OUTING ANTI-GAY TEACHING IN SCHOOLS: HOW THE CONSTITUTIONAL SUCCESSES OF CONVERSION THERAPY BANS PROVIDE VIABLE ARGUMENTS TO DEFEND BANS ON HETERONORMATIVE EDUCATION

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I. INTRODUCTION

As society has become more accepting of homosexuality, the United States has experienced increasing attempts to protect lesbian, gay, bisexual, and transgender (LGBT) youth from prevailing homophobic/hetero-normative attitudes. Recognizing the importance of quality education and the fragility of the early developing human mind, states may have a strong interest in eliminating harmful anti-gay education in their schools. If such an agenda exists, a state statute banning anti-gay curriculum would be a natural step in achieving that goal. A proposed statute could explicitly prohibit curriculum or course material that teaches that any one sexual orientation is subpar, less moral, or less socially acceptable than any other. The controversial nature of such legislation would likely lead to a host of constitutional challenges alleging violations of First Amendment free speech and free exercise of religion rights, among others. While this might seem like a daunting uphill battle, it is not quite a David versus Goliath scenario considering extremely similar situations in the mental health environment.

Two states, California and New Jersey, have recently passed legislation prohibiting state-licensed mental health providers ("LMHP") from engaging in sexual orientation change efforts ("SOCE") with minors. [1] Although challenged as unconstitutional, both laws survived litigation and were deemed

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[1] *See* CAL. BUS. & PROF. CODE §865.1 (West 2013); *see also* N.J. STAT. ANN. § 45:1-55 (West 2013).

constitutionally valid.[2] In upholding the SOCE statues, both courts found that the states' government interest in protecting the well-being of minors from harmful or ineffective counseling was sufficient enough to overcome various constitutional claims.[3] The failed claims argued that the statutes infringed on free speech rights, free exercise of religion rights, and parental rights to raise their children.[4] These statutes and cases apply directly to the regulation of mental health treatment and licensed professionals providing such services. However, as this article points out, many of the implications of these statutes and rulings can also be applied to the education environment.

As mentioned above, a state ban on certain educational teachings will likely be challenged as unconstitutional. Looking to the litigation of the SOCE statutes, one can hypothesize about the likely constitutional challenges to be brought. These challenges are likely to claim regulations on teaching about sexual orientation infringes on 1) free speech rights, 2) the right to exercise one's religion freely, and 3) the fundamental right of parents to raise their children without government intervention. Although similarities are apparent between the potential claims brought against anti-gay education bans and SOCE bans, much more jurisprudence exists in the realm of education, since the first conversion therapy statute was passed only recently in 2013. Accordingly, this article will explain some of this jurisprudence and how it may be more difficult for state education regulations.

In evaluating the potential constitutional claims described above, this article analyzes whether states have a constitutionally defensible interest in protecting children from the harms of anti-gay education. The analysis will seek to define what courts will consider "harmful" treatment under the prohibitions of SOCE and if such "harm" can be considered the equivalent of related harms

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[2] *See* Pickup v. Brown, 740 F.3d 1208, 1236 (9th Cir. 2014); *see also* King v. Governor of New Jersey, 767 F.3d 216, 246 (3d Cir. 2014).

[3] *See Pickup*, 740 F.3d at 1236 (finding that SB 1172 did not violate First Amendment free speech rights or Fourteenth Amendment due process rights of parents to make decisions regarding the care, custody, and control of their children); *see also King*, 767 F.3d at 246 (finding that A3371 did not violate First Amendment free speech or freedom of religion rights).

[4] *See Pickup*, 740 F.3d at 1225–32 (free speech argument); *id.* at 1235–36 (parental rights argument); *King*, 767 F.3d at 224–40 (free speech argument); *id.* at 241–43 (free exercise of religion argument).

in the education environment. For instance, under Alabama education statutes, sexual education courses must emphasize that "homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the laws of the state."[5] Arguably, if SOCE is deemed harmful to minors in its efforts to change a child's sexual orientation, an educational system that indoctrinates children into thinking that homosexuality is immoral and advocates for sexual orientation change may be equally as harmful.[6] These similarities and others set the stage for arguments about states' roles in regulating education and defending those arguments in U.S. constitutional law doctrine.

Ultimately, this article seeks to establish that states' interests in protecting its minors may be sufficient to overcome claims involving the fundamental constitutional rights of parents, schools, and educators. After explaining the recent SOCE statutes and the constitutional claims arising from them, this article will show the historical trend limiting the state's police power to regulate education. Against that backdrop, this article will hypothesize about a state's ability to constitutionally defend regulations on education in light of the rulings on the SOCE statutes. As discussed further below, the Ninth and Third Circuit rulings differ in their rationales upholding each statute. Thus, the hypothetical analyses will discuss the implications of these rationales in each circuit. Because these two courts are showing a trend in upholding state statutes protecting minors from mental and psychological harm, courts may be willing to protect children from harmful effects brought upon them by certain educational teachings despite the traditionally successful arguments about infringing on fundamental rights protected under the U.S. Constitution.

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[5] *See* ALA. CODE § 16-40A-2(c)(8) (1992).

