The First Amendment and the Future of Conversion Therapy Bans in Light of *National Institute of Family and Life Advocates v. Harris*

James Hampton

**INTRODUCTION** .................................................................................................................. 170

I. **A BRIEF HISTORY OF CONVERSION THERAPY** .................................................. 171
   A. The Origins of Conversion Therapy and How it is Used Today .................................. 171
   B. Conversion Therapy is Ineffective and Harmful ......................................................... 174

II. **THE STATUTORY LANDSCAPE OF CONVERSION THERAPY LAWS** ............. 175

III. **PRE-NIFLA LITIGATION** ............................................................................................ 177
   A. The First Amendment Right to Free Speech in the Professional Context .................. 177
   C. King v. Governor of the State of New Jersey .............................................................. 179

IV. **NIFLA**
   A. The Southern District of California’s Decision ........................................................... 181
   B. The Ninth Circuit’s Decision ...................................................................................... 182
   C. The Supreme Court’s Decision .................................................................................. 183

V. **POST-NIFLA CONVERSION THERAPY BAN LITIGATION** ............................ 184
   A. Wollschlaeger v. Governor ......................................................................................... 184
   B. Vazzo v. Tampa ........................................................................................................... 186
   C. Otto, et al., v. Boca Raton .......................................................................................... 188

VI. **WHAT NIFLA MEANS FOR PENDING CONVERSION THERAPY LITIGATION** .......................................................................................................................... 190

**CONCLUSION** .................................................................................................................... 193
INTRODUCTION

“I was told that my faith community rejected my sexuality; that I was the abomination we had heard about in Sunday school; that I was the only gay person in the world; that it was inevitable I would get H.I.V. and AIDS.”¹ These were just some of the harsh words Sam Brinton, head of advocacy and government affairs at the Trevor Project, endured from a conversion therapy counselor when he was a middle-schooler in Florida.² Brinton was not only subjected to talk-therapy sessions, but also strapped to a table and ordered to have “ice, heat and electricity applied to [his] body.”³ “[He] was forced to watch clips on a television of gay men holding hands, hugging and having sex. [He] was supposed to associate those images with the pain [he] was feeling to once and for all turn into a straight boy.”⁴ Brinton’s family belonged to the Southern Baptist Church and believed that conversion therapy could cure his sexuality.⁵ It did not cure him, but it did cause a “permanent tear” in his relationship with his parents.⁶

Conversion therapy is a practice used on LGBTQ people to try to “alter same-sex attractions or an individual’s gender expression with the specific aim to promote heterosexuality as a preferable outcome.”⁷ Many medical organizations in the United States, including the American Psychiatric Association, the American Academy of Child & Adolescent Psychiatry, and the American Psychiatric Association Commission on Psychotherapy by Psychiatrists have condemned the practice, finding no scientific evidence to support therapies premised on the idea that “sexual orientation, gender identity, and/or gender expression is pathological.”⁸ In fact, many of these organizations have found that conversion therapy is harmful when used on adolescents and can be life threatening.⁹ In response to new studies being conducted on the effects of conversion therapy, cities and states have started passing legislation prohibiting practicing conversion therapy on minors.

On June 26, 2018, the United States Supreme Court issued its opinion in National Institute of Family & Life Advocates v. Becerra (“NIFLA”), which struck down a California law requiring clinics that provide pregnancy services to publicize certain notices on the grounds that the ordinance violated those clinics’ First Amendment right to freedom of speech.¹⁰ The Ninth Circuit had previously

DOI: https://doi.org/10.15779/Z38H41JN4J

¹ Sam Brinton, I Was Tortured in Gay Conversion Therapy. And It’s Still Legal in 41 States, N.Y. TIMES (Jan. 24, 2018), https://perma.cc/78H2-32HP.
² Id.
³ Id.
⁴ Id.
⁵ Id.
⁶ Id.
⁷ AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, CONVERSION THERAPY (Feb. 2018), https://www.perma.cc/W2PU-Q9PH.
⁸ Id.
⁹ Id. at 2.
¹⁰ 585 U.S. __, 138 S. Ct. 2361 (2018). Licensed clinics were required to disclose to clients that they provide services such as abortions and contraceptives. Unlicensed clinics were required
upheld the law, finding that it regulated a category of speech called “professional speech,” and was thus only entitled to intermediate scrutiny.\textsuperscript{11} The court defined professional speech as speech that occurs between a professional and their client “in the context of their professional relationship.”\textsuperscript{12} As such, the court only analyzed the statute under intermediate scrutiny, as opposed to strict scrutiny. The Supreme Court criticized the Ninth Circuit’s opinion for holding that all speech uttered by a professional is always entitled to intermediate scrutiny.\textsuperscript{13} In reaching its decision, the Supreme Court noted that other circuit courts have reviewed professional speech under intermediate scrutiny.\textsuperscript{14} Of those circuit court decisions, two involved the constitutionality of conversion therapy laws.\textsuperscript{15}

The \textit{NIFLA} decision raises serious questions regarding the constitutionality of conversion therapy bans: Do laws banning conversion therapy violate the First Amendment? And what level of scrutiny applies when deciding this question? This Article concludes that conversion therapy bans should be reviewed under intermediate scrutiny and are constitutional. In reaching this conclusion, this Article first discusses the history of conversion therapy and the current legal landscape for such laws. Next, it breaks down the \textit{NIFLA} decision and examines other existing precedent on conversion therapy bans. This Article then examines a split in the United States District Courts of Florida to show how courts are examining conversion therapy laws in light of \textit{NIFLA}. Lastly, this Article explains the implications of the pending litigation and why intermediate scrutiny is the correct standard of review.

\section{I. A Brief History of Conversion Therapy}

In this Section, I will describe the origins of conversion therapy and how members of the medical community have used it on members of the LGBTQ community. I will further describe academic studies that have been conducted on conversion therapy and the findings of those studies.

\subsection{A. The Origins of Conversion Therapy and How it is Used Today}

During the late 1800s, doctors and other medical professionals in Europe began examining and conducting studies on gender-nonconforming individuals, focusing on both their gender and their sexuality. Richard von Krafft-Ebing, a psychiatry professor at the University of Vienna, began treating gay men in 1888 to disclose to clients that they were not a licensed clinic. \textit{Id.} at 2368–70.


\textsuperscript{12} Harris, 839 F.3d at 839.

\textsuperscript{13} Becerra, 138 S. Ct. at 2371–72.

\textsuperscript{14} \textit{Id.} at 2371.

\textsuperscript{15} \textit{Id.} See King v. Governor of the State of New Jersey, 767 F.3d 216, 232 (3rd Cir. 2014), \textit{abrogated by Becerra}, 138 S. Ct. at 2361; Pickup v. Brown, 740 F.3d 1208, 1228 (9th Cir. 2014), \textit{abrogated by Becerra}, 138 S. Ct. at 2361.
using “hypnotic suggestion therapy.” Krafft-Ebing considered homosexuality to be a “degenerative disorder” or a “psychiatric disorder” despite his belief that one might be born gay. Krafft-Ebing’s work, and the work of other psychiatric physicians, sparked a movement suggesting that homosexual behavior could be cured, framing it as an illness rather than a criminal offense. At the time of these psychiatrists’ work, most countries, including the United States, had anti-sodomy laws and treated homosexual acts as criminal. Homosexuality began to be categorized as pathological: that “some internal defect or external pathogenic agent causes homosexuality” whose symptoms needed to be attended to by mental health professionals. By the mid-1900s, this view of homosexuality made its way to the United States and prominent figures in the medical field began using conversion therapy.

