RELIANCE INTEREST: THE CASE FOR AFFIRMING STATUTORY BANS ON CONVERSION THERAPY

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INTRODUCTION

Imagine a child is taken to a psychologist who informed them that all their favorite foods, hobbies, or media were bad. Not that they were unhealthy or unproductive, but innately bad. The psychologist then informs the child that the foods, hobbies, and media they detested were actually remarkable and enjoyable. This process continued for weeks where pictures and sounds were introduced, and the child was exposed to tests meant to further convince them to change their perception due to their personal experiences being entirely invalid and in need of correction. Over the course of the treatments, the child is regularly informed that the person performing these evaluations is a professional within their field, duly licensed to practice this type of treatment. Conversion therapy operates in a similar manner, seeking to deny or alter the inherent characteristics of the patient, often children, to better fit societal expectations. While the hypothetical is by no means directly analogous to the practice of conversion therapy, the innateness towards preferences of food, hobbies, and media not being directly comparable to one's sexual orientation, that does not negate the feelings of confusion, powerlessness, and self-doubt that would come from such a scenario. This practice is not to correct behavior, rather it is to hostilely alter it in a manner that has been shown to cause demonstrable harm.

Conversion therapy is the debunked practice of using clinical therapy treatments seeking to change a person's sexual orientation or gender identity.[1] Although the professional field of psychology largely views the use of conversion therapy as harmful, it still has proponents today, primarily among highly religious and conservative factions.[2] Legally, the debate over the use of conversion therapy

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1. Stephen Vider & David S. Byers, *A Half-Century of Conflict Over Attempts to 'Cure' Gay People,* TIME (Feb. 12, 2015, 12:00 PM), https://time.com/3705745/history-therapy-hadden/.

2. Daniel E. Conine et al., *LGBTQ+ Conversion Therapy and Applied Behavior Analysis: A Call to Action*, J. APPLIED BEHAV. ANALYSIS, Winter 2022, at 6, 18; Diana Cariboni & Joni Hess, *US Christian Right Group Accused of Promoting Anti-LGBTQ 'Conversion Therapy'*, OPEN DEMO-

has resulted in a number of states enacting statutory bans on the practice by duly licensed mental health providers.[3] These statutes reflect a delicate balance between the health providers' First Amendment right to free speech and the ability of states to regulate professional conduct to protect the interest of the public. While the Supreme Court has not articulated a stance regarding statutory bans on conversion therapy, there exists a circuit split between the Ninth and Eleventh Circuits.[4] In the Ninth Circuit case of *Tingley v. Ferguson*, the Court reaffirmed its position, upholding a Washington state statutory ban on the use of conversion therapy on minors by licensed therapists.[5] Alternatively, in the Eleventh Circuit case of *Otto v. City of Boca Raton*, the Court struck down a local ordinance that similarly banned the use of conversion therapy on minors.[6] While First Amendment free speech rights are intentionally robust, there are circumstances where the state has a vested interest in providing restrictions for the health and well-being of its citizens. The procurement and maintenance of clinical licensure is one such instance where the state has an important interest in ensuring that the public, especially particularly vulnerable and susceptible populations such as children, are not subject to adverse treatment practices by licensed clinicians. However, as First Amendment free speech rights are implicated, heightened levels of constitutional scrutiny are also implicated. Due to the important nature of such bans, no level of constitutional scrutiny should prevent the protection of LGBTQ+[7] children from the adverse consequences of conversion therapy.

This Note will outline the history of conversion therapy, provide the current state of the law regarding the distinction between free speech and professional conduct, and explain court cases having applied this analysis in the context of determining the constitutionality of bans on conversion therapy. Finally, this Note will consider the risks associated with a potential Supreme Court decision that such bans on conversion therapy are unconstitutional.

CRACY (Nov. 24, 2021, 9:00 AM), https://www.opendemocracy.net/en/5050/us-christian-right-conversion-therapy-despite-bans/.

3. Joseph Frankel, *More and More States Are Outlawing Gay-Conversion Therapy,* ATL. (July 10, 2017), https://www.theatlantic.com/health/archive/2017/07/states-outlawing-conversion-therapy/533121/.

4. These cases also raise issues of First Amendment free exercise rights, unconstitutional vagueness under the Fourteenth Amendment, and parental rights. While important considerations, this article does not contemplate these issues, instead focusing on the First Amendment free speech claims that have resulted in the current circuit split.

5. Tingley v. Ferguson, 47 F.4th 1055, 1063-64 (9th Cir. 2022).

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

7. While there are different acronyms that may be used to refer to the queer community, this Note uses LGBTQ+ as this reflects the subsets of the community who may be most likely to experience exposure to conversion therapy. This is in no way meant to invalidate other identities or suggest there is no exposure therein to conversion therapy, but to direct attention to the most commonly affected parties. *See* Erin Blakemore, *From LGBT to LGBTQIA+: The Evolving Recognition of Identity*, NAT'L GEOGRAPHIC (Oct. 19, 2021), https://www.nationalgeographic.com/history/article/from-lgbt-to-lgbtqia-the-evolving-recognition-of-identity.

I. HISTORY OF THE USE OF CONVERSION THERAPY

The belief that a person's sexual orientation is mutable is not new. At minimum, this belief dates back to the 1930s when controversial psychologist Sigmund Freud posited hypnosis could be used to alter a person's sexuality.[8] While Freud himself recanted this belief, and instead argued against attempts to change sexual orientation by 1935, this did not stop his initial theories from gaining traction.[9] Since Freud's initial hypothesis, attempts to change the sexual orientation of LGBTQ+ people have occurred. Historically, the clinical diagnosis of "homosexuality,"[10] as presented in the first edition of the *Diagnostic and Statistical Manual of Mental Disorders (DSM)*, first published in 1952, represented same-sex attraction as an ailment in need of treatment.[11] Though removed from the subsequent *DSM-II*, published in 1973, the treatment of same-sex attraction had become popular in the 1960s and 1970s.[12] It is estimated that approximately 698,000 LGBTQ+ adults in the United States have received some form of conversion therapy with 350,000 subject to conversion therapy as minors.[13]

Conversion therapy treatments have taken many forms over the last eighty years. The descriptions of early iterations are gruesome. In the 1960s and 1970s, aversion therapy was used as a form of behavioral modification that would expose queer people to depictions of same-sex sexual images while at the same time introducing a negative stimulus.[14] Negative stimuli often included electric shocks and nausea-inducing drugs for the purpose of creating a negative association with feelings of same-sex attraction.[15] In extreme instances, lobotomies were performed.[16] With a history fraught with ethical and moral questions, it is problematic that conversion therapy continues to be practiced today. While current treatments are less facially distasteful, including cognitive-behavioral therapy, eye-movement desensitization, and re-processing, exposure still often causes psychological, physical, and economic harm to patients.[17] These practices are

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8. Laura Boone, *Conversion Therapy*. SALEM PRESS ENCYCLOPEDIA (2023), https://search.ebscohost.com/login.aspx?direct=true&AuthType=shib&db=ers&AN=121772812&site=eds-live&authtype=ip,shib&custid=s8899245.