[6] Arguably, many other harmful teachings exist in the education environment including those related to sex education, the roles of women in society, and science, among others. Because of the recent rulings and specific arguments focused on SOCE statutes, this article is limited to educational teaching regarding sexual orientation.

II. HISTORICAL BACKGROUND

A. History of Sexual Orientation Change Efforts ("SOCE")

Sexual orientation change efforts are sometimes also referred to as conversion or reparative therapy efforts. These efforts began during a time when the medical and psychological community viewed homosexuality as an illness.[7] This type of therapy originated during the mid-nineteenth century when stigmatization of homosexuals was on the rise socially, politically, and legally.[8] As the name suggests, the goal of this type of therapy is to "change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex."[9] SOCE methods generally involve "individual counseling sessions, group therapy, and . . . prayer and scriptural study."[10] A recent New Jersey case discusses some SOCE techniques used by Jews Offering New Alternatives for Healing ("JONAH").[11] One of JONAH's private session techniques alleged by the plaintiff in *Ferguson v. JONAH* required him to "say one negative thing about himself, remove an article of clothing, then repeat the process."[12] Historically, SOCE treatments have also utilized "physically invasive techniques such as electroshock therapy, hormone therapy, and surgery."[13]

During the mid-twentieth century, research in mental health began demonstrating that "same-sex attractions were more

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[7] *Pickup*, 740 F.3d at 1222.

[8] Caitlin Sandley, Note, *Repairing the Therapist? Banning Reparative Therapy for LGB Minors*, 24 HEALTH MATRIX 247, 251 (2014).

[9] S.B. 1172, 2012 Reg. Sess. (Cal. 2012).

[10] Sandley, *supra* note 8, at 251.

[11] *See* Ferguson v. JONAH, No. HUD-L-5473-12, 2015 N.J. Super. Unpub. LEXIS 236 (N.J. Super. Ct. Law Div. Feb. 5, 2015). Although this recent case illustrates some of the techniques used in conversion therapy, it does not represent the wide-spread extent of therapy techniques nationally.

[12] *Id.* at *3. Other SOCE methods in the complaint alleged similar group and individual disrobing exercises, counseling an individual to "spend more time at the gym and to be naked with their fathers at bathhouses," and instructing him to "beat an effigy of his mother with a tennis racket while screaming, as if killing her." *Id.* at *3–4.

[13] Sandley, *supra* note 8, at 251.

common than previously thought."[14] With this research came a shift among legal mental health providers ("LMHP") "who began describing homosexuality as a normal variant of human sexuality" rather than an illness or disorder.[15] It was this shift among LMHPs that led to the removal of homosexuality as a mental disorder in the Diagnostic and Statistical Manual of the American Psychological Association ("APA") in 1972.[16] After the APA declared that homosexuality was not an illness, many practitioners started questioning the appropriateness of SOCE.[17] In recent years, many professional health organizations have followed the lead of the APA by issuing "declarations and position statements asserting that SOCE is ineffective, unethical, and even harmful to patients."[18] Yet, while most mental health professionals agree that SOCE is harmful, some LMHPs continue to use conversion therapy because the "moral argument about homosexuality is alive and well . . . ."[19]

One of the most widely known organizations in the SOCE industry is the National Association for Research and Therapy of Homosexuality ("NARTH"). According to NARTH's statement on SOCE, it "remains committed to protecting the rights of clients with unwanted same-sex attractions to pursue change as well as the rights of clinicians to provide such psychological care."[20] Although much of the mental health community has opposed SOCE, clearly SOCE therapy is still utilized, as seen by NARTH's position statement and recent cases, such as the previously mentioned 2015 *Ferguson* decision. Some of the asserted reasons that one might pursue SOCE include the following:

> a deep religious conviction that homosexuality is wrong; a belief that homosexuality is a diagnosable illness or disorder; a belief that same-sex attractions stem from flawed parental relationships or prior

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14 *Id.*

15 *Id.*

16 *See id.*

17 *See Pickup*, 740 F.3d at 1222.

18 Sandley, *supra* note 8, at 252.

19 *Id.*

20 *NARTH Institute Statement on Sexual Orientation Change*, NARTH INSTITUTE, http://www.narth.com/#!about1/c1wab (last visited Jul. 9, 2015).

> sexual abuse; fear of familial and community stigma and rejection; and fear of oppression and of losing heterosexual societal privileges.[21]

With the prevalence of organizations such as NARTH and the many purported reasons to seek SOCE counseling, such treatments still exist in the United States.

