bd. of Educ.*, 137 Ohio St. 3d 469, 2013-Ohio-5000, 1 N.E.3d 335, ¶¶ 2–5 (finding that the school did not violate the teacher's First Amendment right of speech by firing him for regularly teaching his own personal beliefs of creationism and intelligent design to students).

<sup>333</sup> See *Freshwater*, 137 Ohio St. 3d, 2013-Ohio-5000, 1 N.E.3d, ¶ 99 (denying that a First Amendment violation of the teacher occurred because the school could deny the teacher from being allowed to teach creationism and intelligent design).

<sup>334</sup> See *id.* ¶¶ 93–99 (allowing expression of personal views on creationism, but not the teaching of these views while in school); *Garcetti*, 547 U.S. at 421 (holding that teaching does not have full First Amendment protection).

<sup>335</sup> See *Keeton v. Anderson-Wiley*, 664 F.3d 865, 871–76 (11th Cir. 2011) (permitting a university to require its therapy students to comply with professional standards when interacting with clients, and in doing so rejecting the argument that the university is violating the student-therapists' freedom of speech because the students can still express their disagreement with the ethical requirements). Extending the *Otto II* majority's logic to its limits would mean that the government could not regulate any words a therapist speaks. See McGinnis, *supra* note 13, at 276–77 (stating that striking down SOCE therapy bans “would eviscerate the states’ ability to effectively regulate their mental health professionals” (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 466–67 (1978))); see also *King v. Christie*, 981 F. Supp. 2d 296, 319 (D.N.J. 2013) (“Plaintiffs’ argument . . . taken to its logical end . . . would mean that any regulation of professional counseling necessarily implicates fundamental First Amendment free speech rights, and therefore would need to withstand heightened scrutiny to be permissible.”), *aff'd sub nom.* *King v. Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014).

<sup>336</sup> *Otto II*, 981 F.3d 854, 868 (11th Cir. 2020).

<sup>337</sup> *Id.* at 868–69; *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 794–95 (2011).

<sup>338</sup> *Brown*, 564 U.S. at 794–95.

*Brown*, the localities' ordinances in Florida are attempting to restrict the therapists' ideas and information regarding sexual orientation to minors.<sup>339</sup>

This view is imprecise.<sup>340</sup> The majority is mistaken when it states that the ordinances prohibit the therapists from stating their views or ideas regarding "sex[ual orientation], gender [identity], [or] sexual ethics."<sup>341</sup> In fact, unlike the video games in *Brown*, the localities' ordinances do not prohibit the therapists from telling their minor clients any or all of their ideas and views on these subjects.<sup>342</sup> The therapists are free to express to their minor clients that they morally disagree with homosexuality or that homosexuality is a sin.<sup>343</sup> The ordinances are narrowly tailored to prohibit therapists from administering these views as actual psychotherapeutic remedies; the ordinances do not prohibit the underlying views themselves.<sup>344</sup> The ordinances prohibit the therapists from providing their views only as a valid state-licensed medical treatment.<sup>345</sup> In practice then, the only thing that the ordinances bar the therapists from doing is administering a specific medical procedure on children.<sup>346</sup>

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<sup>339</sup> See *Otto II*, 981 F.3d at 868 (comparing the ordinances to the *Brown* case by stating that what the Florida ordinances are seeking to do is stop the spread of unpopular ideas to minors).

<sup>340</sup> See *id.* at 875, 877 n.4 (Martin, J., dissenting) (calling the analogy between *Brown* and the instant case inapposite, and stating that "the differences between [a law] which concerns children's exposure to conversion therapy, and one that concerns video games, are evident").

<sup>341</sup> See *id.* at 864 (majority opinion) (finding that the therapists' "practices are grounded in a particular viewpoint about sex, gender, and sexual ethics"). But see Palm Beach County, Fla., Ordinance 2017-046, at 3-4 (Dec. 21, 2017) (codified at PALM BEACH COUNTY, FLA., CODE OF LAWS AND ORDINANCES ch. 18, art. V (2017)) ("Palm Beach County does not intend to prevent mental health providers from speaking to the public about SOCE; expressing their views to patients; recommending SOCE to patients; administering SOCE to any person who is 18 years of age or older; or referring minors to unlicensed counselors, such as religious leaders."); Boca Raton, Fla., Ordinance 5407, at 4 (Oct. 10, 2017) (codified at BOCA RATON, FLA., CODE OF ORDINANCES ch. 9, art. VI (2017)) (stating same for the City of Boca Raton).

<sup>342</sup> See *Brown*, 564 U.S. at 794-95 (holding that California's bar on video games to minors was prohibiting video game makers from disseminating particular ideas and information); see also, e.g., Palm Beach County, Fla., Ordinance 2017-046, at 3-4 (stating clearly that licensed therapists are free to speak to their minor clients about their opinions of SOCE therapy or any other ideas and views the therapists have about sex and gender).