The psychological framework for understanding homosexuality came to the United States in part through the work of Sandor Rado, a Hungarian émigré. Rado believed that “heterosexuality was the only biological norm and reconceptualized homosexuality as a ‘phobic’ avoidance of the other sex caused by inadequate parenting.” This idea, however, contradicted the work of Sigmund Freud. Freud believed that everyone was born bisexual and people became homosexual due to conditioning rather than disease. He urged against attempts to “cure” homosexuality. Nonetheless, members of the psychiatric community in the United States began conducting experiments where they tried to cure people of their homosexual tendencies. In the 1950s, Samuel Hadden, a professor at the University of Pennsylvania and a psychiatrist, attempted to use group psychotherapy to cure homosexuality. Hadden claimed that the experiments were a success, reporting that over four to eight years, his patients “shared and interpreted each other’s dreams, cast aside their ‘flamboyant’ clothes and manners, worked through their hostilities and neuroses, and began dating women.”

This conception of homosexuality—as a disease that should be cured—was further entrenched by the publication of the Diagnostic and Statistical Manual (“DSM”). In 1952, the American Psychiatric Association published its first DSM which listed all of the conditions psychiatrists considered to be mental disorders. With growing support from the medical community that homosexuality could be

18. It was not until the 2003 Lawrence v. Texas decision that anti-sodomy laws were declared unconstitutional. 539 U.S. 653 (2003).
19. Drescher, supra note 17, at 566.
20. Id. at 569.
22. Id.
23. Id.
24. Drescher, supra note 17, at 569.
cured, the American Psychiatric Association classified homosexuality as a “sociopathic personality disturbance.”

In the 1960s, psychologists and psychiatrists began using different types of “treatments” to try to change an individual’s sexual orientation. Therapists would use “a variety of aversion treatments, such as inducing nausea, vomiting, or paralysis; providing electric shocks; or having the individual snap an elastic band around the wrist when the individual became aroused to same-sex erotic images or thoughts.” Aversion therapy was used to condition someone to dislike same-sex attraction by pairing a certain stimulus, such as a picture of a same-sex couple kissing, with an unpleasant stimulus, such as electric shocks or induced vomiting. Other commonly used methods included “covert sensitization, shame aversion, and orgasmic reconditioning.” Some psychiatrists went as far as subjecting their patients to lobotomies.

After the Stonewall Riots in 1969, the nascent movement to remove homosexuality from the DSM gained strength. In 1973, the American Psychological Association (“APA”) did an internal evaluation of its publications on homosexuality and voted to remove homosexuality as a psychiatric disorder. The APA also made a public statement of support for protections for the gay community in “employment, housing, public accommodation, and licensing, and the repeal of all sodomy laws.” A year later, the American Psychiatric Association affirmed the APA’s resolution and stated that “homosexuality per se implies no impairment in judgment, stability, reliability, or general social and vocational capabilities.” Concurrent with the APA’s stance against conversion therapy, members of the medical community began to question whether

25. Id.
27. Id.
28. Id.
29. Robert Colville, The ‘gay cure’ experiments that were written out of scientific history, MOSAIC (July 4, 2016), https://www.permca.cc/Z32T-VD5Z.
30. Id.
31. AM. PSYCHOL. ASS’N TASK FORCE, supra note 26, at 23. On Tuesday, June 24, 1969, New York City police raided the Stonewall Inn, a gay club, to pull out employees, bar patrons and neighborhood residents. After the raid, word spread and people from across the country came to protest at the Stonewall Inn. The protests lasted for six days and involved flights between police and protesters in front of Stonewall and around neighboring streets. Emanuella Grinberg, How the Stonewall riots inspired today’s Pride celebrations, CNN (June 28, 2019), https://perma.cc/UE7Y-9RBW.
32. AM. PSYCHOL. ASS’N TASK FORCE, supra note 26, at 23.
33. Id.
34. Id. at 24.
conversion therapies were “inappropriate, unethical, and inhumane.” Overall, the removal of homosexuality from the DSM dramatically decreased the belief among scientific communities that an individual’s sexual orientation could be cured. This shift was further hastened by the fact that empirical evidence showed that conversion therapy simply did not work.

B. Conversion Therapy is Ineffective and Harmful

In 2009, the APA created a taskforce to review conversion therapy practices, articles, and studies done on conversion therapy from 1960 to 2007. The taskforce concluded that “enduring change[s] to an individual’s sexual orientation [are] uncommon and that a very small minority of people in these studies showed any credible evidence of reduced same-sex attraction.” In addition, some participants in conversion therapy reported that they were harmed by the practice. There were reports of losing “all sexual feeling,” experiencing severe depression, and suicidal ideations. Other participants reported difficulty with social and emotional intimacy, anxiety, and sexual dysfunction.

Despite the condemnation of conversion therapy by the APA, the voice of mainstream psychological practice in America, conversion therapy is still practiced by politically and religiously conservative organizations that refuse to accept or tolerate LGBTQ people. In some conservative religious groups, if a member has same sex desires, the group encourages the member to “[renounce] their homosexuality and seek ‘healing’ or change” rather than expelling or removing the member. Churches and religious groups have developed programming targeted at distressed individuals whose families hold negative views of homosexuality. These programs include Homosexuals Anonymous, Metanoia Ministries, and Love in Action. In addition to these religious organizations, some psychologists and family therapists with no religious affiliation also continue to practice conversion therapy.

35. Id.
36. Id at 27-28.
37. AM. PSYCHOL. ASS’N TASK FORCE, supra note 26, at 2.
38. Id. at 43.
39. Id. at 41-42.
40. Id. at 42.
41. Id. at 25.
42. AM. PSYCHOL. ASS’N, supra note 26, at 25.
43. Id.
45. For example, David Pickup, LMFT, a “Reintegrative Therapist,” whose personal website is available at https://www.davidpickuplmft.com/ [https://www.perma.cc/Z769-XCG9].
II. THE STATUTORY LANDSCAPE OF CONVERSION THERAPY LAWS

In this Section, I will describe state and federal laws that have been passed that limit the practice of conversion therapy. Based on the research done by the APA and the stance the APA and other psychiatric organizations have taken against conversion therapy, sixteen states and the District of Columbia have passed laws that ban conversion therapy practices on minors. These laws vary in their scope, both in terms of who is covered and which acts are prohibited. New York is one of the most recent states to prohibit conversion therapy and its law is paradigmatic. The law states:

[It is] professional misconduct for any mental health professional to engage in sexual orientation change efforts upon any patient under the age of eighteen years, and any mental health professional found guilty of such misconduct . . . shall be subject to the penalties [described in the statute].

Delaware’s law goes a step further by making it a crime for an in-state medical professional to even refer a patient to someone out-of-state for conversion therapy services. Connecticut and Rhode Island also prohibit the expenditure of state funds for conversion therapy. Finally, the District of Columbia expands on other conversion therapy bans by banning conversion therapy against adults “for whom a conservator or guardian has been appointed.”