Despite the existence of SOCE treatment, social acceptance of homosexuality and scientific research has led to state legislation prohibiting such treatment. As discussed more fully below, New Jersey and California have recently enacted legislation to prohibit LMHPs from using SOCE on minors because of its potential harm on individuals' mental health. Furthermore, the Superior Court of New Jersey went so far as to prohibit expert testimony in favor of SOCE.[22] The court stated that "[t]he universal acceptance of that scientific conclusion," that homosexuality is not a disorder or abnormal, "requires that any expert opinions to the contrary must be barred."[23] Such a statement by the New Jersey Superior Court reflects the degree to which attitudes about SOCE treatment have shifted in both the legal and mental health environments from its first appearance in the mid-nineteenth century.[24]

B. History on Legality of Homosexual Conduct

Social and legal changes regarding homosexuality can be seen not only in the history of SOCE treatment but also in the decriminalization of homosexual conduct in the United States. This issue first came before the United States Supreme Court in *Bowers v. Hardwick*.[25] The Supreme Court determined in *Bowers* that Georgia's statute criminalizing homosexual sodomy was constitutional and did not deprive the plaintiff of his fundamental rights under the Fourteenth Amendment of the Constitution.[26] The Court defined the plaintiff's asserted right as the

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21 Sandley, *supra* note 8, at 250-51.

22 *See Ferguson*, 2015 N.J. Super. Unpub. LEXIS 236, at *20.

23 *Id.*

24 For a more extensive and thorough discussion on the history of SOCE in the United States, see Sandley, *supra* note 8, at 250-54.

25 478 U.S. 186 (1986).

26 *Id.* at 189.

"fundamental right [of] homosexuals to engage in acts of consensual sodomy."[27] Pointing to many laws that proscribe homosexual conduct and recognizing that such proscriptions have ancient roots, the Court found that the right was not "deeply rooted in this Nation's history . . . or implicit in the concept of ordered liberty" and therefore, was not a fundamental right.[28]

However, seventeen years after its decision in *Bowers*, the Supreme Court overruled its holding in *Lawrence v. Texas*.[29] The statute at issue in *Lawrence* was a Texas sodomy statute making it "an offense if [a person] engages in deviate sexual intercourse with another individual of the same sex."[30] As part of its reasoning in *Lawrence*, the Court recognized that in the United States, "criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects . . . ."[31] Although the exact legal doctrine and reasoning of the *Lawrence* decision is not explicitly clear, the holding invalidates any state law prohibiting homosexual sodomy between consenting adults as a violation of the Fourteenth Amendment due process clause of the Constitution.[32]

C. History of Anti-Gay Stigma in the Education Environment

Before *Bowers* was overruled by the Supreme Court, many states advanced legislative initiatives that were consistent with the anti-homosexual sentiment of the time.[33] Such homophobia resulted in legislation that has been termed "no promotion of homosexuality" or "no promo homo" laws.[34] Fearing strong influences of homosexuality on the youth of America, no promo

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27 *Id.* at 192.

28 *Id.* at 194.

29 539 U.S. 558, 578 (2003).

30 *Id.* at 563.

31 *Id.* at 576.

32 *Id.* at 578 (invalidating the Texas statute without stating which level of review the Court was applying and overruling *Bowers* which used rational basis review).

33 Leora Hoshall, Note, *Afraid of Who You Are: No Promo Homo Laws in Public School Sex Education*, 22 TEX. J. WOMEN & L. 219, 221 (2013).

34 *Id.*

homo policies became most popular in public education.[35] This can be seen by Oklahoma's attempt to pass legislation that would allow the dismissal of public school teachers for "advocating . . . encouraging or promoting public or private homosexual activity . . . ."[36] The statute was invalidated by the United States Court of Appeals for the Tenth Circuit in 1984 as facially overbroad.[37] Although similar laws have also been invalidated, in the area of "public school sex education, no promo statutes remain rarely challenged and rarely discussed."[38]

No promo homo laws codified in sex education statutes can be found currently in the following states: Alabama, Arizona, Mississippi, Oklahoma, South Carolina, Texas, and Utah.[39] While some are more subtle than others, the most blatant are those in Alabama and Texas that emphasize the teaching of homosexuality as an unacceptable lifestyle and a criminal offense despite the invalidation of their sodomy laws by the Supreme Court in *Lawrence*.[40] Attempts have been made to repeal the no promo homo sex education laws in Texas in 2005, 2007, 2009, and 2011.[41] The 2011 attempt ended with the matter pending, and the bill was never revisited.[42] Much of the discussion by the opponents of the bill involved concerns over keeping the state's "policy statement" regarding homosexuality.[43] Representative Coleman, the author of the bill, suggested several times that if backing off on the education amendments would help advance the repeal of the sodomy statute (the one invalidated in *Lawrence*) he would be

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[35] William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1359 (2000).

[36] OKLA. STAT. tit. 70, § 6-103.15 (repealed 1989).

[37] *See* Nat'l Gay Task Force v. Bd. of Educ., 729 F.2d 1270, 1272 (10th Cir. 1984), *aff'd*, 470 U.S. 903 (1985).

[38] Hoshall, *supra* note 33, at 222.

[39] *Id.* For a more thorough discussion of the no promo homo laws in these states, see *Id.* at 222–39.

[40] *See* ALA. CODE § 16-40A-2(c)(8) (1992) ("Course material and instruction that relate to sexual education . . . should include . . . [a]n emphasis . . . that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the laws of the state."); *see also* TEX. HEALTH & SAFETY CODE ANN. § 163.002 (West 1991) (same).

[41] *See* Hoshall, *supra* note 33, at 236 n. 178.

[42] *Id.* at 238.

