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Why Can't I Speak? SOCE Laws and the Case for Strict Scrutiny

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COMMENT

WHY CAN'T I SPEAK? SOCE LAWS AND THE CASE FOR STRICT SCRUTINY

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ABSTRACT

The freedom of speech is of paramount importance to American society, and yet some people want to revoke this freedom. Likewise, courts are wary of statutes and laws that regulate it—or at least, they should be. When a law is passed that regulates speech, a court will evaluate its constitutionality in light of one of the three levels of judicial scrutiny. The level that is applied, will, in turn, have a great effect upon the approval or rejection of the law in question. However, courts sometimes are confused as to which level of scrutiny to apply.

This confusion has become especially prominent with Sexual Orientation Change Efforts (SOCE) laws. These laws regulate what a psychologist can and cannot say to their patients in regard to questions of sexual orientation. Two of these laws have come before United States Circuit Court of Appeals, and both Circuits have applied a different level of scrutiny. The Ninth Circuit applied rational basis review and the Third Circuit applied intermediate scrutiny. This confusion regarding which standard to apply to SOCE laws stems from a much broader problem. The issue is whether a distinction should be drawn between the speech of a professional in a client relationship, commonly referred to as professional speech, and speech in the ordinary public sector. Several circuits have drawn this distinction.

Support for the idea of professional speech is typically drawn from three Supreme Court decisions, *Lowe v. SEC*, *Thomas v. Collins*, and *Planned Parenthood of Southeastern Pennsylvania. v. Casey*. These opinions, however, when viewed in the proper context, do not support the professional speech doctrine. Instead, the Supreme Court has made it clear that the crucial

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determination is whether a law is content-based. If it is, then strict scrutiny should be applied. If it is content-neutral, then intermediate scrutiny should be applied. Thus, courts err when they focus on whose speech is being regulated instead of the nature of the regulation itself. The Supreme Court has recently made it clear that professional speech is not a separate category and that professional speech is afforded full First Amendment protections. Likewise, it is imperative for lower courts to follow Supreme Court precedent and reverse their unconstitutional decisions. While there was once a great confusion regarding professional speech, the Supreme Court has clearly established the appropriate standard for all courts to apply.

I. INTRODUCTION

> *"If liberty means anything at all, it means the right to tell people what they do not want to hear."*
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> – *George Orwell, English novelist* [1]

The freedom of speech is a fundamental freedom right enjoyed by American society. Benjamin Franklin stated that "[w]hoever would overthrow the [l]iberty of a [n]ation, must begin by subduing the [f]reeness of [s]peech . . . ."[2] This freedom is so important that it was included in the Bill of Rights as part of the First Amendment to the United States Constitution. But the freedom of speech has become restricted by way of Sexual Orientation Change Efforts (SOCE) laws that have been passed in California and New Jersey.[3] In both of these states, the laws were challenged as an unconstitutional restriction on the freedom of speech.[4] Both laws, however, were upheld by United States Circuit Courts of Appeals.[5] This was, in part, based on the level of scrutiny that the circuits used to determine whether the statutes were constitutional.

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1. Brian Levin, *Liberty: The Right to Tell People What They Don't Want to Hear*, HUFFPOST (Feb. 17, 2015), https://www.huffingtonpost.com/brian-levin-jd/liberty-the-right-to-tell_b_6349214.html.

2. Benjamin Franklin, *Silence Dogood, No. 8*, THE NEW ENGLAND COURANT (July 9, 1722), https://founders.archives.gov/documents/Franklin/01-01-02-0015.

3. *See* N.J. STAT. ANN. 45:1-55; CAL. BUS. & PROF. CODE D. 2, Ch. 1, Art. 15 (West 2017). Connecticut has passed a similar statute that is yet to be challenged. *See* Substitute H.B. 6695, Gen. Assemb. (Conn. 2017).

4. *See* Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014); King v. Governor of New Jersey, 767 F.3d 216 (3d Cir. 2014).

5. *See Pickup*, 740 F.3d at 1214; *King*, 767 F.3d at 220.

The Ninth Circuit applied minimal scrutiny to the California law, while the Third Circuit applied intermediate scrutiny to the New Jersey law.[6] This Comment will analyze both the Ninth Circuit's ruling in *Pickup v. Brown* and the Third Circuit's ruling in *King v. Governor of the State of New Jersey*. The rationale of both holdings, concerning the appropriate standard of review, will be examined within the context of the Supreme Court precedent revolving around strict scrutiny and regulations of speech. The issue will also be analyzed in light of the Eleventh Circuit's recent holding in *Wollschlaeger v. Governor of Florida*. Finally, this Comment closes with the determination that strict scrutiny is the only appropriate level of scrutiny to attach to SOCE laws in order to uphold the Constitution's rigorous protections of free speech.

II. BACKGROUND

Courts will apply various levels of scrutiny when determining whether a particular statute is constitutional.[7] While these levels are not constitutional requirements,[8] they are firmly established areas of law.[9] It is evident, upon further examination of the different levels of scrutiny, that it is crucial for courts to apply the appropriate level of scrutiny to a case.

A. Challenging an Unconstitutional Law

Before setting out the different levels of judicial scrutiny, it will be helpful to show how a statute can come before the courts. Congress has established a means by which an unconstitutional law or statute can be challenged.[10] In 1871, Congress enacted 42 U.S.C. § 1983 "for the protection of certain rights 'secured by the Constitution and laws' against infringement by the states."[11] The Supreme Court has explained that the purpose of this statute was "to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . . ."[12] The text reads,

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6. *See Pickup*, 740 F.3d at 1231; *King*, 767 F.3d at 234.

7. *See* CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 48 (5th ed. 2016).

8. *Id.* ("Nothing in the Constitution states or even suggests that the Constitution's various limits on government should be treated differently by reviewing courts.").

9. *Id.* ("Some justices . . . have contended that tiered review is a misleading illusion, but the Court as a whole has never agreed with that view.").

10. 1 SHELDON H. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 1:1 (4th ed. 2017).

11. *Id.*

12. *Id.* at § 1:4.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[13]

The freedom of speech is a federal right established in the First Amendment.[14] The First Amendment states "Congress shall make no law . . . abridging the freedom of speech . . . ."[15] Thus, § 1983 allows a person to sue for a violation of their constitutional rights when a state legislature enacts an unconstitutional statute.[16] Judicial review then comes into play, as the court must determine whether the statute is or is not constitutional. The levels of scrutiny will have a great effect upon the court's decision regarding constitutionality.

B. The Levels of Judicial Review

The lowest level of scrutiny is referred to as minimal scrutiny, often called rational basis review.[17] Under this level of scrutiny, a challenged statute will be presumed to be constitutional.[18] That presumption holds until it is shown that the statute "is not rationally related to a legitimate government objective."[19] This is a "very weak basis for review," and as long as "the government's reason for acting is legitimate" the reviewing court will uphold the challenged statute.[20] In addition, the burden is placed on the party that is

13. 42 U.S.C.A. § 1983.
14. U.S. CONST. amend. I.
15. U.S. CONST. amend. I.
16. NAHMOD, *supra note* 10 at § 1:1.
17. *See* MASSEY, *supra* note 7, at 48.
18. *Id.*
19. *Id.*
20. *Id.*

challenging the statute.[21] Therefore, this level of scrutiny is highly deferential to the government.

