PROTECTING FLORIDA'S LGBTQ+ YOUTH BY PROHIBITING THE USE OF CONVERSION THERAPY

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I. INTRODUCTION

James Guay grew up in Los Angeles raised by strict, Christian parents.[1] He was nine years old when he first realized he was gay.[2] By the age of sixteen, the extremely homophobic messages James experienced at home, school, and church led him to seek out conversion therapy.[3] James began to attend weekly therapy sessions with an "ex-gay" psychologist.[4] In these sessions James was:

> encouraged to blame [his] distant relationship with [his] father and over-involved relationship with [his] mother for [his] same-sex desires. [He] was also guided to "remember" an original wounding—in particular, sexual or physical abuse—that [he] had not experienced. The main cures were to build "healthy same-sex non-sexual friendships," become more "masculine" and date girls.[5]

Eventually, James realized this therapy was not working.[6] He recounts a long and painful process of breaking free from the shame and self-harm resulting from of years of conversion therapy.[7] Unfortunately, James' story is not a unique one.

A survey of recent Supreme Court decisions and changing American attitudes may lead one to believe the fight for rights and protections for

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1. James Guay, *My Hellish Youth in Gay Conversion Therapy and How I Got Out*, TIME (July 15, 2014, 11:50 AM EDT), https://time.com/2986440/sexual-conversion-therapy-gay/.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

the lesbian, gay, bisexual, transgender, and queer ("LGBTQ+")[8] community is close to complete. The Supreme Court's recent decision in *Bostock v. Clayton County* marks another victory for the LGBTQ+ community in the quest toward equality and treatment relative to that enjoyed by their heterosexual and cisgender peers.[9] This is just the most recent in a string of Supreme Court decisions that have expanded the rights and improved the treatment of LGBTQ+ individuals. These decisions reflect the changing American attitudes and the increasing number of Americans who believe "homosexuality should be accepted by society."[10] However, none of these landmark cases directly address the rights of and protections for LGBTQ+ youth. Couple this with legislation at the federal, state, and local levels rarely designed with LGBTQ+ youth in mind, and it is easy to see how this population is often left unprotected.

The changing political and legal landscape for LGBTQ+ individuals alongside evolving societal views have likely influenced the number of American youth who feel comfortable identifying as LGBTQ+. A 2017 Gallup poll estimated 4.5% of American adults identify as lesbian, gay, bisexual, or transgender.[11] Among Americans thirteen to eighteen years old, however, this number is estimated at a much higher 10.5%.[12] While these numbers may indicate young people in America have an easier time living their most authentic lives when it comes to sexual orientation and gender identity, other numbers tell a much darker story. A 2019 study estimated that of the LGBTQ population between the ages of thirteen and eighteen, 45.3% had "seriously considered suicide in the past [twelve] months."[13] Considering a 2017 estimate of all high school students admitting to contemplating suicide in the last year was 17%,[14] one is left to wonder why the rate is so much higher among LGBTQ+

8. This acronym refers to Lesbian, Gay, Bisexual, Transgender, Queer, and other individuals who do not identify as heterosexual or cisgender. Other acronyms used throughout this paper reflect the communities included in specific research and studies.

9. Bostock v. Clayton County, 140 S. Ct. 1731, 1731 (2020) (holding that an employer who fires an employee for being gay or transgender has violated Title VII of the Civil Rights Act of 1964).

10. A poll of Americans shows the percentage who believe "homosexuality should be accepted by society" rose from 51% to 72% between 2002 and 2019. Jacob Poushter & Nicholas Kent, *The Global Divide on Homosexualtity Persists*, PEW RSCH. CTR. (June 25, 2020), https://www.pewresearch.org/global/2020/06/25/global-divide-on-homosexuality-persists/.

11. Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, GALLUP (May 22, 2018), https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx.

12. AMY GREEN ET AL., TREVOR PROJECT, NATIONAL ESTIMATE OF LGBTQ YOUTH SERIOUSLY CONSIDERING SUICIDE 4 (2019), https://www.thetrevorproject.org/wp-content/uploads/2019/06/Estimating-Number-of-LGBTQ-Youth-Who-Consider-Suicide-In-the-Past-Year-Final.pdf.

13. *Id.* at 5.

14. *Teen Suicide*, CHILD TRENDS, https://www.childtrends.org/?indicators=suicidal-teens (last visited May 2, 2022).

youth. Statistics indicate the key factors to consider in answering this question include discrimination, pressure to conform, and concerns with today's political climate. Seventy-one percent of LGBTQ+ youth claimed to have faced discrimination as a result of their sexual orientation or gender identity.[15] Two-thirds reported being pressured to change their sexual orientation or gender identity.[16] And 76% "felt that the recent political climate impacted their mental health or sense of self."[17] In addition to the elevated suicide rates and mental health concerns experienced by LGBTQ+ youth, this population suffers a greater risk of homelessness, placement in the juvenile welfare system, and finding themselves in the juvenile justice system.[18]

The numbers in Florida paint a similar picture. Forty percent of students identifying as gay, lesbian, or bisexual seriously considered suicide whereas just ten percent of students who do not identify as part of that community contemplated suicide.[19] Additionally, Florida's legal and political landscape presents substantial obstacles to creating a welcoming environment for LGBTQ+ youth.[20] Legal issues related to

15. TREVOR PROJECT, NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH 1 (2019), https://www.thetrevorproject.org/wp-content/uploads/2019/06/The-Trevor-Project-National-Survey-Results-2019.pdf.

16. *Id.*

17. *Id.*

18. Estimates show that youth identifying as lesbian, gay, bisexual, or transgender were 120% more likely to experience homelessness as compared to their heterosexual and cisgender peers. M.H. MORTON, A. DWORSKY & G.M. SAMUELS, CHAPIN HALL AT THE UNIV. OF CHI., MISSED OPPORTUNITIES: YOUTH HOMELESSNESS IN AMERICA NATIONAL ESTIMATES 13 (2017), https://voicesofyouthcount.org/wp-content/uploads/2017/11/VoYC-National-Estimates-Brief-Chapin-Hall-2017.pdf. Additionally, the percentage of foster care youth who identify as part of the LGBTQ community is greater than that of youth who identify as LGBTQ in the general population. HUM. RTS. CAMPAIGN & FOSTER CLUB, LGBTQ YOUTH IN THE FOSTER CARE SYSTEM 1, https://assets2.hrc.org/files/assets/resources/HRC-YouthFosterCare-IssueBrief-FINAL.pdf (last visited May 2, 2022). Finally, one survey found that "39% of girls and 3.2% of boys in juvenile detention and correctional facilities self-identified as lesbian, gay, or bisexual." MOVEMENT ADVANCEMENT PROJECT ET AL., UNJUST: LGBTQ YOUTH INCARCERATED IN THE JUVENILE JUSTICE SYSTEM 3 (2017), https://www.lgbtmap.org/file/lgbtq-incarcerated-youth.pdf.

19. *Lesbian, Gay, and Bisexual (LGB) Public High School Students, 2017 Youth Risk Behavior Survey | Florida*, FLA. HEALTH 1, 1 (2017), http://www.floridahealth.gov/statistics-and-data/survey-data/florida-youth-survey/florida-youth-tobacco-survey/LGBflyerFinal.pdf. It is important to note this figure only reflects students who identify as gay, lesbian, or bisexual, and there is no data on how much higher the first number would be if transgender and other gender non-conforming youth were included.

20. As a result of the "merit-based" system for selecting judges, Florida has one of the most conservative courts in the United States. Noreen Marcus, *Conservatives Note that Ron DeSantis Has Turned Florida into 1 of the Most Conservative Courts in America*, U.S. NEWS (Sept. 8, 2020), https://www.usnews.com/news/best-states/articles/2020-09-08/conservatives-note-that-ron-desantis-has-turned-florida-into-the-most-conservative-court-in-america. Furthermore, counties and regions in Florida are incredibly politically divided, and the differences from county-to-county and region-to-region create disparities in policies and politics that affect LGTBQ+ youth. *See generally* David Weigel, *The Six Political States of Florida*, WASH. POST (Sept. 8, 2020), https://www.washingtonpost.com/graphics/2020/politics/florida-political-geography/

Florida's LGBTQ+ youth are wide-ranging and most certainly contribute to the desperation and helplessness felt by this particular population.

But James' story, like so many others', highlights one of the greatest dangers to LGBTQ+ youth in Florida and in many other parts of the country—conversion therapy. This Article will examine the legal battle over conversion therapy in Florida and the Eleventh Circuit. Part II will explore the changing societal views of the LGBTQ+ community in the United States and the historical context of LGBTQ+ protections. Part III will go on to define conversion therapy and examine the history of its use. Part IV will outline the legislative and judicial battles over the highly-debated use of conversion therapy on minors in Florida. Then, Part V will analyze how the Eleventh Circuit Court of Appeals incorrectly concluded that local prohibitions on conversion therapy violate the Constitution, as well as address the importance of a prohibition on conversion therapy for minors. Finally, Part VI will propose state legislative action necessary to provide a safer and more inclusive environment for LGBTQ+ youth in Florida.

II. CHANGING SOCIETAL AND LEGAL VIEWS OF LGBTQ+ PEOPLE

Over the last twenty years, Supreme Court decisions examining the rights and protections of LGBTQ+ Americans have evolved considerably and reflect changing American attitudes towards and societal views of the LGBTQ+ community. These shifts also signal the need to create a safer and more inclusive environment for the most vulnerable members of the LGBTQ+ population—its youth.

A. Changing Societal Views of the LGBTQ+ Community

Public perception of the LGBTQ+ community has notably changed over time. Many early cultures accepted same-sex relationships.[21] However, there is little other documentation regarding the issue of

(providing a useful description and breakdown of political regions in Florida and their differences). Additionally, as of March 2022 the Florida House of Representatives passed, with the Governor's support, the Parental Rights in Education Bill—referred to by many as the 'Don't Say Gay Bill'. *Florida Governor DeSantis Defends Controversial "Don't Say Gay" Bill*, CBS NEWS (Mar. 5, 2022), https://www.cbsnews.com/news/florida-governor-desantis-defends-dont-say-gay-bill/. The bill will limit discussion of sexual orientation and gender identity in schools. *See CS/CS/HB 1557 - Parental Rights in Education*, FLA. HOUSE OF REPS., https://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=76545&SessionId=93 (last visited May 2, 2022).

21. Michael K. Sullivan, *Homophobia, History, and Homosexuality: Trends for Sexual Minorities*, 8 J. HUM. BEHAVIOR SOC. ENV'T 1, 4 (2003).

homosexuality until the Victorian age.[22] It was at that point that many parts of Europe and America began to label homosexuality a criminal offense; thus introducing the idea of homosexuality as deviant.[23] Despite this early view, as early as 1890 and continuing into the 1920s, some large American cities had thriving gay social scenes with businesses that catered to gay life.[24] It would appear, however, that most of this prewar history has been overshadowed by societal backlash towards homosexuality that began during the Prohibition Era and lasted well into the 1950s.[25] The Cold War and a McCarthyism[26] view of homosexuals as a national security threat led to further persecution.[27] Following the war, some scientists, such as Alfred Kinsey and Evelyn Hooker, began to counter the prevailing view of homosexuality as a pathological issue.[28] Such work was instrumental in moving away from the view of homosexuality as a mental illness, culminating in the removal of homosexuality as a mental illness from the American Psychiatric Association's Diagnostic and Statistical Manual (DSM)[29].

