FIRST AMENDMENT — PROFESSIONAL SPEECH — ELEVENTH CIRCUIT INVALIDATES MINOR CONVERSION THERAPY BANS. — *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020).

Conversion therapy, also known as sexual orientation change efforts (SOCE), is the scientifically discredited practice of trying to change someone's sexual orientation or gender identity.[1] While the most appalling forms of conversion therapy have largely been abandoned,[2] the controversial practice remains alive and well today, primarily through speech-based talk therapy.[3] Today, half of the nearly 700,000 LGBTQ+ U.S. adults who have undergone conversion therapy received the treatment as children.[4] In an effort to protect LGBTQ+ children, twenty states have passed ordinances banning licensed physicians from practicing conversion therapy on minors.[5] These bans were aimed at minors, for whom the treatment is especially harmful because minors are typically pressured by family to participate.[6]

Just days after California passed the first ban, multiple lawsuits challenging the ban's constitutionality were filed.[7] Each circuit that has

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[1] AM. MED. ASS'N, LGBTQ CHANGE EFFORTS (SO-CALLED "CONVERSION THERAPY") 1, 3 (2019), https://www.ama-assn.org/system/files/2019-12/conversion-therapy-issue-brief.pdf [https://perma.cc/37MM-AVVA] ("All leading professional medical and mental health associations reject 'conversion therapy' as a legitimate medical treatment." *Id.* at 3.).

[2] Tiffany C. Graham, *Conversion Therapy: A Brief Reflection on the History of the Practice and Contemporary Regulatory Efforts*, 52 CREIGHTON L. REV. 419, 421–22 (2019) (describing use of electroshock therapy and lobotomies during the "gilded age," *id.* at 422, of conversion therapy in the mid-twentieth century).

[3] *See* CHRISTY MALLORY ET AL., THE WILLIAMS INST., CONVERSION THERAPY AND LGBT YOUTH 1 (2018), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Conversion-Therapy-Jan-2018.pdf [https://perma.cc/P2SW-49YD].

[4] *Id.*

[5] *See* Sandra E. Garcia, *Virginia Is First Southern State to Ban Conversion Therapy for Minors*, N.Y. TIMES (Mar. 3, 2020), https://www.nytimes.com/2020/03/03/us/va-conversion-therapy-ban.html [https://perma.cc/8DWL-FBBU]; *see also* MALLORY ET AL., *supra* note 3, at 1 (noting an estimated "20,000 LGBT youth (ages 13–17) will receive conversion therapy from a licensed health care professional" in the "states that currently do not ban the practice").

[6] *See* A.B.A. COMM'N ON SEXUAL ORIENTATION AND GENDER IDENTITY, REPORT TO THE HOUSE OF DELEGATES 4–6 (2015), https://www.americanbar.org/content/dam/aba/administrative/sexual_orientation/2015-hod-ann-mtg-doc-112.pdf [https://perma.cc/M5FB-WPZ3] ("[C]onversion therapy often occurs within the context of other rejecting behaviors and attitudes within the family." *Id.* at 4.); *see also* NAT'L CTR. FOR LESBIAN RTS., JUST AS THEY ARE: PROTECTING OUR CHILDREN FROM THE HARMS OF CONVERSION THERAPY 12–13 (2017), https://www.nclrights.org/wp-content/uploads/2017/09/just-as-they-are-sept2017-1.pdf [https://perma.cc/3MGG-LWJE] (finding that youth who experience conversion therapy are at higher risk of suicide, depression, substance abuse, and risky sexual behavior).

[7] 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. & L. 451, 454 (2014).

reviewed these bans has upheld them, until now.[8] Recently, in *Otto v. City of Boca Raton*,[9] the Eleventh Circuit held that local bans on juvenile conversion therapy violated the First Amendment.[10] In doing so, the *Otto* panel incorrectly categorized talk therapy as constitutionally protected speech when Supreme Court precedent would instead suggest treating it as speech only incidental to conduct, subject to lower scrutiny. The holding threatens to turn the First Amendment into a blunt weapon against all regulations aimed at professional conduct.

