American University Journal of Gender, Social Policy & the Law

Volume 30 | Issue 1 Article 3

2022

Toxic Therapy: Examining the Constitutionality of Conversion Therapy Bans in Light of Otto

Kathleen Stoughton
American University Washington College of Law

TOXIC THERAPY: EXAMINING THE CONSTITUTIONALITY OF CONVERSION THERAPY BANS IN LIGHT OF *OTTO*

KATHLEEN STOUGHTON*

* Kathleen Stoughton is a Juris Doctor candidate at American University's Washington College of Law. She received her BA in Political Science from Carleton College in 2020. Kathleen would like to thank her friends and family for all their support. She would also like to thank Professor Bridget Rowan and the entire Journal of Gender, Social Policy, & the Law faculty and staff for all their advice and aid in the creation of this Comment.

I. INTRODUCTION

Lesbian, Bisexual, Gay, Transgender, and Queer (LGBTQ+) youth are five times more likely than their heterosexual peers to attempt suicide.[1] Suicide attempts are even more prevalent among LGBTQ+ survivors of conversion therapy.[2] Compared to other LGBTQ+ people, conversion therapy survivors are 92% more likely to experience lifetime suicidal ideation, 75% more likely to attempt suicide that results in significant injuries, and 88% more likely to attempt suicide that results in minor injuries.[3] Conversion therapy is demonstrably damaging to LGBTQ+ youth, yet this dangerous practice continues across the United States.[4]

In December 1973, the American Psychiatric Association ("APA") officially issued a resolution declaring that it would no longer consider

1. *E.g.*, *Facts About Suicide*, THE TREVOR PROJECT (Aug. 20, 2021), http://web.archive.org/web/20210814180331/https://www.thetrevorproject.org/resources/preventing-suicide/facts-about-suicide/ (giving the facts about suicide among LGBTQ+ youth from the leading national organization that provides crisis intervention for LGBTQ+ youth).

2. *See generally*, Press Release, WILLIAMS INST., *LGB People Who Have Undergone Conversion Therapy Almost Twice as Likely to Attempt Suicide* (June 15, 2020) [hereinafter WILLIAMS INST.], https://williamsinstitute.law.ucla.edu/press/lgb-suicide-ct-press-release/ (discussing the impact of SOCE on LGBTQ+ youth).

3. *See* WILLIAMS INST., *supra* note 2 (examining the mental trauma of survivors of SOCE).

4. *See Progress Map*, THE TREVOR PROJECT (June 15, 2021) [hereinafter *Progress Map*], https://web.archive.org/web/20210505050152/https:/www.thetrevorproject.org/get-involved/trevor-advocacy/50-bills-50-states/progress-map/ (providing information on the introduction and adoption of laws limiting SOCE).

homosexuality a mental disorder.[5] For nearly a century before this resolution, the APA and many psychiatrists held the view that homosexuality was a mental disease that caused abnormal behavior.[6] Consequently, many mental health professionals believed that homosexuality was akin to any other disease and could be "cured" through treatment like other diseases.[7]

Since 1973, the United States has taken significant steps forward in recognizing the rights of LGBTQ+ people.[8] However, LGBTQ+ people continue to face widespread discrimination based on their sexual orientation and/or gender identity.[9] This continued stigmatization parallels the continuation of the discriminatory belief that homosexuality is a mental disorder.[10] As a result of this belief, some counselors and therapists continue to practice treatments for same-sex attraction and non-binary or transgender identification.[11] These treatments are referred to as conversion therapy, sexual orientation change efforts ("SOCE"), and gender identity change efforts ("GICE") and are typically practiced by mental health providers or through faith-based ministries.[12] The most common technique involved in conversion therapy is talk therapy, but conversion therapy practitioners still

---

5. *See generally*, Allison Turner, *Today in 1973, APA Removed Homosexuality From List of Mental Illnesses,* HUM. RTS. CAMPAIGN (Dec. 15, 2017), https://www.hrc.org/news/flashbackfriday-today-in-1973-the-apa-removed-homosexuality-from-list-of-me (providing an overview on the historical changes in the continued fight for LGBTQ+ rights).

6. *See* Richard D. Lyons, *Psychiatrists, in a Shift, Declare Homosexuality No Mental Illness*, N.Y. TIMES (Dec. 16, 1973), https://www.nytimes.com/1973/12/16/archives/psychiatrists-in-a-shift-declare-homosexuality-no-mental-illness.html (providing historical context on shifts in opinions on SOCE).

7. *See id.* (reviewing the prior classification of homosexuality as a mental disease and early SOCE).

8. *See* Turner, *supra* note 5 (discussing the changing views of society and the mental health field on homosexuality). *See also* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (striking down sodomy laws which was a significant step forward in LGBTQ+ rights); Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (securing gay marriage and creating greater equality in human rights across the spectrum of sexualities).

9. *See The Trevor Project National Survey*, THE TREVOR PROJECT (Aug. 20, 2021), https://www.thetrevorproject.org/survey-2021/?section=Discrimination (providing the 2021 survey results of LGBTQ+ youth and finding widespread discrimination with "75% of LGBTQ youth . . . had experienced discrimination").

10. *See* Turner, *supra* note 5 (discussing the continued discrimination and challenges faced by LGBTQ+ people).

11. *E.g.*, *Progress Map*, *supra* note 4 (defining what conversion therapy entails and how it continues to harm LGBTQ+ youth).

12. *See Progress Map*, *supra* note 4 (giving background on what is included under the banner of SOCE and how it is typically carried out).

use more aversive forms.[13] Even in its less aversive form, the testimonials of conversion therapy survivors demonstrate that all forms of conversion therapy are demonstrably harmful to LGBTQ+ youth.[14] In recognition of the harm caused by conversion therapy, numerous states have recently adopted laws to regulate conversion therapy.[15]

As of August 2021, twenty-five states have adopted laws that protect minors from conversion therapy, and another sixteen states have introduced similar bills.[16] Unsurprisingly given the contentious debate around conversion therapy, mental health providers, religious groups, and parents that support the continued usage of conversion therapy have challenged the constitutionality of laws that limit conversion therapy.[17] While numerous challenges have been made, these challenges have mainly persisted in the form of freedom of speech challenges to the constitutionality of anti-SOCE laws.[18] Challengers claimed these regulations violated their freedom of speech by restricting what they, as therapists and counselors, could say and prevented them from expressing their own viewpoints.[19] Early free speech challenges were rejected by the Third and Ninth Circuits, which upheld the constitutionality of laws restricting conversion therapy.[20]

However, the Supreme Court in *National Institute of Family and Life*

---

13. *See generally Progress Map*, *supra* note 4 (providing an overview on the different forms of conversion therapy, including aversive practices and talk therapy).

14. *See* Hum. Rts. Campaign, *LGBTQ "Conversion Therapy" Survivor: "They Got Some Weird Joy Out of Torturing Children"* YOUTUBE (May 16, 2018), https://www.youtube.com/watch?v=i13JbzSnk94&ab_channel=HumanRightsCampaign (detailing the experiences of a survivor at a conversion therapy camp in which she and other minors were subject to continued mental and physical abuse).

15. *E.g.*, *Progress Map*, *supra* note 4 (tracking which states have adopted laws limiting SOCE and discussing the wide range of attitudes towards conversion therapy across the nation).

16. *See Progress Map*, *supra* note 4 (tracking which states adopted bans on SOCE).

17. *Compare* Pickup v. Brown, 740 F.3d 1208, 1221 (9th Cir. 2014) (adjudicating the constitutionality of CA's SOCE ban on free speech grounds), *with* King v. Governor of New Jersey, 767 F.3d 216, 220 (3d Cir. 2014) (examining the challenge to New Jersey's SOCE ban on free speech grounds).