Culturally and historically, homosexual and transgender identities have often been conflated.[30] In the mid-nineteenth century, for example, one writer propounded that some men were born with a woman's spirit trapped in their bodies and vice versa; this information is often viewed by historians as describing gays and lesbians but bears a stronger relationship to an understanding of transgender people.[31] The word transgender was not used until the early 1970s and was first used to describe individuals who lived as a gender different from their biological sex.[32] Similar to nineteenth-century views on homosexuality, and often in connection with the confusion between the two, there was scrutiny of

22. *Id.*
23. *Id.*
24. *Id.* at 5.
25. *Id.*
26. McCarthyism is a term coined to describe the act of accusing individuals or groups of being a threat to national security, particularly based in a fear of Communism. McCarthyism reached its height in the late 1940s and early 1950s. *Joseph McCarthy*, HISTORY, https://www.history.com/topics/cold-war/joseph-mccarthy (last visited May 2, 2022). The term is derived from the name of Senator Joseph McCarthy, who made public remarks that homosexuals, as well as other groups, were a threat to national security. *Id.*; *Sullivan*, *supra* note 21, at 5.
27. *Sullivan*, *supra* note 21, at 5.
28. *Id.* at 5–6.
29. *Id.* at 6.
30. Jack Drescher, *Queer Diagnoses: Parallels and Contrasts in the History of Homosexuality, Gender Variance, and the Diagnostic and Statistical Manual*, 39 ARCHIVES SEXUAL BEHAV. 427, 430 (2010).
31. *Id.*
32. *Id.* at 435.

the transgender community as well.[33] The first distinctions between homosexuality and transgender identity arose in the 1920s, with experimentation in the field of sex reassignment surgery soon to follow.[34] The next several decades were marked by the beliefs of many medical professionals who saw those dealing with gender identity issues as psychotic or neurotic and criticized the use of hormones and surgery to treat patients.[35] The DSM did not mention gender identity until the publication of the DSM-3, referencing the diagnosis of transsexualism.[36] The term gender identity disorder later replaced the term transsexualism in the DSM-4, published in 1994, and was then removed with the publication of the DSM-5 in 2013.[37] The focus of the current DSM with regard to gender identity is gender dysphoria, which "focus[es] the diagnosis on the gender identity-related distress that some transgender people experience (and for which they may seek psychiatric, medical, and surgical treatments) rather than on transgender individuals or identities themselves."[38]

While the shift of medical opinions away from views of homosexuality and transgender identity as mental illnesses did not create immediate acceptance of the LGBTQ+ population, a greater general acceptance of LGBTQ+ people and understanding of how and why people identify as LGBTQ+ has evolved over the last several decades. A poll of Americans shows the percentage of those believing "homosexuality should be accepted by society" rose from 51% to 72% between 2002 and 2019.[39] Additionally, the percentage of Americans who "believe[] that a person was born lesbian or gay" rose from 13% to 49% between 1977 and 2019.[40] Americans who think "gay people should be allowed to adopt a child" rose from 14% in 1977 to 75% in 2019.[41] Another survey conducted in 2017 measured that 64.6% of participants believed transgender individuals should be allowed to

33. *Id.* at 436.

34. *Id.* Sexual reassignment surgery is now referred to by many as gender confirmation surgery. *What to Expect from Gender Confirmation Surgery*, HEALTHLINE, https://www.healthline.com/health/transgender/gender-confirmation-surgery (last visited May 2, 2022).

35. Drescher, *supra* note 30, at 437.

36. *Gender Dysphoria Diagnosis*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/psychiatrists/cultural-competency/education/transgender-and-gender-nonconforming-patients/gender-dysphoria-diagnosis (last visited May 2, 2022).

37. *Id.*

38. *Id.*

39. Poushter & Kent, *supra* note 10.

40. Maya Salam, *Americans' Shifting Attitude on Gay Rights*, N.Y. TIMES (June 18, 2019), https://www.nytimes.com/2019/06/18/us/americans-lgbt-opinions.html.

41. *Id.*

adopt children.[42] Of the same survey participants, nearly 71% agreed "the United States is becoming more tolerant of transgender people."[43]

Greater acceptance and understanding of the LGBTQ+ population is a step in the right direction. However, a history of misguided notions about sexual orientation and gender identity coupled with the ethical considerations of conducting studies on youth have created a gap in our understanding of LGBTQ+ youth.[44] Changing American viewpoints mark the need for our society to better understand LGBTQ+ youth and to provide greater support for this vulnerable population.

B. LGBTQ+ History in The Supreme Court

Alongside an evolution of American attitudes towards LGBTQ+ people, LGBTQ+ related court outcomes have mirrored changes seen in the public sphere. The Supreme Court is responsible for the most prominent legal protections afforded to LGBTQ+ Americans over the last thirty years. However, the Court's early position on the rights of LGBTQ+ individuals was a far cry from the more accepting opinions handed down over recent years.

One of the earliest cases to come before the Supreme Court regarding the rights of LGBTQ+ individuals was *Bowers v. Hardwick*.[45] There, a man challenged the constitutionality of a Georgia statute that criminalized sodomy, including that between consenting adults.[46] The *Bowers* Court chose not to view the issue as one relating to a right of privacy and distinguished it from a line of caselaw supporting such a notion, narrowing the issue to the question of whether "the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[47] The narrowing of the issue to this degree, paired with a discussion of the history and tradition of anti-sodomy laws,[48] made the

42. WINSTON LUTHER, TAYLOR N. T. BROWN & ANDREW R. FLORES, UCLA SCH. OF L. WILLIAMS INST., PUBLIC OPINION OF TRANSGENDER RIGHTS IN THE UNITED STATES 5 (2019), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Public-Opinion-Trans-US-Aug-2019.pdf.

43. *Id.* at 7.

44. *See* Anthony R. D'Augelli & Arnold H. Grossman, *Researching Lesbian, Gay, and Bisexual Youth: Conceptual, Practical, and Ethical Considerations*, 3 J. GAY & LESBIAN ISSUES EDUC. 35, 48–50 (2006).

45. 478 U.S. 186, 186 (1986).

46. *Id.* at 187–88.

47. *Id.* at 190. The *Bowers* Court denied any resemblance between the case at hand and previous cases related to family, marriage, and decisions related to having and raising children. *Id.* at 190–91. The majority opinion went so far as to assert "any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable." *Id.* at 191.

48. *Id.* at 192–93. The majority opinion cited the existence of anti-sodomy laws at common law, the ratification of the Bill of Rights, and the ratification of the Fourteenth Amendment as evidence

Court's negative position on protecting the rights of homosexuals clear—even in their own homes. It would take almost twenty years for the Court to reverse its position on the criminality of homosexual behavior.[49]

In the interim, the Court addressed a different question with regard to the rights of LGBTQ+ persons in *Romer v. Evans*: the issue of discrimination and sexual orientation as a protected class.[50] In 1992, after a number of Colorado municipalities passed ordinances protecting individuals from discrimination based on sexual orientation, Colorado passed an amendment to its state constitution prohibiting any branch of the state or local governments from taking action intended to protect individuals identifying as gay, lesbian, or bisexual.[51] When the issue of the amendment's constitutionality came before the Supreme Court, the Court ruled the amendment violated the Equal Protection Clause.[52] *Romer* paved the way for the Equal Protection Clause to be used in a way that would provide for the right of same-sex couples to marry.[53] This recognized right to marriage would then lead to an allowance for same-sex, nonbiological parents to be listed on birth certificates.[54] This snowball effect has laid a foundation of federal rights and protections for those who do not identify as heterosexual.

The Court's most recent LGBTQ+ rights-related decision moves beyond a focus on marriage and family. In *Bostock v. Clayton County*, the Court held that an employer who fires an employee for being gay or transgender has violated Title VII of the Civil Rights Act of 1964.[55] The majority opinion in *Bostock* relied on the idea that while sexual orientation and nonconformity to one's gender assigned at birth are not specifically referenced by Title VII,[56] such a specific reference is not

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that a right by homosexuals to engage in sodomy could not be a fundamental right as defined by the Court in previous decisions. *Id.*

49. Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding there is a privacy right of consenting adults to engage in sexual activity, including homosexual activity, without criminal consequences).

50. 517 U.S. 620, 623–24 (1996).

51. *Id.* at 623; *see* COLO. CONST. art. II, § 30b.

52. *See Romer*, 517 U.S. at 631–36.

53. *See* Obergefell v. Hodges, 576 U.S. 644, 681 (2015) ("[S]ame-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold—and it now does hold—that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character."); United States v. Windsor, 570 U.S. 744, 775 (2013) (ruling the Defense of Marriage Act unconstitutional on the basis the act deprived individuals in state-recognized same-sex marriages equal protection under the law).

54. Pavan v. Smith, 137 S. Ct. 2075, 2078–79 (2017) (holding that because Arkansas allows for married, nonbiological parents to be included on birth certificates, and in some instances requires as much, this same right should not be denied to same-sex couples who are married).

55. 140 S. Ct. 1731, 1754 (2020).

56. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

required because "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[57] The Court's position on this issue is noteworthy, as it makes a connection between sexual orientation/transgender status and the characteristic of sex—a characteristic widely used in antidiscrimination—and equal-protection-based legislation and caselaw. The extension of discrimination on the basis of sex to include discrimination against gay and transgender individuals will likely have considerable effects as it is further examined in the context of employment discrimination, as well as areas such as education and public accommodation.

The last thirty years of precedent laid out by the Supreme Court have greatly advanced the legal position of the LGBTQ+ community in the United States. What remains to be seen is how the Court will build upon this framework in an effort to support LGBTQ+ youth. Federal district and circuit courts have been the sole forums for issues related to LGBTQ+ youth, among which inconsistencies often exist. The prohibition of conversion therapy use on minors remains one such inconsistency.

III. DEFINITION OF CONVERSION THERAPY AND A HISTORY OF ITS USE

The use of conversion therapy on LGBTQ+ youth has become a question of recent debate. "Conversion therapy is any attempt to change a person's sexual orientation, gender identity, or gender expression."[58] Conversion therapy is one of the most widely used terms for this practice, though there are many others.[59] Beliefs surrounding homosexuality and gender non-conformity as deviant, sinful, or the result of disease ultimately led people to seek ways to cure or correct these behaviors and to the eventual development of conversion therapy.[60]

The practice of attempting to change one's sexual orientation, by some accounts, dates back to the 1800s.[61] Since its inception, conversion

57. *Bostock*, 140 S. Ct. at 1741.

58. *Conversion Therapy*, GLAAD, https://www.glaad.org/conversiontherapy?response_type=embed (last visited May 2, 2022).

59. *Id.* This site provides a list of examples of alternative terminology used by providers of conversion therapy. One of the most common, sexual orientation change efforts (SOCE), will be used interchangeably throughout this Article.

60. Erinn E. Tozer & Mary K. McClanahan, *Treating the Purple Menace: Ethical Considerations of Conversion Therapy and Affirmative Alternatives*, 27 COUNSELING PSYCH. 722, 723 (1999).

61. Timothy F. Murphy, *Redirecting Sexual Orientation: Techniques and Justifications*,

therapy can, and has, taken many forms. Early uses often focused on inciting behavioral changes.[62] Some of the most extreme physical therapies included institutionalization, castration, and electroconvulsive shock therapy.[63] While homosexuality and gender nonconformity are no longer viewed by the majority of the medical community as disorders, evidenced by their removal from the DSM,[64] conversion therapy is still in use by some medical practitioners, and other individuals, seeking to alter the sexual orientation and gender identity of both adults and children.[65] Today's conversion therapy practitioners often use methods that depart from the extreme physical-behavior-targeted therapies of the early days in favor of a more "talk therapy" centered approach.[66]

IV. THE LEGAL BATTLE OVER CONVERSION THERAPY IN FLORIDA

Currently, twenty states and the District of Columbia have statewide legislation protecting minors from the use of conversion therapy.[67] These laws prevent licensed mental health practitioners from utilizing conversion therapy techniques on minors but do not prohibit religious providers from doing so.[68] Florida, however, has no such law. The legal debate over conversion therapy in Florida is a relatively recent one and has been the subject of both judicial decision and legislative action. Where statewide legislation has failed, city, county, and municipal governments in Florida have moved forward with enacting

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29 J. SEX RSCH. 501, 502 (1992). One doctor documented an attempt to curb a twenty-four-year-old man's sexual attractions to men through excessive bicycle riding to extinguish the man's sexual appetite. *Id.*

62. *Id.*

63. NAT'L CTR. FOR LESBIAN RTS. & HUM. RTS. CAMPAIGN FOUND., JUST AS THEY ARE PROTECTING OUR CHILDREN FROM THE HARMS OF CONVERSION THERAPY 6 (2017), https://www.nclrights.org/wp-content/uploads/2017/09/just-as-they-are-sept2017-1.pdf [hereinafter JUST AS THEY ARE]. In addition to these extreme examples, other historical types of behavioral therapy recommended strategies such as rest; sex with the opposite sex (often through visits with prostitutes); marriage; the use of alcohol, drugs, chemicals, and other substances; and other techniques. Tozer & McClanahan, *supra* note 60, at 723.