However, conversion therapy bans typically contain a broad religious exemption. Most conversion therapy bans do not apply to “religious or spiritual advisors” who practice conversion therapy “within their pastoral or religious capacity.” This means that anyone “(including licensed professionals) may

46. California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington and Massachusetts. These state bans are directed at therapists, rather than punishing parents for voluntarily or involuntarily taking their children to conversion therapy.
47. See CONN. GEN. STAT. ANN. § 19a-907a (2018) (no health care provider may practice conversion therapy); N.H. REV. STAT. ANN. § 332-L:2(1) (2018) (anyone who is licensed to provide professional counseling, “including, but not limited to, a nurse, physician assistant, physician, psychologist, clinical social worker, clinical mental health counselor, marriage and family therapist, or licensed alcohol and drug counselor, or a person who performs counseling as part of the person’s professional training for any of these professions, may not practice conversion therapy”).
51. D.C. CODE ANN. § 7-1231.14a(a) (West 2019).
52. These exemptions have been confirmed by courts. See Pastors Protecting Youth v. Madigan, 237 F. Supp. 3d 746, 750 (N.D. Ill. 2017) (holding pastors lacked standing to challenge the constitutionality of Illinois’ conversion therapy ban because the law only applies to “mental health professionals or those who deceptively advertise conversion therapy for commercial purposes”).
engage in conversion therapy as long as they are acting as clergy or religious counselors and they do not hold themselves out as acting pursuant to a professional license."54 Additionally, in states whose law only bans providing conversion therapy for payment, religious or spiritual advisors may provide conversion therapy as long as they are acting within their religious capacity and “do not accept payment for their services.”55

Despite the increasing state interest in conversion therapy bans and growing research on the harms of conversion therapy, thirty-five states still have no law banning conversion therapy. However, some cities and counties within these states have enacted local ordinances that ban the practice on minors. For example, in 2019, Denver became the first city in Colorado to pass a conversion therapy ban. The Denver ban makes it “[u]nlawful for any provider to provide conversion therapy or reparative therapy to a minor, regardless of whether the provider receives compensation in exchange for such services.”56

Penalties for violation of the ordinance range from a $150 to $999 fine.57 Mayor Michael Hancock stated that the ordinance “is aimed at state-licensed therapists, operating their practice in the city, who are falsely claiming that being gay or transgender is a mental illness, and therefore taking advantage of parents and harming vulnerable youth.”58

Even Congress has moved to end conversion therapy, albeit unsuccessfully. On April 25, 2017, Senator Patty Murray introduced the Therapeutic Fraud Prevention Act of 2017 in the Senate.59 The act would have made it illegal for any individual or entity to receive compensation for providing or “knowingly assist[ing] or facilitat[ing] the provision of conversion therapy.”60 Because it did not differentiate between a religious advisor and a licensed professional, the act would have been the first piece of federal legislation to place an outright ban on conversion therapy, although it would not have barred people from providing conversion therapy services for free.61 There were thirty-four cosponsors of the bill, but it did not make it out of committee.62

Since the Therapeutic Fraud Prevention Act of 2017, there have been several other efforts to ban conversion therapy at the federal level. On March 28, 2019, Representative Sean Maloney introduced the Prohibition of Medicaid Funding for Conversion Therapy Act, which would amend title XIX of the Social Security Act

54. Id.
55. Id.
56. DENVER ORDINANCE SEC. 28-257(a) (2019).
57. Id.
60. Id. § 4(a)(3).
61. Id. §§ 4(a), 4(a)(1).
62. Id.
and prohibit all payments under Medicaid for conversion therapy.63 The bill was referred to the Committee on Energy and Commerce and no action has been taken since.64 Senator Murray also re-introduced the Therapeutic Fraud Prevention Act on June 27, 2019 and it was referred to the Senate Committee on Commerce, Science, and Transportation.65 Representative Ted Lieu introduced a companion House bill on the same day, which was referred to the House Committee on Energy and Commerce.66 While these attempts at federal bans on conversion therapy are just at their beginning stages, a number of state bans have already faced court challenges.

III. PRE-\textit{NIFLA} LITIGATION

In this Section, I describe the general precedent of the First Amendment right to free speech in the commercial and medical context because that is the constitutional frameworks the courts have been using to analyze conversion therapy bans. I then describe several important cases where the courts examined the constitutionality of conversion therapy bans prior to the Supreme Court’s case in \textit{NIFLA}. Finally, I analyze the constitutional frameworks used and explain the different outcomes the courts reached.

A. The First Amendment Right to Free Speech in the Professional Context

The First Amendment to the United States Constitution, incorporated to apply to the states through the Fourteenth Amendment, prohibits any state from passing a law that abridges the freedom of speech.67 Under existing First Amendment jurisprudence, when a state passes a law that limits speech based on its content, it is presumed to be unconstitutional.68 In most cases, the only way that such a law will be upheld is if the state that passed the law proves it survives strict scrutiny, which is that the law must be “narrowly tailored to serve a compelling state interest.”69 But when the state passes a law that regulates the speech of professionals, the constitutional framework changes.

Essentially, courts have examined laws that regulate the speech of professionals on a continuum.70 At one end of the continuum are laws that regulate

\begin{footnotesize}
64. \textit{Id.}
67. U.S. CONST. amend. I.
69. \textit{Id.}
70. See Pickup v. Brown, 728 F.3d 1042, 1053 (9th Cir. 2014), \textit{abrogated by Becerra}, 138 S. Ct. 2361 (describing the constitutionality of regulation of professional speech as a continuum).
\end{footnotesize}
professionals’ public dialogue. These laws are reviewed under the strict scrutiny standard described above. In the middle of the continuum are laws regulating professionals’ speech within the confines of a professional relationship, which are reviewed under intermediate scrutiny. Intermediate scrutiny requires speech restrictions to “directly advance a substantial government interest and is not more extensive than is necessary to serve that interest” in order to be constitutional. At the far end of the continuum are laws that regulate professional conduct and whose effects on speech are only incidental. At this end of the continuum, laws are reviewed under the rational basis test and will be upheld if they “bear[] a rational relationship to a legitimate state interest.” The cases below give a more in-depth analysis of professional speech and how each court determined what constitutes professional speech in the context of conversion therapy bans.


In Pickup v. Brown and Welch v. Brown, groups of plaintiffs who wanted to provide or receive conversion therapy filed suit in two separate cases in the Eastern District of California challenging the constitutionality of California’s ban on conversion therapy. Both sets of plaintiffs argued the statute was a violation of their First Amendment rights. In Welch v. Brown, the district court granted the plaintiffs’ motion for a preliminary injunction, holding that plaintiffs would suffer irreparable harm in the absence of an injunction. In Pickup v. Brown, the district court denied the plaintiffs’ motion for the same relief, holding that they were unlikely to succeed on any of their claims. On appeal, the cases were heard together before the Ninth Circuit.

