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**IT'S NOT CALLED CONDUCT THERAPY; TALK THERAPY
AS A PROTECTED FORM OF SPEECH UNDER THE
FIRST AMENDMENT**

Warren Geoffrey Tucker*

INTRODUCTION

Many states regulate the practice of psychotherapy through a licensing board operated by the state. Like with doctors or lawyers, those not licensed to practice psychotherapy are normally prohibited from doing so. While there have been numerous cases arguing that such a regulation necessarily infringes on the free speech rights of those wishing to practice these professions, courts often hold that there is no constitutional infringement as these laws serve to further legitimate state interests.¹

Unlike medical doctors and attorneys, however, there is a dearth of case law prohibiting specific psychological treatments. As will be discussed, there are a number of regulations and laws limiting not only who may practice psychotherapy, but also the duties and obligations accompanying licensure in that field. However, until very recently, there were no laws saying what kind of therapy a psychologist is *not* allowed to engage in. This recent California law, SB 1172,² prohibits the practice of gay conversion therapy on minors, even those forms of therapy relying wholly or mostly on speech.³

The Ninth Circuit recently upheld this law in *Pickup v. Brown (Pickup II)*, stating unequivocally that this law does not violate the First Amendment because it only regulates conduct, not speech.⁴ Because the law still allows therapists to discuss and recommend the therapy, the court found that their First Amendment rights were not affected.⁵ The only thing the therapist cannot do, reasoned the court, is engage in the actual

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¹ See Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1046 (9th Cir. 2000).

² CAL. BUS. & PROF. CODE § 865.1 (West 2013).

³ See *Pickup v. Brown (Pickup II)*, 740 F.3d 1208, 1220 (9th Cir. 2013) (describing the limitations placed on therapists through this bill).

⁴ *Id.* at 1229–30.

⁵ *Id.* at 1229.

therapy itself.⁶ The court pointed to a number of similar regulations in the medical field preventing or compelling a doctor's speech.⁷

While the Supreme Court refused to grant certiorari on this particular case,⁸ more and more states are considering enacting similar legislation. New Jersey already passed such a law, which was instantly challenged and recently ruled constitutional by the Third Circuit.⁹ It seems likely, however, that the Supreme Court may grant certiorari if this issue appears before it again, especially if one of the other circuits decides the case differently. This could have far-reaching consequences for the practice of psychotherapy, as the Supreme Court's affirmation of the Ninth Circuit's reasoning would make it very easy to ban any sort of therapy without much concrete evidence. While most people may view this revolving around the issue of sexual orientation, this case will have an effect on an entirely different issue.

As this Note will discuss, there are basic and inherent differences between psychotherapy, and talk therapy in particular, and other regulated professions such as law and medicine.¹⁰ Unlike those professions, speech is often the primary vehicle through which psychological treatment is delivered. Furthermore, a psychologist takes much of him or herself into the therapy room when meeting a client, which is often used to elicit change. Restricting the speech which may occur in session may weaken the efficacy of the treatment; the client's sense that the therapist is withholding information or treatment options could harm the connection that forms between the client and therapist.

This is not to say, however, that all types of therapy should be acceptable, nor does it support the idea of gay conversion therapy in any way whatsoever. Instead, this Note suggests that the communication which occurs during a session between a therapist and client is pure speech, especially when it is being used as the sole tool for change.¹¹ Psychotherapy is unique in that speech often lies at the heart of the practice, and the practice cannot be regulated in the same vein as the medical and legal fields. Thus, this Note will argue that, unlike other professions, laws prohibiting a certain type of therapy should be held to strict scrutiny and require a state to show a compelling interest in banning it.¹²

This Note will first discuss the importance of *Pickup II*¹³ on the psychological profession.¹⁴ Secondly, Part II will briefly examine the ways in which the legal and

⁶ *Id.* at 1223.

⁷ *Id.* at 1229.

⁸ *Pickup v. Brown*, 134 S. Ct. 2871 (2014).

⁹ *King v. Governor of New Jersey*, 767 F.3d 216, 224 (3d Cir. 2014). As will be discussed, the Third Circuit actually held that the law affected speech, and upheld the law after applying an intermediate scrutiny analysis. *Id.* at 224, 237.

¹⁰ *See* Part II.C.

¹¹ *See* Part II.B.1.

¹² *See* Part II.B.2.

¹³ 740 F.3d 1208, 1208 (9th Cir. 2013).

¹⁴ *See* Part I.C.

medical fields are regulated, as well as the existing regulations in place for mental health professionals.¹⁵ Part III will address the ways in which the connection between the therapist and client is unique to other client-professional relationships, and will argue that speech is affected much more through wide-sweeping bans on psychotherapy than with regulations placed on lawyers and medical physicians.¹⁶ Finally, Part IV of this Note will discuss alternatives to broad bans on particular forms of therapy, such as obtaining sufficient evidence to satisfy heightened review, regulating only those treatments which are not heavily imbued with speech, and requiring more rigorous informed consent.¹⁷

I. THE IMPORTANCE OF *PICKUP V. BROWN*

A. Senate Bill 1172

On September 29, 2012, the Governor of California signed a bill making it illegal for a mental health provider to practice sexual orientation change efforts (SOCE) on minors.¹⁸ Senate Bill 1172 (SB 1172) defines SOCE as “any practices by mental health providers that seek to change an individual’s sexual orientation. This includes efforts to change behaviors of gender expressions, or to eliminate or reduce romantic attractions or feelings toward individuals of the same sex.”¹⁹

This bill was drafted after a Task Force from the American Psychological Association (APA) went through all of the available literature on SOCE and concluded that it is harmful and not proven to be efficacious.²⁰ However, methodological problems in the reviewed literature made it difficult for the Task Force to make a broad conclusion on the harm and efficacy of SOCE.²¹ Indeed, the Task Force often relied on anecdotal evidence instead of empirical data:

A central issue in the debates regarding efforts to change same-sex sexual attractions concerns the risk of harm to people that may result from attempts to change their sexual orientation. . . . Although the recent studies *do not provide valid causal evidence of the efficacy of SOCE or of its harm*, some recent studies document that there are people who perceive that they have been harmed through SOCE.²²

¹⁵ See Part II.

¹⁶ See Part III.

¹⁷ See Part IV.

¹⁸ *Welch v. Brown*, 907 F. Supp. 2d 1102, 1105 (E.D. Cal. 2012), *overruled by Pickup II*, 740 F.3d at 1208.

¹⁹ CAL. BUS. & PROF. CODE § 865(b)(1) (West 2013).

²⁰ *Pickup v. Brown (Pickup I)*, No. 2:12-CV-02497-KJM-EFB, 2012 WL 6021465, at *5–6 (E.D. Cal. Dec. 4, 2012), *aff’d by, Pickup II*, 740 F.3d at 1208.

²¹ *Id.* at *25.

²² American Psychological Association, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, 41–42 (2009),

However, while this bill prevents licensed mental health professionals from practicing the therapy, it does not prevent them from discussing or recommending SOCE therapy to adults or minors.²³ Furthermore, they may even refer clients seeking SOCE to unlicensed professionals, such as religious officials, and may practice this therapy on consenting adults.²⁴

B. The District Court Split and the Ninth Circuit Decision

This bill was quickly challenged in two separate district court cases. In the first of these cases, *Welch v. Brown*,²⁵ SOCE practitioners argued that this law unconstitutionally violated their First Amendment rights.²⁶ The court in California's Eastern District noted that many mental health professionals engaging in SOCE did so through speech using talk therapy.²⁷ In determining this, the court ruled that this law would likely be subject to strict scrutiny and was likely to fail that heightened standard of review.²⁸ Thus, the court issued a preliminary injunction against the law until the case was fully resolved.²⁹

Conversely, a day after the *Welch* decision was reached, another court in the Eastern District of California found the law was likely to pass constitutional muster, applying a rational basis test instead of heightened review.³⁰ The court compared the instant case with *Conant v. Walters*,³¹ where the Ninth Circuit ruled a law prohibiting physicians from merely recommending marijuana to patients unconstitutional.³² The court reasoned that, unlike the law in *Conant*, mental health professionals were still free to discuss and recommend SOCE.³³ Because they were only enjoined from utilizing the actual therapy itself, the court explained that this law merely prohibited conduct and not speech.³⁴ Thus, the court applied rational basis review, ultimately declaring that California had a legitimate, rational reason for prohibiting this practice by mental health professionals.³⁵

<http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf> [hereinafter APA Report] (emphasis added).

²³ *Pickup II*, 740 F.3d at 1223–24.

²⁴ *Id.*

²⁵ 907 F. Supp. 2d 1102 (E.D. Cal. 2012).

²⁶ *Id.* at 1105 n. 1.

²⁷ *Id.* at 1113.

²⁸ *Id.* at 1121.

²⁹ *Id.* at 1122.

³⁰ *Pickup I*, No. 2:12-CV-02497-KJM-EFB, 2012 WL 6021465, at *24 (E.D. Cal. Dec. 4, 2012), *aff'd by*, *Pickup II*, 740 F.3d 1208 (9th Cir. 2013).

³¹ 309 F.3d 629 (9th Cir. 2002).