64. *See supra* pt. II.A. (discussing a change in the medical communities' views of homosexuality and gender identity).

65. JUST AS THEY ARE, *supra* note 63.

66. *Id.* at 7. Typical manifestations of "talk therapy" for this purpose include "training to conform to stereotypical gender norms; teaching heterosexual dating skills; and using hypnosis to try to redirect desires." *Id.*

67. *Equality Maps: Conversion "Therapy" Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/conversion_therapy (last visited May 2, 2022). States with statewide protections are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Virginia, and Washington. *Id.*

68. *Id.*

local legislation in an effort to protect minors from conversion therapy—or as some ordinances refer to it—sexual orientation change efforts (SOCE).[69] These local prohibitions have not been received without controversy, however, and the bans created by multiple local governments have had their constitutionality raised in court.[70]

A. Conversion Therapy in the State Legislature

The first attempts in Florida to legislate the use of conversion therapy statewide were introduced in November of 2018.[71] José Javier Rodríguez, a Democratic state senator from Miami, introduced *Senate Bill 84* with the hope of protecting LGBTQ+ youth from the harms of conversion therapy.[72] This proposal made Florida the first state to introduce legislation in support of a statewide prohibition of conversion therapy for minors in the 2019 legislative session.[73] *Senate Bill 84* proposed:

> [p]rohibit[ing] a person who is licensed to provide professional counseling or a practitioner who is licensed under provisions regulating the practice of medicine, osteopathic medicine, psychology, clinical social work, marriage and family therapy, or mental health counseling from practicing or performing conversion therapy for an individual who is younger than a specified age.[74]

State House of Representatives member Michael Grieco proposed a companion bill in the Florida House of Representatives.[75] After being referred to subcommittees, both bills died in May of 2019 without any serious discussion.[76] Rodríguez and Grieco proposed the same

69. *Id.* States with local bans on conversion therapy include Alaska, Arizona, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Ohio, Pennsylvania, and Wisconsin. *Id.*

70. *See* Hamilton v. City of Boca Raton, 353 F. Supp. 3d 1237, 1237 (S.D. Fla. 2019), *rev'd sub nom*, Otto v. City of Boca Raton, 981 F.3d 854 (11th Cir. 2020); *see also* Vazzo v. City of Tampa, 415 F. Supp. 3d 1087, 1087 (M.D. Fla. 2019).

71. *Florida Becomes First State to Introduce Legislation Protecting LGBTQ Youth from Conversion Therapy in 2019 Legislative Session*, TREVOR PROJECT (Nov. 29, 2018), https://www.thetrevorproject.org/trvr_press/florida-becomes-first-state-to-introduce-legislation-protecting-lgbtq-youth-from-conversion-therapy-in-2019-legislative-session/.

72. *Id.*

73. *Id.* This would have followed on the heels of fourteen other states who passed similar legislation by the end of 2018. *Conversion Therapy*, *supra* note 58.

74. An Act Relating to Conversion Therapy, S. 84, 2019 Sess. (Fla. 2019).

75. *Bill History, HB 109: Conversion Therapy*, FLA. HOUSE OF REPS., https://myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=62983&SessionId=87 (last visited May 2, 2022).

76. *Id.*; *Bill History, SB 84: Conversion Therapy*, FLA. SENATE, https://www.flsenate.gov/Session/Bill/2019/00084/?Tab= (last visited May 2, 2022).

legislation again in 2020, unfortunately, with the same result.[77] Representative Grieco is quoted in a press conference saying, "We'll file this bill every year if we have to,"[78] however, recent challenges to the constitutionality of local prohibitions present significant roadblocks to this strategy.[79]

Florida's more conservative legislators have been less direct in their attempts to address conversion therapy. LGBTQ+ activists criticized Republican legislators for attempting to pass a number of anti-LGBTQ+ pieces of legislation at the start of the 2020 legislative session.[80] Only one of the bills criticized was directly related to LGBTQ+ issues; the remainder dealt with business regulations with the potential to preempt local ordinances prohibiting conversion therapy.[81] Republican legislators deny that the business-related bills are intended as an attack on the rights of LGBTQ+ individuals.[82] LGBTQ+ activists, on the other

77. *Bill History, SB 180: Conversion Therapy*, FLA. SENATE, https://www.flsenate.gov/Session/Bill/2020/180/?Tab=RelatedBills (last visited May 2, 2022); *Bill History, HB 41: Conversion Therapy*, FLA. HOUSE OF REPS., https://myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=66437&SessionId=89 (last visited May 2, 2022).

78. Forrest Saunders, *Florida Lawmakers Call Conversion Therapy State-Sanctioned Child Abuse*, ABC ACTION NEWS, https://www.abcactionnews.com/news/state/florida-lawmakers-call-conversion-therapy-state-sanctioned-child-abuse (last updated Nov. 6, 2019, 10:16 AM EST).

79. *See* Otto v. City of Boca Raton, 981 F.3d 854 (11th Cir. 2020).

80. *See* An Act Relating to Home-Based Businesses, S. 778, 2020 Sess. (Fla. 2020). This Act was an attempt by conservative legislators to regulate home-based businesses. *Id.* Equality Florida publicly criticized this Act as anti-LGBTQ+ due to its ability to "roll[] back critical protections for LGBTQ youth by enabling conversion therapy even where cities and counties have already instituted protections, as long as the therapy occurs in a home." *Slate of Anti-LGBTQ Bills Dominate Florida Legislative Session*, EQUALITY FLA. (Jan. 14, 2020), https://eqfl.org/press-release-slate-anti-lgbtq-bills-dominate-florida-legislative-session.

81. *See Slate of Anti-LGBTQ Bills Dominate Florida Legislative Session*, *supra* note 80. House Bill 1365 and its companion bill in the Senate proposed assessing criminal penalties for health care providers who performed gender-affirming care practices on minors. *Bill History, HB 1365: Vulnerable Child Protection Act*, FLA. HOUSE OF REPS., https://myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=69696&SessionId=89 (last visited May 2, 2022); *Bill History, SB 1864: Vulnerable Child Protection Act*, FLA. SENATE, https://www.flsenate.gov/Session/Bill/2020/1864 (last visited May 2, 2022). The other bills would have preempted local ordinances related to employment conditions, licensing, and home-based businesses. *See Bill History, HB 305: Preemption of Conditions of Employment*, FLA. HOUSE OF REPS., https://myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=66842&SessionId=89 (last visited May 2, 2022); *Bill History, SB 1126: Employment Conditions*, FLA. SENATE, https://www.flsenate.gov/Session/Bill/2020/1126 (last visited May 2,, 2022); *Bill History, HB 3: Preemption of Local Occupational Licensing*, FLA. HOUSE OF REPS., https://myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=68638&SessionId=89 (last visited May 2, 2022); *Bill History, SB 1336: Preemption of Local Occupational Licensing*, FLA. SENATE, https://www.flsenate.gov/Session/Bill/2020/1336 (last visited May 2, 2022); *Bill History, HB 537: Home-based Businesses*, FLA. HOUSE REPS., https://myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=67394&SessionId=89 (last visited May 2, 2022); *Bill History, SB 778: Home-Based Businesses*, FLA. SENATE, https://www.flsenate.gov/Session/Bill/2020/778 (last visited May 2, 2022).

82. Lawrence Mower & Samantha J. Gross, *Florida GOP Lawmakers Say Legislation Is Not Anti-LGBTQ*, TAMPA BAY TIMES (Jan. 17, 2020), https://www.tampabay.com/florida-politics/buzz/2020/01/17/florida-gop-lawmakers-say-legislation-is-not-anti-lgbtq/.

hand, disagree.[83] Ultimately, none of the proposed legislation passed in the 2020 session.[84]

B. Conversion Therapy and Local Regulation

As of 2020, twenty-two local governments in Florida have enacted legislation protecting minors from conversion therapy.[85] This is more than any other state without a statewide prohibition in place.[86] The earliest of these local prohibitions was enacted in 2016.[87] These ordinances are similar or identical in several ways. Of those that explicitly include a provision outlining the purpose or intent of the ordinance, all contain almost identical language and note the goal of the ordinance as "protect[ing] the physical and psychological well-being of minors, including but not limited to lesbian, gay, bisexual, transgender and/or questioning youth, from exposure to the serious harms and risks caused by conversion therapy."[88]

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83. *See generally id.*

84. *See generally 2020 Florida Legislative Session*, BALLOTPEDIA, https://ballotpedia.org/2020_Florida_legislative_session (last visited May 2, 2022).

85. *Equality Maps: Conversion "Therapy" Laws*, *supra* note 67. The following Florida cities and counties have passed local prohibitions on the use of conversion therapy by licensed medical professionals on minors: Bay Harbor Islands, Boca Raton, Boynton Beach, Delray Beach, El Portal, Fort Lauderdale, Gainesville, Greenacres, Key West, Lake Worth Beach, Miami, Miami Beach, North Bay Village, Oakland Park, Riviera Beach, Tallahassee, Wellington, West Palm Beach, Wilton Manors, Alachua County, Broward County, and Palm Beach County. *Id.* These local protections are almost exclusively located in South Florida and a few other cities and counties centered around major universities; of the listed cities, only Gainesville, Tallahassee, and Key West are not within Palm Beach, Broward, or Miami-Dade County. *City County List*, FLA. DEP'T OF STATE, https://dos.myflorida.com/library-archives/research/florida-information/government/local-resources/citycounty-list/ (last visited May 2, 2021). These areas are also congruent with more politically progressive areas of Florida (with progressives typically being more supportive of the LGBTQ+ community than their more politically conservative counterparts). *See* Weigel, *supra* note 20.

86. *Florida Becomes First State to Introduce Legislation Protecting LGBTQ Youth from Conversion Therapy in 2019 Legislative Session*, *supra* note 71.

87. MIAMI BEACH, FLA., CODE OF ORDINANCES § 70-405 (2020). The Miami Beach ordinance, passed in June of 2016, was the first ordinance in Florida to prohibit the use of conversion therapy on minors. *Id.* For comparison, the first statewide prohibition was passed by California in 2012. *Conversion Therapy*, *supra* note 58.

88. BOCA RATON, FLA., CODE OF ORDINANCES § 9-104 (2020). There are slight variances in the statutory language describing various groups within the LGBTQ+ community, but otherwise, the stated intent of the ordinances are identical. *See* BOYNTON BEACH, FLA., CODE OF ORDINANCES § 15-134 (2020); DELRAY BEACH, FLA., CODE OF ORDINANCES § 133.02 (2020); FORT LAUDERDALE, FLA., CODE OF ORDINANCES § 29-65 (2020); GAINESVILLE, FLA., CODE OF ORDINANCES § 17-36 (2020); LAKE WORTH BEACH, FLA., CODE OF ORDINANCES § 15-101 (2020); OAKLAND PARK, FLA., CODE OF ORDINANCES § 8-126 (2020); RIVIERA BEACH, FLA., CODE OF ORDINANCES § 12-26 (2018); WELLINGTON, FLA., CODE OF ORDINANCES § 36-45 (2020); WEST PALM BEACH, FLA., CODE OF ORDINANCES § 54-171 (2020); ALACHUA COUNTY, FLA., CODE OF ORDINANCES § 120.01 (2020); BROWARD COUNTY, FLA., CODE OF ORDINANCES § 161/2-166 (2020); PALM BEACH COUNTY, FLA., CODE OF ORDINANCES § 18-121 (2020).

