Fordham Law Review

Volume 92 | Issue 1 Article 7

2023

Anything but Prideful: Free Speech and Conversion Therapy Bans, State-Federal Action Plans, and Rooting Out Medical Fraud

Jordan Hutt
Fordham University School of Law

ANYTHING BUT PRIDEFUL: FREE SPEECH AND CONVERSION THERAPY BANS, STATE-FEDERAL ACTION PLANS, AND ROOTING OUT MEDICAL FRAUD

*Jordan Hutt**

At a time when conversion therapy might seem archaic to many people, this practice remains prevalent across the United States and finds legal support in the halls of federal courthouses. In 2020, the U.S. Court of Appeals for the Eleventh Circuit, in Otto v. City of Boca Raton, *held that two ordinances banning conversion therapy in Boca Raton and Palm Beach violated First Amendment free speech rights. Specifically,* Otto *held that conversion therapy bans were content-based restrictions subject to strict scrutiny. Conversely, the U.S. Courts of Appeals for the Third and Ninth Circuits' prior decisions upheld conversion therapy bans under intermediate scrutiny and rational basis review, respectively. Applying strict scrutiny to conversion therapy bans,* Otto *created a circuit split among the Eleventh, Third, and Ninth Circuits, casting doubt on the appropriate levels of scrutiny to which conversion therapy bans should be subjected. Accordingly, the laws of more than twenty states stand on shaky ground. But the harms of conversion therapy are clear, and studies supporting its efficacy are flawed; conversion therapy is dangerous and does not work. Accordingly, to protect the LGBTQ+ community from conversion therapy, the federal government and states must carefully design their laws to avoid strict scrutiny.*

This Note takes a three-fold approach, suggesting that states and the federal government reshape their laws and adopt a consumer protection model. First, this Note formulates a model deceptive commercial practices statute, implementing civil penalties for conversion therapy on the state level. Second, for the federal government, this Note encourages Congress to pass Representative Ted Lieu's "Therapeutic Fraud Prevention Act." This Note supports the notion that the Federal Trade Commission has the statutory authority to treat conversion therapy as a "deceptive" trade or practice. Moreover, this Note argues that—if the constitutionality of conversion

* J.D. Candidate, 2024, Fordham University School of Law; B.A., 2020, Binghamton University. A warm thank you to Professor Abner Greene for his knowledge, advice, and guidance throughout the publication process. I would also like to thank Maya Syngal McGrath and the rest of the *Fordham Law Review* for their editing and feedback. Finally, thank you to my friends and family—particularly my parents, Amy Korobow and Michael Hutt—for their endless love and support.

therapy bans reaches the Supreme Court—the Court should treat conversion therapy as incidental to the practice of professional medicine. Most importantly, this Note seeks to advocate for those people harmed by conversion therapy and pave the way for substantive change protecting the most vulnerable members of the LGBTQ+ community.

INTRODUCTION

> At 16, I was the youngest participant among 300 others struggling with their sexual orientation and religious beliefs. In breakout groups, we learned about how to become more "manly." We were told that if one walked, talked and sat different[ly] from others of our gender, this was evidence of dysfunction that could be altered to instill heterosexual desires.[1]

When James Guay was sixteen years old, he came out to his parents as gay when they noticed signs of self-harm.[2] Concerned that he would not join them in "eternal life with God," Guay's parents enrolled him in conversion therapy.[3] Guay attended weekly therapy sessions and ex-gay conferences, where he was told to be more "masculine" and to "remember" a nonexistent original wounding.[4] He listened to audiotapes and read books claiming that the "gay lifestyle" would bring "disease, depravity, and misery."[5] Yet, nothing worked, and when Guay's parents found out that he had a boyfriend, Guay was forced to move out.[6] Guay was only able to break down his trauma, shame, and self-harm after decades of therapy.[7]

If Guay's story were uncommon, it would represent a singular, disturbing account of Sexual Orientation Change Efforts (SOCE). Sadly, his story is not unique; nearly 700,000 adults have undergone conversion therapy, approximately half of whom did so as adolescents.[8] SOCE's harmful effects provide states with strong incentives to make SOCE illegal.[9] Recently, however, courts have upheld challenges to these prohibitions: in 2020, the Eleventh Circuit struck down two ordinances outlawing "talk therapy."

---

1. James Guay, *My Hellish Youth in Gay Conversion Therapy and How I Got Out*, TIME (July 15, 2014, 11:50 AM), https://time.com/2986440/sexual-conversion-therapy-gay/ [https://perma.cc/QNR5-PBG2].
2. *Id.*
3. *Id.*
4. *Id.* In this context, Guay refers to physical and sexual abuse. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *See* CHRISTY MALLORY, TAYLOR N.T. BROWN & KERITH J. CONRON, WILLIAMS INST., UCLA SCH. OF L., CONVERSION THERAPY AND LGBT YOUTH 1 (Jan. 2018), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Conversion-Therapy-Jan-2018.pdf [https://perma.cc/FSC8-QQZK].
9. AM. PSYCH. ASSOC., RESOLUTION ON APPROPRIATE AFFIRMATIVE RESPONSES TO SEXUAL ORIENTATION DISTRESS AND CHANGE EFFORTS 30 (2022), https://www.apa.org/about/policy/sexual-orientation.pdf [https://perma.cc/LP7C-45KV] ("Although sound data on the safety of SOCE are extremely limited, some individuals reported being harmed by SOCE. Distress and depression were exacerbated. Belief in the hope of sexual orientation change followed by the failure of the treatment was identified as a significant cause of distress and negative self-image."); *see also* Susan L. Morrow & Amy Lee Beckstead, *Conversion Therapy for Same-Sex Attracted Clients in Religious Conflict: Context, Predisposing Factors, Experiences, and Implications for Therapy*, 32 COUNSELING PSYCH. 641, 646 (2004) (noting "personal accounts of increased self-hatred, confusion, isolation, and failure that they experienced as a result of undergoing such treatments").

In *Otto v. City of Boca Raton*,[10] the U.S. Court of Appeals for the Eleventh Circuit addressed First Amendment free speech challenges to Boca Raton and Palm Beach County ordinances prohibiting therapists from counseling minors with the goal of changing their sexual orientation, gender identity, or gender expression.[11] Applying strict scrutiny, the Eleventh Circuit became the first federal court of appeal to invalidate SOCE-related legislation.[12] The *Otto* court created a federal circuit split, treating SOCE bans and limitations with more skepticism than the U.S. Court of Appeals for the Third Circuit or the U.S. Court of Appeals for the Ninth Circuit.[13]

Part I of this Note will introduce SOCE development and history, its dangers, and relevant First Amendment case law. Part II will delineate the circuit courts' different approaches to the constitutionality of SOCE bans. Finally, Part III will recommend local, state, and federal legislative packages to combat SOCE, as well as recommend that the U.S. Supreme Court treat SOCE as medical speech incidental to professional speech.

I. THE HISTORY OF SEXUAL ORIENTATION CHANGE EFFORTS, RELEVANT FIRST AMENDMENT CASE LAW, AND *OTTO*

SOCE does not exist in a vacuum; its history extends across multiple centuries. Part I.A discusses the history of SOCE and its harmful effects, as well as scientific studies on SOCE therapies and their efficacy. Part I.B describes both basic First Amendment free speech analysis and this doctrinal framework in relation to *Otto* and SOCE.

A. Sexual Orientation Change Efforts: A Brief History

SOCE are treatments intended to change an LGBTQ+ person's sexual orientation, gender identity, or gender expression.[14] This treatment, which has origins in medicine, is rooted in the notion that same-sex attraction and gender nonconformity denote physical or mental disease.[15] "Homosexuality" was considered a diagnosis because it was understood to be a "pathology": a treatable mental illness.[16] Psychiatrist and psychoanalyst Edmund Bergler, for example, wrote an illustrative, though chilling, passage asserting that sexual orientation was curable[17]:

> I have no bias against homosexuals; for me they are sick people requiring medical help . . . . Still, though I have no bias, I would say: Homosexuals

10. 981 F.3d 854 (11th Cir. 2020), *reh'g denied*, 41 F.4th 1271 (9th Cir. 2022) (mem.).
11. *Id.* at 859.
12. *See infra* Part II.A.
13. *See infra* Part II.A.
14. *See* MALLORY ET AL., *supra* note 8, at 1.
15. *See* Johanna Olson-Kennedy, *When the Human Toll of Conversion Therapy Is Not Enough*, 176 JAMA PEDIATRICS 450, 450 (2022) (noting that "efforts to delineate a cause for a less common human attribute are undergirded by a fundamental belief that the trait in question is pathologic").
16. *See* MALLORY ET AL., *supra* note 8, at 1; *see also* Olson-Kennedy, *supra* note 15, at 450.
17. EDMUND BERGLER, HOMOSEXUALITY: DISEASE OR A WAY OF LIFE? 28–29 (1956).

> are essentially disagreeable people, regardless of their pleasant or unpleasant outward manner . . . . [Their] shell is a mixture of superciliousness, fake aggression, and whimpering. Like all psychic masochists, they are subservient when confronted with a stronger person, merciless when in power, unscrupulous about trampling on a weaker person.

SOCE therapy dates back to the principal studies of sexuality in mid-nineteenth-century Europe,[18] along with discrimination against and criminalization of same-sex intimacy.[19] Once SOCE reached the United States, physicians attempted to cure same-sex attraction as a "medical problem."[20] During the 1890s, doctors castrated individuals with same-sex attraction and experimented with testicle implantation in the early 1900s.[21] Other bizarre treatments included "bladder washing" and "rectal massages."[22] Doctors recommending bladder washing would flush patients' bladders with silver or nitrate solutions.[23] Rectal massages involved inserting small devices into the rectum to massage the prostate.[24] One physician peculiarly thought that rectal massages could "kill the homosexual cells" in the prostate and replace them with "heterosexual cells."[25] By 1913, physicians questioned the efficacy of these procedures.[26] Nevertheless, SOCE did not disappear.

Psychology-based efforts to alter sexual orientation emerged through aversion and behavior therapy in the 1950s to the 1960s.[27] Aversion therapy advanced the idea that, if LGBTQ+ people were trained to be disgusted by their sexuality, they would no longer want to engage in same-sex intimacy.[28] Conversely, behavioral therapy was based on the premise that same-sex attraction resulted from faulty learning.[29] Behavioral therapists sought to remove homoerotic responses to stimuli and to "replace" them with

---

18. AM. PSYCH. ASSOC., REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASKFORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION 15–16, 21 (2009), https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf [https://perma.cc/5BZL-WGHD].

19. *See id.* at 15–16.

20. *See* J. Seth Anderson, *Why We Still Haven't Banned Conversion Therapy in 2018*, WASH. POST (Aug. 5, 2018, 6:00 AM), https://www.washingtonpost.com/news/made-by-history/wp/2018/08/05/why-we-still-havent-banished-conversion-therapy-in-2018/ [https://perma.cc/PDQ7-CKJK].

21. *See id.*

22. *See id.*

23. *See id.*

24. *See id.*

25. *See id.*

26. *See id.*

27. *See* Olson-Kennedy, *supra* note 15, at 450; *see also* AM. PSYCH. ASSOC., *supra* note 18, at 22.

28. *See* Erin Blakemore, *Gay Conversion Therapy's Disturbing 19th Century Origins*, HISTORY (June 22, 2018), https://www.history.com/news/gay-conversion-therapy-origins-19th-century [https://perma.cc/WUU8-FMTJ].