In contrast, strict scrutiny is the highest level of scrutiny.[22] Under this level of scrutiny, a challenged statute will be presumed to be unconstitutional.[23] In addition, the burden is placed on the party that is asserting the statute to be constitutional.[24] To overcome this, it must be shown that statute "is necessary to accomplish a compelling government objective."[25] Furthermore, the statute must use "the least restrictive means to further the articulated interest."[26] This is also referred to as requiring the statute to be narrowly tailored to achieving the compelling government interest.[27] This standard is extremely difficult to overcome.[28] The government's reason for passing the statute must be of "paramount importance, and the use of the criterion must be essential to accomplish that very important goal."[29]

The middle level of scrutiny is intermediate scrutiny.[30] Under this level of scrutiny, the challenged statute will still be presumed to be unconstitutional, but this is not nearly as strong of a presumption as is found under strict scrutiny.[31] The burden is also on the party that is supporting the statute.[32] To meet this burden, however, it must only be shown that the government's "actual purpose of the statute . . . is important and . . . substantially related to the accomplishment of that actual purpose."[33]

From this basic framework of constitutional scrutiny, it can be seen that a case can completely turn on which level of scrutiny is applied. Which party bears the burden of proof will differ depending on which standard is applied. The level of scrutiny will also determine how hard it is to prove that a statute is constitutional or unconstitutional. Furthermore, if a statute is only

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21. *Id.*

22. *Id.* at 49. "The classic example, derived from the equal protection clause, is a statute that classifies by race." *Id.*

23. *See* MASSEY, *supra* note 7, at 49.

24. *Id.*

25. *Id.*

26. Sable Commc'ns of Cal., Inc. v. F.C.C., 492 U.S. 115, 126 (1989).

27. *Id.*

28. *See* MASSEY, *supra* note 7, at 48.

29. *Id.*

30. *Id.* "This level of review is inherently subjective and, as a result, cases applying this standard . . . reflect a wide range of results." *Id.* at 50.

31. *Id.* at 49.

32. *Id.*

33. *Id.* at 48.

subjected to minimal scrutiny, then the statute will have to be "truly bizarre" in order to be found to be unconstitutional.[34] This is one of the main reasons why it is crucial for the court to apply the appropriate level of scrutiny in free speech cases. Such a fundamental freedom should not be subjected to uncertainty or an inappropriate level of review.

C. Determining Which Level to Apply

The courts will determine which level of scrutiny to apply based upon the type of right that is being violated. For example, a court will often apply minimal scrutiny for claims regarding violations of property protections or claims that "Congress has exceeded its granted powers."[35] On the other hand, courts will often apply intermediate scrutiny to claims of sex discrimination.[36] Courts will apply strict scrutiny when there is a freedom of speech violation, depending on the nature of the violation.

For the purposes of this Comment, it is necessary to understand which level of scrutiny the courts will apply to First Amendment issues or violations. Under the First Amendment, "a government . . . 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"[37] Thus, "[t]he threshold determination courts make when considering which level of scrutiny to apply to a First Amendment challenge is whether a regulation is content-based or content-neutral."[38] If a law is content-based, the Supreme Court has made it clear that it will apply strict scrutiny. The Supreme Court has also established a standard to determine whether a law is content-based.[39] This occurs when a particular law or statute "target[s] speech based on its communicative content."[40] In other words, a law will be content-based if it regulates "particular speech because of the topic discussed or the idea or message expressed."[41] Furthermore, courts will look

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34. *See* MASSEY, *supra* note 7, at 48.

35. *Id.* at 50.

36. *Id.* at 49.

37. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) (citing Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972)).

38. Erika Schutzman, Note, *We Need Professional Help: Advocating for a Consistent Standard of Review when Regulations of Professional Speech Implicate the First Amendment*, 56 B.C. L. REV. 2019, 2028 (2015).

39. *Reed*, 135 S. Ct. at 2227 (2015). "Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226.

40. *Id.* at 2226.

41. *Id.* at 2227.

at whether the law "draws distinctions based on the message a speaker conveys."[42] If it does not, the challenged law is content-neutral. However, even if a law appears to be content-neutral, the courts will treat it as content-based if it "cannot be 'justified without reference to the content of the regulated speech . . . .'"[43]

An example can illustrate the difference between content-based and content-neutral regulations. A statute that prohibited any use of a loudspeaker within city limits after midnight would be content-neutral.[44] The statute would be content-based, however, if it only prohibited the use of a loudspeaker after midnight by a person that was speaking about a political matter.

Another important type of discrimination is viewpoint discrimination. The Supreme Court has taken a strong stance on this type of discrimination. The Court made two important statements in *Rosenberger v. Rector & Visitors of University of Virginia* concerning viewpoint discrimination. First, "the government may not regulate speech based on its substantive content or the message it conveys."[45] Second, "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."[46]

From these two statements, the Court's stance on viewpoint discrimination is clear. It will not be tolerated. This has been made clear in another case as well, where the Court stated that "[t]he principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'"[47] This is not a conditional statement. It simply states that if the government regulates a message or viewpoint, the regulation will be unconstitutional. The previous example concerning content discrimination will also be helpful here. If the statute focused its prohibitions on one particular type of political matter, like speaking about democratic candidates, instead of just all political matter, then the statute would be viewpoint discriminatory in addition to being content discriminatory.

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42. *Id.*

43. *Id.* (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

44. *See* Schutzman, *supra* note 38, at 2030.

45. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995).

46. *Id.* at 829.

47. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984)).

D. Sexual Orientation Change Efforts Laws

Sexual Orientation Change Efforts (SOCE) laws are an area where judicial scrutiny has become particularly important. These laws seek to ban any form of conversion therapy given by a counselor, therapist, or psychologist.[48] Conversion therapy is commonly defined in SOCE statutes as any attempt to change a minor's sexual orientation.[49] Thus, a counselor is prohibited by SOCE statutes from even saying or suggesting to a minor that he or she can change their sexual orientation. For example, in a situation where a minor is having unwanted homosexual attractions, a counselor cannot render therapy to change this, even if the minor asks the counselor to give him or her such therapy. Unfortunately, there are additional statutes related to SOCE that greatly increase the scope of SOCE regulation.[50]

SOCE statutes do nothing to limit the prohibitions to physical actions.[51] For example, the statute could say that only electroshock therapy is prohibited, but such a limitation is not present. They clearly include speech in its simplest form.[52] Thus, SOCE statutes are a restriction on speech. Because they are a violation of this federal right, SOCE laws can be challenged in court pursuant to § 1983.

Two SOCE statutes have come before United States Circuit Courts of Appeals. Both circuits upheld the statutes as constitutional. The outcome was largely due to the level of scrutiny that the Circuits applied. In *Pickup v. Brown*, the Ninth Circuit applied minimal scrutiny to a California SOCE statute.[53] In *King v. Governor of the State of New Jersey*, on the other hand, the

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48. *See* Substitute H.B. 6695, Gen. Assemb. (Conn. 2017); N.J. STAT. ANN. 45:1-55; CAL. BUS. & PROF. CODE D. 2, Ch. 1, Art. 15 (West 2017).

49. Substitute H.B. 6695, Gen. Assemb. (Conn. 2017) (defining conversion therapy as "any practice or treatment administered to a person under eighteen years of age that seeks to change the person's sexual orientation or gender identity, including, but not limited to, any effort to change gender expression or to eliminate or reduce sexual or romantic attraction or feelings toward persons of the same gender.").