18 *See generally Pickup*, 740 F.3d at 1226-32 (claiming that the regulations restrict free speech); *King*, 767 F.3d 216 at 216 (claiming the New Jersey law limits freedom of speech).

19 *See generally Pickup*, 740 F.3d at 1226-32 (focusing on plaintiff's claimed freedom of speech violations); *King*, 767 F.3d 216 at (reiterating plaintiff's claim that their constitutional freedom of speech rights were violated).

20. *Compare Pickup*, 740 F.3d at 1222 (ruling that the law was not unconstitutional on any of the challenged grounds), *with King*, 767 F.3d 216 at 233 (finding that the law was not unconstitutional on freedom of speech grounds).

Advocates v. Becerra shook the foundation of both court's decisions by undermining the concept of professional speech as a category within free speech.[21] This concept was one of the fundamental theoretical underpinnings of both circuit courts' decisions.[22] In *Becerra*, the Supreme Court abrogated the lower courts' reasoning that professional speech was a category of speech deserving of a lower standard of constitutional protection.[23] Following the Supreme Court's ruling in *Becerra*, the Eleventh Circuit, in *Otto v. City of Boca Raton*, became the first circuit to hold that a law limiting conversion therapy was unconstitutional.[24] The court's decision in *Otto* demonstrates the stark differences among the lower courts on the constitutionality of anti-conversion therapy laws.[25]

This Comment argues that laws prohibiting mental health professionals from engaging in conversion therapy with minors are constitutional and do not violate the First Amendment.[26] Part II of this Comment gives background on the Third, Ninth, and Eleventh Circuits' decisions.[27] Part III argues that the Eleventh Circuit's decision in *Otto* was incorrect.[28] Part IV recommends that the Supreme Court review the Eleventh Circuit's decision.[29] Finally, Part V concludes by reiterating that laws banning

---

21 *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2369-78 (2018) (rejecting officially that professional speech was a lesser protected category of free speech).

22. *See id.* at 2365 (emphasizing that "speech is not unprotected merely because it is uttered by professionals").

23. *E.g.*, *id.* at 2371 (arguing that the law was a regulation of professional speech which is a special category of speech that does not deserve full protection).

24. *Compare id.* at 2372 (refusing to accept that professional speech is a special category of speech), *with Otto v. City of Boca Raton*, 981 F.3d 854, 859 (11th Cir. 2020) (ruling that restricting mental health providers from practicing SOCE was unconstitutional and that no professional speech exception may apply).

25. *See Otto*, 981 F.3d at 859 (finding that the ban was unconstitutional on freedom of speech considerations).

26. *See generally* U.S. CONST. amend. I (stating that "[C]ongress shall make no law . . . abridging the freedom of speech, or of the press.").

27. See *infra* Part II (providing background information on the development of the law relevant to the constitutionality of laws banning SOCE. Focusing on the rulings of the Third, Ninth, and Eleventh circuits and the Supreme Court's ruling on professional speech).

28. See *infra* Part III (discussing and pushing back on *Otto* and arguing that the laws do not violate freedom of speech even under the highest standard of strict scrutiny).

29. See *infra* Part IV (giving policy recommendations on SOCE and recommending that the Supreme Court officially reviews the issue).

conversion therapy are constitutional.[30]

II. BACKGROUND

A. The Circuit Courts' Differing Approaches to Conversion Therapy Bans Create Confusion on the Appropriate Level of Scrutiny and Constitutionality of these Laws

1. The Ninth Circuit Found that SOCE Bans are Permissible under Rational Basis Review Because the Bans Pertain to "Professional Speech"

California ("CA") was the first state to adopt a law prohibiting licensed mental health professionals from engaging in conversion therapy with minors.[31] Opponents challenged the new law's constitutionality on the grounds that it violated parents' fundamental rights to make medical decisions for their children.[32] They also argued that this law infringed on the First Amendment freedoms of religion, association, and speech.[33] Additionally, the plaintiffs argued that the law was both vague and overbroad.[34] The Ninth Circuit summarily dismissed the freedom of religion claims and quickly found no breaches of the freedom of association or parents' fundamental rights.[35] The court also promptly dismissed vagueness and overbreadth arguments.[36] Instead, the court focused most of its discussion on the alleged violations of the plaintiffs' freedom of speech.[37]

The Ninth Circuit's analysis of the alleged breaches of freedom of speech

30. See *infra* Part V (concluding that even under strict scrutiny, state and local governments may limit or ban mental health professionals from engaging in SOCE with minors).

31. *See generally Progress Map*, *supra* note 4 (tracking the adoption of laws that limit SOCE, CA has protected minors from conversion therapy by state law since 2012).

32. *See* Pickup v. Brown, 740 F.3d 1208, 1235 (9th Cir. 2014) (questioning whether a parent's fundamental right to make decisions in their child's care includes the right to pursue medical treatments that the state has deemed harmful).

33. *See id.* at 1224-25 (discussing the multitude of constitutional challenges that were thrown at limiting conversion therapy).

34. *E.g.*, *id.* at 1225 (arguing that the law should be held void for vagueness and was not narrowly tailored).

35. *E.g.*, *id.* at 1232-36 (dismissing the freedom of religion claims, and association claims, and fundamental rights claim).

36. *E.g.*, *id.* at 1232-34 (rejecting basis for the claims because the law was clear in putting mental health providers on notice of legal conduct and narrow in its regulation of specific conduct).

37. *See generally id.* at 1227–31 (discussing freedom of speech doctrine and its implications on the California law at issue).

focused on determining which level of scrutiny applied.[38] The court's analysis first looked at whether the law attempted to regulate speech or conduct.[39] The circuit court contemplated that, while the speech of medical professionals is not wholly insulated from regulation by the First Amendment, it is still entitled to protection.[40] The court concluded that in a spectrum of speech protections, the law fell into the gray zone of "professional conduct."[41] According to the court, professional conduct is exempt from the typical rule that content-based speech regulations are subject to strict scrutiny.[42] In this area of exemption, the powers of the state are great, and regulation is permissible even if it may have an incidental effect on speech.[43] Following this reasoning, the circuit court believed that rational basis review was the correct test to apply and that the law was constitutional.[44] While the freedom of speech arguments were easily surmounted in this case, these same few issues have continued to be the sticking points regarding the constitutionality of conversion therapy bans in other courts as well.[45]

2. The Third Circuit Allows SOCE Under Intermediate Scrutiny Because it is a Lesser Protected Category of Speech

The Third Circuit was the next circuit court to rule on the constitutionality of limiting SOCE.[46] New Jersey's state government enacted its own ban in

38. *See Pickup*, 740 F.3d at 1229 (expanding on the necessity of determining the correct level of scrutiny in constitutional analysis).

39. *See id.* (deciding that the California law primarily regulated conduct and not speech).

40. *See id.* at 1226 (reasoning that the speech falls into a gray zone that receives some but not all constitutional protections).

41. *E.g.*, *id.* at 1229 (discussing the existence of professional speech and that the category is more traditionally regulated by the law).

42. *See id.* at 1228 (determining that professional speech is not deserving of the full scope of constitutional protections because it is an area that has traditionally been regulated by the government).

43. *See id.* at 1229 (discussing the traditional regulation of speech in this category).

44. *See Pickup*, 740 F.3d at 1231-32 (reasoning that the rational basis test should be applied based on historical and legal precedent).

45. *Compare id.* at 1231 (finding that the California law was able to pass rational basis review), *with* King v. Governor of New Jersey, 767 F.3d 216, 220-40 (3d Cir. 2014) (deciding that the New Jersey law passes intermediate scrutiny), *and* Otto v. City of Boca Raton, 981 F.3d 854, 860-71 (11th Cir. 2020) (concluding that strict scrutiny is appropriate and the law did not pass).

46. *E.g.*, *King*, 767 F.3d at 220-240 (deciding on the constitutionality of the New Jersey law).

