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## The Freedom To Be “Converted”?: An Analysis of the First Amendment Implications of Laws Banning Sexual Orientation Change Efforts

*“California has 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 sexual orientation change efforts.”*<sup>1</sup>

### I. INTRODUCTION

Despite widespread criticism and a lack of scientific legitimacy, therapists throughout the United States continue to use Sexual Orientation Change Efforts (SOCE) on patients seeking to change their sexual orientation.<sup>2</sup> SOCE, also known as conversion or reparative therapy, includes a number of methods employed by practitioners to change an individual’s sexual orientation from homosexual to heterosexual.<sup>3</sup> In October 2012, California Governor Jerry Brown signed a law outlawing the practice of gay conversion therapy on patients under the age of eighteen.<sup>4</sup> One year later, New Jersey Governor Chris Christie followed suit by signing a similar law barring gay conversion therapy practices in New Jersey.<sup>5</sup> Since the passage of these statutes in California and New Jersey, Massachusetts and New York have introduced similar bills.<sup>6</sup>

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1. S. 1172, 2011-2012 Reg. Sess., 2012 Cal. Stat. 6,569, 6,571. Within the past three years, California and New Jersey passed statutes banning the practice of gay conversion therapy, also known as Sexual Orientation Change Efforts (SOCE). See Assemb. 3371, 215th Leg., 2d Sess., 2013 N.J. Laws 1206; Cal. S. 1172.

2. See Nancy A. Del Pizzo, *If It Ain't Broke, Don't Fix It: Condemning Promises to 'Straighten' Homosexuals for a Fee*, N.J. LAW. MAG., June 2013, at 6, 6, available at <http://www.njsba.com/images/content/1/0/1006605.pdf>, archived at <http://perma.cc/C5K3-9JYE> (describing continuance of SOCE despite scientific advances).

3. See *Pickup v. Brown*, 728 F.3d 1042, 1048 (9th Cir. 2013) (defining SOCE), amended by, 740 F.3d 1208 (9th Cir. 2014), cert. denied, 134 S. Ct. 2871 (2014).

4. See Cal. S. 1172 (providing text of California law); *Conversion Therapy*, 25 MED. MALPRACTICE L. & STRATEGY, no. 8, 2013, at 7, 7 (explaining recent developments in New Jersey law).

5. N.J. Assemb. 3371 (describing reasoning behind and summarizing content of New Jersey bill); Kate Zernike, *Christie Signs Bill Outlawing a Gay 'Cure'*, N.Y. TIMES (Aug. 19, 2013), [http://www.nytimes.com/2013/08/20/nyregion/christie-signs-bill-banning-gay-conversion-therapy.html?\\_r=0](http://www.nytimes.com/2013/08/20/nyregion/christie-signs-bill-banning-gay-conversion-therapy.html?_r=0) (announcing signing of New Jersey bill).

6. See Ian Lovett, *Law Banning 'Gay Cure' Is Upheld in California*, N.Y. TIMES (Aug. 29, 2013), <http://www.nytimes.com/2013/08/30/us/law-banning-gay-cure-is-upheld-in-california.html>, archived at <http://perma.cc/2P8H-FY68> (reporting similar bans introduced in Massachusetts and New York). Some believe the court’s ruling upholding California’s ban on gay conversion therapy could motivate more states to follow

While the purpose of the California bill is to safeguard the health and well-being of minors by protecting them from the purported harmful effects of SOCE, the statute's constitutionality has been the subject of judicial action since the bill's passage.<sup>7</sup> Conservative advocacy group Pacific Justice Institute (PJI), on behalf of plaintiff therapists, sought to enjoin the State from enforcing the California law, which it believed to be unconstitutional on a number of grounds, particularly as violative of the therapists' First Amendment rights.<sup>8</sup> The U.S. District Court for the Eastern District of California granted the plaintiffs' motion for a preliminary injunction, finding the law is content- and viewpoint-based and thus unlikely to withstand strict scrutiny.<sup>9</sup> On review, however, the Ninth Circuit reversed, holding the statute survives plaintiffs' constitutional challenges.<sup>10</sup> In January 2014, the Ninth Circuit denied plaintiffs' request for a rehearing en banc and again upheld the statute in an amended opinion.<sup>11</sup> As a result, PJI announced its intent to appeal to the United States Supreme Court.<sup>12</sup>

New Jersey has also seen judicial action regarding SOCE, but from

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suit with similar bans, as evidenced by the introduction of such legislation in Massachusetts and New York. *See id.*; see also Cheryl Wetzstein, *More States Likely To Ban Sexual-Orientation Change Therapy*, WASH. TIMES (Feb. 16, 2014), <http://www.washingtontimes.com/news/2014/feb/16/more-states-likely-to-ban-sexual-orientation-change/?page=all>, archived at <http://perma.cc/HJ75-XU98>. Wetzstein reported that lawmakers in Florida, Minnesota, Ohio, Pennsylvania, and Virginia have also introduced bills to ban SOCE. *See* Wetzstein, *supra*.

7. *See Conversion Therapy, supra* note 4 (describing litigation opposing bill since its passage). Individuals and groups opposing the bill cite various reasons for believing it is unconstitutional, including violations of free speech, privacy rights, and state law. *See id.* (describing reasoning for suits and relief requested).

8. *See id.* (summarizing various claims of suit); *New Court Filings Seek To Halt Gay Therapy Ban*, PAC. JUST. INST. (Oct. 31, 2012), <http://www.pacificjustice.org/1/post/2012/10/-new-court-filings-seek-to-halt-gay-therapy-ban.html> [hereinafter *Filings Seek To Halt*] (announcing filing of suit opposing law).

9. *See Welch v. Brown*, 907 F. Supp. 2d 1102, 1121 (E.D. Cal. 2012) (announcing trial court's grant of preliminary injunction), *rev'd sub nom. Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013), *amended by*, 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, 134 S. Ct. 2871 (2014); *see also infra* Part II.D.1.a (discussing preliminary outcome of *Welch v. Brown*).

10. *See Pickup v. Brown*, 728 F.3d 1042, 1048 (9th Cir. 2013) (explaining reasoning behind reversal of lower court decision), *amended by*, 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, 134 S. Ct. 2871 (2014). The court remanded the case for further proceedings consistent with their findings. *See id.* at 1061-62.

11. *See id.* at 1061-62 (concluding S.B. 1172 survives plaintiffs' constitutional challenges and reversing order granting preliminary relief); *see also 9th Circuit Deals Major Blow to Free Speech & Religious Freedom*, PAC. JUST. INST. (Aug. 29, 2013), <http://www.pacificjustice.org/1/post/2013/08/-9th-circuit-deals-major-blow-to-free-speech-religious-freedom.html>, archived at <http://perma.cc/A7LT-9UA9> [hereinafter *Blow to Free Speech*] (informing public about Ninth Circuit decision and announcing plans to evaluate options surrounding requesting rehearing).

12. *See Gay Therapy Case Heads to Supreme Court*, PAC. JUST. INST. (Jan. 30, 2014), <http://www.pacificjustice.org/1/post/2014/01/gay-therapy-case-heads-to-supreme-court.html>, archived at <http://perma.cc/ZHG2-WD7F> [hereinafter *Gay Therapy*] (announcing court's denial of rehearing and intention to appeal case to Supreme Court). The PJI issued a press release stating the organization "will continue the fight to protect the freedom of counselors and young people seeking help with their same-sex attractions." *Id.* The organization's president asserted his optimism "that the Supreme Court will rectify the Ninth Circuit's latest attempt to defy its precedents." *Id.*

individuals opposing conversion therapy practices and seeking reparations for services performed on them by therapists employing SOCE methods.<sup>13</sup> In *Ferguson v. JONAH*, the plaintiffs brought suit against a program called Jews Offering New Alternatives for Healing (JONAH), where the plaintiffs received conversion therapy treatment.<sup>14</sup> The plaintiffs allege that the defendants violated New Jersey's Consumer Fraud Act by falsely promising to cure sexual orientation, a practice they claim has no scientific legitimacy.<sup>15</sup> Oral arguments in *Ferguson v. JONAH* began in July 2013; and the litigation continues on the heels of the passage of New Jersey's statute banning the very practice for which the plaintiffs complain.<sup>16</sup>

This Note will focus on the constitutional impact of state statutes banning SOCE practices on minors, specifically looking at the effect on free speech.<sup>17</sup> It will first address the history of SOCE; the therapy's purported benefits and harmful effects; and the events leading to the passage of legislation in California and New Jersey.<sup>18</sup> Specifically, this Note focuses on pending and decided cases in those states and will assess those decisions while making predictions about how future courts may rule.<sup>19</sup> This Note also assesses the future of SOCE in California and New Jersey, as well as what this might mean for other states seeking to pass laws banning the practice, and the ban's greater implications regarding the right to free speech.<sup>20</sup> Finally, this Note will predict the likely application of strict scrutiny to statutes prohibiting SOCE, and advocate for the use of commercial speech analysis in order to uphold laws banning such harmful practices.

## II. HISTORY

### A. Origins of Sexual Orientation Change Efforts

Practitioners working in a variety of professional capacities use SOCE on patients who seek to change their sexual orientation from homosexual to

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13. See *Conversion Therapy*, *supra* note 4, at 7 (explaining lawsuit against New Jersey SOCE practices); Del Pizzo, *supra* note 2, at 6-7 (describing judicial action in New Jersey regarding SOCE).

14. See Del Pizzo, *supra* note 2, at 6-7 (describing background of case and multiple plaintiffs' grievances); see also Complaint and Jury Demand at 5-6, *Ferguson v. JONAH*, No. L-5473-12 (N.J. Super. Ct. Law Div. Nov. 27, 2012) (explaining background and reasoning behind filing suit).

15. See Complaint and Jury Demand, *supra* note 14, at 11-13 (describing grievances submitted in suit currently filed in New Jersey state court); see also N.J. STAT. ANN. § 56:8-2 (West 2014) (providing text of New Jersey Consumer Fraud Act).

16. See Jeff Bennion, *A Low Attack on Same-Sex Therapy*, N.Y. POST (July 22, 2013), <http://nypost.com/2013/07/22/a-low-attack-on-same-sex-therapy/>, archived at <http://perma.cc/7LAM-HLA5> (reporting beginning of oral arguments and offering support of SOCE from purported beneficiary).

17. See *infra* Part III.

18. See *infra* Part II.

19. See *infra* Part I.

20. See *infra* Part III.

heterosexual.<sup>21</sup> The precise methods employed by practitioners depend upon their expertise, field of study, and often their beliefs; but these methods can include both aversive and nonaversive treatments.<sup>22</sup>

SOCE emerged from the development of the science of sexuality in the mid-nineteenth century, which believed homosexual attractions were caused by illness or abnormality.<sup>23</sup> Psychoanalysis during the nineteenth and twentieth centuries, especially in the United States, stigmatized homosexuality as a negative human characteristic caused by immaturity, pathology, family dynamics, or other outside influences.<sup>24</sup> As a result, the first attempts at changing a patient's sexuality in psychoanalysis focused upon altering family dynamics, reversing the effects of pathology, and facilitating maturity.<sup>25</sup> Negative views of homosexuality played a significant role in homosexuality's inclusion in the American Psychiatric Association's (APA) *Diagnostic and Statistical Manual of Mental Disorders* (APA DSM) in 1952 and 1968.<sup>26</sup> While SOCE techniques employed by behavioral therapy psychiatrists and psychologists varied, the goal of changing the patient's sexual orientation was the same.<sup>27</sup> It was during this period of stigmatizing homosexuality that contrary studies suggesting homosexuality was normative and homosexual behavior was part of a continuum of sexual orientations began to emerge.<sup>28</sup>

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21. See *Pickup v. Brown*, 728 F.3d 1042, 1048-49 (9th Cir. 2013) (providing background and explanation of SOCE), *amended by*, 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, 134 S. Ct. 2871 (2014).