Additionally, the enactments share several common definitions. Arguably the most important definition is the one for conversion or reparative therapy, typically defined as "any counseling, practice, or treatment that seeks to change an individual's sexual orientation or gender identity, including, but not limited to, efforts to change behaviors, gender identity, or gender expression, or to eliminate or reduce sexual or romantic attractions or feelings towards individuals of the same gender or sex."[89] These definitions also clarify certain actions not included within the definition of conversion therapy, such as services provided in connection with a gender transition; counseling that supports, but does not try to change, those struggling with their sexual orientation and gender identity; and interventions for unlawful or unsafe sexual practices that are neutral towards an individual's sexual orientation.[90]

Another key similarity between the ordinances is the prohibition on the practice of conversion therapy by "providers," a term defined similarly by each code as:

> a person who is licensed by the State of Florida to provide professional counseling, or who performs counseling as part of his or her professional training under F.S. ch. 456, 458, 459, 490 or 491, as may be amended, including but not limited to, medical practitioners, osteopathic practitioners, psychologists, psychotherapists, social workers, marriage and family therapists, and licensed counselors.[91]

Religious leaders and members of the clergy are explicitly excluded from many of the enactments, so long as these individuals act solely in that capacity.[92]

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89. FORT LAUDERDALE, FLA., CODE OF ORDINANCES § 29-66 (2020); *see* BAY HARBOR ISLANDS, FLA., CODE OF ORDINANCES § 23-5.2 (2020); BOCA RATON, FLA., CODE OF ORDINANCES § 9-105 (2020); BOYNTON BEACH, FLA., CODE OF ORDINANCES § 15-135 (2017); DELRAY BEACH, FLA., CODE OF ORDINANCES § 133.02 (2020); EL PORTAL, FLA., CODE OF ORDINANCES § 5.5-1 (2018); GAINESVILLE, FLA., CODE OF ORDINANCES § 17-37 (2020); GREENACRES, FLA., CODE OF ORDINANCES § 8-73 (2017); KEY WEST, FLA., CODE OF ORDINANCES § 42-18 (2020); LAKE WORTH BEACH, FLA., CODE OF ORDINANCES § 15-102 (2020); MIAMI, FLA., CODE OF ORDINANCES § 37-13 (2020); MIAMI BEACH, FLA., CODE OF ORDINANCES § 70-405 (2020); NORTH BAY VILLAGE, FLA., CODE OF ORDINANCES § 137.01 (2020); OAKLAND PARK, FLA., CODE OF ORDINANCES § 8-127 (2020); RIVIERA BEACH, FLA., CODE OF ORDINANCES § 12-26 (2018); TALLAHASSEE, FLA., CODE OF ORDINANCES § 11-81 (2020); WELLINGTON, FLA., CODE OF ORDINANCES § 36-46 (2020); WEST PALM BEACH, FLA., CODE OF ORDINANCES § 54-172 (2020); WILTON MANORS, FLA., CODE OF ORDINANCES § 12-11 (2020); ALACHUA COUNTY, FLA., CODE OF ORDINANCES § 120.02 (2020); BROWARD COUNTY, FLA., CODE OF ORDINANCES § 161/2-167 (2020); PALM BEACH COUNTY, FLA., CODE OF ORDINANCES § 18-124 (2020).

90. *See, e.g.*, BOCA RATON, FLA., CODE OF ORDINANCES § 9-104 (2020).

91. *See, e.g.*, FORT LAUDERDALE, FLA., CODE OF ORDINANCES § 29-66 (2020).

92. *See* BOCA RATON, FLA., CODE OF ORDINANCES § 9-105 (2020); BOYNTON BEACH, FLA., CODE OF ORDINANCES § 15-135 (2017); DELRAY BEACH, FLA., CODE OF ORDINANCES § 133.02 (2020); FORT

Finally, each of the ordinances, with one exception, define minors as those under the age of eighteen.[93] The specific delineations and definitions that exist within these ordinances create a tailored prohibition on the use of conversion therapy; one that is legally significant and will be discussed in more detail when examining the legal challenges these ordinances have faced in the Eleventh Circuit.

It is also important to note the ordinances enacted by these local Florida governments share several commonalities with those that exist on a statewide level elsewhere. States regulating the use of conversion therapy also limit the prohibition to its use on minors;[94] similarly define and describe the practice of conversion therapy;[95] and limit the ban to only medical providers and those qualified to provide mental health services and counseling.[96] Again, these similarities demonstrate a legislative intent that is legally significant to the current debate surrounding conversion therapy in Florida.

C. Conversion Therapy in the Judicial Arena

In 2019, many of these local ordinances became the subject of litigation in the United States District Courts for the Middle and Southern Districts of Florida.[97] The courts in those cases came to distinctly different conclusions. The decision from the United States District Court for the Southern District of Florida was ultimately appealed to the Eleventh Circuit Court of Appeals who handed down a decision in

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LAUDERDALE, FLA., CODE OF ORDINANCES § 29-66 (2020); GAINESVILLE, FLA., CODE OF ORDINANCES § 17-37 (2020); GREENACRES, FLA., CODE OF ORDINANCES § 8-74 (2017); LAKE WORTH BEACH, FLA., CODE OF ORDINANCES § 15-102 (2020); OAKLAND PARK, FLA., CODE OF ORDINANCES § 8-127 (2020); RIVIERA BEACH, FLA., CODE OF ORDINANCES § 12-26 (2018); WELLINGTON, FLA., CODE OF ORDINANCES § 36-46 (2020); WEST PALM BEACH, FLA., CODE OF ORDINANCES § 54-172 (2020); BROWARD COUNTY, FLA., CODE OF ORDINANCES § 161/2-167 (2020); PALM BEACH COUNTY, FLA., CODE OF ORDINANCES § 18-124 (2020).

93. *See, e.g.*, BAY HARBOR ISLANDS, FLA., CODE OF ORDINANCES § 23-5.2 (2020). The exception is Tallahassee, which excludes from the definition those legally emancipated. TALLAHASSEE, FLA., CODE OF ORDINANCES § 11-81 (2020). While there has been no noticeable practical effect of this difference, Tallahassee's prohibition also differs from the others in that it extends to *vulnerable adults*, defined as "a ward over whom a plenary guardian has been appointed, pursuant to F.S. ch. 744, as may be amended from time to time." *Id.*

94. *Conversion "Therapy" Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/conversion_therapy (last visited May 2, 2022).

95. *Compare e.g.*, COLO. REV. STAT. § 12-240-104 (2020); CAL. BUS. & PROF. CODE § 865 (2020); 405 ILL. COMP. STAT. ANN. 48/15 (2020), *with, e.g.*, BOCA RATON, FLA., CODE OF ORDINANCES § 9-105 (2020).

96. *Id.* The language and qualifications describing the types of practitioners banned from using conversion therapy does vary some between the different pieces of legislation. *Id.*

97. Hamilton v. City of Boca Raton, 353 F. Supp. 3d 1237, 1241 (S.D. Fla. 2019), *rev'd sub nom*, Otto v. City of Boca Raton, 981 F.3d 854, 854 (11th Cir. 2020); Vazzo v. City of Tampa, 415 F. Supp. 3d 1087, 1089–90 (M.D. Fla. 2019).

November of 2020 currently binding on states within the Eleventh Circuit, including Florida.[98]

1. District Level Decisions- Hamilton

One of the first challenges to Florida's local prohibitions on the use of conversion therapy for minors came when licensed therapists Robert Otto and Julie Hamilton sought a preliminary injunction to enjoin the City of Boca Raton and Palm Beach County from enforcing their prohibitions.[99] Otto and Hamilton are licensed marriage and family therapists who offer talk therapy to their clients.[100] Otto and Hamilton, as plaintiffs, primarily argued the ordinances violated their First Amendment freedom of speech rights.[101]

The court acknowledged the importance of deciding whether the First Amendment was applicable and, if so, the appropriate level of review.[102] First, the court conducted a detailed analysis of whether talk therapy constituted speech or conduct; and if the former, whether this type of speech qualified as content-based or content-neutral.[103] The court went on to state that "applying intermediate scrutiny to medical treatments that are effectuated through speech would strike 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."[104] Recognizing the difficulty of applying a categorical approach to First Amendment protections, the court concluded it was unsure which standard of review should apply and utilized all three standards in its evaluation of the local ordinances.[105]

The court believed there were sufficient findings to demonstrate the ordinances were narrowly drawn if assessed under a rational basis or intermediate scrutiny standard.[106] When assessing the relationship between the ordinances and the government interest under strict

98. Otto v. City of Boca Raton, 981 F.3d 854, 854 (11th Cir. 2020).
99. *Hamilton*, 353 F. Supp. 3d at 1241.
100. *Id.* at 1242–43.
101. *Id.* at 1245.
102. *Id.* at 1248. Content-based speech protected by the First Amendment is subject to strict scrutiny. *E.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552, 565–67 (2011). Speech considered content-neutral is typically reviewed under an intermediate level of scrutiny. *E.g.*, Holder v. Humanitarian L. Project, 561 U.S. 1, 26–27 (2010). Regulations that do not include protected speech, or do so only incidentally, are subject to rational basis review. *Hamilton*, 353 F. Supp. 3d at 1248.
103. *Hamilton*, 353 F. Supp. 3d at 1249–52.
104. *Id.* at 1256.
105. *Id.* at 1256–58.
106. *Id.* at 1267.

scrutiny, however, the court conceded that valid questions exist as to whether the ordinances were the least restrictive means of achieving the governments' goals.[107] The court was satisfied with a short discussion on this matter, concluding more analysis was not necessary because the plaintiffs had failed to meet their burden of showing their substantial likelihood of success on the matter.[108]

Ultimately, the motion for preliminary injunction was denied because the plaintiffs did not successfully meet their burden of demonstrating a substantial likelihood of success on the merits for their claims.[109] This case, however, would be revisited and the decision reversed by the Eleventh Circuit Court of Appeals.[110]

2. District Level Decisions- Vazzo

Another case regarding a local government's prohibition of the use of conversion therapy on minors would arise in United States District Court for the Middle District of Florida.[111] This court, unlike the *Hamilton* court, declined to reach issues of constitutionality, stating the "Eleventh Circuit follows 'the longstanding principle that federal courts should avoid reaching constitutional questions if there are other grounds upon which a case can be decided.'"[112] As a result, the district court declined to address First Amendment issues entirely and instead focused its decision on a point only briefly discussed in *Hamilton*—preemption.[113] The court hinged its conclusion on the doctrine of implied preemption and decided "Florida's substantive regulation of healthcare practices, modalities, and discipline is so pervasive that it occupies the entire

107. *Id.* at 1267–68.

108. *Id.* at 1268.

109. *Id.* at 1273. The therapists in *Hamilton* also made several other arguments in their motion which were dismissed rather quickly by the court. *See id.* The court dismissed plaintiffs' claims that the restrictions are viewpoint discriminatory, prior restraints on speech, vague, and preempted by state law. *Id.*

110. Otto v. City of Boca Raton, 981 F.3d 854 (11th Cir. 2020).

111. Vazzo v. City of Tampa, 415 F. Supp. 3d 1087 (M.D. Fla. 2019).

112. *Id.* at 1089 (quoting BellSouth Telecomms., Inc. v. Town of Palm Beach, 252 F.3d 1169, 1176 (11th Cir. 2001)).