In 2017, the City of Boca Raton and Palm Beach County joined a "growing list of states and municipalities" by passing local ordinances banning licensed therapists from practicing conversion therapy or "sexual orientation change efforts" — any therapy aimed at changing a patient's sexual orientation or gender identity.[11] The passage of both ordinances relied upon "legislative findings that SOCE pose[d] a serious health risk to minors."[12] Dr. Robert Otto and Dr. Julie Hamilton are licensed therapists who practiced speech-based SOCE therapy.[13] They asserted that clients with depression and anxiety due to "unwanted same-sex attraction or unwanted gender identity issues" could benefit from SOCE therapy to "reduce same-sex behavior and attraction and eliminate what they term confusion over gender identity."[14]

Drs. Otto and Hamilton filed suit in the Southern District of Florida.[15] They sought to enjoin enforcement of the ordinances and moved for a preliminary injunction on the ground that prohibiting speech-based SOCE violated their First Amendment rights.[16] The district court denied their motion for preliminary injunction.[17] Declining to rule on the proper standard of review, the court instead applied all three tiers of scrutiny.[18] Because the ordinances would survive rational basis and intermediate review, and would likely survive strict scrutiny,

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[8] *See* King v. Governor of N.J., 767 F.3d 216, 240 (3d Cir. 2014) (upholding New Jersey's SOCE ban); Pickup v. Brown, 740 F.3d 1208, 1229 (9th Cir. 2014) (upholding California's SOCE ban), *cert. denied*, 573 U.S. 945 (2014).

[9] 981 F.3d 854 (11th Cir. 2020).

[10] *Id.* at 859.

[11] *Id.* Clergy members are exempted from the ban. *Id.*

[12] *Id.* Scientific studies relied upon by the legislature include the American Psychiatric Association's findings that such treatment may lead to increased risk of "depression, anxiety, and self-destructive behavior." Otto v. City of Boca Raton, 353 F. Supp. 3d 1237, 1259 (S.D. Fla. 2019).

[13] *Otto*, 981 F.3d at 860.

[14] *Id.*

[15] *Otto*, 353 F. Supp. 3d at 1245.

[16] *Id.* The plaintiffs also argued that the ordinances were *ultra vires* and preempted by state law. *Id.* at 1245, 1272.

[17] *Id.* at 1270.

[18] *See id.* at 1242 ("At this early stage of the litigation, the Court need not resolve whether strict scrutiny [applies] . . . .").

the court concluded that the plaintiffs failed to demonstrate a substantial likelihood of success.[19] The plaintiffs filed an interlocutory appeal.[20]

The Eleventh Circuit reversed.[21] Writing for the panel, Judge Grant[22] held that all four requirements for a preliminary injunction were satisfied.[23] She stated that the ordinances constituted both content and viewpoint discrimination, triggering heightened scrutiny.[24] She explained that the Supreme Court's ruling in *National Institute of Family Life & Advocates (NIFLA) v. Becerra*[25] rejected the district court's position that a relevant carveout might apply for professional speech.[26] Citing *NIFLA*, Judge Grant stated that speech by professionals, like other forms of speech, is protected by the First Amendment.[27] She further cited circuit precedent in *Wollschlaeger v. Florida*[28] to reject the defendant's characterization of talk therapy as conduct, stating that the SOCE treatment was "*entirely* speech."[29] Judge Grant reasoned that if SOCE was not speech, then teaching, protesting, debating, and book clubs cannot be speech.[30] Therefore, she held that the ordinances must be reviewed under strict scrutiny.[31]

Further, Judge Grant held that the government failed to demonstrate that the ordinances were narrowly tailored to further a compelling interest.[32] She acknowledged that protecting children from harm was a compelling interest, but stated that the government failed to demonstrate that SOCE caused harm.[33] She rejected existing studies on speech-based SOCE as insufficiently rigorous evidence to demonstrate harms against children, instead explaining that suppressing ideas that the legislature thought "unsuitable for [children]" alone could not support a government interest.[34] Therefore, the panel concluded that the

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19 *Id.* The plaintiffs' claims on grounds of prior restraint, vagueness, and state preemption also failed. *Id.*

20 *Otto*, 981 F.3d at 860.