29. *See* Douglas C. Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. CONSULTING & CLINICAL PSYCH. 221, 223 (1994).

heteroerotic responses.[30] Tactics used were alarmingly brutal: inducing nausea and vomiting through electroconvulsive therapy; explaining the "evils" of homosexuality under paralysis through hypnosis; pressuring gay men to find female sex workers;[31] and performing lobotomies.[32]

Reevaluating the horrors of aversive and behavioral SOCE therapy, the American Psychological Association (APA) removed the diagnosis of "homosexuality" from the Diagnostic and Statistical Manual (DSM) in 1973.[33] Although the DSM is not free from criticism, "[a] central aim of the DSM taskforce was to set appropriate cutoff points between what is considered 'normal' from what is 'pathological.'"[34] Removing same-sex attraction from the DSM may seem trivial, but it marked a transition in the mental health profession from the archaic notion of same-sex attraction as a pathology and instead toward recognition that same-sex attraction is a normal human characteristic.[35]

The most common form of SOCE today is psychoanalytic, non-aversive "talk therapy,"[36] the type of SOCE therapy at issue in *Otto*.[37] SOCE therapists' primary arguments continue to be that sexual orientation is a choice, a decision which, if made in favor of homosexuality, indicates that a person is mentally ill and a threat to society.[38] Although over half a century has passed since SOCE's more aversive, brutal tactics gained steam, SOCE advocates still appear to believe that sexual orientation is chosen and not innate.

Data regarding the effectiveness of talk therapy is relatively scarce, and what data exists is particularly flawed—it commonly surveys white male

---

30. *See id.*

31. *See* Olson-Kennedy, *supra* note 15, at 450; *see also* AM. PSYCH. ASSOC., *supra* note 18, at 22.

32. *See* Blakemore, *supra* note 28.

33. *See* Jack Drescher, *Out of DSM: Depathologizing Homosexuality*, 5 BEHAV. SCIS. 565, 565 (2015).

34. Bassam Khoury, Ellen J. Langer & Francesco Pagnini, *The DSM: Mindful Science or Mindless Power?: A Critical Review*, 5 FRONTIERS IN PSYCH. 1, 1 (2014).

35. *See* Linda Hojgrová, Conversion Therapy in Popular Culture 15 (2018) (A.B. thesis, Masaryk University) (on file with the Masaryk University Department of English and American Studies) ("As a result of homosexuality being removed from The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, criticism of the practise of conversion therapy started to spread across the United States and Europe.").

36. *See* MALLORY ET AL., *supra* note 8, at 1.

37. *See* Otto v. City of Boca Raton, 981 F.3d 854, 860 (11th Cir. 2020), *reh'g denied*, 41 F.4th 1271 (9th Cir. 2022) (mem.). *Otto* made clear that talk therapy is inherently different from other forms of SOCE because it involves speech and conduct. *See id.* at 865 ("What the governments call a 'medical procedure' consists—entirely—of words."). However, this distinction is irrelevant: it presumes that medical professionals cannot practice on a speech-only basis. Entire medical professions, such as psychology, may use speech-only approaches and yet are regulated by professions and state governments. *See generally* Stephen T. Demers & Jack B. Schaffer, Am. Psych. Assoc., *The Regulation of Professional Psychology*, *in* 1 APA HANDBOOK OF ETHICS IN PSYCHOLOGY (Samuel J. Knapp, Michael C. Gottlieb, Mitchell M. Handelsman & Leon D. VandeCreek eds., 2011).

38. *See* Ariel Shidlo & Michael Schroeder, *Changing Sexual Orientation: A Consumer's Report*, 33 PRO. PSYCH.: RSCH. & PRAC. 249, 250 (2002).

Christians.[39] One frequently-cited study reported a 27 percent success rate[40] but failed to clarify that approximately half the participants were bisexual and that one-quarter were diagnosed with schizophrenia.[41] Other analyses have criticized SOCE studies for their failure to document the degree to which their participants' sexual orientation changed. The authors of a British study of 100 cisgender gay men, for example, stated that "[they] believe[d] that claims for the cure of homosexuals should be treated with reserve unless the Kinsey rating before and after treatment is clearly stated and relevant evidence is adduced. It seldom is."[42] In that study, each of the 100 participants received some form of in-patient care (usually for an associated psychiatric condition, such as alcoholism), psychotherapy, or simple counseling and prescription medication.[43] Noting that same-sex attraction is not "all-or-none," the authors measured changes in sexual orientation on the Kinsey Scale, with zero representing exclusive heterosexuality and six representing exclusively same-sex attraction.[44] The study found that only nine participants claimed that they experienced any change in sexual orientation, with most changes being negligible.[45] Moreover, when the *degree* of change was accounted for in SOCE studies, efforts to change orientation were largely ineffective. The few scientifically rigorous studies

39. *See* Morrow & Beckstead, *supra* note 9, at 646.

40. In this context, "success" refers to sexual reorientation from homosexuality to heterosexuality.

41. *See* Kathleen Bieschke Mary McClanahan, Erinn Tozer, Jennifer L. Grzegorek & Jesseon Park, *Programmatic Research on the Treatment of Lesbian, Gay, and Bisexual Clients: The Past, the Present, and the Course for the Future*, *in* HANDBOOK OF COUNSELING AND PSYCHOTHERAPY WITH LESBIAN, GAY, AND BISEXUAL CLIENTS 309, 313 (Kathleen Bieschke et al. eds., 2000) (citing IRVING BIEBER, HARVEY J. DAIN, PAUL R. DINCE, MARVIN G. DRELLICH, HENRY G. GRAND, RALPH H. GUNDLACH, MALVINA W. KREMER, ALFRED H. RIFKIN, CORNELIA B. WILBUR & TOBY B. BIEBER, HOMOSEXUALITY: A PSYCHOANALYTIC STUDY (rev. ed. 1988). The methodological flaw of failing to exclude bisexual men cannot be overstated. *See* GARY J. GATES, WILLIAMS INST.: UCLA SCH. OF L., HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 1 (2011), https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-People-LGBT-Apr-2011.pdf [https://perma.cc/D5AE-C8T5]. Accounting for schizophrenic participants, whose results may not be reliable, it is unclear whether Bieber's study produced any effective results.

42. *See* Desmond Curran & Denis Parr, *Homosexuality: An Analysis of 100 Male Cases Seen in Private Practice*, 1 BRITISH MED. J. 797, 801 (1957). As developed in 1948 by Drs. Alfred Kinsey, Wardell Pomeroy, and Clyde Martin, the Kinsey Scale is a numerical rating ranging from zero to six, with an additional category of "X." The closer a person is to zero, the more their sexual behavior exhibited traits of heterosexuality. Conversely, a score closer to six indicates sexual behavior exhibiting homosexuality. A score of "X" represents no sociosexual contacts or relations. *See The Kinsey Scale*, KINSEY INST.: IND. UNIV., https://kinseyinstitute.org/research/publications/kinsey-scale.php [https://perma.cc/R282-W9XJ] (last visited Sept. 3, 2023).

43. *See* Curran & Parr, *supra* note 42, at 797, 799; *see also The Kinsey Scale*, *supra* note 42.

44. *See* Curran & Parr, *supra* note 42, at 798.

45. *See id.* at 801 ("The follow-up gave evidence of a change in the direction of heterosexuality in 9 cases out of 59 (roughly 1 in 6) about whom sufficient information on the sex life was available; but such change sometimes amounted to no more than one or two points on the Kinsey scale").

produced during the 1960s and 1970s found that efforts to change sexual orientation failed.[46]

What *is* relatively clear are SOCE's harmful effects.[47] One "groundbreaking" study[48] on the harms of SOCE found that, among other negative outcomes, participants experienced depression, suicidal ideation and suicide attempts, and self-esteem issues.[49] The APA "advises parents, guardians, young people, and their families to avoid sexual orientation change efforts that portray homosexuality as a mental illness or developmental disorder."[50] Although evidence of SOCE's effectiveness is not plentiful, the current psychological consensus is that SOCE are ineffective and could seriously harm the majority of participants.[51]

State-level reforms took aim at SOCE in the early 2010s. In 2012, California was the first state to pass legislation banning SOCE,[52] and New Jersey followed suit in 2013.[53] Both California and New Jersey's statutes were immediately subject to free speech challenges.[54] Twenty states and

---

46. *See* AM. PSYCH. ASSOC., *supra* note 18, at 29–30; *see also* Barry Tanner, *A Comparison of Automated Aversive Conditioning and a Waiting List Control in the Modification of Homosexual Behavior in Males*, 5 BEHAV. THERAPY 29, 30 (1974) (stating that "none of [various] studies, however, demonstrated directly that avoidance training was more effective than no treatment at all in changing homosexual behavior").

47. *See* AM. PSYCH. ASSOC., *supra* note 9, at 30 ("Although sound data on the safety of SOCE are extremely limited, some individuals reported being harmed by SOCE. Distress and depression were exacerbated. Belief in the hope of sexual orientation change followed by the failure of the treatment was identified as a significant cause of distress and negative self-image."); *see also* Morrow & Beckstead, *supra* note 9, at 646 (2004) (noting "personal accounts of increased self-hatred, confusion, isolation, and failure that they experienced as a result of undergoing such treatments").

48. *See* Morrow & Beckstead, *supra* note 9, at 646.

49. *See* Shidlo & Schroeder, *supra* note 38, at 249, 254–55.

50. AM. PSYCH. ASSOC., *supra* note 9, at 31.

51. State governments usually regulate professions when professionals receiving a state-issued license provide care. *See* Pickup v. Brown, 728 F.3d 1042, 1055 (9th Cir. 2013), *amended on denial of reh'g*, 740 F.3d 1208 (9th Cir. 2014) ("When professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate."). The basis for what conduct is professional, however, is normally set by professional associations themselves. *See* Shea v. Med. Bd. of Exam'rs, 146 Cal. Rptr. 653, 662 (Ct. App. 1978) (explaining that "in order to be subject to discipline for unprofessional conduct, [a doctor] must have demonstrated an unfitness to practice medicine by conduct which breaches the rules or ethical code of his profession, or conduct which is unbecoming to a member in good standing of that profession").

52. *See* Michael J. Mishak & Patrick McGreevy, *California Lawmakers Advance Ban on Gay 'Conversion' Therapy*, L.A. TIMES (June 1, 2012, 12:00 AM), https://www.latimes.com/archives/la-xpm-2012-jun-01-la-me-legislature-20120601-story.html [https://perma.cc/H859-6FVX]. Incidentally, California's SOCE ban was the same ban at issue in the Ninth Circuit's *Pickup* decision. *See infra* Part II.A.2; *see also Pickup*, 728 F.3d at 1042.

53. *See* Victoria Cavaliere, *New Jersey Poised to Become Second State to Ban Anti-Gay Therapy*, REUTERS (June 24, 2013, 6:24 PM), https://www.reuters.com/article/us-usa-newjersey-gay-idUSBRE95N1EO20130624 [https://perma.cc/APD6-5XZ7]. Like *Pickup*, New Jersey's SOCE ban happened to be the same legislation challenged in the Third Circuit's *King* decision. *See infra* Part II.A.2; *see also* King v. Governor of the State of N.J., 767 F.3d 216 (3d Cir. 2014).

54. *See infra* Parts II.A.1–2.

Washington D.C. currently ban SOCE for minors; however, *Otto's* preliminary injunction bars any SOCE bans from taking effect in Florida, Georgia, and Alabama.[55] Governors in six states and Puerto Rico have partially limited SOCE for minors via executive order[56] by prohibiting use of state or federal funds for SOCE,[57] requiring health care companies to attest that they do not provide SOCE, authorizing state agencies to punish SOCE as an "unfair business practice,"[58] and deeming it an ethical violation for social workers to administer SOCE therapy.[59] The remaining states and territories do not have laws or policies limiting SOCE therapy.[60] Although enumerating the statutory SOCE bans of twenty states and Washington D.C. would be impractical, a brief review of their commonalities informs a comparative analysis of this Note's suggested reforms.