9. *Id.*; Vider & Byers, *supra* note 1.

10. Brianna A. Smith, *'Gay' or 'Homosexual': The Words We Use Can Divide Public Opinion on Civil Rights*, LONDON SCH. OF ECON. & POL. SCI (Dec. 8, 2017), https://blogs.lse.ac.uk/usappblog/2017/12/08/gay-or-homosexual-the-words-we-use-can-divide-public-opinion-on-civil-rights/. Words and the context in which they are used are important to how ideas and concepts are received. Due to the clinical and often negative uses of the word "homosexuality," this Note will instead use LGBTQ+, gay, or queer.

11. Boone, *supra* note 8.

12. *Id.*

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

14. Boone, *supra* note 8.

15. *Id.*; Vider & Byers, *supra* note 1.

16. Boone, *supra* note 8.

17. Vider & Byers, *supra* note 1; Anna Forsythe et al., *Humanistic and Economic Burden of Conversion Therapy Among LGBTQ Youths in the United States*, 176 JAMA PEDIATRICS 493, 494 (2022).

generally meant to change the thoughts surrounding same-sex attraction or gender identity so as to encourage queer individuals to identify, or at least present, as heterosexual and cisgender.[18] Even in cases where someone's sexual orientation has been seemingly changed, this may result in detrimental outcomes to the individual affected.[19] This may take the form of adverse mental health consequences or economic harm due to adverse health outcomes.[20]

As the practice of conversion therapy in professional settings is extremely harmful to LGBTQ+ individuals, it is important to note that many psychological institutions condemn the practice. The American Psychiatric Association,[21] the American Psychological Association,[22] and the American Academy of Child and Adolescent Psychiatry[23] are among the professional organizations that have advocated against the use of conversion therapy, particularly on minors. In addition, there have been calls within the psychological community to not just denounce the use of conversion therapy, but also to critically analyze past research that has advocated for its use, and retract studies that are demonstrably invalid.[24] This shift in attitude has been accompanied by state legislation banning the use of conversion therapy on minors.[25]

To date, twenty-two states and the District of Columbia have enacted bans on performing conversion therapy on minors with five additional states having enacted partial bans.[26] Monumental shifts in the fields of psychology and law have reflected a societal shift in how LGBTQ+ individuals are viewed. Yet, the practice of conversion therapy remains in use and in some circumstances, may be gaining popularity.[27] This historic practice of disparate treatment towards LBGTQ+ individuals, specifically through the use of conversion therapy, is what state legislatures are attempting to prevent by enacting statutory bans on the use of conversion therapy on minors. However, some politicians in conservative jurisdictions advocate for the use and protection of the practice of conversion

18. *Conversion Therapy*, GOODTHERAPY, https://www.goodtherapy.org/blog/psychpedia/conversion-therapy (Oct. 26, 2017).

19. *Id.*

20. Forsythe et al., *supra* note 17, at 497; *Conversion Therapy*, *supra* note 18.

21. *Position Statement on Conversion Therapy and LGBTQ Patients*, AM. PSYCHIATRIC ASS'N (Dec. 2018), https://www.psychiatry.org/getattachment/3d23f2f4-1497-4537-b4de-fe32fe8761bf/Position-Conversion-Therapy.pdf.

22. *Banning Sexual Orientation and Gender Identity Change Efforts*, AM. PSYCH. ASS'N, https://www.apa.org/topics/lgbtq/sexual-orientation-change (last visited July 21, 2024).

23. *Conversion Therapy*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Feb. 2018), https://www.aacap.org/AACAP/Policy_Statements/2018/Conversion_Therapy.aspx.

24. Conine et al., *supra* note 2, at 9.

25. Frankel, *supra* note 3.

26. *Conversion "Therapy" Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.mapresearch.org/equality-maps/conversion_therapy (July 19, 2024).

27. Jamie Ducharme, *Conversion Therapy Is Still Happening in Almost Every U.S. State*, TIME (Dec. 12, 2023, 9:00 AM), https://time.com/6344824/how-common-is-conversion-therapy-united-states/.

therapy as it may be politically beneficial.[28] This counter movement is most often associated with some religious affiliations, including white protestants, who are particularly hostile to the rights of LGBTQ+ people.[29] These movements have garnered support from conservative advocacy groups who have assisted plaintiffs in bringing suit against state bans on conversion therapy, primarily under the claim that such bans on conversion therapy are a restriction of the clinician's First Amendment rights to free speech.[30] Although most courts reject these arguments, the Eleventh Circuit in *Otto* found it persuasive. As a result, Alabama, Florida, and Georgia are prevented from enacting state or local bans on conversion therapy. The contention with this holding is such bans are necessary to protect the health, safety, and future of queer children, which outweighs the personal liberty of clinicians. That such bans prevent unrestricted free speech of clinicians in the course of their professional conduct is merely incidental to the protection of vulnerable populations.[31]

II. INTERSECTION OF FIRST AMENDMENT RIGHTS TO FREE SPEECH AND STATES' POWER TO REGULATE PROFESSIONAL CONDUCT

A. Constitutional Protections of Free Speech Are Robust

In an attempt to address the ambiguity that has persevered through constitutional interpretation of the First Amendment, the Supreme Court sought to clearly state the standards of review in the case of *Reed v. Town of Gilbert.*[32] Here, the Court found a local code that placed different restrictions on different types of signage unconstitutional by finding this restriction to be content-based.[33] The code outlined twenty-three different categories of signage including ideological signs, political signs, and temporary directional signs, the latter of which received the

28. Andrea Ens, *Conversion Therapy Is Harmful and Ineffective. So Why Is It Still Here?,* WASH. POST (May 15, 2023, 8:00 AM), https://www.washingtonpost.com/made-by-history/2023/05/15/conversion-therapy-political-history/.

29. Michael Lipka & Patricia Tevington, *Attitudes About Transgender Issues Vary Widely Among Christians, Religious 'Nones' in U.S.*, PEW RSCH. CTR. (July 7, 2022), https://www.pewresearch.org/short-reads/2022/07/07/attitudes-about-transgender-issues-vary-widely-among-christians-religious-nones-in-u-s/.

30. David Kirkpatrick, *The Next Targets for the Group that Overturned Roe*, NEW YORKER (Oct. 2, 2023), https://www.newyorker.com/magazine/2023/10/09/alliance-defending-freedoms-legal-crusade.

31. Notably, there are also current statutes specifically impacting the ability of transgender individuals to receive gender-affirming care. In the approaching 2024-2025 term the Supreme Court will hear arguments in *United States v. Skrmetti*, which considers a Tennessee law that would ban gender-affirming care to transgender minors. While this is an important issue that is due consideration, this Note is limited to the constitutionality of statutory bans on conversion therapy. Central in both legal issues is the ability for queer, specifically transgender, children to grow with the care necessary for their development. The results of this decision will have nationwide consequences. *See generally 2024 Anti-Trans Bills Tracker*, TRANS LEGIS. TRACKER, https://translegislation.com/ (last visited Sept. 30, 2024).