50. *See* Cal. Assemb. B. No. 2943 (making "advertising, offering for sale, or selling services constituting sexual orientation change efforts with efforts, as defined, to an individual" an "unlawful practice prohibited under the Consumer Legal Remedies Act"). This bill would effectively ban the sale of any book related to SOCE therapy.

51. *See* Substitute H.B. 6695, Gen. Assemb. (Conn. 2017); N.J. STAT. ANN. 45:1-55; CAL. BUS. & PROF. CODE D. 2, Ch. 1, Art. 15 (West 2017).

52. *See* Substitute H.B. 6695, Gen. Assemb. (Conn. 2017) (defining conversion therapy as "any practice or treatment administered to a person under eighteen years of age that seeks to change the person's sexual orientation or gender identity, including, but not limited to, any effort to change gender expression or to eliminate or reduce sexual or romantic attraction or feelings toward persons of the same gender").

53. Pickup v. Brown, 740 F.3d 1208, 1231 (9th Cir. 2014).

Third Circuit applied intermediate scrutiny to a New Jersey SOCE statute.[54] These two cases will be the focus of this Comment. It will now be shown why strict scrutiny would have been the appropriate level of scrutiny in both of these cases.

III. AN INCONSISTENT STANDARD: DIFFERENT LEVELS OF SCRUTINY IN DIFFERENT CIRCUITS

As has already been explained, different levels of scrutiny have been applied to SOCE laws in different circuits. Thus, there is a split regarding which level of scrutiny should be applied to regulations of professional speech. It will be helpful to begin by explaining how both circuits reached their respective conclusions.

A. Pickup v. Brown

The Ninth Circuit applied rational basis review, or minimal scrutiny, to California's SOCE law.[55] In determining which level of scrutiny to apply, the Ninth Circuit drew a distinction between regulations of speech and regulations of conduct.[56] It deemed the SOCE law to be a regulation of conduct.[57] The Ninth Circuit relied upon two prior Ninth Circuit decisions to reach this conclusion, *National Association for the Advancement of Psychoanalysis v. California Board of Psychology* (*NAAP*) and *Conant v. Walters*.[58]

In *NAAP*, a California "licensing scheme required that persons who provide psychological services to the public for a fee obtain a license . . . ."[59] Thus, this case merely dealt with the licensing of professionals. The Ninth Circuit held that "[t]he communication that occurs during psychoanalysis is entitled to constitutional protection, but it is not immune from regulation."[60] The law in question, however, was content-neutral and viewpoint neutral.[61] It did not regulate "what can be said between psychologists and patients

54. King v. Governor of New Jersey, 767 F.3d 216, 237 (3d Cir. 2014).

55. *Pickup*, 740 F.3d at 1231.

56. *Id.* at 1225.

57. *Id.* at 1229.

58. *Id.* at 1225.

59. *Id.*

60. Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1054 (9th Cir. 2000).

61. *Id.* at 1055.

during treatment."[62] Therefore, it did not "trigger strict scrutiny."[63] In *Conant*, the law in question prohibited a doctor from recommending the use of marijuana.[64] The Ninth Circuit applied strict scrutiny to the law because it deemed it to be both content and viewpoint discriminatory.[65] It was easy for the Ninth Circuit to rule that this was a regulation of speech.

From this, the Ninth Circuit drew several principles.[66] Interestingly enough, however, the Ninth Circuit stated that the principles "do not tell us whether or how the First Amendment applies to the regulation of specific mental health treatments . . . ."[67] Thus, the Ninth Circuit decided to look at the law in the context of "the First Amendment rights of professionals" and viewed the "issue along a continuum."[68]

The First Amendment protections were said to be strongest "where a professional is engaged in a public dialogue . . . ."[69] In the middle of the continuum was the situation "within the confines of a professional relationship," where the "First Amendment protection of a professional's speech is somewhat diminished."[70] The protections were said to be weakest when professional conduct is being regulated.[71] Concerning conduct, the Supreme Court has "made clear that First Amendment protection does not apply to conduct that is not 'inherently expressive.'"[72] This is where the Ninth Circuit deemed California's SOCE to fall on the continuum.[73] The law was "a

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62. *Id.*

63. *Id.*

64. *Pickup*, 740 F.3d at 1226.

65. *Id.*

66. *Id.* at 1227.

> We distill the following relevant principles from NAAP and Conant: (1) doctor-patient communications about medical treatment receive substantial First Amendment protection, but the government has more leeway to regulate the conduct necessary to administering treatment itself; (2) psychotherapists are not entitled to special First Amendment protection merely because the mechanism used to deliver mental health treatment is the spoken word; and (3) nevertheless, communication that occurs during psychotherapy does receive some constitutional protection, but it is not immune from regulation.

Id.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Pickup*, 740 F.3d at 1228.

71. *Id.* at 1229.

72. *Id.* at 1225 (quoting Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 66 (2006)).

73. *Id.* at 1229.

form of treatment," so it was deemed to be conduct instead of speech.[74] This was likened unto a situation where a drug is banned and a physician cannot "speak the words necessary to provide or administer the banned drug."[75] Thus, because it was conduct, it did not receive First Amendment protections.[76] The Ninth Circuit went on to apply rational basis review because of the possibility that the law could have an incidental effect on speech.[77]

1. Problems with the Ninth Circuit's Analysis

The Supreme Court has specifically rejected the conclusion reached by the Ninth Circuit. The Court made it clear in *Holder v. Humanitarian Law Project* that communications cannot be labeled as conduct.[78] In *Humanitarian Law Project*, the government argued that the law in question was regulating conduct.[79] The Court rejected that argument, however, and held that even when a law is "directed at conduct," if "the conduct triggering coverage under the statute consists of communicating a message" in reference to the plaintiff, then the court must approach it as a regulation of speech.[80] This statement from the Supreme Court alone is enough to put the Ninth Circuit's conclusion in jeopardy. As will be explained further below, the Third Circuit has also made a clear case for why SOCE laws are not a regulation of conduct.

The dissent in *Pickup* also elaborated upon the weakness of the majority's conclusion. It stated that the majority opinion "contravenes recent Supreme Court precedent, ignores established free speech doctrine, misreads our cases, and thus insulates from First Amendment scrutiny California's prohibition—in the guise of a professional regulation—of politically unpopular expression."[81] The dissent bemoaned the fact that the majority opinion created a dichotomy for which it had "no principled doctrinal basis" or "legal authority" to do so.[82] In reaching its conclusion, the Ninth Circuit used two cases that stood for opposite positions and then went on to create a continuum, while admitting that it had nothing to support the assertion of

74. *Id.*
75. *Pickup*, 740 F.3d at 1229.
76. *Id.*
77. *Id.* at 1231.
78. Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010).
79. *Id.* at 27.
80. *Id.* at 28.
81. *Pickup*, 740 F.3d at 1215.
82. *Id.* at 1215-16.

such a continuum.[83] This is just another example of the many problems with finding regulations of speech, like SOCE laws, to be regulations of conduct.