Statutes outlawing SOCE are relatively short, and some states' laws are virtually identical. For example, Illinois's SOCE prohibition is one sentence: "Under no circumstances shall a mental health provider engage in sexual orientation change efforts with a person under the age of 18."[61] California's

---

55. *See Conversion "Therapy" Laws: Statewide Bans*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/conversion_therapy [https://perma.cc/L9H5-4CSX] (last updated Sept. 3, 2023).

56. *See id.*

57. North Carolina and Pennsylvania bar state agencies' use of state funds for SOCE. *See* Matt Clibanoff, *Democratic Governor Signs Order Ending State Funding of Youth 'Conversion Therapy,'* LAW & CRIME (Aug. 2, 2019, 6:02 PM), https://lawandcrime.com/high-profile/democratic-governor-signs-order-ending-funding-for-conversion-therapy/ [https://perma.cc/KLX8-BAE6]; *see also* Gillian McGoldrick, *Pennsylvania Protects LGBTQ Residents from Conversion Therapy*, GOVERNING (Aug. 17, 2022), https://www.governing.com/now/pennsylvania-protects-lgbtq-residents-from-conversion-therapy [https://perma.cc/2SAR-BPTT]. Michigan and Wisconsin, in addition to banning state agencies from using state funds for SOCE, also prohibit using federal funds for SOCE. *See* Beth LeBlanc, *Whitmer Bans State, Federal Funding for Conversion Therapy on Minors*, DETROIT NEWS (June 14, 2021, 4:46 PM), https://www.detroitnews.com/story/news/local/michigan/2021/06/14/whitmer-bans-state-federal-funding-conversion-therapy-minors/7688741002/ [https://perma.cc/2ZNM-T2BM]; *see also* Anagha Srikanth, *Wisconsin Bans Taxpayer Money from Funding Conversion Therapy*, HILL (June 4, 2021), https://thehill.com/changing-america/respect/equality/556883-wisconsin-bans-taxpayer-money-from-funding-conversion/ [https://perma.cc/T4G8-4ZKZ].

58. In July 2021, Minnesota governor Tim Walz issued an executive order mandating the Minnesota Departments of Health, Commerce, and Human Rights to prohibit SOCE as "an unfair or deceptive act or practice" and allowing each agency to pursue civil actions. *See* Minn. Exec. Order. No. 21-25 (July 15, 2021), https://www.lrl.mn.gov/archive/execorders/21-25.pdf [https://perma.cc/2R5E-U2W9]. Walz's executive order, signed approximately two years before publication of this Note, is likely too new to determine whether it has been successful. However, Walz's executive order is similar to Representative Ted Lieu's Therapeutic Fraud Prevention Act (TFPA) and signals support for a consumer protection approach to limiting SOCE. *See infra* Part II.B.

59. In June 2021, North Dakota's Administrative Rules Committee narrowly approved a rule establishing an ethical violation for licensed social workers providing SOCE. *See* Trudy Ring, *North Dakota Finds Novel Way to Ban Most Conversion Therapy*, ADVOC. (June 11, 2021, 5:01 PM), https://www.advocate.com/politics/2021/6/11/north-dakota-finds-novel-way-ban-most-conversion-therapy [https://perma.cc/T4FP-LTT3]. That rule protects North Dakotans regardless of age but excludes religious organizations from regulation. *See id.*

60. *See Conversion "Therapy" Laws: Statewide Bans*, *supra* note 55.

61. 405 ILL. COMP. STAT. 48/20 (2023).

statute is the same, but it replaces "person" with "patient" and "under the age of 18" with "under 18 years of age."[62] Much like Illinois and California, most states ban SOCE for minors or adults with appointed guardians but not other groups of people.[63] Some statutes define SOCE, excluding gender transition counseling or therapy that provides "acceptance, support and understanding . . . as long as the counseling is not provided for the purpose of attempting to change the client's sexual orientation or gender identity."[64] Beyond those limited instances, however, statutes banning attempts to alter sexual orientation or gender identity are nearly the same. If courts applied *Otto's* free speech analysis to SOCE bans as currently written, they, too, would likely fail strict scrutiny.

B. The First Amendment: Free Speech Analysis

Challenges to SOCE bans, including *Otto*, rely on First Amendment free speech claims. The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech . . . ."[65] Whether a law abridges speech depends substantially on a distinction between content-based and content-neutral speech; "above all else, the First Amendment means that [the] government has no power to restrict expression because of its message, its ideas, its subject matter, or its *content*."[66] Regulations restricting certain types of content are "presumptively invalid"[67] and must satisfy strict scrutiny to avoid invalidation.[68] Strict scrutiny requires that a law be "narrowly tailored" to achieve a "compelling government interest."[69] Content-neutral laws and regulations, on the other hand, are subject to intermediate

62. *See* CAL. BUS. & PROF. CODE § 865.1 (Deering 2023).

63. *See, e.g.*, D.C. CODE § 7-1231.14a (2022) ("A provider shall not engage in sexual orientation change efforts with a consumer who is a minor, or a consumer, regardless of age, for whom a conservator or guardian has been appointed"); *see also* OR. REV. STAT. § 675.850 (2023) ("A mental health care or social health professional may not practice conversion therapy if the recipient of the conversion therapy is under 18 years of age."); VT. STAT. ANN. tit. 18, § 8352 (2021) ("A mental health care provider shall not use conversion therapy with a client younger than 18 years of age.").

64. OR. REV. STAT. § 675.850(2)(B)(ii) (2023).

65. U.S. CONST. amend. I.

66. Police Dep't of City of Chi. v. Mosley, 408 U.S. 92, 95 (1972) (emphasis added).

67. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

68. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641–42 (1994).

69. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273–74 (1986) (describing strict scrutiny in relation to a minority-oriented layoff policy). To be "narrowly tailored," a law must be *necessary* to a compelling government interest. Moreover, a state's law must be the *least restrictive means possible* to regulate a subject or entity. If a law does not use the least restrictive means possible, it cannot survive strict scrutiny. *See* Ark. Writers' Project v. Ragland, 481 U.S. 221, 231 (explaining that, under strict scrutiny, "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end"); *see also* McLaughlin v. Florida, 379 U.S. 184, 196 (1964) (requiring that a law subject to strict scrutiny be "necessary . . . to the accomplishment of a permissible state policy").

scrutiny.[70] To satisfy intermediate scrutiny, a law must be "substantially related" to an "important" governmental interest.[71]

A law is content-neutral if it is both viewpoint-neutral and subject matter–neutral.[72] Viewpoint neutrality requires that the government abstain from regulating the ideology of a message.[73] In *Boos v. Barry*,[74] for example, the Supreme Court held a Washington, D.C. ordinance prohibiting protestors from displaying signs critical of foreign governments within 500 feet of those governments' embassies to be unconstitutional. On its face, the ordinance disfavored certain expressed ideologies.

Subject matter neutrality, meanwhile, restrains governments from policing the topic of speech.[75] *Carey v. Brown*,[76] for example, was a clear instance of impermissible subject matter restriction: there, the Supreme Court held that a Chicago ordinance banning all picketing on matters unrelated to labor was unconstitutional.[77] Chicago's ordinance plainly discriminated against pickets based on their subject matter and, thus, was not neutral.[78] When the government regulates the viewpoint or subject matter of speech, the law is content-based and thus subject to strict scrutiny.

For all other speech—speech that does not favor a particular viewpoint or exclude certain subject matter—the "baseline rule" is rational basis review, whereby a law or regulation is presumptively constitutional.[79] To survive the rational basis test, a law must bear a rational relation to a legitimate government aim.[80] If a legislature has a conceivable, rational basis for enacting a law, then the law is constitutionally valid, as "it is for the legislature, not the courts, to balance its advantages and disadvantages."[81]

Some types of speech are afforded lesser or no protection, even when the state regulates that speech by content: obscenity,[82] fighting words,[83] and

---

70. *See Turner*, 512 U.S. at 642.

71. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (referring to intermediate scrutiny in the context of gender classifications and equal protection challenges); *see also* United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (applying intermediate scrutiny to a law prohibiting the destruction of Vietnam war "draft cards").

72. Rosenberger v. Rector of Univ. of Va., 515 U.S. 819, 828 (1995) ("[I]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.").

73. *See id.* at 829.

74. 485 U.S. 312 (1998).

75. *See* Carey v. Brown, 447 U.S. 455, 462 (1980).

76. 447 U.S. 455 (1980).

77. *See id.*

78. *See id.* at 470.

79. Frederick Schauer, *On the Distinction Between Speech and Action*, 65 EMORY L.J. 427, 430 (2015).

80. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955) (holding that a law regulating opticians was rationally related to a legitimate government objective); *see also* Ferguson v. Skrupa, 372 U.S. 726, 732 (1963) (determining that relief from a law prohibiting debt adjustment except as done by lawyers "lies not with [the Court] but with the body constituted to pass laws for the State of Kansas").

81. *See Williamson*, 348 U.S. at 487.

82. *See* Roth v. United States, 354 U.S. 476 (1957).

83. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

incitement of illegal activity,[84] to name a few. Prior to 2018, both the Third and Ninth Circuits also subjected "professional speech" to lesser scrutiny.[85] Professional speech was defined as speech "within the confines of the professional relationship"[86] that relies on a professional's "expert knowledge and judgment."[87] Under the Third and Ninth Circuits' approaches, strict scrutiny would not apply to content-based laws regulating professional speech.[88]

However, in *National Institute of Family & Life Advocates v. Becerra*[89] (*NIFLA*), the Supreme Court refused to carve out an exception for professional speech. The Court maintained that it "ha[d] not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by 'professionals.'"[90] Accordingly, professional speech can still be subjected to First Amendment analysis.

The *Otto* court, like *NIFLA*, rebuked the "professional speech exception" as applied to SOCE.[91] Addressing the two Florida ordinances banning talk-based SOCE, the court warned that "it is not enough for the [government] to identify a compelling interest . . . . [T]hey must prove that the ordinances 'further[]' that compelling interest and are 'narrowly tailored to that end.'"[92] In so holding, the Eleventh Circuit created ambiguity in the level of scrutiny applicable to SOCE laws, leaving their fate uncertain.

NIFLA, however, did recognize two important free speech exceptions warranting lesser scrutiny: (1) laws mandating professionals to provide factual, noncontroversial information in their commercial speech and (2) professional conduct incidentally implicating speech.[93] As for speech incidental to professional conduct, *NIFLA* cited *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[94] In the context of physician speech and abortion, the *Casey* Court noted that "the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State."[95]

---

84. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

85. *See* King v. Governor of N.J., 767 F.3d 216, 235–37 (3rd Cir. 2014) (determining that like commercial speech, professional speech is subject to intermediate scrutiny); *see also* Pickup v. Brown, 740 F.3d 1208, 1232 (9th Cir. 2014) (holding that legislation banning SOCE is subject to rational basis review).

86. *See Pickup*, 740 F.3d at 1228.

87. *See King*, 767 F.3d at 232.

88. *See* Nat'l Inst. Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018).

89. 138 S. Ct. 2361 (2018).

90. *Id.* at 2371–72.

91. Otto v. City of Boca Raton, 981 F.3d 854, 867 (11th Cir. 2020) ("The idea that the ordinances target 'professional speech' does not loosen the First Amendment's restraints.").

92. *Id.* at 868 (quoting Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015)).

93. *See NIFLA*, 138 S. Ct. at 2732.