113. *Id.* The concept of preemption was not addressed in detail by the *Hamilton* court because it found the plaintiffs failed to show they would suffer irreparable harm as needed to issue a preliminary injunction. *Hamilton*, 353 F. Supp. 3d at 1272–73. Florida recognizes both express and implied preemption with regard to legislative enactments by local governments. D'Agastino v. City of Miami, 220 So. 3d 410, 421 (Fla. 2017). Express preemption occurs when a local government is prevented from creating or enforcing legislation in a certain area by the specific and clear language in a state statute. *Id.* Implied preemption, however, does not require clear cut language in the state legislation, but rather is the result of a state legislative scheme that is pervasive and with which the local legislation could potentially interfere. *Id.*

field."[114] Ultimately, the court granted the plaintiff's motion for summary judgment, resulting in disagreement within federal district courts in the Eleventh Circuit surrounding the constitutionality of local prohibitions on conversion therapy for minors.[115]

3. Eleventh Circuit Court of Appeals

The *Hamilton* case arising out of Florida's Southern District was subsequently appealed to the Eleventh Circuit Court of Appeals and decided in November of 2020 as *Otto v. City of Boca Raton*.[116] The majority opinion in *Otto* largely focused on First Amendment claims that were the basis for the lower court's opinion in *Hamilton*.[117] The Eleventh Circuit Court of Appeals ultimately reversed the *Hamilton* decision and held that the ordinances violated the First Amendment rights of the types of providers regulated by the statute.[118]

a. First Amendment Claims and Strict Scrutiny

The district court engaged in a detailed analysis of the First Amendment claims at issue.[119] The court first answered whether the ordinances were content-based, and as such, subject to strict scrutiny.[120] The court determined that because the ordinances regulate what is said, they contain content-based speech and as such are subject to strict scrutiny.[121] As a result, the majority rejected the argument that a more flexible level of scrutiny should be applied for professional speech[122] or

114. *Vazzo*, 415 F. Supp. 3d at 1107. The court cited five areas in which the conversion therapy ban would interfere with Florida's legislation in the scheme of medical regulation and healthcare: right to privacy, parental choice in healthcare, Florida's Patient's Bill of Rights, endorsement of alternative healthcare options, and informed consent. *Id.* at 1097–100. The court also concluded Florida legislation was pervasive in that all types of medical practitioners were regulated and "[a]ll practice types regulated by Tampa's Ordinance are included in Chapter 456's program of regulation." *Id.* at 1101.

115. *Id.* at 1107; *Hamilton*, 353 F. Supp. 3d at 1273.

116. Otto v. City of Boca Raton, 981 F.3d 854 (11th Cir. 2020).

117. *See id.*; *Hamilton*, 353 F. Supp. 3d at 1248.

118. *Otto*, 981 F.3d at 872.

119. *See id.* at 854.

120. *Id.* at 862–64.

121. *Id.* at 864. The court's analysis placed significant importance on a previous Eleventh Circuit Court of Appeals case, *Wollschlaeger v. Governor*, 848 F.3d 1293, 1307 (11th Cir. 2017) (en banc). *Id.* at 862–64. In *Wollschlaege*r, the court ruled unconstitutional a Florida law that prohibited medical providers from asking or talking to patients about gun ownership. 848 F.3d at 1329–30. The majority in *Otto* likened the conversion therapy ordinances to the ordinances in *Wollschlaeger* by noting they "limit a category of people—therapists—from communicating a particular message." *Otto*, 981 F.3d at 863.

122. *Otto*, 981 F.3d at 866. The court heeded warnings from the Supreme Court about the dangers of regulating content-based speech in professional settings. *Id.* In addition, the court

that talk therapy regulated by the ordinances could be labeled as conduct.[123]

The court concluded the ordinances are content-based restrictions on speech, do not satisfy the demands of strict scrutiny, and are therefore unconstitutional.[124] Building on this conclusion, the court further decided that continued enforcement would cause irreparable harm to the therapists, thus satisfying that necessary element of their argument in support of a preliminary injunction.[125]

b. The Dissenting Opinion

Judge Martin issued a dissenting opinion in the case.[126] The dissent agreed that strict scrutiny is the proper level of scrutiny to be applied, however, opposed the majority by determining the ordinances in question satisfy strict scrutiny.[127] The dissenting opinion examined whether the regulations were narrowly tailored towards serving the compelling interest.[128] In doing so, Judge Martin rejected the majority's argument that the ordinances attempt to control the information being distributed, insisting instead that the ordinances prevent a particular medical practice from being performed as opposed to a message being spread.[129] Finally, the dissent addressed the issue of whether the ordinances satisfy the least restrictive means test, deciding the ordinances are in fact the least restrictive means.[130] Judge Martin did this

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detailed types of speech that are less protected or completely unprotected under the First Amendment, denying the ordinances in question were well suited to any of those categories. *Id.* at 865.

123. *Id.* at 865–66. The court cited one of its own previous decisions stating, "The enterprise of labeling certain verbal or written communications 'speech' and others 'conduct' is unprincipled and susceptible to manipulation." *Id.* at 861 (citing *Wollschlaeger*, 848 F.3d at 1308). In furthering the analysis, the majority was clear to assert the conversion therapy in question is practiced entirely through speech, and as a result, is inescapably characterized as speech rather than conduct. *Id.* at 865–66.

124. *See id.* at 867–70.

125. *Id.* at 870. In addition to the First Amendment claims, the plaintiff therapists in *Otto* claimed the ordinances were ultra vires. *Id.* at 870–71. The court, however, asserted this issue was not dispositive and remanding the case on that issue would cause harm to the plaintiffs. *Id.* at 871. The court felt its focus on the constitutional freedom of speech claims was appropriate. *Id.*

126. *Id.* at 872 (Martin, J., dissenting). Judge Martin was appointed to the bench by President Barack Obama; the judges representing the majority in the *Otto* case were appointed by President Donald Trump. *Federal Court Strikes Down Conversion Therapy Bans in Florida*, NBC NEWS (Nov. 22, 2020), https://www.nbcnews.com/feature/nbc-out/federal-court-strikes-down-conversion-therapy-bans-florida-n1248518.

127. *Otto*, 981 F.3d at 873 (Martin, J., dissenting).

128. *Id.* at 874–79. Judge Martin recognizes the rarity of a restriction on speech being narrowly tailored to the necessary extent but argues this is such a case. *Id.* at 874.

129. *Id.* at 874–75.

130. *Id.* at 879–80.

by dismissing the therapists' arguments about under- and over-inclusivity of the ordinances, stating that excluding religious counselors from the ordinances is a reasonable avoidance of issues with the Establishment Clause, and restricting only aversive conversion therapies would not properly serve the compelling interest.[131] Judge Martin's dissent echoed points laid out by several courts in other jurisdictions and provides insight into the missteps made by the majority in its First Amendment analysis.[132]

V. PROTECTING FLORIDA'S YOUTH FROM THE HARMS OF CONVERSION THERAPY

The legality of conversion therapy is an issue with the potential to affect thousands of children across the state of Florida. Approximately 73,000 LGBTQ+ youth nationwide will be subjected to conversion therapy, either at the hands of licensed medical providers or religious advisors, before turning eighteen.[133] With Florida being one of the largest states in the nation[134] and the second largest without a statewide prohibition on conversion therapy,[135] it stands to reason that a significant number of those youth will reside in Florida. Accordingly, conversion therapy poses a threat to the well-being of LGBTQ+ youth, and the practice should be banned.

A. Overruling the Incorrectly Decided *Otto*

The Eleventh Circuit Court of Appeals incorrectly decided the *Otto* case by finding the ordinances prohibiting the use of conversion therapy on minors unconstitutional. These ordinances do not violate the First Amendment because they do not regulate speech. Furthermore, even if the ordinances do regulate speech, a strict scrutiny standard of review is not appropriate to apply in these circumstances.

131. *Id.*

132. *See infra* pt. V (analyzing in further detail missteps in the majority's analysis and viewpoints of other jurisdictions).

133. CHRISTY MALLORY, TAYLOR N.T. BROWN & KEITH J. CONRON, UCLA SCH. OF L. WILLIAMS INST., CONVERSION THERAPY AND LGBT YOUTH UPDATE 1 (2019), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Conversion-Therapy-Update-Jun-2019.pdf.

134. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, https://www.census.gov/popclock/ (last visited Jan. 2, 2022).

135. *Compare id.*, *with Equality Maps: Conversion "Therapy" Laws*, *supra* note 67.

1. The Speech Versus Conduct Debate

There is an important distinction in *Otto* regarding the difference between speech and conduct. The majority's conclusion correctly articulated that ordinances classified as content-based restrictions on speech are subject to a strict scrutiny analysis, whereas, those not in that category are reviewed with intermediate scrutiny or rational basis review.[136] The majority quickly dismissed the idea that these ordinances regulated anything other than speech.[137] Even the dissenting judge conceded to this point.[138] However, this conclusion is inaccurate and misconstrues the very nature of therapy provided by mental health practitioners. Therapy, even that exclusively carried out through speech, warrants a different perspective because it is a very specific form of conduct—treatment.

a. Caselaw Addressing Conversion Therapy as Treatment

The conclusion that therapy is treatment, and thus a form of conduct, was relied upon by both the United States District Court of New Jersey and the Ninth Circuit Court of Appeals in upholding prohibitions almost identical to those addressed in *Otto*.[139] In furthering its position that the type of therapy prohibited is conduct as opposed to speech, the district court in *King* focused on the text of the state statute.[140] There, the words "engage" and "practice" were "commonly understood to refer to conduct, and not speech, expression, or some other form of communication."[141] These same words are used in the Palm Beach County and City of Boca Raton ordinances at issue in *Otto*.[142] In further examining the idea of talk therapy as conduct, the district court in *King* relied in part on the Ninth Circuit Court of Appeals decision in *Pickup*.[143]

136. *Otto*, 981 F.3d at 861.
137. *Id.*
138. *Id.* at 873 (Martin, J., dissenting).
139. Pickup v. Brown, 740 F.3d 1208, 1229 (9th Cir. 2014) ("Senate Bill 1172 regulates conduct. It bans a form of treatment for minors."); King v. Christie, 981 F. Supp. 2d 296, 320 (D.N.J. 2013) ("Thus, I find that A3371 does not seek to regulate speech; rather the statute regulates a particular type of conduct, SOCE counseling.").
140. *King*, 981 F. Supp. 2d at 313. "For example, the operative statutory language directs that a licensed counselor 'shall not engage in sexual orientation change efforts,' and further defines 'sexual orientation change efforts' as 'the practice of seeking to change a person's sexual orientation.'" *Id.* (citing N.J. REV. STAT. § 45:1-55).
141. *Id.* (citing several cases that focus on the nature of the words used in the statute).
142. *See* BOCA RATON, FLA., CODE OF ORDINANCES §§ 9-105, 9-106 (2020); PALM BEACH COUNTY, FLA., CODE OF ORDINANCES §§ 18-124, 18-125 (2020); *Otto*, 981 F.3d at 859–60.
143. *King*, 981 F. Supp. at 314–20.

There, the Ninth Circuit concluded the guiding principles regarding therapy and the First Amendment were:

> (1) doctor-patient communications about medical treatment receive substantial First Amendment protection, but the government has more leeway to regulate the conduct necessary to administering treatment itself; (2) psychotherapists are not entitled to special First Amendment protection merely because the mechanism used to deliver mental health treatment is the spoken word; and (3) nevertheless, communication that occurs during psychotherapy does receive some constitutional protection, but it is not immune from regulation.[144]

The court then applied these principles to the specific type of mental health treatment in question.[145] Ultimately, the court held that the legislation at issue regulated therapeutic treatment provided by licensed mental health practitioners and thus, not expressive speech deserving of First Amendment protections.[146]

b. The Nature of Talk Therapy

Psychotherapy, also known as talk therapy,[147] is defined as "any psychological service provided by a trained professional that primarily uses forms of communication and interaction to assess, diagnose, and treat dysfunctional emotional reactions, ways of thinking, and behavior patterns."[148] Therapy is a goal-oriented practice. As mentioned above, the goal of therapy, by definition, is *treatment*. Talk therapy, as a form of treatment, consists entirely of speech, as asserted by the court in *Otto*[149]—however, this speech is a tool focused on treating patients struggling with mental health issues.

The types of issues addressed by talk therapy include diagnosable mental disorders such as depression or anxiety, in addition to non-

144. *Pickup*, 740 F.3d at 1227.

145. *Id.* at 1227–29. The court determined this analysis should exist on a continuum with a medical professional participating in public dialogue on one end, speech in the context of the professional relationship at the midpoint, and professional conduct at the far end of the spectrum. *Id.* The appropriate levels of First Amendment protections to be applied on this spectrum would be robust protection, diminished protection, and almost no protection, respectively. *Id.*

146. *Id.* at 1229–30.

147. *What Is Psychotherapy?*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/patients-families/psychotherapy (last visited May 2, 2022).

148. *APA Dictionary of Psychology*, AM. PSYCHIATRIC ASS'N, https://dictionary.apa.org/psychotherapy (last visited May 2, 2022).