B. King v. Governor of the State of New Jersey

The Third Circuit applied intermediate scrutiny to New Jersey's SOCE law.[84] It did not follow the Ninth Circuit's line of reasoning. Instead, the Third Circuit held that the law was a regulation of speech and not of conduct.[85] The Third Circuit declared that "speech is speech, and it must be analyzed as such for purposes of the First Amendment."[86] To reach this conclusion, the Third Circuit noted that the Supreme Court had specifically rejected an argument that a similar type of speech could be conduct.[87] This was because the activity in question "consisted of 'communicating a message.'"[88] Therefore, if legal counseling had been deemed to be speech by the Supreme Court, it was only logical that "that the verbal communications that occur during SOCE counseling" are also speech.[89]

In regard to the Ninth Circuit and the *Pickup* case, the Third Circuit also stated that, "the argument that verbal communications become 'conduct' when they are used to deliver professional services was rejected by" the Supreme Court and "is unprincipled and susceptible to manipulation."[90] Therefore, it was clear to the Third Circuit that this was a regulation of speech.

Surprisingly, the Third Circuit did not stop there and apply strict scrutiny. Instead, it held that even though the law in question was a regulation of speech, it was not "fully protected by the First Amendment."[91] It did so by differentiating the speech being regulated from normal speech.[92] According to the Third Circuit, this was professional speech.[93] To make this distinction, the Third Circuit noted that the states have the power to regulate certain professions.[94] Therefore, because the states have the power to regulate

83. *Id.* at 1227-29.
84. King v. Governor of New Jersey, 767 F.3d 216, 237 (3d Cir. 2014).
85. *Id.* at 224-25.
86. *Id.* at 229.
87. *Id.* at 225.
88. *Id.* (quoting *Holder*, 561 U.S. at 28).
89. *Id.*
90. *King*, 767 F.3d at 228.
91. *Id.* at 229.
92. *Id.*
93. *Id.*
94. *Id.*

professions, the speech of professionals should be a separate category.[95] The Third Circuit also relied on several opinions from other circuits that had also recognized professional speech as a separate category.[96] The Third Circuit then went on to liken professional speech to commercial speech and note the similarities between the two.[97] Thus, because regulations of commercial speech receive intermediate scrutiny, regulations of professional speech should also be viewed under the same standard.[98] The decision to apply intermediate scrutiny was further supported by concerns "that anything less . . . would adequately protect the First Amendment interests inherent in professional speech."[99]

1. Problems with the Third Circuit's Analysis

As has been shown, the Third Circuit relied on the idea of professional speech in order to reach its conclusion. Interestingly, this doctrine is "one of the least developed areas in First Amendment jurisprudence."[100] "This understanding of professional speech grew out of Justice Byron White's concurring opinion to the U.S. Supreme Court's 1985 decision in *Lowe v. SEC*, in which he used the term 'personal nexus' to describe the hallmark of professional speech."[101] The doctrine is also based on "Justice Robert H. Jackson's concurring opinion to the U.S. Supreme Court's 1944 decision in *Thomas v. Collins*."[102] From these cases, the Third Circuit found support for its conclusion that professionals are not afforded full protection under the First Amendment.[103] The Third Circuit also looked to *Planned Parenthood of Southeastern Pennsylvania v. Casey*, and referred to it as the most recent Supreme Court case about professional speech.[104] *Casey*, however, only mentioned the First Amendment in a mere three sentences in reference to

95. *Id.* at 232.

96. *King*, 767 F.3d at 231 (A trio of recent federal appellate decisions has read these opinions to establish special rules for the regulation of speech that occurs pursuant to the practice of a licensed profession.). The opinions were Wollschlaeger v. Governor of Florida, 760 F.3d 1195 (11th Cir. 2014); *Pickup*, 740 F.3d at 1208; Moore–King v. Cty. of Chesterfield, Va., 708 F.3d 560 (4th Cir. 2013). *Id.* The Eleventh Circuit opinion in *Wollschlaeger* was reversed in Wollschlaeger v. Governor of Florida, 848 F.3d 1293 (11th Cir. 2017).

97. *King*, 767 F.3d at 233.

98. *Id.* at 235.

99. *Id.* at 236.

100. Schutzman, *supra* note 38, at 2034.

101. *Id.*

102. *Id.* at 2035.

103. *See King*, 767 F.3d at 229-31.

104. *Id.* at 230-31.

informed consent laws.[105] Thus, the case "provides virtually no guidance as to the general constitutional status of professional speech."[106]

Upon examination of these cases, however, it shows that they do not support the conclusion of the Third Circuit. First, *Thomas* was an early case and the Supreme Court "applied the highest level of First Amendment protections then known to it" at that time.[107] Thus, it is not logical to say that this shows that a lower level of scrutiny should be applied because of *Thomas*. Furthermore, *Thomas* was not dealing with situations, like professional speech, where a court regulates what is said in the context of a professional relationship.[108] It was only dealing with "when the state could *require* a license as a professional precondition to engaging in public speech."[109] Finally, the Supreme Court insisted "that the regulation at issue before it was *not* the regulation of a profession, but suppression of free speech."[110] When looking at the case through this context, it shows that it was not supporting a broad view of regulation, but instead a narrow, more constricted one. The Supreme Court also made the important statement that "[t]he idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity."[111] In other words, professional does not forfeit the right to First amendment protections simply by operating in a business type of setting.

Next, *Lowe* has a similar background as did *Thomas*. While *Lowe* discussed professional speech, the purpose "was not to limit . . . expression, but expand it."[112] In fact, *Lowe* "held that the professional's speech was entitled to maximum First Amendment protection."[113] Thus, the context again shows that the Supreme Court meant to make it harder to regulate speech, not easier. Thus, a closer examination of Supreme Court precedent makes it clear that the Supreme Court has not established that First Amendment prohibitions are lessened in the context of a professional relationship with a client.[114] "Rather, the opinions posit that there is no First Amendment

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105. Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67, 81 (2016).

106. *Id.*

107. *Id.* at 77.

108. *Id.*

109. *Id.*

110. *Id.*

111. Thomas v. Collins, 323 U.S. 516, 531 (1945).

112. Smolla, *supra* note 105, at 79.

113. *Id.*

114. *Id.*

impediment to government *requiring a license* for certain professional activity."[115] These are two totally different issues. Therefore, just because the Supreme Court has established one of them, does not mean that the other is also good law. When viewed in this context, it makes the Third Circuit's reliance on these cases appear to be questionable. It does not seem logical or valid to base an entire doctrine on nothing more than a weak analogy.

Without the support of these cases, the Third Circuit's approach to professional speech is limited to the argument that professional speech is like commercial speech. Commercial speech is a clearly-established part of First Amendment jurisprudence.[116] This, however, is also not without problems. "The core test for identifying commercial speech is speech which does 'no more than propose a commercial transaction.'"[117] Professional speech, however, consists of much more than this. It is a dialogue between a professional and their client with the client's best interest in mind. Thus, "[w]hile a professional's advertising to solicit clients is commercial speech, the professional's advice to the client is not."[118] They are clearly two different things.

Another problem with this argument is that the purpose of commercial speech is to protect consumers from fraudulent information.[119] The arguments made by the Third Circuit to show similarities between the two types of speech are not sufficient to support the doctrine of professional speech. In fact, there are problems with the Third Circuit's argument. For example, in regard to the argument based on both professional speech and commercial speech being a means for information to reach the public, it has been said that:

> This argument, however, proves too much, for a vast part of the public discourse that reaches non-expert readers, listeners, and viewers originates from speakers with specialized knowledge or expertise. Indeed, a major function of the marketplace of ideas is to enable those with superior knowledge (or claims thereof), including members of countless professions, to spread what they know to persons who are not experts in their fields. The

115. *Id.*

116. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557 (1980); Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York, 447 U.S. 530 (1980).