[43] *See id.* at 237.

willing to do that.[44] However, nothing came of that offer. Thus, sex education statutes in Texas and Alabama continue to require that public schools emphasize to their children that homosexuality is an unacceptable lifestyle.[45]

Not only do such laws contribute to a stigmatization of LGBT students, but bullying and harassment in schools enhance the homophobic educational atmosphere.[46] Some defenders of LGBT students are critical of educators and school administrators asserting their unwillingness to step in and stop bullying exacerbates the LGBT bullying problem in schools.[47] Moreover, some attribute the prevalence of anti-gay prejudice in schools directly to teachers claiming that they themselves "harass, misinform, and unfairly punish gay students."[48] Although some schools may have gay-straight alliance organizations and anti-discrimination/anti-bullying policies, schools would also benefit from a state statute focusing on anti-gay teaching to eliminate or reduce the wide-spread homophobic attitudes in schools.[49]

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[44] *See id.* at 238.

[45] Sex education statutes such as those in Texas and Alabama are particularly problematic, however, sex education materials that omit any discussion of LGBT issues can also be harmful and problematic to LGBT students. *See* Sarah C. Conrey, Note, *Hey, What About Me?: Why Sexual Education Classes Shouldn't Keep Ignoring LGBTQ Students*, 23 HASTINGS WOMEN'S L.J. 85, 105 (2012) (noting sex education statutes are harmful if they 1) prohibit presenting homosexuality as acceptable, 2) require emphasizing that homosexuality is unacceptable, and 3) ban sexual orientation topic entirely).

[46] *See generally* Elizabeth J. Meyer, GENDER, BULLYING, AND HARASSMENT: STRATEGIES TO END SEXISM AND HOMOPHOBIA IN SCHOOLS (2009).

[47] *See* Michael J. Higdon, *To Lynch a Child: Bullying and Gender Nonconformity in Our Nation's Schools*, 86 IND. L.J. 827, 844 (2011) (discussing three potential reasons why teachers do not respond: 1) the high frequency of homophobic insults makes it too difficult to interfere, 2) they see the behavior as a normal part of childhood, and 3) they are prejudiced against LGBT students themselves).

[48] *Id.* at 845 (quoting Donna I. Dennis & Ruth E. Harlow, *Gay Youth and the Right to Education*, 4 YALE L. & POL'Y REV. 446, 448 (1986)).

[49] Another contributing factor to anti-gay attitudes in education arises from certain religious schools. However, although prevalent and wide-spread in certain American religious schools, anti-gay religious ideology is beyond the scope of this article and will not be addressed.

III. LEGAL BACKGROUND

A. SOCE Statutes

The first state to enact a state-wide ban on SOCE was California, when it enacted Senate Bill 1172 ("SB 1172"). The bill was adopted into the California Business and Professional Code and became effective January 1, 2013.[50] The statute reads: "Under no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age."[51] The statute requires disciplinary action "by the licensing entity" for a mental health provider that violates the statute.[52]

Under the definitions section of the statute, the legislature defines SOCE as "any practices by mental health providers that seek to change an individual's sexual orientation . . . includ[ing] efforts to change behaviors or gender expressions."[53] However, the statute does not apply to "psychotherapies that . . . provide acceptance, support, and understanding of clients . . . and do not seek to change sexual orientation."[54] The legislature's purpose in enacting the bill was to "protect[] the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and [to] protect[] its minors against exposure to serious harms caused by sexual orientation change efforts."[55]

The second state to enact a law prohibiting SOCE was New Jersey, when Governor Christopher J. Christie signed Assembly Bill A3371 ("A3371") into law on August 19, 2013.[56] The law states:

> A person who is licensed to provide professional counseling under Title 45 of the Revised Statues, including, but not limited to, a psychiatrist, licensed practicing psychologist, certified social worker,

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50 CAL. BUS. & PROF. CODE §865.1 (West 2013); *see* S.B. 1172, 2012 Reg. Sess. (Cal. 2012).

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

52 § 865.2.

53 § 865(b)(1).

54 § 865(b)(2).

55 *Pickup*, 740 F.3d at 1223 (quoting 2012 Cal. Legis. Serv. Ch. 835, § 1(n)).

56 *See* N.J. STAT. ANN. § 45:1-55 (West 2013).

> licensed clinical social worker, licensed social worker, licensed marriage and family therapist, certified psychoanalyst, or a person who performs counseling as part of the person's professional training for any of these professions, shall not engage in sexual orientation change efforts with a person under 18 years of age.[57]

The definitions and language of the New Jersey statute mirror almost exactly the language of the California statute.[58] Once again, the statute does not impose any penalties for mental health providers but exposes the provider to professional discipline by the appropriate licensing board.