³² *Pickup I*, 2012 WL 6021465, at *8 (citing *Conant*, 309 F.3d at 638).

³³ *Id.* at *9.

³⁴ *Id.*

³⁵ *Id.* at *24–26.

In August of 2013, the Ninth Circuit resolved this district court split, overruling *Welch* and holding that this law prohibited conduct, not speech.³⁶ The court held that licensed mental health professions were still able to convey their opinions and recommendations to clients.³⁷ Because they were only estopped from engaging in the actual therapy itself, the court ruled that SB 1172 did not regulate speech and was subject to rational basis review.³⁸ The court held that California has great power to regulate professional conduct, “even though such regulation may have an incidental effect on speech.”³⁹ Just as doctors cannot use the speech necessary to actually provide an illegal drug through a prescription, the court reasoned, so too is a mental health professional prohibited from using the words necessary to facilitate SOCE treatment.⁴⁰

While the Ninth Circuit denied a motion to rehear the case en banc, Judge O’Scannlain provided a dissenting opinion as to the reasoning used to decide *Pickup II*, which was joined by two other judges.⁴¹ He argued that the court arbitrarily labeled such expression as “conduct,” noting, “[t]he panel provides no principled doctrinal basis for its dichotomy: by what criteria do we distinguish between utterances that are truly ‘speech,’ on the one hand, and those that are, on the other hand, somehow ‘treatment or conduct?’”⁴² He stated that SB 1172 is essentially a vehicle to silence politically unpopular expression⁴³ and the Ninth Circuit’s ruling will give government more power to “silence expression based on a political or moral judgment.”⁴⁴ Thus, while he declined to find that SB 1172 necessarily violated the First Amendment,⁴⁵ he averred that *some* level of scrutiny was required.⁴⁶

C. Consequences of this Decision

Since California passed SB 1172, other states are beginning to follow suit. Shortly before the Ninth Circuit made its ruling, New Jersey became the second state to prohibit mental health professionals from practicing gay conversion therapy.⁴⁷ Mere days after this bill was signed into law, a lawsuit was filed against it.⁴⁸ On November 8,

³⁶ *Pickup II*, 740 F.3d 1208, 1222 (9th Cir. 2013).

³⁷ *Id.* at 1223.

³⁸ *Id.* at 1230–31.

³⁹ *Id.* at 1229.

⁴⁰ *Id.*

⁴¹ *Id.* at 1215 (O’Scannlain, J., dissenting).

⁴² *Id.* at 1215–16.

⁴³ *Id.* at 1215.

⁴⁴ *Id.* at 1216.

⁴⁵ *Id.* at 1221.

⁴⁶ *Id.* at 1217.

⁴⁷ See N.J. STAT. ANN. § 45:1-55 (West 2013), available at <http://www.njleg.state.nj.us/bills/BillView.asp>; Susan K. Livio, *N.J. Gay Conversion Therapy Ban for Kids Challenged in Federal Court*, NJ.COM (Aug. 26, 2013 3:17 AM), http://www.nj.com/politics/index.ssf/2013/08/nj_gay_conversion_therapy_ban_for_kids_challenged_by_therapist_groups.html.

⁴⁸ See Livio, *supra* note 47.

2013, a federal judge in the District of New Jersey granted the state's motion for summary judgment, upholding the prohibition.⁴⁹ The judge relied heavily on the language in *Pickup II* in deciding that the conversion therapy ban regulated conduct and not speech.⁵⁰ In response to the plaintiff's assertion that counseling was, at its core, talk therapy, the court looked to three sources which defined the term "counseling."⁵¹ After examining the language of New Jersey statutory law, as well as two secondary authorities, the court concluded that the term is in reference to the practice of giving psychological aid and did not allude to speech interests.⁵² Indeed, the judge placed much emphasis on the fact that counseling and talk therapy were never defined with respect to any free speech interest.⁵³ Ultimately, the judge refused to see counseling as speech because:

[T]aken to its logical end, it would mean that *any* regulation of professional counseling necessarily implicates fundamental First Amendment free speech rights, and therefore would need to withstand heightened scrutiny to be permissible. Such a result runs counter to the longstanding principle that a state generally may enact laws rationally regulating professionals, including those providing medicine and mental health services.⁵⁴

In affirming the district court's decision, the Third Circuit recently decided the case on different grounds.⁵⁵ The court rejected that the law affected only conduct, stating "speech is speech, and it must be analyzed as such for purposes of the First Amendment."⁵⁶ Because it affected the First Amendment, the court decided to employ an intermediate scrutiny analysis because the law regulated a profession, which the court decided did not merit strict scrutiny.⁵⁷ However, the language of the decision still reflected a very low standard of review; the court relied on the positions taken by well-respected institutions such as the ABA, notwithstanding their recognition of the "limited amount of methodologically sound research" concerning the harm the therapy causes.⁵⁸ Despite this deferential review of the law, this case still recognized that

⁴⁹ *King v. Christie*, 981 F. Supp. 2d 296, 303 (D.N.J. 2013), *aff'd sub. nom.* *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014).

⁵⁰ *Id.* at 312–20 (discussing in detail the Ninth Circuit's analysis).

⁵¹ *Id.* at 315–17.

⁵² *Id.* at 317. It is very important to note, however, that one of the two secondary sources referred only very generally to medicine and health care in general and did not include the use of the word "counseling." *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 319.

⁵⁵ *King v. Governor of New Jersey*, 767 F.3d 216, 221 (3d Cir. 2014).

⁵⁶ *Id.* at 229.

⁵⁷ *Id.* at 234–35 (noting that, to survive intermediate scrutiny, the law must directly advance the government's interest in protecting potential clients from ineffective/harmful professional services and is not more extensive than it has to be to achieve that purpose).

⁵⁸ *Id.* at 238–39.

professional speech is still inherently speech, requiring a First Amendment analysis on at least some level.⁵⁹

Maybe because the *Pickup* cases are the first of their kind, the Supreme Court did not grant certiorari.⁶⁰ As more and more states adopt legislation prohibiting this type of therapy, it is likely that the Supreme Court will eventually grant certiorari if the issue appears before it again, especially if a circuit split develops.⁶¹ While there are very strong policy implications behind the banning of SOCE, the Supreme Court's ruling will have large consequences for the psychology community. If the Court does rule on this issue, the case is very likely to turn on the issue of whether this type of therapy constitutes speech or conduct.⁶² On the one hand, if the Supreme Court decides that this law regulates speech, then the government will be faced with heightened review whenever it wishes to prohibit a certain type of talk therapy.⁶³ On the other hand, if the Court rules that gay conversion therapy is mere conduct, then state governments need only face the deferential rational basis review in regards to psychotherapy.⁶⁴ As many of the techniques employed by psychotherapists are done solely through speech between the therapist and client, such a ruling could seriously undermine this profession. Indeed, as Judge O'Scannlain's dissenting opinion supports, such a ruling would give the government much more power to silence speech that is politically unpopular.⁶⁵

II. PROFESSIONAL REGULATIONS AND THE FIRST AMENDMENT

Courts have long held that a state has an interest in regulating licensed professions working with its citizens. In *Thomas v. Collins*,⁶⁶ Justice Jackson summarizes the state's interest as follows:

⁵⁹ *Id.* at 236.

⁶⁰ *Pickup v. Brown*, 134 S. Ct. 2871 (2014).

⁶¹ *See* SUP. CT. R. 10(a) (noting that one of the factors the Supreme Court looks to in granting certiorari is when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"); *see also* Lila Shapiro, *Conversion Therapy Ban in Pennsylvania Gaining Support*, HUFFINGTON POST (Sept. 18, 2013, 1:51 PM), http://www.huffingtonpost.com/2013/09/18/conversion-therapy-pennsylvania_n_3948815.html (stating that Pennsylvania, Massachusetts, and New York are also considering enacting similar legislation).

⁶² Nick Clair, *Chapter 835: "Gay Conversion Therapy" Ban: Protecting Children or Infringing Rights?*, 44 MCGEORGE L. REV. 550, 558 (2013) ("Some argue that [SB 1171] violates the state and federal free speech rights of therapists. Others say that this law simply regulates conduct, specifically the practice of medicine, and thus does not implicate protected speech. The constitutionality of [SB 1172] will likely hinge on this distinction." (internal citations omitted)).

⁶³ *See* *Welch v. Brown*, 907 F. Supp. 2d. 1102, 1110 (E.D. Cal. 2012), *rev'd*, *Pickup II*, 740 F.3d 1208 (9th Cir. 2013).

⁶⁴ *See* *Pickup v. Brown*, 740 F.3d 1208, 1231 (9th Cir. 2013) (O'Scannlain, J., dissenting) *cert denied*, 134 S.Ct. 2871 (2014).

⁶⁵ *Id.* at 1216 (O'Scannlain, J., dissenting).

⁶⁶ 323 U.S. 516 (1945), *cert denied*, 323 U.S. 819 (1945).

