DO ACTIONS SPEAK LOUDER THAN WORDS?: AN ANALYSIS OF CONVERSION THERAPY AS PROTECTED SPEECH VERSUS UNPROTECTED CONDUCT

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I. INTRODUCTION

Even in a world of changing times, many religious organizations still cling to their tightly held conservative beliefs, especially when it comes to the topic of sexual orientation.[1] Religious organizations in states across the county are practicing sexual orientation change efforts[2] (SOCE) in order to protect their youth from what they believe is a sinful life.[3] One way these organizations apply SOCE is through "conversion" or "reparative" therapy, where licensed therapists will use conversation and other methods to help convert minors back to a life of heterosexuality.[4] However, states are fighting back by passing legislation to prevent the documented harmful effects[5] such efforts can have on minors.[6]

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[1] "'Sexual orientation' is the preferred term used when referring to an individual's physical and/or emotional attraction to the same and/or opposite gender. 'Gay,' 'lesbian', 'bisexual' and 'straight' are all examples of sexual orientations." *Sexual Orientation and Gender Identity Definitions,* HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/resources/entry/sexual-orientation-and-gender-identity-terminology-and-definitions (last visited Jan. 3, 2015).

[2] "[T]he notion that sexual orientation can be changed" through various methods. *Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts*, AMERICAN PSYCHOLOGICAL ASSOCIATION, http://www.apa.org/about/policy/sexual-orientation.aspx (last visited Jan. 3, 2015).

[3] *See Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts*, AMERICAN PSYCHOLOGICAL ASSOCIATION, http://www.apa.org/about/policy/sexual-orientation.aspx (last visited Feb. 28, 2015).

[4] *Reparative Therapy*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/reparative-therapy (last visited Jan. 11, 2015).

[5] [C]ompared with LGBT young people who were not rejected or were only a little rejected by their parents and caregivers because of their gay or transgender identity, highly rejected LGBT young people were: [m]ore than 8 times as likely to have attempted suicide[, n]early 6 times as likely to report high levels of depression[, m]ore than 3 times as likely to use illegal drugs[, and m]ore

For example, two states that have passed SOCE legislation are California and New Jersey.[7] In 2012, California passed Senate Bill No. 1172,[8] while in 2013, New Jersey passed Assembly Bill A3371.[9] Both laws deal with protecting minors against SOCE and both inevitably lead to issues needing to be resolved in court.[10] In both the California case of *Pickup v. Brown*,[11] and the New Jersey case of *King v. Governor of New Jersey*,[12] plaintiffs argued that using conversation or "talk therapy" as a method of SOCE was entitled to free speech and free exercise protection[13] under the First Amendment[14] and thus, plaintiffs felt that both SB 1172 and A 3371 were unconstitutional. While both the Ninth Circuit in *Pickup* and the Third Circuit in *King* disagreed with plaintiffs and upheld both legislations, the Circuits differed as to whether or not "talk therapy" was considered protected free speech or simply conduct.[15]

Therefore, this article will first look at a brief history of sexual orientation change efforts and how religious organizations use them today. Next, this article will analyze the decisions in both *Pickup v. Brown* and *King v. Governor of New Jersey*, as well as look at the California and New Jersey SOCE laws prevalent in each case. Lastly this article will consider and analyze, based on both cases, what standard of review should be used and whether or not "talk therapy" should be protected under the First Amendment

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than 3 times as likely to be at high risk for HIV and STDs. *The Lies and Dangers of Efforts to Change Sexual Orientation or Gender Identity*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/resources/entry/the-lies-and-dangers-of-reparative-therapy (last visited Jan. 3, 2015).

6 Peter Sprigg, *Protect Client and Therapist Freedom of Choice Regarding Sexual Orientation Change Efforts*, FAMILY RESEARCH COUNCIL, http://www.frc.org/

socetherapybans (last visited Jan. 3, 2015).

7 *Id*.

8 Pickup v. Brown, 728 F.3d 1042, 1050 (9th Cir. 2013).

9 King v. Governor of N.J., 767 F.3d 216, 221 (3d Cir. 2014).

10 *Pickup*, 728 F.3d at 1048; *King*, 767 F.3d at 220.