21 *Id.* at 872.

22 Judge Grant was joined by Judge Lagoa.

23 *Otto*, 981 F.3d at 870. The four requirements for preliminary injunction are met if the plaintiff can show a likelihood of success on the merits, irreparable injury, a favorable balance of equities and hardships, and that the injunction would not be adverse to the public interest. *Id.* at 860.

24 *Id.* at 864; *see also id.* at 861 ("[B]ecause the ordinances depend on what is said, they are content-based restrictions . . . .").

25 138 S. Ct. 2361 (2018).

26 *Otto*, 981 F.3d at 867.

27 *Id.* at 861.

28 848 F.3d 1293 (11th Cir. 2017).

29 *Otto*, 981 F.3d at 865.

30 *Id.*

31 *Id.* at 867–68.

32 *Id.* at 868.

33 *See id.* at 868–69.

34 *Id.* at 868 (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 213–14 (1975)).

minor SOCE bans failed to survive strict scrutiny and thus were unconstitutional.[35] Having determined that the plaintiffs were likely to succeed on the merits of their claim, Judge Grant concluded that the other three requirements for a preliminary injunction were met.[36]

Judge Martin dissented.[37] She declined to answer the "difficult question" of whether the ordinances regulated speech or conduct that incidentally involved speech.[38] However, she stated that even if strict scrutiny applied, the ordinances were narrowly tailored to further a compelling government interest, thus passing constitutional muster.[39] Judge Martin explained that the government's compelling interest both in protecting minors from harm and in regulating professions was supported by "evidence . . . indicat[ing] that individuals experience harm from SOCE."[40] Her dissent noted that the panel improperly dismissed the "mountain of rigorous evidence" proving the dangers of SOCE.[41] She stated that the majority "invit[ed] unethical research" by demanding additional evidence of harm, because encouraging studies on SOCE would be both dangerous and scientifically futile.[42] Further, because the ordinances still allowed therapists to recommend, discuss, and publicly support SOCE and practice SOCE on adult patients, they were narrowly tailored.[43] Judge Martin concluded that the minor SOCE bans would survive strict scrutiny.[44] Therefore, she would have affirmed the district court's denial of preliminary injunction.[45]

As the first federal court of appeals to strike down a SOCE ban against minors, the *Otto* panel failed to grapple with the existing Supreme Court framework for differentiating constitutionally protected speech from speech incidental to professional conduct. Under *NIFLA*, the Supreme Court carefully differentiated professional speech subject to full First Amendment protection from professional speech incidental

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[35] *Id.* at 869.

[36] *Id.* at 870. She stated that the second, third, and fourth requirements were met due to the unconstitutional nature of the ordinance. *Id.*

[37] *Id.* at 872 (Martin, J., dissenting).

[38] *Id.* at 873. Judge Martin also argued that the ordinances did not constitute viewpoint discrimination because they did not preference any type of speech over another. *Id.* at 874.

[39] *Id.* at 879–80.

[40] *Id.* at 876 (quoting a report from the American Psychological Association).

[41] *Id.* at 878. Such evidence includes the APA's 130-page report and other scientific reports detailing the harmful impacts of conversion therapy on a patient's risk of suicide, depression, anxiety, and self-destructive behavior. *Id.* at 876, 878 n.6.