22. See *id.* (describing variety of methods SOCE encompasses).

23. See JUDITH M. GLASSGOLD ET AL., AM. PSYCHOLOGICAL ASS'N, REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION 21 (2009), available at <http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>, archived at <http://perma.cc/P54E-5LQ7> [hereinafter APA REPORT] (describing origins of science of homosexuality). In its 2009 report, the American Psychological Association's Task Force on Appropriate Therapeutic Responses to Sexual Orientation (APA Task Force) discussed Sigmund Freud's finding that psychoanalysts could not promise to replace homosexuality for heterosexuality and that his reported attempt at doing so was unsuccessful. See *id.* The APA Task Force noted the scientific approach to homosexuality reflected cultural norms of "discrimination, criminalization, and heterosexism." *Id.*

24. See *id.* (describing techniques employed in psychoanalysis dominating mental health fields after Freud).

25. See *id.* (explaining early attempts at SOCE). At that time, homosexuality was seen as a criminal act or medical ailment. See *id.* Therefore, efforts to change the patient's sexual orientation focused on these psychoanalytic techniques. See *id.*

26. See *id.* at 22 (explaining reasoning behind inclusion of homosexuality in DSM when regarded as illness). The APA asserts that this codification reinforced sexual stigma and prejudice. See *id.*

27. See APA REPORT, *supra* note 23, at 22 (providing summary of techniques utilized for similar goal of changing sexual orientation). Aversion therapy techniques included: "inducing nausea, vomiting, or paralysis; providing electric shocks; or having the individual snap an elastic band around the wrist when the individual became aroused to same-sex erotic images or thoughts." *Id.* Other techniques included: "covert sensitization, shame aversion, systematic desensitization, orgasmic reconditioning, and satiation therapy." *Id.* Nonaversive treatments included: "dating skills, assertiveness, and affection training with physical and social reinforcement to increase other-sex sexual behaviors." *Id.*

28. See *id.* at 22-23 (describing studies by various scientists finding homosexuality natural). Publications like *Sexual Behavior in the Human Male* and *Sexual Behavior in the Human Female*, by Alfred Kinsey, as well as research by Evelyn Hooker, tested homosexuality as a mental disorder and found homosexuals similar to

### 1. Reported Effects of SOCE

APA studies surrounding the effects of SOCE report varying responses to the therapies, ranging from perceived benefits to highly detrimental effects.<sup>29</sup> The APA Task Force on Appropriate Therapeutic Responses to Sexual Orientation (APA Task Force), in its intensive study conducted in 2009, reported that those who failed to change their sexual orientation often found the experience a significant cause of emotional and spiritual distress; conversely, others found SOCE helpful, reporting it helped them reduce stress and live in a manner consistent with their faith.<sup>30</sup>

The APA Task Force found that studies largely indicated attempts to change patient's sexual orientation may cause distress and poor mental health, including depression and suicidal thoughts.<sup>31</sup> The APA Task Force also reported that early and modern research provides no clear indication of the harm experienced by patients undergoing SOCE, and thus, it is difficult to conclude how likely it is that SOCE is harmful.<sup>32</sup> They further asserted this lack of research presents serious concern for the validity of SOCE and practitioners' ability to help patients successfully and irreversibly change their sexual orientation.<sup>33</sup> While early studies showed lasting change to a patient's sexual orientation was uncommon, a minority of patients demonstrated reduced same-sex attraction and reduced arousal to all sexual stimuli, especially stimuli relating to same-sex attraction.<sup>34</sup> "Compelling evidence of decreased same-sex sexual behavior and increased . . . engagement in sexual behavior with the other sex was rare."<sup>35</sup>

Despite early studies, research surrounding modern SOCE shows no

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heterosexuals in both adaptation and functioning. *See id.*

29. *See id.* at 3 (summarizing APA study findings and discussing variance in reports).

30. *See id.* (describing results from patients interviewed). Other participants reported they found a community in religious SOCE and appreciated finding individuals with whom they could readily relate. *See id.* Further reported benefits included: "reduction of isolation, alterations in how problems are viewed, and stress reduction." *Id.*

31. *See* APA REPORT, *supra* note 23, at 36-42 (reporting responses from participants in SOCE regarding effects).

32. *See id.* at 42 (concluding lack of research in area makes scientific and definitive conclusions difficult to reach).

33. *See id.* (reporting limited studies and research in area of SOCE makes practice dangerous).

34. *See id.* at 42-43 (explaining early studies finding enduring change to sexual orientation uncommon). These studies reported that only a small minority of patients found same-sex attraction reduced after participation in SOCE. *See id.* at 43.

35. *See* APA REPORT, *supra* note 23, at 43 (describing findings from early studies leading to inconclusive solutions to issues with SOCE); *see also* David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297, 1398-99 (1999) (asserting likely impossibility of knowing whether SOCE works due to complexities of human sexuality); *Insufficient Evidence that Sexual Orientation Change Efforts Work, Says APA*, AM. PSYCHOLOGICAL ASS'N (Aug. 5, 2009), <http://www.apa.org/news/press/releases/2009/08/therapeutic.aspx>, archived at <http://perma.cc/N7VP-KVWM> (questioning effectiveness of SOCE).

conclusive evidence about the effectiveness of nonaversive treatments.<sup>36</sup> The APA Task Force similarly found no empirical evidence that participating in SOCE during childhood alters sexual orientation during adulthood.<sup>37</sup> Additionally, the APA Task Force found that SOCE using negative representations of homosexuality provides no documented benefits and can lead to harmful effects as a result of sexual stigma.<sup>38</sup> The APA Task Force also found SOCE provides patients with inaccurate information about homosexuality while promising unsubstantiated benefits and relying on methods with no scientific basis.<sup>39</sup>

The APA Task Force also reported the benefits of SOCE experienced by certain participants.<sup>40</sup> Some SOCE patients reported decreased interest in, sexual attraction to, and sexual behavior with same-sex partners, as well as increased interest in, sexual attraction to, and sexual behavior with other-sex sexual partners.<sup>41</sup> Some participants also reported an increase in healthy relationships and marriages with their other-sex partners, leading to an improved quality of life and mental health overall.<sup>42</sup> In many instances, however, patients enjoying these benefits had agreed to participate in SOCE as a result of a deep desire to change their sexual orientation.<sup>43</sup>

Despite reported benefits, the APA Task Force found no sound scientific basis for determining SOCE's actual impact on decreasing same-sex attraction and increasing other-sex attraction in participants.<sup>44</sup> Finally, the APA Task Force reported that a lack of sound data regarding the mental health effects of SOCE means there is no basis for claims that SOCE improves or harms a patient's mental health and quality of life.<sup>45</sup>

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36. See APA REPORT, *supra* note 23, at 43 (reporting lack of evidence of impacts of SOCE needed for making important recommendations). The APA Task Force attributes this lack of research largely to high dropout rates by participants, including many believed to have ended the therapy as a result of harm experienced. *See id.*

37. *See id.* at 79 (reporting APA Task Force findings regarding children undergoing SOCE effects into adulthood).

38. *See id.*

39. *See id.* (reporting APA Task Force findings surrounding SOCE for children). The APA Task Force reports some practitioners using SOCE continue to view homosexuality as a mental disorder, although there are no scientific theories to support such a belief or the practices. *See id.* Instead of these treatments, the APA recommends practitioners provide "multicultural, client-centered, and affirmative treatments that are developmentally appropriate." *Id.*

40. See APA REPORT, *supra* note 23, at 35-41 (describing beneficial outcomes experienced by patients who underwent SOCE).

41. *See id.* at 36-41 (outlining some reported positive experiences by patients); *see also* Bennion, *supra* note 16 (providing first-hand account of benefits of SOCE from former participant).

42. See APA REPORT, *supra* note 23, at 36-41 (describing reported improved relationships as result of SOCE).

43. *See id.* (describing reasoning behind discrepancies in findings).

44. *See id.* at 41 (reiterating no conclusive evidence found regarding benefits of SOCE).

45. *See id.* at 36-41 (describing lack of sound, conclusive data preventing APA Task Force from making firm recommendations).

Notwithstanding inconclusive findings regarding the benefits and damages of SOCE, the APA Task Force reports that conversion therapy is found to pose a significant risk to patients.<sup>46</sup> The APA Task Force reports that SOCE participants have experienced feelings of increased self-hatred, confusion, depression, suicidal thoughts, and other serious mental health effects.<sup>47</sup> While there is a lack of sound scientific data regarding the effects of SOCE, that lack of data is precisely what leads the APA Task Force to conclude SOCE is not beneficial to patients.<sup>48</sup> It reports an overall consensus in the psychological community that SOCE does not work, especially because it is not grounded in the science of psychology.<sup>49</sup>

## 2. Homosexuality Removed from APA DSM

In 1962, as a result of growing research, activists began pressuring the APA to remove homosexuality from the APA DSM’s mental illness listing.<sup>50</sup> As a result, the APA undertook an evaluation process, culminating in a vote to remove homosexuality from the 1973 edition of the DSM.<sup>51</sup> In support of this decision, the APA issued an accompanying statement “supporting civil rights protection for gay people in employment, housing, public accommodation, and licensing, and the repeal of all sodomy laws.”<sup>52</sup>

Mental health providers increasingly questioned and rejected SOCE and similar practices following the removal of homosexuality from the DSM; and a consensus developed in the medical community that homosexuality is not an illness.<sup>53</sup> Modern providers largely find SOCE “inappropriate, unethical, and

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46. See APA REPORT, *supra* note 23, at 42-43 (concluding lack of sound research and probable negative impacts of SOCE cause serious concern). The APA Task Force found that patients undergoing SOCE have experienced low self-esteem, depression, or other forms of mental distress. See *id.* at 42 (listing some reported negative results of SOCE).

47. See *id.* at 50 (listing harm experienced by patients in two studies).

48. See *id.* at 42-43 (concluding lack of rigorous research and reports of harm to patients presents “serious concern”).

49. See *id.* at 36-41 (asserting SOCE not generally accepted in scientific community and not grounded in psychology).

50. See APA REPORT, *supra* note 23, at 23-24 (describing events leading to removal of homosexuality from APA DSM, including homophile-movement campaign in 1960s).

51. See *id.* (reporting process involved in removing homosexuality from APA DSM); see also AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980) (constituting first edition of DSM excluding homosexuality as mental illness).

52. APA REPORT, *supra* note 23, at 23. Other mental health organizations passed similar resolutions, including the National Association of Social Workers and the American Counseling Association. See *id.* at 24. The World Health Organization removed homosexuality from its International Classification of Diseases more recently, in 1992. See 2 WORLD HEALTH ORG., INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS (10th ed. 2010), available at [http://www.who.int/classifications/icd/ICD10Volume2\\_en\\_2010.pdf?ua=1](http://www.who.int/classifications/icd/ICD10Volume2_en_2010.pdf?ua=1), archived at <http://perma.cc/Q3AV-GLK4> (announcing similar action by WHO).

53. See *Pickup v. Brown*, 728 F.3d 1042, 1049 (9th Cir. 2013) (suggesting removal of homosexuality from DSM caused decline in SOCE practices and increased skepticism and rejection of SOCE), amended by, 740 F.3d 1208 (9th Cir. 2014), cert. denied, 134 S. Ct. 2871 (2014).

inhumane” and support “affirmative approaches that focus on helping sexual minorities cope with the impact of minority stress and stigma.”<sup>54</sup> Very few mental health providers today believe in the merits of SOCE or continue its practice.<sup>55</sup>

### 3. Continued SOCE Practices

The community of mental health providers continuing to employ SOCE efforts, despite its small size, is a strong group whose members believe deeply in the merits of their work.<sup>56</sup> Among them is D. Charles W. Socarides who, based on Sigmund Freud’s theory that humans are born bisexual and move along a continuum from homosexual to heterosexual, founded the National Association for the Research and Therapy of Homosexuals (NARTH) to promote SOCE.<sup>57</sup> Since its founding, NARTH has forged alliances with similar advocacy groups to promote SOCE through advertising and sharing of success stories.<sup>58</sup>

In May 2001, Dr. Robert Spitzer of Columbia University concluded a study of individuals who sought to change their sexual orientation from homosexual to heterosexual; and he found approximately half the people interviewed succeeded in achieving “good heterosexual functioning.”<sup>59</sup> Dr. Spitzer defined “good heterosexual functioning” as being in a “loving and emotionally satisfying heterosexual relationship” for the year leading up to the interview, having engaged in satisfying heterosexual sex at least monthly and having never or rarely thought of same-sex partners during heterosexual sex.<sup>60</sup> Despite being met with negative feedback and opposing studies, Spitzer

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54. APA REPORT, *supra* note 23, at 24 (asserting prevailing beliefs of modern mental health providers regarding SOCE).

55. *See Pickup*, 728 F.3d at 1049 (describing number of modern mental health providers using SOCE as “small”).

56. *See* Benedict Carey, *Psychiatry Giant Sorry for Backing Gay ‘Cure,’* N.Y. TIMES (May 18, 2012), <http://www.nytimes.com/2012/05/19/health/dr-robert-l-spitzer-noted-psychiatrist-apologizes-for-study-on-gay-cure.html> (describing origins and continuance of SOCE including modern advocates).

57. *See id.* (giving example of modern SOCE advocacy efforts). In its statement on SOCE, NARTH announced its commitment to protect its clients’ rights to seek change to their unwanted same-sex attractions, as well as the rights of therapists to provide this care. *See NARTH Institute Statement on Sexual Orientation Change*, NARTH INST. (Jan. 25, 2012), <http://www.narth.com/#!/about1/c1wab> (describing NARTH philosophy and goals with SOCE). NARTH also states that change to one’s sexual orientation is possible, and viewing change along a continuum as opposed to in an absolute sense allows for SOCE’s success in many circumstances. *See id.*

58. *See* Carey, *supra* note 56 (describing NARTH’s campaign promoting conversion therapy as “aggressive”).