11 *Pickup*, 728 F.3d at 1042.

12 *King*, 767 F.3d at 216.

13 *Pickup*, 728 F.3d at 1051; *King,* 767 F.3d at 222.

14 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

15 *King*, 767 F.3d at 229; *Pickup*, 728 F.3d at 1055.

or whether it should be treated solely as conduct, therefore warranting no constitutional protection.

II. SEXUAL ORIENTATION CHANGE EFFORTS

Sexual Orientation Change Efforts attempt to rid minors of homosexual attraction while also attempting to cultivate heterosexual attraction in the patients being treated.[16] Such practices have been around for over a century.[17] One of the main reasons for the start of SOCE was the belief that homosexuality was either a crime or a medical disease.[18] In fact it was not until 1973 that the American Psychiatric Association (APA) decided to remove homosexuality from its Diagnostic and Statistical Manual of Mental Disorders.[19] Nevertheless—even after 1973—many physiologists, especially those affiliated with conservative religious organizations, still carry the belief that homosexuality is something that can be cured.[20]

In attempts to free individuals of homosexual thoughts and behaviors, therapists have conducted a plethora of methods over time.[21] Such tactics include "psychoanalytic therapy, prayer and spiritual intervention, electric shock, nausea-inducing drugs, hormone therapy, surgery and various adjunctive behavior treatments, including masturbatory reconditioning, rest, visits to prostitutes, and excessive bicycle riding."[22] While many of these practices include physical intrusions on patients, one common non-physical practice used is that of "talk therapy."[23]

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[16] Jacob Victor, Note, *Regulating Sexual Orientation Change Efforts: The California Approach, Its Limitations, and Potential Alternatives,* 123 YALE L.J. 1532, 1534 (2014).

[17] Jonathan Sacks, Note*, "Pray Away the Gay?" An Analysis of the Legality of Conversion Therapy By Homophobic Religious Organizations,* 13 RUTGERS J.L. & RELIGION 67, 72 (2011).

[18] *Appropriate Therapeutic Responses to Sexual Orientation*, 21 (2009), http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf.

[19] Sacks, *supra* note 17, at 72–73.

[20] Victor, *supra* note 16, at 1534–35.

[21] Douglas C. Halderman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 No. 2 J. OF CONSULTING AND CLINICAL PSYCHOLOGY 221 (1994).

[22] *Id*.

[23] "Talking therapies can help [one] work out how to deal with negative thoughts and feelings and make positive changes. They can help people who are feeling distressed by difficult events in their lives as well as people with a mental health problem." *Talking Therapies*, MENTAL HEALTH FOUNDATION,

Today, despite the growing acceptance of homosexuality[24] and the general movement away from SOCE, many psychologists and therapists associated with religious organizations feel that under the First Amendment, talk therapy is a constitutional, perfectly legal, form of reparative therapy.[25] In fact, both the plaintiffs in *Pickup* and *King*, felt that under Freedom of Speech,[26] talk therapy should be protected because it is implemented "solely through verbal communication."[27] Therapists will begin SOCE by looking to find the "root cause" of the homosexual behavior.[28] Next, therapists attempt to convert the patient to heterosexuality by discussing "traditional, gender-appropriate behaviors and characteristics."[29] Many counselors implement biblical perspectives into their discussions.[30] However, such therapists tend to ignore the harmful effects that can occur when sexual orientation change efforts are implemented.[31]

Therefore, in order to study the effects of SOCE, the APA created a task force in 2007 to look into such matters.[32]

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http://www.mentalhealth.org.uk/help-information/mental-health-a-z/t/talking-therapies/ (last visited Jan. 5, 2015). Talk therapy as a method of SOCE involves discussing homosexual behaviors in an attempt to "cure[ ]" patients. *See* Victor, *supra* note 16, at 1534.

[24] "[P]ublic attitudes toward gays and lesbians are rapidly changing to reflect greater acceptance, with younger generations leading the way." *Americans Move Dramatically Toward Acceptance of Homosexuality*, NORC AT THE UNIVERSITY OF CHICAGO, http://www.norc.org/NewsEventsPublications/

PressReleases/Pages/american-acceptance-of-homosexuality-gss-report.aspx (last visited Mar. 4, 2015).

