

## COMMENTS

### Changing Speech in a Changing World: An Examination of Contemporary SOCE State Legislation and the Fight for Legal Protection Amid Constitutional Challenge

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#### I. INTRODUCTION

In a nation that calls itself the best country on Earth, American legislators have only recently begun the arduous process of attempting to regulate the archaic and insidious practice of conversion therapy.<sup>1</sup> Though the average level of acceptance of the LGBTQ+ community has risen

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1. See Andrew Ozaki, *Nebraska Lawmakers Consider Banning Conversion Therapy Statewide*, KETV, (Feb. 26, 2021), <https://www.ketv.com/article/lawmakers-hear-pros-and-cons-of-state-ban-on-conversion-therapy/35655443#>; See Todd Richmond, Associated Press, *Wisconsin Legislature Moves to Protect Conversion Therapy*, U.S. NEWS, (Mar. 16, 2021), <https://www.usnews.com/news/best-states/wisconsin/articles/2021-03-15/wisconsin-republicans-move-to-protect-conversion-therapy>.

globally, contemporary sexual orientation change efforts (SOCE), continue to pose a significant threat to the health and safety of American youth.<sup>2</sup> Due to the great physical and psychological harm conversion therapy can have on minor patients, many states have begun attempting to regulate this pseudo-therapy through state legislation.<sup>3</sup> This Comment examines how various states have attempted to regulate conversion therapy through legislation, the types of constitutional challenges faced by state bans, and the potential legal weapons available to advocates of statutory protection for LGBTQ+ youth. Part II of this Comment outlines the origin and evolution of SOCE in addition to the general dangers associated with these practices. Part III examines the contemporary rise of SOCE state legislation, and Part IV focuses on the constitutional challenges that SOCE bans face. Finally, Part V explores SOCE regulation through the lens of consumer fraud protection, and Part VI analyzes the future of state SOCE bans.

In recognition of the fact that individuals who practice conversion therapy contest the terminology of “conversion therapy” due to its historical association with torturous physical and psychological procedures and because there is an extraordinary amount of terminology used to describe similar types of practices,<sup>4</sup> this Comment uses the terms “conversion therapy” and “sexual orientation change efforts” interchangeably to mean any practice, physical or mental, performed for the purpose of altering an individual’s “sexual orientation, gender identity, or gender expression.”<sup>5</sup>

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2. See Andrew R. Flores, *Social Acceptance of LGBTI People in 175 Countries and Locations*, WILLIAMS INST., (Nov. 2021), <https://williamsinstitute.law.ucla.edu/publications/global-acceptance-index-lgbt/>; See Robert J. Cramer et al., *Weighing the Evidence: Empirical Assessment and Ethical Implications of Conversion Therapy*, 18 ETHICS & BEHAVIOR 93, 101 (2008) (describing potential harms of SOCE and previous scientific studies that explored the effectiveness and harm of SOCE on individuals).

3. Christy Mallory et al., *Conversion Therapy and LGBT Youth*, WILLIAMS INST., (Jun. 2019), <https://williamsinstitute.law.ucla.edu/publications/conversion-therapy-and-lgbt-youth/>.

4. *Just as They Are*, NAT'L CTR. FOR LESBIAN RTS., 6, <https://www.nclrights.org/wp-content/uploads/2017/09/just-as-they-are-sept2017-1.pdf> (last visited Feb. 27, 2021) (provides a list of commonly used terminology other than “conversion therapy” and “sexual orientation change efforts”).

5. GLAAD, *Conversion Therapy*, (last visited Apr. 12, 2021), <https://www.glaad.org/conversiontherapy>.

## II. THE TORTUROUS AND UNSUCCESSFUL HISTORY OF CONVERSION THERAPY

Sexual orientation change efforts, more commonly known as conversion therapy, are defined as a series of practices designed to correct a queer individual's sexual orientation, gender identity, or gender expression.<sup>6</sup> Originating in nineteenth century Europe, conversion therapy spread to America, promoting the ideology that homosexuality was a medical phenomenon requiring remedial treatment such as castration or bladder washing.<sup>7</sup> As these early techniques proved unsuccessful, psychotherapy became the leading form of treatment for "homosexual mental disorders" in the 1920s.<sup>8</sup> Prominent procedures during this period included techniques such as lobotomy, talk therapy, and electroshock therapy.<sup>9</sup> By the 1960s, despite the continuation of previously ineffective physical interventions, behavioral therapy dominated the field, subjecting patients to aversive and heteronormative behavioral conditioning.<sup>10</sup> These exercises included aversive conditioning to induce nausea in response to homoerotic imagery, male assertiveness training, and orgasmic reconditioning.<sup>11</sup>

By the early 1970s, psychotherapists began questioning the effectiveness of conversion therapy and, bolstered by contemporary medical research and LGBTQ+ civil rights activism, the American Psychiatric Association eventually depathologized homosexuality, removing it from the medical list of psychological disorders in 1973.<sup>12</sup> Subsequently, health-care associations such as the American Medical Association and the American Psychological Association also rejected SOCE practices, stating that they were generally ineffective and harmful to patients.<sup>13</sup> Currently, no American professional health-care associations support SOCE, and conversely, many have published data-supported public statements rejecting the practices due to the harm they pose to patients.<sup>14</sup> However, despite this professional consensus, the antediluvian concept of homosexuality as a pathological anomaly persists today and is

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6. Tiffany C. Graham, *Conversion Therapy: A Brief Reflection on the History of the Practice and Contemporary Regulatory Efforts*, 52 CREIGHTON L. REV. 419 (2019).

7. *Id.* at 421.

8. *Id.*

9. *Id.*

10. *Id.* at 422.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 423.

the underlying ideological genesis behind the recent legal attacks on SOCE state legislation.<sup>15</sup>

*A. The Inherent Risks Associated with Conversion Therapy*

Many scientific studies have evaluated the effectiveness of SOCE and the potential harm it poses to patients.<sup>16</sup> These studies have concluded that not only does conversion therapy not effectively alter an individual's sexual orientation, but the practice also produces a variety of negative physical and mental effects that can substantially impede an individual's ability to maintain their mental stability and form healthy emotional relationships.<sup>17</sup> These negative effects range in harmfulness from a heightened susceptibility to thoughts of shame, confliction, and fearfulness, to the development of phobic anxiety concerning sexual attraction and an increase in physical aggression.<sup>18</sup> Additionally, studies have found that patients who undergo SOCE experience a significant vulnerability to depression and self-hatred, along with elevated suicidality and long term sexual-dysfunction.<sup>19</sup>

Though SOCE practices have generally been found to produce harmful mental and physical side effects in patients, these harms seem to be exacerbated in minors.<sup>20</sup> According to Dr. Joy Whitman, a licensed LGBTQ+ counselor and distinguished faculty member for the Master of Arts in Counseling Program at the Family Institute at Northwestern University, attempting to forcefully change a person's sexual orientation is akin to trying to change that person's soul.<sup>21</sup> "There's a crisis of identities," says Dr. Whitman in a co-authored note featured in *Counseling Today*.<sup>22</sup> "Especially for kids, there is a sense of failure in not being able to change that can cause a loss of community and disconnect from family."<sup>23</sup> This sense of failure and community disconnect can lead to

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15. See Laura A. Gans, *Inverts, Perverts, and Converts: Sexual Orientation Conversion Therapy and Liability*, 8 B.U. PUB. INT. L.J. 219, 222-33 (1999).