B. Constitutional Challenges to SOCE Legislation

Each state's SOCE statute was challenged as unconstitutional, resulting in two circuit court rulings: the Ninth Circuit for California's statute and the Third Circuit for New Jersey's statute. The first case came before the United States Court of Appeals for the Ninth Circuit in January 2014. The Ninth Circuit in *Pickup v. Brown* considered whether SB 1172 was unconstitutional by violating the plaintiffs' First and Fourteenth Amendment rights.[59] The plaintiffs in *Welch* (one of the district court cases) were "two SOCE practitioners and an aspiring SOCE practitioner" who claimed that SB 1172 violated their free speech and privacy rights.[60] Also practitioners, the plaintiffs in *Pickup* (the other district court case) brought similar claims including a claim that SB 1172 infringed on "minors' right to receive information, and parents' right to direct the upbringing of their children."[61]

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[57] *Id.*

[58] *Id.* ("'sexual orientation change efforts' means the practice of seeking to change a person's sexual orientation . . . [it] shall not include counseling for a person seeking to transition from one gender to another . . . .").

[59] This appellate case involved decisions regarding the following two separate district court cases: Welch v. Brown, 907 F. Supp. 2d 1102 (E.D. Cal. 2012) and Pickup v. Brown, 2012 U.S. Dist. LEXIS 172027 (E.D. Cal. 2012).

[60] *Pickup*, 740 F.3d at 1224.

[61] *Id.* at 1225.

The Ninth Circuit determined that the first step of the constitutional analysis should begin with a determination of whether the legislation would be subject to heightened scrutiny.[62] The *Welch* district court had determined that, under the First Amendment, SB 1172 was subject to the highest scrutiny (strict scrutiny) "because it would restrict the content of speech and suppress the expression of particular viewpoints."[63] The Ninth Circuit disagreed with the lower court's finding that SB 1172 "regulates only *treatment*, while leaving mental health providers free to discuss and recommend, or recommend against, SOCE . . . ."[64] Accordingly, the law was not subject to a First Amendment strict scrutiny analysis, but rather was "subject to only rational basis review and must be upheld if it bears a rational relationship to a legitimate state interest."[65] Having determined that SB 1172 was subject to the lower rational basis review, the Ninth Circuit Court held that the SOCE ban indeed was constitutional because it was rationally related to "protecting the physical and psychological well-being of minors . . . against exposure to serious harms caused by sexual orientation change efforts."[66]

The holding suggests that, under rational basis review, under the First Amendment where a minor is subjected to *treatment* to change his or her sexual orientation, a state has discretion to enact laws prohibiting the treatment without proving actual harm has occurred. In finding that SB 1172 was constitutional, the court did not delve into whether SOCE actually caused serious harms since it could "reasonably be conceived to be true by the governmental decisionmaker."[67] However, as suggested by the court, the standard would be higher if the state were to prohibit conversations about SOCE[68]— this would indeed require strict scrutiny, forcing the state to prove a compelling government interest in enacting the law.

The plaintiffs in *Pickup* also unsuccessfully argued that SB 1172 infringed on their First Amendment freedom of association

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62 *Id.*
63 *Id.* at 1224.
64 *Id.* at 1231 (emphasis added).
65 *Id.*
66 Pickup, 740 F.3d at 1231
67 *Id.*
68 *Id.* at 1229.

rights by preventing them from entering into and maintaining "the intimate human relationships between counselors and clients."[69] The Ninth Circuit found that the SOCE proscription did not prevent the therapists from entering and maintaining their client relationships but only denied counseling meant to change a minor's sexual orientation.[70] The court went further to determine that the freedom of association right does not even extend to the therapist-client relationship but is meant for decisions regarding "close-knit relationships," such as marriage, childbirth, and raising children.[71] Accordingly, the court held that SB 1172 did not violate the plaintiffs' freedom of association rights.[72]

Other challenges brought by the plaintiffs involved an argument that the statute was invalid because it was both vague and overbroad.[73] The plaintiffs argued that SB 1172 was vague by not distinguishing between what is prohibited by the bill and what is permitted—for instance, whether "the mere dissemination of information about SOCE would subject them to discipline."[74] The court determined that "[a] reasonable person would understand the statute to regulate only mental health treatment . . . that aims to alter a minor patient's sexual orientation."[75] Because the court thought that licensed therapists who identify themselves as SOCE practitioners should be able to understand more than most ordinary people what practices qualify as SOCE, it found that the statute was not vague.[76] The court also quickly determined that SB 1172 was not overbroad as it plainly applies not only to SOCE techniques carried out verbally but other "techniques such as inducing vomiting or paralysis, administering electric shocks, and performing castrations."[77] Thus, SB 1172 survived both the vague and overbroad invalidation challenges.

Finally, the *Pickup* court had to decide whether SB 1172 violated the Fourteenth Amendment due process clause by infringing on the fundamental right of parents to make important

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69 *Id.* at 1232.
70 *Id.*
71 *Id.* at 1233.
72 *Pickup*, 740 F.3d at 1233.
73 *Id.* at 1233-34.
74 *Id.* at1234.
75 *Id.*
76 *Id.*
77 *Id.* at 1235.

medical decisions on behalf of their children.[78] The court recognized that while parents do have a fundamental right to raise their children, their right has certain limitations.[79] The court relied on its previous decision in *Fields v. Palmdale School District*, where parental upbringing rights could not "compel public schools to follow their own idiosyncratic views as to what information the schools may dispense."[80] The court analogized the issue in *Fields* to the current issue, finding that the fundamental rights of parents do not include choosing a specific provider or mental health treatment that the state has determined to be harmful.[81] By not recognizing a valid parental right at issue, the court held that SB 1172 did not infringe on parents' fundamental rights.[82]