59. *See* Erica Goode, *Scientist Says Study Shows Gay Change Is Possible*, N.Y. TIMES (May 9, 2001), <http://www.nytimes.com/2001/05/09/health/09GAY.html> (summarizing methodology employed by Dr. Spitzer in 2001 study). Dr. Spitzer and his colleagues found sixty-six percent of men and forty-four percent of women participating in the study, all of whom sought to change their sexual orientation from homosexual to heterosexual, were able to achieve “good heterosexual functioning.” *Id.*

60. *Id.*



asserted that society should not assume a homosexual person's desire to change his or her sexual orientation is irrational or due to societal pressures.<sup>61</sup> Gay rights groups criticized Dr. Spitzer's study, pointing out that most of his subjects were recruited by groups condemning homosexuality, including religious organizations.<sup>62</sup> In 2012, Dr. Spitzer apologized to the gay community, admitting that his study had serious scientific flaws and had led to increased discrimination against the gay community.<sup>63</sup>

In 1980, the APA defined "ego-dystonic homosexuality" to describe men and women who wanted to change their sexuality, stating that for these people, homosexuality constituted a source of "distress."<sup>64</sup> In doing so, the APA effectively classified sexual orientation as a choice, leading to the belief that conversion therapy could be a legitimate manner of changing one's sexual orientation.<sup>65</sup> Scholars like Susan J. Becker assert that this added category "reinforced psychology's tendency to fault homosexuals for lacking sufficient coping skills, rather than blame society for prejudicial treatment."<sup>66</sup>

Today, organized religions remain the strongest advocates against homosexual behavior, resulting from long-standing moral beliefs against acting on homosexual impulses.<sup>67</sup> Evangelical Protestants are recognized as one of the groups most fervently opposed to homosexual behavior and most strongly supportive of gay conversion therapy practices.<sup>68</sup> The primary advocates of gay conversion therapy are "pastors and religiously-oriented lay persons," as well as certain mental health professionals, often with religious ties, who serve as referral sources to religious groups who provide the therapy.<sup>69</sup>

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61. *See id.* (outlining Dr. Spitzer's findings). Dr. Spitzer's study conflicted with that of Dr. Ariel Shidlo and Dr. Michael Schroeder, who found that their subjects failed to change through reparative therapies. *See id.*

62. *See id.* (reporting backlash Spitzer received regarding study). After leading the task force responsible for removing homosexuality from the APA's DSM and talking to protesters who objected to the APA's policy discouraging SOCE and similar therapies, Dr. Spitzer believed his study was necessary. *See id.*

63. *See Carey, supra* note 56 (detailing criticisms and Dr. Spitzer's regrets surrounding study). Dr. Spitzer stated that the results of his study were unreliable for a number of reasons. *See id.* For one thing, it was based largely on asking people whether they have changed, which does not constitute evidence of change. *See id.* He also admitted that many of the subjects were ex-gay advocates who were politically active. *See id.* Finally, Dr. Spitzer's study was based on subjects' distant memories of feelings from years past, which are often unreliable. *See id.*

64. Susan J. Becker, *Many Are Chilled, but Few Are Frozen: How Transformative Learning in Popular Culture, Christianity, and Science Will Lead to the Eventual Demise of Legally Sanctioned Discrimination Against Sexual Minorities in the United States*, 14 AM. U. J. GENDER SOC. POL'Y & L. 177, 237 (2006) (citing AM. PSYCHIATRIC ASS'N, *supra* note 51, at 281-82) (describing diagnosis adopted).

65. *See id.* (explaining implications of diagnosis classification).

66. *Id.* (describing effects of diagnosis classification and asserting blame misguided).

67. *See* Jonathan Sacks, New Development, "Pray Away the Gay?" *An Analysis of the Legality of Conversion Therapy by Homophobic Religious Organizations*, 13 RUTGERS J. L. & RELIGION 67, 71 (2011) (explaining history of religious opposition to homosexuality and advocacy for SOCE).

68. *See id.* (describing Protestant beliefs leading to stigmatizing homosexuality). This particular aversion to homosexual behavior results from Evangelical theology stressing morality and holding social institutions responsible for fostering moral behavior in individuals. *See id.*

69. *See id.* at 73-74 (outlining support for gay conversion therapy practices and highlighting religious

#### 4. Declining Prevalence of SOCE

Despite ongoing advocacy for gay conversion therapy by some mental health professionals who refer patients to Christian organizations, some religiously affiliated groups have since ended their SOCE practices.<sup>70</sup> Formerly one of the largest national providers of gay conversion therapy, Exodus International closed its doors in June 2013 after years of offering and advocating for conversion therapy.<sup>71</sup> The organization issued an apology to the gay community after closing.<sup>72</sup> The end of prominent practices like this, coupled with ongoing questioning of the scientific legitimacy of SOCE and its damaging effects upon patients, have led to a decrease in SOCE's prevalence.<sup>73</sup>

Conversion therapy efforts have also declined due to a recent and widespread trend of characterizing the practice as child abuse.<sup>74</sup> Advocates for the classification of SOCE as child abuse are currently pushing for state intervention in cases where parents mandate their children's participation in SOCE.<sup>75</sup> A combination of reports about the damaging effects of SOCE, protests from gay advocacy groups, and the characterization of SOCE as child abuse have led to proposed and enacted legislation attempting to ban SOCE, which would prevent the continued practice of conversion therapy.<sup>76</sup>

#### B. Legislation Banning SOCE

##### 1. California Senate Bill 1172

California led the legislative movement against SOCE by passing a bill prohibiting mental health providers from engaging in such therapeutic efforts in

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participation as common factor).

70. See *id.* at 74 (reporting conversion therapy discredited due to ineffectiveness and "potentially dangerous effects on patients").

71. See Ross Murray, *Closing Time: "Ex-Gay" Group Realizes They're Wrong*, GLAAD (June 19, 2013), <http://www.glaad.org/blog/closing-time-ex-gay-group-realizes-theyre-wrong>, archived at <http://perma.cc/8KWZ-UAK5> (providing apology from former company president).

72. See *id.* In a statement, the organization's President Alan Chambers said: "I am sorry for the pain and hurt that many of you have experienced. I am sorry some of you spent years working through the shame and guilty when your attractions didn't change. I am sorry we promoted sexual orientation change efforts and reparative theories about sexual orientation . . ." *Id.*

73. See Del Pizzo, *supra* note 2, at 6 (reporting waning prevalence of SOCE in recent years).

74. See John Alan Cohan, *Parental Duties and the Right of Homosexual Minors To Refuse "Reparative" Therapy*, 11 BUFF. WOMEN'S L.J. 67, 76-80 (2002-2003) (outlining reasoning behind author's view of SOCE as form of abuse).

75. See *id.* Advocates argue that in instances of child abuse "the state has an interest in overriding parental autonomy," recognizing that the emotional abuse of children has become an "increasingly serious concern for policies aimed at protecting and supporting adolescent development." *Id.* at 76-77.

76. See Assemb. 3371, 215th Leg., 2d Ann. Sess., 2013 N.J. Laws 1206 (providing advocacy for classification of forced SOCE by parents as child abuse); S. 1172, 2011-2012 Reg. Sess., 2012 Cal. Stat. 6,569; Cohan, *supra* note 74, at 76-80.

that jurisdiction.<sup>77</sup> In the text of California Senate Bill 1172 (SB 1172), the legislature cites studies, including the APA Task Force study, finding SOCE harmful to those involved and posing serious risks to patients.<sup>78</sup> The legislative findings also included the APA’s Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts, which advises,

[P]arents, guardians, young people, and their families to avoid sexual orientation change efforts that portray homosexuality as a mental illness or developmental disorder and to seek psychotherapy, social support, and educational services that provide accurate information on sexual orientation and sexuality, increase family and school support, and reduce rejection of sexual minority youth.<sup>79</sup>

The legislature concluded that the lack of research or conclusive studies by reparative therapists substantiating their claims of “cure” has led the APA to recommend that practitioners refrain from SOCE, at least until valid information becomes available.<sup>80</sup>

The bill’s text then provides statements and research by other psychological and therapeutic organizations and associations denouncing SOCE and recommending that practitioners refrain from such efforts until scientific evidence becomes available, if ever.<sup>81</sup> After citing these various sources, the

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77. See Cal. S. 1172 (providing text of California bill); see also Sam Hotchkiss, Comment, *Disputes Between Christian Schools and LGBT Students: Should the Law Get Involved?*, 81 UMKC L. REV. 701, 719-20 (2013) (asserting California leading push against SOCE in U.S.); *Conversion Therapy*, *supra* note 4, at 7 (reporting change in California legislation).

78. See Cal. S. 1172 (providing purported risks of SOCE). The legislature reported that these health risks include:

confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, suicidality, substance abuse, stress, disappointment, self-blame, decreased self-esteem and authenticity to others, increased self-hatred, hostility and blame toward parents, feelings of anger and betrayal, loss of friends and potential romantic partners, problems in sexual and emotional intimacy, sexual dysfunction, high-risk sexual behaviors, a feeling of being dehumanized and untrue to self, a loss of faith, and a sense of having wasted time and resources.

See *id.*; *The Lies and Dangers of Efforts To Change Sexual Orientation or Gender Identity*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/the-lies-and-dangers-of-reparative-therapy> (last visited Jan. 8, 2015), archived at <http://perma.cc/275K-F5N6> [hereinafter *The Lies*] (describing dangers of SOCE).

79. *Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts*, AM. PSYCHOLOGICAL ASS’N 31 (2009), <http://www.apa.org/about/policy/sexual-orientation.pdf>, archived at <http://perma.cc/5FXY-5QXV> (providing APA findings of study surrounding treatment of homosexual patients). The California legislature uses this language in the bill to further legitimize efforts to end SOCE practices in that state. See Cal. S. 1172.

80. See Cal. S. 1172 (providing text of bill relating to lack of SOCE research); see also *supra* Part II.A.1 (summarizing APA findings in report and advising practitioners refrain from using SOCE).

81. See Cal. S. 1172. The American School Counselor Association’s position statement on professional school counselors and lesbian, gay, bisexual, transgender and questioning youth states: It is not the role of the

bill's text states that "California has a compelling interest in protecting the . . . well-being of" its minor citizens, both physically and mentally, including gay, lesbian, bisexual, transgender, and questioning youth.<sup>82</sup> It is in this way that the legislature justifies passing a bill protecting this population from the harmful effects of SOCE.<sup>83</sup>

In October 2012, California Governor Jerry Brown signed the proposed bill into law.<sup>84</sup> The law, Section 865 of the California Business and Professions Code, defines "mental health provider" as:

[A] physician and surgeon specializing in the practice of psychiatry, a psychologist, a psychological assistant, intern, or trainee, a licensed marriage and family therapist, a registered marriage and family therapist, intern, or trainee, a licensed educational psychologist, a credentialed school psychologist, a licensed clinical social worker, an associate clinical social worker, a licensed professional clinical counselor, a registered clinical counselor, intern, or trainee, or any other person designated as a mental health professional under

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counselor to try to change the student's sexual orientation but instead to provide support to these students to "promote equal opportunity and respect for all individuals regardless of sexual orientation, gender identity or gender expression." *The Professional School Counselor and LGBTQ Youth*, AM. SCH. COUNS. ASS'N (rev. 2014), [http://www.schoolcounselor.org/asca/media/asca/PositionStatements/PS\\_LGBTQ.pdf](http://www.schoolcounselor.org/asca/media/asca/PositionStatements/PS_LGBTQ.pdf), archived at <http://perma.cc/JC3P-H5T5>. The statement goes on to recommend that counselors ensure their services promote self-acceptance, understand coming out and related issues, and identify helpful resources in the community. See *id.* The American Academy of Pediatrics stated in its journal in 1993 that attempts at changing sexual orientation "can provoke guilt and anxiety." Comm. on Adolescence, *Homosexuality and Adolescence*, 92 PEDIATRICS 631, 633 (1993), available at <http://pediatrics.aappublications.org/content/92/4/631.full.pdf>, archived at <http://perma.cc/7RTC-EQAJ>. The report also stated that these therapies have "little or no potential for achieving changes in orientation." *Id.* The American Academy of Pediatrics' latest publication prohibits practitioners from referring patients to conversion or reparative therapies. See David A. Levine, *Office-Based Care for Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 132 PEDIATRICS e297, e301 (2013), available at <http://pediatrics.aappublications.org/content/132/1/e297.full.pdf+html> (explaining recommendations for care of homosexual patients). The American Medical Association's Council on Scientific Affairs prepared a report in 1994 stating that aversion therapy is not recommended for gays and lesbians, as those populations are capable of being comfortable with their sexual orientation. See Cal. S. 1172 (providing statement from association). The National Association of Social Workers (NASW) published a policy statement in 1997 asserting that no data exists demonstrating that therapies are effective and that indeed the therapies may be harmful. See *id.* NASW issued a similar statement in 2000. See Nat'l Comm. on Lesbian, Gay, & Bisexual Issues, NASW, "*Reparative*" and "*Conversion*" Therapies for Lesbians and Gay Men, NAT'L ASS'N. OF SOC. WORKERS (Jan. 21, 2000), <http://www.socialworkers.org/diversity/lgb/reparative.asp?>, archived at <http://perma.cc/47TP-X5N3> (describing purported harmful effects of SOCE). The California legislature quotes and summarizes similar position statements from the American Counseling Association's Governing Council, the American Psychoanalytic Association, the American Academy of Child and Adolescent Psychiatry, and the Pan American Health Organization. See Cal. S. 1172.