32. Reed v. Town of Gilbert, 576 U.S. 155 (2015).

33. *Id.* at 173.

strictest restrictions.[34] This was found harmful to the plaintiff, a pastor from a small church congregation that routinely moved locations and thus relied on signage to direct the congregation.[35]

The Court found in the First Amendment context, generally only content and/or viewpoint-based restrictions are subject to strict scrutiny.[36] A statute subject to strict scrutiny must further a compelling government interest and use means narrowly tailored to achieving said interest.[37] Alternatively, when a restriction is both content- and viewpoint-neutral, a lower level of scrutiny may apply.[38] This requires a substantial state interest that is sufficiently drawn to achieve such interest.[39] The final level of scrutiny, rational basis, requires merely a rational relation to a legitimate state interest.[40] While rational basis has been applied to First Amendment claims, the legitimacy of such applications have been deemed suspect.[41]

The Court found that because the code at issue required analysis of the information on the signage to determine what restrictions applied, this constituted a content-based restriction and thus, strict scrutiny should be applied.[42] The Court did not find that the Town of Gilbert met this level of heightened scrutiny as it was unable to demonstrate how this furthers a compelling governmental interest.[43] This decision makes clear the Supreme Court interprets content-based restrictions as triggering a strict scrutiny analysis. While professional conduct requires additional considerations, the analysis of this holding was leveraged by the Eleventh Circuit as discussed below.[44]

B. State Interest in Regulating Professional Conduct for the Public Good

The Supreme Court has noted professional conduct is a perhaps less protected area of the First Amendment right to free speech. This niche area has been contemplated by the Supreme Court in the cases of *Ohralik v. Ohio State Bar Ass'n*,[45] and *Planned Parenthood v. Casey*.[46] In *Ohralik*, the principal issue was whether it was constitutional for the state to regulate the commercial practices of attorneys when soliciting business from potential clients.[47] The Court noted the

34. *Id.* at 159.
35. *Id.* at 161.
36. *Id.* at 163-64.
37. *Id.* at 171 (quoting Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 734 (2011)).
38. *Id.* at 162-63.
39. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 773 (2018).
40. Pickup v. Brown, 740 F.3d 1208, 1231 (9th Cir. 2014).
41. *Becerra*, 585 U.S. at 767. Except for unprotected speech categories, this practice has generally not been viewed favorably.
42. *Reed*, 576 U.S. at 172.
43. *Id.*
44. *See infra* Section IV.A.
45. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).
46. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).
47. *Ohralik*, 436 U.S. at 449.

state could enact regulations for professional conduct that also have an effect on free speech, so long as that effect is incidental.[48] Notably, the Court acknowledged that even when language is used in professional contexts, this does not automatically trigger strict First Amendment protections because the state maintains an interest in the regulation of commercial activity.[49] The Court cited to numerous situations where the regulation of communication did not infringe First Amendment protections when the commercial activity being regulated was "deemed harmful to the public whenever speech is a component of that activity."[50] In these contexts, First Amendment protections are not entirely removed, rather, the level of judicial scrutiny of restrictions on speech is lessened.[51] Specifically, the Court should consider the state interests implicated in the case.[52] Here, the Court noted the important interest of the state in maintaining the standards required of licensed professionals, citing cases implicating the practices of optometrists and dentists as examples of where First Amendment protections may not be as influential as the interests of the state to regulate.[53]

Following a similar approach in *Casey*, the Court rejected a challenge to a regulation of professional conduct, stating as part of the practice of medicine and under licensure of the state, it was acceptable for the state to enact such regulation.[54] *Casey* involved provisions of the Pennsylvania Abortion Control Act which required informed consent prior to an abortion, and those seeking an abortion must "be provided with certain information at least 24 hours before the abortion is performed."[55] The act also required minors seeking an abortion to receive parental consent and pregnant women to sign a statement that she had notified her husband of her intent to obtain an abortion. Due to the mandatory disclosure requirement, the Court acknowledged that the physician's First Amendment rights to not speak were implicated, but only to the extent of their professional obligations, as reasonably regulated by the state.[56] Outside the practice of medicine and their state licensure, their First Amendment rights to free speech were not affected.[57] These cases reveal that although the Supreme Court has limited jurisprudence in this facet of the First Amendment, limited regulation

48. *Id.* at 456.

49. *Id.* (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)).

50. *Id.* (citing SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 847-48 (2d Cir. 1968)) (regarding exchange of information about securities); Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 383 (1970) (regarding corporate proxy statements); Amer. Column & Lumber Co. v. United States, 257 U.S. 377, 391 (1921) (regarding the exchange of price and production information among competitors); NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969) (regarding employers' threats of retaliation for the labor activities of employees).

51. *Ohralik*, 436 U.S. at 457.

52. *Id.* at 456.

53. *Id.* at 460 (citing Williamson v. Lee Optical Co., 348 U.S. 483 (1955) and Semler v. Oregon. State Bd. of Dental Exam'rs, 294 U.S. 608 (1935)).

54. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992), *overruled on other grounds by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

55. *Casey*, 505 U.S. at 844 (citing 18 Pa. Cons. Stat. § 3205 (1990)).

56. *Id.* at 884.

57. *Id.*

of professional conduct, so long as it is not overly burdensome on the individual free speech rights of providers, is within the powers of the state.

III. CASE LAW PRECEDING THE CURRENT CIRCUIT SPLIT REGARDING CONVERSION THERAPY

The primary case resulting in the split between the Ninth Circuit and Eleventh Circuit is the case of *Pickup v. Brown*.[58] In this case, the plaintiffs from the district courts were bringing challenges to Senate Bill 1172 ("S.B. 1172"), referred to by the legislature as Sexual Orientation Change Efforts[59], which outlawed the use of conversion therapy on minors by licensed mental health providers.[60] *Pickup*, as it appeared in front of the Ninth Circuit, was the consolidation of two cases, *Welsh v. Brown* and *Pickup v. Brown* (*Pickup I*).[61] The plaintiffs in *Welsh*, two current and one aspiring conversion therapy practitioners, argued S.B. 1172 was a violation of their First Amendment free speech rights. Additional arguments by the plaintiffs included allegations that the statute violated their rights to privacy, violated the religion clauses, and was unconstitutionally vague and overbroad.[62] The *Welsh* Court found S.B. 1172 constituted viewpoint discrimination of the plaintiffs First Amendment free speech rights and was therefore subject to strict scrutiny.[63] The District Court did not believe the state action would stand up to the heavy requirements of strict scrutiny and therefore ordered a preliminary injunction of S.B. 1172, stating the plaintiffs were likely to succeed in their argument that S.B. 1172 was a violation of the First Amendment.[64] Because of this holding on the First Amendment claim, the District Court did not consider the plaintiffs' other constitutional challenges.[65]