[25] *King*, 767 F.3d at 220–22.

[26] "This clause prohibits the government from banning speech because it does not agree with the message. The Founders saw free speech as a natural right." *First Amendment: Freedom of Speech (1791)*, BILL OF RIGHTS INSTITUTE, http://billofrightsinstitute.org/resources/educatorresources/americapedia/americapedia-bill-of-rights/first-amendment/freedom-of-speech/ (last visited Jan 5, 2015).

[27] *King*, 767 F.3d at 220–21; *See also Pickup*, 728 F.3d at 1056 n.5.

[28] *King,* 767 F.3d at 221.

[29] *Id*.

[30] *Id*.

[31] *Id.* at 221–22.

[32] In February 2007, the American Psychological Association (APA) established the Task Force on Appropriate Therapeutic Responses to Sexual Orientation with a charge that included three major tasks: 1. Review and update the Resolution on Appropriate Therapeutic Responses to Sexual Orientation (APA, 1998). 2. Generate a report that includes discussion of the following:

[ ] The appropriate application of affirmative therapeutic interventions for children and adolescents who present a desire to change either their sexual

Ultimately, the task force concluded that SOCE was unlikely to increase other-sex sexual behavior and that harm could result from aversive efforts to change sexual orientation.[33] Additionally, studies indicate "attempts to change sexual orientation may cause or exacerbate distress and poor mental health in some individuals, including depression and suicidal thoughts."[34] Because of these conclusions, it is no surprise that many states are seeking to prevent these potential harms, especially when it involves minors.

III. SEXUAL ORIENTATION CHANGE EFFORTS CASE LAW

A. Varying Degrees of Scrutiny and Free Speech[35]

Free speech is protected under the First Amendment.[36] Nevertheless, varying degrees of scrutiny are applied depending on the degree of the wrongdoing.[37] Rational basis scrutiny will be

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orientation or their behavioral expression of their sexual orientation, or both, or whose guardian expresses a desire for the minor to change. [ ] The appropriate application of affirmative therapeutic interventions for adults who present a desire to change their sexual orientation or their behavioral expression of their sexual orientation, or both. [ ] The presence of adolescent inpatient facilities that offer coercive treatment designed to change sexual orientation or the behavioral expression of sexual orientation. [ ] Education, training and research issues as they pertain to such therapeutic interventions. [ ] Recommendations regarding treatment protocols that promote stereotyped gender-normative behavior to mitigate behaviors that are perceived to be indicators that a child will develop a homosexual orientation in adolescence and adulthood. 3. Inform APA's response to groups that promote treatments to change sexual orientation or its behavioral expression and support public policy that furthers affirmative therapeutic interventions.

Appropriate Therapeutic Responses to Sexual Orientation, 21 (2009), http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf.

[33] *Id*. at 41.

[34] *Id*. at 42.

[35] It is important to note that the tiers of scrutiny were originally applied in the Equal Protection context under the 14th Amendment. *History of Equal Protection and the Levels of Review*, NATIONAL PARALEGAL COLLEGE, http://nationalparalegal.edu/conLawCrimProc_Public/EqualProtection/HistoryOf EqualProtection.asp (last visited Jan. 30, 2015). However, SB 1172 and A3371 are not looked at under the equal protection of a specific class of individuals such as homosexuals. Rather, both laws deal with limiting the speech of state licensed therapists. *King*, 767 F.3d at 224; *Pickup,* 728 F.3d 1050–51.

[36] U.S. CONST. amend. 1.