149. Otto v. City of Boca Raton, 981 F.3d 854, 860 (11th Cir. 2020).

medical issues like assisting patients with responses to trauma or loss.[150] Ultimately, some people seek therapy for medical reasons, while others seek assistance with life's problems.[151] The reasons people engage in therapy, however, do not alter the fact that the practice is a form of treatment. In using psychotherapy, "psychologists apply scientifically validated procedures to help people develop healthier, more effective habits."[152] The practice of psychotherapy is not limited to psychologists, and the practice of psychotherapy by any professional requires specialized training.[153] When engaging in talk therapy, practitioners utilize this training. The very definition of the word training indicates a focus on the development of a skill or behavior.[154] Skills and behaviors are most closely associated with conduct, not speech. Additionally, training and expertise differentiate therapy from friendly advice—a differentiation that could provide insight as to why almost twenty percent of American adults received some form of mental health treatment in 2019.[155]

c. Regulation and Training

Furthermore, the ordinances at issue specifically limit enforcement to providers who receive training and are subject to regulation under Florida state law.[156] Florida's regulation of clinical, counseling, and psychotherapy services provides:

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150. *What Is Psychotherapy?*, *supra* note 147.

151. *Understanding Psychotherapy and How It Works*, AM. PSYCH. ASS'N, https://www.apa.org/topics/understanding-psychotherapy (last updated July 31, 2020).

152. *Id.*

153. *What Is the Difference Between Psychologists, Psychiatrists and Social Workers?*, AM. PSYCH. ASS'N (July 2017), https://www.apa.org/ptsd-guideline/patients-and-families/psychotherapy-professionals (explaining that psychotherapy is practiced by "psychologists, psychiatrists, social workers, licensed professional clinical counselors, licensed marriage and family therapists, pastoral counselors and psychiatric nurse practitioners").

154. Training is defined as "[t]he action of teaching a person or animal a particular skill or type of behavior." *Training*, LEXICO, https://www.lexico.com/en/definition/training (last visited May 2, 2022).

155. *Mental Health Treatment Among Adults: United States, 2019*, CDC, https://www.cdc.gov/nchs/products/databriefs/db380.htm#fig1 (last reviewed Sept. 23, 2020). Data from the National Health Interview Survey indicated that "[i]n 2019, 19.2% of adults had received . . . mental health treatment in the past 12 months." *Id.*

156. *See* BOCA RATON, FLA., CODE OF ORDINANCES § 9-105 (2020); PALM BEACH COUNTY, FLA., CODE OF ORDINANCES § 18-124 (2020). The statutes only prohibit the practice of conversion therapy by "providers" defined as:

> any person who is licensed by the state to provide professional counseling, or who performs counseling as part of his or her professional training under F.S. chs. 456, 458, 459, 490 or 491, as such chapters may be amended, including but not limited to, medical practitioners, osteopathic practitioners, psychologists, psychotherapists, social workers, marriage and family therapists, and licensed counselors.

> The term "practice of mental health counseling" means the use of scientific and applied behavioral science theories, methods, and techniques for the purpose of describing, preventing, and treating undesired behavior and enhancing mental health and human development and is based on the person-in-situation perspectives derived from research and theory in personality, family, group, and organizational dynamics and development, career planning, cultural diversity, human growth and development, human sexuality, normal and abnormal behavior, psychopathology, psychotherapy, and rehabilitation. The practice of mental health counseling includes methods of a psychological nature used to evaluate, assess, diagnose, and treat emotional and mental dysfunctions or disorders, whether cognitive, affective, or behavioral, interpersonal relationships, sexual dysfunction, alcoholism, and substance abuse. The practice of mental health counseling includes, but is not limited to, psychotherapy, hypnotherapy, and sex therapy. The practice of mental health counseling also includes counseling, behavior modification, consultation, client-centered advocacy, crisis intervention, and the provision of needed information and education to clients, when using methods of a psychological nature to evaluate, assess, diagnose, treat, and prevent emotional and mental disorders and dysfunctions (whether cognitive, affective, or behavioral), behavioral disorders, sexual dysfunction, alcoholism, or substance abuse. The practice of mental health counseling may also include clinical research into more effective psychotherapeutic modalities for the treatment and prevention of such conditions.[157]

It is important to note that the word speech nor any derivative of that term is included in the above definition.[158] The focus is on methods—and methods are conduct. The statutory provision goes on to limit the practice of these methods to those who have been "appropriately trained in the use of such methods, techniques, or modalities."[159] This language suggests mental health counseling, and any speech associated with the practice, is something greater than expressive speech. Beyond that, this goes to show that mental health practitioners, even those operating largely or entirely through the use of speech, can be regulated. The district court in *Vazzo* went so far as to allude to the fact that therapeutic practices used by mental health

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BOCA RATON, FLA., OF ORDINANACES § 9-105 (2020); PALM BEACH COUNTY, FLA., CODE OF ORDINANCES § 18-124 (2020).

157. FLA. STAT. § 491.003(9) (2020).

158. *See id.*

159. *Id.*

providers are already regulated at the state level, and the court raised no questions about the constitutionality of such regulation.[160]

Regulation of the content of talk therapy is also analogous to the regulation of the contents of other medical treatments, such as those regulated by the Food & Drug Administration (FDA). The FDA ensures "that human and veterinary drugs, and vaccines and other biological products and medical devices intended for human use are safe and effective."[161] Therapy is treatment for mental health issues, just as drugs regulated by the FDA are treatments for physical conditions. The federal government developed the FDA to ensure medications are safe and effective; similarly, the local governments in Florida sought to ensure methods of therapy used on minors were safe and effective.

d. Distinguishing Between Speech, Conduct, and Treatment

The majority in *Otto* is not alone in the assertion that talk therapy should be viewed as speech as opposed to conduct. The Third Circuit in *King* denounced the lower court's findings that the therapy in question was conduct.[162] In doing so, the court largely relied on justifications laid out in a dissenting opinion in a denial for rehearing en banc in the Ninth Circuit *Pickup* case and the Supreme Court's precedent in *Holder v. Humanitarian Law Project*.[163] The Supreme Court in *Humanitarian Law Project* differentiated between First Amendment protections for speech from those for conduct when assessing the constitutionality of a federal statute that made it a crime to provide material support to terrorist organizations.[164] The Court concluded that while the law was prohibiting conduct, as applied to the plaintiffs in that case, it was directed at conduct that "consists of communicating a message."[165] Therefore, the regulation was related to expression and, in light of the First Amendment, required the application of a more demanding

160. *See* Vazzo v. City of Tampa, 415 F. Supp. 3d 1087, 1100–07 (M.D. Fla. 2019). The court in *Vazzo* did a thorough analysis of state regulations regarding mental health practice by various types of professionals identified in ordinances almost identical to those in *Otto*. *Id.* The purpose of this analysis was to demonstrate that state law preempted local ordinances on the matter, an issue outside the scope of this Article. *Id.* at 1107.

161. *What Does FDA Do?*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/about-fda/fda-basics/what-does-fda-do (last updated June 28, 2021).

162. King v. Governor of N.J., 767 F.3d 216, 228 (3d Cir. 2014).

163. Holder v. Humanitarian L. Project, 561 U.S. 1, 28 (2010); *King*, 767 F.3d at 228 (citing Pickup v. Brown, 740 F.3d 1208, 1215–16 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of rehearing en banc)).

164. *Humanitarian L. Project*, 561 U.S. at 7–8.

165. *Id.* at 28.

standard of review.[166] Judge O'Scannlain, in dissenting from the Ninth Circuit Court of Appeals panel denying an en banc rehearing of *Pickup*, claims cases regarding prohibitions on conversion therapy are analogous to the situation in *Humanitarian Law Project* because they too seek to regulate the communication of a message.[167] The majority in *Pickup*, however, aptly distinguishes *Humanitarian Law Project* from the circumstances at hand regarding the prohibitions on conversion therapy.[168] The court articulated that the prohibition on conversion therapy, first, does not involve the communication of a message.[169] After all, the statute at issue in California, and the legislative actions addressed in similar cases referenced throughout this Article, do not prevent providers from expressing their views about conversion therapy, or anything else for that matter.[170] Additionally, the relevant ordinances in *Otto* only prevent licensed providers from engaging in sexual orientation change efforts, explicitly excluding individuals such as religious advisors.[171] In essence, if conversion therapy is expressive speech and not conduct, then anyone could provide the "guidance" the therapist plaintiffs seek to give. The prohibitions would not prevent therapists from suggesting conversion therapy as an alternative method the minor and their parent could pursue by meeting with non-licensed individuals, or from seeking therapy in another jurisdiction where the practice is not banned.[172]

Additionally, the *Pickup* court cited the difference between regulating the conduct of licensed professionals, as was the issue before it, and the regulation and protection of private citizens' speech or

166. *Id.* (citing Texas v. Johnson, 491 U.S. 397, 403 (1989)).

167. *Pickup*, 740 F.3d at 1217 ("The cases here present an analogous situation: professionals—including but not limited to doctors and psychologists—desire to 'communicate a message' that the law in question does not permit. This court accordingly should subject SB 1172 to *some level of scrutiny* under the First Amendment.").

168. *Id.* at 1230.

169. *Id.*

170. *Id.* "Plaintiffs may express their views to anyone, including minor patients and their parents, about any subject, including SOCE, insofar as SB 1172 is concerned. The *only* thing that a licensed professional cannot do is avoid professional discipline for *practicing* SOCE on a minor patient." *Id.*; *see* BOCA RATON, FLA., CODE OF ORDINANCES § 9-106 (2020); PALM BEACH COUNTY, FLA., CODE OF ORDINANCES § 18-125 (2020); CAL. BUS. & PROF. CODE § 865 (2020); N.J. REV. STAT. § 45:1-55 (2020).

171. *See* BOCA RATON, FLA., CODE OF ORDINANCES § 9-105 (2020); PALM BEACH COUNTY, FLA., CODE OF ORDINANCES § 18-124 (2020).

172. *See generally* BOCA RATON, FLA., CODE OF ORDINANCES § 9-105 (2020); PALM BEACH COUNTY, FLA., CODE OF ORDINANCES § 18-124 (2020). The majority in *Otto* acknowledges this point, "[T]herapists remain free to describe SOCE to the public or recommend that a client receive SOCE in another jurisdiction." Otto v. City of Boca Raton, 981 F.3d 854, 863 (11th Cir. 2020). The author is not advocating for this alternative and, in fact, finds the suggestion morally objectionable; however, the point still stands that the alternative is permissible as the ordinances are written and would be allowable even if the court took the view of conversion therapy as conduct.

conduct, as examined in *Humanitarian Law Project*.[173] The court described the speech at issue in *Humanitarian Law Project* as "political speech" by "ordinary citizens."[174] In contrast, the regulations on conversion therapy were in response to "(1) therapeutic treatment, not expressive speech, by (2) licensed mental health professionals acting within the confines of the counselor-client relationship."[175] Detractors from this comparison claim that there are not reduced First Amendment protections for "professional speech,"[176] but this misconstrues the emphasis on treatment as a form of conduct.

Beyond the above distinctions laid out in *Pickup*, there exists an apparent difference between professional speech, professional conduct, and treatment. One point cited in *Otto* is that the Supreme Court, in *National Institute of Family & Life Advocates v. Becerra*, rejected the idea of allowing content-based speech regulations for professional speech.[177] There, a California act required clinics dealing primarily with pregnant women to give patients certain types of notices, and the Court addressed whether this requirement was constitutional under the First Amendment.[178] The Eleventh Circuit's reliance on this case, however, is erroneous. As with other precedents cited, this reliance fails to recognize treatment as a form of conduct. The Supreme Court in *National Institute of Family & Life Advocates* hints at this distinction, noting that the notices in question had no direct relationship to any procedure.[179] There, the Court explained that the regulated notice was in fact a regulation of "*all interactions* between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed."[180] Treatment, however, is a procedure, and thus this precedent is misapplied in *Otto* when used to differentiate between speech and conduct.