Plaintiffs in *Pickup I* consisted of conversion therapy practitioners, organizations that supported the use of conversion therapy, children actively undergoing conversion therapy, and parents of children undergoing conversion therapy.[66] They similarly argued S.B. 1172 was a violation of a myriad of First and Fourteenth Amendment rights including: "right to free speech, minors' right to receive information, and parents' right to direct the upbringing of their children," in addition to arguing for unconstitutional vagueness.[67] Contrary to the Court in *Welsh*, the District Court in *Pickup I* rejected a preliminary injunction, instead holding the plaintiffs were unlikely to succeed on the merits of their argument.[68] The *Pickup I* Court held that because S.B. 1172 restricted the use of conversion therapy as a

58. Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014).
59. Referenced herein as conversion therapy.
60. 2011 S.B. 1172, Cal. Legis. Serv. Ch. 835 (West).
61. *Pickup*, 740 F.3d at 1221.
62. *Id.* at 1224.
63. *Id.*
64. *Id.* at 1221-22.
65. *Id.* at 1224.
66. *Id.*
67. *Id.* at 1225.
68. *Id.* at 1221-22.

form of treatment, not discussion of conversion therapy treatment, this primarily constituted a regulation of conduct rather than speech, meaning the statute was only subject to rational basis review.[69] Additionally, the District Court held the language of the text was not vague nor an infringement of parental rights to prevent the use of treatment the state has found to be harmful.[70] The cases were combined by the Ninth Circuit to settle the conflicting decisions.

In making its decision in *Pickup v. Brown*, the Ninth Circuit outlined the harmful, traumatic, and dangerous history of conversion therapy.[71] This included a description of some of the more gruesome treatment practices that have been used in attempt to change a youth's sexual orientation. While the conversion therapy treatment practices today are less extreme than historical practices, they continue to discredit and attempt to change the sexual orientation of minors. The Court noted that in 1973 the American Psychological Association stated that being LGBTQ+ was not an illness or condition needing treatment.[72] This therefore calls into question the need for a treatment of a condition that is not recognized as an ailment. In passing S.B. 1172, the state found the use of outdated and harmful practices by mental health providers to attempt to change the sexual orientation of those under the age of majority constituted "unprofessional conduct" and the state's purpose in passing the bill was to protect LGBTQ+ youth from the harms associated with exposure to conversion therapy.[73] Of note, the Court made clear that S.B. 1172 does not restrict therapy practices that engage in affirming the sexual orientation of queer children.[74] Rather, mental health providers are statutorily able to provide care centered around acceptance of the queer identities of children.[75]

In *Pickup*, the Court relied primarily on the reasoning of two other Ninth Circuit cases regarding the intersection of free speech and conduct, *National Association for the Advancement of Psychoanalysis v. California Board of Psychology* ("*NAAP*") and *Conant v. Walters*.[76] In *NAAP*, the plaintiffs were psychoanalysts who were trained and licensed to practice in states and nations outside of California.[77] At issue in this case was the California legislature's enactment of the Psychology Certification Act, which created specific licensure requirements to be able to practice as a psychologist in the state of California.[78] California's purpose in the statute was to maintain the integrity of the profession of psychology due to the importance of public health, safety, and welfare.[79] The statute contained a degree requirement in addition to supervised training and the

69. *Id.* at 1225.
70. *Id.*
71. *Id.* at 1222.
72. *Id.*
73. *Id.* at 1223 (citing Cal. Bus. & Prof. Code § 865.2).
74. *Id.*
75. *Id.* at 1222; Cal. Bus. & Prof. Code § 865(b)(2) (West 2024).
76. *Pickup*, 740 F.3d at 1225.
77. Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psych., 228 F.3d 1043, 1048 (9th Cir. 2000).
78. *Id.* at 1047-48.
79. *Id.* at 1047.

passage of board testing.[80] Plaintiffs argued California's specific requirements to practice psychology in the state violated their First Amendment rights of free speech and association, in addition to violating their substantive due process and equal protection under the Fourteenth Amendment. [81] Regarding free speech rights, the Court stated California's licensing requirements are acceptable even if a speech interest is implicated.[82] This Court quoted the Supreme Court in its holdings of *Giboney v. Empire Storage & Ice Co*.[83] and *Ohralik v. Ohio State Bar Ass'n,*[84] which held the state is not entirely prohibited from regulating language whether spoken, written, or printed.[85] Rather, the state can regulate speech related to commercial activity that may be harmful to the public.[86] Because the statute dealt with licensure meant to preserve the safety of Californians seeking the services of psychologists, the Court found this a valid exercise of the state's police power.[87] The Court also addressed potential content and viewpoint discrimination.[88] The Court found the statute content- and viewpoint-neutral in that it did not consider any regulation of the conversations that providers could have with patients.[89] Certain types of speech are therefore not being restricted due to this statute. This led the Court to hold the statute was not subject to strict scrutiny.[90] Finally, regarding the Fourteenth Amendment violations, the Court found psychoanalysts do not constitute a suspect class, and California's licensing laws did not violate any fundamental rights.[91] Therefore, under rational basis review, the Court upheld the Psychology Certification Act as a valid exercise of the state's police power.[92]

Contrary to *NAAP*, in *Conant v. Walters* the Ninth Circuit found the state action was a violation of First Amendment rights to free speech.[93] In *Conant*, the issue was whether it was a violation of federal law for physicians in California to discuss the use of medical marijuana with their patients.[94] At this time, California had allowed for limited use of medical marijuana while the use of marijuana in any capacity was prohibited under federal law.[95] The plaintiffs, which included physicians and patients, brought a cause of action against the federal government under 21 U.S.C § 823(f), which prevented physicians' ability to conduct research or in any way distribute controlled substances.[96] To do so could result in

80. *Id.*
81. *Id.* at 1049.
82. *Id.* at 1053.
83. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).
84. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).
85. *Nat'l Ass'n for the Advancement of Psychoanalysis*, 228 F.3d at 1053-54.
86. *Id.* at 1054.
87. *Id.*
88. *Id.* at 1055.
89. *Id.*
90. *Id.*
91. *Id.* at 1049-50.
92. *Id.* at 1051.
93. Conant v. Walters, 309 F.3d 629, 632 (9th Cir. 2002).
94. *Id.* at 634.
95. *Id.* at 632.
96. *Id.* at 632-33.

disciplinary action in the form of a revocation of their Drug Enforcement Administration ("DEA") prescription authority.[97] The Court found this constituted viewpoint discrimination in that it condemned the used of medical marijuana as a potential treatment in certain cases, and therefore subjected the statute to strict scrutiny.[98] The Court held that because the state was not narrow enough in its restriction, that is it sought to punish physicians on the communications they had with patients not exclusively pertaining to prescriptions given, this was an infringement of the First Amendment.[99] The Ninth Circuit's holdings in *Pickup*, *NAAP*, and *Conant* present a limited space where the state has the ability to regulate some forms of professional conduct, even when that conduct is presented in the form of speech. However, the state action may not be so broad as to infringe on First Amendment free speech rights of licensed clinicians, outside of their professional practice.