The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money. When one does so through the practice of a calling, the state may have an interest in shielding the public from the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency. A usual method of performing this function is through the licensing system.⁶⁷

Indeed, the States have enacted much legislation regulating a licensed professional's speech.⁶⁸ As this Section will address, the legal and medical communities have been particularly regulated in this regard, often prohibited from making certain statements or else compelled to give their clients certain information.⁶⁹

A. Medical Field

The government has long regulated the practice of medicine, often limiting physicians' free speech rights. In *Conant v. Walters*,⁷⁰ for example, the federal government enacted a law subjecting physicians to punishment by the licensing board for recommending the use of medical marijuana.⁷¹ The Ninth Circuit ultimately held the law unconstitutional, noting that it deprived physicians of their First Amendment rights:⁷² "Being a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment rights."⁷³ The court emphasized the importance of the doctor-patient relationship and the ability of the doctor to speak "frankly and openly" to patients.⁷⁴ Additionally, the court ruled that this law did not clearly define what a "recommendation" was; it seems to have been subject to the patient's understanding of what the doctor communicated.⁷⁵

⁶⁷ Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1054 (9th Cir. 2000), *cert. denied*, 532 U.S. 972 (2001) (quoting *Thomas*, 323 U.S. at 544 (Jackson, J., concurring)).

⁶⁸ See, e.g., Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885, 889 (2000) (explaining a number of laws affecting licensed professionals and the ways in which these regulations may impair one's First Amendment rights).

⁶⁹ See, e.g., *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 447 (1978) (upholding sanctions against an attorney for personally soliciting accident victims for the purpose of representing them on a contingent fee basis); see also Martha Swartz, *Physician-Patient Communication and the First Amendment After Sorrell*, 17 MICH. ST. J. MED. & LAW 101, 102 (2012) (citing VA. CODE ANN. § 32.1-229(7) (West 2012) (requiring doctors to notify patients of the potential risk of breast cancer and other issues if a mammogram reveals dense breast tissue)).

⁷⁰ 309 F.3d 629 (9th Cir. 2002), *cert. denied*, 540 U.S. 946 (2003).

⁷¹ *Id.* at 632-33.

⁷² *Id.* at 632.

⁷³ *Id.* at 637.

⁷⁴ *Id.* at 636.

⁷⁵ *Id.* at 639.

Furthermore, in *Wollschlaeger v. Farmer*,⁷⁶ a district court in Florida decided the constitutionality of a law forbidding physicians from asking patients whether they owned firearms unless the question is “relevant to the patient’s medical care or safety, or the safety of others.”⁷⁷ Florida insisted that this law protected its citizens’ right to bear arms and from any discrimination physicians may have against gun owners.⁷⁸ The court noted that, while the State may have a legitimate interest in protecting the right of its citizens to own guns, it offered no support, outside some anecdotal evidence, that this law would achieve either of Florida’s stated interests.⁷⁹ Further, it also stated that while the State does have an interest in regulating the medical profession, the law was not sufficiently narrowly tailored to justify the prohibition on speech.⁸⁰ The court added that this ban may even prevent a physician from providing potentially life-saving information to the client.⁸¹ The court then quoted *United States v. Alvarez*,⁸² stating, “[t]he mere potential for the exercise of [government censorial power] casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.”⁸³ The court also held that the wording of the statute was vague, leaving the physician uncertain of when he or she may inquire about gun ownership.⁸⁴ Thus, the court issued a permanent injunction against the enforcement of the statute.⁸⁵ Perhaps unsurprisingly, the injunction was very recently lifted by the Eleventh Circuit, citing *Pickup II* in justifying that the law applied to conduct and not speech.⁸⁶

These two cases highlight the difficulty legislatures face when trying to prohibit a physician’s speech with his or her client. Indeed, as the *Wollschlaeger* cases show, courts use differing standards of scrutiny, and thus come to different results, when analyzing this issue.⁸⁷ When states wish to *compel* a physician’s speech, however, courts are more deferential. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁸⁸ for example, the Pennsylvania legislature enacted a law requiring physicians to give patients certain information regarding abortion at least twenty-four hours before the procedure.⁸⁹ The Court ruled this provision constitutional, noting that the State’s preference for childbirth over abortion was immaterial; the law still served the

⁷⁶ 880 F. Supp. 2d 1251 (S.D. Fla. 2012), *rev’d*, 760 F.3d 1195 (11th Cir. 2014).

⁷⁷ *Id.* at 1268.

⁷⁸ *Id.* at 1264.

⁷⁹ *Id.* at 1264, 1266.

⁸⁰ *Id.*

⁸¹ *Id.* at 1267.

⁸² 132 S. Ct. 2537 (2012).

⁸³ *Wollschlaeger*, 880 F. Supp. 2d at 1267 (quoting *Alvarez*, 132 S. Ct. at 2548).

⁸⁴ *Id.* at 1268.

⁸⁵ *Id.* at 1270.

⁸⁶ *Wollschlaeger*, 760 F.3d at 1224 (citing *Pickup II*, 740 F.3d 1208 (9th Cir. 2013)).

⁸⁷ *See id.* at 1236; *Conant v. Walters*, 309 F.3d 629, 632–33 (9th Cir. 2002).

⁸⁸ 505 U.S. 833 (1992).

⁸⁹ *Id.* at 844.

legitimate interest of protecting the life of the unborn child.⁹⁰ In addition, the Supreme Court noted that the requirement to give information about abortion is no different than a doctor's requirement to give information about any other medical procedure.⁹¹ Taken together, these statements indicate that the Court views any requirement of physicians to supply truthful information about a medical procedure will be held under rational basis review.⁹²

B. Legal Field

In addition to regulating physicians, states often impose regulations on the legal profession as well. In *Ohralik v. Ohio State Bar Association*,⁹³ for example, the Ohio State Bar Association sought sanctions against an attorney who was personally soliciting accident victims so that he may represent them in court on a contingent fee basis.⁹⁴ The attorney argued that because speech was integral in these solicitations, the government was restricting his First Amendment rights.⁹⁵ Responding to this argument, the court reasoned that this was “commercial speech,” as it related to a business transaction, and was thus entitled to “a limited measure of protection.”⁹⁶ In a discussion about the government's interest in preventing personal solicitations, the court noted that attorneys act “as trusted agents of their clients, and as assistants to the courts in search of a just solution to disputes.”⁹⁷ As the dangers of personal solicitations include “stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and the potential harm to the solicited client in the form of overreaching, overcharging, underrepresentation, and misrepresentation,” the Court concluded that the government had the requisite interest to justify the law under the more deferential commercial speech standard.⁹⁸

⁹⁰ Swartz, *supra* note 69, at 113 (citing *Casey*, 505 U.S. at 883).

⁹¹ *Casey*, 505 U.S. at 884.

⁹² See *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2079–80 (2012) (“As long as the City’s distinction has a rational basis, that distinction does not violate the Equal Protection Clause. This Court has long held that ‘a classification neither involving fundamental rights nor proceeding among suspect lines . . . cannot run afoul . . . if there is a *rational* relationship between the disparity of treatment and some *legitimate* governmental purpose.’” (emphasis added) (internal citations omitted)).

⁹³ 436 U.S. 447 (1978).

⁹⁴ *Id.* at 447–52.

⁹⁵ *Id.* at 455.

⁹⁶ *Id.* at 455–56 (citing *Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (holding that commercial speech is not wholly outside the First Amendment and is entitled to some protection as a result, though it may still be subject to state regulation)).

⁹⁷ *Id.* at 460 (quoting *Cohen v. Hurley*, 336 U.S. 117, 124 (1961)).

⁹⁸ *Id.* at 459–61 (discussing that commercial speech regulations require an important state interest, which was present in the current case); see also *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980) (establishing that commercial speech is subject to intermediate scrutiny, requiring a substantial governmental interest).

Another case restricting attorney speech, *Legal Services Corp. v. Velazquez*⁹⁹ dealt with a law prohibiting lawyers receiving federal funds from the Legal Services Corporation from engaging in “representation involv[ing] effort to amend or otherwise challenge existing welfare law.”¹⁰⁰ Under this law, attorneys could not represent cases challenging the constitutionality of these welfare laws, and would be forced to withdraw from a case even if such issues arose well into the representation of the client.¹⁰¹ The government tried to compare the facts of this case to that of *Rust v. Sullivan*,¹⁰² where the Court upheld a restriction prohibiting recipients of federal funds from counseling any clients on abortion.¹⁰³ The Court held that *Rust* was a special case where the government “used private speakers to transmit specific information pertaining to its own program.”¹⁰⁴ Refusing to find the facts of these cases analogous, the Court ruled that advice given by an attorney to his or her clients could not be considered to be “government” speech, even under a generous application of the *Rust* doctrine.¹⁰⁵ In finding this section of the law to be an unconstitutional restriction on First Amendment rights, the Court also noted that Congress “may not design a subsidy to effect this serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary.”¹⁰⁶

A final case discussing an attorney’s free speech rights is *Gentile v. State Bar of Nevada*, which concerned a law restricting what an attorney may publicly say while in preparation for trial.¹⁰⁷ More specifically, the law forbade attorneys from making statements that may influence or affect the outcome of the case.¹⁰⁸ The plaintiff was charged with violating this law during a pretrial press conference held six months before the case he was working on was supposed to go to trial.¹⁰⁹ In finding the law unconstitutional, the Court referenced a balancing test in determining whether a law or regulation may abridge an attorney’s free speech rights, weighing the importance of the State’s purpose in enacting the law against an attorney’s First Amendment rights on the current issue.¹¹⁰

⁹⁹ 531 U.S. 533 (2001).

