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"[T]his case presents a conflict between one of society's most cherished rights—freedom of expression—and one of the government's most profound obligations—the protection of minors."[1]

INTRODUCTION

Sexual orientation conversion therapy is the use of counseling and psychotherapy in an attempt to abolish an individual's attraction to members of the same sex.[2] In this practice, licensed therapists promote heterosexuality as the desired outcome under the false pretense that there is a need to intervene to change the patient's core identity because homosexuality and diverse gender identities are inherently pathological.[3] Merriam-Webster defines "pathological" as "altered or caused by disease; being such to a degree that is extreme, excessive, or markedly abnormal."[4] Therefore, therapists who use conversion therapy inherently believe their

1. Am. Booksellers v. Webb, 919 F.2d 1493, 1495 (11th Cir. 1990).

2. Just the Facts Coal., *Just the Facts About Sexual Orientation and Youth: A Primer for Principals, Educators, and School Personnel*, AM. PSYCHOL. ASS'N (2008), https://www.apa.org/pi/lgbt/resources/just-the-facts.pdf [https://perma.cc/X2FY-4DU3].

3. *Conversion Therapy*, AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY (Feb. 2018), https://www.aacap.org/AACAP/Policy_Statements/2018/Conversion_Therapy.aspx [https://perma.cc/3RT4-AWPU].

4. *Pathological*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/pathological [https://perma.cc/3XXL-QSD5] (last visited Aug. 20, 2021).

homosexual patients possess a disease that can only be cured by participating in Sexual Orientation Change Efforts (SOCE).[5]

However, in 1973, the American Psychological Association (APA) declassified homosexuality as a pathology from the Diagnostic and Statistical Manual of Mental Disorders (DSM).[6] The APA explained its decision by stating, "The idea that homosexuality is a mental disorder or that the emergence of same-sex attraction and orientation among some adolescents is in any way abnormal or mentally unhealthy has no support among any mainstream health and mental health professional organizations."[7] Further, the APA suggests that even in the absence of scientific evidence to support SOCE, conversion therapy practices have been adopted and promoted by some political and religious organizations, which indicates that sexual orientation is not considered a mental disorder but a moral one.[8]

Organizations such as Focus on the Family and Americans for Truth About Homosexuality have used morality as a defense for subjecting minors to conversion therapy.[9] For example, in its 2018 statement, Focus on the Family wrote:

> Professional therapy for same-sex attraction and sexual identity has recently generated question and concern . . . [a]t stake are religious freedoms sacred to families and American life, client autonomy, individual well-being, and parental rights . . . We believe in and support the availability of professional counseling in matters of sexuality that is respectful, safe, ethical, and responsive to the client's values and desires.[10]

This statement illustrates that SOCE should be supported so long as *professional* therapy for same-sex attraction is used to protect

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5. AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY, *supra* note 3.
6. Just the Facts Coal., *supra* note 2 at 5.
7. *Id.*
8. *Id.*
9. *Counseling for Sexual Identity Concerns: A measured, careful, and compassionate approach*, FOCUS ON THE FAM. (Nov. 2, 2018), http://media.focusonthefamily.com/topicinfo/counseling-for-sexual-identity-concerns.pdf [https://perma.cc/69X6-6REZ].
10. *Id.*

parental rights, religious freedoms, and the patient's health.[11]

This Comment will explore fundamental parental rights and First Amendment arguments as a means to establish conversion therapy as child abuse. Section II will discuss how SOCE relates to fundamental parental rights, Section III will discuss challenges facing the First Amendment, including freedom of speech and freedom of religion, and Section IV will explore child abuse statutes and establish SOCE as child abuse.

I. SEXUAL ORIENTATION CHANGE EFFORTS AND FUNDAMENTAL PARENTAL RIGHTS

The Supreme Court has long recognized the relationship between the parent and child is constitutionally protected.[12] Additionally, the Court has stated that a parent's fundamental right to raise their children is beyond debate as an enduring American tradition.[13] Further, the Court has repeatedly recognized parents have a fundamental right to make decisions concerning the care, custody, and control of their children.[14] This indicates that parents have broad authority over minor children.[15]

This authority extends into medical treatment for minor children.[16] Further, simply because a parent's medical decision is not the child's preferred method or because it involves risk does not automatically transfer power to make a medical decision from parents to the State.[17] However, while governmental power may not supersede parental authority in all cases solely because some parents abuse or neglect children, the State is not without constitutional authority over parental discretion when a child's mental and physical health is jeopardized.[18] Parents have no more of an unlimited right to inflict corporal punishment on their children under the Fourth and Fourteenth Amendments than they do under the First

11. *See id.*
12. Quilloin v. Walcott, 434 U.S. 246, 255 (1978).
13. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).
14. Troxel v. Granville, 530 U.S. 57, 65 (2000).
15. Parham v. J.R., 442 U.S. 584, 602 (1979).
16. *See id.* at 602–04.
17. *Id.* at 602.
18. *Id.* at 603.

Amendment,[19] and a state has a compelling interest in protecting children from harmful medical treatments and has broad authority to do so.[20]

There are only two cases thus far that have raised the question of fundamental parental rights regarding SOCE, and this Section will analyze how courts have prohibited SOCE while reconciling fundamental parental rights.