[37] Elizabeth Bookwalter, *Getting it Straight: A First Amendment Analysis of California's Ban on Sexual Orientation Change Efforts and Its Potential Effects on Abortion Regulations*, 22 AM. U.J. GENDER SOC. POL'Y & L. 451, 460 (2014).

applied when "a state action, such as a law or professional regulation, does not implicate any constitutional rights."[38] The state law will be valid as long as the state has a legitimate basis for taking such action and as long as the action is rationally related to the state's interest.[39] Intermediate scrutiny will be applied when state action "implicates a fundamental right."[40] With intermediate scrutiny, the state will win unless they fail to show that the state action is narrowly tailored to serve a substantial government interest.[41] Lastly, strict scrutiny will be applied when the state action is content-based or viewpoint based.[42] Strict scrutiny is the most demanding level of review and can only be overcome if the state cannot prove "that the action addresses a compelling interest, that the state narrowly tailored the regulation to further its interest, and that the regulation is the least restrictive means of achieving that end."[43]

B. Pickup v. Brown

One of the first challenges to a legislative ban on talk therapy came in the case of *Pickup v. Brown*.[44] *Pickup* was a consolidation of two separate cases: *Welch v. Brown*[45] and *Pickup v. Brown*.[46] In both cases, plaintiffs were mental health providers that used non-aversive sexual orientation change efforts.[47] Plaintiffs were challenging SB 1172, claiming a violation of their First Amendment free speech protections, as well as a violation of their privacy rights.[48] Plaintiffs also argued that the law violated their Freedom of Religion[49] and was unconstitutionally vague and overbroad.[50]

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38 *Id*. at 461.
39 *Id*.
40 *Id.*
41 *Id*.
42 Bookwalter, *supra* note 37, at 462.
43 *Id*.
44 *See Pickup*, 728 F.3d at 1048.
45 Welch v. Brown, 907 F. Supp. 2d 1102 (E.D. Cal. 2012).
46 *Pickup*, 728 F.3d at 1048.
47 *Id*. at 1049.
48 *Id*. at 1051.
49 "The First Amendment to the Constitution protects freedom of religion by banning Congress from passing any law respecting an establishment of religion and from prohibiting people from freely exercising their religion. The Supreme Court has applied these limits to state governments through the Fourteenth Amendment." *Freedom of Religion*, BILL OF RIGHTS INSTITUTE,

In short, SB 1172 prohibits SOCE efforts on patients under the age of eighteen because it considers such practices "unprofessional conduct" subject to "discipline by the licensing entity for that mental health provider."[51] SB 1172 defined SOCE as "any practices by mental health providers that seek to change an individual's sexual orientation."[52] These practices would include "efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex."[53] Ultimately, SB 1172 "requires licensed mental health providers in California who wish to engage in 'practices . . . that seek to change a [minor's] sexual orientation' either to wait until the minor turns 18 or be subject to professional discipline."[54] The legislative intent behind the bill was to "'protect[ ] the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and [to] protect[ ] its minors against exposure to serious harms caused by sexual orientation change efforts.'"[55] Nevertheless, the plaintiffs felt that not being able to engage is SOCE with minors was a violation of their constitutional rights.[56]

Prior to reaching the Ninth Circuit, the *Welch* court granted the plaintiffs injunction for preliminary relief because it felt that California was unlikely to meet its burden and plaintiffs were likely to suffer irreparable harm in the absence of an injunction.[57] The *Welch* court applied a strict scrutiny standard of review, finding that SB 1172 was not content or viewpoint neutral.[58] However, the opposite conclusion was reached in *Pickup*, holding that SB 1172 regulated conduct alone, and therefore, there was no violation of plaintiffs' free speech rights.[59] Additionally, the *Pickup* court applied rational basis review because the law dealt with regulating conduct and not speech.[60] On appeal, the Ninth

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http://billofrightsinstitute.org/resources/educator-resources/headlines/freedom-of-religion/ (last visited Jan. 5, 2015).

50 *Pickup*, 728 F.3d at 1051.

51 *Id*. at 1049.

52 CAL. BUS. & PROF. CODE § 865(b)(1) (2014).

53 *Id.*

54 *Pickup*, 728 F.3d at 1050.

55 *Id*. (citing 2012 Cal. Legis. Serv. ch. 835, § 1(n)).

56 *Pickup*, 728 F.3d at 1051.

57 *Id.*

58 *Welch*, 907 F. Supp. 2d at 1109.

59 *Pickup*, 728 F.3d at 1051.