16. Robert J. Cramer et al., *supra* note 2, at 100-01 (describing potential harms of SOCE and previous scientific studies that explored the effectiveness and harm of SOCE on individuals).

17. *Id.*

18. *Id.*

19. *Id.* at 102.

20. *In the Aftermath of Conversion Therapy, Counselors Offer Healing Support*, FAM. INST., <https://counseling.northwestern.edu/blog/conversion-therapy-lgbtq-counseling/> (last visited Apr. 11, 2021).

21. *Id.*

22. *Id.*

23. *Id.*

depression, self-hatred, suicidality, and anti-social behavior, all of which have the potential to become fatal, as was the case for Leelah Alcorn.<sup>24</sup>

In 2014, seventeen-year-old Leelah Alcorn, who identified as a transgender woman, posted a suicide note to her Tumblr blog before being struck and killed by a tractor-trailer on Interstate 71.<sup>25</sup> Her suicide note expressed her deep depression and alienation, which she blamed on her parents' treatment of her and the conversion therapy they had forced her to undergo.<sup>26</sup> Alcorn's Tumblr post was reposted nearly 200,000 times within forty-eight hours, garnering international media attention and sparking a national debate on conversion therapy and legal protection for LGBTQ+ youth.<sup>27</sup> In response to a *We the People* petition, the Obama Administration released a statement calling for an end to conversion therapy for minors.<sup>28</sup> The statement declared the administration's dedication to protecting American youth and advocated for greater state protection due to the congressional difficulties of passing a federal ban.<sup>29</sup> Despite the difficulty, in 2019, Congress introduced two legislative instruments called the Prohibition of Medical Funding for Conversion Therapy Act and the Every Child Deserves a Family Act, which focused on regulating conversion therapy by prohibiting Medicaid and Social Security programs from paying for SOCE.<sup>30</sup> Both bills died in session, supporting the Obama Administration's advocacy for states to lead the way with local legislation.<sup>31</sup> Subsequently, many states have begun banning the practice through state legislation that aims to protect the health and welfare of LGBTQ+ minors.<sup>32</sup>

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24. *Id.*

25. *Id.*

26. *Id.*

27. Maura Johnston, *Transgender Teen Leelah Alcorn: 'My Death Needs to Mean Something*, BOS. GLOBE, (Dec. 31, 2014), <https://web.archive.org/web/20150407114757/http://www.bostonglobe.com/lifestyle/2014/12/31/transgender-teen-leelah-alcorn-death-needs-mean-something/4hw6uPd8NtjIbn8kAdyAbM/story.html>; *In the Aftermath of Conversion Therapy, Counselors Offer Healing Support*, *supra* note 20.

28. Valerie Jarrett, *Petition Response: On Conversion Therapy*, (Apr. 8, 2015, 8:42 PM), <https://obamawhitehouse.archives.gov/blog/2015/04/08/petition-response-conversion-therapy>; *In the Aftermath of Conversion Therapy*, *supra* note 20.

29. *In the Aftermath of Conversion Therapy*, *supra* note 20.

30. Christy Mallory et al., *supra* note 3.

31. Valerie Jarrett, *Petition Response: On Conversion Therapy*, (Apr. 8, 2015, 8:42 PM), <https://obamawhitehouse.archives.gov/blog/2015/04/08/petition-response-conversion-therapy>.

32. *In the Aftermath of Conversion Therapy, Counselors Offer Healing Support*, *supra* note 20.

### III. SOCE STATE LEGISLATION

Though the regularity of conversion therapy has declined since the public discreditation of the practice by every well-known American medical association, SOCE is still used therapeutically, and both professional- and clergy-based providers continue to advertise it to families and individuals.<sup>33</sup> According to a 2019 report by the Williams Institute at the UCLA School of Law, 698,000 LGBTQ+ American adults have undergone some form of SOCE at some point in their life, with 350,000 of those adults receiving the discredited treatment in their adolescence.<sup>34</sup> Additionally, 16,000 LGBTQ+ youths (ages thirteen to seventeen) will receive conversion therapy from a professional before the age of eighteen, and an estimated 57,000 minors (ages thirteen to seventeen) across all fifty states will receive conversion therapy from religious, non-professional advisors before the age of adulthood.<sup>35</sup> In response to contemporary SOCE treatment, numerous professional health associations have called on the United States Congress and state legislatures to implement partial regulations or complete bans.<sup>36</sup> This call to arms has increased state legislative momentum astronomically over the past few years, producing various statutory instruments designed to regulate or completely ban the infliction of conversion therapy on minors.<sup>37</sup>

As of 2019, the District of Columbia and more than eighteen states have passed some form of legislation regulating conversion therapy provided by licensed health-care providers to youth under the age of eighteen.<sup>38</sup> Additionally, in states that do not possess any SOCE statutes, numerous cities and counties have passed local bans to fill the void.<sup>39</sup> In response to public statements expressed by medical health-care associations concerning the risks of conversion therapy, the California legislature became the first in the nation to pass legislation banning licensed mental health practitioners from providing SOCE to minors.<sup>40</sup>

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33. See Nancy A. Del Pizzo, *If It Ain't Broke, Don't Fix It Condemning Promises to "Straighten" Homosexuals for A Fee*, 282 N.J.L., 13, 14-15 (2013).

34. Christy Mallory et al., *supra* note 3.

35. *Id.*

36. *Id.*

37. Amanda Robert, *Protecting LGBTQ Minors ABA Develops Guide for Drafting Laws to Ban Controversial Conversion Therapy*, A.B.A.J. 63, 64 (Apr. 2019) at 63, 64.