<sup>343</sup> See Boca Raton, Fla., Ordinance 5407, at 4-5 (stating that the statute only bans the actual application of SOCE therapy, not the therapists' opinions regarding it); Palm Beach County, Fla., Ordinance 2017-046, at 3-4 (same).

<sup>344</sup> See *Otto v. City of Boca Raton (Otto I)*, 353 F. Supp. 3d 1237, 1268-69 (S.D. Fla. 2019) (stating that the ordinances regulate SOCE therapy "because [of] the harm or potential harm" that these treatments cause minors, and do not regulate "the viewpoint . . . of the speaker"), *rev'd*, 981 F.3d at 854.

<sup>345</sup> See *Otto II*, 981 F.3d at 875 (Martin, J., dissenting) (concluding that the localities are only preventing therapists from administering a specific medical treatment to children, and not prohibiting any dissemination of ideas or information).

<sup>346</sup> *Id.*; see Boca Raton, Fla., Ordinance 5407, at 4-5 ("This ordinance does not prevent unlicensed providers, such as religious leaders, from administering SOCE to children or adults; nor does it prevent minors from seeking SOCE from mental health providers in other political subdivisions or

The fact that the ordinances only apply to state-licensed therapists further underscores this point.<sup>347</sup> Licensed mental health professionals, like the therapists challenging the localities' ordinances, hold unique positions of credibility, authority, and trust within society.<sup>348</sup> By only excluding state-licensed therapists from administering SOCE therapy, the bans are seeking to stop the public from viewing SOCE therapy as a state-sponsored or state-approved medical treatment.<sup>349</sup> The ordinances are narrowly tailored then, because they do not allow for licensed mental health professionals to disguise their personal views as state-licensed medical treatment.<sup>350</sup>

The therapists also allege that the ordinances are not narrowly tailored because they are “under-inclusive.”<sup>351</sup> Both ordinances are under-inclusive, the therapists argue, because the ordinances do not regulate all SOCE therapy, since they expressly allow for “unlicensed religious counselors” to provide SOCE therapy.<sup>352</sup> At first glance, it may appear true that the localities' ordinances do not curb all forms of SOCE therapy by allowing non-licensed religious-based counselors to administer SOCE.<sup>353</sup> But the choice to exclude religious counselors is understandable because of Establishment Clause concerns.<sup>354</sup> The Establishment Clause prohibits the government from getting in-

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states outside of the [this jurisdiction] . . . .”); Palm Beach County, Fla., Ordinance 2017-046, at 4 (same).

<sup>347</sup> See BOCA RATON, FLA., CODE OF ORDINANCES ch. 9, art. VI, § 9-104 (2017) (applying the prohibition only to state-licensed providers), *held unconstitutional by Otto II*, 981 F.3d at 854; PALM BEACH COUNTY, FLA., CODE OF LAWS AND ORDINANCES ch. 18, art. V, § 18-121 (2017) (same), *held unconstitutional by Otto II*, 981 F.3d at 854.

<sup>348</sup> See PETER BOBKOWSKI & KARNA YOUNGER, *BE CREDIBLE: INFORMATION LITERACY FOR JOURNALISM, PUBLIC RELATIONS, ADVERTISING AND MARKETING STUDENTS* 9–10 (2d ed. 2010) (observing that industries requiring their members “to obtain licenses before they can begin [work] in [that] field[]” is “an indicator of trust”).

<sup>349</sup> *See id.* at 10 (stating that “[b]y granting a license, the licensing entity vouches that the license holders are competent in their field, and that the public can trust these people to perform the skills they are trained to perform”).

<sup>350</sup> *Otto II*, 981 F.3d at 875 (Martin, J., dissenting) (“[T]he Localities have prevented no information from being distributed from therapists to their minor patients. The only thing the Therapists may not do is perform a particular medical practice on their minor patients.”)

<sup>351</sup> Verified Complaint for Declaratory, Preliminary and Permanent Injunctive Relief, and Damages, *supra* note 151, at 39.

<sup>352</sup> Brief of Plaintiffs-Appellants at 56–57, *Otto II*, 981 F.3d 854 (No. 19-10604).

<sup>353</sup> *See* Boca Raton, Fla., Ordinance 5407, at 4–5 (Oct. 10, 2017) (codified at BOCA RATON, FLA., CODE OF ORDINANCES ch. 9, art. VI (2017)) (“This ordinance does not prevent unlicensed providers, such as religious leaders, from administering SOCE to children or adults; nor does it prevent minors from seeking SOCE from mental health providers in other political subdivisions or states outside of [this jurisdiction] . . . .”); Palm Beach County, Fla., Ordinance 2017-046, at 4 (Dec. 21, 2017) (codified at PALM BEACH COUNTY, FLA., CODE OF LAWS AND ORDINANCES ch. 18, art. V (2017)) (same).