A. *California*

California passed a bill that prohibited licensed mental health professionals from practicing SOCE on minor patients.[21] In *Pickup v. Brown*, Plaintiffs challenged the constitutionality of the new law, arguing their fundamental parental rights were violated.[22] In their argument, Plaintiffs asserted their right to make important medical decisions regarding their children.[23] While recognizing this fundamental right, the court disagreed with Plaintiffs, writing, "Parents have a constitutionally protected right to make decisions regarding the care, custody, and control of their children, but that right is 'not without limitations.'"[24] The court then analyzed other situations in which the State may impede on parental rights, including when a parent refuses necessary medical care for a child.[25] Further, the court took notice that the State is not without constitutional control over parental discretion when a child's physical or mental health is jeopardized.[26]

Additionally, because there has yet to be a decision that specifically addresses whether a parent's fundamental rights encompass the right to choose for a child a particular type of provider for a particular treatment that the state has deemed harmful, the court looked to whether the parents have the right to choose specific

19. Doe v. Christie, 33 F.Supp.3d 518, 529 (D.N.J. 2014) (quoting Sweaney v. Ada Cnty., 119 F.3d 1385, 1391 (9th Cir. 1997)).

20. *Id.* (citing Croft v. Westmoreland Co. Children and Youth Serv., 103 F.3d 1123, 1125 (3rd Cir. 1997)).

21. Pickup v. Brown, 740 F.3d 1208, 1221, 1222–23 (9th Cir. 2014).

22. *Id.* at 1225.

23. *Id.* at 1235.

24. *Id.* (citing Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1204 (9th Cir. 2005)).

25. *Id.*

26. *Id.* (citing Parham v. J.R., 442 U.S. 584, 603 (1979)).

treatments for themselves.[27] The court essentially concluded parents did not possess that right.[28] In making this decision, the court looked to other circuits' decisions regarding similar issues and found "a patient does not have a constitutional right to obtain a particular type of treatment or to obtain treatment from a particular provider if the government has reasonably prohibited that type of treatment or provider."[29] The court used this reasoning to undercut Plaintiffs' substantive due process argument and found parents do not have a fundamental right to utilize a specific medical or mental health treatment the State has deemed harmful.[30]

B. *New Jersey*

New Jersey also implemented a law that prohibited SOCE because the State determined the medical treatment harmful to minors.[31] In *Doe v. Christie*, Plaintiffs challenged the constitutionality of this law, arguing the law infringed upon Plaintiffs' constitutional right to care for their child and direct his upbringing.[32] Specifically, Plaintiffs argued the law deprived them of their constitutionally-protected authority to select medical procedures and to otherwise decide what is best for their son without interference from the government.[33] In response, Defendant argued that while Plaintiffs possessed the fundamental right to parent their child as they saw fit, they do not have the right to select medical treatment for their minor child that the state has deemed harmful.[34]

The *Doe* court mentioned Plaintiffs provided no case law or any other authority to support their position that Plaintiffs' fundamental parental rights encompass the right to choose a specific medical treatment for their son.[35] However, the Court recognized the Third

27. *Id.*
28. *Id.*
29. *Id.* (citing Mitchell v. Clayton, 995 F.2d 772, 775 (7th Cir. 1993)).
30. *Id.*
31. Doe v. Christie, 33 F. Supp. 3d 518, 521 (D.N.J. 2014).
32. *Id.* at 529.
33. *Id.* at 528.
34. *Id.*
35. *Id.* at 529.

Circuit had not ruled on this issue, so the Court looked to other circuits for guidance.[36]

The Ninth Circuit concluded that "the fundamental rights of parents do not include the right to choose a specific type of provider for a specific medical or mental health treatment that the state has *reasonably deemed harmful*."[37] The Ninth Circuit also held that "substantive due process rights do not extend to the choice of type of treatment or of a particular health care provider" and that "there is not a fundamental right to choose a mental health professional with specific training."[38] Additionally, the Seventh Circuit held "[A] patient does not have a constitutional right to obtain a particular type of treatment or to obtain treatment from a particular provider if the government has *reasonably prohibited* that type of treatment or provider."[39] Finally, the Tenth Circuit held "[T]he decision by the patient whether to have a treatment or not is not a protected right, but his selection of a particular treatment, or at least a medication, is within the area of governmental interest in *protecting public health*."[40]

The *Doe* court found these decisions persuasive and rejected the Plaintiff parents' argument that they were denied their fundamental parental right because the ultimate medical treatment—SOCE—had been deemed harmful and ineffective by the state of New Jersey.[41]

While the Ninth and Third Circuits are currently the only courts that have ruled on this constitutional issue, more courts have analyzed other constitutional arguments regarding SOCE.

II. FIRST AMENDMENT ARGUMENTS

"Speech," as protected by the First Amendment, extends to many activities that are by their very nature nonverbal, "[b]ut

36. *Id.* at 529–30.

37. Pickup v. Brown, 740 F.3d 1208, 1236 (9th Cir. 2014) (emphasis added).

38. Nat'l Ass'n for Advancement of Psychoanalysis v. California Bd. Of Psychology, 228 F.3d 1043, 1050 (9th Cir. 2000).

39. Mitchell v. Clayton, 995 F.2d 772, 775 (7th Cir. 1993) (emphasis added).

40. Rutherford v. United States, 616 F.2d 455, 457 (10th Cir. 1980) (emphasis added).

41. *Doe*, 33 F.Supp.3d at 530.

whatever its source, there must be some outward manifestation of the allegedly protected First Amendment activity."[42] While the First Amendment protects commercial speech, it does not protect misleading commercial speech.[43] Additionally, this protection does not extend to commercial speech about unlawful activity.[44] Therefore, a law may burden speech protected by the First Amendment even when it does so indirectly.[45]

Additionally, the right to free exercise of religion is not absolute, in that conduct remains subject to regulation for society's protection.[46] However, for a regulation to not conflict with the First Amendment, the regulation must have a secular purpose, the principal effect must be one that neither advances nor inhibits religion, and it must not foster excessive government entanglement with religion.[47] Therefore, when a statute possesses the predominant purpose of advancing religion, it violates the central First Amendment value of official religious neutrality.[48]

This Section will explore the various First Amendment arguments regarding SOCE and how courts have responded to such claims.