38. Christy Mallory et al., *supra* note 3.

39. *Id.*

40. Tiffany C. Graham, *supra* note 6.

This 2012 state statute, a true pioneer in its field, became the legislative model for the subsequent state SOCE bans that were soon to follow.<sup>41</sup>

Though each of the state statutory bans are similar in some ways (i.e., each permits a relevant licensing entity to discipline professional health-care providers who violate the statute), the statutes are not identical.<sup>42</sup> For example, some states have included other legal mechanisms by which to hold violators liable.<sup>43</sup> State laws in Connecticut, Illinois, and New Hampshire stipulate that the use of conversion therapy on minors also constitutes an unfair business practice and allows enforcement and penalties consistent with other state laws that govern unfair business practices.<sup>44</sup> Additionally, the New Jersey judiciary held that providing conversion therapy to either adults or minors for monetary compensation constituted a fraudulent business practice as there is no scientific basis to support the claims advertised.<sup>45</sup> The prohibition of monetary compensation and limiting available funds to pay for SOCE is a useful regulatory method employed by various states.<sup>46</sup> For example, Maryland and Rhode Island both utilize this method of disallowing state funds to pay for SOCE as a means of limiting providers to those who are willing to perform the service for free to patients who could not afford to pay for the therapy out-of-pocket.<sup>47</sup>

In 2020, Virginia became the first southern state to pass a SOCE bill.<sup>48</sup> HB 386 prohibits any health-care provider or person in training for any profession licensed by the Department of Health Professions from providing SOCE to individuals under eighteen.<sup>49</sup> According to the bill, SOCE counseling constitutes unprofessional conduct, and those found in violation may be subject to disciplinary action.<sup>50</sup> Additionally, HB 386 prohibits state funds from being used to provide SOCE to a minor, referring a person under the age of eighteen for conversion therapy, or

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41. *Id.* at 423-24.

42. Christy Mallory et al., *supra* note 3; Tiffany C. Graham, *supra* note 6, at 424.

43. Christy Mallory et al., *supra* note 3.

44. *Id.*

45. *Id.*

46. See Brooke Sopelsa, *Virginia Becomes 20th State to Ban Conversion Therapy for Minors*, NBC NEWS (Mar. 3, 2020, 3:54 PM), <https://www.nbcnews.com/feature/nbc-out/virginia-becomes-20th-state-ban-conversion-therapy-minors-n1148421>; Tiffany C. Graham, *supra* note 6.

47. Tiffany C. Graham, *supra* note 6, at 424.

48. Brooke Sopelsa, *supra* note 46.

49. H.B. 386, 116th Cong. § 54.1-2409.5 (Va. 2020).

50. *Id.*

extending health benefits to cover the cost of conversion therapy for minors.<sup>51</sup>

#### IV. SOCE BANS AND THE CONSTITUTION

An individual's freedom of speech, established by the First Amendment, is one of America's most fervently guarded constitutional rights.<sup>52</sup> In essence, the First Amendment insulates "protected speech" from government interference while permitting the regulation of a handful of limited categories of "unprotected" speech such as defamation speech, obscene materials, speech integral to criminal conduct, and fraud.<sup>53</sup> To examine the constitutionality of state legislation, one must look at both the First Amendment and the Due Process Clause of the Fourteenth Amendment.<sup>54</sup> State regulation of speech based on its message, ideas, subject matter, or content is presumed unconstitutional unless the government can pass strict scrutiny and a compelling interest test.<sup>55</sup>

##### A. *A Compelling State Interest*

For government legislation to pass a strict scrutiny test, the government must show that its action is necessary and narrowly tailored to achieve a compelling government interest.<sup>56</sup> The definition of "compelling" has not been adequately defined; however, it is generally understood that a compelling interest is greater than a "legitimate" or "important" interest.<sup>57</sup> In *Ohralik v. Ohio State Bar Ass'n*, the Supreme Court held that a state bar could discipline a lawyer for in-person solicitation without implicating the First Amendment.<sup>58</sup> The plaintiff, attorney Ohralik, learning that an acquaintance named McClintock had been injured in a car accident, visited the individual in the hospital and

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51. *Id.*

52. Micheal Gonchar, *Why Is Freedom of Speech an Important Right? When, if Ever, Can It Be Limited?*, N. Y. TIMES (Sep. 12, 2018), <https://www.nytimes.com/2018/09/12/learning/why-is-freedom-of-speech-an-important-right-when-if-ever-can-it-be-limited.html>.

53. Victoria L. Killion, *The First Amendment: Categories of Speech*, CONG. RESCH. SERV., (Jan. 16, 2019), <https://fas.org/sgp/crs/misc/IF11072.pdf>.

54. Nat'l Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology, 228 F.3d 1043, 1049 (9th Cir. 2000).

55. *Constitution Annotated*, Amdt1.2.4.1.1 *Content-Based Regulation*, LIBR. CONGRESS, (last visited Apr. 13, 2021), [https://constitution.congress.gov/browse/essay/amdt1\\_2\\_4\\_1\\_1/](https://constitution.congress.gov/browse/essay/amdt1_2_4_1_1/).

56. Ronald Steiner, *Compelling State Interest*, FIRST AMEND. ENCYC., (last visited Apr. 15, 2021), <https://www.mtsu.edu/first-amendment/article/31/compelling-state-interest>.

57. *Id.*

58. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 445, 447 (1978).



asked her to sign a retainer agreement, which she did.<sup>59</sup> Next, the defendant visited the home of Wanda Lou Holbert, who had been the passenger in the vehicle and who had also been injured in the accident.<sup>60</sup> During this visit, Ohralik told Holbert that he had been retained by the driver McClintock and advised her that she might be entitled to compensation under McClintock's insurance policy.<sup>61</sup> The defendant offered Holbert the same contingent fee agreement he had offered McClintock and Holbert verbally agreed to retain Ohralik as her attorney.<sup>62</sup> Subsequently, the Ohio State Bar Association undertook disciplinary proceedings and found that the defendant had violated the Ohio state rules of professional conduct, which prohibited the direct solicitation of prospective clients for financial gain and thus permanently suspended Ohralik's license to practice law.<sup>63</sup> The state supreme court upheld the permanent suspension, and Ohralik petitioned the United States Supreme Court for review.<sup>64</sup>

The Supreme Court held that the state had a compelling interest in preventing solicitations that involve fraud, undue influence, or intimidation that are most likely to occur during face-to-face solicitations.<sup>65</sup> The Court reasoned that because lawyers are professionally trained, lay consumers are particularly vulnerable to undue influence and intimidation by lawyers.<sup>66</sup> Additionally, the Court contended that because in-person solicitations are more likely than not to result in the harm that the state intends to prevent through its regulations, the state is not required to prove that the particular solicitation, in this case, caused the harm.<sup>67</sup> Therefore, the Supreme Court concluded that a state bar has a particular interest in preventing in-person solicitations and that such restrictions do not violate the regulated lawyers' First Amendment rights.<sup>68</sup>

Additionally, in *New York v. Ferber*, the defendant, a New York adult bookstore owner, was arrested for selling two films depicting underage boys masturbating to an undercover police officer.<sup>69</sup> The defendant was convicted of violating a New York criminal statute that prohibited

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59. *Id.* at 449-50.