¹⁰⁰ *Id.* at 537.

¹⁰¹ *Id.* at 539.

¹⁰² 500 U.S. 173 (1991).

¹⁰³ *Velazquez*, 531 U.S. at 542–43 (citing *Rust*, 500 U.S. at 173).

¹⁰⁴ *Id.* at 541 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1985)).

¹⁰⁵ *Id.* at 542–43.

¹⁰⁶ *Id.* at 544.

¹⁰⁷ *Id.* at 1033.

¹⁰⁸ *Id.* (citing NEV. SUP. CT. R. 177(1)).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1051–52 (“Moreover, this Court’s decisions dealing with a lawyer’s First Amendment right to solicit business and advertise have not suggested that lawyers are protected to the same extent as those engaged in other businesses, but have balanced the State’s interest in regulating a specialized profession against a lawyer’s First Amendment interest in the kind of speech at issue.”).

In addition to regulating what attorneys specifically may do, states have also enacted legislation prohibiting those not licensed by a state bar from giving legal advice or acting as a legal professional. In *State v. Niska*,¹¹¹ for example, a man was charged with practicing law without a license.¹¹² While Niska claimed that this prohibition violated his free speech rights, the court noted that the policy behind the law was not to “quash the political views he was expressing by means of his legal advice and pleadings,” but rather it was to “prohibit . . . the unlicensed practice of law.”¹¹³ The court noted that his free speech rights were only indirectly limited. Using the Supreme Court’s standard, the court stated that an indirect limitation on speech is constitutional if:

1. The regulation is within the constitutional power of the state;
2. It furthers an important or substantial governmental interest;
3. The governmental interest is unrelated to the suppression of free expression; [and]
4. The incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest.¹¹⁴

The court reasoned that all of these criteria were met, explaining that the state has not only an important interest in regulating the legal profession, but a compelling one.¹¹⁵ Thus, the incidental and indirect infringement of Niska’s First Amendment rights was not unconstitutional.¹¹⁶

C. Psychology

Unlike other professionals such as medical doctors or lawyers, there is very little case law regulating psychotherapists and practitioners of talk therapy. Other than *Pickup v. Brown*,¹¹⁷ the field of psychology only recognizes two widely known, relevant cases defining the scope of a therapist’s responsibilities and privileges. The first of these cases is *Tarasoff v. Regents of the University of California*.¹¹⁸ In this case, a client told his psychologist that he planned to harm a fellow student at the University of California.¹¹⁹ While the psychologist did attempt to warn the police about his patient’s threats, he did not warn the intended victim or her family.¹²⁰ After the patient carried out his threat and killed the victim, her family sued, arguing that psychologists

¹¹¹ 380 N.W.2d 646 (N.D. 1986).

¹¹² *Id.* at 648.

¹¹³ *Id.* at 649.

¹¹⁴ *Id.* (citing *United States v. Albertini*, 472 U.S. 675 (1985)) (internal citations omitted).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 650.

¹¹⁷ 740 F.3d 1208 (9th Cir. 2014).

¹¹⁸ 551 P.2d 334 (Cal. 1976).

¹¹⁹ *Id.* at 339.

¹²⁰ *Id.* at 339–40.

have a duty to warn those who they reasonably believe are in danger of grave bodily harm.¹²¹ The court noted that the psychologists and patients share a special relationship, and that psychologists should be able to recognize when such threats are serious.¹²²

The second, and more related, case is *National Association for Advancement of Psychoanalysis v. California Board of Psychology* (*NAAP* case), which concerned a California law restricting the practice of psychotherapy only to those licensed by the State's board.¹²³ The plaintiffs alleged that this violated their First Amendment rights, as psychotherapy is, in essence, the "talking cure."¹²⁴ The court rejected this argument, noting that the main component of psychotherapy was not speech, but rather the treatment of depression and other mental disorders.¹²⁵ As such, the court held that this was not pure speech and subject to regulation by the state's police power.¹²⁶ In determining this, the court then determined that this regulation was content and viewpoint neutral:¹²⁷ "California's mental health licensing laws are content-neutral; they do not dictate what can be said between psychologists and patients during treatment. Nothing in the statutes prevents licensed therapists from utilizing psychoanalytical methods or prevents unlicensed people from engaging in psychoanalysis if no fee is charged."¹²⁸ Thus, the court emphasized that California had the power to regulate the practice of psychotherapy in general and require licensure, but hinted at the fact that this was limited to content-neutral legislation.¹²⁹

This line of reasoning was dismissed in the *Pickup* case, however.¹³⁰ There, the court said that the *NAAP* case court used "both a belt and suspenders" in its decision, declaring that a finding *either* that a regulation is content neutral *or* dealing with only conduct, and not speech, would be enough to allow for a rational basis review.¹³¹ Indeed, the *Pickup* court simply ruled that the actual treatment component to conversion therapy was simply and purely conduct.¹³² Thus, the court never discussed whether the law was content-neutral or specific.¹³³

¹²¹ *Id.* at 340.

¹²² *Id.* at 343–45.

¹²³ 228 F.3d 1043, 1047 (9th Cir. 2014).

¹²⁴ *Id.* at 1054.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 1055.

¹²⁸ *Id.*; *see also id.* (Jackson, J., concurring) (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945) ("I do not think it could make a crime publicly or privately to speak urging persons to follow or reject any school of medical thought.")).

¹²⁹ *Id.* at 1054–56.

¹³⁰ *Pickup II*, 740 F.3d 1208, 1226 (9th Cir. 2014) (discussing *NAAP* case).

¹³¹ *Id.* at 1231 (discussing *NAAP* case).

¹³² *Id.* at 1229. In Judge O'Scannlain's dissent to the denial of an en banc hearing of the case, he criticized the ruling for its failure to consider *any* standard of review for the speech that would be censured as a result of this law. *Id.* at 1217 (O'Scannlain, J., dissenting).

¹³³ *Id.* at 1231. Interestingly, in *King v. Governor of New Jersey*, the Third Circuit found that the law was indeed content-specific. 767 F.3d 216, 237 (3d Cir. 2014).

III. THE PSYCHOLOGICAL DIFFERENCE: THERAPY AS SPEECH

Essentially, *Pickup v. Brown*¹³⁴ reinforces the idea that mental health providers can be regulated with the same ease as other licensed professionals.¹³⁵ This Part will argue, however, that there are inherent differences between talk therapy and giving medical treatment or legal advice. First, this Part will discuss the nature of the relationship between the therapist and the client, and the ways in which the efficacy of that relationship thrives on the free speech of both parties. Second, it will discuss the ways in which this type of relationship does not exist with other professions regulated by the State, and the ways in which speech is the crucial element of treatment.

A. *The Therapist-Client Relationship*

The relationship between a client and his or her mental health provider is very unique.¹³⁶ In this context, the client is often meeting with the therapist on a very frequent basis, usually at least once per week. In addition, the client is often disclosing very intimate details that he or she may not have previously disclosed to anyone else. While there are a number of different theories therapists use when treating their patients (called therapeutic orientations), most of them involve talk therapy with the client.¹³⁷ Indeed, this communication is vital to the relationship; it is often the vehicle through which a client's change occurs.¹³⁸ Thus, this Section will analyze the therapist-client relationship and demonstrate why unrestricted speech is essential for meaningful counseling and treatment.

In their book on counseling and psychology, Don Dinkmeyer, Jr. and Len Sperry provide the following quote to describe the nature of the therapeutic relationship:

The proper therapeutic relationship, as we understand it, does not require transference but a relationship of mutual trust and respect.

¹³⁴ *Pickup II*, 740 F.3d at 1208.

¹³⁵ *See Pickup II*, 728 F.3d 1208, 1228–29 (9th Cir. 2014) (discussing that the court will use the same analysis for psychologists as it would for any other profession when discussing whether or not a regulation violates the First Amendment).

¹³⁶ *See* GORDON WARME, *THE PSYCHOTHERAPIST: USE AND ABUSE OF PSYCHOLOGICAL INFLUENCE* 3 (Judith D. Cohen ed., 1996) (noting that a therapist's "every word, . . . every gesture, [and] every glance has influence on the patient").

¹³⁷ *See* DON DINKMEYER, JR. & LEN SPERRY, *COUNSELING AND PSYCHOTHERAPY: AN INTEGRATED, INDIVIDUAL PSYCHOLOGY APPROACH* 9–11, 76 (3d ed. 2000). The different theoretical orientations seemingly share all three common tenets, which are, "(1) therapeutic focus, or the centrality of the lifestyle and lifestyle convictions as the focus of psychotherapy; (2) therapeutic relationship, or the cooperative and collaborative nature of the client-therapist relationship; and, (3) therapeutic change, or the process of reeducation and reorientation." *Id.* at 10.

¹³⁸ *See id.* at 75–76 (noting that the speech that occurs between the therapist and client is essential for effective treatment).