A. *Freedom of Speech*

Congress shall make no law abridging the freedom of speech.[49] Congress is allowed, however, to restrict speech when the speech incites illegal activity, consists of fighting words, or contains obscenity.[50] The theory behind these restrictions is that social order and society's moral values outweigh First Amendment protections, which begs the question: should SOCE be considered speech that is afforded First Amendment protection?

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42. Jordan v. Ector County, 516 F.3d 290, 296 (5th Cir. 2008).
43. Fanning v. FTC, 821 F.3d 164, 175 (1st Cir. 2016).
44. United States v. Bell, 238 F.Supp.2d 696, 704 (M.D. Pa. 2003).
45. *In re* Tam, 808 F.3d 1321, 1340 (Fed. Cir. 2015).
46. Cantwell v. State of Connecticut, 310 U.S. 296, 304 (1940).
47. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).
48. McCreary Cnty., Ky. v. ACLU of Ky., 545 U.S. 844, 860 (2005).
49. U.S. CONST. amend. I.
50. Phelphs-Roper v. Koster, 713 F.3d 942, 948 (8th Cir. 2013) (quoting Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 622 (8th Cir. 2002) (en banc)).

1. Sexual Orientation Change Efforts as Professional Speech

Courts are split on whether SOCE therapy should be considered professional speech or conduct.[51] In *Pickup v. Brown*, the Ninth Circuit categorized California's law prohibiting SOCE as regulating conduct and concluded that the law should be analyzed through rational basis review.[52] Contrastly, in *King v. Governor of the State of New Jersey*, the Third Circuit established SOCE as professional speech that does not trigger strict scrutiny based on content and viewpoint.[53] However, in *National Institute of Family and Life Advocates v. Becerra*, the Supreme Court held that professional speech is not a separate category of speech exempt from the rule that content-based regulations of speech are subject to strict scrutiny.[54]

If one were to argue that SOCE should be classified as speech because speech is the only tool therapists use in SOCE treatment, the court will likely apply strict scrutiny review. While laws prohibiting SOCE are prohibiting *treatment*, it is the therapists' words that are the tool for the treatment.[55] Further, restrictions on SOCE would also be considered content-based restrictions because these restrictions target specifically SOCE speech based on communicative content: the therapists' words to the patient intended to change the patient's sexual orientation.[56] However, content-based laws are presumptively unconstitutional and may be justified only if the government proves that the laws in question are narrowly tailored to serve a compelling government interest.[57] Finally, if the laws prohibiting SOCE are content-based, an analysis of whether the laws are viewpoint discriminatory is required.[58]

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51. *Compare* Pickup v. Brown, 740 F.3d 1208, 1234 (9th Cir. 2014) *with* King v. Governor of New Jersey, 757 F.3d 216, 237 (3rd Cir. 2014).

52. *Pickup*, 740 F.3d at 1234.

53. *King*, 757 F.3d at 237.

54. Nat'l Inst. of Fam. & Life Advoc. v. Becerra, 138 S. Ct. 2361, 2371 (2018).

55. *See King*, 757 F.3d at 221.

56. *But see* Mason D. Bracken, *Torture is Not Protected Speech: Free Speech Analysis of Bans on Gay Conversion Therapy*, 63 WASH. UNIV. J.L. & POL'Y 325, 347–48 (2020).

57. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

58. Otto v. City of Boca Raton, 353 F. Supp. 3d 1237, 1252 (S.D. Fla. 2019).

Viewpoint discrimination occurs when the government favors "one speaker over another" and when speech is prohibited "because of its message."[59] Therefore, the government may not target "particular views taken by speakers on a subject."[60] However, "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable [sic], no significant danger of viewpoint discrimination exists."[61]

To apply strict scrutiny review to laws prohibiting SOCE, one must establish that the law was passed to further a compelling governmental interest, and the law restricting a professional's speech is narrowly tailored to serve that government interest.[62] A number of states have passed laws banning SOCE that would be subjected to strict scrutiny review.[63] For example, in 2019, the New York legislature passed a law that prohibited SOCE on minors, and the legislature deemed it professional misconduct for a mental health professional to engage in SOCE.[64] New York arguably has a compelling interest in protecting its minors' physical and psychological health from dangerous psychological practices, and a law that heavily relies on information provided by major professional associations of mental health practitioners and researchers to establish SOCE as dangerous should be considered narrowly tailored to serve this interest because the law is narrowly tailored to attack that *one particular harmful practice*.[65] Therefore, it is likely this law would pass strict scrutiny review, and the ban on SOCE in New York would likely be upheld.

Similarly, in 2013, New Jersey passed a law that banned SOCE.[66] Much like in New York, the New Jersey legislature included statistics in its findings that reinforced New Jersey's interest in protecting minors from SOCE.[67] Here, New Jersey stated:

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59. Rosenberger v. Rector, 515 U.S. 819, 828 (1995).
60. *Id.* at 829.
61. R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).
62. Welch v. Brown, 907 F. Supp. 2d 1102, 1117 (E.D. Cal. 2012).
63. *E.g.,* N.Y. EDUC. LAW § 6531-a (McKinney 2019).
64. *Id.*
65. *But see Welch*, 907 F. Supp. 2d at 1120.
66. N.J. STAT. ANN. § 45:1-54(n) (West 2013).
67. *See* N.J. STAT. ANN. § 45:1-54(m) (West 2013).