2013, which prohibited licensed counselors from engaging in SOCE with minors.[47] Mirroring the claims made by the plaintiffs in *Pickup*, the plaintiffs, who were involved in conversion therapy solely through speech-based talk therapy, alleged that the law violated their constitutional rights.[48] While the plaintiffs made additional claims of constitutional violations, the bulk of the court's discussion again focused on freedom of speech.[49]

The Third Circuit differed from the Ninth Circuit when determining that the law regulated speech and not conduct.[50] Since the Third Circuit approached its analysis of talk therapy as speech, its analysis turned on whether or not said speech fell into one of the historically lesser protected categories of speech that the Supreme Court has identified.[51] The Third Circuit paralleled the Ninth Circuit's reasoning that the state has a valid and historically recognized interest in regulating professional speech and that SOCE fell into this lesser protected category.[52] However, the Third Circuit reviewed the law's constitutionality under intermediate scrutiny.[53] Under this standard, the circuit court concluded that New Jersey had satisfied intermediate scrutiny because the law was substantially related to protecting the wellbeing of minors and was therefore constitutional.[54]

3. The Supreme Court in Becerra Determined that Professional Speech is not a Separate Category of Speech and Does Not Lie Outside of Normal First Amendment Freedom of Speech Protections

While there were distinct differences in how the Ninth and Third circuits approached the freedom of speech claims, each circuit court still heavily relied upon the idea that professional speech fits within a category of speech

---

47. *See id.* at 221 (stating that the law prohibited mental health providers from engaging in SOCE with minors).

48. *See Pickup*, 740 F.3d at 1224 (reiterating the plaintiffs' claims that the law infringed on their free speech rights); *King*, 767 F.3d at 220-240 (reviewing Plaintiff's claims that the law infringed on their constitutional rights).

49. *See Pickup*, 740 F.3d at 1225-32 (discussing how freedom of speech is implicated by the law).

50. *Compare id.* (determining that the law was primarily regulating conduct and not speech), *with King*, 767 F.3d at 229 (ruling that the law was regulating speech).

51. *See King*, 767 F.3d at 229 (examining the appropriate level of scrutiny and the different categories of speech).

52. *See id.* at 232-35 (discussing why professional speech is a gray area for which strict scrutiny does not apply).

53. *See id.* at 237 (reasoning that intermediate scrutiny was appropriate because the speech was professional speech).

54. *See id.* at 238 (finding that New Jersey had satisfied intermediate scrutiny because the law was substantially related to an important government interest).

that is less deserving of the First Amendment's full freedom of speech protections.[55] Furthermore, upon this bedrock idea of professional speech exemptions, each circuit court weighed the laws against lower standards of *scrutiny and found the laws constitutional.*[56] However, the Supreme Court's decision in *National Institute of Family & Life Advocacy v. Becerra* would ultimately shatter the bedrock foundations of these opinions.[57]

While *Becerra* did not directly relate to the issue of conversion therapy, its decision had profound impacts on the legal discussion surrounding conversion therapy.[58] *Becerra* revolved around California's FACT Act and what disclosures crisis pregnancy centers were legally required to make.[59] The plaintiffs invoked a freedom of speech argument by claiming that the government could not compel their speech.[60] In this case, defenders of the FACT Act's constitutionality relied on the principle that a lower level of scrutiny applied to regulations on professional speech.[61] The Supreme Court summarily rejected this line of reasoning in its majority opinion.[62]

According to the Supreme Court, it had "never recognized 'professional speech' as a separate category of speech subject to different rules" and

---

55. *Compare Pickup*, 740 F.3d at 1215-36 (determining that the law primarily regulates conduct and professional speech), *with King*, 767 F.3d 216 at 220-240 (concluding that the law regulates professional speech and is not subject to strict scrutiny).

56. *See King*, 767 F.3d at 220-240 (applying intermediate scrutiny); *Pickup*, 740 F.3d at 1215-36 (utilizing only rational basis review); *see also* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2368 (2018) (describing the FACT Act, otherwise known as the California Reproductive Freedom, Accountability, Comprehensive Care which was intended to regulate crisis pregnancy centers and the notices they were required to make).

57. *See Nat'l Inst. of Fam. & Life Advocs.*, 138 S. Ct. at 2369-78 (focusing on compelled speech rather than restricted speech and rejecting professional speech as a category of free speech subject to lower scrutiny).

58. *See id.* at 2375 (declining to recognize professional speech as "a unique category that is exempt from ordinary First Amendment principles").

59. *E.g.*, *id.* at 2368-70 (discussing the FACT Act and the freedom of speech basis for the case).

60. *E.g.*, *id.* at 2371 (implicating freedom of speech because the law compelled speech on the part of health professionals).

61. *See Pickup*, 740 F.3d at 1215-36 (acknowledging professional speech as its own category of speech); *King*, 767 F.3d at 220-40 (utilizing the concept of professional speech); *but see Nat'l Inst. of Fam. & Life Advocs.*, 138 S. Ct. at 2369-78 (rejecting the claim of advocates that professional speech was its own category).

62. *Nat'l Inst. of Fam. & Life Advocs.*, 138 S. Ct. at 2369-78 (rejecting that professional speech is a category of speech exempt from strict scrutiny).

"speech is not unprotected merely because it is uttered by professionals."[63] The Supreme Court summarily rejected the idea that professional speech should be subjected to a lower level of scrutiny and instead pointed to Supreme Court precedent, which had protected the First Amendment rights of professionals under strict scrutiny.[64]

While the Supreme Court did not ultimately discuss conversion therapy bans, the Supreme Court's decision in *Becerra* dealt a considerable blow to the legal reasoning of both courts.[65] As the Ninth and Third Circuits ruled on the issue of conversion therapy before the Supreme Court's decision in *Becerra*, the circuit courts' reasoning is no longer fully congruent with the new understanding of professional speech after *Becerra*.[66] However, the ramifications of *Becerra* were a definitive factor in the Eleventh Circuit's decision on the constitutionality of conversion therapy bans.[67]

B. Otto Diverges from its Predecessors and Finds SOCE Unconstitutional Based on The Supreme Court's Rejection of Professional Speech in Becerra

The Eleventh Circuit declared that laws banning mental health professionals from engaging in conversion therapy with minors were unconstitutional in *Otto v. City of Boca Raton*.[68] However, in 2017, Palm Beach and the City of Boca Raton passed ordinances that banned mental

63. *See id.* at 2365 (failing to be persuaded by the argument for professional speech as a lesser protected category of speech, not subject to strict scrutiny).

64. *Compare id.* at 2366 (rejecting the argument that the government has a traditional interest in regulating professional speech), *with* Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 170-72 (2015) (applying strict scrutiny to lawyer's speech), *and* Sorrell v. IMS Health Inc., 564 U.S. 552, 573-80 (2011) (applying strict scrutiny to the professional speech of medical professionals).

65. *Compare Nat'l Inst. of Fam. & Life Advocs.*, 138 S. Ct. at 2369-78 (rejecting the idea that professional speech is not subject to strict scrutiny), *with Pickup*, 740 F.3d at 1230-36 (arguing for a lower standard for professional speech), *and King*, 767 F.3d at 220-40 (advocating for less protections for professional speech).

66. *See generally Pickup,* 740 F.3d at 1229 (emphasizing that "within the confines of a professional relationship, First Amendment protection of a professional's speech is somewhat diminished"), and *King,* 767 F.3d at 228 (discussing that within the professional relationship, constitutional speech protections are diminished).

67. *E.g.*, Otto v. City of Boca Raton, 981 F.3d 854, 860-71 (11th Cir. 2020) (adjudicating the constitutionality of bans on SOCE with minors after the rejection of professional speech).