60 *Id.*

Circuit ultimately agreed with the *Pickup* court.[61] The Court held that when considering whether SB 1172 regulated speech or conduct, the decision was to be made on a continuum.[62] They concluded that SB 1172 fell on the end of the continuum where the mental health profession's actions were considered conduct rather than speech.[63] This was so because most medical treatment requires some speech, but that fact alone did not amount to First Amendment protection when a particular treatment is banned.[64] Therefore, applying a rational basis review, SB 1172 was upheld.[65]

Nonetheless, plaintiffs appealed for a hearing en banc.[66] While the hearing was ultimately denied,[67] Ninth Circuit Judge O'Scannlain dissented from the decision.[68] In his dissent, Judge O'Scannlain disagreed with the Circuit's decision to rule the professional's speech as conduct.[69] He felt that, "[T]he panel contravene[d] recent Supreme Court precedent, ignore[d] established free speech doctrine, misread our cases, and thus insulate[d] from First Amendment scrutiny California's prohibition—in the guise of a professional regulation—of politically unpopular expression."[70] Judge O'Scannlain felt that this decision could cause a slippery slope of providing the Government with too much power to restrict speech, something the First Amendment should protect against.[71]

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61 *Id*. at 1048.

62 At one end of the continuum, where a professional is engaged in a public dialogue, First Amendment protection is at its greatest . . . [a]t the midpoint of the continuum, within the confines of a professional relationship, First Amendment protection of a professional's speech is somewhat diminished . . . [a]t the other end of the continuum, and where we conclude that SB 1172 lands, is the regulation of professional conduct, where the state's power is great, even though such regulation may have an incidental effect on speech. *Id*. at 1053-55.

63 *Pickup*, 728 F.3d at 1055.

64 *Id.*

65 *Id*. at 1056–57.

66 Pickup v. Brown, 740 F.3d 1208, 1214 (9th Cir. 2014). En Banc is defined as "all judges present and participating; in full court." BLACK'S LAW DICTIONARY 606 (9th ed. 2009).

67 *Pickup,* 740 F.3d at 1214.

68 *Id*. at 1215.

69 *Id*.

70 *Id*.

71 *Pickup*, 740 F.3d at 1215. (O'Scannlain, J., dissenting) (holding that "[e]mpowered by this ruling of our court, government will have a new and powerful tool to silence expression based on a political or moral judgment about the content and purpose of the communications.").

C. King v. Governor of New Jersey

In many ways, *King v. Governor of New Jersey* is similar to *Pickup v. Brown*, except the story takes place on the opposite side of the country. In *King*, plaintiffs were licensed individuals or organizations that provided counseling to minors who were looking to eliminate same-sex attractions.[72] These therapists and organizations sought to do so from a religious perspective.[73] The type of SOCE used by these therapists was provided solely through verbal communication.[74] As previously stated, these counselors would attempt to find the "root-causes" of the same-sex attractions and then prescribe gender appropriate behavior for the patient to practice.[75]

The passing of A 3371 in August 2013 by New Jersey Governor Chris Christie made it nearly impossible, if not illegal, for the therapists to continue with their SOCE work.[76] A 3371 states that licensed professional counselors are not allowed to engage in sexual orientation change efforts with persons under the age of eighteen.[77] A 3371 described SOCE as "the practice of seeking to change a person's sexual orientation, including, but not limited to, efforts to change behaviors, gender identity, or gender expressions, or to reduce or eliminate sexual or romantic attractions or feelings toward a person of the same gender."[78] The legislative history of A 3371 suggests that this law was enacted to prevent the "significant risk of harm" to those who undergo

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72 *King*, 767 F.3d at 220.

73 *Id.* at 220–21.

74 *Id.* at 221.

75 *Id.*

76 *Id.*

77 A 3371 states the following:

> (a) A person who is licensed to provide professional counseling under Title 45 of the Revised Statutes, including, but not limited to, a psychiatrist, licensed practicing psychologist, certified social worker, licensed clinical social worker, licensed social worker, licensed marriage and family therapist, certified psychoanalyst, or a person who performs counseling as part of the person's professional training for any of these professions, shall not engage in sexual orientation change efforts with a person under 18 years of age.