This is more than mere establishment of contact and rapport. Therapeutic cooperation requires an alignment of goals. When the goals and interests of the patient and therapist clash, no satisfactory relationship can be established. Winning the patient's cooperation for the common task is a prerequisite for any therapy; maintaining it requires constant vigilance. What appears as "resistance" constitutes a discrepancy between the goals of the therapist and those of the patient.¹³⁹

Thus, regardless of a talk therapist's specific theoretical orientation, the personal relationship with the client is at the core of the treatment.¹⁴⁰ In addition, as was hinted at in the excerpt above, speech lies at the very core of this relationship from the very beginning.¹⁴¹

As previously mentioned, the therapist's words can have a profound impact on the client, often guiding his or her thought processes in a way that generates effective change. It is important to discuss, however, that the therapist is not merely using technical, general language. His or her advice is tailored to each specific client, reacting to each unique individual and the issues faced.¹⁴² Furthermore, the therapist is always bringing his or her own experiences into the room, which often affects treatment.¹⁴³ As one book notes, "[t]here is widespread acceptance now of the belief that analytic interaction resembles all other interactions as a relationship between two people, each of whom contributes to the twosome."¹⁴⁴ This argument is buttressed by empirical research concerning the factors that influence client development.¹⁴⁵ In one such study, the researchers concluded that the therapeutic relationship is vital to the success of treatment.¹⁴⁶ Going further, they also stress that continuous and "[f]requent evaluation of relationship factors is essential for experienced clinicians."¹⁴⁷

¹³⁹ *Id.* at 75–76 (quoting RUDOLF DREIKURS, *PSYCHODYNAMICS, PSYCHOTHERAPY, AND COUNSELING: COLLECTED PAPERS* 65 (1967)).

¹⁴⁰ *See id.*

¹⁴¹ *See id.* at 76.

¹⁴² *See id.* at 108–09 (describing the ways in which the therapist should tailor the therapeutic process to each client, forming treatment strategies to adjust the individual problems).

¹⁴³ *See* THE THERAPIST AS A PERSON: LIFE CRISES, LIFE CHOICES, LIFE EXPERIENCES, AND THEIR EFFECTS ON TREATMENT xiii–xxi (Barbara Gerson ed., 1996) [hereinafter Gerson] ("Each [therapist's] work is unique, affected by the [therapist's] values, assumptions, and psychological idiosyncrasies, by their own dynamics, passions, ideas and general subjectivity, and by their experiences and personal development." (citations omitted) (internal quotation marks omitted)); *id.* at xiv.

¹⁴⁴ *Id.* at xiii.

¹⁴⁵ *See* Michael J. Lambert & Dean E. Barley, *Research Summary on the Therapeutic Relationship and Psychotherapy Outcome*, 38 *PSYCHOTHERAPY: THEORY, RES, PRAC., TRAINING* 357 (2001).

¹⁴⁶ *Id.* at 357 ("Decades of research indicate that the provision of therapy is an interpersonal process in which a main curative component is the nature of the therapeutic relationship.").

¹⁴⁷ *Id.* at 359.

Indeed, the notion that a therapist actually has a personal reaction to a client, one that affects the treatment, is very popular; in the psychology realm, this is called “countertransference.”¹⁴⁸ This occurrence makes it very difficult, if not impossible, for a talk therapist to have a session with a client without some of his or her personal beliefs and attitudes having some influence in the session.¹⁴⁹ As such, every conversation the therapist has with his or her clients during his sessions is tainted, at least to some degree, with the personal thoughts and feelings of the therapist.¹⁵⁰

As such, the line between “treatment” and “speech” in talk therapy is very blurred, and it may be that no distinction can be made at all. Regulating the type of treatment a therapist may engage in necessarily restricts the therapist’s ability to connect with a client through his or her speech, as he or she normally would be able to do. Especially if the client is aware of the fact that the therapist is holding back, the client-therapist relationship is likely to be inhibited and treatment may be less effective.¹⁵¹ If a client has a number of goals he or she wishes to achieve through talk therapy, the relationship may be damaged with the knowledge that the therapist may not be able to work towards one or more of those treatment objectives.¹⁵²

Additionally, such prohibitions on specific types of talk therapy may also serve to chill a therapist’s speech on the subject completely, especially where the prohibition is broad, as it is with the ban on gay conversion therapy.¹⁵³ Looking to SB 1172, the *Pickup II* court emphasized the fact that the therapist is able to still recommend and describe gay conversion therapy to minor patients.¹⁵⁴ The problem arises, however, in defining where “treatment” actually begins for talk therapists. Here, from the moment

¹⁴⁸ See Gerson, *supra* note 143, at xiv (describing how many consider countertransference to be an automatic, immediate response to meeting with a client, as it describes a subjective reaction to a client); Steven Reidbord, *Countertransference, an Overview*, PSYCHOL. TODAY (May 24, 2010), <http://www.psychologytoday.com/blog/sacramento-street-psychiatry/201003/countertransference-overview> (generally describing the concept of countertransference).

¹⁴⁹ See Gerson, *supra* note 143, at xiv–xv.

¹⁵⁰ See *id.* at xiii–xiv. It should be noted that not even Sigmund Freud, the founder of psychoanalysis, was immune from feelings of countertransference, despite being heavily against its use in a therapeutic setting. See CARL GOLDBERG, ON BEING A PSYCHOTHERAPIST: THE JOURNEY OF THE HEALER 81 (1986) (describing Freud’s infatuation with a particular client).

¹⁵¹ It is very important for a therapist to be aware of, and work towards, a client’s stated goals, which is obviously very difficult if the therapist is prohibited from helping the client achieve such goals. See DINKMEYER & SPERRY, *supra* note 139, at 77.

¹⁵² *Id.* (describing that a “lack of movement or resistance” may “arise from a discrepancy between the goals of the counselor and those of the client”).

¹⁵³ See CAL. BUS. & PROF. CODE § 865(b)(1) (West 2012) (defining SOCE as “any practices by mental health providers that seek to change an individual’s sexual orientation,” which includes “efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex”).

¹⁵⁴ 740 F.3d 1208, 1231 (9th Cir. 2014) (“[The conversion therapy ban] regulates only treatment, while leaving mental health providers free to discuss and recommend, or recommend against, SOCE . . .”).

the client walks into the door, treatment may be said to have begun. While some talk therapies may use more structured means of treatment, such as formalized goal setting or conditioning exercises, others focus solely on the interplay and conversation between the therapist and client.¹⁵⁵ Most, if not all, of these, however, rely on the strength of the therapist-client relationship as a means to promote treatment progress; without this, a client may find it difficult to trust and work with the therapist.¹⁵⁶ Two essential questions are then posed: when does this relationship begin to build? does the formation of this relationship qualify as an aspect of “treatment,” especially considering its crucial role to the process?

Considering these questions, the California and New Jersey laws may be more complicated than their plain language would suggest.¹⁵⁷ These statutes do not expressly prohibit licensed mental health professionals from recommending conversion therapy or describing it, but they do not expressly permit this behavior, either.¹⁵⁸ Looking at the first question posed above, the answer seems to be that the therapeutic relationship starts immediately when the therapist and client first meet and begin to address the client’s presenting problem.¹⁵⁹ If this is the case, then by the time the therapist and client get to a point of discussing SOCE, a therapeutic relationship will already exist between the patient and the client.

This then leads to the second question. An argument could be made that a talk therapist is actively engaged in “treatment” from the moment the therapeutic relationship is forged. As this relationship is the primary vehicle for change,¹⁶⁰ a therapist may feel that by recommending, or even mentioning, conversion therapy (or another banned therapy), he or she may be liable to the licensing board. Where mere words constitute treatment, it may be difficult, if not impossible, for therapists to be confident they are not overstepping their bounds. As such, they may not mention such treatments at all. Thus, this law may have the effect of completely estopping a therapist from being able to discuss his or her views on sexual orientation (or the subject of another government

¹⁵⁵ See, e.g., Ken Duckworth & Jacob L. Freedman, *Cognitive Behavioral Therapy (CBT)?*, NAMI (July 2012), http://www.nami.org/Template.cfm?Section=About_Treatments_and_Supports&template=/ContentManagement/ContentDisplay.cfm&ContentID=7952 (describing Cognitive Behavioral Therapy, a more structured form of talk therapy).

¹⁵⁶ See DINKMEYER & SPERRY, *supra* note 137, at 76 (noting the importance of mutual trust and respect between the therapist and client for the success of treatment).

¹⁵⁷ CAL. BUS. & PROF. CODE § 865.1 (West 2012) (“Under no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age.”); N.J. STAT. ANN. § 45:1-55 (West 2013) (“A person who is licensed to provide psychological counseling . . . shall not engage in sexual orientation change efforts with a person under 18 years of age.”).

¹⁵⁸ The *Pickup II* and *King* courts have inferred this ability, however. *Pickup II*, 740 F.3d at 1229; *King v. Christie*, 981 F. Supp. 2d 296, 313–14 (D.N.J. 2013).