60. *Id.* at 450-51.

61. *Id.*

62. *Id.* at 451.

63. *Id.* at 453-54.

64. *Id.* at 454.

65. *Id.* at 460-62.

66. *Id.* at 465.

67. *Id.* at 466-67.

68. *Id.* at 468.

69. *New York v. Ferber*, 458 U.S. 747, 751-52 (1982).

individuals from knowingly promoting sexual performances by children under the age of sixteen by distributing material depicting such performances.<sup>70</sup> Though the intermediate appellate court affirmed the defendant's conviction, the New York Court of Appeals reversed on First Amendment grounds.<sup>71</sup> The Supreme Court granted certiorari to determine whether or not the New York statute violated the First Amendment.<sup>72</sup>

The Supreme Court held that the New York state statute did not violate the First Amendment, stating that though there is a risk that such state statutes criminalize protected expression, the state's interest in prohibiting child pornography substantially outweighs that risk.<sup>73</sup> The Court reasoned that states have a compelling interest in protecting the welfare of minors and that the distribution of child pornography is intrinsically related to the sexual abuse of children in two significant ways.<sup>74</sup> First, the Court reasoned that the videos produced are a permanent record of that child's participation, the distribution of which intensifies the harm that is done to the child.<sup>75</sup> Second, the only way of controlling the production of child pornography is to eliminate the network of distribution.<sup>76</sup>

The Court held that because states have a significant interest in protecting children from sexual abuse, they may constitutionally regulate the circulation of child pornography even in cases where the content is not considered legally obscene under *Miller*.<sup>77</sup> Furthermore, the Court distinguished this case from other cases involving obscenity, stating that the *Miller* test is inapplicable as it does not account for the physical or psychological harm caused by child pornography.<sup>78</sup> Finally, the Court reasoned that it is unlikely that child pornography would contain a necessary literary or artistic value that may justify its protection under the First Amendment.<sup>79</sup> Therefore, the Supreme Court concluded that the classification of child pornography as unprotected material is not

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70. *Id.*

71. *Id.* at 752.

72. *Id.* at 773-74.

73. *Id.* at 747-48.

74. *Id.* at 752, 758-59.

75. *Id.* at 759.

76. *Id.*

77. *Id.* at 760-61.

78. *Id.*

79. *Id.*

inconsistent with the Court's previous decisions governing content-based regulations of speech.<sup>80</sup>

### *B. Regulating Professional Speech*

A common defense introduced by states during judicial review of SOCE statutes is the concept of "professional speech."<sup>81</sup> The professional speech doctrine seems to have originated from a 1985 Supreme Court concurring opinion where Justice Byron White stated that a professional who engages in speech with a client is "engaging in the practice of a profession," which makes that speech "incidental to the conduct of the profession."<sup>82</sup> In the case of *Pickup v. Brown*, mental health providers that offered SOCE to children sued the State of California, claiming that state statute SB 1172 prohibiting licensed mental health providers from providing SOCE therapy to children under eighteen was unconstitutional.<sup>83</sup>

The United States Court of Appeals for the Ninth Circuit acknowledged that the federal courts had not formally recognized First Amendment exceptions for state professional regulations.<sup>84</sup> However, the court stated that though the First Amendment rights of medical practitioners are protected when the professional engages in speech regarding public issues, the constitutional protection of those rights lessens when the professional distributes medical advice.<sup>85</sup> The court reasoned that the government has an obligation and a corresponding power to protect citizens through the regulation of professional conduct of health practitioners and that the First Amendment does not shield "the verbal charlatan" from responsibility resulting from his conduct.<sup>86</sup> Moreover, the court reasoned that medical practitioners are vulnerable to malpractice litigation for giving negligent medical advice to their patients without the ability to establish a serious defense of First Amendment protections regarding their right to give medical advice.<sup>87</sup> Finally, the Ninth Circuit

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80. *Id.* at 774.

81. *See* *Doyle v. Hogan*, 411 F. Supp. 3d 337, 343 (D. Md. 2019).

82. David L. Hudson, *Professional Speech Doctrine*, FIRST AMEND. ENCYC., (last visited Apr. 22, 2021), <https://mtsu.edu/first-amendment/article/1551/professional-speech-doctrine> (citing *Lowe v. S.E.C.*, 472 U.S. 181, 232 (1985) (J. White Concurring)).

83. *Pickup v. Brown*, 740 F.3d 1208, 1215 (9th Cir. 2014), abrogated by *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018).

84. *Id.* at 1218.

85. *Id.*

86. *Pickup v. Brown*, 728 F.3d 1042, 1054 (9th Cir. 2013) (citing *Shea v. Bd. of Med. Exam'rs*, 81 Cal. App. 3d 564).

87. *Id.* at 1054.

noted that “most, if not all, medical and mental health treatments require speech, but that fact does not give rise to a First Amendment claim when the state bans a particular treatment.”<sup>88</sup> Therefore, the court concluded that SB 1172 survives the constitutional First Amendment challenges brought by the plaintiffs.<sup>89</sup>

In the case of *Nat’l Inst. of Family and Life Advocates v. Becerra*, two crisis pregnancy centers brought an action against California’s attorney general and governor arguing that the California statute requiring licensed pregnancy clinics to give notice to clients of the existence of publicly funded family planning services including contraception and abortions violated their First Amendment rights to free speech.<sup>90</sup> The Ninth Circuit held that because the licensed notice involved professional speech, it survives the lower level of scrutiny applied, and therefore the statute is constitutional.<sup>91</sup> The plaintiffs appealed, and the United States Supreme Court granted certiorari to review the Ninth Circuit’s decision.<sup>92</sup>

The Ninth Circuit applied a lower level of scrutiny to the contested speech on the basis that the notice was regulating professional speech even though the licensed notice is content-based.<sup>93</sup> The Supreme Court noted that there is a theme among some of the lower courts that professional speech, which is defined as speech by licensed professional individuals “that is based on their expert knowledge and judgment ( . . . ) or is within the confines of the professional relationship” is recognized as a separate category of speech that is exempt from the general rule that content-based regulations of speech are subject to strict scrutiny.<sup>94</sup> The Court stated that it has never recognized professional speech as a separate category unprotected by the First Amendment merely because it is speech by a professional.<sup>95</sup> The Supreme Court reasoned that it had afforded less protection for professional speech in only two circumstances, neither of which were based on the fact that a professional produced the speech in question.<sup>96</sup> These circumstances include: (1) “the application of a more deferential review to laws which require professionals to disclose factual, noncontroversial information to their commercial speech” and (2) there

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88. *Id.* at 1056.