The Ninth Circuit reversed Welch and affirmed Pickup, holding that California’s conversion therapy ban regulated professional conduct and thus did not violate the plaintiffs’ right to free speech. The Ninth Circuit held that California’s conversion therapy ban was the “regulation of professional conduct, where the state’s power is great, even though such regulation may have an incidental effect on speech.” The Ninth Circuit reasoned that the California statute banned a form of medical treatment on minors, and that “the fact that speech may be used to carry out those therapies does not turn the prohibitions of conduct into prohibitions of speech.” The Ninth Circuit also noted that talk

74. Pickup, 728 F.3d at 1053.
75. Id. at 1056.
76. Id. at 1042.
77. Id. at 1051.
78. Id.
79. Pickup, 728 F.3d at 1048.
80. Id. at 1055.
81. Id.
therapy does not receive special First Amendment protection just because it is carried out through speech, and thus the California statute had only an incidental effect on plaintiffs’ free speech rights.\textsuperscript{82}

After determining that the conversion therapy ban regulated conduct rather than speech, the Ninth Circuit held that the California statute was only subject to rational basis review and “must be upheld if it “bear[s] . . . a rational relationship to a legitimate state interest.”\textsuperscript{83} Accordingly, the Ninth Circuit held that California had a legitimate interest in protecting the physical and mental well-being of minors.\textsuperscript{84} When deciding whether the California Legislature had acted rationally, the Court noted that it relied on the reports and recommendations of many professional organizations such as the Task Force of the APA, the American Academy of Pediatrics, and the American Psychoanalytic Association, all of which oppose the use of conversion therapy on minors.\textsuperscript{85} Because there was a plausible reason for California to enact the conversion therapy ban, the Ninth Circuit ruled that the statute did not violate plaintiffs’ right to free speech.\textsuperscript{86}

\textbf{C. King v. Governor of the State of New Jersey}

In \textit{King v. Governor of the State of New Jersey}, individuals and organizations that provided conversion therapy services challenged New Jersey’s ban on conversion therapy.\textsuperscript{87} The plaintiffs alleged that the ban violated their First Amendment rights to freedom of speech and free exercise of religion and sought an injunction to prevent enforcement of the conversion therapy ban.\textsuperscript{88} The trial court rejected both claims and held that, as in \textit{Pickup v. Brown}, the conversion therapy ban regulated conduct, not speech, and thus was not a violation of the plaintiffs’ right to free speech.\textsuperscript{89}

The Third Circuit affirmed the district court’s decision but disagreed with its analysis. The Third Circuit, unlike the Ninth Circuit in \textit{Pickup}, held that New Jersey’s conversion therapy ban did regulate speech and was thus subject to stricter scrutiny than the rational basis test employed by the district court.\textsuperscript{90} The court reasoned that those who provide conversion therapy are using speech to provide a specialized service designed to alter client’s behaviors and thoughts, and

\textsuperscript{82} \textit{Id.} at 1056.
\textsuperscript{83} \textit{Id.} (quoting \textit{NAAP v. Cal. Bd. of Psychology}, 228 F.3d 1034, 1049 (9th Cir. 2000)).
\textsuperscript{84} \textit{Pickup}, 728 F.3d at 1057.
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} 767 F.3d 216, 220 (3d Cir. 2014).
\textsuperscript{88} \textit{Id.} at 222.
\textsuperscript{89} \textit{Id.} at 223. The State tried to argue that because conversion therapy or “talk therapy” was being used as a treatment, it became conduct. The Court of Appeals disagreed and noted that the State lacked any authority from the Supreme Court that “characterized verbal or written communications as ‘conduct’ based on the function these communications served.”
\textsuperscript{90} \textit{Id.} at 235.
thus it fell under the category of professional speech.  

In analyzing the protection that professional speech is entitled to, the court compared professional speech to commercial speech, which is “truthful, non-misleading speech that proposes a legal economic transaction.” The court examined previous commercial speech cases which held that commercial speech is entitled to some degree of protection under the First Amendment because it encourages the “free flow of commercial information” where the general public has a strong interest. However, that protection is diminished because commerce is an area that is “traditionally subject to government regulation” and the state has the duty to protect its citizens from harmful, dangerous, and deceptive products. Similar to commercial speech, the Third Circuit held that professional speech was entitled to some protection under the First Amendment because professionals “have access to a body of specialized knowledge” and professional speech serves as a channel for that knowledge to be communicated to the public. However, especially in the context of the medical profession, states have broad authority to regulate professions to protect the public from “harmful or ineffective professional services.” The court went on to note that the state’s power to regulate a licensed professional’s speech was not always limited but “warrants lesser protection only when it is used to provide personalized services to a client based on the professional’s expert knowledge and judgment.”

The Court ended its analysis of the plaintiffs’ freedom of speech claim by finding that intermediate scrutiny was the proper standard of review, meaning that New Jersey’s statute would only survive if it furthered a substantial state interest and was “no more extensive than necessary to serve that interest.” The Court held that strict scrutiny was not triggered even though the statute “discriminates on the basis of content” because (1) the New Jersey Legislature passed the statute based on evidence that conversion therapy is “ineffective and potentially harmful to clients,” and (2) the statute does not prevent the plaintiffs from expressing their viewpoint that same-sex attractions can be eliminated through conversion therapy. Applying intermediate scrutiny, the Court held that the statute did not violate the plaintiffs’ right to free speech because the State has a substantial interest in protecting minors from harmful professional practices, and the statute was targeted only at efforts to change someone’s sexual orientation, gender

91. King, 767 F.3d at 233.
92. Id. (citing Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447 (1978)).
93. Id. (citing Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447 (1978)).
95. Id. at 234.
96. Id.
97. King, 767 F.3d at 232.
98. Id. at 233.
99. Id. at 236–37.
identity, or gender expression.  

IV. NIFLA

Despite the Ninth and Third Circuits’ rulings, the Supreme Court’s decision in NIFLA has revived the question of whether conversion therapy bans violate the First Amendment. Although the Court’s decision had nothing to do with conversion therapy laws, it dealt with professional speech. As described above, the case stemmed from a California statute requiring crisis pregnancy centers to make certain disclosures about their services. Licensed clinics had to disclose to clients that they provide services such as abortions and contraceptives. Unlicensed clinics were required to disclose to clients that they were not licensed. The plaintiffs, crisis pregnancy centers, alleged that the California statute violated their First Amendment right to free speech. After the Southern District of California denied the plaintiffs’ motion for a preliminary injunction, the plaintiffs appealed to the Ninth Circuit Court of Appeals.

In this Section, I will describe the procedural history of the NIFLA case and how each of the lower courts analyzed the constitutionality of the California law. In discussing each court’s decision, I will explain the role that professional speech had when reviewing crisis pregnancy center laws under the First Amendment. Lastly, I will discuss and explain the Supreme Court’s holding in NIFLA and the impact it has on conversion therapy bans. Because the Supreme Court’s analysis of the licensed clinic involves professional speech, I will only be focusing on the holding for the licensed notice.

A. The Southern District of California’s Decision

In NIFLA v. Harris, two non-profit pro-life pregnancy centers filed suit against various California state officials alleging that the Reproductive FACT Act would, among other civil rights violations, violate their First Amendment right to free speech. As stated above, the plaintiffs alleged that the Act violated their right to freedom of speech because the licensed notice required them to speak against their pro-life views and say that the state of California provides services

100.  Id. at 238–41. The Court noted the evidence the New Jersey Legislature relied on was from “reputable professional and scientific organizations,” including the American Psychological Association and the American Psychiatric Association.

101.  Crisis pregnancy centers are “pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center.” Becerra, 138 S. Ct. at 2368.

102.  Id. at 2369.

103.  Id.

104.  Id. at 2370.

such as abortions and contraceptives. The plaintiffs argued that the Act discriminated on the basis of viewpoint by specifically targeting “crisis pregnancy centers that aim to discourage and prevent women from seeking abortions” and thus should be reviewed under strict scrutiny.

The state, however, relied on the holding in Pickup to defend the Act. The state argued that, as in Pickup, the Act did not concern expressive activity, but instead dealt solely with the “delivery of pregnancy-related health care services.” The state further argued that even if the notice was considered compelled speech, it was still only subject to rational review because the notice contains “only pure factual and incontrovertible information that simply provides notice about the full spectrum of pregnancy-related health services.”