¹⁵⁹ See DINKMEYER & SPERRY, *supra* note 137, at 76 (“The effective therapeutic relationship begins with [the therapist’s] focusing on the concerns as presented by [the] client.”).

¹⁶⁰ See *id.*

ban) at all. Taken from this point of view, even if the activity of talk therapy is seen as conduct and not speech, the unique nature of the therapist-client relationship makes it so that such broad sweeping treatment bans may still have the effect of preventing the therapist from exercising his First Amendment rights. As the mental health professional's speech is effectively chilled in this context, courts should still apply heightened scrutiny to laws regulating what may be said in the therapy room.¹⁶¹

Ultimately, the connection between a therapist and a client is very unique and difficult to broadly regulate without implicating free speech interests. Effective counseling through talk therapy relies on a strong therapist-client relationship focused on shared treatment goals. As noted above, as the therapist becomes more limited in what he or she may bring into treatment, the therapy may become less effective. Furthermore, the therapist may ultimately feel unable to even speak his or her opinions on certain treatments, as there may be a fear of running afoul of the law through a mere mention of those therapies. Thus, courts should recognize the unique position a therapist is in when it comes to wide-sweeping regulations.

B. Differences Between Other Professions

As noted in Part I, courts often grant states much deference in regulating licensed professionals, even where such regulations may have an impact upon the practitioner's speech.¹⁶² Indeed, courts have upheld numerous regulations both limiting and compelling certain types of speech.¹⁶³ While there are some instances where courts have overturned some regulations on the basis of the First Amendment, such as in *Conant v. Walters*¹⁶⁴ and *Legal Services Corp. v. Velazquez* (described above),¹⁶⁵ these seem to be the exception rather than the rule. However, very few of these cases actually refer to psychotherapy specifically.¹⁶⁶ Thus, when the *Pickup II* court looked to case law in making its decision, there was very little guidance about this specific regulated profession.¹⁶⁷ As such, the courts applied case law regulating different professions,

¹⁶¹ See *Conant v. Walters*, 309 F.3d 629, 636–39 (9th Cir. 2002) (discussing that a law which chilled a physician's speech was subject to heightened scrutiny).

¹⁶² See cases cited *supra* Part I.

¹⁶³ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 901 (1992) (affirming a law which mandates physicians to disclose certain information to patients seeking an abortion); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978) (upholding a regulation prohibiting lawyers from conducting in-person solicitations, despite the fact that speech is involved).

¹⁶⁴ 309 F.3d 629, 632 (9th Cir. 2002) (overturning a law which prohibited doctors from even recommending medical marijuana, as merely the discussion of medical marijuana was enough to violate the law).

¹⁶⁵ 531 U.S. 533, 537 (2001) (ruling unconstitutional a law which prohibited legal services lawyers from challenging the current welfare laws).

¹⁶⁶ See *supra* Part I.C.

¹⁶⁷ In subsequent cases involving legislation regulating SOCE, the language of *Pickup II* is heavily cited. See *King v. Christie*, 981 F. Supp. 2d 296, 312–18 (D.N.J. 2013).

namely the medical and legal fields.¹⁶⁸ Instead of recognizing a potential difference between the different fields, the courts grouped them together. Indeed, both *Pickup* cases emphasized the courts' view that psychological treatment is perfectly analogous to medical treatment or legal advice.¹⁶⁹ These cases cite, at length, the previously mentioned cases regulating doctors and lawyers.¹⁷⁰

For example, in *Pickup I*, the court compares the prohibition of conversion therapy to the ban on attorney solicitations at issue in the previously described *Ohralik* case,¹⁷¹ noting that the therapist's free speech rights are only marginally affected.¹⁷² Additionally, in *Pickup II*, the court expressly states that it views conversion therapy as a form of medical treatment, and thus the state has the ability to regulate it.¹⁷³

Indeed, these cases all rest on the proposition that there is nothing unique about talk therapy; it can easily be regulated along the same lines as other professions.¹⁷⁴ However, as this Section will discuss, talk therapy is substantially different under the First Amendment than other regulated professions. The first Subsection will describe the substantial differences between the professional relationship involved in talk therapy and those in other fields. The second Subsection will compare these fields and demonstrate that, unlike the attorney-client or doctor-patient relationships, the relationship a therapist develops with a client actually affects the outcome of treatment.

1. Comparing the Professional Relationships

As noted above, the therapist-client interaction is very unique;¹⁷⁵ in addition to the professional nature of the relationship, there is also a personal aspect.¹⁷⁶ First, when a client first begins therapy, the therapist often spends much of the first few sessions

¹⁶⁸ See *Pickup II*, 740 F.3d 1208, 1229 (9th Cir. 2014) (applying cases regarding the constitutionality of regulations of the medical field); *Pickup I*, No. 2:12-CV-02487-KJM-EFB, 2012 WL 6021465, at *11 (E.D. Cal. Dec. 4, 2012) (relying on *Ohralik*, a case concerning regulations on attorneys).

¹⁶⁹ *Pickup II*, 740 F.3d at 1229 (comparing talk therapy to medical treatment); *Pickup I*, 2012 WL 6021465, at *11 (noting that this issue was akin to prohibiting a lawyer from soliciting clients); *King*, 981 F. Supp. 2d at 319 (citing prior decisions in relation to the medical field as justification for its ruling).

¹⁷⁰ See cases cited *supra* Parts I.A–B.

¹⁷¹ *Pickup I*, 2012 WL 6021465, at *11.

¹⁷² *Id.* (citations omitted) (“This case is instead more like *Ohralik* . . . , in which the Court rejected a lawyer’s challenge to professional discipline for his in-person solicitation of clients.”).

¹⁷³ *Pickup II*, 740 F.3d at 1229 (“[This law] regulates *conduct*. It bans a form of treatment for minors (emphasis added)).

¹⁷⁴ See *id.* (noting that SB 1172 is “the regulation of professional *conduct*, where the state’s power is great, even though such regulation may have an incidental effect on speech”).

¹⁷⁵ See *supra* Part III.A.

¹⁷⁶ See DINKMEYER & SPERRY, *supra* note 137, at 75 (noting that the “proper therapeutic relationship” requires a “relationship of mutual trust and respect”).

establishing the necessary rapport and a genuine relationship with the client.¹⁷⁷ As one author notes, “winning the patient’s cooperation for the common task is a prerequisite for any therapy.”¹⁷⁸ Additionally, once this relationship is established, the therapist is constantly tasked with maintaining it.¹⁷⁹ Moreover, the therapist and client usually meet fairly regularly, typically once a week, over an extended period of time.¹⁸⁰

With other professions, this personal connection is not as important. Looking first to the medical field, while it is true that doctors are expected to build rapport with their clients,¹⁸¹ the scope of the doctor-patient relationship is not nearly as broad as the relationship between a therapist and client. While a professional relationship with a patient may help to more easily illicit information or treat an underlying illness or problem,¹⁸² the fact remains that this relationship is not *necessary* as it is with talk therapists.¹⁸³

A similar limitation exists with attorneys as well; a close professional relationship is not necessary. Indeed, even where the attorney-client relationship has been completely destroyed, the lawyer may still be required to continue to represent the client.¹⁸⁴ Therapists, however, may more freely terminate the relationship whenever they sense that more harm than good is coming from the sessions, emphasizing the importance of a good rapport and relationship between the therapist and client.¹⁸⁵

Second, and more importantly, is the notion that the therapist is actually bringing parts of his or herself into the therapy room.¹⁸⁶ As previously noted, through the process of countertransference, the therapist forms reactions to the client, and these reactions can actually be used beneficially in the treatment.¹⁸⁷ It is not just that the therapist has

¹⁷⁷ See *id.* at 75–76.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 76.

¹⁸⁰ See Stephen Barrett, *Mismanagement of Psychotherapy*, QUACKWATCH (May 12, 2013), <http://www.quackwatch.com/01QuackeryRelatedTopics/mispsych.html> (describing how forms of cognitive therapy are conducted on a weekly basis over the course of fifteen to twenty-five weeks).

¹⁸¹ See Susan Dorr Goold & Mark Lipkin, Jr., *The Doctor-Patient Relationship: Challenges, Opportunities, and Strategies*, 14 J. GEN. INTERNAL MED. 26, 26–27 (1999) (describing the necessity of developing a good relationship with the patient, especially during the initial interview).

¹⁸² See *id.* at 26 (noting that “a patient who does not trust or like the practitioner will not disclose complete information efficiently”).

¹⁸³ See DINKMEYER & SPERRY, *supra* note 137, at 75–76 (describing this relationship as a “prerequisite”).

¹⁸⁴ See MODEL RULES OF PROF’L CONDUCT R. 1.16 (1983) (requiring the permission of the court or tribunal before a lawyer may cease to represent a client).

¹⁸⁵ See ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT R. 10.10(a) (2010), www.apa.org/ethics/code/principles.pdf (“Psychologists terminate therapy when it becomes reasonably clear that the client/patient no longer needs the service, is not likely to benefit, or is being harmed by continued service.”).

¹⁸⁶ See Reidbord, *supra* note 150 (describing the ways in which psychologists bring their own feelings and experiences into the therapy room through the previously discussed notion of countertransference).