<sup>354</sup> *Otto II*, 981 F.3d at 879 (Martin, J., dissenting); *see, e.g.,* *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (discussing that the Founders enacted the Establishment Clause to separate religious and government institutions).

volved in religious activity.<sup>355</sup> As such, proscribing only licensed mental health professionals, and not religious counselors, from administering SOCE therapy, where the state might be invading religious activity, is reasonable and not under-inclusive.<sup>356</sup>

The therapists also contend that the ordinances are over-inclusive because there were alternative options the localities could have pursued to address the problem, such as “banning only aversive [forms of SOCE] therapy” or instituting an “informed consent requirement[.]”<sup>357</sup> Both of these alternatives that the therapists put forth, however, would not be successful.<sup>358</sup> First, only barring aversive forms of SOCE therapy still leaves the non-aversive forms, which as documented above, still cause harm.<sup>359</sup> As a result, strict scrutiny should not require the localities to restrict their ordinances to prohibit only aversive forms of SOCE.<sup>360</sup> Second, the informed consent option does not make practical sense in regards to minor children because they are a “vulnerable population” and their families or therapists could pressure or influence them into undergoing SOCE therapy.<sup>361</sup> In summary, the therapists’ alternatives are not viable options to addressing the harms that SOCE causes children, and thus the localities’ ordinances are not over-inclusive.<sup>362</sup>

Instances of restrictions on speech surviving strict scrutiny are appropriately rare.<sup>363</sup> But they are not a myth.<sup>364</sup> Anti-SOCE legislation is one of those

<sup>355</sup> See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . . .”); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (stating that the “Establishment Clause was intended to afford protection: ‘sponsorship, financial support, and active involvement of the sovereign in religious activity’” (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970))).

<sup>356</sup> See *Otto II*, 981 F.3d at 872–80 (Martin, J., dissenting) (articulating that the localities are “reasonable” in omitting religious officials from the ordinances because of Establishment Clause concerns).

<sup>357</sup> Verified Complaint for Declaratory, Preliminary and Permanent Injunctive Relief, and Damages, *supra* note 151, at 39; Brief of Plaintiffs-Appellants, *supra* note 352, at 28, 54–55.

<sup>358</sup> *Otto II*, 981 F.3d at 879–80 (Martin, J., dissenting) (arguing that both alternatives are ineffective in addressing the harms SOCE therapy causes).

<sup>359</sup> *Id.* at 880; see *infra* notes 256–272 and accompanying text (reviewing the volumes of research documenting the harms that research has shown aversive and non-aversive SOCE therapy to cause).

<sup>360</sup> *Otto II*, 981 F.3d at 880 (Martin, J., dissenting); see *infra* notes 256–272 and accompanying text.

<sup>361</sup> See *King v. Governor of N.J.*, 767 F.3d 216, 240 (3d Cir. 2014) (finding that an informed consent requirement would be inadequate alternative to anti-SOCE proscriptions), *abrogated by* Nat’l Inst. of Fam. & Life Advocs. v. Becerra (*NIFLA*), 138 S. Ct. 2361 (2018); *Otto II*, 981 F.3d at 880 (Martin, J., dissenting) (quoting *King*, 767 F.3d at 240).

<sup>362</sup> *Otto II*, 981 F.3d at 879–80 (Martin, J., dissenting).

<sup>363</sup> See *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 437, 442–43, 455 (2015) (holding that Florida’s ban on personal solicitation of campaign funds by judicial candidates passed strict scrutiny and did not infringe on the First Amendment); *Otto II*, 981 F.3d at 872–80 (Martin, J., dissenting) (stating that the ordinances should survive strict scrutiny because there was a compelling interest in protecting children from harm, and the ordinances were narrowly tailored to prohibit only the actual administration of SOCE therapy itself, while still allowing therapists to express their opinions and talk about SOCE therapy).

rare restrictions on speech that meets the demanding standards of strict scrutiny.<sup>365</sup> There is a compelling interest in protecting children from a therapy that has zero efficacy and instead may cause serious harm.<sup>366</sup> The fact that further study of SOCE therapy is neither scientifically, ethically, or morally sound further compounds the government's compelling interest.<sup>367</sup> SOCE therapy poses too great a risk to subject children to it.<sup>368</sup> On top of that, the professional mental health organizations have formed a consensus that SOCE therapy is dangerous, may cause harm, and professionals should not practice it.<sup>369</sup> To address this compelling problem, jurisdictions across the United States have implemented narrowly tailored prohibitions on SOCE therapy to minors.<sup>370</sup> These prohibitions, like Boca Raton's and Palm Beach County's, only prohibit the actual practice of SOCE therapy on minors, while still allowing therapists to advocate for it, recommend it, and espouse their own views of sexual orientation.<sup>371</sup> As a result, anti-SOCE legislation survives strict scrutiny.<sup>372</sup>