117. Smolla, *supra* note 104, at 89 (quoting Thompson v. W. States Med. Ctr., 535 U.S. 357, 367 (2002)).

118. *Id.*

119. *Id.*

> professional speech doctrine appears to accept that professionals are often engaged in speech that has as its subject matter issues of public concern, but then assumes that because that speech occurs in a setting involving direct communication between a professional and a client, the speech is disqualified from the protection it would otherwise deserve. Yet even commercial speech doctrine does not go this far.[120]

Just because two things are similar does not mean that they are the same or that they should be treated the same. The communications between a patient and a physician could sound like obscenity, but courts would be amiss to treat those communication the same as courts treat obscenity. They are, in fact, very different, as are regulations of commercial speech and professional speech.

C. *Strict Scrutiny Is the Only Appropriate Standard to Apply to the SOCE Laws*

Upon an examination of Supreme Court precedent and the Eleventh Circuit's decision in *Wollschlaeger v. Govenor of Florida*, it is readily apparent that courts must apply strict scrutiny to content-based regulations of professional speech, like the SOCE laws that are the focus of this Comment. There are also several other reasons that professional speech should be protected.

1. Practical Reasons for Applying Strict Scrutiny

There are several practical reasons for applying strict scrutiny to SOCE laws. First, the communications between a doctor and patient are vital and should be rigorously protected. One reason for their importance is that "good communication between physicians and patients . . . can improve treatment adherence and can be associated with lower malpractice risk."[121] Another reason is that "the special relationship between physicians and patients . . . has as its foundation . . . confidence and trust . . . ."[122] If a patient cannot trust his or her physician, then the relationship between a doctor and patient could be undermined.[123] A patient will not be able to trust their physician if the

120. *Id.* at 91-92.

121. Martha Swartz, *Are Physician Patient Communications Protected by the First Amendment?*, 2015 CARDOZO L. REV. DE NOVO 92, 102 (2015).

122. *Id.* at 102-03.

123. *Id.* at 103.

physician is forced to communicate "the state's directives."[124] The reason for this is that a "[p]atients' ability to make informed decisions about their health is dependent on physicians' abilities to communicate with them in a manner in accordance with their professional training."[125]

Another reason for applying strict scrutiny is that the prohibitions contained in SOCE laws are wholly unnecessary. The reason for this is because "physicians are already constrained in the manner in which they communicate with their patients by their professional ethical obligations . . . ."[126] The APA code of ethics places the requirement upon psychologists to "take reasonable steps to avoid harming their clients/patients."[127] Furthermore, a doctor will already be "constrained by . . . the potential for malpractice suits by her patients . . . ."[128] It is therefore unnecessary to ban harmful speech when a doctor is already prohibited from harming their patients.[129] SOCE laws are an unnecessary abridgment of the freedom of speech.

2. The Eleventh Circuit Takes a Stand

The Eleventh Circuit has followed the Supreme Court in regard to regulations of free speech. In *Wollschlaeger*, a law was passed that prohibited doctors from asking questions to their patients about whether they owned firearms.[130] The Eleventh Circuit began by noting that if a regulation is based on content, it should be presumed to be invalid.[131] The Eleventh Circuit then went on to note that "while content-based restrictions typically trigger strict scrutiny, the court need not decide whether it applies here, as the provisions in question fail even under heightened scrutiny as set forth in *Sorrell*."[132] This,

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124. *Id.*

125. *Id.*

126. *Id.*

127. *Ethical Principles of Psychologists and Code of Conduct* § 3.04 (2017), AMERICAN PSYCHOLOGICAL ASSOCIATION, http://www.apa.org/ethics/code/ (last visited October 20, 2017).

128. Swartz, *supra* note 121, at 103.

129. There are many types of medical treatment that could potentially be harmful if they are inadequately administered. There are also many types of medical treatment that could come with a high risk of harm even if they are properly administered. For example, a heart transplant has the potential to be very dangerous. I cannot imagine, however, that people would agree with completely banning this type of medical treatment.

130. Wollschlaeger v. Governor of Florida, 848 F.3d 1293, 1302-03 (11th Cir. 2017).

131. *Id.* at 1300.

132. Claudia E. Haupt, *Professional Speech and the Content-Neutrality Trap*, 127 YALE L.J. FORUM 150, 153 (2017).

however, is not necessarily what is important about this case. What is important is that the Eleventh Circuit did not draw the distinction between ordinary speech and professional speech.[133] Instead, the Eleventh Circuit made it clear that "doctor-patient communications *about* medical treatment receive substantial First Amendment protection."[134] The Eleventh Circuit followed Supreme Court precedent and established content neutrality as the appropriate standard.

There is a distinction that could be drawn between *Wollschlaeger* and SOCE cases like *Pickup* and *King*. *Wollschlaeger* was regulating doctors from asking about firearms, which appear to be unrelated to medical care. The SOCE cases, on the other hand, are regulating medical care that is given through speech. This distinction does not, however, have a negative effect on this Comment. First, the regulation concerning guns was related to medical care. The doctors were asking about guns in situations where they thought their patient might be mentally unstable or contemplating suicide. This is medical treatment because it goes towards the mental health and protection of a patient. Regardless of this, the important point of the decision is that the Eleventh Circuit did not recognize a category of professional speech. Instead, the Eleventh Circuit simply applied Supreme Court precedent, which is further explained below.

3. Supreme Court Precedent Points Toward the Use of Strict Scrutiny

The Supreme Court has not shied away from hearing cases regarding regulations of free speech. When viewing Supreme Court precedent as a whole, one can see that the general consensus is not in favor of regulations of speech, but in opposition to such regulations. In addition, it is evident that the focus of the Court is whether a law is content-based or content-neutral.

In *U.S. v. Playboy Entertainment Group, Inc.*, the federal government had enacted a law that restricted television providers from showing any Playboy content between 10 p.m. and 6 a.m.[135] The Court deemed the transmission of sexually explicit images to be protected by the First Amendment even though the images could be harmful if children viewed them.[136] Because of this, it was necessary to determine whether the law was content-based.[137] The Court

133. The Eleventh Circuit's "reference to 'public debate,' of course, is telling, as it reveals the court's failure to distinguish public discussions from advice-giving within the confines of the professional-client relationship." *Id.* at 154.

134. *Wollschlaeger*, 848 F.3d at 1309.

135. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 806 (2000).

136. *Id.* at 811.