94. *See id.*; *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled on other grounds by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

95. *Casey*, 505 U.S. at 884. States' regulatory authority over mental health professionals, like other medical professionals, is expansive and long recognized. *See* Coggeshall v. Mass. Bd. of Registration of Psychs., 604 F.3d 658, 664–65 (1st Cir. 2010) ("[I]t needs little embellishment to establish that the state has a profound interest in the licensure of health-care

This Note's suggested legislative reforms invoke the commercial speech exception. The Supreme Court has struggled to articulate the "precise bounds" of "commercial speech."[96] *Bolger v. Youngs Drug Products Corp.*[97] recognized three characteristics that, together, render speech commercial[98]: the speech (1) contains advertisements, (2) refers to a specific product, and (3) is produced by someone with an economic motivation. To determine whether a government may regulate commercial speech, the Supreme Court set out a helpful four-part analysis in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*[99]: (1) the relevant speech must concern lawful activity and not be misleading, (2) the government's interest must be substantial, (3) government regulations must advance that interest, and (4) those regulations must not be more extensive than necessary to serve that interest.[100] So long as the relevant commercial speech concerns lawful activity and is not misleading, courts use intermediate scrutiny.[101] Untruthful speech—commercial or noncommercial—remains unprotected and is subject to the default rational basis standard.[102] Currently, states have not taken consumer protection– and commercial speech–oriented approaches to banning SOCE.

II. THE FEDERAL COURTS OF APPEALS' DIFFERING APPROACHES TO SOCE AND PROPOSED LEGISLATIVE ALTERNATIVES

SOCE has been the subject of discussion and disagreement in courtrooms and legislatures across the United States. Federal circuit courts, accordingly, have applied varying levels of scrutiny to seemingly identical SOCE bans. Part II.A analyzes these decisions and their consequences for SOCE prohibitions. Part II.B lays out unique state and federal consumer protection–based approaches to banning SOCE, which, in turn, form the basis for this Note's legislative recommendations.

A. The Federal Courts of Appeals Disagree on the Applicable Level of Scrutiny

The circuit courts have not reached a consensus as to what level of scrutiny to apply to legislation banning SOCE, applying rational basis review, intermediate scrutiny, or strict scrutiny across different cases. The standard to which SOCE bans are held, importantly, determines their fate. Subsection

---

professionals (such as psychologists) and the maintenance of appropriate standards of practice for such professionals . . . . [I]t would serve no useful purpose to repastinate that well-plowed ground.").

96. Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 637 (1985).
97. 463 U.S. 60 (1983).
98. *See id*. at 66–68.
99 447 U.S. 557 (1980).
100 *See id.* at 566.
101. *See id.* at 573 (Blackmun, J., concurring).
102. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771–72 (1976) (explaining that "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake"); *see also* Gertz v. Robert Welch, Inc. 418 U.S. 323, 340 (1974) (noting that "the erroneous statement of fact is not worthy of constitutional protection").

Part II.A.1 delineates the Ninth Circuit's rational basis, conduct-incidental-to-speech approach. Part II.A.2 describes the Third Circuit's professional speech carveout and intermediate scrutiny analysis. Part II.A.3 evaluates *Otto's* content-based, strict scrutiny analysis.

1. A Rational Basis Approach: Ninth Circuit Defers to the Legislature Under Rational Basis Review

In *Pickup v. Brown*[103] and *Welch v. Brown*,[104] the United States District Court for the Eastern District of California heard challenges seeking to enjoin California Senate Bill (SB) 1172, which outlawed providing SOCE services to minors.[105] Similar to later SOCE bans, SB 1172 was short: it stated that "[u]nder no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age."[106] The *Welch* court determined that SB 1172 was neither content-neutral nor viewpoint-neutral, applied strict scrutiny, and granted the plaintiffs' request for a preliminary injunction to enjoin the law.[107] Conversely, the *Pickup* court—finding that no fundamental speech rights were implicated because SB 1172 regulated SOCE therapists as professionals—applied rational basis review and denied preliminary relief.[108] The Ninth Circuit reviewed the two decisions on consolidated appeal.[109]

Framing SOCE therapists' free speech rights in the broader sphere of professional speech, the Ninth Circuit analyzed SB 1172's constitutionality on a speech-to-conduct continuum.[110] At one end of the spectrum, First Amendment protection is strongest when a professional engages in public dialogue.[111] The court reasoned that professionals' public speech, unlike

---

103. 42 F. Supp. 3d 1347 (E.D. Cal. 2012), *aff'd in part, rev'd in part,* 728 F.3d 1042 (9th Cir. 2013).

104. 907 F. Supp. 2d 1102 (E.D. Cal. 2012), *rev'd sub nom.* Pickup v. Brown, 728 F.3d 1042 (9th Cir. 2013).

105. CAL. BUS. & PROF. CODE § 865.1 (West 2013). SB 1172 was enacted in 2013. *Id.*

106. *See id.*

107. *See Welch*, 907 F. Supp. 2d at 1121–22.

108. *See Pickup*, 42 F. Supp. 3d at 1362.

109. *See* Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014) [hereinafter *Pickup II*].

110. *See Pickup II*, 740 F.3d at 1227. *Pickup II's* "continuum" was not a novel conception: Justice Byron White's concurring opinion in *Lowe v. SEC* noted that "[a]t some point, a measure is no longer a regulation of a profession but a regulation of speech or of the press; beyond that point, the statute must survive the level of scrutiny demanded by the First Amendment. *Lowe v. SEC*, 472 U.S. 181, 230 (1985) (White, J., concurring). Determining the "location" of that point, according to Justice White, was a judicial duty. *See id.*; *see also* 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, 2036 (2015) ("The continuum ranges from professional speech—speech that occurs between a professional and client within the 'personal nexus'—to public speech—speech that occurs outside of the personal nexus and professional advice-giving role and is protected by the First Amendment.").

111. *See id.*; *see also* Snyder v. Phelps, 562 U.S. 443, 451–52 (2011) ("[S]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'"(quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–759 (1985))).

NIFLA's incidental professional conduct exception,[112] receives extra protection because "communicating to the *public* on matters of *public concern* lies at the core of First Amendment values."[113] To illustrate, if SB 1172—instead of prohibiting SOCE therapy—stated that "no SOCE therapist shall publicly advocate for SOCE therapy," SB 1172 would have been unconstitutional under the Ninth Circuit's analysis.

Professional speech, or speech that occurs "within the confines of a professional relationship,"[114] falls in the middle of the continuum and warrants lesser First Amendment protection. "[W]ithin the confines of a professional relationship, First Amendment protection of a professional's speech is somewhat diminished."[115] Professional speech falls within the "confines of a professional relationship" when a professional (a doctor, for example) speaks to a patient in order to provide medical information or advice.[116]

Professional conduct that incidentally involves speech, which falls on the opposite end of the continuum, merits the weakest free speech protections.[117] Accordingly, the fact that SOCE therapists might use a talk-based form of treatment did not turn SB 1172 into a speech regulation.[118] Moreover, the Court found that SB 1172 regulated SOCE therapists' conduct and was subject to rational basis review.[119] Under rational basis review, the court determined that SB 1172 was rationally related to the legitimate government purpose of protecting the well-being of minors and shielded the law from the free speech challenge.[120] The Ninth Circuit did not, however, provide a doctrinal basis on which to distinguish professional conduct from speech within a professional relationship or to discuss the applicable levels of scrutiny for other points along its continuum.[121]

---

112. *See NIFLA*, 138 S. Ct. 2361, 2372 (2018).
113. *Pickup II*, 740 F.3d at 1227.
114. *Id.* at 1228.
115. *Id.*
116. *See id.*
117. *See id.* at 1231.
118. *See* Timothy Zick, *Professional Rights Speech*, 47 ARIZ. ST. L.J. 1289, 1305 (2015).
119. *See Pickup II*, 740 F.3d at 1231 ("Because SB 1172 regulates only treatment, while leaving mental health providers free to discuss and recommend, or recommend against, SOCE, we conclude that any effect it may have on free speech interests is merely incidental. Therefore, we hold that SB 1172 is subject to only rational basis review . . . ."). *Pickup II's* distinction between SOCE recommendations and words spoken during treatment is blurry. The court compared SOCE recommendations to medical marijuana, explaining that *recommending* medical marijuana was protected speech under the First Amendment, but that *prescribing* it would be regulable conduct incidental to speech. *See id.* at 1226. In effect, this would mean that recommending SOCE would be meaningless because SOCE therapists could not practice. Nonetheless, *Pickup II* found this line-drawing persuasive. *See id.*
120. *Id.* at 1231.
121. *See* Victoria Hamscho, *NIFLA v. Becerra: The First Amendment and the Future of Mandatory Disclosure Laws*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 269, 288–89 (2020) ("[*Pickup II*], however, did not provide a doctrinal basis for distinguishing professional conduct from speech that occurs within the confines of the professional relationship. Moreover, [*Pickup II*], did not discuss the level of scrutiny applicable to speech that occurs as part of such professional relationship. Instead, the Ninth Circuit ultimately found that the ban involving speech related to SOCE therapy implicated only professional conduct subject to rational basis

Assuming that, if the Ninth Circuit's approach became the prevailing view and courts determined that SOCE therapy is conduct that incidentally implicates speech, then laws banning or limiting SOCE would likely survive free speech challenges. Although a law subject to rational basis review must be rationally related to a legitimate government objective,[122] courts need not scrutinize how "rational" a legislature's SOCE-related law is; it is enough that the legislature's measures *could be* conceived of as rational.[123] Under this deferential standard of review, laws limiting or banning SOCE would survive judicial scrutiny in almost all instances.

2. Professional Speech "Carveout": Third Circuit Applies Intermediate Scrutiny

In *King v. Governor of the State of New Jersey*,[124] the Third Circuit addressed a challenge to Assembly Bill A3371 ("A3371") by licensed counselors providing SOCE "talk therapy."[125] Like SB 1172, A3371 prohibited licensed professionals from engaging in SOCE with minors.[126] Specifically, A3371 mandated that "[a] person who [was] licensed to provide professional counseling . . . [could not] engage in sexual orientation change efforts with a person under 18 years of age."[127] Nonetheless, the court held that communications in SOCE talk therapy constituted speech covered by the First Amendment, not conduct.[128] Tentatively carving out a new category of covered speech, the Court set out to decide on an appropriate level of scrutiny.

In its analysis, the *King* court compared professional speech to commercial speech,[129] which warrants lesser scrutiny under *NIFLA*.[130] According to the Third Circuit, similar to commercial speech, professional speech serves an "informational function" that is valuable to listeners.[131] Professionals

---

review"). *Pickup II's* lack of doctrinal basis and failure to articulate the appropriate levels of scrutiny beyond professional conduct is problematic. Other courts may easily determine that *Pickup II* incorrectly placed SOCE on their own continuum. Moreover, some courts could determine that SOCE are part of a professionals' public dialogue or fall within the confines of the professional relationship, which could subject SOCE to higher scrutiny. Although this Note assumes courts would similarly determine that SOCE was professional conduct, *Pickup II* leaves the door open for courts to subject SOCE to higher scrutiny. That ambiguity could be ample reason alone to take a legislative approach, avoiding the task of convincing the Supreme Court that SOCE therapy is professional conduct. *See infra* Part III.

122. *See* Nebbia v. New York, 291 U.S. 502, 537 (1934) (explaining that if laws "have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory," they survive rational basis scrutiny).

123. *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955) (noting that under the rational basis test "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it").

124. 767 F.3d 216 (3d Cir. 2014).