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<sup>364</sup> See, e.g., *Williams-Yulee*, 575 U.S. at 442–43, 455 (upholding under strict scrutiny Florida's law prohibiting judicial candidates from soliciting money); *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28, 32 (2010) (upholding a law under strict scrutiny that prohibits support for designated terrorist organizations).

<sup>365</sup> See *Williams-Yulee*, 575 U.S. at 444 (“[I]t is the rare case’ in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest,” but that these “cases do arise” (quoting *Burson v. Freeman*, 504 U.S. 191, 211 (1992)) (first citing *Burson*, 504 U.S. at 211; then citing *Humanitarian L. Project*, 561 U.S. at 25–39; then citing *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 314 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part), *overruled in part* by *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); and then citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995))).

<sup>366</sup> See *supra* notes 245–316 and accompanying text (discussing the compelling interest in preventing harm to children from a “therapy” that research has not shown to change minor’s sexual orientation, but instead may incur harm).

<sup>367</sup> See *supra* notes 292–308 and accompanying text (outlining why further study of SOCE therapy is ethically and scientifically unsound).

<sup>368</sup> See Brief of *Amici Curiae*, *supra* note 203, at 8–9 (cautioning that “[t]o conduct a random controlled trial of a treatment that has not been determined to be safe is not ethically permissible and to do such research with vulnerable minors who cannot themselves provide legal consent would be out of the question for institutional review boards to approve”).

<sup>369</sup> See *Otto v. City of Boca Raton (Otto I)*, 353 F. Supp. 3d 1237, 1258–60 (S.D. Fla. 2019) (noting that there is essentially an industry consensus that SOCE therapy can inflict injury on minors), *rev’d*, 981 F.3d 854 (11th Cir. 2020).

<sup>370</sup> See *Otto II*, 981 F.3d at 872–80 (Martin, J., dissenting) (arguing that Boca Raton and Palm Beach County’s anti-SOCE legislation survives strict scrutiny because the government has a compelling interest in protecting children and the ordinances are narrowly tailored in only prohibiting the actual administration of SOCE therapy itself).

<sup>371</sup> Palm Beach County, Fla., Ordinance 2017-046, at 4 (Dec. 21, 2017) (codified at PALM BEACH COUNTY, FLA., CODE OF LAWS AND ORDINANCES ch. 18, art. V (2017)) (“Palm Beach County does not intend to prevent mental health providers from speaking to the public about SOCE; expressing their views to patients; recommending SOCE to patients; administering SOCE to any person who is 18 years of age or older; or referring minors to unlicensed counselors, such as religious leaders.”); Boca Raton, Fla., Ordinance 5407, at 4 (Oct. 10, 2017) (codified at BOCA RATON, FLA., CODE OF ORDINANCES ch. 9, art. VI (2017)) (stating same for the City of Boca Raton).

## CONCLUSION

SOCE therapy teaches LGBTQ minors that they are unnatural and immoral, and continues to oppress and marginalize the LGBTQ community further. It also teaches the incorrect notion that one can change or correct one's homosexuality. Research documents that SOCE therapy lacks any benefit, and instead, actually causes harm when performed. The LGBTQ community has fought fervently to stop the attacks on its members. In response, legislatures on both state and municipal levels have enacted legislation banning SOCE therapy for minors.

These legislative efforts have resulted in legal challenges that questioned the constitutionality of these laws under the First Amendment right to free speech. The Supreme Court, however, has thus far evaded the question of whether anti-SOCE legislation constitutes a violation of mental health professionals' freedom of speech. Because of this evasion, three different circuit courts, using three distinct levels of scrutiny, have come to opposite outcomes regarding anti-SOCE statutes. As a result, for the first time, a court was able to strike down an anti-SOCE statute in the Eleventh Circuit's majority decision in *Otto v. City of Boca Raton (Otto II)*. *Otto II*'s decision could have substantial implications on First Amendment jurisprudence, and could lead to courts subjecting other restrictions on professional medical speech to strict scrutiny. Even if courts continue to validate the subjecting of anti-SOCE legislation to strict scrutiny, anti-SOCE legislation is the rare regulation that should prevail under this rigorous standard of review.

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<sup>372</sup> See *Otto II*, 981 F.3d at 873 (Martin, J., dissenting) (finding that the ordinances should survive strict scrutiny).