89. *Id.* at 1061.

90. *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2368 (2018).

91. *Id.* at 2371.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 2371-72.

96. *Id.* at 2372.

exists legal precedents that allow states to regulate professional conduct, even in cases where the conduct incidentally involves speech.<sup>97</sup>

### C. *First Amendment Challenges to SOCE Legislation*

The rise of SOCE state legislation initiated an immediate corresponding influx of lawsuits challenging the constitutionality of the state statutes.<sup>98</sup> The majority of these legal challenges to state SOCE legislation are claims of First Amendment violations.<sup>99</sup> These First Amendment challenges attack the breadth of the statutes, focusing on the type of therapy provided (talk therapy vs. conduct therapy), the type of speech regulated (professional vs. non-professional vs. religious), and whether or not the state's interest in protecting LGBTQ+ youth outweighed the constitutional risks of regulating the content of citizen speech.<sup>100</sup>

In 2017, the Boca Raton city council voted 4-1 to ban conversion therapy by passing Ordinance 5407, which created Article VI "Prohibition of Conversion Therapy on Minors."<sup>101</sup> The ordinance prohibited licensed providers and therapists from practicing SOCE on minors regardless of monetary compensation, with violations punishable by a fine not exceeding \$500.00.<sup>102</sup> In one of the most recent and influential cases involving a constitutional challenge to a legislative ban involving the use of SOCE, two licensed marriage and family therapists brought an action against the city of Boca Raton in the case *Otto v. City of Boca Raton*, challenging the county's legislative prohibition of providing SOCE to minors under Ordinance 5407.<sup>103</sup>

The plaintiffs, Robert Otto and Julie Hamilton, are licensed therapists who provide SOCE therapy to minor clients.<sup>104</sup> The plaintiffs argued that the Boca Raton ordinances infringed upon their First Amendment right to

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97. *Id.*

98. *See Otto v. City of Boca Raton*, 981 F.3d 854, 859 (11th Cir., 2020); *New York v. Ferber*, U.S. at 747, 752; *Welch v. Brown*, 58 F.Supp. 3d 1079 (E.D. Cal. 2014).

99. *See Otto*, 981 F.3d at 859; *Ferber*, 458 U.S. at 747.

100. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018); *Doyle v. Hogan*, 411 F. Supp. 3d 337 (D. Md. 2019); *Ferber*, 458 U.S. at 747, 752.

101. Boca Raton, Fl., Art. IV, Sec. 9-106, Ord. No. 5407.

102. *Id.* (Individuals licensed by the state of Florida to provide professional counseling, including but not limited to medical practitioners, osteopathic practitioners, psychologists, psychotherapists, social workers, marriage and family therapists, and licensed counselors. This category does not include clergy, religious leaders, or pastoral counselors acting within their religious roles).

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

104. *Id.* at 860.

speak freely with their clients and to engage in “talk therapy.”<sup>105</sup> Though both parties agreed that the plaintiffs’ therapy consisted entirely of speech, the government contended that the legislation’s intent was to protect LGBTQ+ minors from serious harm caused by that specific speech and that because conversion therapy is professional speech or conduct, they have the power to limit it.<sup>106</sup> To make a finding of constitutionality, the district court stated that it must decide if the ordinances were content-based regulations that would require them to be analyzed under strict scrutiny.<sup>107</sup> The court reasoned that because whether or not speech falls under the regulation of the ordinances depends entirely on the content of what is said, the regulations are content-based and therefore must receive strict scrutiny.<sup>108</sup>

Additionally, the court stated that it could not lower the high threshold of strict scrutiny simply because the government categorizes their ordinances as professional regulations.<sup>109</sup> On numerous occasions, the Supreme Court has stated that regulating the content of professional speech includes a risk that the government’s true interest is to suppress unpopular ideas as opposed to a more legitimate state interest.<sup>110</sup> The *Otto* court held that the ordinances discriminate on the basis of viewpoint, which is another version of content discrimination that leads to biased censorship of differing views.<sup>111</sup> The Supreme Court addressed viewpoint discrimination in the case of *Members of the City Council v. Taxpayers for Vincent*, stating that “the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”<sup>112</sup> Furthermore, the *Otto* court stated that the government’s argument that the plaintiffs’ conversion therapy is actually conduct and thus escapes First Amendment implication was unpersuasive.<sup>113</sup> Therefore the United States Court of Appeals for the Eleventh Circuit held that the ordinances in the *Otto* case were content-based regulations that discriminated based on viewpoint and thus violated the First Amendment

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105. *Id.*

106. *Id.* at 861.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 864.

112. *Id.* (citing *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

113. *Id.*

rights of practitioners, therefore granting the plaintiffs' motion for a preliminary injunction.<sup>114</sup>

Similarly, in *King v. Christie*, a New Jersey state-licensed practitioner brought an action against New Jersey governor, Chris Christie, alleging that New Jersey statute A3371, which prohibits licensed practitioners from treating minors using SOCE, violated the First Amendment.<sup>115</sup> Though the New Jersey SOCE statute closely resembled the ordinances at issue in *Otto*, the United States District Court for the District of New Jersey came to a very different conclusion.<sup>116</sup> In 2013, the New Jersey governor signed Bill A3371 into law, which prohibited state-licensed practitioners from providing SOCE treatment to minors.<sup>117</sup> The plaintiffs, two licensed practitioners named Tara King and Ronald Newman, brought a constitutional claim stating that the statute infringed upon their First Amendment right to free speech and freedom of religious expression.<sup>118</sup> Seeking injunctive and declaratory relief, the plaintiffs alleged that A3371 infringes upon their First Amendment rights by unconstitutionally restraining the content of the plaintiffs' message to their clients, and by interfering with the plaintiffs' right to freely express their religion by prohibiting them from "provide[ing] spiritual counsel and assistance to their clients who seek such counsel in order to honor their clients' right to self-determination and to freely exercise their own sincerely held religious beliefs ( . . . )" <sup>119</sup>

Regarding the constitutional challenge involving freedom of speech, the plaintiffs alleged that A3371 violates the First Amendment as the statute constitutes viewpoint and content-based regulation of the plaintiffs' ability to engage in SOCE by forbidding licensed counselors from talking about SOCE with their minor clients or providing SOCE to minor clients regardless of the existence of informed consent.<sup>120</sup> They reasoned that because psychotherapy is exclusively "talk therapy," governmental restriction of a therapist's ability to engage in such therapy is a restriction of that therapist's right to free speech.<sup>121</sup> The state responded by claiming that A3371 regulates conduct, not speech, and therefore does not implicate

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114. *Id.* at 864-65.