125. *See id.*

126. *See* N.J. STAT. ANN. § 45:1–54 (West 2013). A3371 was enacted in 2013.

127. *Id.*

128. *See King*, 767 F.3d at 224–25.

129. *See id.* at 233; *see also supra* Part I.B.

130. *See NIFLA*, 138 S. Ct. 2361, 2371–72 (2018).

131. *See King*, 767 F.3d at 234.

provide specialized knowledge that, although available to the public through journal publications and public speeches, is more readily accessible to members of the public through professional relationships.[132] For example, a patient who receives blood testing may not understand the meaning of their test results. A physician's expertise and explanation would thus be critical for that patient to get effective care. "[P]rofessional speech, like commercial speech, serves as an important channel for the communication of information that might otherwise never reach the public."[133] Connecting the informational functions of commercial and professional speech, *King* held that laws regulating SOCE should be subject to intermediate scrutiny.[134]

The Third Circuit recognized that states have traditionally had wide authority to regulate professionals to protect the public from ineffective or harmful professional services.[135] Applying intermediate scrutiny, the court found substantial evidence indicating that SOCE are harmful and ineffective.[136] Professional and scientific communities have reached a strong consensus on SOCE's effects, and many organizations "concluded that there is no credible evidence that SOCE counseling is effective."[137] Accordingly, the court held that A3371 "directly advance[d]" New Jersey's interest in protecting its citizens from ineffective or harmful practices and was "not more extensive than necessary to serve that interest."[138]

A middle-of-the-road method of analyzing First Amendment protection for SOCE therapy, the Third Circuit's decision to use intermediate scrutiny would hold SOCE limitations and bans to a higher standard than the Ninth Circuit's standard.[139] Unlike with the deferential approach of rational basis review, courts applying intermediate scrutiny would inquire into whether SOCE bans or limitations substantially advanced the state's interest in protecting the LGBTQ+ community from SOCE.[140] Were the Third Circuit's approach to prevail, the fate of laws banning or limiting SOCE would depend largely on how effective those laws were at protecting the physical and mental well-being of LGBTQ+ patients.[141]

---

132. *Id.*
133. *Id.*
134. *See id.* at 235.
135. *See id.*
136. *See id.* at 238–39.
137. *Id.* at 238.
138. *Id.* at 237 (quoting Cent. Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980)). It should be noted that the meaning of "necessary" does not imply that A3371 needed to be the *least restrictive* means of outlawing SOCE for minors. Such laws do not have to represent "the single best disposition but one whose scope is in proportion to the interest served." *Id.* at 239 (quoting Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 188 (1999)).
139. *Id.* at 238.
140. *See* Abner S. Greene, "*Not in My Name" Claims of Constitutional Right*, 98 B.U. L. REV. 1475, 1489 (2018) (describing the possible application of intermediate scrutiny in the context of compelled speech regarding abortions).
141. Federal district courts have wrestled with how to apply *King*'s intermediate scrutiny standard for SOCE, especially in light of *NIFLA*. *See, e.g.*, *Vazzo v. City of Tampa*, No. 17-CV-2896, 2019 WL 1048294, at *7 (M.D. Fla. Jan. 30, 2019). Similar to *Otto*, *Vazzo* involved SOCE therapist free speech challenges to a Tampa city ordinance banning SOCE

3. *Otto* Shakes the Balance: The Eleventh Circuit Applies Strict Scrutiny

The *Otto* court's decision diverged from other circuits', injecting uncertainty into the fate of SOCE bans. In *Otto*, two family and marriage therapists providing talk-based SOCE therapy sought to enjoin enforcement of two ordinances: one passed by Palm Beach County and another passed by the city of Boca Raton, both in 2017.[142] Based on a model ordinance provided by the Palm Beach County Human Rights Council,[143] Boca Raton's ordinance made it "unlawful for any provider to practice [SOCE] on an individual who is a minor regardless of whether the provider receives monetary compensation in exchange for such services."[144] Palm Beach County's ordinance contained identical operative language.[145]

The court first concluded that the two ordinances were content- and viewpoint-based speech restrictions.[146] Relying on the Supreme Court's decision in *NIFLA*, the Eleventh Circuit was similarly reluctant to carve out a professional speech exception that would give more leeway to government regulation of professionals.[147] Thus, *Otto* applied strict scrutiny.[148]

Determining whether the Florida ordinances were narrowly tailored to a compelling government interest, the court criticized studies presented by the government: "when examined closely, these documents offer assertions rather than evidence, at least regarding the effects of purely speech-based SOCE."[149] Regarding the APA's conclusions, the court found a "complete lack" of "rigorous recent prospective research."[150] Accordingly, the court found that the Palm Beach County and Boca Raton ordinances were insufficiently tailored to an interest in protecting LGBTQ+ youth and failed to survive strict scrutiny.[151]

Under the Eleventh Circuit's approach to SOCE bans, any legislation banning or limiting SOCE would likely not survive judicial interrogation. Laws or regulations subject to strict scrutiny are "presumptively invalid,"[152]

---

therapy. *See id.* at *1. During the pleading stage of *Vazzo*, the court rejected a variety of Tampa's motions to dismiss the free speech claims under *King*'s intermediate scrutiny or a content-based strict scrutiny standard. *See id.* at *7. Although *Vazzo* determined that SOCE therapists' claims were sufficiently pleaded on a strict scrutiny basis, its holdings demonstrate district courts' difficulty in applying *King*.

142. *See* Otto v. City of Boca Raton, 981 F.3d 854, 859–60 (11th Cir. 2020).

143. *See* Memorandum from Diana Grub Frieser, City Att'y, Boca Raton, to Will Haynie, Mayor, Boca Raton, and City Council, Boca Raton (Sept. 12, 2017) (on file with author).

144. BOCA RATON, FL., CODE OF ORDINANCES ch. 9, art. VI, § 9-106 (2017) (alteration in original).

145. Palm Beach Cnty., Fl., Ordinance 2017-046, § 5 (Dec. 19, 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.").

146. *See Otto*, 981 F.3d at 864.

147. *See id.* at 867; *see also NIFLA*, 138 S. Ct. at 2731–72.

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

149. *Id.* at 868.

150. *Id.*

151. *See id.* at 870.

152. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); *see also supra* notes 57–58 and accompanying text.

and states would bear the heavy burden of proving that anti-SOCE legislation advanced a compelling state interest. States' compelling interests in patient health could be served by SOCE bans, but narrowing SOCE prohibitions to states' compelling interests in patient health would require showing that SOCE therapy is clearly harmful.[153] Judge Beverly B. Martin's dissent found that it was; the record contained a "mountain of rigorous evidence" indicating that SOCE was harmful.[154]

Judge Martin's dissent, however, is not a Supreme Court opinion; recent First Amendment jurisprudence has "signal[ed] the [Roberts] Court's willingness to entertain new or aggressive forms of deregulatory First Amendment challenges."[155] Put differently, the current Supreme Court has been especially willing, in efforts to limit government regulation, to hear experimental free speech arguments.[156] As applied to SOCE, the Roberts Court would be more inclined to limit states' ability to prohibit SOCE, even if plaintiffs' claims are far-fetched. Were this approach adopted by the Supreme Court, SOCE restrictions would likely fail.

B. Consumer-Protection Alternatives to Banning SOCE

Outside of conventional SOCE bans, litigators and legislatures have found creative ways to discourage SOCE therapy. One of the most successful avenues has been a consumer fraud approach. This is not entirely novel: in a recent case, *Ferguson v. JONAH*, the court granted civil damages for plaintiffs endangered by SOCE under consumer fraud statutes.[157] The

153. Discussing the need to narrowly tailor SOCE in order to further patient health, *Otto* stated that SOCE did not present clear harm. *See Otto*, 931 F.3d at 868–69. *Otto*'s support for this assertion is lackluster: the majority focused its attention "on the APA's 2009 task force report because it 'performed a systematic review of the peer-reviewed literature' to assess SOCE." *See id.* at 869 n.8; *see also* AM. PSYCH. ASSOC., *supra* note 18. The plaintiffs similarly referenced a passage from the report, summarily asserting that "there [was] no empirical evidence of harm" from SOCE. *See* Reply Brief for Plaintiffs-Appellants at 11, *Otto*, 981 F.3d 854 (No. 18-CV-80771). Relying solely on that report, however, ignores a large amount of evidence and fails to review any studies directly. Although scientifically rigorous early studies of SOCE's harms were lacking, numerous other studies have filled the literature, some of which were used in the APA's 2009 report. *See, e.g.*, Shidlo & Schroeder, *supra* note 38; Morrow & Beckstead, *supra* note 9. If the *Otto* court was easily willing to conclude SOCE did not pose clear harms to patient health, it should have, at minimum, been just as willing to consider the literature itself.

154. *See Otto*, 853 F.3d at 878 (Martin, J., dissenting).

155. Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323, 332 (2016); *see also* Citizens United v. Fed. Election Comm'n, 588 U.S. 310, 340 (2010) ("[T]he First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers . . . As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content." (alteration in original)); *see also* Sorrell v. IMS Health Inc., 564 U.S. 552, 571 (2011) ("In the ordinary case it is all but dispositive to conclude that a law is content based and, in practice, viewpoint discriminatory.").

156. *See* Garden, *supra* note 155, at 332.

157. *See, e.g.*, Ferguson v. JONAH, 136 A.3d 447 (N.J. Super. Ct. Law Div. 2014). There, a jury found that JONAH, a nonprofit religious organization providing SOCE, violated the New Jersey Consumer Fraud Act (CFA). *See id.*; *see also* N.J. STAT. ANN. § 56:8-2 (West

Ferguson court even excluded the expert testimony of the defendant, who was a SOCE therapist.[158] Part II.B.1 describes Representative Ted Lieu's proposed Therapeutic Fraud Prevention Act (TFPA), which clarifies that the Federal Trade Commission (FTC) has the statutory authority to regulate SOCE. Part II.B.2 briefly reviews states' current deceptive commercial practice statutes and determines where SOCE fits in.

1. The Therapeutic Fraud Prevention Act: Empowering the FTC to Regulate and Penalize SOCE Therapy

The latest federal attempt to outlaw SOCE has been Representative Ted Lieu's proposed act, the TFPA. Specifically, the TFPA would amend the Federal Trade Commission Act (FTCA),[159] mandating that the FTC treat SOCE therapy as an "unfair" or "deceptive" act or practice.[160] In particular,

---

2023). The court approved of treble damages, explaining that the CFA's purpose was to compensate fraud victims for their loss, punish wrongdoers through treble damages, and attract competent counsel to counteract the scourge of fraud. *See* JONAH, 136 A.3d at 452–53. Awarding damages, the court ordered payment of both the costs of JONAH's SOCE therapy and post-JONAH treatment costs, which were categorized as "damages sustained." *See id.* Moreover, the court required JONAH to pay treble damages for both its SOCE therapy and victims' post-therapy costs. *See id.* Similar punishments could effectively deter SOCE therapists from profiteering off the false premise that sexual orientation is changeable.