137. This has an important application to SOCE laws. Even if a particular form of speech is harmful, a content-based regulation of such harmful speech will still be subject to strict

found the law to be content-based because it only applied to channels that transmitted sexually-explicit images.[138] Therefore, strict scrutiny was applied to the law.[139]

In *Turner Broadcasting System v. F.C.C.*, the Court applied intermediate scrutiny.[140] The law in *Turner Broadcasting System* required cable providers to carry channels from local broadcasting stations.[141] Again, the Court focused on the content of the statute.[142] Because the statute applied to all stations or channels and did not focus on one type in particular, the law was content-neutral.[143] The Court also looked to *Ward v. Rock Against Racism* to define content neutrality.[144] There, the Court declared that the "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys."[145] It was clear to the Court that the law was "not designed to favor or disadvantage speech of any particular content."[146] The purpose of the law was to protect broadcast television and not to limit it.[147] Thus, intermediate scrutiny was the appropriate standard.[148]

Other cases have also handed down language that is helpful. For example, the Supreme Court has issued the clear statement that "the principle that government may restrict entry into [the] professions and vocations through licensing schemes has never been extended to encompass the licensing of speech . . . ."[149] This is paramount in the context of professional speech and SOCE laws. It serves to refute the very analogy the Ninth and Third Circuits relied on in *Pickup* and *King*. As has already been shown, courts applying a lesser level of scrutiny often rely on the fact that the states have the power to license professionals.[150] The Supreme Court has made it clear, however, that

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scrutiny. *See Playboy Entm't Grp., Inc.*, 529 U.S. at 813. Thus, even though it is argued that SOCE therapy is harmful, a law that regulates SOCE therapy in a content-based manner must still be subjected to strict scrutiny.

138. *Playboy Entm't Grp., Inc.*, 529 U.S. at 811.

139. *Id.* at 813.

140. Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 661-62 (1994).

141. *Id.* at 630.

142. *Id.* at 642.

143. *Id.* at 652.

144. *Id.* at 642.

145. Ward v. Rock Against Racism, 491 U.S. 781, 791(1989).

146. *Turner Broad. Sys., Inc.*, 512 U.S. at 652.

147. *Id.*

148. *Id.* at 662.

149. Lowe v. SEC, 472 U.S. 181, 229 (1985).

150. King v. Governor of New Jersey, 767 F.3d 216, 228 (3d Cir. 2014).

the power to license professionals has no bearing and should not be applied to the licensing of speech. It would seem illogical to conclude that because the government can restrict entry into a profession, it can also restrict what individuals in that profession can say. The Supreme Court has answered this question.

This issue culminated in the landmark case of *Reed v. Town of Gilbert*. In *Reed*, a town had a local ordinance that restricted the manner and means through which signs could be displayed.[151] The law prohibited a church from putting up signs "to advertise the time and location of their Sunday church services."[152] The Court held that the sign law was content-based.[153] It did not struggle to reach this conclusion.[154] The law drew distinctions based upon what the sign was doing or what it said.[155] For example, it applied to political or ideological signs.[156] It also placed different restrictions on the different types of signs.[157] Furthermore, "[t]he restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign."[158] Thus, they were content-based on their face.[159] Because of this, the

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151. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2224 (2015).

152. *Id.* at 2225.

153. *Id.* at 2227.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Reed*, 135 S. Ct. at 2227.

158. *Id.*

159. *Id.* The Court also addressed the argument that a law is not content-based if that was not the government's motive for the regulation. *Id.* at 2228. In regard to this, the Court made it clear that

> this analysis skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993). We have thus made clear that "'[i]llicit legislative intent is not the sine qua non of a violation of the First Amendment,'" and a party opposing the government "need adduce 'no evidence of an improper censorial motive.'" Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 117 (1991). Although "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary." Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 642 (1994). In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.

Id. The Court also gave a very logical reason for this rule. The Court stated,

Court stated that there was "no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny."[160]

On a side note, this statement is very important in the context of SOCE laws. When determining whether to apply strict scrutiny, the Supreme Court has made it clear that courts should not look to the reasons or justifications behind a regulation or statute. Instead, courts are only to determine whether a law is content-based or content-neutral. In the context of SOCE laws, courts have considered the importance of the law and the need to protect children. This is a plain error in light of *Reed*.[161] The only issue that should be considered is whether a given SOCE law is content-based.

"In *Reed*, the Court drew a firm line in insisting that all content-based regulations should be subject to strict scrutiny."[162] Of note, this case was decided after both *Pickup* and *King*. The Court stated that "a government, including a municipal government vested with state authority, 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"[163] The Court also made it clear that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[164] This statement makes one thing clear: a content-based law can *only* be constitutional if it survives strict scrutiny. The Court did not make this conditional upon whether the statute was professional speech or ordinary speech. It applies to all content-based laws, no matter their function. Thus, strict scrutiny must be applied to content-based regulations of professional speech.

The SOCE laws at issue in *Pickup* and *King* are content-based for similar reasons that the law in *Reed* was content-based. They regulate what a

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> Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—i.e., the "abridg[ement] of speech"—rather than merely the motives of those who enacted them. U.S. Const., Amdt. 1. "'The vice of content-based legislation ... is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.'" Hill v. Colorado, 530 U.S. 703, 743 (2000) (Scalia, J., dissenting).

160. *Id.* at 2227.

161. *Id.* at 2227.

162. Schutzman, *supra* note 38, at 2052 (emphasis added).

163. *Reed*, 135 S. Ct. at 2226.

164. *Id.*

counselor says to minor patients or clients. The SOCE regulations are based on the communicative content of the speaker, just like the law in *Reed* was based on the communicative content of the sign. For example, if a counselor affirms an individual's homosexual attractions, then he will not be in violation of an SOCE law.[165] If, on the other hand, he merely suggests that these attractions can be changed if the individual wishes, then he will be in violation of the SOCE law.[166] Therefore, pursuant to *Reed*, SOCE laws are content-based.[167]

Furthermore, the Court stated that "a speech regulation is content-based if the law applies to particular speech because of the topic discussed or the idea or message expressed."[168] SOCE laws are regulations of a particular form of speech. They apply to counselors that administer therapy through speech.[169] For example, one such law applies to any therapy, which naturally must include speech therapy, that "seeks to change the person's sexual orientation or gender identity."[170] Thus, it applies to any type of speech that fits within this criterion. The law does not apply if a counselor affirms a person's sexual orientation. Therefore, the law applies to a specific message and is content-based.

There are additional reasons why SOCE laws are content-based. The Court in *Reed* stated:

> [o]ur precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be "justified without reference to the content of the regulated speech," or that were adopted by the government "because of disagreement with the message [the speech] conveys."[171]

An SOCE law cannot be justified without reference to the content of the speech. A law enforcement officer cannot determine whether someone is violating an SOCE law without making some reference to whether a

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165. *See* Conn. Substitute House Bill No. 6695; N.J. STAT. ANN. 45:1-55; CAL. BUS. & PROF. CODE D. 2, Ch. 1, Art. 15 (West 2017).

166. *See id.*

167. Megan E. McCormick, Note, *The Freedom to be "Converted"?: An Analysis of the First Amendment Implications of Laws Banning Sexual Orientation Change Efforts*, 48 SUFFOLK U. L. REV. 171, 198 (2015).

168. *Reed*, 135 S. Ct. at 2231.

169. *See* Conn. Substitute House Bill No. 6695; N.J. STAT. ANN. 45:1-55; CAL. BUS. & PROF. CODE D. 2, Ch. 1, Art. 15 (West 2017).

170. Conn. Substitute House Bill No. 6695.

171. *Reed*, 135 S. Ct. at 2227.

counselor is affirming or seeking to change a person's sexual orientation. Thus, SOCE laws are content-based because of this first category.

SOCE laws also fall within the second category as well. The legislature has clearly stated that it finds SOCE therapy to be harmful.[172] It also admits that the purpose or reason it adopted the law was because it deemed SOCE therapy to be harmful.[173] Therefore, the government clearly disagrees with the message of a counselor that renders SOCE therapy. If you find speech to be harmful, then that naturally means you disagree with the viewpoint expressed. Thus, the laws were adopted because of a disagreement with the viewpoint of SOCE counselors. These two categories are additional evidence that serve to show that SOCE laws are content-based.