¹⁸⁷ See sources cited *supra* note 150.

a reaction, but rather that this personal reaction can actually serve a useful purpose.¹⁸⁸ With both the legal and medical professions, a personal reaction to a client or patient is rarely used in providing services to clients and patients. While it is true that lawyers and doctors employ their subjective reactions to clients and patients in some ways, that practice is nowhere near as pervasive as with therapists.

Finally, the parameters of the relationship between a therapist and client are much more private than those involving a doctor or a lawyer. As with these other professions, therapists are held to a very high standard of confidentiality.¹⁸⁹ Indeed, a therapist is often disallowed from revealing the identity of a client.¹⁹⁰ The information shared between a therapist and his or her client remains much more private than the information shared with medical doctors or lawyers. In a medical setting, for example, the patient may be seen by a number of nurses and administrative staff in addition to the doctor, limiting the overall privacy inherent in the doctor-patient relationship; additionally, these personnel have access to the patient's files and the information therein. In the legal field, many of the things discussed between an attorney and client may come out in a courtroom or legal document. The therapist, however, rarely, speaks to others about the matters discussed in session. Absent client permission or an exigent circumstance, the information communicated between the client and therapist typically stays in the room and in the private records of the therapist.¹⁹¹ Indeed, the mere fact that a therapist is seeing a particular client is confidential information.¹⁹² Thus, the therapist-client relationship better maintains confidentiality than the relationships entered into with doctors or lawyers, and clients very much rely on this confidentiality during treatment.

For all of these reasons, the *Pickup II*¹⁹³ court erred in deciding that talk therapy could be regulated in the same fashion as other licensed professions. As the relationship between the therapist and client is different in so many ways from these other professions, the courts should not rely so heavily on the case law concerning those regulated fields.

2. Speech as Affecting Treatment

In addition to the notion that the actual relationship is different, talk therapy is also unique in the sense that, unlike with the legal or medical fields, the spoken words

¹⁸⁸ *Id.*

¹⁸⁹ See ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT R. 04.01 (2010), available at <http://www.apa.org/ethics/code/> (“Psychologists have a primary obligation and take reasonable precautions to protect confidential information obtained through or stored in any medium . . .”).

¹⁹⁰ *Id.* at 4.06–4.07.

¹⁹¹ See *id.* at 4.05 (“Psychologists disclose confidential information without the consent of the individual only as mandated by law for a valid purpose. . .”).

¹⁹² See *id.* at 4.06.

¹⁹³ 740 F.3d 1208 (9th Cir. 2013).

actually constitute the treatment.¹⁹⁴ Indeed, talk therapy is often called the “talking cure.”¹⁹⁵ In both the medical field and legal fields, regulating certain types of speech does not significantly alter the practice in a particular field. For example, in *Ohralik*, the Court’s decision did not impact the actual practice of law.¹⁹⁶ While the attorney could not actively solicit clients in person, the laws had no effect on the quality or form of his legal representation.¹⁹⁷ Additionally, the restrictions upheld in *Casey* did little to actually prevent the performance of the medical procedure.¹⁹⁸ While doctors were compelled to make certain disclosures to patients seeking an abortion, this did not impact the actual performance of the procedure.¹⁹⁹

With talk therapy, however, censoring the treatment is the equivalent of censoring one’s speech. While the courts upheld the conversion therapy ban on the grounds that it only regulated a form of treatment, they shunted aside the reality that many forms of this therapy deal purely with speech.²⁰⁰ Unlike the numerous other cases these courts cite to,²⁰¹ there is no difference here between the practice to be “regulated” and pure speech. Indeed, for talk therapists, the only “conduct” they are engaged in is *speaking* with their clients. At least in the realm of the First Amendment, common law concerning the regulation of other professions is incompatible with talk therapy, as there is no distinction between “conduct” and pure speech. As the Third Circuit noted in *King v. Governor of New Jersey*,²⁰² “speech is speech, and it must be analyzed as such for purposes of the First Amendment.”²⁰³

IV. ALTERNATIVES TO AN OUTRIGHT BAN

It is very important to note that regarding psychotherapy as speech does not automatically make it impossible to regulate; the process is just more difficult.²⁰⁴ This Part will address the different ways in which the government could reduce the harm caused by gay conversion therapy, and other forms of therapy as well. First, the state

¹⁹⁴ See generally DINKMEYER & SPERRY, *supra* note 137, at 75–109 (discussing the ways in which the therapist can employ certain language in the therapy room to affect change over the course of the client’s treatment).

¹⁹⁵ See *Pickup II*, 740 F.3d at 1218.

¹⁹⁶ See generally *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978).

¹⁹⁷ *Id.* at 467–68.

¹⁹⁸ See generally *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

¹⁹⁹ *Id.* at 882–83.

²⁰⁰ See *Pickup II*, 740 F.3d at 1229 (“[The conversion therapy ban] regulates conduct. It bans a form of [*medical treatment*]” (emphasis added)).

²⁰¹ See *supra* Part II.

²⁰² 767 F.3d 216 (3d Cir. 2014).

²⁰³ *Id.* at 229.

²⁰⁴ Though perhaps not. The Third Circuit found, without much difficulty, that prohibitions on SOCE, although considered speech, were still constitutional under an intermediate scrutiny analysis. *Id.* at 237–40.

could conduct more empirical research into the specific type of therapy it wishes to ban so that it can establish an important or compelling interest for the purposes of heightened review.²⁰⁵

Second, this Part will address the ways in which the government could isolate and restrict those aspects of treatment, such as electroshock therapy, that do not have a speech element. By only regulating non-speech therapies, the government will still be able to further its own agenda while maintaining the free speech rights of those practicing psychotherapy.

A. Conducting More Research

As noted in the *Pickup* cases,²⁰⁶ the government has little empirical evidence clearly demonstrating the harms of gay conversion therapy.²⁰⁷ Anecdotal evidence is the primary support for the state's claim that this ban is an important or compelling government interest.²⁰⁸ In fact, gaining enough evidence of harm for this particular type of therapy may be all but impossible. As one psychologist noted, it is "nearly impossible to obtain a random sample of research participants who have been treated for their sexual orientation."²⁰⁹ Furthermore, he notes that it is equally difficult to conduct such research in an environment free from social bias.²¹⁰ Without this research, it is very difficult to make any meaningful generalizations about this type of therapy.²¹¹ The psychologist noted, however, that "without nonrandom surveys, there would probably be scant data on *any* aspect of sexual orientation, given the difficulty in accessing participants who are willing to be surveyed about their sexuality."²¹² The judge in the initial *Pickup* case echoed this sentiment:

[T]here is a dearth of scientifically sound research on the safety of SOCE. Early and recent research studies provide no clear indication of the prevalence of harmful outcomes among people who have undergone efforts to change their sexual orientation or the frequency of occurrence of harm because no study to date of

²⁰⁵ While the Third Circuit stated that it did not need high levels of empirical evidence to find an important governmental interest, other courts may either apply strict scrutiny or else require more evidence to establish an important state interest. *Id.*

²⁰⁶ See *Pickup v. Brown*, 728 F.3d 1042, 1056–57 (9th Cir. 2013).

²⁰⁷ *Id.*

²⁰⁸ *Pickup I*, No. 2:12-CV-02497-KJM-EFB, 2012 WL 6021465, at *24, (E.D. Cal. Dec. 4, 2012), *aff'd by Pickup II*, 740 F.3d 1208 (9th Cir. 2013).

²⁰⁹ Douglas C. Haldeman, *Gay Rights, Patient Rights; The Implications of Sexual Orientation Change Therapy*, 33 PROF. PSYCHOL.: RES. & PRAC. 260, 261 (2002).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* (emphasis added).

adequate scientific rigor has been explicitly designed to do so. Thus, we cannot conclude how likely it is that harm will occur from SOCE. However, studies . . . indicate that attempts to change sexual orientation may cause or exacerbate distress and poor mental health in some individuals, including depression and suicidal thoughts.²¹³

Thus, at least for this particular type of therapy, the government may have a heavy burden to provide enough evidence to establish either an important or a substantial government interest.²¹⁴

However, as this Note touches on the government ban of therapeutic practices in general, it is important to note that it is not nearly as difficult to gather empirical data for *other* forms of therapy. For example, there have been countless studies showing the efficacy of specific treatments for a variety of mental-health related issues, such as depression²¹⁵ and posttraumatic stress disorder.²¹⁶ Thus, in the broader sense, it may be much easier for the government to acquire the empirical data needed to establish an important or compelling government interest for the purposes of satisfying heightened review. Additionally, as the psychological community is continually conducting studies on the efficacy of different methods of psychotherapy, a state may have ready access to the necessary data.²¹⁷ It may very well be that gay conversion therapy is unique in how difficult it is to gather empirical data as to its efficacy, and not at all a fair representation of talk therapy in general.

B. Banning Only the Non-Speech Elements of Psychotherapy

The California and New Jersey laws prohibiting the use of conversion therapy are very broad; the scope is defined as any treatment aimed at changing a minor's sexual orientation.²¹⁸ The California law specifically notes:

“Sexual orientation change efforts” means any practices by mental health providers that seek to change an individual's sexual

²¹³ *Pickup I*, 2012 WL 6021465, at *25 (quoting APA Report, *supra* note 22).