158. The standard for expert testimony reliability in *Ferguson v. JONAH*, a case taking place in New Jersey, was the *Frye* standard. *See* AQUILOGIC, EXPERT TESTIMONY AND THE DAUBERT AND FRYE STANDARDS 2 (2014), https://www.aquilogic.com/pdf/Expert%20Testimony%20and%20the%20Daubert%20and%20Frye%20Standards.pdf [https://perma.cc/5R3E-JVKX]; *see also* Ferguson v. JONAH, No. HUDL547312, 2015 WL 609436, at *6 (N.J. Super. Ct. Law Div. Feb. 5, 2015). Under *Frye*, expert scientific testimony is reliable and admissible evidence only if it has "gained general acceptance in the particular field in which it belongs." Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). Moreover, the court in *JONAH* effectively determined that SOCE expert testimony is not generally accepted within the mental health profession. *See JONAH*, 2015 WL 609436, at *10 ("[One JONAH expert] reject[ed] the DSM, disagreeing with the generally accepted understanding that homosexuality is a normal variation of human sexuality, and instead believe[d] homosexuality is a developmental problem that can be fixed through SOCE."). Under the more lenient federal *Daubert* standard, SOCE expert testimony still may not be reliable. *Daubert* allows a court to weigh multiple factors, in addition to *Frye's* general acceptance standard: whether a scientific technique or theory has methodology that can be tested, is subject to peer review, and has known or potential rates of error. Daubert v. Merrell Dow. Pharms., Inc., 509 U.S. 579, 593–94 (1993). SOCE studies suggesting that sexual orientation is alterable pose significant methodology issues, may or may not be subject to peer review, and exhibit error rates that nullify their hypotheses. *See supra* Part I.A. Under either standard used to determine whether expert testimony is reliable, SOCE would likely flounder. Thus, *Otto*'s reliance on professional associations alone is misplaced; if evidence law would deem SOCE expert testimony to be unreliable in any capacity, courts should not validate SOCE and determine that it is not deceptive under a faulty free speech basis.

159. *See* Federal Trade Commission Act, 15 U.S.C. §§ 41–58.

160. *See id.* § 57(a); *see also* Therapeutic Fraud Prevention Act, H.R. 4146, 117th Cong. (2021). The TFPA defines SOCE as an "unfair" *or* "deceptive" act or practice, even though the FTC's prior policy guidance suggests that SOCE would not fall within the FTC's definition of "unfair." *See supra* note 159 and accompanying text. Should Congress reintroduce the TFPA in future legislative sessions, it would be wise to alter the TFPA's language and regard SOCE as "deceptive" acts or practices, not "unfair" *or* "deceptive." Although it may seem trivial, future FTC suits could be hampered if those suits relied on proving that SOCE was not reasonably avoidable by its participants and would therefore be unfair.

§ 4(a) of the TFPA would outlaw[161]: (1) providing SOCE to any individual; (2) advertising SOCE while claiming that SOCE can change sexual orientation or reduce or eliminate same-sex attractions, or while asserting that such efforts are harmless or without risk; and (3) knowingly assisting or facilitating SOCE while receiving compensation for such practices or treatment. Under § 4(b) and in accordance with the Administrative Procedure Act,[162] the FTC could promulgate regulations to enforce § 4(a).[163] Violations of the FTC's TFPA-related regulations would be subject to the same civil penalties as other § 5 FTCA violations.[164] Combined with state-level penalties, a prospective $50,000 fine for each SOCE incident would provide ample deterrence.

Apart from including SOCE in the definition of "unfair or deceptive," the TFPA does not indicate whether SOCE therapy would be unfair *or* deceptive, as opposed to unfair *and* deceptive. Although the FTC would assumedly have the power to regulate SOCE under the FTCA, federal agencies have distinguished between acts or practices that were unfair and acts or practices that were deceptive.[165] Without clarifying whether SOCE therapy would be unfair or deceptive, the TFPA leaves the FTC with broader regulatory authority that is still hazy under the FTCA. That authority could be limited by wary courts, so specifying whether SOCE are unfair *or* deceptive is worth an inquiry.

To determine whether the FTC could regulate SOCE as an "unfair or deceptive trade or practice," it is necessary to look at the FTCA's text.[166] As enacted in 1914, the FTCA prohibited "unfair methods of competition in commerce."[167] In what is now part of FTCA § 5, Congress directed the FTC to prevent "unfair or deceptive acts or practices in commerce,"[168] in light of concerns for consumer safety.[169] Although the FTCA defines "unfair or deceptive" for the purposes of foreign commerce, the Act fails to do so in the domestic context.[170] Congress "left the concept flexible to be defined with

161. *See* Therapeutic Fraud Prevention Act, H.R. 4146.

162. *See* Administrative Procedure Act, 5 U.S.C. § 553.

163. *See* Therapeutic Fraud Prevention Act, H.R. 4146, § 4(b).

164. *See id.* § 4(b)(2)(A); *see also* 15 U.S.C. § 45(m)(1) (permitting the FTC to bring civil suits for no more than $10,000 per violation). As per the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, the maximum civil penalty for a § 5 violation has increased to $46,517 for 2022. *See* Federal Civil Penalties Inflation Adjustment Act of 2015, Pub. L. No. 114-74, 129 Stat. 599 (codified as amended in scattered sections of the U.S.C.); *see also FTC Publishes Inflation-Adjusted Civil Penalty Amounts for 2022*, FTC (Jan. 6, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/01/ftc-publishes-inflation-adjusted-civil-penalty-amounts-2022 [https://perma.cc/SE3P-H3FK].

165. *See infra* note 169 and accompanying text.

166. *See id.*

167. Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 719 (1914), *amended by* 15 U.S.C. § 45(a)(1).

168. Wheeler-Lea Act, ch. 49, § 5, 52 Stat. 111 (1938) (codified at 15 U.S.C. § 45(a)(1)).

169. FTC v. Colgate-Palmolive Co., 380 U.S. 374, 384 (1965).

170. For foreign commerce, the FTCA defines "unfair or deceptive acts or practices" as those which will "cause or are likely to cause reasonably foreseeable injury within the United States;" *or* which "involve material conduct within the United States." *See* 15 U.S.C. § 5(a)(4)(A). However, the FTCA does not specify what is "unfair" or "deceptive"

particularity by the myriad of cases from the field of business."[171] Given that the FTC deals with cases in the area, the FTC is in a better position to determine when an act or practice is "deceptive" within the meaning of the FTCA.[172] Moreover, courts have deferred to the FTC's judgment.[173]

The standard for "unfair" acts or practices likely would not include SOCE. The Consumer Financial Protection Bureau has provided a useful definition of "unfair" within the Dodd-Frank Act[174]: an act or practice is unfair if, among other things, the "injury is not reasonably avoidable by consumers."[175] SOCE are not commodities that are practicably necessary for most American consumers. If SOCE therapy is not a necessary commodity, it cannot be said that its harms are unavoidable by consumers.[176]

However, FTC policy guidance could provide a stronger basis for treating SOCE as "deceptive" under the FTCA.[177] According to the FTC, an act or practice is "deceptive" if: (1) there is a representation, act, or omission that is likely to mislead the consumer; (2) the representation, act, or omission would be reasonable from the perspective of a consumer under the circumstances; and (3) the representation, act, or omission is "material."[178] An act or practice is "material" if it is "likely to affect the consumer's conduct or decision with regard to a product or service."[179]

Claims that SOCE are effective are clearly misleading; studies in the field are marred by unrepresentative test groups and have not produced consistent, scientifically rigorous results.[180] From the perspective of SOCE participants, SOCE could be seen as reasonable under the circumstances: those most likely to seek out SOCE are those who are religious and exhibit high levels of internalized homophobia.[181] It is not hard to imagine that someone who displays internalized homophobia, under the guise of religion, could believe

---

domestically. The FTC's compliance policy guidelines appear to treat the foreign commerce definition as a baseline, requiring more for something to be an "unfair" or "deceptive." *See infra* notes 171–173 and accompanying text. Assuming an act or practice was "unfair" or "deceptive" within the bounds of the FTC's policy guidance, it would also be "unfair or "deceptive" for the purposes of the FTCA.

171. FTC v. Motion Picture Advising Serv. Co., 344 U.S. 392, 394 (1953).

172. *Colgate-Palmolive*, 380 U.S. at 385.

173. *See id.*

174. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S.C.).

175. CFPB, UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES 1 (2022), https://files.consumerfinance.gov/f/documents/cfpb_unfair-deceptive-abusive-acts-practices-udaaps_procedures.pdf [https://perma.cc/X8JT-P4LN]; *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. at 1376.

176. *See supra* note 175 and accompanying text.

177. *See* Letter from James C. Miller III, Chairman, Fed. Trade Comm'n, to Representative John D. Dingell, Chairman, Comm. on Energy and Com., FTC Policy Statement on Deception 1 (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [https://perma.cc/R3T9-NLDY].

178. *See id.* at 1–2.

179. *See id.* at 1.

180. *See supra* notes 39–46 and accompanying text.

181. *See* Erinn E. Tozer & Jeffrey A. Hayes, *Why Do Individuals Seek Conversion Therapy?: The Role of Religiosity, Internalized Homonegativity, and Identity Development*, 31 J. COUNSELING PSYCH. 716, 736 (2004).

SOCE are effective. Guay—a young, impressionable teenager, who grew up in a strict Christian environment and was told that being gay was "the worst sin—comparable to murder, rape and child molestation"—held such a belief himself.[182]

With respect to materiality, people seeking to change their sexual orientation could be persuaded to do so under the pretext that SOCE are effective. There are numerous stories of LGBTQ+ community members being persuaded to participate in SOCE while in vulnerable positions: a man going to a chapel at a Virginia-based university because of an advertisement for men "struggling with same-sex attractions," an Egyptian man going to a woman who claimed to have a 100 percent "cure rate," and a Malaysian transgender woman who believed that she was "sick," to name a few.[183] Under the FTC's interpretation of "deceptive" acts or practices, SOCE could qualify as an FTCA Section 5 violation.

2. The Current Makeup of States' "Deceptive Commercial Practice" Statutes and Where SOCE Fits In

On the state and local level, consumer protection statutes tend to be plaintiff-friendly. Consumer fraud laws generally do not require proof that a defendant knew or intended their actions to be fraudulent, meaning that a plaintiff need only show false or misrepresentative conduct.[184] For example, Kansas defines a deceptive commercial practice as the "knowing act, use or employment by any person of any deception, fraud, false pretense, false promise, or misrepresentation of a material fact, with the intent that others shall rely thereon in connection with the sale of any merchandise."[185] In other words, defendants need not know or intend their actions to be fraudulent; defendants must only have an intent for consumers to rely on their deceptive commercial practice. Defendants must only knowingly engage in the deceptive commercial practice, irrespective of whether they know it was fraudulent.

Punishment for deceptive commercial practices is typically criminal: Alaska makes deceptive business practices a class A misdemeanor or class C felony, and Delaware treats deceptive business practices as class A misdemeanors.[186] Additionally, many states provide victims of deceptive

182. *See* Guay, *supra* note 1.

183. *See* Rachel Savage, *Conversion Therapy Thrives Globally as Bans Gather Pace*, THOMSON REUTERS FOUND. (Sept. 15, 2021), https://longreads.trust.org/item/lgbt-conversion-therapy-global-bans [https://perma.cc/6BBF-FBC5].

184. *See* John J. Lapin, *The Legal Status of Conversion Therapy*, 22 GEO. J. GENDER & L. 251, 269–72 (2020).

185. KAN. STAT. ANN. § 21-6503 (2023). Merchandise includes services, which could encompass SOCE therapy. *See id.* § 21-6503(d)(1).