The district court ruled in favor of the state, following the state’s lead by relying heavily on the Pickup holding. The court reasoned that, as with the statute at issue in Pickup, the licensed notice still allowed the clinics to discuss their opinions and viewpoints about abortion and only required them to inform their patients about the various types of pregnancy treatments so patients were fully informed when making decisions regarding their pregnancies. Ultimately, the court held that the licensed notice was professional conduct subject to rational basis review and that the state has a “legitimate interest in ensuring pregnant woman are fully advised of their rights and treatment options when making reproductive health care decisions.”

B. The Ninth Circuit’s Decision

The plaintiffs appealed the district court’s decision to grant summary judgment in favor of the state to the Ninth Circuit. The Ninth Circuit affirmed

---

107. Id.
108. Id. at *5.
109. Id. at *6.
110. Id. at *7.
111. Id.
112. Harris, 2016 WL 3627327 at *8.
113. Id. The court also held that the law was not broad, content-based discrimination because clinics could still inform patients of non-abortion options, express their disagreement with the notice, and the California act did not expressly adopt pro-life over pro-choice. Id.
THE FIRST AMENDMENT AND CONVERSION THERAPY BANS

the district court’s decision, holding that the act permissibly regulated professional speech. In reaching its decision, the court also relied on its reasoning in Pickup. The court noted that the licensed notice fell at the midpoint of the Pickup continuum. It found that the notice requirements were speech within the professional-client relationship that can be regulated because the “purpose of the relationship is to advance the welfare of the clients rather than to contribute to public debate.”\textsuperscript{115} The court reasoned that the licensed notice was professional speech because it contained information about “professional services offered by the clinics” and was contained to within the walls of the clinic.\textsuperscript{116} As such, the court held that because professional speech is not entitled to the highest level of protection of the First Amendment, intermediate scrutiny should be applied.\textsuperscript{117}

Applying intermediate scrutiny, the Ninth Circuit held that the California law did not violate the plaintiffs’ right to free speech. The Ninth Circuit found that the state had a substantial interest in ensuring that its citizens have access to “adequate information about constitutionally-protected medical services like abortion.”\textsuperscript{118} In addition, the Ninth Circuit held that the statute was sufficiently narrowly tailored because the licensed notice only informed the client of “the existence of publicly-funded family-planning services.”\textsuperscript{119} Because notice did not encourage, endorse, or imply that women should or must use these state-funded services, the statute was not broader than necessary to achieve the state’s goal.\textsuperscript{120}

C. The Supreme Court’s Decision

The Supreme Court overturned the Ninth Circuit’s decision, stating that the Court has never recognized a broad category of professional speech that is always entitled to intermediate scrutiny.\textsuperscript{121} Instead, the Court identified only two instances where it had not afforded professional speech the full protections of the First Amendment: “laws that require professionals to disclose factual, noncontroversial information in their commercial speech,” and the regulation of “professional conduct, even though that conduct incidentally involves speech.”\textsuperscript{122} The Court found the California act fell into neither of these categories because clinics communicating that they provide contraceptive services and abortions is “anything but an ‘uncontroversial’ topic” and the licensed notice “is not tied to a procedure at all.”\textsuperscript{123} The Supreme Court did not agree that the act was a regulation of professional conduct, instead finding that the act regulated speech not conduct,

\textsuperscript{115} \textit{Id.} at 839.
\textsuperscript{116} \textit{Id.} at 840.
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{Id.} at 841.
\textsuperscript{119} \textit{Id.} at 842.
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} \textit{Becerra,} 138 S. Ct. at 2371.
\textsuperscript{122} \textit{Id.} at 2372.
\textsuperscript{123} \textit{Id.} at 2372-73.
because the notice applied to all interactions in a clinic and other facilities that provided the same services, such as general practice clinics, were not required to provide the notice.\textsuperscript{124}

\section*{V. POST-NIFLA CONVERSION THERAPY BAN LITIGATION}

In this section, I will first examine an Eleventh Circuit decision regarding professional speech. I will examine this case first because it plays a critical role in two district court cases that are currently reviewing conversion therapy laws under \textit{NIFLA}. I will then examine two district court cases following the \textit{NIFLA} decision, how they have examined conversion therapy bans in light of the Supreme Court’s reasoning, and how they both came to different conclusions. Lastly, I will discuss the possible implications if the Eleventh Circuit affirms or reverses either of these decisions.

\subsection*{A. Wollschlaeger v. Governor}

While \textit{Wollschlaeger v. Governor} was decided prior to \textit{NIFLA}, the decision is binding precedent on the two district courts in Florida that are currently reviewing the constitutionality of conversion therapy laws. This case is particularly important because it involves examining speech in the medical profession. In \textit{Wollschlaeger}, physicians and medical organization sued various Florida state officials after the passage of the Florida’s Firearms Owners’ Privacy Act (FOPA).\textsuperscript{125} FOPA had three provisions which the plaintiffs argued were a violation of their First Amendment right to freedom of speech:

the record-keeping provision . . . states that a doctor or medical professional may not intentionally enter any disclosed information concerning firearm ownership into a patient’s medical record if he or she knows that such information is not relevant to the patient’s medical care or safety, or the safety of others. The inquiry provision . . . states that a doctor or medical professional should refrain from making a written inquiry or asking questions concerning the ownership of a firearm or ammunition by the patient or by a family member of the patient, or the presence of a firearm in a private home” unless he or she in “good faith believes that this information is relevant to the patient’s medical care or safety, or the safety of others. The anti-discrimination provision . . . states that a doctor or medical professional “may not discriminate against a patient based solely” on the patient’s ownership and possession of a firearm.\textsuperscript{126}

FOPA thus essentially prevented all medical professionals from asking any of their patients whether they own a firearm and prevented them from recording

\begin{itemize}
  \item \textsuperscript{124} \textit{Id.} at 2373–74.
  \item \textsuperscript{125} \textit{Wollschlaeger v. Governor}, 848 F.3d 1293, 1300 (11th Cir. 2017).
  \item \textsuperscript{126} \textit{Id.} at 1302–03.
\end{itemize}
any answers to such questions. 127 The court began its analysis by stating that the law expressly limited the ability of medical professionals to speak and write about a certain topic, in this case gun ownership.128 Because FOPA applied only to speech regarding gun ownership, the court held that it was a content-based regulation.129 As such, the court reasoned that the law must be analyzed under First Amendment jurisprudence.130

After the court decided that FOPA was a content-based regulation of speech, it then moved on to decide what the appropriate standard of review was under the First Amendment. The state attempted to argue that FOPA did not regulate speech, rather, it regulated professional conduct and any effect on speech was merely incidental.131 The court disagreed, stating that “saying that restrictions on writing and speaking are merely incidental to speech is like saying that limitations on walking and running are merely incidental to ambulation.”132 In its analysis, the court also noted plaintiffs’ reliance on Pickup and indicated that it had serious doubts as to whether the Ninth Circuit was correct.133 The court also stated that the Supreme Court had never adopted a “rational basis standard to regulations which limit the speech of professionals to clients based on content.”134

But the court did not explicitly say which standard it adopted. The court simply said that because the regulations would not even survive intermediate scrutiny, it did not “need to decide whether strict scrutiny should apply.”135 However, the court still analyzed the law under strict scrutiny, first examining whether there was a “fit between the legislature’s ends and the means chosen to accomplish those ends.”136 The court found none of the interests asserted by the state compelling enough to satisfy strict scrutiny.137 The state asserted that it was protecting its citizens’ Second Amendment right to bear arms, but the state provided no evidence that medical professionals were taking away patients’ guns or infringing on their Second Amendment rights in any way.138 Another interest that the state asserted was its interest in its citizens’ privacy, but the court also found this uncompelling because other Florida laws already placed “significant limits on the disclosure of a patient’s confidential medical records.”139