The Court in *Pickup* noted the language of S.B. 1172 specifically states mental health providers are prohibited from conducting conversion therapy on children under the age of majority.[100] As indicated in the ruling by *NAAP*, talk therapy, though speech, may be subject to regulation because it is a form of treatment which the state has an interest in regulating.[101] The Court noted S.B. 1172 simply requires licensed mental health providers wait until a minor has passed the age of majority before conducting any form of conversion therapy.[102] The Court listed seven practices S.B. 1172 does *not* do:

- Prevent mental health providers from communicating with the public about [conversion therapy];
- Prevent mental health providers from expressing their views to patients, whether children or adults about [conversion therapy], homosexuality, or any other topic;
- Prevent mental health providers from recommending [conversion therapy] to patients, whether children or adults;
- Prevent mental health providers from administering [conversion therapy] to any person who is 18 years of age or older;
- Prevent mental health providers from referring minors to unlicensed counselors, such as religious leaders;
- Prevent unlicensed providers, such as religious leaders, from administering [conversion therapy] to children or adults; and
- Prevent minors from seeking [conversion therapy] from mental health providers in other states.[103]

The Court interpreted this to suggest the only restriction is the conduct of licensed mental health providers towards patients under the age of majority; either

97. *Id.* at 633.
98. *Id.* at 637.
99. *Id.* at 638-39.
100. 2011 S.B. 1172, Cal. Legis. Serv. Ch. 835 (West).
101. Pickup v. Brown, 740 F.3d 1208, 1230-31 (9th Cir. 2014).
102. *Id.* at 1223.
103. *Id.*

clinicians avoid the practice of conversion therapy on children, or they may face professional consequences.[104] Notably, this indicates S.B. 1172 is not a content-based restriction of conversion therapy. Conversion therapy can still be discussed as a form of treatment, which is materially different from the facts of *Conant*.[105] Allowing for discussion of conversion therapy, the state avoided invoking both content and viewpoint discrimination, and thus avoided the application of strict scrutiny. The Court also held S.B. 1172 was not an infringement of parental rights.[106] The Court and the state of California both acknowledged that parents generally do have the right to raise their children as they see fit.[107] However, California argued this did not extend to requiring the state to allow licensed professionals to use unsafe practices.[108] The Court agreed with the state, holding that to extend parental rights to this degree would be contrary to precedent indicating the state is able to offer some restrictions.[109]

Outside of the holding in *Pickup*, there was controversy due to the description of a continuum between First Amendment protection and professional conduct.[110] The Court described one end where a professional engages in public dialogue.[111] Here, First Amendment protections would be at its strongest. A court should apply the First Amendment analysis in its full authority, with no deference to the state.[112] At the midpoint of the continuum is where the professional is speaking within their profession, and they are expected to uphold the standards of their profession.[113] As an example, the Court cited *Planned Parenthood v. Casey*, where the joint opinion denoted physicians must provide accurate, non-misleading information about the potential risks of obtaining abortions.[114] If a professional does not meet the requirements of their professional standard, the First Amendment may not be sufficient to provide them protection, even if their conduct was exclusively speech, meaning it would be acceptable for such professionals to lose their licensure as a result of improper speech. The final point on the continuum is the regulation of professional conduct, which the state has the most power to regulate.[115] The Court acknowledged that there is the potential for an effect on speech; however, this is deemed incidental rather than intentional, and is therefore an acceptable use of state power.[116] The latter is where the court found S.B. 1172 to fall.[117] As noted above, because S.B. 1172 only regulates the use of conversion therapy treatment on minors, but not the discussion of the treatment, California is regulating

104. *Id.*
105. *Id.* at 1229.
106. *Id.* at 1235-36.
107. *Id.* at 1235.
108. *Id.*
109. *Id.* at 1236.
110. *Id.* at 1227-29.
111. *Id.* at 1227.
112. *Id.* at 1227-28.
113. *Id.* at 1228.
114. *Id.* (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).
115. *See id.* at 1229. While not explicitly stated, this presents as similar to intermediate scrutiny.
116. *Id.*
117. *Id.*

professional conduct not speech.[118] The notion that speech may be impacted is not without warrant, but because it is not the intention, it is not a First Amendment infringement by the state.

Directly following the decision in *Pickup*, the Third Circuit took a case regarding a New Jersey statute with similar verbiage and intent to the California statute at issue in *Pickup*. Signed into law by Governor Chris Christie, who cited the importance of deferring to the medical literature,[119] New Jersey Statute Section 45:1-55 ("N.J. Stat. § 45:1-55") prevents licensed and/or certified practitioners from conducting conversion therapy practices on minors.[120] Similar to S.B. 1172, N.J. Stat. § 45:1-55 in no manner prevents practices focused on acceptance or support of an adolescent's sexual orientation.[121] The plaintiffs bringing suit were "licensed counselors and founders of Christian counseling centers" who felt that N.J. Stat. § 45:1-55 violated their rights to free speech and free exercise of religion under the First and Fourteenth Amendments.[122] The District Court cited to the continuum noted in *Pickup* and found the conversion therapy constituted conduct, and therefore did not receive First Amendment protections.[123] The Third Circuit disagreed with this finding, citing to the dissent following the appeal to rehear *Pickup* en banc as well as Supreme Court precedent indicating new categories of speech under the First Amendment are disfavored.[124] Notably, the Court found states have broad powers in establishing licensing standards for practitioners within regulated professions.[125] Although the Third Circuit disagreed with the rationale provided by the Ninth Circuit in *Pickup*, as the plaintiffs were professionals licensed by the state, the protections afforded to them by the First Amendment were diminished, but only to the extent the state could protect citizens from harmful or ineffective professional practices.[126] Therefore, the Court held so long as the statute advanced the State's interest of protecting its citizens from harmful professional practices, it is not overly expansive.[127] The Court, recognizing the similarities between professional speech and commercial speech, determined that while the highest scrutiny is likely not appropriate, a heightened level of scrutiny was still necessary to ensure First Amendment rights are not entirely dismissed.[128] This level of scrutiny towards commercial speech was recognized by the Supreme Court as intermediate scrutiny, the test of which would only find a statute permissible when it "'directly advances' a 'substantial' government interest and is 'not more extensive than is necessary to serve that

118. *Id.*

119. *Legislative History Checklist*, N.J. STATE L. LIBR. (Aug. 19, 2013), https://repo.njstatelib.org/bitstream/handle/10929.1/24655/L2013c150.pdf?sequence=1&isAllowed=y.

120. N.J. STAT. ANN. § 45:1-55(a) (West 2013).

121. N.J. STAT. ANN. § 45:1-55(b) (West 2013).

122. King v. Governor of N.J., 767 F.3d 216, 220, 222 (3d Cir. 2014).

123. *Id.* at 226.