186. *See* ALASKA STAT. § 11.46.710 (2023); *see also* DEL. CODE ANN. tit. 11, § 906 (2023).

commercial practices with private causes of action, sometimes providing for treble and punitive damages.[187]

Applying current consumer fraud laws to SOCE, therapists would not have to intend or know that providing SOCE therapy, on the pretense that SOCE are effective, is fraudulent.[188] Instead, SOCE therapists only need to knowingly provide SOCE therapy with the intent that clients rely on the therapists' services. As suggested by this Note, creating *civil* state penalties and private causes of action for SOCE victims would be less restrictive than most consumer fraud laws, and such an approach is more likely constitutional as opposed to current SOCE bans.[189]

III. STATE LEGISLATURES AND CONGRESS SHOULD PASS COMMERCIAL-BASED LAWS TO DISINCENTIVIZE AND OUTLAW SEXUAL ORIENTATION CHANGE EFFORTS

Rather than relying on a particular view of the Third, Ninth, or Eleventh Circuits, this Note suggests adopting a dual state-federal legislative approach. Specifically, this approach relies on consumer protection and fraud laws. This Note formulates a model state statute that frames SOCE as a deceptive trade practice subject to civil penalties and urges Congress to provide more serious civil punishments by passing the TFPA.[190] Considering the Supreme Court's denouncement of a professional speech exception in *NILFA*, the Court may determine that legislation limiting or banning SOCE infringes on free speech rights.[191] However, should the Supreme Court address the constitutionality of legislation limiting or banning SOCE, this Note argues that any speech concerns are incidental to SOCE's as a medical practice.

A. The Supreme Court Should Recognize That Speech Is Incidental to Sexual Orientation Change Efforts

The Supreme Court may address the constitutionality of SOCE legislation before any of the following state-federal legislative prescriptions can be enacted.[192] Should the Supreme Court address this issue, it should determine

187. *See Deceptive Trade Practices and False Advertising State Law Survey*, LEXIS, https://plus.lexis.com/api/permalink/7396621e-751d-4651-956f-58ec6e772978/?context=1530671 [https://perma.cc/9NDN-2NLF] (Oct. 10, 2022).

188. *See supra* notes 181–83 and accompanying text.

189. *See infra* Part III.

190. *See* Therapeutic Fraud Prevention Act, H.R. 4146, 117th Cong. (2021).

191. *See NIFLA*, 138 S. Ct. 2361, 2372 (2018). It would also be naïve to neglect the current makeup of the Court. Given the Supreme Court's conservative composition, avoiding reliance on the judiciary and taking a carefully tailored legislative approach becomes exceedingly important.

192. Challenges to legislation limiting or banning SOCE are a recurring problem. As of the publishing of this Note, the Ninth Circuit readdressed the question of SOCE legislation in *Tingley v. Ferguson*, in which, relying in its prior decision in *Pickup*, the court upheld the constitutionality of a Washington statute banning SOCE therapy for minors. *See* 47 F.4th 1055 (9th Cir. 2022). Tingley, a SOCE therapist, has filed a petition for writ of certiorari, asking the Supreme Court to deny that SOCE are conduct and reject the Ninth Circuit's rationale.

that speech is incidental to the conduct of SOCE therapy, as opposed to content-based speech. Whether this Note's legislative recommendations withstand the Court's scrutiny depends entirely on whether the Court views SOCE bans as content-based restrictions, deems SOCE therapy commercial speech (this Note's basis for passing SOCE bans), or treats SOCE therapy as speech incidental to conduct.

As previously mentioned, the *NIFLA* Court noted two circumstances relevant to this Note in which the Court has recognized lesser speech protections: (1) noncontroversial, factual information as commercial speech and (2) professional conduct that incidentally involves speech.[193] Under *Casey*, a doctor's free speech rights are implicated when that doctor speaks while providing medical services, but any such regulation would be analyzed under a deferential rational basis review standard.[194]

SOCE's history indicates that same-sex attraction and gender nonconformity were considered medical problems, based on the false premise that they were curable.[195] SOCE's origins in the United States involved brutal surgeries, inserting devices in the bodies of LGBTQ+ individuals, and other outlandish medical interventions.[196] The transition from general physicians and invasive medical techniques to psychotherapists and talk therapy did not make SOCE any less "medical" in nature. Judge Robin S. Rosenbaum's dissent from *Otto*'s denial of rehearing en banc aptly described the *Otto* majority's misplaced characterization of SOCE:

> Mere "conversation" and "not medical at all." . . . That's how the panel opinion characterizes talk therapy (psychotherapy) that is practiced by a licensed mental-healthcare professional who has attended years of school and clinical training, and that is administered in a private setting for the purpose of helping a client with a mental-health condition. In the Concurrence's view, there's no difference between this mental-healthcare treatment and "political, social, and religious debates."[197]

Moreover, the *Otto* majority opinion and concurrence from the denial of a rehearing en banc mischaracterize the words uttered by SOCE therapists. For instance, assume a patient went to a state-licensed psychiatrist or psychologist because they were experiencing depression. Their doctor might ask a variety of questions[198]: What brings you here today? How has your

---

Petition for Writ of Certiorari, *Tingley*, 47 F.4th 1055 (No. 22-942). A number of other cases have reached the federal courts of appeals, although challenges to state statutes banning SOCE have been unsuccessful for a variety of reasons apart from free speech claims. *See, e.g.*, Doyle v. Hogan, 1 F.4th 249, 252–53 (4th Cir. 2021) (declining to reach the issue of Maryland's state ban on SOCE because of plaintiff's insufficient standing).

193. *See NIFLA*, 138 S. Ct. at 2372.

194. *See supra* Part I.

195. *See id.*

196. *See supra* notes 20–26 and accompanying text.

197. *See* Otto v. City of Boca Raton, 41 F.4th 1271, 1285 (11th Cir. 2022) (Rosenbaum, J., dissenting) (mem.).

198. These questions were derived from a guide to psychiatric interviews. *See, e.g.*, *The Psychiatric Interview*, PSYCHDB, https://www.psychdb.com/teaching/1-psych-interview#anxiety [https://perma.cc/74XJ-YUGC] (Nov. 29, 2022).

sleep been? Are you currently on any medications? Can you tell me a little more about your childhood? The doctor may even recommend and prescribe certain medications based on the patient's symptoms and discussions. The appointment could last from as few as ten minutes to as long as thirty-four minutes.[199] However, it is *highly* unlikely that the doctor was espousing any of their ideologies or viewpoints. The words that the doctor used were designed to help treat the patient and to convey medical information within the confines of the physician-patient relationship. They were not the sort of content-based words justifying excessive judicial inquiry; rather, they were words incidental to the doctor's obligation of care.

Like in *Casey*, SOCE therapists' conduct in "speaking" to participants does not convey a particular viewpoint or ideology. Instead, SOCE therapy was founded on the conception that same-sex attraction was a medical issue that, setting aside efficacy or ethical concerns, required medical intervention, and this intervention is conduct with only incidental speech implications.[200] A SOCE therapist providing SOCE therapy might ask more invasive questions than a psychiatrist or psychologist[201]: Were you ever sexually assaulted? Have you ever experimented with same-sex partners? Do you want to be straight? Those questions might be based on "quack medicine"[202] and might try to uncover a nonexistent past abuse, but they are not trying to establish a particular viewpoint or ideology. Instead, they comprise medical "treatment" in the form of SOCE, formulating speech that is incidental to professional conduct.

Under rational basis review, that conduct would have been for Boca Raton and Palm Beach County to regulate based on the mental health profession's consensus, not the *Otto* majority.[203] In its reasoning, the majority opinion discouraged relying on professional consensus. "Only in 1987 was homosexuality completely delisted from the [DSM]. The Association's abandoned position . . . *shows why we cannot rely on professional organizations' judgments*—it would have been horribly wrong to allow the old professional consensus . . . to justify a ban on counseling that affirmed it."[204]

If this were true, the basis for what constitutes "professional conduct" would not be set by professional organizations. However, professional

---

199. *See* Mario Cruz, Debra L. Roter, Robyn F. Cruz, Melissa Wieland, Susan Larson, Lisa A. Cooper & Harold Alan Pincus, *Appointment Length, Psychiatrists' Communication Behaviors, and Medication Management Appointment Adherence*, 64 PSYCH. SERVS. 886, 889 (2013).

200. *See supra* Part I.

201. These questions were derived from Luke Romesberg's recounting of his experiences during SOCE therapy. *See, e.g.*, Luke Romesberg, *Conversion Therapy: Learning to Love Myself Again*, COUNSELING TODAY (Feb. 27, 2017), https://ct.counseling.org/2017/02/conversion-therapy-learning-love/ [https://perma.cc/JHC9-7TCL].

202. Conant v. McCaffrey, No. C 97-00139, 2000 WL 1281174, at *1, *13 (N.D. Cal. Sept. 7, 2000).

203. *See supra* notes 80–81 and accompanying text; *see also supra* note 94 and accompanying text.

204. Otto v. City of Boca Raton, 981 F.3d 854, 869–70 (11th Cir. 2020) (emphasis added).

organizations and professional consensus have historically been the basis for defining what conduct is professionally acceptable.[205] Based on those professional standards, states and localities have long regulated state-licensed professionals to protect the public's wellbeing. To use an example especially relevant to attorneys, it would be odd if the American Bar Association's (ABA) Model Rules of Professional Conduct were irrelevant in determining whether a lawyer committed legal malpractice.[206] Most attorneys probably would not want a layperson to be deciding the appropriate standard of malpractice if doing so would permit rogue lawyers to delegitimize their client's claims. Similarly, most doctors likely would not want national standards of medical care to be based on a layperson's medical knowledge; someone without a medical degree would not have adequate training to ensure the wellbeing of patients. Consequently, it makes sense for legislators, regulators, and judges to turn to the American Medical Association (AMA).[207] Even though the ABA may change the professional standards for legal practice because of developing law or the AMA may alter medical ethical rules based on scientific advances, legislators and courts have not made about-faces on the validity of professional organization's standards in response to such changes.

If the Supreme Court addresses the constitutionality of SOCE legislation, the Court should defer to state legislatures and the mental health profession, upholding the constitutionality of laws banning or limiting SOCE. Conduct that is incidental to speech, as part of rational basis review, is not within the province of the judiciary.[208] The Supreme Court should not, therefore, legislate against SOCE bans from the bench and be "unconcerned or insufficiently concerned with the truth of [its] statements."[209] If the Court recognizes SOCE therapy as speech, it should acknowledge that SOCE therapy is "quack medicine"[210] and treat it as deceptive commercial speech.

---

205. *See supra* note 51 and accompanying text.

206. *See* MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2020). Although the Model Rules of Professional Conduct themselves do not establish liability, the testimony of experts recounting them at trial can be used by a jury to determine the appropriate legal standard of care. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 (AM. L. INST. 2000) (stating that a professional rule of conduct "may be considered by a trier of fact as an aid in understanding and applying the standard . . . to the extent that (i) the rule or statute was designed for the protection of persons in the position of the claimant and (ii) proof of the content and construction of such a rule or statute is relevant to the claimant's claim"). It is notable that although the jury would return the ultimate verdict in a legal malpractice case, professional standards of legal conduct can inform the jury's decision, with the judge determining all matters of law.

207. *See Code of Medical Ethics*, AM. MED. ASS'N, https://code-medical-ethics.ama-assn.org/ [https://perma.cc/RZV2-6JS3] (last visited Sept. 3, 2023).

208. *See supra* notes 80–81 and accompanying text.