N.J. STAT. ANN. § 45:1–55(a) (West 2014).

78 N.J. STAT. ANN. § 45:1–55(b) (West 2014).

SOCE.[79] However, the counselors affected by A 3371 failed to see the harm that can come from SOCE and brought suit challenging the law, claiming a violation of their freedom of speech and free exercise of religion under the First and Fourteenth Amendments.[80]

Once again, the District Court of New Jersey ruled in favor of the state, relying heavily on the decision from *Pickup v. Brown*.[81] The District Court ruled that A 3371 covered conduct—not speech—and was not overbroad or vague.[82] Therefore, there was neither a First nor Fourteenth Amendment violation.[83] While the decision was ultimately upheld, the Third Circuit disagreed with the District Court's reasoning on appeal to the Third Circuit.[84] The Third Circuit held that "verbal communication that occurs during SOCE counseling is speech that enjoys some degree of protection under the First Amendment."[85] Therefore, A 3371 reached speech as well as conduct; a holding dissimilar from *Pickup v. Brown*.[86] The Third Circuit adamantly rejected the Ninth Circuit and the District Court's reasoning, suggesting that simply "labeling [the therapists'] communications as 'conduct'" completely diminished the counselors' First Amendment rights, something that should not be done.[87] Nonetheless, even though the counselors were entitled to some First Amendment protections, as licensed therapists working for the State, this protection was limited.[88] The Third Circuit decided to use an intermediate level of scrutiny.[89] The court stated, "[W]e have serious doubts that anything less than intermediate scrutiny would adequately protect the First Amendment interests inherent in professional speech. Without sufficient judicial oversight, legislatures could too easily suppress disfavored ideas under the guise of professional regulation."[90]

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79 *King*, 767 F.3d at 221–22. "[T]he legislature declared that 'New Jersey 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.' " *Id*. at 222.

80 *Id.* at 222.

81 *Id.* at 223.

82 *Id.*

83 *King*, 767 F.3d at 223.

84 *Id.* at 224.

85 *Id.*

86 *Id.*

87 *Id.* at 229.

88 *King,* 767 F.3d at 229.

89 *Id.* at 234.

90 *Id.* at 236.

Court precedent has concluded that there are "special rules" for regulated speech amongst state licensed professions.[91] Therefore, in order for a professional's speech to be protected, it must "directly advance[ ] the State's substantial interest in protecting its citizens from harmful or ineffective professional practices and is not more extensive than necessary to serve that interest."[92] Because the Third Circuit found that A 3371 directly advanced the Government's interest in protecting clients from harmful services, the law was upheld, as was the ruling in favor of the defendants.[93]

IV. ANALYSIS

While the Ninth and Third Circuit ultimately came to the same conclusion, they took vastly different paths to get there. Thus, it is logical to suggest that one of those paths was the incorrect one, and could eventually set a bad precedent for other Circuits to follow. The wrong path was the one taken in *Pickup v. Brown*. While I agree overall with the ruling from both Circuits, this section will discuss why *Pickup* incorrectly ruled the therapists' actions as conduct rather than speech. Next this section will discuss the appropriate level of scrutiny that should be applied: that being strict scrutiny. Finally, this section will look at the slippery slope that could occur if other Circuits choose to follow the *Pickup* decision rather than the holding in *King*.

While it is hard to get much done without communication, using speech to accomplish certain goals should be considered just that: speech. The Ninth Circuit was incorrect in concluding that SB 1172 only applied to conduct. [94] Their claim that the professional conduct being regulated only had an "incidental effect"[95] on speech is mischaracterized, when the *entire* conduct relied solely on verbal communication.[96] Judge O'Scannlain was correct in his dissent of hearing for en banc review. [97] The legislature should not be able to avoid First Amendment

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91 *Id*. at 231 (citing Wollschlaeger v. Florida, 760 F.3d 1195 (11th Cir. 2014); *Pickup*, 740 F.3d at 1227-29; Moore-King v. Cnty of Chesterfield, Va., 708 F.3d 560, 568–70 (4th Cir. 2013)).