68. *See generally id.* (reviewing local ordinances that were very similar to the California and New Jersey laws).

health counselors from engaging in SOCE with minors.[69] These ordinances applied to conversion therapy intending to change a minor's sexual orientation or gender identity but included a carveout for clergy members and counselors who supported those undergoing gender transition.[70] Two licensed therapists challenged the constitutionality of the city ordinances because it infringed upon their First Amendment right to freedom of speech.[71]

The majority opinion made three major legal decisions in *Otto*.[72] First, the court determined that the law was a content-based regulation that constituted viewpoint discrimination.[73] Second, the court determined that strict scrutiny was the appropriate test for evaluating the city ordinances.[74] Third, the court found that the law did not pass strict scrutiny.[75]

1. The Eleventh Circuit Found that Strict Scrutiny was the Correct Test to Apply to SOCE Bans

The argument for a lesser standard of scrutiny was much more potent before *Becerra*, and the Ninth and Third Circuit made this argument when applying rational basis review and intermediate scrutiny, respectively.[76] Utilizing the *Becerra* decision, the Eleventh Circuit rejected the rationale of the Ninth and Third Circuits and determined that the bans must pass strict scrutiny, for which the law must be narrowly tailored to achieve a compelling

---

69. *See id.* at 859 (examining both laws, which mandated the same limitation on mental health providers).

70. *Id.* at 859–60 (providing the substance of the two laws which stated counselors could not engage in SOCE with minors).

71. *See generally id.* at 860 (giving the background on the claims of Constitutional infringements that were raised).

72. *See id.* at 860-70 (stating the circuit court's reasoning on why the ban was unconstitutional).

73. *See Otto*, 981 F.3d at 860, 864 (arguing that the law amounted to viewpoint discrimination because it was not viewpoint-neutral).

74. *See id.* at 861 (examining the required level of scrutiny based on speech versus conduct and the protected and lesser protected categories of free speech).

75. *See id.* at 868 (holding that the law did not pass strict scrutiny because the state failed to demonstrate how SOCE harms minors).

76. *Compare* Pickup v. Brown, 740 F.3d 1208, 1230-131 (9th Cir. 2014) (applying rational basis review because the law was regulating medical practices rather than pure speech), *with* King v. Governor of New Jersey, 767 F.3d 216, 226-37 (3d Cir. 2014) (utilizing intermediate scrutiny because the law was seeking to regulate professional speech which the government has a historically recognized interest in regulating), *and* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371-78 (2018) (abrogating the previous decisions in rejecting the concept of professional speech).

government interest.[77] The court determined that strict scrutiny was the correct test to apply because, in their view, the ordinances were content-based regulations of speech.[78] The court rejected the idea that the ordinances were laws regulating conduct that incidentally regulated speech.[79] Instead, they argued that the laws primarily targeted speech and were content-based regulations.[80] Content-based laws, which regulate based on the substance of the message being communicated, are presumptively unconstitutional and are given the highest level of constitutional protection, strict scrutiny.[81]

2. The Eleventh Circuit Found that SOCE Bans are Viewpoint Discrimination

The Eleventh Circuit furthered its argument that strict scrutiny was the correct test to apply in *Otto* by determining that the ordinances constituted viewpoint discrimination.[82] Viewpoint discrimination is considered a subset and "a particularly 'egregious form' of content discrimination."[83] A law is not viewpoint neutral but is viewpoint discriminatory when it involves bias towards or the censorship of opposing viewpoints.[84] According to the court, the law in question advocated for "a particular viewpoint about sex, gender, and sexual ethics" while censoring an opposing point of view.[85] To support their claim that the local government was engaging in viewpoint discrimination, the court pointed out that the law in question created an exception for gender transition counseling.[86] In the eyes of the court, this

77. *See Otto*, 981 F.3d at 861-869 (applying strict scrutiny because the law was a content-based restriction and viewpoint discrimination); *Nat'l Inst. of Fam. & Life Advocs.*, 138 S. Ct. at 2371-75 (differing from the previous circuit courts' interpretations of the appropriate test that should be applied to the bans).

78. *See Otto*, 981 F.3d at 865 (determining the law was primarily regulating talk therapy and therefore speech).

79. *See id.* at 865 (stating that the regulation of speech was direct rather than indirect).

80. *E.g.*, *id.* at 865-866 (focusing on the restrictions on speech).

81. *See id.* at 862 (examining approaches to content-based regulations).

82. *See id.* at 864 (finding the law was viewpoint discrimination because it censored one point of view).

83. *E.g.*, Pahls v. Thomas, 718 F.3d 1210, 1229 (10th Cir. 2013) (discussing how viewpoint discrimination offends the core values of the First Amendment and the expression of political beliefs).

84. *See* City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (finding that law was viewpoint neutral because did not involve bias or censorship).

85. *E.g.*, *Otto*, 981 F.3d at 864 (arguing that the law promotes one viewpoint while censoring others).

86. *See id.* at 864 (utilizing this exception to demonstrate viewpoint discrimination).

carveout confirmed that the ordinances codified one viewpoint about gender and sexuality while prohibiting counselors from advancing other perspectives and was, therefore, blatantly viewpoint discrimination.[87]

3. The Eleventh Circuit Found that SOCE Bans do not Pass Strict Scrutiny

The court in *Otto* ruled that the ordinances in question did not pass strict scrutiny.[88] The court recognized that the compelling government interest raised by the state, namely protecting the mental and physical wellbeing of minors, was indeed a compelling government interest.[89] However, the court believed that the evidence presented by the defendants was insufficient to demonstrate that conversion therapy harms minors.[90] Instead, the court argued that the research presented by the government was not empirically rigorous enough to pass muster in the court's eyes.[91] Satisfied that the defendants had failed to demonstrate cognizable harm sufficient for their compelling government interest, the court did not address the issue of narrow tailoring.[92]

III. ANALYSIS

Otto v. City of Boca Raton serves as a jumping-off point in evaluating the constitutionality of laws banning mental health professionals from engaging in sexual orientation change efforts or conversion therapy with minors.[93] While the decisions of the Ninth and Third Circuits still stand, the Eleventh Circuit is the only post-*Becerra* court that has dealt with the issue of conversion therapy.[94] However, the Eleventh Circuit still erred in its analysis and when it ruled that laws banning mental health providers from engaging

87. *See id.* (arguing that the law was viewpoint discrimination because it advocated for a particular viewpoint regarding gender and sexuality).

88. *E.g.*, *id.* at 869 (finding a failure to prove cognizable harm).

89. *E.g.*, *id.* at 868 (recognizing that protecting the wellbeing of minors is a traditional and well-respected government interest).

90. *See id.* at 869 (ruling that the presented data lacked the scientific rigor necessary to be compelling and that it failed to show true causation between SOCE and harm).

91. *See Otto*, 981 F.3d at 868 (arguing that the presented data was not compelling enough to necessitate the law).

92. *See id.* (failing to address the issue of narrow tailoring).

93. *See id.* at 859-64 (holding in the majority that laws banning therapists from engaging in conversion therapy is viewpoint discrimination, fails strict scrutiny, and violates the First Amendment freedom of speech rights of mental health providers).

94. *See id.* at 859-64 (addressing *Becerra* and professional speech).

in conversion therapy with minors are unconstitutional.[95]

A. The Correct Level of Scrutiny in Assessing SOCE Bans Is Not Strict Scrutiny Because Laws Banning SOCE Primarily Regulate Conduct and Only Incidentally Regulate Speech

Across the differing opinions of the Ninth, Third, and Eleventh Circuits, one of the primary areas in which the three courts' opinions diverged was determining which level of scrutiny was appropriate to evaluate the law's constitutionality.[96] Before *Becerra*, the Ninth and Third Circuits operated under the reasoning that "professional speech" was its own gray area, a category of speech that did not receive the full protection of the law, namely, strict scrutiny.[97] However, since the Supreme Court rejected this notion in *Becerra*, so too did the court in *Otto*.[98] Thus, as a content-based law that did not seek to regulate any of the categories of speech that the Supreme Court has officially recognized as being less deserving of the full protection of the Constitution, the law was subject to the strict scrutiny test.[99]

While *Becerra* firmly pushed back on the conceptualization of professional speech as its own category of speech that would not receive the full benefits of First Amendment protections, it raised two critical exceptions to the presumption of applying strict scrutiny.[100] These two exceptions that allow the regulation of professional speech occur when (1) professionals are

---

95. *See id.* at 866-67 (ruling for the first time on the constitutionality of conversion therapy bans after the Supreme Court's rejection of a professional speech exemption); Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2361 (2018) (rejecting the notion that professional speech belongs to a category of free speech that is less protected than other speech and thus not analyzed under strict scrutiny).