[42] *Id.* at 877. Judge Martin explained that the studies demanded by the panel would be both dangerous, because SOCE is harmful, and pointless, because sexual orientation is not an issue that requires fixing. *See id.*

[43] *See id.* at 879.

[44] *Id.* at 880.

[45] *Id.*

to conduct, unprotected by the First Amendment. The Court's analysis of *Planned Parenthood of Southeastern Pennsylvania v. Casey*[46] demonstrated that what constitutes protected professional speech turns not on whether the law affects speech, but whether such speech is itself part of professional practice.[47] Because speech therapy is itself part of medical practice, the Eleventh Circuit should have concluded that the SOCE bans did not regulate constitutionally protected speech or trigger strict scrutiny. Further, *Otto*'s misguided reliance on incongruous analogies demonstrated a failure to apply this framework. The Eleventh Circuit's decision has sweeping implications, not only gutting state authority to regulate professional speech but also subjecting LGBTQ+ minors to the deeply harmful practice of SOCE.[48]

In *NIFLA*, the Supreme Court established a First Amendment framework that differentiated between constitutionally protected speech spoken by professionals and unprotected professional speech *incidental* to professional conduct.[49] The *NIFLA* Court examined the constitutionality of a California notice requirement that compelled pro-life clinics to provide notice of free state-provided abortions.[50] The Court rejected a First Amendment carveout for professional speech and stated that content-based regulations, even regarding professional speech, remain subject to strict scrutiny.[51] Applying strict scrutiny, the Court held that the California regulation compelled speech in violation of the First Amendment.[52] However, the Court also reaffirmed that the government could constitutionally regulate professional speech incidental to professional conduct because speech incidental to conduct fell outside of the First Amendment's ambit.[53] While the Court rejected California's argument that its notice requirement fell under this exception, the Court did not eliminate the exception.[54]

The *NIFLA* Court's discussion of *Casey* also established that speech that is itself a "part of the *practice* of medicine" constituted speech incidental to conduct and, therefore, was unprotected by the First Amendment.[55] The *NIFLA* Court explained that *Casey* fit squarely

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[46] 505 U.S. 833 (1992).

[47] *See* NIFLA v. Becerra, 138 S. Ct. 2361, 2373 (2018).

[48] *See* MALLORY ET AL., *supra* note 3, at 1 (estimating that 6,000 LGBT youth living in states banning conversion therapy would have received conversion therapy from a licensed professional if their state had not banned it).

[49] *NIFLA*, 138 S. Ct. at 2373.

[50] *Id.* at 2368. The regulation also required unlicensed clinics to disclose their unlicensed status. *Id.* at 2369–70.

[51] *See id.* at 2372, 2374–75.

[52] *Id.* at 2361–62.

[53] *Id.* at 2373.

[54] *Id.* at 2373–74.

[55] *Id.* at 2373.

within this exception.[56] In *Casey*, Justice O'Connor's opinion rejected a free speech challenge against a Pennsylvania informed-consent law that compelled doctors to provide information designed to discourage an abortion.[57] Because informed consent was itself "part of the *practice* of medicine," the law regulated conduct, not speech, even though it was effectuated exclusively through speech.[58] *Casey* thus held that where a physician's speech is implicated, "but only as part of the practice of medicine," it is "subject to reasonable licensing and regulation by the State."[59] Using *Casey*, the *NIFLA* Court explained that regulation of speech that is itself part of the practice of medicine did not trigger First Amendment scrutiny and was constitutionally permissible.[60]

The *Otto* panel erred by failing to conclude that the SOCE ban, a regulation of speech therapy, fell within the First Amendment exception for speech incidental to conduct. Supreme Court jurisprudence has established that while professional speech receives First Amendment scrutiny, professional speech that is itself part of the practice of medicine does not.[61] When considering whether speech falls under this exception, the operative factor is not whether speech itself is affected, but whether such speech is itself part of medical practice. Speech therapy is itself undoubtedly "part of the practice of medicine."[62] Like *Casey*, *Otto* involved a law that regulated medical practice, despite being effectuated through professional speech. The ordinances did not impact a clinical therapist's ability to recommend, discuss, or publicly support SOCE.[63]

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[56] *Id.*; *see also* Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights:* NIFLA v. Becerra, 94 N.Y.U. L. REV. 61, 66 (2019) ("*Casey* is the big elephant in the room; it is standing in the way between Clarence Thomas and sound logic, and he can't get around it." (citation omitted)).