115. *King v. Christie*, 981 F. Supp. 2d 296, 30. (D.N.J. 2013), *aff'd sub nom.* *King v. Governor of the State of New Jersey*, 767 F.3d 216 (3d Cir. 2014).

116. *Otto*, 981 F.3d 854 at 864; *King*, 981 F. Supp. 2d 296 at 333.

117. *King*, 981 F. Supp. 2d 296 at 302.

118. *Id.* at 303.

119. *Id.* at 305.

120. *Id.* at 312.

121. *Id.*

the First Amendment and may be reviewed under the rational basis standard instead of strict scrutiny.<sup>122</sup> To determine whether or not the statute regulates speech or conduct, the court looked at the plain language of A3371, which does not reference speech or communication.<sup>123</sup> Additionally, the court reasoned that commentators on the subject of psychotherapy have generally considered the practice to be a form of conduct as it is a means of rendering psychological aid to an individual.<sup>124</sup>

Accordingly, the court concluded that the statute does not regulate speech.<sup>125</sup> Therefore, the court analyzed the statute using a rational basis review to consider whether A3371 has any subsidiary effect of burdening speech protected by the First Amendment.<sup>126</sup> The court concluded that the statute does not infringe upon any First Amendment speech as it specifically “seeks to regulate the ‘practice’ of SOCE by a licensed professional and not any speech, public or private, by the licensed professional.”<sup>127</sup>

### 1. An Analysis of Constitutional Challenges

The Supreme Court has clearly stated that state regulations that discriminate on the basis of content or viewpoint are unconstitutional.<sup>128</sup> In *Otto*, the plaintiffs argued, and the Eleventh Circuit agreed, that the Boca Raton ordinances discriminate based on viewpoint.<sup>129</sup> The court reasoned that these regulations are discriminatory because they are restricting speech based on the speech’s content and the underlying ideology, which is that homosexuality is a medical malady that conversion therapy can treat.<sup>130</sup> The court held that the state could not prohibit speech because it promotes a viewpoint that the government disagrees with.<sup>131</sup> The *Otto* court’s designation of conversion therapy as speech that is based on the speaker’s viewpoint is not an unreasonable conclusion.<sup>132</sup>

However, at what point does an opinion or viewpoint become a fact supported by medical study or a scientifically discredited belief? As

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122. *Id.*

123. *Id.* at 313.

124. *Id.* at 317.

125. *Id.* at 320-21.

126. *Id.*

127. *Id.* at 330.

128. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829-30 (1995).

129. *Otto v. City of Boca Raton*, 981 F.3d 854 at 864.

130. *Id.*

131. *Id.*

132. *See Otto*, 981 F.3d 854 at 864.



previously stated, every medical association in America has depathologized homosexuality.<sup>133</sup> Furthermore, many have produced peer-edited medical studies that conclude that SOCE therapy, even if conducted via purely “talk therapy,” is ineffective in altering an individual’s sexual orientation and causes negative physical and emotional harm to patients, especially minors.<sup>134</sup> Therefore, with a medical consensus regarding the dangers of conversion therapy and its effectiveness, the plaintiffs’ opinion of homosexuality, which the *Otto* court states cannot be the basis for state regulation, is no longer a viewpoint but a subversion of a scientifically backed fact.<sup>135</sup>

When presented by a professional medical provider during the process of administering psychological treatment under their professional license, these medically discredited beliefs should not eclipse the government’s police power to pass laws that promote the “health, peace, morals, education and good order of the people.”<sup>136</sup> These SOCE statutes, which specifically only regulate SOCE provided by licensed practitioners, do not prohibit those same practitioners from engaging in SOCE outside the purview of their professional licenses.<sup>137</sup> As the court in *King* stated, the New Jersey statute does not infringe upon any First Amendment speech as it is specifically enforced against “licensed professionals who actually conduct SOCE as a method of counseling, not against those who merely discuss the existence of SOCE with their clients.”<sup>138</sup> For example, a variety of states such as Nevada, Washington, and New Hampshire have crafted their SOCE laws to include overt exceptions for religious advisors who wish to provide their parishioners with conversion therapy.<sup>139</sup> Therefore, if licensed mental-health-care practitioners still wish to provide SOCE services to minors, they may be able to do so, as Nevada notes, by providing SOCE therapy through the lens of a religious counselor or in a pastoral capacity as long as they explicitly state that they are not providing these services under their professional licenses.<sup>140</sup>

Additionally, the SOCE state statutes are necessary actions narrowly tailored to promote the states’ very compelling interest in protecting the

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133. Tiffany C. Graham, *supra* note 6, at 422.

134. See Tiffany C. Graham, *supra* note 6, at 422; Robert J. Cramer et al., *supra* note 2, at 101.

135. See *Otto*, 981 F.3d 854 at 864.

136. See *Barbier v. Connolly*, 113 US 27, 31 (1885).

137. Tiffany C. Graham, *supra* note 6, at 424-25.

138. *King v. Christie*, 981 F. Supp. 2d 296, 330. (D.N.J. 2013).

139. Tiffany C. Graham, *supra* note 6, at 424.

140. *Id.* at 25.

health and welfare of LGBTQ+ youth.<sup>141</sup> According to the Trevor Project, suicide is the second leading cause of death among individuals ages thirteen to twenty-four, and LGBTQ+ youth are nearly four times more likely to attempt suicide than heterosexual youth.<sup>142</sup> Moreover, a 2020 report by the Williams Institute at UCLA School of Law states that LGB individuals who experienced SOCE were nearly twice as likely to develop and act upon suicidal thoughts compared to their peers who had not been subjected to conversion therapy.<sup>143</sup> The judiciary should consider the compelling interest at the core of SOCE state statutes similar to the compelling state interest present in *Ferber*.<sup>144</sup>

As previously stated, the Supreme Court held that the state's interest in prohibiting child pornography substantially outweighs the risk that the statute would criminalize protected expression.<sup>145</sup> The Court reasoned that states have a compelling interest in protecting the welfare of minors and that the distribution of child pornography is intrinsically related to the sexual abuse of children.<sup>146</sup> Therefore, the Court held that because the states have a significant interest in protecting children from sexual abuse, "they may constitutionally regulate the circulation of child pornography even in cases where the content is *not* considered legally obscene under *Miller*."<sup>147</sup> Similarly, states have a significant interest in protecting LGBTQ+ minors from the psychological and physiological harms associated with conversion therapy, and the use of SOCE on minors by licensed health-care providers is intrinsically related to the emotional and physical health of LGBTQ+ minors.<sup>148</sup>

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141. See *King*, 981 F. Supp. 2d 296 at 324-25.