In New Jersey, three days after SOCE bill A3371 was enacted, claims were brought against various New Jersey executive officials alleging violations of "rights to free speech and free exercise of religion" under the First Amendment.[83] These constitutional challenges to A3371 were brought before the United States Court of Appeals for the Third Circuit in *King v. Governor of N.J.* in September 2014.[84] Before reaching the Third Circuit, the United States District Court for the District of New Jersey relied heavily on the holding in *Pickup* to find that the statute did not regulate speech but merely conduct (treatment) of the mental health providers.[85] However, the Third Circuit came to a different understanding than the Ninth Circuit in evaluating the verbal communication of the providers stating, "speech is speech, and it must be analyzed as such for purposes of the First Amendment."[86]

Having found that the treatment provided by the counselors is indeed speech, the Third Circuit moved to the next inquiry: whether the speech is in a "historically delineated

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78 *Pickup*, 740 F.3d at 1235.

79 *Id.*

80 *Id.* at 1236 (quoting Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1206 (9th Cir. 2005)).

81 *Id.*

82 *Id.*

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

84 *Id.* at 216.

85 *See id.* at 226.

86 *Id.* at 229.

category of lesser protected or unprotected expression."[87] The Court determined that the speech of the mental health providers is categorized as "professional speech" and thus does not receive the full protection of the First Amendment.[88]

Finding that the professional speech would not be subject to First Amendment strict scrutiny, the Third Circuit used intermediate scrutiny in this case—a higher standard than the rational basis review the Ninth Circuit employed.[89] Under intermediate scrutiny, the court stated, A3371 would be found constitutional if it "directly advance[d] the government's interest in protecting clients from ineffective and/or harmful professional services . . . ."[90] Ultimately, the Court determined that A3371 directly advanced New Jersey's interest in protecting minor citizens, a group "especially vulnerable" in the eyes of the state, from harmful professional practices.[91] Thus, even under a higher standard (intermediate scrutiny), the Court found that the regulation of this type of professional speech could be considered harmful enough to permit state regulation.[92]

Next, the Third Circuit was charged with determining whether A3371 violated the plaintiffs' First Amendment right to free exercise of religion.[93] The legal standard for a free exercise of religion claim is that a law will be subject to rational basis review if it is "neutral" and "generally applicable."[94] As discussed previously, rational basis review is the lowest form of review, and

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87 *Id.*

88 *Id.* at 232 (recognizing 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").

89 *King*, 767 F.3d at 237.

90 *Id.*

91 *Id.* at 240.

92 As in *Pickup*, the plaintiffs in *King* challenged A3371 as unconstitutionally vague and overbroad. Regarding A3371's vagueness, the Third Circuit found that "its list of illustrative examples provides boundaries that are sufficiently clear to pass constitutional muster." *Id.* at 241. As to their overbroad claim, the plaintiffs did not succeed because their only argument—that A3371 was overbroad by prohibiting counseling that is actually beneficial—had already been proven false by the court's determination that New Jersey had a legitimate interest in banning the harmful treatment. *Id.*

93 *Id.*

94 *King*, 767 F.3d at 242 (quoting Brown v. City of Pittsburgh, 586 F.3d 263, 284 (3d Cir. 2009)).

requires showing only that the law is "rationally related to a legitimate government objective."[95] The Third Circuit found that because A3371 makes no reference to religion and is neutral on its face, it passes the "neutral" requirement.[96] As to its "general applicability," the plaintiffs argued A3371 targeted their religious practices while simultaneously allowing other non-religious treatments that are equally harmful to minors.[97] The court found that none of the five exceptions provided by the plaintiffs showed "that A3371 covertly targets religiously motivated conduct."[98] Therefore, by finding that A3371 was a neutral law of general applicability, the court had only to subject the law to rational basis review. Because A3371 had already survived the higher standard of intermediate scrutiny, it automatically exceeded what was required under rational basis review.[99] Accordingly, A3371 did not violate the plaintiffs' First Amendment free exercise of religion rights.[100]

Although both *Pickup* and *King* reached the same conclusion—that their state's SOCE statutes were constitutionally valid—the reasoning in each Circuit differs slightly. The implications from *King* reach a little further than *Pickup*, since the court in *King* actually defined the prohibited conduct as speech and still found that it did not violate the First Amendment. *King* used a higher level of scrutiny when determining whether A3371 violated the First Amendment free speech rights of the plaintiffs and found that by restricting only professional speech, New Jersey did not exert power "more extensive than necessary" to protect the interests of its minor citizens.[101]

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95 *Id.* (quoting *Brown*, 586 F.3d at 284).

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.* at 243.

100 The plaintiffs had also challenged the District Court's decisions regarding standing and allowing Garden State Equality, a New Jersey civil rights organization advocating for LGBT equality, to intervene as a defendant. *See King*, 767 F.3d at 243–46. These claims and their arguments are beyond the scope of this article and have therefore been omitted.

101 *Id.* at 239–40.