82. See S. 1172, 2011-2012 Reg. Sess., 2012 Cal. Stat. 6,569 (asserting reasoning for banning SOCE).

83. See *id.* The bill proposes adding to the state's Business and Professions Code, specifically to Chapter 1, Division 2, dealing with the healing arts, an article prohibiting mental health providers from engaging in SOCE with patients under eighteen years of age. See *id.*

84. See *Conversion Therapy*, *supra* note 4, at 7 (explaining passage and effects of bill).

California law or regulation.<sup>85</sup>

The text of the law prohibits mental health providers from engaging in SOCE with patients under the age of eighteen.<sup>86</sup> It states that any SOCE attempted by mental health providers “shall be considered unprofessional conduct” and one engaged in such efforts will be subject to “discipline by the licensing entity for that mental health provider.”<sup>87</sup>

Critics and proponents of the law note that its provisions do not apply to nonlicensed practitioners, including religious groups, and that adult patients are not protected by the prohibition.<sup>88</sup> Some academics believe the law’s narrow scope means it should always pass constitutional challenges and will likely survive such scrutiny.<sup>89</sup> Other scholars predict that if similar legislation becomes the norm throughout the United States, it will likely present a challenge for organizations like Christian universities who recommend SOCE for LGBTQ students, recognizing that more restrictive bans could arise, especially given the disapproval of reparative therapy by groups like the APA.<sup>90</sup>

## 2. *New Jersey Bill 3371*

In August 2012, New Jersey followed California’s lead when Governor Chris Christie signed a bill outlawing therapy that aims to change the sexual orientation of gay children.<sup>91</sup> The text of the New Jersey bill largely mirrors that of the California bill: it declares that being gay, lesbian, or bisexual is not a disease or deficiency; and it cites similar sources as the California bill.<sup>92</sup>

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85. See CAL. BUS. & PROF. CODE § 865(a) (West 2014) (providing text of law as finalized in California). The law also defines Sexual Orientation Change Efforts as any practice undertaken by such providers that seeks to change a patient’s sexual orientation. See *id.* § 865(b)(1).

86. See *id.* § 865.1.

87. *Id.* § 865.2.

88. See Nick Clair, *Chapter 835: “Gay Conversion Therapy” Ban: Protecting Children or Infringing Rights?*, 44 MCGEORGE L. REV. 550, 556 (2013) (predicting California law could survive constitutional challenges because does not apply to these populations); Hotchkiss, *supra* note 77, at 720-21 (suggesting restrictive trend against practice could present challenge to Christian universities and other similar organizations).

89. See Clair, *supra* note 88, at 558 (suggesting survival of law likely depends on whether it regulates conduct or speech).

90. See Hotchkiss, *supra* note 77, at 720-21 (predicting negative response from certain groups, including Exodus International, former supporter of SOCE).

91. See Zernike, *supra* note 5 (reporting passage of New Jersey legislation).

92. See Assemb. 3371, 215th Leg., 2d Ann. Sess., 2013 N.J. Laws 1206; S. 1172, 2011-2012 Reg. Sess., 2012 Cal. Stat. 6,569. The text of the New Jersey bill cites statements and literature from the APA, the American School Counselor Association, the American Academy of Pediatrics, the American Medical Association Council on Scientific Affairs, the National Association of Social Workers, the American Counseling Association Governing Council, the American Psychoanalytic Association, the American Academy of Child and Adolescent Psychiatry, the Pan American Health Organization, and others, all recommending that practitioners refrain from using SOCE. See N.J. Assemb. 3371.

Echoing the California legislature, the New Jersey bill asserts that the state “has a compelling interest in protecting the physical and psychological well-being of minors” in that jurisdiction, “including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by sexual orientation change efforts.”<sup>93</sup> The definitions provided for “[a] person who is licensed to provide professional counseling” and “sexual orientation change efforts” largely replicate those in the California bill for “mental health providers” and “sexual orientation change efforts,” respectively.<sup>94</sup> Since the passage of such legislation in California and New Jersey, similar bills have been introduced in both Massachusetts and New York, while talk of comparable action exists around the country.<sup>95</sup>

### C. First Amendment Free Speech Implications

The First Amendment of the U.S. Constitution protects citizens’ rights to free speech.<sup>96</sup> Throughout free speech jurisprudence, courts have grappled with articulating consistent rules and doctrines prohibiting censorship and First Amendment violations.<sup>97</sup> The protection of content-based speech is a crucial concept in First Amendment analysis; and laws restricting this form of speech are, and historically have been, subject to a stricter test and regarded as “more suspect” than content-neutral laws.<sup>98</sup> Laws restricting speech based on content are subject to the highest form of judicial review: strict scrutiny.<sup>99</sup> On the other hand, content-neutral laws restricting speech are subject only to intermediate scrutiny.<sup>100</sup>

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93. N.J. Assemb. 3371.

94. *Id.*; Cal. S. 1172 (providing key terms mirrored by New Jersey legislature).

95. *See* Lovett, *supra* note 6 (reporting talks of similar legislation in other states).

96. *See* U.S. CONST. amend. I. In addition to protecting free speech, the First Amendment protects citizens’ rights to practice religion, to assemble peacefully, to petition their government, and enjoy freedom of the press. *See id.*; Martha Swartz, *Physician-Patient Communication and the First Amendment After Sorrell*, 17 MICH. ST. U. J. MED. & L. 101, 125 (2012) (detailing First Amendment protections).

97. *See* DAVID L. HUDSON, JR., THE FIRST AMENDMENT: FREEDOM OF SPEECH § 2:1 (2012) (introducing First Amendment jurisprudence as confusing and complicated). Modern free speech jurisprudence centers around three areas: content, categorization, and context. *See id.* These principles, among others, have become the most important areas of analysis and have governed the way free speech is regulated and controlled. *See id.*

98. *Id.* § 2:2 (providing overview of content discrimination in First Amendment jurisprudence). Content-based laws prohibit certain speech based on its content, while content-neutral laws apply to all forms of speech, regardless of their content. *See id.*

99. *See id.* (explaining forms of judicial review for laws restricting speech). Content-based laws are considered “presumptively unconstitutional.” *Id.* (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992)).

100. *See id.* While content-based discrimination is considered presumptively unconstitutional, viewpoint discrimination is subject to stricter scrutiny. *See id.* In *Rosenberger v. Rector and Visitors of University of Virginia*, Justice Kennedy explained that viewpoint discrimination is “an egregious form of content discrimination” because it targets not subject matter but “particular views.” 515 U.S. 819, 828-29 (1995). While certain laws are fairly obviously content-based or content-neutral, distinguishing between those less obvious is accomplished by determining “whether the government has adopted a regulation of speech because

The modern strict scrutiny test, besides regulating challenges to discriminatory statutes under the Equal Protection Clause, provides “the baseline rule” for analyzing statutes that regulate content-based speech under the First Amendment.<sup>101</sup> Developed in the 1960s, the strict scrutiny test involves assessing whether statutes are narrowly tailored to serve a compelling government interest.<sup>102</sup> When strict scrutiny is applied to a statute regulating speech, the government has the burden of proving it serves a compelling interest.<sup>103</sup>

Although the Supreme Court has not definitively articulated the precise differences between strict scrutiny and the other standards of review, the requirement to prove a compelling interest suggests that the state’s interest must be “extremely weighty, possibly urgent, but also rare.”<sup>104</sup> Scholars like Richard H. Fallon, Jr., however, suggest that because the standard is not precisely defined, the Supreme Court has “adopted an astonishingly casual approach to identifying compelling interests.”<sup>105</sup>

The narrowly-tailored requirement of strict scrutiny review demands an “especially tight” connection between challenged laws and the specific governmental ends the laws aim to promote.<sup>106</sup> The Supreme Court has interpreted this requirement to mean that the government must demonstrate the necessity of infringing upon a constitutional right, and such infringements cannot be underinclusive or overinclusive.<sup>107</sup>

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of disagreement with the message it conveys.” HUDSON, *supra* note 97, § 2:3 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984)) (explaining method for distinguishing between less-obvious content-based and content-neutral laws); *see also Clark*, 468 U.S. at 295 (finding ordinance banning sleeping in parks content-neutral because it applied equally to all people and its purpose was not to suppress speech but to keep parks in acceptable condition. *See Clark*, 468 U.S. at 299.

101. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268-69 (2007) (analyzing strict scrutiny review throughout history); *see also, e.g., United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813-14 (2000) (applying strict scrutiny analysis); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (following test for strict scrutiny); *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (applying strict scrutiny analysis).

102. *See Johnson v. California*, 543 U.S. 499, 505 (2005); *see also Playboy Entm’t Grp., Inc.*, 529 U.S. at 804 (using strict scrutiny test in analysis); *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (following narrowly-tailored test); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 653 (1994) (using narrowly-tailored test); *Ward v. Rock Against Racism*, 491 U.S. 781, 782-83 (1989) (utilizing narrowly-tailored test).

103. *See* Fallon, *supra* note 101, at 1273 (borrowing language from courts to describe standard for strict scrutiny review).

104. *Id.* (attempting to distinguish strict scrutiny as heightened standard above others and articulating its doctrinal structure).

105. *Id.* at 1321 (articulating author’s views on Supreme Court’s perplexing compelling interest analysis). While some courts have suggested compelling interests can be derived from the Constitution, such as the Equal Protection Clause, the Supreme Court has often labeled interests compelling “on the basis of little or no textual inquiry.” *Id.* at 1321-22.

106. *Id.* at 1274 (analyzing meaning behind “narrowly tailored”).

107. *See* Fallon, *supra* note 101, at 1326-32 (providing analysis of elements for narrow tailoring). Fallon describes the narrowly tailored requirement based on his analysis of Supreme Court cases, but he asserts that in

Intermediate scrutiny mandates the government point to an “important” rather than “compelling” state interest, thus implicating a lower standard of review.<sup>108</sup> Further, challenged legislation subject to intermediate scrutiny will be upheld as long as there is a substantial relationship between means and ends.<sup>109</sup>

Besides issues with content, courts have found that the overbreadth and vagueness of laws can have detrimental effects upon free speech.<sup>110</sup> A law is overbroad if it tends to prohibit forms of protected speech due to broad, sweeping language.<sup>111</sup> A law might be found unconstitutionally vague if it does not adequately inform citizens about when their conduct or speech is protected or violates the law.<sup>112</sup>

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reality, the test contains significant ambiguities and courts have not strictly defined it. *See id.* at 1326 (noting lack of judicial guidance in this area). Fallon states that the infringement of constitutional rights must be “necessary,” suggesting that courts sometimes understand necessary to be the “least restrictive alternative” to achieve a state’s goals. *See id.*; *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (using “necessary” language); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 815 (2000) (using similar test). A statute cannot fail to regulate activities that “pose substantially the same threats to the government’s purportedly compelling interest as the conduct that the government prohibits.” Fallon, *supra* note 101, at 1327. Fallon notes, however, that this requirement does not make every underinclusive statute unconstitutional and suggests the Supreme Court has not defined this standard stringently. *See id.* at 1326-27 (noting ambiguity in Court’s treatment of standard). Fallon also states that statutes cannot be overinclusive, suggesting a statute might not be narrowly tailored to meet a legitimate government interest if less restrictive alternative exists. *See id.* at 1328 (defining overinclusiveness). Finally, Fallon suggests that in some cases there exists a fourth element, proportionality. *See id.* at 1330. Fallon suggests that this factor lies between underinclusiveness or overinclusiveness. *See id.* He states that a court must determine “whether the damage or wrong attending an infringement on protected rights is constitutionally acceptable in light of the government’s compelling aims, the probability that the challenged policy will achieve them, and available alternative means of pursuing the same goals.” *Id.* Fallon notes, however, that the Supreme Court has seldom expressed the need to use this balancing test. *See id.*

108. *See* Fallon, *supra* note 101, at 1273-74 (contrasting strict and intermediate scrutiny).

109. *See id.* (describing elements of intermediate scrutiny).

110. *See* HUDSON, *supra* note 97, § 2:7, 2:8 (explaining overbreadth and vagueness doctrines).

111. *See id.* § 2:7 (explaining overbreadth and providing examples). The Supreme Court decision in *Board of Airport Commissioners v. Jews for Jesus, Inc.* is one helpful example of a law that is overbroad in both its reach and scope. 482 U.S. 569 (1987). In that case, to prevent solicitation, Los Angeles airport officials passed a regulation prohibiting First Amendment activity by individuals or groups in the “Central Terminal Area” of the airport. *See id.* at 570-71. Despite the officials’ legitimate concerns regarding solicitations within the airport, the Court found the regulation overly broad because it prohibited all forms of speech. *See id.* at 574-75. While overbroad statutes are generally considered unconstitutional, courts have ruled that the overbreadth must be “substantial.” HUDSON, *supra* note 97, § 2:7. The Court’s failure to define this requirement has led to varying decisions regarding overbreadth. *See id.* For example, in *Ashcroft v. Free Speech Coalition*, the Supreme Court found provisions of a child pornography law substantially overbroad because it could be applied to mainstream movies in addition to pornographic films. 535 U.S. 234, 257-58 (2002) (explaining reasoning behind Court’s holding and providing examples of potential films included in ban). On the other hand, in *Virginia v. Hicks*, the Court upheld a housing regulation banning visitors from a public housing development unless they had a legitimate purpose, finding the statute was not substantially overbroad. 539 U.S. 113, 123 (2003) (describing legitimate purpose served by law: to protect residents).