124. *Id.* at 224, 227, 229 (citing United States v. Alvarez, 567 U.S. 709 (2012)).

125. *Id.* at 229 (citing Goldfarb v. Va. State Bar, 421 U.S. 773 (1975) and Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)).

126. *Id.* at 233.

127. *Id.*

128. *Id.* at 234 (quoting Fla. Bar v. Went for It, 515 U.S. 618 (1995)).

interest.'"[129] The Court found N.J. Stat. § 45:1-55 to meet the first criteria as the statute is intended to protect minors, a particularly vulnerable population, from harmful professional practices.[130] Next, the Court found the legislature demonstrated that literature regarding conversion therapy sufficiently demonstrates the dangerous and adverse nature of the practice.[131] Finally, the Court found the legislature to have acted in a sufficiently narrow manner, demonstrating a fit that is perhaps not perfect but sufficiently reasonable given the interests at stake.[132] Following additional analyses regarding vagueness, overbreadth, and free exercise claims, the Court held the state met the burden of intermediate scrutiny.[133]

As stated, the continuum noted in *Pickup* was controversial to the extent that it was overruled by the Supreme Court in the *National Institute of Family and Life Advocates v. Becerra* ("*NIFLA*").[134] The case arose out of the Ninth Circuit where the issue was whether a California statute violated the First Amendment.[135] The statute in question; the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act ("FACT Act"), required clinics to inform patients that California provides access to publicly funded family planning and pregnancy-related resources that may be granted to patients regardless of their income status.[136] This is referred to as the Licensed Notice.[137] Additionally, the FACT Act required unlicensed clinics to disclose that the clinic is not licensed with the state of California.[138] This is referred to as the Unlicensed Notice.[139] The FACT Act was enacted with the express goal of addressing crisis pregnancy centers, facilities largely maintained by pro-life organizations, that are often noted as seeking to prevent abortions by providing limited pregnancy care resources.[140] Alternatively, California sought to ensure pregnant people had knowledge of and the resources to access all forms of care.[141] The Ninth Circuit upheld the District Court's decision to reject the plaintiffs' plea for a preliminary injunction.[142] In coming to this conclusion, the Court found the Licensed Notice fell in the realm of professional speech, or the midpoint of the continuum described in *Pickup*, and was thus subject to intermediate scrutiny.[143] The Court did not enunciate a level of

129. *Id.* (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980)).
130. *Id.* at 237-38.
131. *Id.* at 238.
132. *Id.* at 239-40.
133. *Id.* at 240, 246.
134. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755 (2018).
135. Nat'l Inst. of Fam. & Life Advocs. v. Harris, 839 F.3d 823, 828-29 (9th Cir. 2016).
136. *Id.* at 828; 2015 Cal. Stat. 775(1)(d).
137. *Harris*, 839 F.3d at 830.
138. *Id.* at 828; 2015 Cal. Stat. 775(1)(e).
139. *Harris*, 839 F.3d at 830.
140. *Id.* at 843.
141. *Id.*
142. *Id.* at 845.
143. *Id.* at 844.

scrutiny for the Unlicensed Noticed, but rather stated it would withstand any level of scrutiny.[144]

Upon appeal to the Supreme Court, in an opinion written by Justice Thomas, both holdings from the Ninth Circuit were overturned. The Supreme Court held Licensed Notice violates the First Amendment and the Unlicensed Notice unduly burdens protected speech.[145] In so finding, Justice Thomas also noted the Supreme Court had never recognized the category of professional speech.[146] Rather, the Supreme Court has only acknowledged commercial speech[147] and professional conduct[148] as spaces where professional speech, as formulated by the Ninth Circuit, could be implicated.[149] As this case did not fit either of the two categories as recognized by the Supreme Court, Justice Thomas ruled professional speech did not apply.[150] To this extent, because the Supreme Court did not recognize the continuum as described by the Ninth Circuit, and the category of professional speech as subject to intermediate scrutiny was rejected, this analysis was effectively struck. Notably, this case did not change the parameters of what constituted professional conduct nor the notion that states maintained the ability to regulate in this space.[151]

IV. CURRENT CASES CREATING THE CIRCUIT SPLIT

A. Eleventh Circuit Interpretation of Pickup Following NIFLA

Following the Supreme Court's decision in *NIFLA*, a challenge was made to two Florida ordinances that restricted the use of conversation therapy on minors. Both ordinances were enacted in 2017, one by the City of Boca Raton, the second by Palm Beach County.[152] The city and county ordinances contained similar language, with the only distinction being the city ordinance allowed for a fine "not exceeding $500.00," while the county ordinance created a $250 fine for the first offense and a $500 fine for a second offense.[153] Both ordinances exclusively prohibited treatment by licensed providers, and neither restricted individual rights to speak about conversion therapy to the public.[154] The plaintiffs, therapists Robert Otto and Julie Hamilton, filed this action on June 13, 2018, thirteen days before the decision in *NIFLA* was announced.[155] The plaintiffs sought a preliminary

144. *Id.*

145. Nat'l Inst. of Fam. & Life Advocs v. Becerra, 585 U.S. 755, 777 (2018).

146. *Id.* at 766.

147. Zauderer v. Off. of Disciplinary Couns. of Sup. Ct., 471 U.S. 626, 651 (1985); Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 250 (2010); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978).

148. *Ohralik*, 436 U.S. at 456; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992).

149. *Becerra*, 585 U.S. at 767.

150. *Id.*

151. *Id.*

152. Otto v. City of Boca Raton, 353 F. Supp. 3d 1237, 1243-44 (S.D. Fla. 2019).

153. *Id.* at 1243 n.2.

154. *Id.* at 1244.

155. *Id.* at 1245; *see generally Becerra*, 585 U.S. 755 (listing decision date as June 26, 2018).

injunction, arguing the ordinances violated their First Amendment free speech rights in addition to violations of the Florida Constitution and Florida law.[156] In addressing the First Amendment free speech claim, the District Court declined to enunciate a standard of review, holding the plaintiffs did not meet their burden of demonstrating a substantial likelihood of success regardless of the level of scrutiny.[157] The Court stated if subject to rational basis review or intermediate scrutiny, the ordinances would likely withstand review.[158] However, should strict scrutiny apply, the Court felt this would be a much closer analysis but noted the plaintiffs did not adequately demonstrate a likelihood of success on the merits.[159] This factored into the District Court's refusal to award plaintiff's a preliminary injunction.[160] This Court did not rehear the case on the merits as plaintiffs moved for an interlocutory appeal and the Eleventh Circuit granted certiorari.