The *Otto* court, in classifying talk therapy as speech, also made several comparisons to its decision in *Wollschlaeger*.[181] However, the

173. *Pickup*, 740 F.3d at 1230.
174. *Id.*
175. *Id.* at 1229–30.
176. *See Otto*, 981 F.3d at 864–65 ("The district court and the defendants suggest that the ordinances here—even if based on the content of a therapist's speech—fall into a kind of twilight zone of 'professional speech' or 'professional conduct.'"); *Pickup*, 740 F.3d at 1216 (O'Scannlain, J., dissenting from denial of rehearing en banc) ("Our precedents do not suggest that laws prohibiting 'conduct' effected exclusively by means of speech escape First Amendment scrutiny.").
177. *Otto*, 981 F.3d at 861 (citing Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2374 (2018)).
178. *Nat'l Inst. of Fam. & Life Advocs.*, 138 S. Ct. at 2368.
179. *Id.* at 2373.
180. *Id.* (emphasis added).
181. *Otto*, 981 F.3d at 861.

conversion therapy bans at issue in *Otto* are distinguishable from the prohibitions in *Wollschlaeger*. Florida's Firearms Owners' Privacy Act at issue in *Wollschlaeger* prevented medical professionals from asking patients about their gun ownership.[182] The Florida legislature created this law based on anecdotal evidence regarding doctors' use of gun-ownership information as justification for refusing to treat patients or making recommendations about gun ownership.[183] These questions were not part of the doctors' treatments but rather were used to assess the safety and well-being of their patients.[184] That prohibition is distinguishable from those in *Otto* because the Palm Beach County and Boca Raton City ordinances do not regulate topics therapists can talk about, or even practices they can recommend; the ordinances only prevent providers from engaging in a certain type of therapy on a certain type of patient.[185] Therefore, much of the precedent that the majority in *Otto* relied upon fails to address the necessary distinctions between speech, a general level of professional conduct, and the highly specific form of professional conduct that encompasses treatment.

Several of the courts discussed thus far suggest that allowing courts to classify talk therapy as conduct as opposed to speech opens the door to endless workarounds of the protections provided by the First Amendment.[186] However, this is not as slippery of a slope as those courts would suggest. Judge O'Scannlian of the Ninth Circuit Court of Appeals articulated that there were no criteria provided by which to determine the difference between speech, conduct, and treatment.[187] But a simple analysis of how the term "treat" is used in the context of state regulations

182. Wollschlaeger v. Governor, 848 F.3d 1293, 1302–03 (11th Cir. 2017).

183. *Id.* at 1302.

184. *Id.* at 1301.

185. *See* BOCA RATON, FLA., CODE OF ORDINANCES §§ 9-105, 9-106 (2020); PALM BEACH COUNTY, FLA., CODE OF ORDINANCES §§ 18-124, 18-125 (2020).

186. *See Otto*, 981 F.3d at 866; King v. Governor of N.J., 767 F.3d 216, 228–29 (3d Cir. 2014); Pickup v. Brown, 740 F.3d 1208, 1230 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of rehearing en banc).

> Simply put, speech is speech, and it must be analyzed as such for purposes of the First Amendment. Certain categories of speech receive lesser protection, or even no protection at all. But these categories are deeply rooted in history, and the Supreme Court has repeatedly cautioned against exercising "freewheeling authority to declare new categories of speech outside the scope of the First Amendment."

King, 767 F.3d at 228–29 (internal citations omitted).

187. *Pickup*, 740 F.3d at 1215–16 (O'Scannlain, J., dissenting from denial of rehearing en banc) ("The 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'?"). This sentiment is echoed by the Third Circuit Court of Appeals in justifying the assertion that therapy is not conduct. *See King*, 767 F.3d at 228.

on mental health counseling makes clear the only criteria necessary to apply this classification:

> The terms "diagnose" and "treat," as used in this chapter, when considered in isolation or in conjunction with any provision of the rules of the board, may not be construed to permit the performance of any act that mental health counselors are not educated and trained to perform, including, but not limited to, admitting persons to hospitals for treatment of the foregoing conditions, treating persons in hospitals without medical supervision, prescribing medicinal drugs as defined in chapter 465, authorizing clinical laboratory procedures or radiological procedures, or the use of electroconvulsive therapy. In addition, this definition may not be construed to permit any person licensed, provisionally licensed, registered, or certified pursuant to this chapter to describe or label any test, report, or procedure as "psychological," except to relate specifically to the definition of practice authorized in this subsection.[188]

Here, mental health counselors are limited to performing only acts they are trained to perform. Extrapolating from this definition, one can imagine that treatment, as a form of conduct, can be limited to medical professionals and the acts they are licensed to perform. This definition also provides guidance by explicitly excluding from the definition of treatment by mental health counselors' practices that when carried out by a different type of medical professional would be considered treatment. Additionally, treatment is defined in the dictionary as "a session of medical care or the administration of a dose of medicine."[189] Medical care is not often associated with laypersons. Therefore, through legal and dictionary definitions of the word treatment, the practical limitations are clear. Treatment is carried out by licensed medical professionals with education and training in administering a particular treatment. This does not leave room for a wide range of possible conduct capable of eluding the protections afforded by the First Amendment.

The court in *Otto* has incorrectly characterized talk therapy as speech by making irrelevant comparisons to other professional and nonprofessional conduct and speech. Treatment is ultimately a form of professional conduct limited to health care practitioners, and talk

188. FLA. STAT. § 491.003(9)(c) (2020).

189. *Treatment*, LEXICO, https://www.lexico.com/en/definition/treatment (last visited May 2, 2022).

therapy is a form of treatment utilized by providers in the mental health field. Regulations on conversion therapy as a form of talk therapy should be subject to rational basis review because they are limitations on conduct as opposed to speech.

2. Strict Scrutiny Is Not the Most Appropriate Scrutiny

Three federal circuit courts have encountered questions on the constitutionality of conversion therapy bans, and each of those three courts has applied a different level of scrutiny. The Ninth Circuit Court of Appeals concluded that because California's conversion therapy ban "regulates only treatment, while leaving mental health providers free to discuss and recommend, or recommend against, SOCE, . . . any effect it may have on free speech interests is merely incidental."[190] As a result, that court concluded only a rational basis review was necessary.[191] The Third Circuit Court of Appeals was less convinced the bans regulated conduct and, after deciding the bans did in fact regulate speech, focused its inquiry on what level of scrutiny should be applied.[192] Therefore, the Third Circuit concluded "a licensed professional does not enjoy the full protection of the First Amendment when speaking as part of the practice of her profession."[193] In deciding where this professional speech would fall on the continuum, the court conducted an analysis comparing commercial and professional speech and ultimately decided that intermediate scrutiny was the appropriate standard of review.[194] The Eleventh Circuit in *Otto* held that the restrictions on conversion therapy were content-based and subject to strict scrutiny.[195] As discussed previously, talk therapy is a type of treatment and should be classified as a form of conduct.[196] However, if the regulations are indeed determined to be restrictions on speech, the Third Circuit's professional speech approach provides for the most workable level of scrutiny.

a. Levels of Scrutiny and Protection

First Amendment protection of speech is an area well-explored by the United States Supreme Court. If the Court decides that talk therapy

190. *Pickup*, 740 F.3d at 1231.
191. *Id.*
192. *King*, 767 F.3d at 229.
193. *Id.* at 232.
194. *Id.* at 234.
195. Otto v. City of Boca Raton, 981 F.3d 854, 867–68 (11th Cir. 2020).
196. *Supra* pt. V.A.1.

is speech, then the possibility exists that there is some level of protection from government regulation under the First and Fourteenth Amendments.[197] There are two relevant questions to this analysis: (1) if the prohibition on conversion therapy is a regulation on speech, what kind of regulation is it, and (2) does conversion therapy involve speech of a type that receives diminished or no protection?

In regard to the first question, the Supreme Court has distinguished between content-based regulation of speech[198] and content-neutral regulation of speech.[199] Content-based restrictions are presumed to be invalid and, as such, are subject to strict scrutiny.[200] Regulations deemed content-neutral often involve restrictions on the time, place, or manner of speech without regard to the message conveyed.[201] These restrictions are subject to a less-demanding standard, and courts assess them under an intermediate level of scrutiny.[202]

Moving to the second question, the analysis shifts toward examining the nature of the speech itself. Historically, there are some categories of speech that have been determined not to deserve First Amendment protections.[203] These categories are limited and include specific types of language relating to criminal conduct and certain classifications giving rise to civil liability.[204] Additionally, there are at least two categories where the Supreme Court has acknowledged diminished First Amendment protections of speech.[205] The first, commercial speech, is an "expression related solely to the economic interests of the speaker and its audience."[206] The second, and more

197. U.S. CONST. amends. I, XIV.

198. *See* Reed v. Town of Gilbert, 576 U.S. 155, 172 (2015).

199. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

200. *Reed*, 576 U.S. at 163 ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

201. *Clark*, 468 U.S. at 293 ("Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.").

202. *Id.* at 293. Content-neutral regulations are examined to determine whether they are "narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Id.* No court examining the issue of prohibitions on conversion therapy has determined such restrictions are content-neutral, nor is that an argument advanced in this Article.

203. United States v. Stevens, 559 U.S. 460, 468–69 (2010).

204. *See id.* at 468–69 (internal citations omitted) (listing "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct" as types of speech that do not require limitations on regulation).

205. Otto v. City of Boca Raton, 981 F.3d 854, 865 (11th Cir. 2020) (recognizing the categories of "commercial speech" and "incidental speech swept up in the regulation of professional conduct").

206. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980). There, the Supreme Court also laid out a four-part test for commercial speech cases. *Id.* at 566. This test is

relevant exception to this analysis, is "incidental speech swept up in the regulation of professional conduct."[207] The Supreme Court has recognized "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[208]

b. Content-Based Restrictions

A content-based restriction "applies to particular speech because of the topic discussed or the idea or message expressed."[209] The Eleventh Circuit in *Otto* made seemingly easy work of classifying the ordinances as content-based regulations.[210] The court claimed the content of the speech used in conversion therapy is the target of the restriction by the local ordinances.[211] One test applied by the court assesses how violations of the restriction would be enforced and determines if those tasked with enforcement would have to "examine the content of the message that is conveyed."[212] In a situation involving conversion therapy, the court asserts, one would need to know the words used to determine whether the therapy is prohibited.[213] However, this is not true. To enforce a ban on conversion therapy, an enforcing authority would need to know one thing—the goal of the therapy. The ordinances are explicit; they prohibit providers from engaging in "any counseling, practice or treatment performed with the *goal* of changing an individual's sexual orientation or gender identity" on minors.[214] This means enforcement of the provision requires only knowledge that the purpose of the session was to alter the sexual orientation or gender identity of a minor patient. Conversely, if the legislature does not prohibit the practice of conversion therapy, then a mental health

irrelevant when analyzing regulations on conversion therapy because no court addressing the question has recognized conversion therapy as commercial speech.

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

208. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)).

209. *Otto*, 981 F.3d at 862 (quoting Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015)).

210. *Id.* at 863 ("We cannot see how the regulations here can be applied without considering the content of the banned speech. Indeed, and as we said in *Wollschlaeger*, 'this is not a hard case in that respect.'" (quoting Wollschlaeger v. Governor, 848 F.3d 1293, 1307 (11th Cir. 2017))).

211. *Id.*

212. *Id.* at 862 (citing McCullen v. Coakley, 573 U.S. 464, 479 (2014) (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 383 (1984))).

213. *Id.* at 863.

214. BOCA RATON, FLORIDA CODE OF ORDINANCES § 9-105 (2020); PALM BEACH COUNTY, FLORIDA CODE OF ORDINANCES § 18-124 (2020) (emphasis added).

counselor could use any words, expressions, or messages he or she felt necessary to effectuate the desired result. Effectively, the legislation does not monitor the content of the therapy session; it monitors the intended result.