127. Id. at 1307.
128. Wollschlaeger, 848 F.3d at 1307.
129. Id.
130. Id. The court held that the anti-harassment provision also regulated speech because the limiting language “during an examination” was read to “refer to questions or advice to patients concerning the subject of firearm ownership.” Id.
131. Id. at 1308.
132. Id.
133. Wollschlaeger, 848 F.3d at 1309.
134. Id. at 1310.
135. Id. at 1311.
136. Id. at 1312.
137. Id. at 1312–17.
139. Id. at 1314.
Furthermore, the state had no evidence that medical professionals were disclosing patients’ gun ownership information. The state asserted two other interests, but the court was unconvinced. The court was very critical of the Florida legislature for only relying on six anecdotes and nothing more when deciding to pass FOPA. Therefore, the court concluded that the “record-keeping, inquiry, and anti-harassment provisions” of the Florida law violated the First Amendment.

B. Vazzo v. Tampa

Two lower courts have addressed challenges to conversion therapy bans since the Supreme Court decided NIFLA. The first dealt with a ban passed by the city of Tampa in 2017. The ordinance prohibited any provider from practicing conversion therapy on a minor, with penalties ranging from $1,000 to $5,000. Later that year a Christian ministry group, Liberty Counsel, and several individual conversion therapists filed a lawsuit in the Middle District of Florida challenging the ordinance. The plaintiffs claimed that the ordinance violated their First Amendment right to free speech and religious freedom.

In 2019, a magistrate judge, in a decision that was later affirmed by the district court, granted-in-part and denied-in-part the plaintiffs’ request for a preliminary injunction. The ruling upheld the ban with regard to aversive practices such as electroshock therapy but prevented the city from enforcing the ban with regard to “non-coercive, non-aversive” conversion therapy counseling “that consists entirely of speech or ‘talk therapy.’”

The district court found that the plaintiffs were likely to succeed on their content-based regulation claim and gave an overview of recent cases which addressed conversion therapy bans. If the court had followed Pickup or King, the distinction between talk therapy and conduct-based conversion therapy would not have mattered because the court would have found that conversion therapy

---

140. Id.
141. Id. The state also asserted that the law was passed to ensure access to adequate health care without discrimination or harassment and that the law was needed to regulate the medical profession to protect the public. Id.
142. Id. at 1312.
143. Id. at 1318.
144. Kate Bradshaw, As Tampa unanimously passes anti-gay conversion “therapy” ban, St. Pete laws groundwork for its own, CREATIVE LOAFING: TAMPA BAY (Apr. 7, 2017, 11:00 AM), https://perma.cc/QG79-FT3S.
146. Among the plaintiffs is David Pickup, a licensed marriage and family therapist who was the main plaintiff in Pickup.
149. Id. at *37.
150. Id. at *21.
happens within the context of a professional relationship and is therefore only entitled to intermediate scrutiny. However, the court agreed with NIFLA’s rejection of the analyses in King and Pickup, and held that taking Pickup, King, Wollschlaeger, and NIFLA together, strict scrutiny was the appropriate standard of review. The court agreed with King that conversion therapy bans do not regulate conduct, but believed the conversion therapy ban was analogous to Wollschlaeger because conversion therapy bans involve doctor-patient communications about a specific subject. This, combined with the NIFLA holding that “traditional First Amendment analyses apply to professional speech that is neither commercial nor incidentally affected by a law regulating conduct,” is how the court reached its decision that strict scrutiny was the appropriate standard. The City tried to rely on the holdings in Pickup and King, but the district court noted that the NIFLA Court expressly rejected Pickup and King which recognized “‘professional speech’ as a separate category of speech subject to different constitutional analysis.” The district court determined that strict scrutiny applied in this case, although it noted that the NIFLA Court applied intermediate scrutiny to the California law requiring clinics to give certain notices because the law could not even survive intermediate scrutiny.

After determining strict scrutiny was the appropriate standard, the court found that the conversion therapy ban failed to survive this standard. The court began its analysis by stating that protecting the physical and psychological well-being of minors was a compelling interest. However, the court believed that the plaintiffs were likely to show that the conversion therapy ban was not narrowly tailored enough to protect minors. The court noted that the City had not considered any lesser restrictions and did not present evidence showing it considered lesser alternatives to a complete ban on conversion therapy. Whereas the plaintiffs had presented evidence of alternatives to a complete ban on conversion therapy, such as a ban on involuntary conversion therapy and banning only “aversive conversion therapy techniques, like electroshock therapy.” Therefore, the court found that the plaintiffs were likely to succeed on their claim that the conversion therapy ban was an unconstitutionally content-based restriction of speech.

151. Id. at *25.
152. Vazzo, No. 8:17-CV-2896-T-02AAS at *25.
153. Id.
154. Id. at *24.
155. Id. at *24–25.
156. Id. at *29.
158. Id.
159. Id. at *28.
160. Id. at *28–29.
161. Id.
C. Otto, et al., v. Boca Raton

In a different Florida case, two licensed marriage and family therapists challenged the City of Boca Raton’s and Palm Beach County’s conversion therapy bans.\textsuperscript{162} Both the city and county passed ordinances in the fall of 2017 that prohibited licensed providers of conversion therapy from engaging in any practice seeking to change a minor’s sexual orientation or gender identity.\textsuperscript{163} The plaintiffs filed suit on June 13, 2018 in the Southern District of Florida, claiming the ordinances violated their First Amendment rights to free speech and seeking to enjoin the enforcement of the ordinances.\textsuperscript{164} In 2019, a district court judge denied the plaintiffs’ motion, holding that they did not sufficiently demonstrate with a substantial likelihood they would succeed on the merits.\textsuperscript{165} This is the opposite of the Vazzo holding, and the Otto court appears to be the first to rely on \textit{NIFLA} to uphold the constitutionality of conversion therapy bans.

The court began its reasoning with the basic premise that while freedom of speech is fundamentally important, First Amendment case law also recognizes it “must occasionally be restricted or limited to accommodate . . . important governmental interest.”\textsuperscript{166} The court noted that the constitutionality of conversion therapy bans was a matter of first impression in Florida and in the Eleventh Circuit, but recognized that similar bans have survived in other districts, specifically in the Third and Ninth Circuits in \textit{Pickup} and \textit{King}.\textsuperscript{167} The court went on to note that since these cases were decided, the Supreme Court had issued its decision in \textit{NIFLA} and the Eleventh Circuit Court of Appeals issued its decision in \textit{Wollschaeger}, both of which are binding precedent on the court.\textsuperscript{168} In \textit{Wollschaeger}, the Eleventh Circuit also disagreed with \textit{Pickup}’s analysis, but did not decide whether strict scrutiny or intermediate scrutiny should have been applied.\textsuperscript{169} The Otto court also noted that in \textit{NIFLA} the Supreme Court did not state what level of review should be applied, just that the California statute would not even survive intermediate scrutiny.\textsuperscript{170}