96. *Compare Otto*, 981 F.3d at 867-68 (applying the highest bar of strict scrutiny), *with* Pickup v. Brown, 740 F.3d 1208, 1229-31 (9th Cir. 2014) (utilizing only rational basis review on the grounds that the law in question was primarily regulating professional conduct), *and* King v. Governor of New Jersey, 767 F.3d 216, 235-37 (3d Cir. 2014) (employing intermediate scrutiny on the grounds that the law in question was regulating professional speech, which is protected by the Constitution but not to the fullest extent of strict scrutiny).

97. *See Pickup*, 740 F.3d at 1229-31 (finding that the law in question primarily regulates conduct and that the speech in question is professional speech and thus the law in question is not subject to strict scrutiny); *King*, 767 F.3d 216 at 229-233 (determining that the law in question regulates professional speech rather than conduct).

98. *See Otto*, 981 F.3d at 861 (rejecting the category of professional speech as a lesser protected category).

99. *See id.* at 864-68 (reasoning that strict scrutiny was the appropriate test).

100. *See Nat'l Inst. of Fam. & Life Advocs.*, 138 S. Ct. at 2372 (providing two exceptions where the Supreme Court has recognized lesser protections for professional speech, but those exceptions did not hinge on the fact that professionals were speaking).

engaged in commercial speech or when (2) the state seeks to regulate the conduct of professionals and that conduct incidentally involves speech.[101] For example, regulation of conversion therapy does not involve commercial speech, but it certainly does involve professional conduct.[102]

In *Becerra*'s discussion of the Supreme Court's historical allowance for the regulation of professional conduct that incidentally involved speech, the majority opinion in *Becerra* pointed to *Planned Parenthood v. Casey*.[103] In *Planned Parenthood*, the Supreme Court determined that a law requiring informed consent did not primarily focus on speech and instead only implicated speech "as part of the practice of medicine."[104] Therefore, the regulation was not subject to strict scrutiny but rather "subject to reasonable licensing and regulation by the [s]tate," as are all medical procedures and conduct.[105] Sexual orientation change efforts conducted by mental health professionals are inherently medical psychiatric treatments.[106] Thus, as the test for direct vs. indirect regulation is different, determining whether a law directly or indirectly regulates speech is one of the first steps in determining the appropriate level of scrutiny and the constitutionality of anti-SOCE laws.[107]

While anti-SOCE laws involve speech, they do not directly regulate

---

101. *See id.* at 2372 (discussing the two historical exceptions in which the Supreme Court has "afforded less protection for professional speech")*; see, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456-58 (1978) (recognizing the validity of applying lower standards of review for commercial speech and of applying a lower level of scrutiny in the regulation of conduct that incidentally burdened speech).

102. *See* BOCA RATON, FLA., CODE OF ORDINANCES § 9-106 (2017) (stating that mental health providers are prohibited from engaging in sexual orientation change efforts with minors).

103. *See Nat'l Inst. of Fam. & Life Advocs.*, 138 S. Ct. at 2373 (invoking *Casey* and regulating professional conduct involving speech as a medical practice); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (plurality opinion) (finding that medical practitioners' first amendment freedom of speech rights are not infringed upon by the regulation of medical practice).

104. *Casey*, 505 U.S. at 838 (stating that medical conduct which incidentally involves speech can be treated by the state as professional conduct and regulated thusly).

105. *E.g.*, *Casey*, 505 U.S. at 884 (concluding that medical conduct incidentally involving speech is not subject to strict scrutiny).

106. *See* BOCA RATON, FLA., CODE OF ORDINANCES § 9-106 (2017) (providing in detail that mental health providers are prohibited from engaging in sexual orientation change efforts with minors).

107. *See Casey*, 505 U.S. at 884 (finding that deferential review is appropriate for examining laws regulating medical conduct that incidentally involves speech).

speech.[108] Instead, laws such as the one in *Otto* directly regulate the medical practice of conversion therapy.[109] Laws regulating conversion therapy regulate SOCE in its totality, including aversive methods of conversion therapy, such as exposure to unpleasant stimuli and talk therapy; in this way, the speech within it is only one facet of that practice that is incidentally regulated.[110] Furthermore, talk therapy in and of itself is primarily a medical treatment.[111] To characterize talk therapy as simply a regular conversation or discussion of thoughts and beliefs is incorrect.[112] According to the APA, psychotherapy conducted through talking and dialogue can take various forms.[113] However, each form is scientifically geared at analyzing and, in many ways, reframing the human mind.[114] Talk therapy does involve expression and dialogue between patient and provider, but at its heart, it is a medical procedure that is conducted by a medical professional aimed at changing thought and behavior.[115] Thus, laws banning mental health providers from engaging in conversion therapy with minors should be recognized as conduct regulations that incidentally involve speech and should not be subject to strict scrutiny.[116]

B. Anti-SOCE Laws are Not Viewpoint Discrimination

The Eleventh Circuit's majority opinion in *Otto* advanced the idea that the

---

108. *See* § 9-106 (stating that mental health providers are prohibited from engaging in sexual orientation change efforts with minors).

109. *See Otto*, 981 F.3d at 865-66 (giving background on the law in question, which only sought to regulate the medical practice of SOCE and excluded its religious administration).

110. *See Progress Map*, *supra* note 4 (discussing different forms of conversion therapy, including the aversive practices).

111. *See generally Understanding Psychotherapy and How it Works*, AM. PSYCH. ASS'N (July 31, 2020), https://www.apa.org/topics/psychotherapy/understanding (establishing that talk therapy, also known as psychotherapy, is a well-recognized form of therapy).

112. *See generally Different Approaches to Psychotherapy*, AM. PSYCH. ASS'N (2009), https://www.apa.org/topics/psychotherapy/approaches (articulating, among other things, the medical benefits associated with each approach to psychotherapy).

113 *See id.* (examining the five broad theories of psychotherapy).

114. *See id.* (reiterating that talk therapy is a well-established form of therapy that can be utilized to change patterns of thought and behavior).

115. *See Understanding Psychotherapy and How it Works*, *supra* note 111 (explaining how talk therapy operates to treat people by changing thought and behavior).

116. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) (plurality opinion) (stating that medical conduct incidentally involving speech is not subject to strict scrutiny).

particular city ordinance, which in content was extremely similar to the laws passed in California and New Jersey, constituted viewpoint discrimination.[117] The court concluded this because in their view, the ordinances advanced a certain viewpoint and restricted an opposing viewpoint.[118] This conclusion differs from those of the Ninth Circuit and the Third Circuit, which both concluded that the laws in question were not viewpoint discrimination.[119] Therefore, laws prohibiting licensed mental health professionals from engaging in conversion therapy with minors, such as the law at issue in *Otto*, should not be considered viewpoint discrimination.[120]

The court in *Otto* concluded that the anti-sexual orientation change effort ordinances are viewpoint discrimination in effect because they censor those mental health professionals that believe sexuality can be changed or that gender is cemented at birth.[121] Therefore, the Eleventh Circuit said these bans censor these providers and prevent them from freely expressing their beliefs and opinions.[122] Laws limiting sexual orientation change efforts are not viewpoint discrimination because they do not prevent mental health professionals from freely expressing their views.[123] The ordinances in

---

117. *See* Otto v. City of Boca Raton, 981 F.3d 854, 864 (11th Cir. 2020) (arguing that the ordinance was viewpoint discrimination because it advocated for one viewpoint while censoring another)*; see also* CAL. BUS. & PROS. CODE § 865.1 (2013) ("Under no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age."); N.J. STAT. ANN. § 45:1–55(2)(a) ("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.").