> Minors who experience family rejection based on their sexual orientation face especially serious health risks. In one study, lesbian, gay, and bisexual young adults who reported higher levels of family rejection during adolescence were 8.4 times more likely to report having attempted suicide, 5.9 times more likely to report high levels of depression, 3.4 times more likely to use illegal drugs, and 3.4 times more likely to report having engaged in unprotected sexual intercourse compared with peers from families that reported no or low levels of family rejection.[68]

If New Jersey's interest to protect minors is compelling, and its laws prohibiting SOCE are narrowly tailored—much like New York's—it is likely that a court will deem New Jersey's prohibition constitutional. If these laws prohibiting SOCE pass strict scrutiny, an analysis of whether the SOCE laws are viewpoint discrimination is required.[69]

Without determining whether the laws prohibiting SOCE fell under strict or intermediate scrutiny, the *Otto* court thoroughly discussed viewpoint discrimination.[70] Here, Plaintiffs argued the ordinances discriminated against the viewpoint of those "who wish to reduce or eliminate behaviors, identity, or expressions that differ from their biological sex."[71] Further, Plaintiffs argued the exclusion of counseling that "provides support and assistance to a person undergoing gender transition" from the definition of conversion therapy demonstrated that the ordinances were viewpoint discriminatory.[72] However, the court disagreed. Rather, the court stated:

> The ordinances do not regulate Plaintiffs' view about SOCE, homosexuality, or human attraction more generally. The ordinances also do not indicate a preference between heterosexual or homosexual individuals seeking to change their sexual orientation one way or another . . . The ordinances do regulate the practices of licensed medical

68. *Id.*

69. *See Welch*, 907 F. Supp. 2d at 1113–14; Otto v. City of Boca Raton, 353 F. Supp. 3d 1237, 1268 (S.D. Fla. 2019).

70. *See generally Otto*, 353 F. Supp. 3d at 1268–70.

71. *Id.* at 1268.

72. *Id.*

> providers in trying to change a child's sexual orientation. This practice is what is regulated, not any particular viewpoint on the subject . . . The ordinances do not ban change, or the expression of the viewpoint that change in sexual orientation is possible. The ordinances do ban efforts, through a medical intervention, by a licensed provider, to therapeutically change a minor's sexual orientation. Presented with a minor client seeking to change his or her sexual orientation or gender identity, Plaintiffs may commend and recommend conversion therapy. Plaintiffs cannot perform SOCE in Palm Beach County or City Boca Raton.[73]

Because the court found the alleged viewpoint discrimination against those who believe that it is possible to change a person's sexual orientation through SOCE was not distinguishable from the subject matter being regulated, the ordinances were not per se unconstitutional.[74] "When the basis for the content discrimination consists *entirely* of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists."[75]

However, even if a court finds that the law prohibiting SOCE fails strict scrutiny review, there is another category of speech that may allow states to ban SOCE within its borders: commercial speech.[76]

2. Sexual Orientation Change Efforts as Commercial Speech

Commercial speech is speech that proposes a commercial transaction.[77] Additionally, commercial speech is an "expression related solely to the economic interest of the speaker and its audience."[78] However, advertising which "links a product to a current public debate" is not entitled to the constitutional protection afforded

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73. *Id*. at 1269.

74. *Id.* at 1270.

75. R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).

76. *See Otto*, 353 F. Supp. 3d at 1253–54.

77. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 776 (1976).

78. Cent. Hudson Gas & Elect. Corp. v. Pub. Serv. Comm., 447 U.S. 557, 561 (1980) (quoting Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976)).

noncommercial speech.[79] While the Supreme Court in *Valentine v. Chrestensen* held that commercial speech was not protected by the First Amendment[80], the Court in *Bigelow v. Virginia* stated "speech is not stripped of First Amendment protection merely because it appears" as commercial advertisement.[81] Further, the Court said that "[t]he fact that the particular advertisement in appellant's newspaper had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees."[82] One year following this decision, the Court clearly established in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* that commercial speech was protected by the First Amendment, and *Valentine v. Christensen* was no longer valid law.[83]

While the *Otto* court determined that SOCE did not fall under the commercial speech category, it is important to look at how SOCE *can* fall under commercial speech. SOCE advertising could be considered commercial speech as SOCE finds itself within the stream of commerce through the exchange of money for psychotherapy services, and SOCE advertising could be subjected to the same commercial scrutiny as any other service or product.[84] If a court determines SOCE can fall under commercial speech, the test used to determine whether a law violates the First Amendment protections for commercial speech comes from *Central Hudson*, and the test appears to be nearly identical to intermediate scrutiny review.[85] In *Central Hudson*, the Court determined the test for commercial speech is: (1) Is the speech lawful and not deceptive that would allow First Amendment protections? (2) Does the

79. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983) (quoting *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563 n.5).

80. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) ("[w]e are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.").

81. Bigelow v. Virginia, 421 U.S. 809, 818 (1975).

82. *Id.*

83. *Va. State Bd. Of Pharmacy*, 425 U.S. at 761–62 ("[i]t is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another.").

84. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm., 447 U.S. 557, 563 (1980).

85. *Id.* at 573 (Blackmun, J., concurring).

government have a substantial interest? (3) Does the law directly advance the government's interest? (4) Is the regulation of speech no more extensive than necessary to achieve the government's interest?[86]

For laws that prohibit SOCE, the first prong would immediately be in question. One could argue that SOCE are deceptive in that there is no scientific evidence to suggest SOCE is successful. Rather, there is a remarkable amount of scientific data from the American Academy of Pediatrics, the American Psychiatric Association, the American Psychological Association, the American Psychological Association Council of Representatives, the Pan American Health Organization (an office of the World Health Organization), the American Academy of Child and Adolescent Psychiatry's Practice Parameter, the American School Counselor Association, and the United States Department of Health and Human Services, Substance Abuse and Mental Health Services Administration that indicates minor children who are subjected to SOCE face a number of subsequent problems including distress, substance abuse, depression, and suicidality.[87] In light of the data cutting against SOCE advocates and practitioners, it would be difficult to overcome the presumption that SOCE deceives minor patients and their families in believing sexual orientation can be altered.[88] Because the "government may ban forms of communication more likely to deceive the public than to inform it,"[89] states like New York and New Jersey are justified in prohibiting SOCE within their borders simply on commercial speech purposes.