²¹⁴ See *King v. Governor of New Jersey*, 767 F.3d 216, 235 (3d Cir. 2014).

²¹⁵ See, e.g., Ellen Driessen et al., *The Efficacy of Cognitive-Behavioral Therapy and Psychodynamic Therapy in the Outpatient Treatment of Major Depression: A Randomized Clinical Trial*, 170 AM. J. PSYCHIATRY 1041, 1041 (2013) (looking at the efficacy of a specific type of therapy, Cognitive-Behavioral Therapy, in particular).

²¹⁶ See, e.g., Sandra A. Wilson et al., *Fifteen-Month Follow-up of Eye Movement Desensitization and Reprocessing (EMDR) Treatment for Post-traumatic Stress Disorder and Psychological Trauma*, 65 J. CONSULTING & CLINICAL PSYCHOL. 1047, 1047 (1997) (describing the efficacy of a specific type of treatment).

²¹⁷ See *supra* notes 104–05 (providing examples of the ways in which psychologists constantly monitor and assess different treatment methods).

²¹⁸ CAL. BUS. & PROF. CODE § 865(b)(1) (West 2012).

orientation. This includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex. . . . “Sexual orientation change efforts” does not include psychotherapies that: (A) provide acceptance, support, and understanding of clients or the facilitation of clients’ coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and (B) do not seek to change sexual orientation.²¹⁹

The huge breadth of this law can more clearly be seen when paired with a list of the large number of different treatments that have been developed for the purposes of actualizing a change in sexual orientation. Indeed, the *Welch v. Brown*²²⁰ court spent an entire paragraph detailing the large number of specific therapy techniques affected by this law:

Behavior therapists tried 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. Other examples of aversive behavioral treatments included covert sensitization, shame aversion, systematic desensitization, orgasmic reconditioning, and satiation therapy. Some nonaversive treatments used an educational process of dating skills, assertiveness, and affection training with physical and social reinforcement to increase other-sex sexual behaviors. Cognitive therapists attempted to change gay men’s and lesbians’ thought patterns by reframing desires, redirecting thoughts, or using hypnosis, with the goal of changing sexual arousal, behavior, and orientation.²²¹

With this bill affecting so many different types of treatment, it does not actually ban one specific type of therapy, but rather the *goal* of the therapy. While the Third Circuit maintains that such definitions are “not more extensive than necessary” to serve the State’s interest,²²² “gay conversion therapy” is essentially an umbrella term encompassing dozens of “treatment” methods. Especially with the dearth of knowledge about the effects of these treatments, it may be that only some are truly harmful. However, many of the treatments listed above do not have a speech element, such as

²¹⁹ *Id.* § 865(b)(1)–(2).

²²⁰ 907 F. Supp. 2d 1102 (E.D. Cal. 2012).

²²¹ *Id.* at 1112 (quoting APA Report, *supra* note 22).

²²² *King v. Governor of New Jersey*, 767 F.3d 216, 237 (3d Cir. 2014).

aversion therapy and conditioning. With these therapies, along with those where speech is not as deeply imbedded as it is in talk therapy, a state has a lot more leeway for prohibitions.

As discussed above, courts have continually upheld state regulations prohibiting certain professional practices that do not inherently embody speech. For example, in *Conant v. Waters*,²²³ the Ninth Circuit ruled that the government could not prohibit a physician from recommending or discussing medical marijuana with patients.²²⁴ However, the court recognized that it is constitutional to prohibit the speech necessary to actually write the prescription for marijuana.²²⁵ Indeed, *Conant* reinforces the idea that as long as speech is not a core aspect of the conduct to be prohibited, a state has much more power to regulate it.²²⁶

Moving beyond the specific example of conversion therapy, there are a number of areas of psychology where multiple treatment options exist for a single ailment, problem, or disorder. For example, there are a wealth of treatment options available for disorders such as depression and anxiety, many of which do not inherently involve speech.²²⁷ As many models of psychotherapy involve non-speech treatment, the government could focus on regulating those models when it believes a particular practice is especially harmful. This argument is buttressed by the fact that the non-speech treatments seem to pose a greater risk than those posed in mere talk therapy. Thus, by declaring talk therapy as speech, the government is not automatically estopped from taking any action to prevent potential harm. By prohibiting those treatments which do not rely so heavily on physician speech, such as the aversive treatments for SOCE described above, a state is still able to mitigate perceived harms without threatening a therapist's First Amendment rights.

C. Compelled Disclosures and More Rigorous Informed Consent

Additionally, instead of working to ban a particular type of speech, a state could make it such that mental health professionals be required to gather more rigorous informed consent before engaging in talk therapies the state deems to be risky. In the specific case of gay conversion therapy, for example, a state could require the therapist to fully disclose the dangers and harms associated with the treatment so that the client and his or her parents could give their fully informed consent. Indeed, courts are much

²²³ 309 F.3d 629 (9th Cir. 2002).

²²⁴ *Id.* at 639 (2002).

²²⁵ *Id.* at 635.

²²⁶ *Id.* at 637.

²²⁷ A GUIDE TO TREATMENTS THAT WORK 226–36, 319–31 (Peter E. Nathan & Jack M. Gorman eds., 2d ed.) (2002) (describing the numerous treatment options available for a wide range of mental disorders and psychological issues, including treatments for both depression and anxiety).

less likely to find that professional compelled speech violates the First Amendment than they are with prohibited speech²²⁸:

The practical effect of prohibiting physicians from speaking is arguably more deleterious than the practical effect of compelling physicians to speak. When a physician is compelled by the state to provide certain information to the patient, the patient is able to weigh the information provided along with other available information to test its worthiness. Moreover, the physician is usually able to disclaim or at least explain the reason that he or she is providing the information.²²⁹

Indeed, “[a]ll fifty states have laws that mandate that physicians inform their patients of the risks, benefits, and alternatives to treatment.”²³⁰ Furthermore, a state’s ability to compel speech is not limited to physicians. For example, in the legal realm, when lawyers face a potential conflict of interest in a certain case, he or she must gain informed consent from his clients before continuing representation.²³¹ The American Psychological Association places an ethical obligation to obtain informed consent (or informed assent, for minors) before any treatment may begin.²³² Thus, by requiring a therapist to warn potential clients of the harms of certain types of therapy in particular, a state is still able to meet its interest in protecting LGBT youth or other affected groups.

CONCLUSION

California’s, and subsequently New Jersey’s, passage of the ban on conversion therapy garnered much controversy,²³³ which swelled even more after *Pickup II*’s unanimous affirmation of the ban’s constitutionality.²³⁴ While some people celebrated this

²²⁸ See Swartz, *supra* note 69, at 112–13 (describing how the *Casey* Court allowed for the states to compel physician speech in regards to abortion).

²²⁹ See *id.* at 114.

²³⁰ *Id.* at 118.

²³¹ See MODEL RULES OF PROF’L CONDUCT R. 1.7 (2012) (noting that, where a conflict of interest exists, a lawyer may only continue to represent the client if the “affected client gives informed consent, confirmed in writing”).

²³² See ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT R. 3.10(a)–(b) (2010), <http://www.apa.org/ethics/code/index.aspx?item=3#> (noting that psychologists engaging in talk therapy must “obtain informed consent of the individual . . . using language that is reasonably understandable to that person”).

²³³ See Ian Lovett, *Law Banning ‘Gay Cure’ Is Upheld in California*, N.Y. TIMES (Aug. 29, 2013), http://www.nytimes.com/2013/08/30/us/law-banning-gay-cure-is-upheld-in-california.html?_r=0 (describing the controversy this law created).

²³⁴ See *id.*

as a victory for the LGBT community, others, including a Ninth Circuit judge, found this to be an unconstitutional infringement of the right to free speech.²³⁵ As this issue continues to grow and other states consider adopting similar legislation, it will be very important to take a step back and look at this through a different lens than gay conversion therapy. While that type of therapy is not considered efficacious and generally lacks support, a blanket holding that talk therapy is only to be considered as pure conduct may have dangerous consequences. As this Note demonstrates, the courts' attempts at justifying their decisions by citing to common law regulating other professions ultimately falls flat, as speech is so heavily imbued in talk therapy. While other professions may use speech in addition to their professional conduct, there is no clear separation between speech and conduct in the realm of pure talk therapy. Thus, in keeping with the First Amendment, bans on forms of talk therapy should be subject to heightened scrutiny, with the government using other avenues to discourage practices it considers ineffective or dangerous. While many people may view a ban of this particular type of therapy to be in society's best interests, the collateral damage of this case may ultimately make it easier for professional, and perhaps even nonprofessional, speech to be suppressed. As stated by Judge O'Scannlain, "[e]mpowered by this ruling of [the Ninth Circuit], government will have a new and powerful tool to silence expression based on a political or moral judgment about the content and purpose of the communications."²³⁶

²³⁵ *Pickup v. Brown*, 740 F.3d 1208, 1215 (9th Cir. 2014) (O'Scannlain, J., dissenting).

²³⁶ *Id.* at 1216.