C. Constitutional Challenges Applicable to State Regulation of Education[102]

Although the government has an interest in protecting children from harm, its police power is limited as it cannot take away rights set forth in the Constitution of the United States. As discussed previously in the *King* and *Pickup* cases, courts will evaluate the state's interest according to a scrutiny regime.[103] Appropriate case law will determine whether a court should use strict scrutiny (the highest level), intermediate scrutiny, or rational basis (the lowest level) review. Under strict scrutiny, the state must have a compelling interest for asserting its police power. Intermediate scrutiny requires that a state's power be upheld if it "directly advances" the government's interest and is "not more extensive than necessary to serve that interest."[104] Finally, rational basis review requires only that the state's assertion of power "bears a rational relationship to a legitimate state interest."[105] Therefore, despite the Supreme Court's acknowledgment that states unquestionably have the power "reasonably to regulate *all* schools, to inspect, supervise and examine them, their teachers and pupils," certain constitutional rights may prohibit a state from exerting that power.[106] The following discussion explains two of the primary constitutional challenges asserted when a state tries to police the regulation of education.

1. Fourteenth Amendment Parental Liberty to Direct the Upbringing and Education of Children

Government regulation of education is often challenged by parents claiming that their right to raise their children has been

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[102] Because First Amendment free speech challenges are significantly discussed in *Pickup* and *King*, this section omits the duplication of that discussion.

[103] As discussed more fully below, the Supreme Court does not always adhere to its scrutiny regime analysis. While this article makes arguments consistent with the traditional scrutiny regime, it is worth noting the ambiguities the Supreme Court has left when evaluating the validity of state regulation.

[104] *King*, 767 F.3d at 237.

[105] *See Pickup*, 740 F.3d at 1231.

[106] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925) (emphasis added).

infringed upon, in violation of the Fourteenth Amendment Due Process Clause. This claim has developed from its early appearance before the Supreme Court in *Meyer v. Nebraska.*[107] The Supreme Court in *Meyer* considered whether the State of Nebraska could lawfully prohibit a private schoolteacher from teaching the German language to his pupils.[108] The State of Nebraska had passed an act stating, "[n]o person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language."[109] In evaluating the constitutional validity of the statute, the Court articulated the issue as "whether the statute . . . unreasonably infringes the liberty guaranteed . . . by the Fourteenth Amendment. 'No State shall . . . deprive any person of life, liberty, or property, without due process of law.'"[110]

In its interpretation of the liberties afforded under the Fourteenth Amendment Due Process Clause, the Supreme Court recognized the right of individuals to "bring up children" and "engage [a teacher] to instruct their children . . . ."[111] The State of Nebraska could not interfere with those rights if its statute was "arbitrary or without reasonable relation to some purpose within the competency of the State to effect."[112] The Supreme Court found that Nebraska's statute was indeed arbitrary, as it had no relation to the protection of children's health.[113] Although this case gives a strong argument to parents, as it found that their constitutional rights should be protected, the language of the holding does suggest that a state's police power to regulate schools may be upheld depending on its interest in protecting children from harm.

This parental right underwent further development by the Supreme Court when it addressed another substantive due process claim under the Fourteenth Amendment in *Prince v.*

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[107] 262 U.S. 390 (1923).

[108] *Id.* at 396. The plaintiff in *Meyer* was an instructor at Zion Parochial School who was tried and convicted for teaching in the German language.

[109] *Id.* at 397.

[110] *Id.* at 399.

[111] *Id.* at 399–400.

[112] *Id.* at 400.

[113] *See Meyer*, 262 U.S. at 403 ("It is well known that proficiency in a foreign language . . . is not injurious to the health, morals or understanding of the ordinary child.").

Massachusetts.[114] In *Prince*, the state law at issue was a Massachusetts child labor law providing that "[n]o boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise . . . in any street or public place."[115] The plaintiff in *Prince* violated the Massachusetts child labor laws by allowing her children "to engage in preaching work with her upon the sidewalks."[116] Specifically, the children were helping to sell copies of "Watch Tower" and "Consolation," both Jehovah's Witness publications.[117]

Although the Court ultimately upheld the state child labor laws,[118] it set a strong precedent for the right of parents to raise their children without state interference. The Court stated, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[119] Despite recognizing the fundamental parental right to custody, care and nurture of one's child, the Court upheld the laws because of Massachusetts's interest in protecting children from harm.[120] The Court, citing the potential harms arising from "diverse influences of the street," as well as the evils inherent in child employment "especially in public places," supported the legislation, stating that it was "appropriately designed to reach such evils within the state's police power . . . ."[121] Accordingly, depending on the nature of the afflicted harm, a state may have a valid interest that trumps the fundamental liberty of parents to raise their kids how they see fit.

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[114] 321 U.S. 158 (1944).

[115] *Id.* at 160-61. Further provisions in the child labor laws mandated punishment for "[a]ny parent, guardian or custodian having a minor under his control who compels or permits such minor to work in violation of any provisions of [the prior sections]." *Id.* at 161.

[116] *Id.* at 162.

[117] *Id.*

[118] *Id.* at 170.

[119] *Prince*, 321 U.S. at 166.

[120] *Id.* at 170.