While the second and third prongs were fulfilled by the analysis in Part III, the fourth prong remains to be the last obstacle that could determine SOCE would not be protected by the First Amendment. To determine whether the government interest could be served by a more limited restriction on commercial speech, it is important to discuss the language of one of the statutes. In its statute, New York specifically prohibits medical health professionals from

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86. *Id.* at 566.

87. *See* Otto v. City of Boca Raton, Florida 353 F. Supp. 3d 1237, 1258–60 (S.D. Fla. 2019).

88. *See id.* at 1261–62, 1266 (holding that the City of Boca Raton was "entitled to conclude that an informed consent protocol would not adequately protect minors from this harm.").

89. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563.

practicing SOCE on minor children.[90] The law is neither overinclusive or underinclusive, and its sole purpose is to protect minor children from a practice that has yet to be proven effective within the medical community.[91] The law does not prohibit SOCE on adult patients, which one could infer that if a mental health professional wished to perform SOCE on a consenting, adult patient, he could do so. New York's sole interest is to protect children from a practice that has yet to yield any scientific or professional support when evidence to the contrary is overwhelming. Therefore, New York's law that prohibits SOCE is no more extensive than necessary to achieve the government's interest. While SOCE may not be classified as protected speech, it may, however, still be protected under freedom of religion.

B. *Freedom of Religion*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.[92] "The right to freely exercise one's religion, however, 'does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."'"[93] A neutral, generally applicable law does not offend the Free Exercise Clause, even if the law has an incidental effect on religious practice.[94] However, a law lacks neutrality if it "targets religious beliefs" or if its "object . . . is to infringe upon or restrict practices because of their religious motivations."[95]

1. Sexual Orientation Change Efforts and the Free Exercise Clause

The free exercise of religion "means . . . the right to believe and

90. N.Y. EDUC. LAW § 6531-a(2) (McKinney 2019).

91. A.B. 576 ch. 7 § 1(k), 242d Leg. Sess. (N.Y. 2019).

92. U.S. CONST. amend. I.

93. Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting Emp't Div. v. Smith, 494 U.S. 872, 879 (1990)).

94. *Smith*, 494 U.S. at 878–79.

95. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

profess whatever religious doctrine one desires."[96] Therefore, the First Amendment protects "government regulation of religious beliefs as such."[97] The government cannot compel its citizens to affirm a specific religious belief,[98] punish a specific religious belief it believes is false,[99] or use its power to favor one religious authority over another.[100] Additionally, the exercise of religion often includes physical acts such as joining others in a worship service, refraining from certain foods, and participating in holy sacraments.[101] Further, a State that prohibits acts only when they are engaged in for religious reasons or because of the religious belief they display would most certainly be "prohibiting the free exercise [of religion]."[102] Courts have held that prohibiting SOCE does not in fact violate the Free Exercise Clause.

In 2018, Maryland passed a law that prohibited mental health practitioners from engaging in SOCE.[103] In *Doyle v. Hogan*, the plaintiff, a professional counselor, challenged this law on the basis that it targeted his "sincerely held religious beliefs regarding human nature, gender, ethics, morality, and counseling to eliminate, reduce, or resolve unwanted same-sex attractions, behaviors, or identity" by prohibiting him from "offering . . . counseling that is consistent with [those] religious beliefs."[104] The court, however, disagreed.[105] Rather, the U.S. District Court for the District of Maryland found that the First Amendment does not provide an absolute protection to engage in religiously motivated conduct.[106] The court reasoned that even in circumstances when a neutral,

96. *Smith*, 494 U.S. at 877.

97. *Id.* (quoting Sherbert v. Verner, 374 U.S. 398, 402 (1963)).

98. Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

99. United States v. Ballard, 322 U.S. 78, 86–88 (1944).

100. *See* Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich, 426 U.S. 696, 708–09 (1976); Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 445 (1969); Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am., 344 U.S. 94, 119–21 (1952).

101. *Smith*, 494 U.S. at 877.

102. *Id.*

103. MD. CODE ANN., HEALTH OCC. § 1-212.1 (West 2018).

104. Doyle v. Hogan, 411 F. Supp. 3d 337, 348 (D. Md. 2019), *vacated*, 1 F.4th 249 (4th Cit. 2021).

105. *Id.* at 349.

106. *Id.*

generally applicable law has an incidental effect on religious practices, that law does not offend the Free Exercise Clause.[107] The court also noted that because the statute is facially neutral, it is "silent as to religion or religious practice," and the plaintiff failed to provide facts showing Maryland's law was designed to "burden practices because of their religious motivation."[108] Therefore, the court determined the law did not violate the plaintiff's free exercise rights.[109]

The right to freely exercise one's religion was infringed again in *King v. Governor of New Jersey*.[110] Here, the Third Circuit stated that if the law prohibiting SOCE is "neutral" and "generally applicable," it will withstand a free exercise challenge so long as it is "rationally related to a legitimate government objective."[111] The court noted that the law made no explicit reference to any religion or religious beliefs and was thus facially neutral.[112] While the plaintiffs contended that the law operates as an "impermissible religious gerrymander" because it provides specific exemptions for counseling, the court held that none of the five exemptions targeted religiously motivated conduct, and the law would survive the rational basis test.[113] The court went on to state that the law did not give preferential treatment to homosexuals because the statute prohibited *all* sexual orientation change efforts regardless of the direction of the desired change.[114] Therefore, the *King* court held the law prohibiting SOCE did not violate the plaintiffs' free exercise rights and was constitutional.[115]

In *Doe v. Christie*, the plaintiffs challenged the same statute found in *King* on similar grounds. Here, the court used identical reasoning from *King* to find that the statute was constitutional.[116]

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107. *Id.*
108. *Id.*
109. *Id.*
110. King v. Governor of the State of New Jersey, 767 F.3d 216, 241 (3d Cir. 2014).
111. *Id.* at 242 (quoting Brown v. City of Pittsburgh, 586 F.3d 263, 284 (3d Cir. 2009)).
112. *Id.*
113. *Id.* at 242–43.
114. *Id.*
115. *Id.* at 243.
116. Doe v. Christie, 33 F. Supp. 3d 518, 527 (D.N.J. 2014).