118. *See Otto*, 981 F.3d at 864 (reasoning that under the law psychiatrists would not be able to advocate for SOCE and beliefs regarding it).

119. *Compare Pickup*, 740 F.3d at 1231 (holding that the law only regulates treatment), *with King*, 767 F.3d at 237 (concluding that the law fits within the category of professional speech).

120. *See Otto*, 981 F.3d at 864–66 (examining the constitutionality of the ban on SOCE); *see also* BOCA RATON, FLA., CODE OF ORDINANCES § 9-106 (2017) (quoting, "It shall be unlawful for any provider to practice conversion therapy on any individual who is a minor . . . .").

121. *See Otto*, 981 F.3d at 864 (arguing that the ordinances "[c]odify a particular viewpoint—sexual orientation is immutable, but gender is not—and prohibit the therapists from advancing any other perspective when counseling clients.").").

122. *E.g.*, *Otto*, 981 F.3d at 864 (arguing that laws limiting sexual orientation change efforts are viewpoint discrimination because they prevent mental health professionals from expressing opinions contrary to views advocated for by the government).

123. *Compare* Pickup v. Brown, 740 F.3d 1208, 1230–31 (9th Cir. 2014) (deciding that the law fell under the category of professional speech because it only regulates

question in *Otto* only prevented mental health professionals from engaging in the therapeutic practice of sexual orientation change efforts with minors.[124] This limitation only applies to the medical practice of conversion therapy.[125] It does not prohibit medical professionals from engaging in any discussion of conversion therapy with minors or from advocating for their personal beliefs.[126] Under this law, it is still entirely permissible for mental health providers to express opinions different from those allegedly supported by the ordinance.[127] For example, a mental health provider could still communicate to patients their belief that the minor may be confused about their gender or sexual orientation, their belief that conversion therapy can change, or correct, sexuality or gender expression, or even their belief that homosexuality is a mental disorder.[128] More importantly, the law in question does not prevent mental health providers from recommending conversion therapy as a medical practice to minors or suggesting that they undergo conversion therapy in either a location that allows conversion therapy or through exempted means, such as faith-based conversion therapy.[129] Viewpoint discrimination, by its nature, targets and censors a particular viewpoint; however, the ordinance in *Otto* is not viewpoint discrimination because it does not censor or target certain views.[130] Instead, laws such as the one in *Otto* only prevent mental health providers from engaging in certain

---

treatment), *with* King v. Governor of New Jersey, 767 F.3d 216,237 (3d Cir. 2014) (concluding that the law in question was not viewpoint discrimination).

124. *E.g.*, BOCA RATON, FLA., CODE OF ORDINANCES § 9-106 (2017) (declaring it illegal for mental health providers to engage in sexual orientation change efforts with minors).

125. *See* BOCA RATON, FLA., CODE OF ORDINANCES § 9-105 (2017) (defining "provider" as "any person who is licensed by the state to provide professional counseling, or who performs counseling as part of his or her professional training" and excluding "members of the clergy or other religious leaders who are acting in their roles as clergy or pastoral counselors, or are providing religious counseling or instruction to congregants" thereby only applying to medical professionals in the mental health field).

126. *See id.* (specifying that only conversion therapy is illegal).

127. *See id.* (limiting sexual orientation change efforts).

128. *See* Otto v. City of Boca Raton, 981 F.3d 854, 875 (11th Cir. 2020) (Martin, J., dissenting) (discussing how mental health professionals can still express their own personal opinions).

129. *See* § 9-106 (limiting the practice of conversion therapy with minors); *see also Otto*, 981 F.3d at 872 (Martin, J., dissenting) (explaining that the ordinance allows unlicensed counselors to practice SOCE).

130. *See Otto*, 981 F.3d at 872 (Martin, J., dissenting) (arguing that the law is not viewpoint discrimination).

harmful practices.[131] Therefore, as in *Pickup* and *King*, the courts should conclude that laws prohibiting or limiting sexual orientation change efforts are not viewpoint discrimination.[132]

C. Anti-SOCE Laws are Capable of Standing up to Strict Scrutiny

Regardless of which level of scrutiny courts apply in assessing the constitutionality of laws prohibiting limiting SOCE, these laws should pass even the most rigid freedom of speech constitutionality test of strict scrutiny.[133] The strict scrutiny test only requires that the law be narrowly tailored to achieve a compelling government interest. Laws banning mental health providers from engaging in conversion therapy with minors pass this test.[134]

It should not be taken as a given that legislators will create narrowly tailored anti-SOCE laws.[135] Instead, the courts must individually examine laws to see if they pass this aspect of strict scrutiny.[136] In assessing if a law passes strict scrutiny, a narrowly tailored law is constructed to be the least restrictive means to achieve the government's compelling state interest.[137] In other words, legislators must specifically craft anti-SOCE laws to place as minimal restrictions as possible on First Amendment rights.[138]

---

131. *Compare* § 9-106 (making conversion therapy for minors illegal), *with* Pickup v. Brown, 740 F.3d 1208, 1231 (9th Cir. 2014) (concluding that the law was not viewpoint discrimination), *and* King v. Governor of New Jersey, 767 F.3d 216, 237 (3d Cir. 2014) (determining that the law in question was not viewpoint discrimination).

132. *See Pickup*, 740 F.3d at 1231 (concluding that the law was not viewpoint discrimination because it did not advocate for one view); *King*, 767 F.3d 216 at 237 (finding that the law in question was not viewpoint discrimination).

133. *Cf. Otto*, 981 F.3d at 872, 878, 880 (Martin, J., dissenting) (arguing, in part, that Florida had sufficiently passed the burden of strict scrutiny by creating a narrowly tailored law that achieved the compelling government interest of protecting minors from harm and that the state had reasonably demonstrated that conversion therapy or sexual orientation change efforts are actually dangerous and harmful to minors).

134. *See* Reed v. Town of Gilbert, 576 U.S. 155, 155 (2015) (defining strict scrutiny and further finding that content-based laws that target speech must pass strict scrutiny).

135. *See* BOCA RATON, FLA., CODE OF ORDINANCES § 9-106 (2017) (modeling the type of law in question).

136. *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (defining narrowly tailored as "choosing the least restrictive means to further the articulated interest"). *See also* United States v. Playboy Ent. Grp., 529 U.S. 803, 813 (2000) (adding to the definition of narrowly tailored that "[I]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative.").

137. *E.g.*, *Sable Commc'ns of Cal.,* 492 U.S. at 126 (defining narrowly tailored as being the least restrictive the law can be to further the articulated interest).

138. *See id.* (providing the constitutional definition for narrow tailoring).

Additionally, if another less restrictive measure is available to achieve the same compelling government interest, then inherently, the law in question is not the least restrictive means available. It would then not be narrowly tailored or constitutional under strict scrutiny.[139]

Assuming that all anti-SOCE laws would be similar to those discussed, they should all be considered narrowly tailored.[140] The compelling government interest at the heart of each of these laws banning conversion therapy practices was the legitimate government interest in protecting minors' wellbeing.[141] Specifically, it was the legitimate and compelling government interest of protecting minors from the trauma and harm caused by experiencing sexual orientation change efforts.[142] Since the government's interest is in protecting minors from the harmful effects of sexual orientation change efforts, courts must determine whether or not the bans were constructed in the least restrictive manner possible to protect children from the harm of sexual orientation change efforts.[143]

Laws limiting licensed mental health providers from engaging in sexual orientation change efforts with minors are sufficiently narrow to pass muster.[144] In these cases, the compelling government interest in question is the protection of minors from the mental and physical harm associated with

---

139. *See Playboy Ent. Grp.,* 529 U.S. at 813 (adding the condition that if an alternate, less restrictive approach is available to the state, then the law in question is not the least restrictive).