Reed has made it clear that the focus of a First Amendment analysis should be on the content of the speech being regulated and not on the person whose speech is being regulated. This makes perfect sense in light of the Fourteenth Amendment to the United States Constitution. This amendment makes it clear that states shall not "deny to any person within its jurisdiction the equal protection of the laws."[174] All people in the United States are to be treated equally, regardless of status. Thus, a professional should not have a diminished right of protection under the First Amendment.

The link between strict scrutiny and professional speech becomes more apparent when looking to the nature of professional speech. "All regulations of professional speech are content-based because they are focused on altering the content of what a professional conveys or does not convey to a client."[175] If the very nature of a restriction of professional speech means that it will be content-based, then this lends further support for the necessity of applying strict scrutiny to all regulations of professional speech.

There was one other statement in *Reed* that is of particular importance. The Court addressed the argument that an "'absolutist' content-neutrality rule would render 'virtually all distinctions . . . subject to strict scrutiny.'"[176] Similar arguments have been advanced against the use of strict scrutiny for SOCE laws. The Court, however, stated that, "[n]ot 'all distinctions' are subject to strict scrutiny, only *content-based* ones are."[177] The Supreme Court

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172. Cal. Senate Bill No. 1172(1)(n).

173. *Id.* (stating "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").

174. U.S. CONST. amend. XIV.

175. Schutzman, *supra* note 38, at 2048.

176. *Reed*, 135 S. Ct. at 2232.

177. *Id.*

has made its position clear on content-based regulations. The lower courts must now follow suit.

4. Arguments against Strict Scrutiny

The main reason that courts reject strict scrutiny as the appropriate standard of review is because they believe "it offers too much protection to the speech."[178] It is feared that this may take away a state's ability to regulate.[179] These concerns, however, are not persuasive as will be explained below.

First, a level of scrutiny should not be chosen based on whether the court wants to uphold a law or statute. A level of scrutiny is the lens through which the court is required to view the statute. If a court is just going to apply a level of scrutiny based on a desired outcome, then there is no point in having levels of scrutiny because it becomes nothing more than a formality. The level of scrutiny should be the starting point of a First Amendment analysis and a court should apply the appropriate level of scrutiny, no matter its views on a particular law or statute. As seen in *Reed*, the Supreme Court has made it clear that content-based regulations should be analyzed under strict scrutiny. Thus, in determining which level of scrutiny to apply, a court must consider whether a law is content-based. If it is, then strict scrutiny should be applied.

Second, the states will not lose their ability to regulate. It is possible for a statute to survive strict scrutiny. The states might have a tougher time regulating in certain areas, but this is the burden the Constitution places upon the states, especially regarding the freedom of speech. Therefore, having to apply strict scrutiny will just require the states to do their job when regulating, and make sure that laws and statutes are properly construed. It is not the job of the courts to make it easy for the states to pass legislation.

Reed has already addressed this concern.[180] First, there are ways that strict scrutiny can be survived.[181] Some regulations will be necessary or essential.[182] The states will still be able to regulate if their statutes survive strict scrutiny.[183] Second, states have "ample content-neutral options available to resolve problems with safety . . . ."[184] The states do not have to enact statutes that are content-based; there are other options to accomplish the same objectives. For

178. Schutzman, *supra* note 38, at 2052.

179. *Id.*

180. *Reed*, 135 S. Ct. at 2232.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

example, a state could pass a statute which prohibits a counselor from performing electroshock therapy on a minor.

Some may assert that the Supreme Court agreed that a lower level of scrutiny should be applied to professional speech regulations in *Doe v. Christie*, where the Supreme Court denied certiorari.[185] In *Doe*, the district court ruled in favor of New Jersey, holding as constitutional the same statute challenged in *King*.[186] The district court in *Doe* ruled in favor of New Jersey and upheld the statute.[187] The court in *Doe* also applied a rational basis review.[188] Therefore, because the Supreme Court denied certiorari, some might object to this Comment because they believe the Supreme Court agrees that rational basis is the appropriate standard.

There are several problems, however, with this line of reasoning. First, a denial of certiorari does not mean that the Supreme Court agrees with every facet of a particular opinion. "A decision to deny certiorari does not necessarily imply that the higher court agrees with the lower court's ruling; instead, it simply means that fewer than four justices determined that the circumstances of the decision of the lower court warrant a review by the Supreme Court."[189]

Second, even if something could be obtained from *Doe* regarding strict scrutiny, *Doe* and *King* can be distinguished. As has already been shown, *King* dealt with a challenge of an SOCE law by a counselor.[190] *Doe*, on the other hand, dealt with a challenge by a patient.[191] Thus, the First Amendment claim was different, in that it concerned an infringement on the right to receive information.[192] Therefore, *Doe* is different from *Pickup* and *King* and should not be used to make presumptive statements concerning these cases.

5. *National Institute of Family and Life Advocates v. Becerra*[193]

The rationale and arguments advanced thus far in this Comment have now been recognized and affirmed by the United States Supreme Court in

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185. Doe v. Christie, 136 S. Ct. 1155 (2016).

186. Doe v. Christie, 33 F. Supp. 3d 518, 521 (D.N.J. 2014).

187. *Id.* at 530.

188. *Id.* at 526.

189. *Certiorari*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/certiorari (last accessed Oct. 8, 2018).

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

191. *Doe*, 33 F. Supp. 3d at 520.

192. *Id.* at 524.

193. *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018). While this Comment was in the process of being published, the Supreme Court decided

National Institute of Family and Life Advocates v. Becerra.[194] In *Becerra*, the Supreme Court declared that it does not recognize a separate category of "professional speech."[195] Furthermore, the Court stated, "Speech is not unprotected merely because it is uttered by 'professionals.'"[196] As a result, the Court abrogated both *Pickup* and *King*.[197] Therefore, the Supreme Court has now directly held that a content-based regulation of speech, regardless of whether the speech is uttered by a professional, should be subjected to strict scrutiny.[198]

While this would seem to end the debate over the appropriate level of scrutiny for SOCE laws, there are still objections that might be advanced to the application of strict scrutiny. The first relates to a statement the Supreme Court made in *Becerra*. The Court remarked that "California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles."[199] The Court then went on to say, however, that it did "not foreclose the possibility that some such reason exists."[200]

From this, an argument could be made that there is a persuasive reason, in the context of SOCE laws, for treating professional speech as a separate category. This argument is flawed for two reasons. First, as has already been stated, there are several practical reasons for why professional speech should not receive diminished protection in the context of SOCE laws.[201] Second, the reasons that were advanced for treating professional speech differently in *Becerra*, which the Supreme Court rejected, were the same reasons that were relied upon in *Pickup* and *King*.[202] Therefore, the courts in *Pickup* and *King*

National Institute of Family and Life Advocates v. Becerra. Thus, it was imperative to amend this article to include a discussion of Becerra.

194. *See Becerra*, 138 S. Ct. at 2361.

195. *Id.* at 2371-72.

196. *Id.*

197. *Id.*

198. *Id.* at 2372.

199. *Id.* at 2375.

200. *Becerra*, 138 S. Ct. at 2375.

201. *Supra* Section III.C.1.