On appeal, the Eleventh Circuit reversed the decision of the District Court. In *Otto*, the Eleventh Circuit held that the ordinances were subject to strict scrutiny as they were found to be content-based restrictions of free speech.[161] This resulted from the Court's finding that the local government's evidence of psychological literature and the statements of professional societies were insufficient to demonstrate a compelling state interest.[162] The Court found such evidence offered assertions rather than evidence.[163] As the dissent and the District Court indicated, this was reasonably due to the questionable ethical nature of conducting research as the majority requested.[164] The Court found the ordinances were content-based regulations because they hinged on what is said by the therapist in the course of treatment, which the Court, citing to *NIFLA*, suggested was an unacceptable use of state action to attempt to regulate the content of speech in professional settings.[165] Notably, although the majority stated "[t]he local governments are not entirely wrong when they characterize speech-based [conversion therapy] as a course of conduct," it held the ordinances were *not* a regulation of professional conduct.[166] The majority came to this conclusion by avoiding an analysis of professional conduct, instead stating "[s]peech is speech," before providing an analysis of "conduct" rather than "professional conduct."[167] As an alternative form of remedy, the Court suggested those harmed by the actions of therapists conducting conversion therapy could seek to bring forth tort malpractice actions

156. *Otto*, 353 F. Supp. 3d at 1245.

157. *Id.* at 1261-62, 1268. Notably, in its argument that the ordinances fulfilled the requirement of a compelling government interest, Defendants provided evidence in the form of psychological literature that describes the potential harm, specifically to minors, that may occur with the use of conversion therapy. Plaintiff countered this by suggesting that the literature was "no evidence at all."

158. *Id.* at 1270.

159. *Id.*

160. *Id.* at 1273.

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

162. *Id.* at 869.

163. *Id.* at 868.

164. *Id.* at 875; *Otto*, 353 F. Supp. 3d at 1259.

165. *Otto*, 981 F.3d at 861.

166. *Id.* at 865.

167. *Id.* at 866 (quoting Wollschlaeger v. Governor, 848 F.3d 1293, 1307 (11th Cir. 2017)).

for the harm caused.[168] The Court concluded by addressing the controversial nature of the decision by suggesting that to rule otherwise would risk states restricting the use of psychologically approved treatments.[169]

B. Ninth Circuit Interpretation of Pickup Following NIFLA

The issue returned to the Ninth Circuit in the case of *Tingley v. Ferguson*. *Tingley* represented a challenge of Washington's statutory ban on conversion therapy, Senate Bill 5722 ("S.B. 5722"), a nearly identical ban to California's S.B. 1172 that was addressed by the Court in *Pickup*.[170] The plaintiff in this case, Brian Tingley, stated he held himself out as a "Christian provider[]" who was suspicious not only of same-sex relationships but also of individuals seeking to change their gender identity.[171] Tingley argued the statute constituted a violation of his First Amendment right to free speech, in addition to arguing the law was unconstitutionally vague under the Fourteenth Amendment.[172] The Washington state legislature noted that in making the decision to enact S.B. 5722, it found "a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by conversion therapy."[173] At the trial level, the District Court weighed whether *Pickup* was struck in its entirety by the Supreme Court in *NIFLA* or if only the continuum that established professional speech was struck.[174] The District Court found, because the *NIFLA* issue centered on professional speech, *Pickup* remained good law to the extent professional conduct may be subject to state regulation, even if professional speech may not.[175] The Ninth Circuit upheld this decision, noting the Court was bound by prior precedent unless such cases are "clearly irreconcilable" with the decision from a higher authority.[176] Although *NIFLA* criticized the test provided in *Pickup*, because *Pickup* was not abrogated, it remains as binding in the Ninth Circuit.

C. Subsequent District Court Case Law Following the Decisions in Otto and Tingley

Following the decisions of *Otto* and *Tingley*, a case presenting similar facts tried in Colorado is *Chiles v. Salazar*.[177] The plaintiff in this case was similarly seeking an injunction to prevent enforcement of a Colorado Statute, the Minor Therapy Conversion Law, which similar to other cases, prevents licensed or

168. *Id.* at 870.
169. *Id.* at 871.
170. Tingley v. Ferguson, 47 F.4th 1055, 1056 (9th Cir. 2022).
171. *Id.* at 1065.
172. *Id.* at 1066.
173. *Id.* at 1065 (quoting 2018 Wash. Sess. Laws, ch. 300 § 2).
174. *Id.* at 1066.
175. Tingley v. Ferguson, 557 F. Supp. 3d 1131, 1140 (W.D. Wash. 2021).
176. *Tingley*, 47 F.4th at 1074 (9th Cir. 2022) (quoting Miller v. Gammie, 335 F.3d 889, 899 (9th Cir. 2003) (en banc)).
177. Chiles v. Salazar, 2022 WL 17770837, at *1 (D. Colo. 2022).

certified practitioners from engaging in the use of conversion therapy practices on minors.[178] As noted with other statutes, this does not include practices that revolve around acceptance of an individual's sexual orientation.[179] The plaintiff in this case sought a preliminary injunction as she felt the statute prevented her from broaching topics she was concerned could violate the Minor Therapy Conversion Law.[180] The Court determined the plaintiff had standing due to the significant importance of the First Amendment protections of free speech, namely the threat that enforcement of the Minor Therapy Conversion Law against her could have on her.[181] As Colorado argued, the plaintiff would not be prohibited from assisting clients with concerns about their sexuality or gender identity, rather the only restriction was in attempting to engage in conversations meant to change an individual's sexual orientation or gender identity.[182] For this reason, the Court found the statute narrowly situated to addressing the harms around conversion therapy.[183] However, the plaintiff contended this was still an infringement of her First Amendment rights of free speech, citing the practice of therapy as one that is largely spoken.[184] In support of this argument, the plaintiff cited the Court in *Otto* for the proposition that speech cannot be relabeled as conduct to avoid First Amendment protections.[185] This Court, finding the holding in *Otto* entirely unpersuasive, cited to *Tingley*, also ruling in line with the Courts in *Pickup* and *King* in finding that although therapy is largely spoken, that does not equate to unrestricted free speech rights.[186] Additionally, the Court found the Minor Therapy Conversion Law merely incidentally impacted speech due to the professional conduct that was regulated, thus only subject to rational basis review.[187] As the threshold for rational basis is generally low, the Court found that the state had a sufficient "legitimate and important" state interest in preventing adverse outcomes in LGBTQ+ minors.[188] The Court also noted the legitimate interest of "regulating and maintaining the integrity of the mental-health profession."[189]

While a decision finding the Minor Therapy Conversion Law to withstand intermediate scrutiny may have been sounder should an appeal follow, the decision of the Tenth Circuit to not follow *Otto* was promising for subsequent cases to raise challenges on statutory bans outside the Ninth Circuit. This invites multiple ways for Courts to find statutes banning conversion therapy to be good law. Additionally, the language indicating the heightened requirements of intermediate scrutiny were met may prove sufficient should an appeal follow, where the Tenth Circuit may affirm the decision but alter the rationale.