[57] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) (plurality opinion).

[58] *NIFLA*, 138 S. Ct. at 273 (quoting *Casey*, 505 U.S. at 884 (plurality opinion)); *see also id.* ("[T]he requirement that a doctor obtain informed consent to perform an operation is 'firmly entrenched in American tort law.'" (quoting Cruzan v. Dir. Mo. Dep't of Health, 497 U.S. 261, 269 (1990))).

[59] *Casey*, 505 U.S. at 884 (plurality opinion) (citing Whalen v. Roe, 429 U.S. 589, 603–04 (1977)).

[60] *NIFLA*, 138 S. Ct. at 2373.

[61] *See id.* at 2373–74.

[62] *See Casey*, 505 U.S. at 884 (plurality opinion) (citing *Whalen*, 429 U.S. at 603–04); *Psychotherapies*, NAT'L INST. OF MENTAL HEALTH, https://www.nimh.nih.gov/health/topics/psychotherapies/index.shtml [https://perma.cc/974R-PC4N] ("Psychotherapy (sometimes called 'talk therapy') is a term for a variety of treatment techniques that aim to help a person identify and change troubling emotions, thoughts, and behavior.").

[63] The Eleventh Circuit has previously recognized the significance of whether a practitioner can speak about the treatment outside of medical practice in *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293 (11th Cir. 2017) (en banc), where it invalidated a ban against physicians asking "*all* patients . . . whether they own firearms or have firearms in their homes," *id.* at 1303. The en banc panel distinguished its facts from those in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), where the Ninth Circuit upheld a minor SOCE ban because "the law . . . did not restrict what the practitioner could say or recommend to a patient or client." *Wollschlaeger*, 848 F.3d at 1309 (citing *Pickup*,

Any such regulation would directly restrict speech and thus should trigger strict scrutiny. But because the ordinances limited only a clinical therapist's ability to practice a form of medicine — speech therapy — they are constitutionally permissible regulations of professional speech incidental to conduct and are not protected by the First Amendment.

The panel's misguided reliance on inapposite analogies similarly failed to capture this nuanced First Amendment framework. Judge Grant embarked on a parade of horribles, stating: "If SOCE is conduct, the same could be said of teaching or protesting," as well as "[d]ebating" and "[b]ook clubs."[64] However, teaching *is* constitutionally regulated. Teaching — speech inside of the classroom that is itself part of the practice of educating students — is not entitled to full First Amendment protection.[65] Another flawed analogy was the panel's comparison of minor SOCE bans to bans restricting the architectural styles architects could propose.[66] But this analogy, along with the hypothetical bans against protest, debate, and book clubs, is closer to the law in *NIFLA* because it would restrict speech beyond professional practice and so would receive First Amendment protection. The proper analogy would be a regulation that restricted the types of buildings architects could build, otherwise known as zoning law.[67] Each of these arguments advanced by the court demonstrates a flawed understanding of the Supreme Court's First Amendment jurisprudence on professional speech incidental to conduct.

Otto's reformulation of existing First Amendment jurisprudence categorically subjects all regulations of professional speech to strict scrutiny, effectively eliminating the exception carved out by *NIFLA*'s treatment of *Casey*. Today, most professionals — from tour guides to accountants — work primarily through speech.[68] Based on the *Otto*

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740 F.3d at 1223); *see also id.* ("[T]he law [in *Pickup*] 'regulate[d] conduct' even though it covered the verbal aspects of SOCE therapy." (third alteration in original) (quoting *Pickup*, 740 F.3d at 1229)). While *Wollschlaeger* cast doubt on *Pickup*'s outcome, the court took pains to distinguish its facts from those in *Pickup*. *See id.*

64 *Otto*, 981 F.3d at 865.