112. *See* HUDSON, *supra* note 97, § 2:8 (discussing instances in which courts find laws void for vagueness). Vague laws that do not state clearly what kind of speech is prohibited often have a “chilling” effect on speech altogether. *See* *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997) (finding internet protection act vague because of chilling effect on speech). The statute in *Reno* prohibited indecent online communication to



Finally, the courts have created a two-part test to determine whether expressive conduct or symbolic speech merits First Amendment protection, asking whether the conduct was intended to convey a particular message and whether that message could be reasonably understood.<sup>113</sup> Some scholars suggest that the standard strict scrutiny test is not appropriate for restrictions on health care providers’ speech.<sup>114</sup> Instead, Shawn L. Fultz supports following the *Central Hudson Gas & Electric Corp. v. Public Service Commission*’s commercial speech approach when confronting mental health professionals using SOCE.<sup>115</sup> Under the *Central Hudson Gas & Electric Corp.* approach, courts consider whether the speech is likely to be false or misleading, and, if not, it weighs the regulation against the government’s interest in preventing that speech.<sup>116</sup>

#### D. Judicial Response to California Bill Banning SOCE

##### I. *Welch v. Brown*

While citizens, advocates, and medical organizations have praised the California law prohibiting SOCE, conservative groups have voiced opposition since its passage; and some groups have challenged its constitutionality through judicial action.<sup>117</sup> In response to the bill, California conservative advocacy

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protect children and regulate online pornography. *See id.* at 858-62. The Court held the statute was vague because it failed to specify exactly what constituted indecent material and thus had the effect of chilling speech. *See id.* at 885.

113. *See HUDSON, supra note 97, § 2:9* (debating whether forms of expressive conduct or symbolic speech constitute speech within First Amendment analysis). The Supreme Court devised a two-part test in *Texas v. Johnson*, where the Court held that burning the American flag constituted protected speech because such conduct—a form of political protest—intended to convey a particular message that could be reasonably understood. 491 U.S. 397, 404 (1989).

114. *See* Shawn L. Fultz, Comment, *If It Quacks Like a Duck: Reviewing Health Care Providers’ Speech Restrictions Under the First Prong of Central Hudson*, 63 AM. U. L. REV. 567, 593 (2013) (asserting health care providers’ speech more similar to commercial than private speech). First Amendment protection of commercial speech, as opposed to private speech, was explained in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, when the Court decided a New York regulation prohibiting advertising was unconstitutional. 447 U.S. 557, 571-72 (1980). In that decision, the Court used a lower level of scrutiny for commercial speech because of the government regulation incorporated in commercial speech. *See id.* at 562-63. In *Central Hudson Gas & Electric Corp.*, the Court came up with a four-prong test for restrictions on commercial speech to determine whether such speech is protected by the First Amendment:

“[I]t at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”

*Id.* at 566.

115. *See* Fultz, *supra* note 114, at 597-98 (asserting first prong of *Central Hudson Gas & Electric Corp.* test protects against shoddy medical work).

116. *See id.*

117. *See* Hotchkiss, *supra* note 77, at 719-21 (reporting reaction by conservative groups following passage

group PJI filed a lawsuit opposing the ban because of its constitutional implications.<sup>118</sup> PJI filed the suit on behalf of three named therapist plaintiffs seeking to protect the rights of parents to obtain conversion therapy for their “sexually confused” children, as well as the right of mental health professionals to provide such therapy when requested by patients and parents.<sup>119</sup> The PJI lawsuit asserted what the group believed to be the key constitutional problems with the law and asked the court for a preliminary injunction halting its enforcement until the suit is adjudicated.<sup>120</sup> Attorney Matthew McReynolds stated that the court’s decision would have wide implications for the protection and future of free speech.<sup>121</sup>

In the case, originally filed as *Welch v. Brown*, PJI represented Dr. Donald Welch, a counselor, Dr. Anthony Duk, a psychiatrist, and Aaron Blitzer, a former conversion therapy patient.<sup>122</sup> The plaintiffs brought the action under 42 U.S.C. § 1983 against various state defendants to challenge the constitutionality of SB 1172, especially its violation of their First Amendment right to free speech.<sup>123</sup> The plaintiffs sought declaratory relief and preliminary and permanent injunctions.<sup>124</sup> The court found that SB 1172 is subject to strict scrutiny because it restricts speech and found the statute is unlikely to satisfy this high standard.<sup>125</sup> Based on these findings, the court ruled that the plaintiffs were likely to succeed on the merits of their §1983 claim because of the violations of their First Amendment right to free speech.<sup>126</sup> The court granted the preliminary injunction, finding that without it, the plaintiffs were likely to

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of California bill).

118. See *Conversion Therapy*, *supra* note 4, at 7 (reporting filing of lawsuit and summarizing key objections to law).

119. See *Filings Seek To Halt*, *supra* note 8 (announcing filing of lawsuit to halt gay therapy ban). In PJI’s press release, its President, Brad Davis, called California’s conversion therapy ban “an unprecedented attempt to reach even inside the four walls of a church to enforce state orthodoxy on homosexual behavior.” *Id.*

120. See *id.* (explaining goals of lawsuit). The PJI president stated that the organization is “looking forward to defending churches—and our children—in court.” *Id.*

121. See *New Court Filing Seeks Rehearing on Gay Therapy Case*, PAC. JUST. INST. (Sept 12, 2013), <http://www.pacificjustice.org/press-releases/new-court-filing-seeks-rehearing-on-gay-therapy-case>, archived at <http://perma.cc/DG2L-Q4F3> [hereinafter *New Court Filing*] (considering free speech implications of Ninth Circuit decision).

122. See *Welch v. Brown*, 907 F. Supp. 2d 1102, 1106 (E.D. Cal. 2012) (providing decision in case as originally filed and listing plaintiffs), *rev’d sub nom.* *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013), *amended by*, 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, 134 S. Ct. 2871 (2014); *New Court Filing*, *supra* note 121 (listing plaintiffs and their interest in overturning SOCE ban). Dr. Welch offers and oversees a counseling ministry at his church, Dr. Duk is a Roman Catholic psychiatrist, and Aaron Blitzer is a former conversion therapy patient training to become a mental health professional so that he can help others pursue conversion therapy. See *New Court Filing*, *supra* note 121.

123. See *Welch*, 907 F. Supp. 2d at 1106-07 (describing legal claims in suit); see also 42 U.S.C. § 1983 (2012) (allowing civil litigation in cases regarding constitutional rights).

124. See *Welch*, 907 F. Supp. 2d at 1106-07.

125. See *id.* at 1117-21 (finding SB 1172 unlikely to withstand strict scrutiny).

126. See *id.* at 1121 (concluding plaintiffs established likelihood of prevailing).

suffer irreparable harm.<sup>127</sup>

The court began its reasoning by contemplating the plaintiff’s First Amendment rights.<sup>128</sup> The Supreme Court has recognized that free speech rights under the First Amendment extend to the doctor-patient relationship.<sup>129</sup> The court also observed that the Ninth Circuit has recognized the communication occurring during psychoanalysis is entitled to First Amendment protection.<sup>130</sup> Having made this determination, the court went on to analyze SB 1172 and whether or not SOCE were entitled to First Amendment protection.<sup>131</sup>

Finding the law was not entitled to a lower level of review as a “professional regulation or a regulation of conduct,” the court went on to inquire as to whether SB 1172 was content and viewpoint neutral.<sup>132</sup> Here, to determine whether a regulation is content-based or content-neutral, a court inquires as to whether the government’s agreement or disagreement with the message the particular speech conveys motivated the adoption of a regulation.<sup>133</sup> To determine whether SB 1172 was content-based or content-neutral, the court relied on two Ninth Circuit cases and one Supreme Court case.<sup>134</sup> In *Conant v. Walters*, the Ninth Circuit granted a permanent injunction against a policy that revoked physicians’ licenses to prescribe controlled substances and allowed investigations into physicians’ practices when they prescribed or recommended medical marijuana, finding the policy content-based.<sup>135</sup> In *National Ass’n for the Advancement of Psychoanalysis v. California Board of Psychology*, the Ninth Circuit concluded that licensing laws requiring licenses for anyone providing psychoanalytic services to the public for a fee were content-neutral because the laws do not dictate the content of exchanges between psychologists

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127. See *id.* at 1122 (finding protecting individual’s free speech outweighs public interest in “rushing to enforce an unprecedented law”).

128. See *Welch v. Brown*, 907 F. Supp. 2d 1102, 1109 (E.D. Cal. 2012) (discussing First Amendment right to free speech in context of doctor-patient relationship), *rev’d sub nom.* *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013), *amended by*, 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, 134 S. Ct. 2871 (2014).

129. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (holding physician speech entitled to First Amendment protection because of importance of doctor-patient relationship).

130. See *Conant v. Walters*, 309 F.3d 629, 636-37 (9th Cir. 2002) (asserting communication during therapy and psychoanalysis entitled to First Amendment protection).

131. See *Welch*, 907 F. Supp. 2d at 1109-17 (describing court’s analysis of law to determine level of review appropriate for free speech analysis).

132. See *id.* at 1113-17. The court concluded even if SB 1172 is classified as a professional regulation or statute regulating conduct, it still must undergo strict scrutiny review if found to be content- or viewpoint-based. See *id.* at 1111.

133. See *Nat’l Ass’n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1055 (9th Cir. 2000) (asserting determination of neutrality depends on this inquiry).

134. See *Welch v. Brown*, 907 F. Supp. 2d 1102, 1113-17 (E.D. Cal. 2012) (undertaking analysis of precedent), *rev’d sub nom.* *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013), *amended by*, 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, 134 S. Ct. 2871 (2014).

135. See 309 F.3d at 637. The Ninth Circuit reasoned that the government’s policy was content-based because it sought to punish physicians based on the content of their communications with patients and applied only to doctor-patient communications about medical marijuana. See *id.* at 637-38.

and patients during treatment and do not prevent therapists from using psychoanalytic methods.<sup>136</sup> Finally, in *Holder v. Humanitarian Law Project*, the Supreme Court analyzed a federal material-support statute making it a federal crime to “‘knowingly provid[e] material support or resources to a foreign terrorist organization.’”<sup>137</sup> The Court held that while the statute was content-based because its regulation depended upon what a person said, it did not suppress speech because people were still free to say what they wished about topics and to join terrorist organizations.<sup>138</sup> The statute only prohibits the speech if, through such speech, people are providing a “specific skill” or “specialized knowledge” to the organizations.<sup>139</sup>

Based on these three holdings, the court in *Welch* found that even though SB 1172 allows mental health providers to say what they wish to patients regarding the merits of SOCE, the provider’s speech is restricted in that he or she cannot attempt to change the patient’s sexual orientation.<sup>140</sup> The *Welch* court pointed out that the legislative intent behind the California statute included the finding that SOCE is harmful to minors, which indicates the legislature’s attempt to regulate this action.<sup>141</sup> The court held that SB 1172 is content and viewpoint based and thus subject to strict scrutiny.<sup>142</sup>

The court then undertook an analysis of whether SB 1172 was likely to

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136. See 228 F.3d at 1047-48, 1055. The challenged California licensing scheme involved the legislature’s Psychology Licensing Law enacted in 1967. See *id.* at 1047. This law refers to a psychologist as a person representing “himself or herself to the public by any title or description incorporating” certain psychology related terms, and it maintains practicing psychology without a license is prohibited. CAL. BUS. & PROF. CODE §§ 2902, 2903 (West 2014). To qualify for such a license, an individual must have a doctorate or an equivalent degree in psychology or a related field and have at least two years of “supervised professional experience.” *Id.* § 2914(b)-(c). Additionally, the applicant must pass the Board’s required examinations and trainings. See *id.* § 2914(d)-(f). California’s Business and Professions Code addresses the qualifications of psychoanalysts in a different section; under § 2529, only graduates of four institutes within the state can engage in psychoanalysis or call themselves psychoanalysts. See *id.* § 2529. These relevant laws do not prevent physicians, social workers, counselors, and other recognized professional groups from engaging in work of a psychological nature, as long as they do not call themselves psychologists or imply that they are licensed to practice psychology. See *id.* § 2908 (explaining applications of law on members of other professional groups).

137. 561 U.S. 1, 8 (2010) (alteration in original) (quoting 18 U.S.C. § 2339B(a)(1) (West 2012)) (describing Supreme Court’s holding and providing text to statute involved).

138. See *id.* at 25-28.

139. See *id.* The Court explained that speech providing generalized skills and unspecialized knowledge to terrorist organizations was not barred. See *id.* at 27.

140. See *Welch v. Brown*, 907 F. Supp. 2d 1102, 1115-17 (E.D. Cal. 2012) (asserting SB 1172 not content-neutral despite practitioners’ freedom to speak on merits of SOCE), *rev’d sub nom.* *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013), *amended by*, 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, 134 S. Ct. 2871 (2014). The court stated that applying the statute to “talk therapy” could “give rise to disciplinary action solely on the basis of what the mental health provider says or the message he or she conveys.” *Id.* at 1115.