The court noted the only difference between *King* and *Doe* was that the *Doe* plaintiffs challenged the statute because they were unable to *receive* SOCE, whereas in *King*, the therapist-plaintiffs based their Free Exercise arguments on the prohibition of *providing* SOCE.[117] Despite the distinction, the court found the statute was constitutional and did not violate the Free Exercise Clause because the statute was facially neutral with respect to religion and was generally applicable.[118]

Here, this law does not restrict one's ability to practice religious sacraments; it merely restricts mental health professionals from engaging in conduct—the mental health treatment—that the State has deemed ineffective and harmful to minors.[119] Further, the restriction is in contemplation of *any* sexuality on the LGBTQ+ spectrum, not just the ones that traditional religious groups have sought to cure.[120] The law does not discriminate on whether someone wishes to change from homosexual to heterosexual, bisexual to heterosexual, or even heterosexual to homosexual.[121] Rather, the law prohibits *medical treatment* that has been deemed harmful by a number of professional organizations, and advocates for SOCE have yet to provide sufficient evidence to support the notion that SOCE is beneficial to—or even successful on—minors. Therefore, it is unlikely a court will hold laws prohibiting SOCE violate the Free Exercise Clause.

There is one more argument pertaining to the First Amendment, and there is currently only one case that addresses whether prohibiting SOCE violates the Establishment Clause.

2. Sexual Orientation Change Efforts and the Establishment Clause

Congress shall make no law respecting an establishment of religion.[122] "This clause applies not only to official condonement of a particular religion or religious belief, but also to official disapproval

117. *Id.* at 527–28.
118. *Id.* at 527.
119. N.J. STAT. ANN. § 45:1-55(a) (West 2013).
120. *See* N.J. STAT. ANN. § 45:1-54(a) (West 2013).
121. § 45:1-55(a).
122. U.S. CONST. amend. I.

or hostility towards religion."[123] A statute will survive an Establishment Clause attack if: (1) it has a secular legislative purpose; (2) its primary effect neither advances nor inhibits religion; and (3) it does not foster excessive government entanglement with religion.[124] While the *Lemon* test is most used in cases involving the government giving preferential treatment to one religion over another, the *Lemon* test may also serve to analyze a claim of hostility toward religion as well.[125]

In *Welch v. Brown*, Plaintiffs solely relied on the third prong of the *Lemon* test to argue that by prohibiting SOCE, California had excessively entangled itself with religion.[126] In determining whether the government has excessively entangled itself with religion, the court must analyze "the character and purpose of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationships between the government and the religious activity."[127] A relationship results in an excessive entanglement with religion "if it requires 'sustained and detailed' interaction between church and State 'for enforcement of statutory or administrative standards.'"[128] The *Welch* court examined how the law prohibiting SOCE would entangle the government with religious activity.[129]

The court began by recognizing the SOCE prohibition would neither contemplate or require an examination of religious views or doctrine because the law does not provide a motive or justification for providing SOCE.[130] The court provides support by stating, "the law simply categorically prohibits a mental health provider from providing that type of therapeutic treatment to a minor."[131] Here, the state does not need to interpret religious texts or doctrines regarding homosexuality or one's ability to change their sexual

123. Am. Fam. Ass'n, Inc. v. City & County of San Francisco, 277 F.3d 1114, 1120–21 (9th Cir. 2002).

124. Williams v. California, 764 F.3d 1002, 1014 (9th Cir. 2014) (citing Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)).

125. *Am. Fam. Ass'n, Inc.*, 277 F.3d at 1121.

126. Welch v. Brown, 58 F. Supp. 3d 1079, 1089 (E.D. Cal. 2014).

127. *Williams*, 764 F.3d at 1015 (quoting *Lemon*, 403 U.S. at 615).

128. *Lemon*, 403 U.S. at 621.

129. *Welch*, 58 F. Supp. 3d at 1089.

130. *Id.* at 1089–90.

131. *Id.* at 1089.

orientation.[132] The court enhanced its holding by stating, "the inquiry into whether a mental health provider performed SOCE will be the same regardless of whether the provider utilized the treatment while working for a church. [The law] will thus not require the state to engage in "intrusive judgments regarding contested questions of religious belief or practice."[133]

Additionally, the court looked to whether upholding the SOCE prohibition would present a "significant risk" that the Establishment Clause would be infringed.[134] The court found that even if a mental health provider's use of SOCE relied on church doctrines or teachings, the state would not need to interpret those teachings to find the provider had performed SOCE.[135] Further, the court stated the substantial risk argument also fails because the government does not need to oversee a church, its teachings, or counseling to enforce the prohibition of SOCE, which only weakens the contention that excessive entanglement is present.[136] Therefore, the government did not risk becoming excessively entangled with religion when it prohibited SOCE.

While the *Welch* court remains to be the only court thus far that has addressed the Establishment Clause issue, this holding—along with the aforementioned holdings in this Comment—continues to fail LGBTQ+ people across the country because these holdings do not offer blanket protections. Without blanket protections, LGBTQ+ youth will not be completely safe under the law. The APA—along with several other professional mental health organizations—has deemed SOCE ineffective and harmful to minors, which now raises the question: if a parent or guardian subjects a minor child to SOCE, can that constitute child abuse?