178. COLO. REV. STAT. § 12-245-202(3.5) (West 2022).
179. § 12-245-202(3.5)(b).
180. *Chiles*, 2022 WL 17770837, at *1-2.
181. *Id.* at *2-3.
182. *Id.* at *6.
183. *Id.*
184. *Id.* at *7.
185. *Id.* at *8.
186. *Id.*
187. *Id.*
188. *Id.* at *9.
189. *Id.* (quoting Ferguson v. People, 824 P.2d 803 (Colo. 1992)).

V. THE CONSEQUENCES OF JUDICIAL ACTIVISM RULING STATUTORY BANS ON CONVERSION THERAPY UNCONSTITUTIONAL

The function of stare decisis and reliance interest in the law and judicial opinions is to ensure the law remains stable and predictable.[190] Stability and predictability of judicial opinions are fundamental to the rule of law as legislatures and courts rely on prior decisions to inform their decisions as well as their directions to parties and the legal community at large. To ignore this reality is to create untoward disturbances to the existing laws and those who rely on them.[191]

In December of 2023, the Supreme Court denied the petition for certiorari in *Tingley*. Three justices, Kavanaugh, Thomas, and Alito, sought to grant certiorari, with Thomas and Alito writing dissents.[192] Justice Thomas decried the Ninth Circuit's decisions in *Pickup*, *NIFLA*, and *Tingley*, indicating a desire to rule S.B. 5722 an unconstitutional restriction of the First Amendment.[193] Should the Supreme Court grant certiorari to another case regarding statutory bans on conversion therapy, it is well established that most states see such bans as appropriate state action to regulate the conduct of professionals. To find such bans unconstitutional would have consequences far broader than simply allowing for the use of conversion therapy on minors. To be sure, in the context of conversion therapy, this would have a sweeping impact. Twenty-seven states, Washington D.C., and Puerto Rico currently have some form of statutory bans on conversion therapy.[194] A decision finding statutory bans on conversion therapy unconstitutional would require judicial resources to determine the extent to which they are still functional, if at all. Additionally, a decision invalidating statutory bans would have consequences for all statutes, state and federal, that regulate or restrict professional conduct. As mentioned above, such statutes are already required to ensure that regulations are carefully tailored to promote the health and welfare of the public without infringing on individual free speech rights. Because this is already a narrow space with which states may operate, to invalidate this precedent would greatly hinder the states' ability to enact regulations that protect their citizens. This would also have detrimental implications for the validity and efficacy of state licensures. If states are further hindered in their ability to regulate professional practice, licensures will be less meaningful if they do not carry the same endorsement or high standards.

A decision in this manner is also likely to result in a loss of trust in the Court. Even as the Court has frequently foregone precedent in the interest of creating a new standard of law, this would completely invalidate not just established precedent but years of statutory reliance on said precedent. As the Court has for years touched on how professional speech should be managed, regarding the First Amendment, to make an abrasive move would point to political motivations due to the ideological contrast between the parties in these cases. Since the Court is

190. Nina Varsava, *Precedent, Reliance, and Dobbs*, 136 HARV. L. REV. 1845, 1849 (2023).
191. *Id.* at 1850-51.
192. Tingley v. Ferguson, 144 S. Ct. 33 (2023).
193. *Id.*
194. *Conversion "Therapy" Laws*, *supra* note 26.

presently facing a legitimacy crisis, and trust in the Court is wavering, such a decision would be regrettable.[195]

In the event such a decision occurs, the burden will be on states to find means of protecting LGBTQ+ youth in a more vigorous manner. While it is difficult to speculate what the Court could rule in this space, it is not outside the realm of possibility to believe that a heightened level of scrutiny will be required for the state to enact bans on conversion therapy. As seen in *King*, a viable argument exists that such a ban meets the requirements of intermediate scrutiny.[196] Not only would this be the most accurate interpretation of how the case law should apply to the present cases, there also exists abundant research to support the vested state interest in protecting citizens from harmful or ineffective treatments, the harm inflicted by conversion therapy, and the narrow application that prevents harmful treatment while allowing space for affirming care. Certainly, this is a more difficult burden than courts applying a rational basis analysis, but as *King* demonstrates, it is a plausible argument before a court.

Additionally, as noted in the dissent in *Otto*, there is also the notion that statutory bans may meet the high burden of satisfying strict scrutiny.[197] Certainly this argument is not one that will be accepted by all, as seen in *Otto*, but there is the potential for a favorable ruling under the right conditions. As noted above, strict scrutiny requires a compelling interest that is narrowly tailored.[198] To some, protecting vulnerable populations from harmful, archaic treatment practices may meet the criteria required to be a compelling interest. Additionally, preventing only this treatment, but not treatment that has been demonstrated to assist in acceptance and favorable outcomes, may be sufficiently narrowly tailored to suit this end. There exists a considerable argument that statutes preventing the use of conversion therapy on minors meets the burden of strict scrutiny when ideology is removed from the equation. By turning to the facts presented within the significant amount of research and institutional advocacy, states should be able to validate such statutes. This would require states to continue to advocate for the health and well-being of LGBTQ+ children, even when the outcome is questionable, and a court willing to recognize the evidence before it.

Another alternative is to follow the suggestion of the majority in *Otto*. Advocacy groups may seek LGBTQ+ children who were subject to conversion therapy to represent them in malpractice tort claims. Doing so would shift the burden to therapists seeking to practice conversion therapy, to prove that their treatment practices were not harmful to their patients. Additionally, with enough cases using judicial resources, this may indicate the need for regulation in this area of professional conduct. A notable challenge to this proposal is statutes of limitation. When children are subject to conversion therapy, they may be living in

195. Steven Greenhouse, *The US Supreme Court is Facing a Crisis of Legitimacy*, GUARDIAN (Oct. 5, 2023, 6:10 AM), https://www.theguardian.com/commentisfree/2023/oct/05/us-supreme-court-facing-crisis-of-legitimacy.

196. King v. Governor of N.J., 767 F.3d 216, 239 (3d Cir. 2014).

197. Otto v. City of Boca Raton, 981 F.3d 854, 873 (11th Cir. 2020).

198. Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015).

households that are not accepting of their queer status and therefore may not have to opportunity to seek remedy until years after treatment. But this would not preclude all potential plaintiffs; therefore, this should be considered as an avenue to resist the decision in *Otto*.

CONCLUSION

The psychological literature suggests conversion therapy is harmful to all LGBTQ+ patients, but particularly to minors. As this is a known harm, recognized not just by the psychological community, but also by states working to protect children from this harm, the courts should not seek to upset precedent and make it more likely that LGBTQ+ children are exposed to harmful outcomes. Democratic state legislators in states that have not enacted bans, and that are not within the Eleventh Circuit, should work towards putting forth legislative bans on conversion therapy to build the case that this is an important interest of the states. While there is currently a majority of state support, a greater demonstration is certainly more persuasive. Finally, it is necessary to openly acknowledge that this discussion constitutes a weighing of First Amendment rights to free speech with the health and well-being of queer children. The First Amendment should not stand for the premise that treatment practices that have been recognized as harmful by the psychiatric community are protected under the Constitution.