141. See *id.* (stating this finding and passage of law indicated legislature “disagreed with the practice”).

142. See *id.* at 1117. “When a mental health provider’s pursuit of SOCE is guided by the provider’s or patient’s views of homosexuality, it is difficult, if not impossible, to view the conduct of performing SOCE as anything but integrally intertwined with viewpoints, messages, and expression about homosexuality.” *Id.* at 1116.

withstand strict scrutiny.<sup>143</sup> Strict scrutiny analysis requires that a state demonstrate a “compelling government interest” and that the statute allegedly restricting speech is “narrowly drawn” to serve that interest.<sup>144</sup> In assessing whether or not a statute restricting speech is narrowly tailored to serve an important governmental interest, the state bears the burden of proving there is an “actual problem” in need of solving and that the obstruction of free speech is necessary to solve that problem.<sup>145</sup> When a state pursues its legitimate interests by enacting a statute, the statute cannot be “seriously underinclusive nor seriously overinclusive.”<sup>146</sup>

In its analysis, the *Welch* court relied on the Supreme Court’s decision in *Brown v. Entertainment Merchants Ass’n*, a case involving a California law that banned the sale of violent videogames to minors absent parental consent.<sup>147</sup> The Court held that the statute did not pass strict scrutiny as a law regulating speech because the State failed to demonstrate that it was narrowly tailored to meet a legitimate governmental end.<sup>148</sup> The State maintained that the law served the legitimate purpose of preventing violent video games from having harmful effects upon minors.<sup>149</sup> The Court found that the State failed to show a direct link between video games and harm to minors and that “ambiguous proof” of causation is insufficient.<sup>150</sup> The Court also found that psychological

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143. See *id.* at 1117-21 (declaring strict scrutiny difficult standard because content-based regulations rarely upheld).

144. See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011) (articulating strict scrutiny test and applying to California statute restricting content-based speech); see also *Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002) (alteration in original) (quoting *Brown v. Hartlage*, 456 U.S. 45, 54 (1982)) (stating narrowly tailored requirement mandates demonstrating regulation does not “unnecessarily circumscrib[e] protected expression”); *Hill v. Colorado*, 530 U.S. 703, 710 (2000) (applying standard from *Ward* to assess time, place, and manner restrictions to speech); *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)) (articulating guideline that regulations be “narrowly tailored to serve a significant governmental interest”); *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (permitting time, place, and manner regulations on speech if “narrowly tailored” to serve governmental interest).

145. See *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 822 (2000); see also *Brown*, 131 S. Ct. at 2738 (applying “actual problem” test to statute restricting sale of violent videogames to minors).

146. *Brown*, 131 S. Ct. at 2741-42; see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (concluding overbroad, underinclusive government ordinances constitute failure to draw narrow terms for accomplishing interests).

147. See 131 S. Ct. at 2732-33 (detailing provisions and language of act, including punishment of civil fine up to \$1000).

148. See *id.* at 2738-42 (“[State] acknowledges that it cannot show a direct causal link between violent video games and harm to minors.”).

149. See *id.* at 2738-39. The State further argued it did not need to show a causal link between violent video games and harm to minors because “the legislature can make a predictive judgment that such a link exists, based on competing psychological studies.” *Id.* at 2738. The State relied on the Supreme Court decision in *Turner Broadcasting System, Inc. v. FCC*, where the court granted “substantial deference” to such “predictive judgments.” 512 U.S. 622, 665 (1994).

150. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2739 (2011). The Court found the State’s reliance on *Turner Broadcasting Systems, Inc.* “misplaced,” as that case involved a content-neutral regulation that merited intermediate scrutiny. See *id.* at 2738. Here, the Court asserted, the burden is higher and therefore

studies the State introduced as evidence of the harmful effects of video games upon minors were not compelling and failed to advance direct evidence of causation, basing their findings instead on correlation.<sup>151</sup>

The *Welch* court followed the *Brown* Court's reasoning in determining that SB 1172 would not withstand strict scrutiny.<sup>152</sup> While the court acknowledged that California has a compelling interest in protecting the health and well-being of its minors, they found that the State's evidence failed to prove a causal relationship between SOCE and harm to minors.<sup>153</sup> Based on an analysis of the State's evidence, the court found that the State failed to show an "actual problem" in need of solution or "a direct causal link' between SOCE and harm to minors."<sup>154</sup>

Finally, the *Welch* court followed the analysis in *Brown* and found SB 1172 is underinclusive.<sup>155</sup> The court noted that SB 1172 prohibits only mental health

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reliance upon psychological research that fails to show evidence of causation is insufficient. *See id.* at 2739.

151. *See id.* at 2739-40. The State relied on psychological research purporting to show a causal "connection between exposure to violent video games and harmful effects on children." *Id.* at 2739. The Court found that the studies do not actually "prove that violent video games *cause* minors to *act* aggressively" but instead show some correlation between exposure to violent games and what the Court described as "minuscule real-world effects," such as feeling more aggressive or making loud noises. *See id.* The Court also held it would be difficult to distinguish the effects of violent video games reported in the study from effects of other forms of media. *See id.* Because the court found the studies were based on correlation, rather than direct evidence of causation, it rejected this research as insufficient to prove the statute served to address an actual problem in need of solution; and therefore, the laws effects on speech were not necessary to solve that problem. *See id.* at 2738-40.

152. *See Welch v. Brown*, 907 F. Supp. 2d 1102, 1117-21 (E.D. Cal. 2012) (undertaking analysis and comparison of *Brown* Court's reasoning through strict scrutiny analysis), *rev'd sub nom.* *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013), *amended by*, 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, 134 S. Ct. 2871 (2014). The court pointed out that, as was the case in *Brown*, the state has failed to demonstrate an "actual problem in need of solving" and "a direct causal link between SOCE and harm to minors." *Id.* at 1119 (quoting *Brown*, 131 S. Ct. at 2738-39) (internal quotation marks omitted). The court likened California's failure to "distinguish between harm caused by SOCE versus other factors" to the State's failure to prove violent video games caused minors harm in *Brown*. *See id.* at 1120. Finally, the court addressed the issue of overinclusiveness and underinclusiveness as discussed in *Brown*, finding SB 1172 underinclusive as it does not apply to unlicensed practitioners engaging in SOCE. *See id.*

153. *See id.* at 1117-21 (undertaking analysis of State's evidence based on *Brown*). The court states that the APA Task Force's Report suggests, at best, that SOCE may be harmful to children. *See id.* at 1119. The court cites passages from the APA Report stating the organization's inability to "conclude how likely it is that harm will occur from SOCE," but studies indicate that SOCE "may cause or exacerbate distress and poor mental health." *Id.* (quoting APA REPORT, *supra* note 23, at 42). The court further explains that the studies discussed in the APA Report do not focus on harm to minors and that the APA Report consistently asserts that there is a lack of studies concerning the subject. *See id.* (citing APA REPORT, *supra* note 23, at 41-43, 72). The court goes on to say the State's expert testimony contained only opinions that SOCE is harmful to children and did not identify studies proving this harm. *See id.* at 1119-20. The court found, like in *Brown*, that the State failed to distinguish between harm caused by SOCE as opposed to other factors. *See id.* at 1120. *But see Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590-94 (1993); Fultz, *supra* note 114, at 598.

154. *Welch*, 907 F. Supp. 2d at 1119-1120 (quoting *Brown*, 131 S. Ct. at 2738-39).

155. *See id.* at 1120. In *Brown*, the Court held the statute at issue was underinclusive because it excluded violence in media other than video games and also contained a provision allowing for parental veto. *Brown*, 131 S. Ct. at 2742. The *Welch* court found SB 1172 similarly underinclusive. *See Welch*, 907 F. Supp. 2d at 1120.

providers—as defined by the statute—from participating in SOCE and did not apply to unlicensed individuals.<sup>156</sup> Parents seeking to subject their children to SOCE can still receive those services from unlicensed individuals because they are not prohibited from engaging in SOCE.<sup>157</sup>

Ultimately, the court concluded the statute was unlikely to withstand strict scrutiny due to: a lack of evidence of a direct causal link between SOCE and harm to minors, the possibility of other intervening factors attributing to harm, and SB 1172’s underinclusiveness.<sup>158</sup> Thus, the court stated that the plaintiffs were likely to prevail on the merits of their claim that SB 1172 violates their First Amendment right to free speech.<sup>159</sup>

The court granted the plaintiffs’ motion for a preliminary injunction, finding that they were likely to suffer “irreparable harm” should the law be in effect.<sup>160</sup> Balancing the interests between the plaintiffs and the State, the court found that the plaintiffs will be restricted from engaging in SOCE with their patients, thus infringing on their First Amendment rights, while harm to the state if unable to enforce SB 1172—at least until the case is decided on the merits—will be de minimis.<sup>161</sup> Finally, the court considered the public’s interest in determining whether to grant an injunction, deciding that protecting First Amendment rights outweighs rushed enforcement of an “unprecedented law.”<sup>162</sup>

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156. See *Welch*, 907 F. Supp. 2d at 1120 (noting statute prohibits only mental health providers, as defined by statute, from engaging in SOCE).

157. See *id.* The court predicted that if SOCE is “harmful and ineffective,” minors will experience more serious harm from unlicensed individuals than they likely would from licensed mental health professionals. See *id.* The court notes that in *National Ass’n for the Advancement of Psychoanalysis v. California Board of Psychology*, the Ninth Circuit “recognized the actual and potential consumer harm that can result from the unlicensed, unqualified or incompetent practice of psychology.” 228 F.3d 1043, 1047 (9th Cir. 2000).

158. See *Welch v. Brown*, 907 F. Supp. 2d 1102, 1121 (E.D. Cal. 2012) (reiterating court’s arguments in finding statute does not withstand strict scrutiny), *rev’d sub nom.* *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013), *amended by*, 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, 134 S. Ct. 2871 (2014). The Ninth Circuit has noted that regulations subject to strict scrutiny “almost always violate the First Amendment.” *DISH Network Corp. v. FCC*, 653 F.3d 771, 777-78 (9th Cir. 2011).

159. See *Welch*, 907 F. Supp. 2d at 1121.

160. See *id.* The court explained the test for determining whether to grant a preliminary injunction is to analyze the interests of the parties and to weigh the damage done to each, deciding whether the balance of interests tips in favor of one party over the other. See *id.*; see also *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (using tests drawn out in *Los Angeles Memorial Coliseum Commission v. National Football League*); *L.A. Mem’l Coliseum Comm’n v. Nat’l Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980) (outlining balance of equities test).

161. See *Welch*, 907 F. Supp. 2d at 1121-22 (balancing equities between parties, finding plaintiffs will likely suffer greater harm than state).

162. See *id.* at 1122 (discussing public interests at stake in court’s ruling). The Ninth Circuit has previously declared that the public’s interest is overcome by other strong competing public interests, especially where First Amendment rights are concerned. See *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974-75 (9th Cir. 2002) (asserting public interest inquiry focuses upon nonparties and granting preliminary injunction for plaintiffs).

## 2. Pickup v. Brown

Despite the preliminary success enjoyed by opponents of SB 1172 and supporters of SOCE, the Ninth Circuit later reversed the *Welch* decision in *Pickup v. Brown*, reversing the order granting preliminary injunctive relief from SB 1172.<sup>163</sup> The court found that SB 1172 does not violate the plaintiffs' First Amendment rights, is neither vague nor overbroad, and does not violate parents' fundamental rights; and therefore, the state should not be enjoined from enforcing the law.<sup>164</sup>

In addressing whether SB 1172 violates the plaintiffs' First Amendment rights, the court first examined whether the First Amendment requires heightened scrutiny of SB 1172.<sup>165</sup> To do so, the court undertook an analysis to determine whether the law regulates conduct or speech, using its earlier decisions in *National Ass'n for the Advancement of Psychoanalysis v. California Board of Psychology* and *Conant v. Walters*.<sup>166</sup>

In *National Ass'n for the Advancement of Psychoanalysis*, the Ninth Circuit found that even if California's mental health licensing scheme implicates speech interest, the law is a valid exercise of California's police power.<sup>167</sup> The court reasoned the prohibition of conduct is not an abridgement of free speech "merely because the conduct was in part initiated, evidenced, or carried out by means of language."<sup>168</sup> The court concluded that the communication occurring during psychoanalysis is "entitled to constitutional protection, but it is not immune from regulation."<sup>169</sup>

The court then discussed *Conant*, where the Ninth Circuit affirmed an order granting a permanent injunction to prevent the government from enforcing a policy that allowed it to revoke a doctor's DEA registration or initiate an

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163. See *Pickup v. Brown*, 728 F.3d 1042, 1048 (9th Cir. 2013) (summarizing holding in *Welch* and announcing reversal of order granting preliminary injunction), *amended by*, 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, 134 S. Ct. 2871 (2014).

164. See *id.* at 1057-61 (undertaking analysis of each potential issue with SB 1172 and announcing holding).

165. See *id.* at 1051-57 (analyzing SB 1172's implications on speech and prior case law to reach conclusion).

166. See *id.*

167. See *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. Of Psychology*, 228 F.3d 1043, 1053-55 (9th Cir. 2000).

168. *Id.* at 1053 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). Similarly, the Supreme Court has recognized that when a course of conduct combines speech and nonspeech elements, regulating the nonspeech element may justify restricting the speech element. See *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

169. *Nat'l Ass'n for the Advancement of Psychoanalysis*, 228 F.3d at 1054. The court did not consider how much protection communication during psychoanalysis should receive; and the court further decided that the licensing scheme was a valid exercise of California's police power because of the state's strong interest in regulating mental health providers. See *id.* at 1054-55. The court found that even if the scheme did regulate speech, it did not trigger strict scrutiny because it was content and viewpoint neutral. See *id.* at 1055. The specific law did not state what should be said between patients and psychologists in the course of treatment. See *id.*



investigation if the physician recommended medical marijuana.<sup>170</sup> The court found that the policy was content- and viewpoint-based.<sup>171</sup> Further, the court held that to withstand First Amendment scrutiny, the policy must have “narrow specificity;” but in *Conant*, the policy did not meet that burden and instead left “doctors and patients ‘no security for free discussion.’”<sup>172</sup>

The Ninth Circuit gleaned from these two cases that doctor-patient conversations regarding medical treatment receive significant First Amendment protection, but the State can more freely regulate conduct that is necessary for the treatment itself.<sup>173</sup> Psychotherapists are not entitled to heightened First Amendment protection just because verbal communication is the vehicle through which treatment is given and received.<sup>174</sup> Finally, communication in psychotherapy—while not immune from regulation—can receive constitutional protection.<sup>175</sup> Using the principles from *National Ass’n for the Advancement of Psychoanalysis* and *Conant*, the court found that SB 1172 regulates conduct because it bans a form of medical treatment rather than the discussion of the merits and negative side effects of treatment; and the court further concluded any effects on free speech are incidental.<sup>176</sup> Because it found SB 1172 regulates only SOCE treatment itself, not speech in favor or against SOCE, the court held SB 1172 was subject only to rational basis review, under which the statute will be upheld if it bears “a rational relationship to a legitimate state interest.”<sup>177</sup> The court concluded that SB 1172 withstands rational basis review, reasoning that protecting the physical and psychological well-being of minors is a legitimate state interest; and under this rational basis review, the court need not determine whether SOCE causes actual harm, it is enough that the rational governmental decision maker could reasonably conceive SOCE

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170. *See Conant v. Walters*, 309 F.3d 629, 632 (9th Cir. 2002) (outlining court’s ruling and legislative history).