III. CHILD ABUSE

"A parent's constitutionally protected right to direct the child's upbringing, which includes authority to consent to necessary, ordinary, surgical, complementary and alternative, and elective

132. *Id.* at 1089–90.
133. *Id.* at 1090.
134. *See id.*
135. *Id.*
136. *Id.*

medical care."[137] However, a parent does not have authority to consent to medical procedures or treatments that provide *no health benefit to the child* and pose a *substantial risk of serious harm to the child's physical or mental health*.[138] Further, a parent's broad authority to make medical decisions on behalf of their minor child is "limited by the duty to provide medical care that is necessary to prevent serious harm or a substantial risk of serious harm to the child's physical or mental health."[139] Examples of serious harm include fractures, internal injuries, second or third degree burns, *severe anxiety*, *depression*, and diagnosable mood or thought disorders that substantially impair judgment.[140]

This Section will explore how states have defined child abuse as a way to establish SOCE as child abuse.

A. *How States Define Child Abuse*

The Office on Child Abuse and Neglect has defined "child abuse and neglect" as "any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm."[141] California defines "child abuse or neglect" to include "the willful harming or injuring of a child or the endangering of the person or health of a child."[142] Further, California defines "willful harming or endangering of a child" as "a situation in which any person willfully causes or permits any child to suffer, or inflicts thereon, unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of the child to be placed in a situation in which his or her person or health is endangered."[143] Similarly, New Jersey defines "child abuse" as "employing or permitting a child to be employed in any vocation or employment injurious to its health or dangerous to its life or limb."[144] Finally, New York defines "neglected

137. RESTATEMENT OF CHILDREN & THE LAW § 2.30 (AM. L. INST., Tentative Draft No. 1, 2018).
138. *Id.* (emphasis added).
139. *Id.*
140. *Id.*
141. 42 U.S.C. § 5101.
142. CAL. PENAL CODE § 11165.6 (West 2008).
143. CAL. PENAL CODE § 11165.3 (West 2008).
144. N.J. STAT. ANN. § 9:6-1 (West 1987).

child" as "a child less than eighteen years of age whose physical, mental, or emotional condition has been impaired."[145]

B. *Sexual Orientation Change Efforts as Child Abuse*

SOCE advocates will likely claim their First Amendment and fundamental parental rights will be violated; however, as noted in Sections II and III, restrictions on both fundamental parental rights and the First Amendment may be constitutional.[146] Even in prohibiting SOCE beyond the scope of mental health professionals to include religious institutions, the restriction could pass strict scrutiny review. Strict scrutiny review is appropriate here because courts are split on which standard of review to apply; therefore, it is plausible that the best course of action is to apply the strictest standard.[147]

Under strict scrutiny review, the law in question must further a compelling governmental interest that is narrowly tailored to achieve that interest.[148] Here, states such as California, New Jersey, and New York have a compelling interest in protecting minors from ineffective, harmful medical treatments, especially when there is no evidence to suggest a specific medical treatment *is* effective and safe.[149] Additionally, states have a compelling interest in promoting and regulating medical treatments that are based on sound, rational, peer-approved scientific research.

The American Academy of Child and Adolescent Psychiatry has stated that "there is no evidence that sexual orientation can be altered through therapy, and that attempts to do so may be harmful."[150] The APA further added that "cures" from SOCE are counterbalanced by anecdotal accounts of psychological harm, which may result in exacerbating other risks like depression, anxiety and self-destructive behavior, "since therapist alignment with societal prejudices against homosexuality may reinforce self-hatred already

145. N.Y. SOC. SERV. LAW § 371 (McKinney 2019).
146. Espinoza v. Montana Dep't of Revenue, 140 S.Ct. 2246, 2260 (2020).
147. *See* Nat'l Inst. of Fam. & Life Advoc. v. Becerra, 138 S. Ct. 2361, 2371 (2018).
148. *Id.*
149. *E.g.,* N.J. STAT. ANN. § 45:1-54(n) (West 2013).
150. § 45:1-54(k).

experienced by the patient."[151] Minors who experience rejection based on their sexuality are far more likely to suffer from depression, use illegal drugs, and commit suicide.[152] Any state that is willing to protect minor children from these repercussions would have a compelling interest to do so.[153] Additionally, the law is narrowly tailored to achieve the government's interest in protecting minors from SOCE.[154] California, New York, and New Jersey all have passed their SOCE laws on the basis of protecting minor children from this medical practice, and these SOCE restrictions do not go beyond serving that interest because the restrictions are *only on SOCE*.[155] Now that it is established SOCE laws may pass strict scrutiny review, below is an analysis of whether SOCE practice itself can be deemed as child abuse.

If SOCE restrictions are upheld, practicing SOCE could be construed as child abuse statutes since the same science that supports the prohibition on SOCE supports the notion that SOCE causes distress, substance abuse, depression, and a high risk of suicide.[156] By doing so, parents, therapists, and religious leaders would be subjecting a child to a medical treatment that poses substantial risks to the child's mental health. For example, in its 2013 press release, the APA mentions fourteen states as well as the District of Columbia have banned SOCE, and the APA goes a step further and "calls upon other lawmakers to ban the *harmful* and discriminatory practice."[157] What makes SOCE so harmful to minors is the social

151. § 45:1-54(d)(1)-(2).

152. § 45:1-54(m).

153. *See* § 45:1-54(m).

154. *See* Bracken, *supra* note 56, at 352–53. *But see* Otto v. City of Boca Raton, 981 F.3d 854, 869 (11th Cir. 2020) ("Strict scrutiny cannot be satisfied by professional societies' opposition to speech. Although we have no reason to doubt that these groups are composed of educated men and women acting in good faith, *their institutional positions cannot define the boundaries of constitutional rights*. They may hit the right mark—but they may also miss it.") (emphasis added).