92 *Id.* at 224.

93 *King,* 767 F.3d at 237.

94 *Pickup*, 728 F.3d at 1055.

95 *Id.* at 1055.

96 *King*, 767 F.3d at 221.

97 *Pickup*, 740 F.3d at 1215-21.

protections simply by labeling unpopular speech as conduct.[98] Judge O'Scannlain states that the Supreme Court has warned against creating new types of speech to which the First Amendment does not apply.[99] Stating that a certain type of therapy, employed solely through speech, is simply conduct that cannot be regulated is effectively doing exactly what the Supreme Court has warned against.[100]

The correct analysis, although not the correct level of scrutiny, was applied in *King*.[101] The Third Circuit correctly stated that verbal communication given through counseling is considered speech and not conduct.[102] While one may be speaking as a state-licensed therapist, they are still employing their *opinion* as to the proper treatment for their patient. Even if the licensed therapist is solely using speech as the means of providing his or her medical services, this should not be considered pure conduct. By the Ninth Circuit holding that the therapists' actions do not constitute speech, they created a constitutional violation of the therapists' First Amendment rights.

While both SB 1172 and A 3371 apply to therapists' speech and not conduct, neither the Ninth nor the Third Circuit correctly analyzed the laws with the appropriate level of scrutiny. Because both laws deal with content-based[103] and viewpoint-based[104] speech, strict scrutiny should have been the applicable standard of review.[105] The correct standard was applied in *Welch*.[106] In *Welch*,

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98 *Id.* at 1215.

99 *Id.* at 1221.

100 *Id.*

101 *King*, 767 F.3d at 224.

102 *Id.*

103 "As a general matter, government may not regulate speech 'because of its message, its ideas, its subject matter, or its content.'" *The Constitution of the United States of America: Analysis and Interpretation*, U.S. GOVERNMENT PRINTING OFFICE 1277, https://www.congress.gov/content/conan/pdf/GPO-CONAN-REV-2014.pdf (last visited Mar. 4, 2015).

104 "In traditional public forums, the government may not discriminate against speakers based on their views." *Forums*, WEX LEGAL DICTIONARY, http://www.law.cornell.edu/wex/forums (last visited Jan 7, 2015).

105 In the equal protection context, when laws applied to the class of homosexuals, the Court has applied intermediate scrutiny. United States v. Windsor, 133 S. Ct. 2675, 2683-84 (2013). However, as this law does not apply to homosexuals, but rather to licensed therapists, I feel that strict scrutiny is the appropriate level of review because it restricts their speech based on content and viewpoint.

106 *Welch*, 907 F. Supp. 2d at 1109.

Ninth Circuit precedent [107] suggested that the regulation of professional speech, which is not content or viewpoint neutral, should be subject to strict scrutiny.[108] From this reasoning, it is clear that plaintiffs in *King* correctly argued that A 3371 discriminated on the basis of content, warranting strict scrutiny review.[109] A 3371—as well as SB 1172—undoubtedly attacks a particular viewpoint and thus, under the reasoning in *Welch*,[110] strict scrutiny should be applied. Sexual orientation change efforts are conducted mostly by those who share a particular view or feeling about homosexuality, usually based on their religious beliefs.[111] As was the case with plaintiffs in *Welch*, and *King*, all therapists employed SOCE for that reason.[112] It is hard to suggest that a law attacking such beliefs could be considered anything other than viewpoint-based speech. The Nation's growing acceptance of homosexuality[113] also suggests that the states are attempting to restrict SOCE based on the nature of its content. While it is undoubtedly an unpopular view, the *content* of SB 1172 and A 3371 are undeniably against those who protest homosexuality and, as such, should be subject to strict scrutiny review.

In order to overcome strict scrutiny review, the state would need to show that SB 1172 and A 3371 address a compelling interest; that California and New Jersey, respectively, narrowly tailored their regulations to further those interests; and that the regulations are the least restrictive means of reaching their

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[107] *See* Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1056 (9th Cir. 2000) (holding that the Supreme Court has recognized that physician speech is entitled to First Amendment protection because of the significance of the doctor-patient relationship). *See also Welch*, 907 F. Supp. 2d at 1111 (finding that, under *NAAP*, professional regulation would be subject to strict scrutiny if it is not content and viewpoint-neutral).