65 *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (holding that public employees making statements pursuant to their official duties do not receive First Amendment protections).

66 *Otto*, 981 F.3d at 867 (quoting *Wollschlaeger*, 848 F.3d at 1311).

67 *See, e.g.*, City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984) ("It is well settled that the state may legitimately exercise its police powers to advance [a]esthetic values."); State *ex rel.* Saveland Park Holding Corp. v. Wieland, 69 N.W.2d 217, 222 (Wis. 1955) (upholding an architectural zoning ordinance restricting building permits based on "exterior architectural appeal," *id.* at 223, as a valid exercise of state police power).

68 *See* Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 179 (2015) ("Virtually everything humans do requires the use of language."); *see also id.* at 181 ("Does anyone believe that every Enron accountant is entitled to his or her opinion, regardless of generally accepted accounting practices?").

court's holding, any regulation impacting such professional speech will be subject to strict scrutiny. But while free speech protections are essential to liberty and democracy, the First Amendment should not be weaponized against reasonable state regulation of practice. Within the medical community, the right of professionals to speak on medical issues is paramount, especially when the profession has diverse views on treatments such as assisted suicide or medical marijuana.[69] States rightfully cannot ban doctors from freely debating or discussing the merits of such treatments, but states constitutionally can (and do) ban the practice of such treatments.[70] Talk therapy, likewise, is medical treatment, and the fact that it is effectuated through speech should not render it constitutionally protected speech immune from state regulation.

Otto created a circuit split and represented a stark departure from sister circuits that have upheld bans against SOCE therapy for minors. *Otto* has sweeping implications — not only subjecting all restrictions on professional speech to strict scrutiny but also prohibiting minor conversion therapy bans in numerous states. Suffering conversion therapy at the hands of licensed therapists is particularly pernicious because licensed medical professionals hold unique positions of authority, credibility, and trust in society. The Eleventh Circuit's ruling in *Otto* represents a massive leap backwards in the fight for LGBTQ+ civil rights.

Nonetheless, *Otto* is only one decision in a long line of cases reflecting the judiciary's trend toward expanding the scope of protected speech under the First Amendment.[71] With a fresh circuit split and ongoing courtroom battles over minor SOCE bans, the constitutionality of such laws may soon reach the Supreme Court. While the Court has consistently chipped away at its own First Amendment limits,[72] it has not yet eliminated its exception for speech incidental to conduct. So long as the Supreme Court continues to cling to this exception to uphold abortion restrictions against free speech challenges, circuit courts must also continue to abide by what remains of this delicate framework.

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[69] *See* NIFLA v. Becerra, 138 S. Ct. 2361, 2374–75 (2018) (discussing the importance of free thought and discussion as the "best test of truth," *id.* at 2375 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)), when professionals disagree about topics in their respective fields).

[70] *See, e.g.*, *Death with Dignity Acts*, DEATH WITH DIGNITY, https://www.deathwithdignity.org/learn/death-with-dignity-acts [https://perma.cc/2JLM-W68L] (stating that only nine states and Washington, D.C., currently allow "physician-assisted dying").

[71] *See generally* Post & Shanor, *supra* note 68 (criticizing courts' use of the First Amendment as a "powerful engine of constitutional deregulation," *id.* at 167, that "threatens to revive the long-lost world of *Lochner* and destroy the very democratic governance the First Amendment is designed to protect," *id.* at 182).

[72] *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365 (2010) (overruling *Austin v. Mich. Chamber of Com.*, 494 U.S. 652 (1990), to hold that the First Amendment prohibits limits on independent corporate campaign financing).