Further, as mentioned previously, the right to discuss conversion therapy is not abridged by the ordinances. The dissent in *Otto* summarizes the decision of the lower court in *Hamilton* and reminds that "[t]he Ordinances do not prohibit licensed therapists from recommending SOCE to a minor patient, discussing SOCE with a minor patient, giving a public statement in support of SOCE, or practicing SOCE on patients 18 years of age or older."[215] The topic of sexual orientation change efforts is not made off-limits by the ordinances. The practice of it on minors is. Therefore, prohibitions on conversion therapy for minors are not content-based restrictions on speech and do not require the application of strict scrutiny as used by the *Otto* court.[216]

c. Exceptions to the Application of Strict Scrutiny

Even if the ordinances enacted by Palm Beach County and the City of Boca Raton are content-based regulations, some exceptions provide for a standard less demanding than that of strict scrutiny. While some categories of speech deserve no protection,[217] conversion therapy need not fall into one of these categories to be afforded only diminished protections under the First Amendment.[218]

The Third Circuit Court of Appeals and district court in *Hamilton* embraced this idea by recognizing a category of professional speech.[219] The Third Circuit concluded that "a professional's speech warrants lesser protection only when it is used to provide personalized services to a client based on the professional's expert knowledge and judgment."[220] The court reached this conclusion by balancing the government's well-documented right to regulate professions with the

215. *Otto*, 981 F.3d at 872 (citing Hamilton v. City of Boca Raton, 353 F. Supp. 3d 1237, 1241 (S.D. Fla. 2019), *rev'd sub nom.*, *Otto*, 981 F.3d at 854).

216. If strict scrutiny must be applied in this instance, the author would agree with Judge Martin in her dissent from the majority in *Otto*, finding that this is the rare case where strict scrutiny of content-based speech is satisfied. *See Otto*, 981 F.3d at 874–80 (Martin, J., dissenting).

217. *See* United States v. Stevens, 559 U.S. 460, 468–69 (2010). There is little argument that conversion therapy could be interpreted as obscenity, defamation, or incitement. However, the author acknowledges that arguments to support conversion therapy as a type of fraud or speech integral to criminal conduct (in the form of child abuse) could exist and are reserved for discussion outside of this Article.

218. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

219. King v. Governor of N.J., 767 F.3d 216, 233 (3d Cir. 2014); *Hamilton*, 353 F. Supp. 3d at 1256.

220. *King*, 767 F.3d at 232.

individual protections afforded to private citizens that are not waived by professional status.[221] In *Otto*, the Eleventh Circuit denied the existence of a category of speech outside the reach of the First Amendment labeled "professional speech,"[222] citing the Supreme Court's *National Institute of Family & Life Advocates* decision as its primary support for doing so.[223] In that case, the Supreme Court was critical of the use of professional speech as a category worthy of diminished protections under the First Amendment, but it "[did] not foreclose the possibility that some such [persuasive] reason exists" for its use.[224] The Court criticized the development of a category for professional speech, contending that the definitions the lower courts used, such as those in *Pickup* and *King*, were broad.[225] With this in mind, the door remains open for a narrower and more well-defined category of speech immune from the application of strict scrutiny.[226]

A recognition of the unique circumstances and nature of talk therapy conducted via licensed mental health practitioners warrants the development of a new category of speech. The district court in *Hamilton* distinguished the ordinances in question by noting that "[t]he speech not only is directly related to the treatment, it is the manner of delivering the treatment."[227] Placing this type of speech in a special category is not a novel idea for the courts to adopt. The Supreme Court has held that communications between licensed psychotherapists, including social workers, and their patients are privileged under the Federal Rules of Evidence.[228] This further supports the notion that such communication deserves special treatment and exists in a space outside the scope of traditional speech.

221. *See id.* at 229–32.

222. Otto v. City of Boca Raton, 981 F.3d 854, 866 (11th Cir. 2020) ("And 'professional speech' is not a traditional category of speech that falls within an exception to normal First Amendment principles. We have already rejected the suggestion that the government's ability to regulate entry into a profession entitles it to regulate the speech of professionals.").

223. *Id.* at 867.

224. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371–75 (2018).

225. *Id.* at 2375.

226. United States v. Alvarez, 567 U.S. 709, 722 (2012) ("[T]he Court has acknowledged that perhaps there exist 'some categories of speech that have been historically unprotected . . . but have not yet been specifically identified or discussed . . . in our case law.'" (alteration in original) (quoting United States v. Stevens, 559 U.S. 460, 473 (2010))).

227. Hamilton v. City of Boca Raton, 353 F. Supp. 3d 1237, 1256 (S.D. Fla. 2019), *rev'd sub nom.*, Otto v. City of Boca Raton, 981 F.3d 854 (11th Cir. 2020).

228. Jaffee v. Redmond, 518 U.S. 1, 15 (1996); FED. R. EVID. 501.

d. Appropriate Level of Scrutiny

If prohibitions on the use of conversion therapy are content-based regulations subject to an exception from strict scrutiny, the final question remains as to what level of review should be applied. An intermediate level of scrutiny is the most appropriate as it recognizes the unworkability of a categorical approach that lacks an understanding of the public's need to regulate certain areas.

The Third Circuit found numerous similarities between the concept of professional speech and the already-recognized category of commercial speech.[229] First, the court acknowledged that like commercial speech, professional speech has value.[230] This similarity also extends to the more narrowly tailored category of speech that encompasses talk therapy. As mentioned earlier, almost twenty percent of Americans sought out mental health treatment in 2019,[231] and this significant portion of the population speaks to the value of therapy. Talk therapy assists millions of Americans in coping with a wide variety of issues.[232]

Next, the court saw an analogous relationship between how commercial and professional speech both "serve[] as an important channel for the communication of information that might otherwise never reach the public."[233] This characteristic too can be extrapolated to the role of a mental health counselor in providing therapy. As discussed previously, all types of providers that the ordinances in question regulate must receive training and licensing before they can practice.[234]

Finally, the court addressed the fact that both commercial and professional speech exist in spheres that are already prone to regulation by the government.[235] The state and federal governments highly regulate the practice of medicine, including mental health care.[236] Even if courts refuse to recognize a class of professional speech, the similarities between commercial speech, an area with recognized diminished protections under the First Amendment,[237] and therapy

229. King v. Governor of N.J., 767 F.3d 216, 233 (3d Cir. 2014).
230. *Id.* at 234.
231. *See supra* text accompanying note 155.
232. *See supra* pt. V.A.1.b.
233. *King*, 767 F.3d at 234.
234. *See supra* pt. V.A.1.c.
235. *King*, 767 F.3d at 234.
236. *See supra* pt.V.A.1.c.
237. *King*, 767 F.3d at 234 ("[T]he Court has repeatedly emphasized that commercial speech enjoys only diminished protection because it 'occurs in an area traditionally subject to government

effectuated through speech are apparent. Courts should consider these similarities when determining the applicable level of scrutiny to be applied.

The *Otto* court incorrectly used a strict scrutiny analysis to examine the regulations in question. If the restrictions do in fact regulate protected speech, and the court finds them to be content-based, then the most workable standard to apply would be intermediate scrutiny. Applying intermediate scrutiny properly recognizes the value and nature of talk therapy that makes it, like other forms of content-based speech, deserving of diminished First Amendment protections.

B. Justifying the Prohibition of Conversion Therapy for Minors

The practice of conversion therapy poses a considerable danger to LGBTQ+ youth. LGBT youth experiencing high levels of familial rejection, often resulting in forced conversion therapy efforts, are more likely to have attempted suicide, experience depression, and use illegal drugs.[238] Such risks are a high price to pay for a morally objectionable practice, especially when considering that it has shown little efficacy. Few studies have demonstrated the "success" of any form of conversion therapy, and many of the more prominent studies have serious shortcomings regarding their scientific validity.[239]

Alongside a lack of documented proof of the efficacy of conversion therapy exists the reality that several reputable professional associations have denounced the practice. The American Psychological Association encourages families to search for mental health support and services that provide accurate information and focus on supportive practices as opposed to rejection—warning LGBTQ+ youth and their caregivers to avoid conversion therapy efforts that portray homosexuality as an illness or disorder.[240] In addition to those recommendations, the American Psychological Association states there is insufficient evidence to support the use of psychology to alter an individual's sexual orientation and recommends professionals take efforts to avoid misrepresenting the effectiveness of sexual orientation

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regulation.'" (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562 (1980) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978)))).

238. *Conversion Therapy*, *supra* note 58. One study found that LGBT youth experiencing high levels of rejection from family are "8.4x more likely to report having attempted suicide, 5.9x more likely report high levels of depression, and 3.4x more likely to use illegal drugs." *Id.*

239. Tozer & McClanahan, *supra* note 60.

240. *Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts*, AM. PSYCH. ASS'N (2009), https://www.apa.org/about/policy/sexual-orientation.

change efforts or conversion therapy.[241] The American Psychiatric Association has also denounced the practice, stating it "does not believe that same-sex orientation should or needs to be changed, and efforts to do so represent a significant risk of harm by subjecting individuals to forms of treatment which have not been scientifically validated and by undermining self-esteem when sexual orientation fails to change."[242] In addition to the American Psychological and American Psychiatric Associations, several other professional associations representing medical and mental health professionals have expressed their support for prohibiting the use of conversion therapy on minors.[243] The practice is harmful, lacks evidence of success, and is not supported by the medical and mental health communities.

VI. ENACTING A STATEWIDE CONVERSION THERAPY PROHIBITION

Following an overturning of the incorrectly decided *Otto* decision, Florida requires a statewide ban on the use of conversion therapy on minors. This would allow Florida to follow in the footsteps of the other twenty states who have successfully prohibited the practice statewide.[244] Florida's government is currently controlled by the Republican Party,[245] and this may pose an obstacle to the passage of such legislation. But it does not make the feat an impossible one. A 2017 poll showed that 71% of Floridians supported a statewide prohibition on conversion therapy.[246] This is a promising sign for the future of proposed legislation. Additionally, if the poll accurately reflects the beliefs of Florida voters, the possibility exists for the proposal of a constitutional amendment through Florida's initiative process.[247]

241. *Id.*

242. DAVID SCASTA & PHILIP BIALER, AM. PSYCHIATRIC ASS'N, POSTION STATEMENT ON ISSUES RELATED TO HOMOSEXUALITY (2013), https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2013-Homosexuality.pdf.

243. *See* CAL. BUS. & PROF. CODE § 865.1 (2020). The legislative findings in support of the enactment of the California statute banning conversion therapy for minors included statements from at least six additional associations. *Id.*

244. *Equality Maps: Conversion "Therapy" Laws*, *supra* note 67.

245. *Party Control over Florida State Government*, BALLOTOPEDIA, https://ballotpedia.org/Party_control_of_Florida_state_government (last visited May 2, 2022). The author recognizes the not all members of the Republican Party support conversion therapy. However, many members hold more conservative views that may stand in the way of such legislation.

246. *Florida Becomes First State to Introduce Legislation Protecting LGBTQ Youth from Conversion Therapy in 2019 Legislative Session*, *supra* note 71.

247. *Florida*, INITIATIVE & REFERENDUM INST., http://www.iandrinstitute.org/states/state.cfm?id=7 (last visited May 2, 2022). The initiative process would require a supermajority vote of 60%. *Id.*

VII. CONCLUSION

The recent trend toward greater protections and rights for the LGBTQ+ community has largely ignored LGBTQ+ youth. Youth identifying as LGBTQ+ are incredibly vulnerable and are at a greater risk of depression, suicide, and finding themselves in the juvenile delinquency and welfare systems. Florida's LGBTQ+ youth face an increased risk due to a lack of legal protections and a predominately conservative state government. One of the most harmful obstacles facing LGBTQ+ youth in Florida, and beyond, is the failure to successfully prohibit the practice of conversion therapy on minors. The practice has harmful effects, lacks efficacy, and many leading medical and mental health organizations have denounced it. Yet therapists can still legally use conversion therapy on minors in the state of Florida and throughout the Eleventh Circuit. Florida has failed to pass a statewide prohibition on the practice, and the Eleventh Circuit Court of Appeals erroneously held that the prohibitions enacted by local governments were unconstitutional. This decision should be overturned because prohibitions on the use of conversion therapy are not protected by the First Amendment and even if they are, they only qualify for diminished protections. Following a successful appeal of the *Otto* decision, Florida legislators should continue to work towards passing a statewide prohibition on the archaic and harmful practice of conversion therapy—particularly its use on minors.