The Otto plaintiffs argued that \textit{NIFLA} abrogated the professional speech doctrine and therefore strict scrutiny should be applied when reviewing conversion therapy laws.\textsuperscript{171} The court noted that in \textit{NIFLA}, the Supreme Court left open the possibility that “[s]tates may regulate professional conduct, even though that conduct incidentally involves speech.”\textsuperscript{172} Thus, the court believed that \textit{Otto} was

\begin{thebibliography}{99}
\bibitem{163} \textit{Id.} at 1243–45.
\bibitem{164} \textit{Id.} at 1245.
\bibitem{165} \textit{Id.} at 1270.
\bibitem{166} \textit{Id.} at 1248.
\bibitem{167} Otto, 353 F. Supp. 3d at 1248–49.
\bibitem{168} \textit{Id.} at 1249.
\bibitem{169} \textit{Id.} at 1255.
\bibitem{170} \textit{Id.}
\bibitem{171} \textit{Id.}
\bibitem{172} Otto, 353 F. Supp. 3d at 1255.
\end{thebibliography}
more related to the Supreme Court’s decision in Planned Parenthood of
Southeastern Pennsylvania v. Casey, where the Court addressed whether required
disclosures by doctors about abortion services and pregnancy implicated the First
Amendment, than it was to NIFLA. In Casey, the Court concluded that doctors’
First Amendment rights “were only implicated as part of the practice of medicine,
subject to reasonable licensing and regulation by the State.” Likewise, the Otto
court reasoned that in the case of conversion therapy “plaintiffs are essentially
writing a prescription for a treatment that will be carried out verbally.”
Because of this, the court held that conversion therapy could be regulated like the practice
of medicine, which is “subject to reasonable licensing and regulation.” For this
reason, the court believed that while rational basis was too low of a standard, strict
scrutiny would be too high.

Because the court found that speech could be regulated in the context of
conversion therapy, it moved to the question of what level of scrutiny to use when
examining the ban. The court believed that rational basis review was inadequate,
but case law suggested that a lower standard of review than strict scrutiny would
be appropriate, leaving the court with intermediate scrutiny. However, the court
ended its analysis by concluding it is “unclear what standard of review should
apply to this case.” The court did not announce what level of scrutiny should be
applied, but was “unconvinced that strict scrutiny is necessarily the appropriate
standard of review, when the ordinances apply to a licensed provider’s treatment
of a patient.” The court believed intermediate scrutiny should apply because it
“strike[s] the appropriate balance between recognizing that doctors maintain some
freedom of speech within their offices, and acknowledging that treatments may be
subject to significant regulation under the government’s police powers.”

The court, however, evaluated the ordinance under the main principles found
in all three levels of review: the government interest and how tailored the law was
toward that interest. First, the court examined the governments’ interest in the
ordinance, noting that both Boca Raton and Palm Beach County examined
research done by the American Academy of Pediatrics, the American Psychiatric
Association, and seven other organizations who found that conversion therapy
“can cause harm, including depression, self-harm, self-hatred, suicidal ideation,
and substance abuse.” Based on this research, the court agreed that the city and

173. Id. at 1256.
174. Id. at 1254 (citing Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 838
(1992)).
175. Id. at 1256.
176. Id. at 1256.
177. Id.
179. Id. at 1258.
180. Id. at 1270.
181. Id. at 1256.
182. Id. at 1258.
183. Id. at 1260.
county had a substantial interest in protecting “the physical and psychological well-being of minors and in protecting minors against exposure to serious harms caused by sexual orientation and gender identity change efforts.”\textsuperscript{184}

Second, the court examined the relationship between the ordinance and the governments’ interest. After determining the scope of both ordinances, the court looked at the alternative means the governments could have used to achieve its interest.\textsuperscript{185} The court emphasized that the county and city had adopted nearly identical ordinances and statutes as other governments to address conversion therapy harms.\textsuperscript{186} The court also rejected the plaintiffs’ arguments that the city and county could have only banned coerced conversion therapy or aversive techniques such as induced vomiting or shock therapy.\textsuperscript{187} In doing so, the court relied heavily on the studies that the city and county cited when passing the ordinances which concluded that conversion therapy in general, regardless of the method used or whether consent was obtained, is ineffective and harmful to minors.\textsuperscript{188}

The court concluded its analysis of the plaintiffs’ free speech claim by stating that, if reviewed under intermediate scrutiny, the ordinances are likely narrowly drawn enough as to not violate the plaintiffs’ rights to free speech.\textsuperscript{189} Under strict scrutiny, the court stated that it was unclear whether these ordinances were the “least restrictive means.”\textsuperscript{190} The court again cited the numerous documents and testimony on which the city and country relied and held that for now, it is sufficient to conclude that the plaintiffs failed to meet their burden of showing a substantial likelihood of success.\textsuperscript{191}

\section*{VI. \textbf{WHAT NIFLA MEANS FOR PENDING CONVERSION THERAPY LITIGATION}}

So, what conclusions can be drawn about the implications of the \textit{NIFLA} case for the constitutionality of conversion therapy bans? First, it is still unclear what standard of review applies when reviewing the constitutionality of conversion therapy bans. \textit{NIFLA} and \textit{Wollschlaeger}, which are both binding precedent on the Florida district courts, did not decide the appropriate standard of review for conversion therapy ban cases. Second, it is unclear whether all forms of

\footnotesize{\textsuperscript{184}. \textit{Id.} at 1258.\\ \textsuperscript{185}. \textit{Id.} at 1264–67. The court determined that the scope of both ordinances was applicable only to prohibiting conversion therapy on minors and did not limit the plaintiffs’ ability to advocate for or express their opinions on conversion therapy. \textit{Id.}\\ \textsuperscript{186}. \textit{Id.} at 1265.\\ \textsuperscript{187}. \textit{Id.} at 1266–67.\\ \textsuperscript{188}. \textit{Otto}, 353 F. Supp. 3d at 1266–67. In addition to relying on evidence from the American Academy of Pediatrics and the American Psychiatric Association, the county heard testimony from various practitioners, including therapists, social workers, and psychologists who all practice in the county. All of the practitioners stated there are no benefits to conversion therapy, only serious health risks.\\ \textsuperscript{189}. \textit{Id.} at 1267.\\ \textsuperscript{190}. \textit{Id.}\\ \textsuperscript{191}. \textit{Id.} at 1268.}
THE FIRST AMENDMENT AND CONVERSION THERAPY BANS

conversion therapy, including talk therapy, can be banned or whether only aversion therapy practices can be banned. But these questions could be answered soon because the plaintiffs in Otto have appealed the district court’s decision to the Eleventh Circuit. If Tampa appeals, then the Eleventh Circuit will have to address the two conflicting opinions.

Based on the Eleventh Circuit’s opinion in Wollschlaeger and the Supreme Court’s opinion in NIFLA, I believe the court will decide that intermediate scrutiny applies. First, the Eleventh Circuit will likely affirm both Vazzo and Otto’s holdings that the rational basis test does not apply when reviewing conversion therapy bans. As described above, the Supreme Court and the Eleventh Circuit were critical of the Ninth Circuit’s decision in Pickup, which held that conversion therapy bans regulate conduct even though the bans cover speech. The Eleventh Circuit used the language in Pickup to affirm its approach that a doctor’s communications with a patient about medical treatment receive “substantial First Amendment protection.” Therefore, it is likely that the Eleventh Circuit will have to analyze which level of heightened scrutiny applies.