142. The Trevor Project, *Facts About Suicide*, (last visited Apr. 20, 2021), <https://www.thetrevorproject.org/resources/preventing-suicide/facts-about-suicide/> (citing CDC & NCIPC, *Web-based Injury Statistics Query and Reporting System (WISQARS)*, (Aug. 1, 2013), [www.cdc.gov/ncipc/wisqars](http://www.cdc.gov/ncipc/wisqars); Laura Kann et al., *Sexual Identity, Sex of Sexual Contacts, and Health-Risk Behaviors Among Students in Grades 9-12-United States and Selected Sites, 2015*, U.S. DEP'T HEALTH HUM. SERVICES, (Aug. 12, 2016), <https://www.cdc.gov/mmwr/volumes/65/ss/pdfs/ss6509.pdf>).

143. Press Release, UCLA Sch. L. Williams Inst., *LGB People Who Have Undergone Conversion Therapy Almost Twice as Likely to Attempt Suicide*, (Jun. 15, 2020), <https://williamsinstitute.law.ucla.edu/press/lgb-suicide-ct-press-release/>.

144. See *New York v. Ferber*, 458 U.S. 748, 752 (1982).

145. *Id.*

146. *Id.* at 752, 759.

147. *Id.* at 761 (emphasis added).

148. See UCLA School of Law Williams Institute, *supra* note 143; Christy Mallory et al., *supra* note 3.

## V. CONVERSION THERAPY AND CONSUMER FRAUD

In 2015 and 2017, Congress introduced federal legislation called the Therapeutic Fraud Prevention Act to regulate conversion therapy.<sup>149</sup> If passed, the Act would have designated the practice of conversion therapy as consumer fraud if it was administered in exchange for payment.<sup>150</sup> Those who provided SOCE for payment or who advertised the service would be subject to disciplinary action via their state attorney general and the Federal Trade Commission.<sup>151</sup> This notion of categorizing conversion therapy as consumer fraud was first explored by the state of New Jersey.<sup>152</sup>

In 2014, the New Jersey case *Ferguson v. JONAH* was the first case involving the novel argument that correlated conversion therapy to fraud, stating that providers advertising SOCE make false and deceptive claims that cannot be scientifically supported.<sup>153</sup> The plaintiffs in *Ferguson* were comprised of five former clients of Jews Offering New Alternatives to Homosexuality (JONAH), all of which participated in the non-profit corporation's conversion therapy program.<sup>154</sup> JONAH advertised their conversion therapy program as providing counseling services to change an individual's sexual orientation from homosexual to heterosexual by using clinical and science-based techniques proven to prevent or cure homosexuality.<sup>155</sup> The program typically costs \$100 per individual session and \$60 per group session, which, depending on the client, could exceed \$10,000 per year.<sup>156</sup>

The plaintiffs brought a New Jersey Consumer Fraud Act (CFA) claim alleging that JONAH had engaged in "unconscionable commercial practice, deception, fraud, false pretense, false promise, and misrepresentation[ ]" when it: (1) misrepresented homosexuality as a mental illness; (2) falsely claimed that they could cure or treat the disorder of homosexuality; (3) claimed to be capable of curing or treating the disorder within a specific time depending on the individual client; (4) specified specific success rates ranging from 70-75%; and (5) claimed that the techniques and theories employed by JONAH were scientifically

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149. Christy Mallory et al., *supra* note 3.

150. *Id.*

151. *Id.*

152. Nancy A. Del Pizzo, *If It Ain't Broke, Don't Fix It Condemning Promises to "Straighten" Homosexuals for A Fee*, N.J. L., at 13; *Ferguson v. JONAH*, 445 N.J. Super. 129, 135 (Law. Div. 2014).

153. *Id.*

154. *Ferguson v. JONAH*, 136 A.3d 447, 449 (N.J. Super. Ct. Law Div. 2014).

155. *Id.* at 450.

156. *Id.* at 451.

supported and valid.<sup>157</sup> The plaintiffs argued that American health associations have discredited SOCE therapy and that the plaintiffs required subsequent restorative therapy as a result of JONAH's abusive services.<sup>158</sup> Therefore, the plaintiffs asked for the money spent on subsequent therapy to be calculated as an ascertainable loss under the CFA.<sup>159</sup>

Pursuant to the CFA, claimants must prove three main elements: (1) that the defendant engaged in unlawful conduct, (2) that the plaintiffs have an ascertainable loss, and (3) that a causal relationship exists between the defendant's unlawful conduct and the plaintiff's loss.<sup>160</sup> The court agreed with the plaintiffs' argument that their post-JONAH therapeutic treatment meets the requirements for an ascertainable loss necessary under the CFA, though the court noted that even if the cost of post-JONAH treatment did not qualify, the costs are quantifiable and thus would constitute "damages sustained" for remedy purposes under the CFA.<sup>161</sup> The jury found that JONAH was guilty of engaging in unconscionable business practices, and the court-ordered permanent injunctive relief, requiring JONAH to cease all operations permanently and dissolve as a corporate entity.<sup>162</sup>

*Ferguson* was a trailblazing case in the legal world of SOCE legislation.<sup>163</sup> Not only was it the first case to categorize conversion therapy as consumer fraud, but it was also the first time in history that an American court had declared that homosexuality was not a mental disease or disorder as a matter of law.<sup>164</sup> The *Ferguson* jury took only three hours to return a unanimous verdict that the JONAH conversion therapy program was not therapy but a fraudulent business.<sup>165</sup> The legal theory behind this verdict—that SOCE is pseudo-therapy constituting unconscionable consumer fraud—provides interested plaintiffs with an appealing new legal weapon with which to strike down American SOCE providers.<sup>166</sup>

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157. *Ferguson v. JONAH*, 2015 WL 609436, at \*2 (N.J.Super.L.).

158. *Ferguson*, 136 A.3d 447 at 451.

159. *Id.*

160. *Id.* at 453.

161. *Id.* at 454-55.

162. *Ferguson v. JONAH*, 2019 WL 5459860, at \*1 (N.J.Super.L.).

163. Peter R. Dubrowski, *The Ferguson v. Jonah Verdict & A Path Towards Nat'l Cessation of Gay-to-Straight "Conversion Therapy,"* 110 NW. U. L. REV. ONLINE 77, 79 (2015).