171. *See id.* at 637-39. The court found that the regulation was content based because it sought to punish doctors speaking with patients about medical marijuana. *See id.* at 637. Further, the policy was viewpoint based because “it condemn[ed] expression of a particular viewpoint, i.e., that medical marijuana would likely help a specific patient.” *Id.*

172. *Id.* at 639 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

173. *See Pickup v. Brown*, 728 F.3d 1042, 1053 (9th Cir. 2013) (distilling principles from *National Ass’n for the Advancement of Psychoanalysis* and *Conant*), *amended by*, 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, 134 S. Ct. 2871 (2014).

174. *See id.*

175. *See id.*

176. *See id.* at 1055. The court found that despite SB 1172’s restrictions, mental health providers are free to recommend SOCE or to discourage patients from seeking out SOCE. *See id.* It distinguished the instant case from *Conant*, finding that while the policy in *Conant* prohibited speech “wholly apart” from treatment, SB 1172 prohibits only the administration of a specific therapy by mental health providers to a certain population. *See id.*

177. *Pickup*, 728 F.3d at 1056 (quoting *Nat’l Ass’n for the Advancement of Psychoanalysis v. Cal. Bd. Of Psychology*, 228 F.3d 1043, 1049 (9th Cir. 2000)); *see also City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (defining standard for rational basis review); *Richardson v. City & Cnty. of Honolulu*, 124 F.3d 1150, 1162 (9th Cir. 1997) (providing substantive due process rule for Fourteenth Amendment scrutiny).

cause such harm.<sup>178</sup> The court also found that SB 1172 is not void for vagueness, nor is it overbroad.<sup>179</sup>

Critics of SB 1172 reacted with outcries to the court's decision in *Pickup*, especially the lawsuit's sponsoring organization, PJI, who released a statement calling the decision "a dark day for those who believe in the [F]irst Amendment and the rights of parents over the proper upbringing of their children."<sup>180</sup> PJI announced in September of 2013 that it would ask the court for a rehearing or rehearing en banc by a larger panel of the court.<sup>181</sup> After the court's decision, PJI staff attorney Matthew McReynolds stated that "[a]nyone who takes a strong interest in the future of free speech should be very concerned by the Ninth Circuit's decision in this case."<sup>182</sup> Following the Ninth Circuit's denial of a rehearing, PJI announced it would seek to take the case to the Supreme Court.<sup>183</sup> On April 22, 2014, PJI filed a petition for certiorari with the Supreme Court.<sup>184</sup> On June 30, 2014, however, the Supreme Court denied plaintiffs' petition for a writ of certiorari.<sup>185</sup>

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178. See *Pickup*, 728 F.3d at 1056-57. The court found that the California legislature "acted rationally" in passing SB 1172 to protect minors from the potential harm of SOCE, relying on the APA Task Force's Report and other professional opinions concluding SOCE is harmful and ineffective. See *id.* at 1057. Each of these reports, the court points out, opposes the use of SOCE by mental health professionals. See *id.* The court, under rational basis review, was only required to find that the state acted rationally in passing provisions and that there was a plausible reason for the state's action. See *id.* The court concluded that this standard does not require scientific proof, contrary to the plaintiffs' argument. See *id.*; see also *Romero-Ochoa v. Holder*, 712 F.3d 1328, 1331 (9th Cir. 2013) (asserting standard for rational basis review as finding only plausible reasons for Act). As a result, the Ninth Circuit concluded "SB 1172 is rationally related to the legitimate government interest of protecting the well-being of minors." *Pickup*, 728 F.3d at 1057.

179. See *Pickup v. Brown*, 728 F.3d 1042, 1058-60 (9th Cir. 2013) (distilling principles from *National Ass'n for the Advancement of Psychoanalysis and Conant*, amended by, 740 F.3d 1208 (9th Cir. 2014), cert. denied, 134 S. Ct. 2871 (2014)). The plaintiffs argued that the law made it difficult to determine what type of speech was prohibited and what was permitted. See *id.* at 1059. The court, however, held that a reasonable person would be able to determine what was prohibited and that the statute applied to mental health professionals with "specialized knowledge," meaning the "standard for clarity is lower." See *id.* The court also found that the statute is not overbroad, as "any incidental effect" is small compared to the "plainly legitimate sweep of the ban." See *id.* at 1060.

180. *Blow to Free Speech*, supra note 11 (announcing *Pickup* court's decision and expressing PJI's feelings regarding implications).

181. See *New Court Filing*, supra note 121 (announcing upcoming court filing seeking rehearing). According to PJI President Brad Dacus, "the court disregarded key portions of the statute" and overlooked certain Supreme Court precedent analyzed in the lower court. See *id.* He asserted that these oversights should be corrected and suggested the Ninth Circuit's decision lacked credibility. See *id.*

182. *Id.* (quoting attorney McReynolds who handled case regarding belief about decision's implications on free speech).

183. See *Gay Therapy*, supra note 12.

184. See *Supreme Court Asked To Hear Case on Free Speech, Homosexual Therapy*, PAC. JUST. INST. (Apr. 23, 2014), <http://www.pacificjustice.org/press-releases/supreme-court-asked-to-hear-case-on-free-speech-homosexual-therapy>, archived at <http://perma.cc/KVJ2-LRDU> (announcing petition filed with U.S. Supreme Court).

185. *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013), amended by, 740 F.3d 1208 (9th Cir. 2014), cert. denied, 134 S. Ct. 2871 (2014).

## III. ANALYSIS

## A. Statutes Prohibiting Mental Health Practitioners’ Use of SOCE Will Likely Be Subject to Future Strict Scrutiny Review

Statutes prohibiting the use of SOCE methods by mental health practitioners effectively restrict communication between these professionals and their patients; and courts in cases like *Welch* and *Pickup* have addressed the free speech implications of such regulations, albeit coming to different conclusions.<sup>186</sup> The First Amendment of the U.S. Constitution protects an individual’s right to free speech, among other natural rights.<sup>187</sup> The Ninth Circuit has determined that speech exchanged throughout the doctor-patient relationship is entitled to free speech protection.<sup>188</sup> Psychoanalysis is also subject to First Amendment protection, and SOCE, which employs methods using speech and nonspeech, falls under this category.<sup>189</sup>

To determine what standard of review applies to a statute reaching speech protected by the First Amendment, one must first determine whether that

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186. See *Welch v. Brown*, 907 F. Supp. 2d 1102, 1122-23 (E.D. Cal. 2013) (granting plaintiff’s request for preliminary injunction), *rev’d sub nom. Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013), *amended by*, 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, 134 S. Ct. 2871 (2014); *Pickup*, 728 F.3d at 1061-62 (finding SB 1172 survives constitutional challenges).

187. See U.S. CONST. amend. I.

188. See *Conant v. Walters*, 309 F.3d 629, 636 (9th Cir. 2002) (finding policy restricting content of doctor-patient communications violated free speech rights). In *Conant*, the court pointed out that the Supreme Court has recognized physician speech “is entitled to First Amendment protection because of the significance of the doctor-patient relationship.” *Id.*; see also Swartz, *supra* note 96, at 25 (asserting physician-patient communication should receive benefit of heightened scrutiny).

189. See Nat’l Ass’n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1054 (9th Cir. 2000) (deciding psychotherapy constitutionally protected but subject to regulation). The court decided that the licensing scheme at issue in *National Ass’n for the Advancement of Psychoanalysis* was a valid exercise of California’s police power, but it did not specify the type of protection such regulation is entitled to. See *id.* at 1054-55 (providing vague analysis upholding law but lacking guidance for future cases). In the case of SB 1172, the law prohibits “any practices by mental health providers that seek to change an individual’s sexual orientation.” See CAL. BUS. & PROF. CODE § 865(b)(1) (West 2014). As evidenced by the APA Report, SOCE practitioners use a number of different SOCE methods, some including speech therapy and some focusing on behavior and conduct. See *supra* note 27 and accompanying text (providing nonexhaustive list of methods of SOCE from APA Report). The Supreme Court, in *United States v. O’Brien*, held that when speech and nonspeech elements are combined in the same course of conduct, as in SOCE, an important government interest in regulating the nonspeech element “can justify incidental limitations on First Amendment freedoms.” 391 U.S. 367, 376 (1968). In *Holder v. Humanitarian Law Project*, the Supreme Court refused to apply the *O’Brien* test to a regulation prohibiting the known passing of resources to a terrorist organization. See 561 U.S. 1, 27 (2010). The Court found that strict scrutiny applies to statutes regulating conduct with incidental effects on speech if people intend to use speech to communicate a message and the regulation is content or viewpoint based. See *id.* at 27-28. The Court explained in *Texas v. Johnson* that if the government’s regulation is not related to expression, the court must apply the *O’Brien* test, but if the regulation is related to expression, a more demanding standard applies. See 491 U.S. 397, 403 (1989) (explaining tests for conduct-related regulation). In this case, plaintiffs sought to engage in SOCE through speech, and thus, the *O’Brien* test only applies if the regulation is content- and viewpoint-neutral. See *Welch*, 907 F. Supp. 2d at 1121 (explaining application of *O’Brien* test to SOCE case).

statute is content-based or content-neutral.<sup>190</sup> To do so, one must determine whether the legislature adopted the regulation because of agreement or disagreement with the message the speech attempts to convey.<sup>191</sup>

In SB 1172's case, the California Legislature sought to prohibit psychoanalytic methods that suggest homosexuality is an ailment that can and should be cured.<sup>192</sup> Based on an analysis of prior Ninth Circuit decisions, this prohibition is content-based, restricting only speech or conduct relating to SOCE methods from mental health professionals to minor patients.<sup>193</sup>

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190. See Hudson, *supra* note 97, § 2:2 (providing steps to determine standard of review of speech-regulating statute).

191. See *Nat'l Ass'n for the Advancement of Psychoanalysis*, 228 F.3d at 1055 (detailing process for determining neutrality of regulations); see also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994) (following test set forth in *Ward*); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.").

192. See S. 1172, 2011-2012 Reg. Sess., 2012 Cal. Stat. 6,569 (explaining legislative intent behind statute). The bill expressly prohibits a mental health provider from using SOCE on patients under the age of eighteen. See CAL. BUS. & PROF. CODE § 865.2 (West 2014) (detailing regulation and punishment for violation). A mental health provider who violates this prohibition is subject to discipline. See *id.* The regulation defines SOCE as "any practices by mental health providers that seek to change an individual's sexual orientation. This includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex." *Id.* § 865(b)(1). The legislature makes its intent clear in the drafted version of the bill by providing a wealth of information from mental health organizations advising against SOCE and indicating its harmful effects upon patients, especially children. See Cal. S. 1172. The California legislature, like the New Jersey legislature, clearly intended to halt a specific exchange between doctors and patients because of the potential harm resulting from such speech. See *Assemb. 3371*, 215th Leg., 2d Ann. Sess., 2013 N.J. Laws 1206; Cal. S. 1172. The court in *Welch* found "little question that the Legislature enacted SB 1172 at least in part because it found that SOCE was harmful to minors and disagreed with the practice," and the court provided excerpts of the findings listed in SB 1172. *Welch v. Brown*, 907 F. Supp. 2d 1102, 1115-16 (E.D. Cal. 2012), *rev'd sub nom. Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013), *amended by*, 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, 134 S. Ct. 2871 (2014). While the prohibition would allow mental health providers to speak about or recommend SOCE to minor patients, it prohibits the specific type of speech SOCE methods encompass. See *id.* at 1114-15 (describing failure of defendants' arguments against content-based finding).