Second, the court will likely determine that intermediate scrutiny, rather than strict scrutiny, applies. The Eleventh Circuit will look to NIFLA, which held that States may regulate professional conduct that incidentally involves speech. In NIFLA, the Supreme Court cited its decision in Casey, which is analogous to conversion therapy bans. In Wollschlaeger and NIFLA, the statutes at issue either prohibited or forced doctors to engage in specific dialogues with their patients about topics that were not tied to treatment. In contrast, conversion therapy bans involve doctors essentially writing a prescription for treatment that will be administered through speech. This line of reasoning falls into line with one of the categories described in NIFLA where the court has not given professional speech the full protections of the First Amendment: professional conduct that incidentally involves speech.

The court in Vazzo failed to evaluate whether the ordinances regulate professional conduct that incidentally involves speech. Rather, the court

194. Wollschlaeger, 848 F.3d at 1309.
195. Pickup, 728 F.3d at 1053.
197. Id. The Supreme Court upheld a Pennsylvania law that required doctors to give women certain information as part of obtaining consent before an abortion. Conversion therapy are similar under the Court’s reasoning in Casey because conversion therapy bans regulated speech “as part of the practice of medicine.” See Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992). Conversion therapy bans are only tied to the practice of trying to change someone’s sexual orientation or gender identity. Whereas in Becerra, the notice requirement was not tied to a procedure at all and applied to “all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed.” Becerra, 138 S.Ct. at 2373.
198. Id. at 2369; Wollschlaeger, 848 F.3d at 1302–03.
199. Id. at 2373.
determined the ordinances were content-based laws that prohibited speech based on the topic expressed and were subject to strict scrutiny.\textsuperscript{200} The Supreme Court in \textit{NIFLA} was critical of the fact that the California CPC law required that a notice be given to all of a clinic’s clients, regardless of whether a procedure was performed or sought.\textsuperscript{201} That is not the case with conversion therapy bans. Typically, the bans only prohibit conversion therapy in the doctor-patient relationship where the goal is to ‘treat’ someone’s sexual orientation or gender identity.\textsuperscript{202} Conversion therapy statutes do not prohibit therapists and psychiatrists from expressing their views or opinions about the practice or providing any sort of counseling that helps someone accept their sexual orientation or gender identity.\textsuperscript{203} Therefore, the Eleventh Circuit should hold that intermediate scrutiny should be applied when reviewing anti-conversion therapy laws.

Under intermediate scrutiny, the conversion therapy bans will likely be upheld. First, the Eleventh Circuit will likely agree with both \textit{Vazzo} and \textit{Otto} that the government has a substantial interest in protecting the physical and mental well-being of minors. Second, the Eleventh Circuit will have to determine whether the means chosen by the cities are not more extensive than necessary to serve that interest. This is where the court will likely distinguish \textit{Otto} from \textit{Vazzo}. In \textit{Wollschlaeger}, the Eleventh Circuit was critical that the Florida Legislature only relied on “six anecdotes” to show “real, and not merely conjectural” harms that would be resolved by enacting Florida’s Firearm Owners’ Privacy Act.\textsuperscript{204} Similarly, in \textit{Vazzo}, the city did not consider any lesser restrictions when adopting its conversion therapy ban.\textsuperscript{205} The court agreed with the plaintiffs that the city and county could have banned involuntary conversion therapy or conversion therapy that involved aversive techniques. Thus, the court held that the city failed to show evidence that these less restrictive means would prevent harm to minors.\textsuperscript{206}

In \textit{Otto}, however, the city and county relied on the research and publications of nine major psychiatric organizations that all concluded there is no evidence that attempts to change someone’s sexual orientation or gender identity are effective.\textsuperscript{207} This evidence confirmed that all forms of conversion therapy,

\begin{flushright}
\textsuperscript{200} \textit{Vazzo}, No. 8:17-CV-2896-T-36AAS, at *26.
\textsuperscript{201} \textit{Becerra}, 138 S. Ct. at 2373.
\textsuperscript{202} \textit{See Conn. Gen. Stat. Ann. § 19a-907a(1) (2018)} (“‘Conversion therapy’ means 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. . .”).
\textsuperscript{203} \textit{See Nev. Rev. Stat. Ann. § 629.600 (West 2018)} (stating that conversion therapy does not include providing assistance to someone undergoing gender transition or “[providing] acceptance, support and understanding of a person or facilitates a person’s ability to cope, social support and identity exploration and development, including, without limitation, an intervention to prevent or address unlawful conduct or unsafe sexual practices that is neutral as to the sexual-orientation of the person receiving the intervention and does not seek to change the sexual orientation or gender identity of the person receiving the intervention”).
\textsuperscript{204} \textit{Wollschlaeger}, 848 F.3d at 1312.
\textsuperscript{205} \textit{Vazzo}, No. 8:17-CV-2896-T-36AAS, at *28.
\textsuperscript{206} \textit{Id.}
\textsuperscript{207} \textit{Otto}, 353 F. Supp. 3d at 1237.
\end{flushright}
THE FIRST AMENDMENT AND CONVERSION THERAPY BANS

regardless of whether talk therapy or aversion therapy methods were used, put youth in serious danger of depression, substance abuse, and even suicide.\textsuperscript{208} The county heard testimony from various practitioners, including therapists, social workers, and psychologists, who all stated that there are no benefits to conversion therapy, only serious health risks.\textsuperscript{209} The county considered other alternatives to its ordinance, but rejected them all at the public hearings.\textsuperscript{210}

Furthermore,\textsuperscript{211} Otto addressed the effectiveness of informed consent requirements, stating that a minor’s desire to change their sexual orientation or gender identity mostly comes from their parents and they are likely unable to give full consent.\textsuperscript{211} The studies relied on by the city and county established that regardless of whether minors consent to or voluntarily undergo conversion therapy, it is still harmful.\textsuperscript{212} Regardless of whether the city and county’s ordinances are the perfect solution, intermediate scrutiny only requires a law “whose scope is in proportion to the interest served.”\textsuperscript{213} Therefore, it is likely that the Eleventh Circuit will affirm the holding in Otto.

CONCLUSION

Although\textit{ NIFLA} appears to undermine prior cases holding that conversion therapy bans are constitutional by possibly changing the standard of review that they are entitled to, conversion therapy bans likely remain constitutional. Conversion therapy bans likely fall under one of the exceptions reaffirmed in\textit{ NIFLA}; that a State may regulate professional conduct, even though it incidentally involves speech. Within this exception, laws regulating speech receive intermediate scrutiny, and it is likely that conversion bans would survive such scrutiny. States have a substantial interest in protecting the physical and mental well-being of minors. Conversion therapy bans are not more extensive than necessary to serve this interest because all forms of conversion therapy, regardless of whether consent is given, have been scientifically proven to be harmful. In addition, medical professionals are still able to give their opinion about conversion therapy and talk about it publicly. Otto should be closely watched as it goes before the Eleventh Circuit because it could have national implications. Regardless of whether the court upholds or rejects the conversion therapy ban, it could provide a blueprint for governments defending such bans across the country.

\begin{itemize}
\item \textsuperscript{208} \textit{Id.}
\item \textsuperscript{209} \textit{Id.}
\item \textsuperscript{210} \textit{Id.}
\item \textsuperscript{211} Otto, 353 F. Supp. 3d at 1237.
\item \textsuperscript{212} \textit{Id.}
\item \textsuperscript{213} \textit{Id.} (quoting \textit{Board of Tr. of State Univ. of N.Y. v. Fox}, 492 U.S. 469, 480 (1989)).
\end{itemize}