164. *Id.*

165. *Id.*

166. *Id.*

Conversion therapy falls squarely within state consumer fraud legislation because it is a practice that is wholly dependent upon misrepresentation.<sup>167</sup> At the core of conversion therapy are two major fraudulent assertions essential to induce clients to purchase any type of SOCE.<sup>168</sup> These two assertions are: (1) homosexuality is a pathological anomaly, and (2) homosexuality can be changed through therapeutic treatment.<sup>169</sup> These misrepresentations are intrinsic to the commercial selling of SOCE, for without them, what patient would bother purchasing the service?<sup>170</sup> Therefore, it is extraordinarily difficult to advertise and sell SOCE without committing consumer fraud.<sup>171</sup> Classifying the selling of SOCE as fraudulent may better help SOCE bans withstand constitutional challenges because the Supreme Court has stated that false speech that rises to the level of libel and fraud enjoys significantly less constitutional protection as, “there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.”<sup>172</sup>

However, despite the lower protection allotted to fraudulent speech, parties attempting to restrict SOCE through consumer fraud claims may run into trouble depending on how the courts define fraud.<sup>173</sup> Fraud has been defined both narrowly and broadly by the circuit courts and the Supreme Court.<sup>174</sup> In *Knauer v. United States*, the Supreme Court defined fraud as “perjury, falsification, concealment, [and] misrepresentation.”<sup>175</sup> Subsequently, the Fifth Circuit held that a fraudulent claim involved “a material misrepresentation, which was false, and which was either known to be false when made or was asserted without knowledge of its truth, which was intended to be acted upon, which was relied upon, and which

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167. *Id.*

168. *Id.* at 80.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, (1974) citing *New York Times Co. v. Sullivan*, 376 U.S., at 270.

173. See Natali Wyson, *Defining Fraud as an Unprotected Category of Speech: Why the Ninth Circuit Should Have Upheld the Stolen Valor Act in United States v. Alvarez*, 2012 B.Y.U. L. REV. 671, 675 (2012).

174. *Id.* at 675.

175. *Knauer v. United States*, 328 U.S. 654, 657 (1946); See Natali Wyson, *Defining Fraud as an Unprotected Category of Speech: Why the Ninth Circuit Should Have Upheld the Stolen Valor Act in United States v. Alvarez*, 2012 B.Y.U. L. REV. at 671, 675.

caused injury.”<sup>176</sup> Additionally, in some cases involving specific types of fraud, the Supreme Court has used very precise language requiring parties to show a variety of elements.<sup>177</sup> These narrowly tailored definitions and elements may pose a threat to fraud based SOCE regulations if the classification of fraud requires a showing of intent to deceive or to misrepresent. In many cases, SOCE providers claim to believe that homosexuality is a curable disorder and base this belief on religious ideology.<sup>178</sup> Therefore, advocates for SOCE regulation seeking to categorize conversion therapy as consumer fraud, may find themselves facing a difficult battle to prove intent.

## VI. THE FUTURE OF SOCE LAW

Despite the Eleventh Circuit’s recent decision in *Otto* and the seemingly inevitable attack from a First Amendment claim upon every SOCE statute that dares to stick its head out of its burrow, the future of conversion therapy law, though fraught, is not depressingly grim. For one, contemporary SOCE has few remaining supporters in the United States.<sup>179</sup> A national public opinion poll conducted by *Ipsos/Reuters* in 2019 found that fifty-six percent of U.S. adults support the illegalization of youth conversion therapy.<sup>180</sup> Additionally, opinion polls in six states have found significant public support for state legislation banning licensed health-care professionals from providing SOCE to minors.<sup>181</sup>

With the multitude of First Amendment challenges to SOCE legislation and the mixture of different judicial outcomes that each one receives, it seems as if anti-deception and anti-consumer fraud legislation may be the best course of action for states wishing to regulate the practice and better survive constitutional attack.<sup>182</sup> Despite the potential problems

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176. *Formosa Plastics Corp. USA v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998); See Natali Wyson, *Defining Fraud as an Unprotected Category of Speech: Why the Ninth Circuit Should Have Upheld the Stolen Valor Act in United States v. Alvarez*, 2012 B.Y.U. L. Rev. at 671, 675.

177. Natali Wyson, *Defining Fraud as an Unprotected Category of Speech: Why the Ninth Circuit Should Have Upheld the Stolen Valor Act in United States v. Alvarez*, 2012 B.Y.U. L. REV. at 675-76.

178. See Christy Mallory et al., *supra* note 3.

179. Peter R. Dubrowski, *The Ferguson v. Jonah Verdict & A Path Towards Nat’l Cessation of Gay-to-Straight “Conversion Therapy”* at 79.

180. Christy Mallory et al., *supra* note 3 (a minority of 18% of U.S. adults believe that conversion therapy for youths should be legal).

181. *Id.* (The six states include: Arizona (59%), Florida (71%), New Mexico (60%), North Carolina (80%), Pennsylvania (54%), and Virginia (64%)).

182. Jacob M. Victor, *Regulating Sexual Orientation Change Efforts: The California Approach, Its Limitations, & Potential Alternatives*, 123 YALE L.J. 1532, 1578 (2014).

outlined in the previous section, the First Amendment is not usually implicated in cases of fraudulent or deceptive advertising and business practices because the assumption that state police power allows states to prohibit fraudulent and misleading advertisement seems to be secure.<sup>183</sup> Additionally, courts usually adopt the definition and requirements of fraud based on the intent of the enacting legislature when that intent is clear.<sup>184</sup> Thus, if the legislation specifically categorizes the selling of SOCE as fraudulent, many courts may abide by the legislative intent instead of imposing the fluid common-law definition.

Therefore, fraud prevention is the suggested form for future SOCE legislation concerning paid SOCE.<sup>185</sup> That said, fraud-based regulation in addition to all the other state bans explored in this Comment, do not address SOCE provided by religious advisors.<sup>186</sup> This is significant because many individuals undergo conversion therapy at the hands of religious counselors and leaders.<sup>187</sup> In order to properly address these sources of SOCE, advocates will need to push for a federal ban that utilizes society's more progressive view of LGBTQ+ rights to classify SOCE as child abuse.

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183. *Id.* at 1578-79.

184. Natali Wyson, *Defining Fraud as an Unprotected Category of Speech: Why the Ninth Circuit Should Have Upheld the Stolen Valor Act in United States v. Alvarez*, 2012 B.Y.U. L. REV. at 676.

185. *Id.*

186. See H.B. 386, 116th Cong. § 54.1-2409.5 (Va. 2020).

187. See Christy Mallory et al., *supra* note 3.