[108] *Welch*, 907 F. Supp. 2d at 1111.

[109] *King*, 767 F.3d at 236.

[110] *Welch*, 907 F. Supp. 2d at 1117.

[111] *Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts*, AMERICAN PSYCHOLOGICAL ASSOCIATION, http://www.apa.org/about/policy/sexual-orientation.aspx (last visited Feb. 28, 2015).

[112] *King*, 767 F.3d at 220; *Pickup*, 728 F.3d at 1051.

[113] *Americans Move Dramatically Toward Acceptance of Homosexuality*, NORC AT THE UNIVERSITY OF CHICAGO (Sept. 2011), http://www.norc.org/NewsEventsPublications/PressReleases/Pages/american-acceptance-of-homosexuality-gss-report.aspx.

goal.[114] Strict scrutiny, and not intermediate or rational basis, is the correct standard of review, and both States could have prevailed under that standard. It is undeniable that California and New Jersey have an interest in protecting their minor citizens, including those who identify with the LGBTQ[115] community. Both regulations were constructed to protect those minors and thus, were narrowly tailored. Also, there are unlikely less restrictive ways to reach that goal, other than passing a law that prohibits SOCE on LGBTQ youth, as was done in both situations. Therefore, even with using a strict scrutiny standard of review, both SB 1172 and A 3371 would have been upheld.

If future Circuits choose to follow *Pickup* rather than *King*, as Judge O'Scannlain suggested, a slippery slope could ensue.[116] All courts would have to do is classify a law as covering conduct, rather than speech, and the government could gain a "powerful tool to silence expression based on a political or moral judgment about the content and purpose of the communications." [117] Additionally, not considering SOCE laws to cover speech could prohibit future therapists from giving their medical advice on other controversial topics. This could lead to therapists not being able to give what they truly believe is the best form of therapy for their patients, in fear that the antidote they are prescribing is against the law. Therefore, in order to ensure this does not happen, other Circuits should be following the holding in *King* finding the therapists actions speech and not the opposite conclusion reached in *Pickup*.

V. CONCLUSION

Sexual orientation change efforts are undoubtedly a growing concern, especially with the increasing acceptance of the LGBTQ community.[118] Therefore, it is no surprise that states such as California and New Jersey have enacted legislation to protect

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[114] Bookwalter, *supra* note 37, at 462.

[115] "These acronyms refer to Lesbian, Gay, Bisexual, Transgender, Queer or Questioning." *LGBT Terms and Definitions*, UNIVERSITY OF MICHIGAN, http://internationalspectrum.umich.edu/life/definitions (last visited Jan. 7, 2015).

[116] *Pickup*, 740 F.3d at 1216.

[117] *Id*.

[118] *See Americans Move Dramatically Toward Acceptance of Homosexuality*, *supra* note 24.

youth who identify as LGBTQ.[119] Nevertheless, organizations with tightly held religious beliefs find homosexuality to be a "wrongful" way of life and thus, employ therapists to conduct SOCE. While such beliefs are a freedom of their religious expression, the implementation of SOCE does not warrant these therapists full constitutional rights—even if the only form of SOCE used is through verbal communication. However, as purely verbal communication between a therapist and a patient, such action should be considered speech, and thus should warrant at least some First Amendment protections. Any law restricting "talk therapy" through SOCE is undeniably restricting these therapists' right to free speech under the First Amendment. While it is my view that SB 1172 and A 3371 pass even strict scrutiny, future SOCE laws should be looked at under such a standard of review, to ensure that licensed therapist speech is only being limited to serve a narrowly tailored purpose. If this is not done, the government could be seen as possessing too much power in restricting one of the main freedoms supplied to us by our founding fathers. Talk therapy, and other verbal communications between therapist and patient should be held as speech when looking at those actions under a First Amendment analysis.

[119] CAL BUS & PROF CODE § 865.1 (2014); N.J. STAT. ANN. § 45:1–55 (2014).