193. See *Conant*, 309 F.3d at 630 (upholding injunction prohibiting government from conducting investigation and revoking physician's license after prescribing medical marijuana). The Ninth Circuit found in *Conant* that the government's policy sought to punish physicians for the content of certain doctor-patient communications because "[o]nly doctor-patient conversations that include[d] discussions of the medical use of marijuana trigger[ed] the policy." *Id.* at 637. Similarly, SB 1172 seeks to punish mental health providers only when SOCE methods are used. See Cal. S. 1172 (specifying type of speech covered by statute); see also *Nat'l Ass'n for the Advancement of Psychoanalysis*, 228 F.3d at 1055-56 (finding challenged laws content-neutral, and not regulating doctor-patient exchange or use of psychoanalytic methods). In *National Ass'n for the Advancement of Psychoanalysis*, the challenged licensing scheme did not regulate the content of treatment, in contrast to SB 1172, which does not prohibit speech or doctor recommendations for or against SOCE but prohibits the use of SOCE methods with minor patients. See *Nat'l Ass'n for the Advancement of Psychoanalysis*, 228 F.3d at 1055-56 (explaining content-neutrality of licensing scheme); see also *Holder*, 561 U.S. at 25-27 (finding statute content based because whether or not speech barred depended on what plaintiffs said); Cal. S. 1172 (providing text of bill applying to type of speech). In *Holder*, while the statute banning aid to terrorist organizations did not suppress ideas or opinions, it was content based because plaintiff's speech to a terrorist organization could be banned depending on what was said. See 561 U.S. at 28. SOCE cases follow a similar line of reasoning because mental health professionals are free to talk about SOCE, as well as give their

Statutes banning the content of protected speech, like SB 1172, are subject to strict scrutiny, must be justified by a compelling government interest, and must be “narrowly tailored” to serve that interest.<sup>194</sup> The State must identify an “actual problem” in need of solving in order to overcome strict scrutiny, and the statute prohibiting speech must actually be necessary to solve that problem.<sup>195</sup>

*B. Statutes Prohibiting SOCE Risk Failing To Withstand Strict Scrutiny Review*

It is well established that states have a strong interest in protecting the physical and psychological well-being of their minor citizens.<sup>196</sup> In *Pickup*, however, the State’s evidence of harm to minors caused by SOCE is similar to the evidence presented in *Brown*, where the Court found the State’s evidence insufficient to prove a causal relationship between violent video games and negative effects upon the psychological well-being of minors.<sup>197</sup> To ensure

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opinions on its usage, but providers are restricted from engaging in SOCE, meaning the ban depends on the content of their speech. See CAL. BUS. & PROF. CODE § 865.1.

194. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011) (describing standard for strict scrutiny); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000).

195. *Brown*, 131 S. Ct. at 2738; *Playboy Entm’t Grp., Inc.*, 529 U.S. at 822-23 (defining standard for strict scrutiny). Strict scrutiny is a “demanding standard.” *Brown*, 131 S. Ct. at 2738. The Supreme Court has said it is rare that a content-based regulation is ever permissible. See *Playboy Entm’t Grp., Inc.*, 529 U.S. at 818 (describing difficult standard associated with regulations restricting content-based speech). In *Brown*, the “actual problem” was the purportedly negative psychological effects of violent video games upon minors, which the California statute attempted to solve by banning the sale of these games to minors. See *Brown*, 131 S. Ct. at 2732-33. The Court held that this did not constitute an “actual problem” in need of solving and that the State’s evidence showing a connection between exposure to violent video games and harmful psychological effects on minors was insufficient to constitute a compelling interest. See *id.* at 2739. The Court found that the evidence demonstrated, at best, a correlation between exposure to violent games and minor effects on children, such as feeling more aggressive. See *id.* (describing inadequacy of State’s evidence in proving psychological effects of violent video games).

196. See *Welch*, 907 F. Supp. 2d at 1118 (noting California’s compelling interest in protecting minors); see also Cal. S. 1172 (declaring California has compelling interest in protecting physical and psychological well-being of minors). The California bill seeks to protect the state’s minors against “serious harms caused by sexual orientation change efforts.” Cal. S. 1172.

197. See *Brown*, 131 S. Ct. at 2739. In *Brown*, the State relied on research from various psychologists suggesting a connection between the use of violent video games and harmful psychological effects on minors. See *id.* Similarly, in *Pickup*, California relied upon the APA Report and expert testimony to prove that protecting children from SOCE was an actual problem in need of a legislative solution. See 728 F.3d 1042, 1057 (9th Cir. 2013), amended by, 740 F.3d 1208 (9th Cir. 2014), cert. denied, 134 S. Ct. 2871 (2014). The APA Report and expert testimony suggests there is a lack of scientific research surrounding SOCE and a lack of research regarding a connection between SOCE and harm to minors. See *id.* As seen above, the APA Report and consequent studies by other mental health organizations report evidence of a likely connection between SOCE and harm to minors that is unlikely to survive the Supreme Court’s standards from *Brown*. See APA REPORT, *supra* note 23, at 42. The APA Task Force found: “There are no methodologically sound studies of recent SOCE that would enable the task force to make a definitive statement about whether or not recent SOCE is safe or harmful and for whom.” *Insufficient Evidence that Sexual Orientation Change Efforts Work*, *supra* note 35. The evidence that the APA Task Force did find, similar to that in *Brown*, was enough to show a correlation between SOCE and harm to minors. See *supra* Part II.A.1 (summarizing Task Force’s

legislation prohibiting SOCE overcomes strict scrutiny analysis in the future, New Jersey and other states that might face comparable suits should present further scientific studies that show SOCE causes harm to minors, which could include individual case studies or intensive research isolating SOCE as a variable.<sup>198</sup> Studies should present evidence tying SOCE directly to harm to minors, in order to clearly express this important issue in need of solving through legislative action affecting speech.<sup>199</sup> Other states, including Massachusetts and New York, have considered legislation similar to that passed in New Jersey and California.<sup>200</sup> To ensure bills withstand strict scrutiny and to avoid time-consuming litigation similar to the circumstances faced by California, states considering similar legislation should include evidence of the harms of SOCE, which evidence should be of similar caliber as the evidence described in *Brown*.<sup>201</sup>

### C. Alternatives to Traditional First Amendment Analysis

While SOCE regulations could fail to withstand traditional strict scrutiny review, these methods of treatment are harmful to patients and continue to perpetuate the incorrect notion that homosexuality is a choice capable of

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reported effects of SOCE). This type of evidence, falling short of a direct causal relationship between SOCE and harm to minors, is unlikely to withstand strict scrutiny, a very high standard that demands proof of a compelling government interest and a statute narrowly tailored to meet that interest. *See Brown*, 131 S. Ct. at 2738 (finding similar correlative evidence fell short of strict scrutiny standard); *Playboy Entm't Grp., Inc.*, 529 U.S. at 818 (articulating strict scrutiny analysis).

198. *See Brown*, 131 S. Ct. at 2739 (explaining evidence must persuasively indicate behavioral causation, not merely a correlation). The Supreme Court in *Brown* indicated that evidence to prove a compelling government interest must show, at least, more than a mere correlation between the prohibited treatment and harm suffered by patients involved. *See id.* The Court found that evidence seeming to reflect negative effects of video games upon minors are difficult to distinguish from the effects of other media. *See id.* Similarly, in *Welch*, the court found that defendants had, at most, shown that SOCE *might* cause harm to minors and that the studies discussed in the APA Report, did not focus on minors specifically. *See Welch v. Brown*, 907 F. Supp. 2d 1102, 1119 (E.D. Cal. 2012), *rev'd sub nom. Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013), *amended by*, 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, 134 S. Ct. 2871 (2014). Additionally, the court found expert opinions submitted did not rely on studies adhering to scientific principles and found that "evidence that SOCE 'may' cause harm to minors based on questionable and scientifically incomplete studies that may not have included minors is unlikely to satisfy the demands of strict scrutiny." *Id.* at 1120. Similar to *Brown*, the *Welch* court found that defendants could not distinguish sufficiently between harm caused by SOCE and harm caused by other factors faced by individuals undergoing SOCE, such as "societal stigmas, harassment and bullying, discrimination, and rejection." *Id.*

199. *See Brown*, 131 S. Ct. at 2739 (explaining shortcomings of evidence provided and indicating what could constitute sufficient proof of causation); *see also The Lies*, *supra* note 78 (providing example of study showing direct causal relationships). For example, a study by San Francisco State University found that gay youth rejected by their parents or caregivers because of their sexual orientation were more likely to have attempted suicide, have high levels of depression, use illegal drugs, and be at risk for HIV and STDs. *See The Lies*, *supra* note 78.

200. *See Lovett*, *supra* note 6 (reporting similar bans introduced in Massachusetts and New York); *Wetzstein*, *supra* note 6 (listing other states where proposals for similar bills introduced).

201. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2739 (2011) (explaining need for evidence more persuasively indicative of behavioral causation, not merely correlative).

change; therefore, the regulation of SOCE could serve to help the gay community overcome prejudice, especially the regulation of SOCE used by inexperienced or biased practitioners.<sup>202</sup> Statutes like SB 1172 effectively prohibit mental health providers from using this illegitimate treatment on minors before they are old enough to decide for themselves what treatment, if any, they might pursue.<sup>203</sup>

As mentioned above, scholars like Shawn Fultz believe that the first prong of the *Central Hudson Gas & Electric Corp.* test could weed out the risk of health care fraud imbedded in practices that, like SOCE, lack scientific credibility.<sup>204</sup> Should courts apply this test, courts would likely find that SOCE practices—lacking in scientific credibility and legitimacy—do not satisfy the first prong of the *Central Hudson Gas & Electric Corp.* test and thus are not subject to First Amendment protection.<sup>205</sup> Therefore, regulations like SB 1172 could be upheld under the *Central Hudson Gas & Electric Corp.* test.<sup>206</sup> Since SOCE would fail to pass the first prong of the *Central Hudson Gas & Electric Corp.* test, the regulation would be subject only to rational basis review.<sup>207</sup> Under that standard, statutes banning SOCE would likely pass constitutional scrutiny because the government has a legitimate interest in protecting minors from the potential harmful effects of mental health treatments that lack scientific support and proof.<sup>208</sup>

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202. See APA REPORT, *supra* note 23, at 79 (describing both lack of scientific basis for and negative effects of SOCE on children).

203. See CAL. BUS. & PROF. CODE § 865.1-865.2 (West 2014) (explaining stringent regulation and punishment for violation).

204. See Fultz, *supra* note 114, at 598 (explaining purported benefits of applying *Central Hudson Gas & Electric Corp.* test). Fultz suggests using factors from *Daubert v. Merrell Dow Pharmaceuticals, Inc.* in this consideration, where the court determined whether to admit certain scientific evidence from experts. See *id.* at 599. The *Daubert* Court found that scientific knowledge must be “ground[ed] in the methods and procedures of science” and the methodology must be valid and testable, published in peer-reviewed literature, have known error rates, and been accepted in the scientific community. 509 U.S. 579, 590-94 (1993). Fultz asserts that, similar to the *Daubert* approach, “courts can determine if health care therapies have any legitimate scientific support using the same approach used to evaluate potential expert scientific testimony,” meaning those theories lacking adequate scientific support would not be entitled to First Amendment protection. See Fultz, *supra* note 114, at 601.

205. See Fultz, *supra* note 114, at 598, 604 (determining unlikelihood of SOCE speech passing first prong of *Central Hudson Gas & Electric Corp.* test). Fultz points out that false commercial speech does not receive the same level of protection as false political speech. See *id.* at 598. He asserts that the government’s interest in preventing false commercial speech should be similar to preventing health care fraud. See *id.*

206. See *id.* at 603-05 (evaluating SB 1172 under single-prong *Central Hudson Gas & Electric Corp.* approach). Fultz asserts that under the *Central Hudson Gas & Electric Corp.* analysis, speech used by mental health providers in SOCE treatment would be found “false and misleading.” See *id.* at 603. SOCE not only lacks public acceptance, it also is not supported by the medical community at large nor has it been proven by scientific studies. See *id.* at 604 (explaining issues with SOCE such as lack of scientific backing); see also APA REPORT, *supra* note 23, at 36-43 (suggesting lack of SOCE research makes practice dangerous).

207. See Fultz, *supra* note 114, at 605.

208. See *id.* (asserting SOCE regulations likely to pass rational basis review).

## IV. CONCLUSION

While the scientific studies on the effects of SOCE remain largely inconclusive, research suggests that these therapies are unlikely to be successful and pose a significant risk of harm to patients. In addition, the existence of SOCE creates a stigma around homosexuality that serves to further oppress a historically marginalized group. SOCE suggests that homosexuality is negative and unnatural, rather than a natural sexual orientation. The mere availability of such practices invites prejudice and potential harm to the gay population as a whole, especially those struggling with identity and self-acceptance. State regulations banning SOCE could eventually protect against this stigmatization by prohibiting the formal practice and advertisement of SOCE and reparative therapies by doctors, mental health professionals, and lay people alike.

Unfortunately, the recent California and New Jersey statutes are vulnerable to strict scrutiny analysis and are unlikely to pass that high threshold if further challenged. The statutes also allow for unlicensed individuals and nonmedical practitioners to carry on with SOCE, providing unregulated and unchecked treatments without legal consequences. For states to pass legislation that definitively passes strict scrutiny analysis, they should seek further scientific studies that demonstrate a causal connection between SOCE and negative medical effects on patients. Until states can present these studies, they may have difficulty establishing a compelling governmental interest in banning SOCE.

For now, a better solution is for courts to take a different approach to the analysis of these regulations. Implementing the analysis used for commercial speech would allow states to maintain these statutes as written, weeding out practices that are likely to result in fraud and that lack scientific credibility or legitimacy.

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