140. *Compare* Otto v. City of Boca Raton, 981 F.3d 854, 864 (11th Cir. 2020) (exemplifying laws of its kind), *with* Pickup v. Brown, 740 F.3d 1208, 1221–23 (9th Cir. 2014) (explaining the SOCE ban at issue), *and* King v. Governor of New Jersey, 767 F.3d 216, 221-21 (3d Cir. 2014) (describing the SOCE ban in question).

141. *See Otto*, 981 F.3d at 868 (identifying protecting minors as the government interest); *Pickup*, 740 F.3d at 1231 (recognizing the protection of minors as an important government interest); *King*, 767 F.3d at 222 (identifying the protection of minors as the compelling government interest); Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty., 457 U.S. 596, 607 (1982) (finding that "safeguarding the . . . wellbeing of a minor ."is a compelling government interest); New York v. Ferber, 458 U.S. 747, 756–57 (1982) (reaffirming that protecting minors is a compelling government interest).

142. *Compare Otto*, 981 F.3d at 875–76 (Martin, J., dissenting) (listing SOCE's harmful effects), *with Pickup*, 740 F.3d at 1222–24 (discussing the harm of SOCE), *and King*, 767 F.3d at 238 (focusing on the harmful effects of SOCE).

143. *See Otto*, 981 F.3d at 875–76 (Martin, J. dissenting) (stating the negative effects of SOCE); *Pickup*, 740 F.3d at 1222–24, 1231–32 (discussing the trauma of SOCE); *King*, 767 F.3d at 238 (focusing on the negative impact of SOCE); *see also* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (defining narrowly tailored in terms of the least restrictive means possible).

144. *See Otto*, 981 F.3d at 859–60 (reviewing the local Florida ordinance at issue).

sexual orientation change efforts.[145] The clearest way to protect minors from this harmful practice is to stop or limit this practice.[146] The law in *Otto* could be more restrictive by preventing all forms of sexual orientation change efforts, including faith-based conversion therapy.[147] Additionally, the law in question is very narrowly tailored to the type of speech it impacts.[148] The law only prevents mental health professionals from engaging in talk therapy practices involved in conversion therapy.[149] It does not prevent mental health providers from giving their personal opinions on sexuality, gender, or conversion therapy.[150] Since the scope of the law is narrow and the only clear way to prevent minors from being harmed by the practice, laws like these are sufficiently narrowly tailored.[151]

The second aspect of strict scrutiny is that it must serve a compelling state interest.[152] Every law banning mental health counselors from engaging in sexual orientation change efforts with minors aims to achieve a compelling government interest, namely protecting minors from harm.[153] Protecting minors from harm is a clearly recognized compelling government interest the Supreme Court has upheld.[154] In each of the cases that dealt with conversion therapy bans, the circuit courts identified protecting minors from harm as the compelling state interest.[155]

---

145. *E.g.*, *id.* at 868 (identifying protecting minors as the compelling government interest raised by the state); *Pickup*, 740 F.3d at 1231 (discussing the necessity of protecting minors); *King*, 767 F.3d at 222 (raising the importance of protecting the wellbeing of minors).

146. *See* BOCA RATON, FLA., CODE OF ORDINANCES § 9-106 (2017) (specifying that only mental health professionals may not engage in SOCE with minors).

147. *See id.* (preventing mental health providers from engaging in SOCE with minors).

148. *See generally id.* (providing details on the anti-SOCE law).

149. *See generally id.* (stating the limitation on the therapeutic practice).

150. *See id.* (limiting the practice of SOCE).

151. *See id.* (stating that mental health professionals may not engage in SOCE with minors).

152. *E.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 155 (2015) (addressing the constitutional test necessary for content-based speech laws and defining the test of strict scrutiny).

153. *See* Otto v. City of Boca Raton, 981 F.3d 854, 868 (11th Cir. 2020) (reviewing the state's argument that the law is meant to protect the wellbeing of minors).

154. *See* Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty., 457 U.S. 596, 607 (1982) (finding that protecting minors is a compelling government interest).

155. *Compare Otto*, 981 F.3d at 868 (stating the compelling government interest), *with* Pickup v. Brown, 740 F.3d 1208, 1231-32 (9th Cir. 2014) (giving credence to

The Ninth and Third Circuit Courts accepted that sexual orientation change efforts present clear harm to the physical and mental wellbeing of LGBTQ+ youth.[156] The Eleventh Circuit, on the other hand, rejected this idea.[157] Instead, the majority opinion in *Otto* argues that the goal of the law is "to restrict the ideas to which children may be exposed."[158] This argument foregrounds the idea that, while protecting children is a vital government interest, speech "cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."[159]

The majority opinion in *Otto* completely mischaracterizes the goals and intentions of the bans on conversion therapy.[160] The ordinance in question in *Otto* does not prevent mental health providers from speaking on their different viewpoints to minors or exposing minors to a view that the majority may not hold. Namely, it does not prevent mental health providers from expressing a belief that homosexuality or gender dysphoria is a mental illness.[161] In fact, under the ordinance provisions, a mental health provider working with a minor could still legally express these personally held opinions to the minor and could still recommend that the minor undergo sexual orientation change efforts elsewhere.[162] Therefore, the ban does not insulate children from specific ideas or viewpoints, nor does it foreground

---

protecting the wellbeing of minors), *and* King v. Governor of New Jersey, 767 F.3d 216, 237-38 (3d Cir. 2014) (identifying protecting minors as the compelling government interest).

156. *See Pickup*, 740 F.3d at 1231 (finding that the protection of minors was the state interest); *King*, 767 F.3d at 246 (identifying protecting minors as the compelling interest).

157. *See Otto*, 981 F.3d at 869 (arguing that the presented evidence failed to rigorously demonstrate the link between sexual orientation change efforts and harm to minors).

158. *E.g.*, *id.* at 868 (determining that the power of the government to protect children from harm does not include protecting children from opposing viewpoints).

159. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 213–14 (1975) (stating that the government's prerogative to protect children from harm does not include the ability to prevent children from hearing opposing views).

160. *Cf. Otto*, 981 F.3d at 868 (finding that the law in question is a content-based restriction and viewpoint discrimination that seeks to insulate children from a set of ideas or viewpoints that the majority does not hold and that children are not harmed by being exposed to different viewpoints).

161. *See Otto*, 981 F.3d at 868 (expressing that the ordinance's attempts to shield minors from exposure to certain viewpoints); BOCA RATON, FLA., CODE OF ORDINANCES § 9-106 (2017) (specifying only that mental health professionals may not engage in SOCE with minors).

162. *See* BOCA RATON, FLA., CODE OF ORDINANCES § 9-106 (2017) (prohibiting the practice of SOCE with minors, but not the discussion of or recommendations for SOCE with minors).

exposure to these viewpoints as the harm caused to minors.[163] Instead, the ban only prevents mental health providers from engaging in a specific therapeutic, medical practice, specifically therapy, changing a person's sexual or gender identity with minors.[164] Furthermore, it prevents mental health providers from engaging in a medical practice that has demonstrably harmful effects on the mental health of LGBTQ+ adults and minors.[165]

The real harm of sexual orientation change efforts is well documented and well established.[166] LGBTQ+ youth that undergo conversion therapy are more than twice as likely to commit suicide as their peers who did not experience conversion therapy.[167] This is even more worrying when taken alongside the fact that in 2020, 40% of LGBTQ youth considered suicide in the past twelve months, with more than half of transgender and nonbinary youths having considered suicide.[168] The American Psychological Association ("APA") has openly disavowed sexual orientation change efforts and has documented the harmful effects of sexual orientation change efforts.[169] The APA's task force on sexual orientation change efforts has identified some of the harmful mental effects of conversion, including anxiety, depression, suicidality, increased guilt, loss of spiritual faith, and a sense of personal failure associated with exposure to sexual orientation change efforts.[170] The consensus of the medical community that sexual orientation change efforts are ineffectual and harmful to minors should be sufficient to demonstrate that sexual orientation change efforts cause actual harm and that the states have a legitimate interest in limiting conversion

163. *See id.* (prohibiting only the medical practice of SOCE).