202. *See* Nat'l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 838-39 (9th Cir. 2016) (relying on *Pickup*, 740 F.3d at 1208 to support the category of professional speech). If *Becerra* relied on *Pickup* to find a separate category of professional speech, and the Court found that no persuasive reason was advanced in *Becerra*, then it is only logical that no persuasive reason was advanced in *Pickup*. Furthermore, *King* also relied on *Pickup* and other Supreme Court cases in finding a separate category of professional speech. *King*, 767 F.3d at 236-37. In light of *Becerra*, these cases do not support a separate category of professional

do not have a persuasive reason, according to *Becerra*, for affording professional speech diminished First Amendment protection.[203]

The other potential argument relates to two exceptions that were mentioned in *Becerra*. The Court mentioned that it

> has afforded less protection for professional speech in two circumstances—neither of which turned on the fact that professionals were speaking. First, our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their "commercial speech." Second, under our precedents, States may regulate professional conduct, even though that conduct incidentally involves speech. But neither line of precedents is implicated here.[204]

The current SOCE laws of California, New Jersey, and Connecticut would not fit within either of these exceptions. In referencing the first exception mentioned above, the Supreme Court explained that the exception is dealing with laws which require "the disclosure of 'purely factual and uncontroversial information about the terms under which . . . services will be available,'" in other words, laws that regulate commercial advertising.[205] SOCE laws are not regulations of commercial advertising.[206] They are a regulation of the communications between a physician and a patient. Thus, SOCE laws do not fit within the first exception mentioned by the Supreme Court.

SOCE laws also do not fit within the second exception. As already explained, SOCE laws are not a regulation of professional conduct.[207] The Supreme Court explained, in *Becerra*, that the informed consent law at issue in *Planned Parenthood of Southeastern Pennsylvania v. Casey* was a regulation of professional conduct.[208] The Court had no trouble concluding

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speech. *See also* Section III.B.1 (discussing why these cases do not support a category of professional speech).

203. *Becerra*, 138 S. Ct. at 2366.

204. *Id.*.at 2372 (citations omitted).

205. *Id.* at 835.

206. While one might argue that a section of Connecticut's SOCE law is a regulation of advertising, the point of this comment is to address those sections of SOCE laws which directly regulate the communications between a physician and a patient during therapy. This aspect of the law is not a regulation of commercial advertising. Thus, any section of an SOCE law which is designed to regulate advertising is outside the scope of this Comment.

207. *Supra* Section III.A.1.

208. *Becerra*, 138 S. Ct. at 2373.

that licensed notice in *Becerra* was not an informed consent law or any other regulation of professional conduct.[209]

The Ninth Circuit held that the SOCE law in *Pickup* was a regulation of conduct because it did not prohibit SOCE counselors from communicating a message.[210] The court reasoned that an SOCE counselor could still express his views on SOCE counseling to a patient, and that he was only prohibited from practicing SOCE therapy on the patient.[211] This logic breaks down very quickly. Even if the Ninth Circuit were correct that a counselor could still express the view that SOCE therapy was a valid form a therapy, this does not mean that speech is not being suppressed. A suppression is still occurring in that a counselor is being told what he can and cannot say about SOCE therapy. It is illogical to conclude that because someone can speak their views on SOCE counseling, there is no suppression of speech when a counselor is prohibited from saying the words necessary to practice SOCE therapy.

As the Third Circuit acknowledged, "the argument that verbal communications become 'conduct' when they are used to deliver professional services was rejected by *Humanitarian Law Project*."[212] The Supreme Court held, in *Humanitarian Law Project*, that a regulation of legal counseling was a regulation of speech, so it is only logical that a regulation of SOCE counseling would also be a regulation of speech.[213]

SOCE laws do not incidentally involve speech. They directly regulate the speech of counselors and prohibit an entire category of speech or therapy. Thus, they do not fit within the second exception relating to regulations of professional conduct that incidentally involve speech. The Supreme Court requires strict scrutiny for content-based laws unless the law is dealing with a regulation of a nonpublic forum or a limited public forum.[214] SOCE laws

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209. *Id.* at 2373-74.

210. *Pickup*, 740 F.3d at 1230.

211. *Id.*

212. *King*, 767 F.3d at 228 (emphasis added).

213. *See* Holder v. Humanitarian Law Project, 561 U.S. 1, 27 (2010); *see also King*, 767 F.3d at 225.

214. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2232 (2015); *see also Becerra*, 138 S. Ct. at 2365. A limited public forum is created where the government makes "an affirmative choice to open up its property for use as a public forum." U.S. v. American Library Association, Inc., 539 U.S. 194, 206 (2003). "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 802 (1985). A nonpublic forum, on the other hand, is "[p]ublic property which is not by tradition or designation a forum for public communication . . . ." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

are not regulations of speech on government property. Therefore, SOCE laws must be subjected to strict scrutiny.

IV. RIGHTING PAST WRONGS

Now that the Supreme Court has clarified that professional speech is afforded full First Amendment protections, it is time for the lower courts to follow suit. SOCE laws, however, are still being enforced and the First Amendment rights of counselors are still being violated. As such, something must be done to restore the rights of SOCE counselors. There are two potential solutions to this problem. The best solution would be for the states to repeal these statutes. Then, going forward, states should avoid passing content-based laws if possible. Unfortunately, this is not likely to happen.

The other solution is for the circuits to apply Supreme Court precedent to SOCE laws. Because *Pickup* and *King* have been abrogated and not directly reversed, the circuits will not automatically rehear these cases. If one of the parties to the case, however, were to file a petition for rehearing, then the circuits would have an opportunity to rehear the case and apply the appropriate level of scrutiny. Finally, if any other SOCE laws are brought before courts, strict scrutiny must be applied.

V. CONCLUSION

The First Amendment may seem clear. It simply says that "Congress shall make no law . . . abridging the freedom of speech . . . ."[215] In light of this Comment, however, one can see the complexities of the First Amendment. While some courts draw distinctions between ordinary speech and professional speech, this does not mean that one is afforded more constitutional protections than the other. The Supreme Court clarified in *Reed* that if a law is content-based, strict scrutiny should be applied.[216] All people are afforded the same protections under the First Amendment. It does not matter if the speaker is a professional. This is very beneficial, as "[p]rofessionals are an important part of the fabric of every community because they provide necessary—even lifesaving—services."[217] The rights of our professionals must be protected.

SOCE laws are one form of regulation to which courts have not applied strict scrutiny. When analyzing Supreme Court precedent, it can be seen that this is not appropriate. SOCE laws are content-based. They regulate the

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215. U.S. CONST. amend. I.

216. *See Reed*, 135 S. Ct. at 2232.

217. Schutzman, *supra* note 38, at 2055.

content of the speech of a counselor. The courts should not focus on the importance or necessity of such a regulation. Instead, the courts should apply strict scrutiny to follow Supreme Court precedent.

While SOCE laws may appear to jeopardize the freedoms of certain professionals, the battle is not over. The Supreme Court recently clarified that there is not a separate category of professional speech and that professional speech is afforded full First Amendment protections.[218] It is now time for the lower courts to follow Supreme Court precedent by overruling their contrary decisions and restore the First Amendment rights of professionals. If this were done, then it would once again demonstrate that America is dedicated to the freedom of speech and will continue to rigorously protect it in the future.

218. *See Becerra*, 138 S. Ct. at 2365-66.