209. Adam J. Kolber, *Supreme Judicial Bullshit*, 50 ARIZ. ST. L.J. 141, 145 (2018).

210. Conant v. McCaffrey, No. C 97-00139, 2000 WL 1281174, at *1, *13 (N.D. Ca. Sept. 7, 2000).

B. State Legislatures Should Use a Deceptive Commercial Practices Strategy

On the state and local levels, states should enact laws outlawing for-profit SOCE as a deceptive commercial practice. As the Supreme Court recognized in *NIFLA*, commercial speech receives less protection than other forms of protected speech.[211] As analyzed below in terms of the TFPA, a deceptive commercial practice approach would satisfy *Bolger's* definition of commercial speech.[212] Analyzing SOCE through *Central Hudson*, SOCE fails the first prong of the *Central Hudson* test and thus merits rational basis scrutiny instead of intermediate scrutiny.[213]

SOCE are not demonstrably effective, and claims that sexual orientation is "convertible" are unsupported.[214] Courts have also denied SOCE-related experts from providing testimony at trial, asserting that "[t]he overwhelming weight of scientific authority concludes that homosexuality is not a disorder or abnormal. The universal acceptance of that scientific conclusion . . . save for outliers . . . requires that any expert opinions to the contrary must be barred."[215] If courts are unwilling to admit SOCE expert testimony under state or federal rules of evidence based on its unreliability, it is unclear why the First Amendment should determine otherwise.[216]

Considering the lack of research supporting SOCE's efficacy and courts' refusal to admit SOCE expert testimony at trial, the government's interest in outlawing SOCE is legitimate. SOCE participants may experience psychological distress, depression, and suicidal ideation;[217] formulating civil penalties for SOCE would advance states' interests in preventing exposure to such harmful consequences.

As for how burdensome state laws regulating SOCE can be, a state "is not required to employ the least restrictive means conceivable."[218] Instead, a

---

211. *See NIFLA*, 138 S. Ct. 2361, 2371–72 (2018).

212. *See infra* notes 231–233 and accompanying text.

213. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

214. *See supra* Part I.A; *see also* Amy Przeworksi, Emily Peterson & Alexandra Piedra, *A Systematic Review of the Efficacy, Harmful Effects, and Ethical Issues Related to Sexual Orientation Change Efforts*, 28 CLINICAL PSYCH.: SCI. & PRAC. 81, 89–90 (2021) (noting that "the only conclusion that could be drawn from the early experimental research is that some men were able to decrease their sexual arousal through aversive conditioning."); *see also* John P. Dehlin, Renee V. Galliher, William S. Bradshaw, Daniel C. Hyde & Katherine A Crowell, *Sexual Orientation Change Efforts Among Current or Former LDS Church Members*, 62 J. COUNSELING PSYCH. 95, 100 (2014) ("[W]ith regard to self[-]reported sexual attraction and identity ratings, only one participant out of 1,019 (.1%) who engaged in SOCE reported both a heterosexual identity label and a Kinsey attraction score of zero (exclusively attracted to the opposite sex).").

215. Ferguson v. JONAH, No. HUDL547312, 2015 WL 609436, at *17–18 (N.J. Super. Ct. Law Div. Feb. 05, 2015).

216. *See id.*; *see also supra* note 157 and accompanying text.

217. *See supra* notes 47–49 and accompanying text.

218. King v. Governor of N.J., 767 F.3d 216, 239 (3d Cir. 2014) (quoting Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 188 (1999)).

particular state's laws banning or limiting SOCE must only bear a rational, nonarbitrary relation to protecting that state's citizens from SOCE.[219]

Such as statute could be written as follows:[220]

> Conversion therapy, commonly known as sexual orientation change efforts (SOCE), is a deceptive commercial practice. A deceptive commercial practice is the knowing act, use, or employment by any person of deception, false pretenses, false promises, fraud, or the misrepresentation, concealing, or omission of any material fact in connection with the sale or advertisement of any merchandise or services. Engaging in a deceptive commercial practice is a civil infraction punishable by a fine of up to $2,000. SOCE victims also have a private right of action and may be awarded treble damages for damages sustained. Damages sustained include the cumulative costs of a plaintiff's SOCE treatment and any post-SOCE related treatment costs. If plaintiff pursues this cause of action based on misrepresentation, concealment, or omission, plaintiff need not show any culpable state of mind on the part of the defendant, i.e., the cause of action becomes strict liability.

Importantly, this statute would create both a civil violation imposable by the state and a private right of action and remedies for affected plaintiffs. The statute's effectiveness in disincentivizing SOCE would largely turn on a violator's ability to pay.[221] Granting plaintiffs treble damages for SOCE treatment costs and post-SOCE treatments would not only compensate plaintiffs for their immediate financial losses, but would also serve to punish violators and attract counsel for meritorious, lucrative claims.[222] Should plaintiffs fail on their claims, a state-enforced civil infraction could disincentivize engaging in SOCE therapy, albeit without compensating victims. In either event, the act would apply whether or not a SOCE therapist acted in good faith.[223] Protecting the public from SOCE would likely be ineffective if SOCE therapists could claim that they genuinely believed SOCE was effective. Indeed, courts have recognized a good-faith defense

---

219. *See* Williamson v. Lee Optical of Okla., Inc., 328 U.S. 483, 487–88 (1955).

220. Statutes from multiple states were used to construct this sample statute. *See, e.g.*, KAN. STAT. ANN. § 21-6503 (2023); S.D. CODIFIED LAWS § 37-24-6 (2023); LA. STAT. ANN. § 51:411 (2023). Although states vary on monetary penalties for engaging in deceptive commercial practices, amounts ranging from a few hundred dollars to a few thousand dollars are the norm. Additionally, this model statute incorporates the punishments established by New Jersey's Consumer Fraud Act, as awarded in *Ferguson v. JONAH*. *See* 136 A.3d 447, 450 (N.J. Super. Ct. Law Div. 2014); *see also* N.J. STAT. ANN. § 56:8-2 (West 2023); *supra* note 157 and accompanying text. This Note opts for heavier civil penalties in lieu of criminal punishment and incarceration.

221. *See* Max Minzer, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853, 901–03 (2012) (discussing upward adjustments of civil monetary penalties for violators with greater ability to pay them in the context of agency punishment).

222. *See supra* note 157 and accompanying text.

223. The New Jersey Consumer Fraud Act, the statute at issue in *Ferguson v. JONAH*, was "designed to protect the public even when a merchant acts in good faith." Cox v. Sears Roebuck & Co., 647 A.2d 454, 461 (N.J. 1994); *see also JONAH*, 136 A.3d at 447. Mirroring that statute as applied in *JONAH* would similarly provide a more protective private cause of action for SOCE under a deceptive commercial practice framework. However, instead of relying on crafty lawyering, this strategy would be codified.

for statutes requiring proof of willfulness.[224] This model statute, in response, would incorporate successful SOCE consumer fraud suit strategies, provide for civil penalty windfalls if plaintiffs do not succeed at trial, and ensure that good faith (but misplaced) beliefs in SOCE's efficacy do not shield violators from punishment.[225]

Considering that other states frequently impose criminal penalties for deceptive business practices, heftier civil penalties and private causes of action, although not "the least restrictive means conceivable,"[226] are certainly "reasonable"[227] compared to other states' punishments for deceptive commercial practices.[228] Creating civil penalties and private causes of action in cases of for-profit SOCE could serve as a deterrent, that, like punitive damages, could be a "blunt tool for rounding out cost-based civil deterrence."[229] Using civil deterrence to prevent SOCE therapists from profiting off of SOCE's false promises would certainly advance a state interest in protecting the well-being of the LGBTQ+ community. Subjected only to rational basis scrutiny for regulating false or deceptive speech, state laws establishing civil penalties against for-profit SOCE would not be "presumptively invalid."[230] Instead, they would be reframed in such a manner as to warrant little or no First Amendment protection and would thus survive rational basis review.

C. Congress Should Bolster States' Efforts by Passing the Therapeutic Fraud Prevention Act

In addition, Congress should empower the FTC to treat SOCE as an "unfair or deceptive trade or practice." Representative Lieu's TFPA does so, giving the FTC the authority to promulgate regulations penalizing for-profit SOCE.[231] As described in Part II.B.1, SOCE could be regulated by the FTC as a "deceptive" (but not "unfair") act or practice.[232] SOCE are clearly misleading and could be seen as reasonable by consumers under the circumstances, and SOCE therapists' claims that SOCE are effective could be material in a consumer's decision to seek out SOCE therapy.[233] So long as advertisements for SOCE are deemed to be deceptive commercial speech, the TFPA could be effective legislation if it frames SOCE advertisement as "deceptive."

---

224. *See* Daniel S. Jonas, *The Circuit Split of Instructing the Jury Specifically on the Good Faith Defense: A Consequence of Superlegisation by the Courts or the Standard of Appellate Review?*, 46 SYRACUSE L. REV. 61, 78–80 (1995).

225. *See supra* note 220 and accompanying text.

226. Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 188 (1999).

227. Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989).

228. *See supra* note 186 and accompanying text.

229. Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1402 (2003).

230. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

231. *See* Therapeutic Fraud Prevention Act, H.R. 4146, 117th Cong. §§ 4(a)–(b) (2021).

232. *See supra* Part II.B.

233. *See supra* Part II.B.

For-profit SOCE as regulated under the TFPA falls squarely in line with the *Bolger's* definition of commercial speech. To reiterate, *Bolger* defines commercial speech as speech that (1) contains advertisements, (2) refers to a specific product, and (3) is produced by someone with an economic motivation.[234] SOCE providers, whether through pamphlets in an office or discussing SOCE with their patients, must "advertise" SOCE to inform their patient of SOCE in the first place. SOCE are SOCE therapists' specific products. Within the context of for-profit SOCE, therapists have an economic motivation to advertise SOCE to patients and profit from it. Although SOCE therapists may harbor motivations other than economic benefit, *Bolger* forecloses alternative motivations as dispositive: "Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues."[235] Put differently, referring to contentious issues in the public dialogue, such as SOCE, would not protect a SOCE therapist from regulation. For instance, a SOCE therapist who tells an LGBTQ+ client "being LGBTQ+ is sinful, and I can help you with my weekly $200 counseling sessions" could not avoid regulation simply because the therapist took a stance on the public issue of SOCE. Rather, the SOCE therapist's economic motivation of making $200 per session would be sufficient under *Bolger*, regardless of the therapist's anti-LGBTQ+ motive. Given that the TFPA would allow the FTC to regulate SOCE therapy as "deceptive,"[236] the FTC would have broad authority to penalize SOCE under rational basis review for misleading speech.[237]

The TFPA is especially important for states neglecting to adopt consumer fraud–based SOCE bans. As SOCE prohibitions currently stand, they are likely to be held unconstitutional under *Otto's* rationale. Supplementing state law, the TFPA would discourage profiteering off of the false promises of SOCE, irrespective of where a SOCE therapist is domiciled. The TFPA offers an opportunity to protect LGBTQ+ Americans nationwide, regardless of their jurisdiction's political leanings, and Congress should invest in that opportunity.

CONCLUSION

States and the federal government should not allow SOCE therapists to profit from harmful practices. From teenaged James Guay, hoping his sexual orientation would change, to every unheard story, LGBTQ+ Americans deserve protection from and recourse for the harms they have experienced through SOCE. Accordingly, states should enact legislation resembling the statute drafted in this Note. Creating a private cause of action will ensure that plaintiffs are compensated, that SOCE therapists are adequately punished for endangering the LGBTQ+ community, and that medical fraud

234. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–68 (1983).
235. *Id.* at 68.
236. *See supra* Part II.B.
237. *See supra* note 101 and accompanying text.

is discouraged. Coupled with a smaller civil penalty, if plaintiffs fail to establish damages, state and local governments can create windfalls to deter providing SOCE therapy. To make sure that SOCE therapists are liable regardless of what U.S. jurisdiction they are domiciled in, Congress should pass the TFPA and provide the FTC with the means to regulate and fine SOCE therapists. If the Supreme Court must address the constitutionality of SOCE bans, it should make one thing clear: the First Amendment does not protect SOCE therapists for counseling their patients using "quack medicine."[238]

238. Conant v. McCaffrey, No. C 97-00139, 2000 WL 1281174, at *1, *13 (N.D. Cal. Sept. 7, 2000).