155. Bracken, *supra* note 56, at 353.

156. *See* § 45:1-54(m).

157. *APA Reiterates Strong Opposition to Conversion Therapy*, AM. PSYCHIATRIC ASS'N (Nov. 15, 2018), https://www.psychiatry.org/newsroom/news-releases/apa-reiterates-strong-opposition-to-conversion-therapy [perma.cc/G3ZH-KQ9R].

rejection they encounter because SOCE itself is rooted in discrimination.[158]

In an attempt to understand why LGBTQ+ people were facing higher rates of depression and suicide, the *American Journal of Public Health* published a study that indicates discrimination may be the cause of mental health issues.[159] Although the study did not necessarily *prove* that discrimination caused mental health problems, the study found strong evidence of a relationship between discrimination and anxiety, depression, and other stress-related mental health problems.[160] Further, another study published in *Pediatrics* suggests that LGBT youth who face *parental* rejection were 8.4 times more likely to report having attempted suicide and 5.9 times more likely to report high levels of depression than LGB peers who reported no or low levels of family rejection.[161] In support of their research, the authors wrote, "Because families play such a critical role in child and adolescent development, it is not surprising that adverse, punitive, and traumatic reactions from parents and caregivers would have such a negative influence on [young people's] risk behaviors and health status as young adults."[162] And finally, another study published in *Annual Review of Clinical Psychology* suggests that positive parental and familial relationships are crucial for youth well-being, and those who experience family repudiation are those at the greatest risk for depressive symptoms, anxiety, and suicide attempts.[163]

All three studies indicate that rejection and discrimination are prominent factors in decreasing mental health in LGBTQ+

158. § 45:1-54(j)(1).

159. Tori DeAngelis, *New data on lesbian, gay and bisexual mental health,* AM. PSYCH. ASS'N, https://www.apa.org/monitor/feb02/newdata [https://perma.cc/9YGS-YUM3] (last visited Jul. 10, 2021).

160. *Id.*

161. *See* Tori DeAngelis, *Parents' rejection of a child's sexual orientation fuels mental health problems,* AM. PSYCH. ASS'N, https://www.apa.org/monitor/2009/03/orientation [https://perma.cc/9BZA-7RVT] (last visited Jul. 10, 2021).

162. *Id.*

163. Stephen T. Russell & Jessica N. Fish, *Mental Health in Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth* 8, DEP'T OF HEALTH & HUM. SERV. PUB. ACCESS, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4887282/pdf/nihms-789458.pdf [perma.cc/6NV8-ZS5B] (last visited Aug. 20, 2021).

youth.[164] While these studies are merely examples of the insurmountable evidence that indicate SOCE is harmful and ineffective, these studies shed light on the substantial risk SOCE poses on a minor's mental health.[165] The medical consensus today suggests that subjecting a child to SOCE simply because the parent or religious leader believes the child's sexual orientation is wrong can lead to substantial mental health concerns.[166] In the absence of evidence to the contrary, SOCE most certainly falls under the definition of child abuse and should be considered as such.

CONCLUSION

In sum, courts across the country are in agreement that when a state decides to prohibit a medical practice it has determined as harmful and ineffective, that prohibition does not violate fundamental parental rights, nor does it violate one's freedom of speech or freedom of religion.[167] As explained above, state legislatures that have decided to prohibit SOCE have not violated a parent's right to raise their child as they wish.[168] Rather, the state may step in to prevent harmful medical professionals from conducting harmful medical treatments within its borders. Additionally, state legislatures may restrict one's freedom to speak or one's freedom to exercise religion if that freedom violates another's freedom to exist without harm, and that restriction has repeatedly been considered facially neutral and surpasses the strict scrutiny standard. Moreover, any parent, religious leader, or medical professional who continues to use SOCE while knowing where the medical community stands on this medical treatment has willfully placed the health of the child in a situation in which his or her person or health is endangered. That decision alone is enough to establish child abuse and neglect under various state law.

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164. *Id.*; DeAngelis, *supra* note 159; DeAngelis, *supra* note 161.

165. *Cf.* Bracken, *supra* note 56, at 336–37 (stating that efforts to change sexual orientation are "unlikely to be successful and involve some risk of harm . . . ," including depression, shame, suicidal tendencies, and other emotional harm).

166. *See* Russell & Fish, *supra* note 163, at 7.

167. *E.g.,* Pickup v. Brown, 740 F.3d 1208, 1235–36 (9th Cir. 2014).

168. *See id.* at 1236.

While current SOCE restrictions are an incredible starting point, they do not extend far enough. LGBTQ+ youth continue to be subjected to an ideology that teaches them that they are inherently wrong—that they are unacceptable and unlovable as they are because of something they cannot change. The purpose of SOCE is to change one's sexual orientation, and the majority of SOCE medical cases—if not all cases—involve LGBTQ+ youth. Regardless of the desired sexual orientation, SOCE is considered a dangerous medical treatment that does not produce results to refute its ineffectiveness, and ultimately, as shown above, states have the authority to prohibit such medical practices.

Our country is slow to change. Many states allow SOCE, while other states have prohibited it. Many states allow same-sex couples to adopt children, while other states do not. And just five years ago, the LGBTQ+ community won a landmark case:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. *They ask for equal dignity in the eyes of the law*. The Constitution grants them that right.[169]

Our laws need to reflect our growing and diverse society, and it all begins with our children. Our children deserve equal dignity in the eyes of the law, and it is our responsibility to ensure they receive it. After all, if we do not protect our children from harmful practices like SOCE, then Justice Kennedy's words regarding equality die on the page, for those words can only live if we allow our children to exist as they are.

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169. Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (emphasis added).