164. *See id.* (limiting the conversion therapy practices).

165. *See generally*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, *Conversion Therapy* (Feb. 2018), https://www.aacap.org/aacap/policy_statements/2018/Converstion_Therapy.aspx/ (discussing the AACAP's belief that SOCE harms LGBTQ+ youth).

166. *E.g.*, *The Trevor Project National Survey, supra* note 9 (documenting the psychological harm experienced by survivors of conversion therapy).

167. *E.g.*, *id.* (reviewing the negative effects of SOCE on LGBTQ+ youth including increased suicidality).

168. *See id.* (discussing the negative mental health outcomes for survivors of SOCE).

169. *E.g.*, AM. PSYCH. ASS'N, REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION (2009), https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf (providing analysis on the psychological harm associated with sexual orientation change efforts conducted on minors).

170. *See id.* (examining the psychological harm done to minors by sexual orientation change efforts).

therapy practices to protect minors.[171]

IV. POLICY RECOMMENDATION

The Supreme Court has established that protecting minors' physical and psychological health is paramount.[172] LGBTQ+ youth across America continue to face discrimination and harm.[173] With suicide rates among young people in the United States steadily rising for the last twenty years, young LGBTQ+ people are disproportionately more likely than their non-LGBTQ+ peers to attempt suicide.[174] These rates are even higher for LGBTQ+ children who have experienced conversion therapy and suffered conversion therapy's consequential mental health effects.[175]

Reading between the lines, the message conveyed by *Otto* is apparent, that LGBTQ+ children are less deserving of the full protection of the law and government than their cisgender, heterosexual peers.[176] While the United States Constitution provides comprehensive and robust protections for citizens' freedom of speech, these protections are not without limitations for the sake of compelling government interests.[177] To deny LGBTQ+ youth vital laws intended to secure their protection is not only a miscarriage of justice but an obvious statement from the courts that protecting the physical and mental wellbeing of LGBTQ+ minors does not carry the same weight as considerations for the wellbeing of cisgender, heterosexual minors.[178]

---

171. *See id.*, at 5-6 (dissecting the psychological harm done to minors by sexual orientation change efforts).

172. *E.g.*, Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty., 457 U.S. 596, 607 (1982) (finding that "safeguarding the physical and psychological well-being of a minor" is a compelling government interest).

173. *See generally*, HUM. RTS. WATCH, LIKE WALKING THROUGH A HAILSTORM: DISCRIMINATION AGAINST LGBT YOUTH IN US SCHOOLS at 1-2 (2020), https://www.hrw.org/report/2016/12/08/walking-through-hailstorm/discrimination-against-lgbt-youth-us-schools (reviewing the discrimination LGBTQ+ youths face, particularly in school).

174. *See* WILLIAMS INST., *supra* note 2 (reporting on a study that examined the experiences of LGBTQ+ youth who were subjected to SOCE).

175. *See id.* (detailing the mental health struggles of LGBTQ+ youth).

176. *E.g.*, Otto v. City of Boca Raton, 981 F.3d 854, 860, 871 (11th Cir. 2020) (finding that a law meant to protect LGBTQ+ children from a practice associated with heightened suicide rates among LGBTQ+ youth was invalid).

177. *See* Reed v. Town of Gilbert, 576 U.S. 155, 170-72 (2015) (stating that content-based restrictions on speech can only stand if they survive strict scrutiny, which requires the government to prove a compelling interest).

178. *See Otto*, 981 F.3d at 870 (stating that there was not plausible harm to necessitate the State stepping in to protect the wellbeing of LGBTQ+ minors).

While many states have adopted or proposed laws that limit conversion therapy for minors, more states should seek to provide increased protection for LGBTQ+ youth.[179] Already, new challenges are appearing to state conversion therapy bans. Petitioners have already requested that *Otto* itself be reheard.[180] Eventually, another suit similar to the Ninth, Third, and Eleventh Circuits will rise up.[181] When those challenges arise, given the standing confusion over the issue of conversion therapy, the Supreme Court must review conversion therapy and put this discussion to rest.[182]

V. CONCLUSION

As the scientific community continues to deepen its understanding of the harmful effects that sexual orientation change efforts have on young members of the LGBTQ+ community, and as more citizens and legislators become aware of these issues, the support for ending conversion therapy in America continues to grow.[183] The constitutionality of these laws is a prescient issue as more states continue to adopt laws banning conversion therapy.[184] Although the Supreme Court in *Becerra* dealt a blow to the lower court's previous interpretation of the constitutionality of laws prohibiting sexual orientation change efforts, the Supreme Court's majority opinion was not a death blow.[185] Laws banning conversion therapy can withstand the challenge of strict scrutiny because they are the least restrictive means of protecting minors from the harm caused by sexual orientation change

179. *See Progress Map*, *supra* note 4 (mapping the adoption and proposal of anti-SOCE laws).

180. Brief for 25 Cities and Counties in Support of Defendant-Appellant at 11, Otto v. City of Boca Raton, 981 F.3d 854 (11th Cir. 2020) (No. 19-10604) (requesting rehearing en banc).

181. *See generally*, Brendan Pierson, *Md. Governor, AG Immune from Challenge to Gay "Conversion" Ban*, REUTERS (June 16, 2021, 10:28 AM), https://www.reuters.com/legal/litigation/md-governor-ag-immune-challenge-gay-conversion-ban-2021-06-15/ (discussing a recent challenge to the Maryland ban on SOCE).

182. *See id.* (giving an overview on the adoption and proposal of anti-SOCE laws). *See also* Brief for 25 Cities and Counties in Support of Defendant-Appellant, Otto v. City of Boca Raton, 981 F.3d 854 (11th Cir. 2020) (No. 19-10604) (petitioning for rehearing on the basis that anti-SOCE laws are constitutional).

183. See Pierson, *supra* note 181 (detailing the growing support for anti-SOCE laws).

184. See Pierson, *supra* note 181 (tracking the states that have proposed anti-SOCE laws in 2020).

185. *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2375 (2018) (rejecting the notion that professional speech belongs to a category of free speech that is less protected and thus not analyzed under strict scrutiny).

efforts.[186] The Supreme Court should review the issue of the constitutionality of conversion therapy bans to put to rest the lower courts' confusion on how to address conversion therapy bans and the constitutionality of such laws.[187] Given that anti-SOCE bans should pass even strict scrutiny, the Supreme Court should find that laws banning mental health professionals from engaging in conversion therapy with minors are constitutional.[188]

186. *E.g.*, Otto v. City of Boca Raton, 981 F.3d 854, 873 (11th Cir. 2020*)* (Martin, J., dissenting) (arguing that the bans on SOCE would pass strict scrutiny).

187. Brief for 25 Cities and Counties in Support of Defendant-Appellant at 12, Otto v. City of Boca Raton, 981 F.3d 854 (11th Cir. 2020) (No. 19-10604) (arguing the need for continued litigation and rehearing on the matter of anti-SOCE laws).

188. *See id.* at 10-11 (reiterating the need for anti-SOCE laws as they are necessary and intended to promote the safety of LGBTQ+ youth).