[121] *Id.* at 168–69. At the end of the opinion the Court puts somewhat of a disclaimer on its holding by saying that they do not lay the foundation for "state intervention in the indoctrination and participation of children in religion" simply if it is done in the name of the children's health and welfare . . . ." *Id.* at 171.

A more recent Supreme Court case shed additional light on this right. In *Troxel v. Granville*, the Court evaluated a Washington statute allowing any person to petition the state court for child visitation rights.[122] In her plurality opinion, Justice O'Connor described the long-recognized care, custody, and control rights of parents as "perhaps the oldest of the fundamental liberty interests recognized by this Court."[123] Although stating clearly that parents have fundamental rights, the plurality did not state a clear standard to apply when evaluating whether those rights have been infringed.[124] Rather than apply strict scrutiny, as suggested by Justice Thomas in the dissent, the plurality struck down the Washington statute, reasoning that the state must show more than a simple disagreement with the parents on the best interests of their children.[125] As a result, the Court articulated no clear standard of review. Rather, the plurality opinion in *Troxel* suggests that the proper determination of whether the fundamental parental right has been infringed involves a balancing test that weighs several factors.[126] Although this holding is specific to the facts of the case and Washington's visitation statute, the Court's holding does provide some guidelines for balancing the state's interest in protecting children from harm against the fundamental rights of parents over the care of their children.

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[122] Troxel v. Granville, 530 U.S. 57, 63 (2000).

[123] *Id.* at 65. Justice O'Connor cites a litany of cases before stating "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.* at 66.

[124] *See id.* at 80 (Thomas, J., concurring) ("The opinions of the plurality . . . recognize such a right, but curiously none of them articulates the appropriate standard of review.").

[125] *Id.* at 72 (finding "this case involves nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children's best interest").

[126] *Id.* ("the combination of these factors demonstrates that the visitation order in this case was an unconstitutional infringement on Granville's fundamental right . . . .").

2. First Amendment Free Exercise of Religion

As illustrated by the Supreme Court in *Wisconsin v. Yoder,*[127] state regulations historically have not withstood parents' constitutional challenges to free exercise of religion under the First Amendment.[128] In *Wisconsin v. Yoder*, the respondents had been convicted of violating Wisconsin's compulsory school-attendance law.[129] The law required the respondents, members of the Amish religion and Conservative Amish Mennonite Church, to "cause their children to attend public or private school until reaching age 16 . . . . "[130] The respondents asserted that the law violated their rights under the First Amendment to exercise their religion, as "their children's attendance at high school, public or private, was contrary to the Amish religion and way of life."[131]

The Supreme Court recognized that "[t]here is no doubt as to the power of a State . . . to impose reasonable regulations for the control and duration of basic education."[132] The conflict arises out of a parent's interest in guiding the religious upbringing and education of their children "in their early and formative years," which has "a high place in our society."[133] In weighing this conflict, the Court held that states' interest must be "of sufficient magnitude to override the [parents'] interest claiming protection under the Free Exercise Clause."[134]

In *Yoder*, the state argued that the additional education requirement was necessary to prepare its citizens to participate "effectively and intelligently in our open political system" and "to be self-reliant and self-sufficient participants in society." [135] Additionally, the state expressed concern about the possibility that the Amish children might someday choose to leave the religion and

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127 406 U.S. 205 (1972).

128 The religious clauses of the First Amendment state, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The second clause is referred to as the Free Exercise Clause of the First Amendment.

129 *See Yoder*, 406 U.S. at 207.

130 *Id.*

131 *Id.* at 208.

132 *Id.* at 213.

133 *Id.* at 213–14.

134 *Id.* at 214.

135 *Yoder*, 406 U.S. at 221.

would be ill-equipped for life outside of that faith.[136] The Supreme Court found the state's arguments to be speculative and looked at evidence showing the Amish members to be "productive and very law-abiding members of society . . . opposed to conventional formal education of the type provided by a certified high school . . . ."[137] Accordingly, the Court found that because foregoing one or two additional years of compulsory education would not impair the physical or mental health of the children, the state interest was not sufficient to overpower the parents' First Amendment right to exercise their religion.[138]

Arguably, the state may have an interest sufficient to overcome a parental rights constitutional challenge if it can show that a parent's exercise of religion over the child's education results in physical or mental harm. Chief Justice Burger's opinion in *Yoder* provides several relevant observations at issue in the discussion of potential harm to children. He seemed to assert that this case may have had a different outcome had the state been able to prove that the children were subjected to some type of harm. He stated, "[t]his case, of course is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred."[139] Additionally, he recognized that the case involved "the fundamental interest of parents," and that the Court had no reason to consider the conflict that would arise if the child expressed "a desire to attend public high school in conflict with the wishes of his parents . . . ."[140] Therefore, additional considerations must be evaluated if a child desires to attend a different school in conflict with his or her parents' desires stemming from the exercise of their own religious rights under the First Amendment.

3. Neutral Law of General Applicability Defense to Free Exercise Challenges

Despite infringing on free exercise of religion rights, a state may be able to defend against a First Amendment challenge if it

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136 *Id.* at 224.
137 *Id.* at 222–24.
138 *Id.* at 234.
139 *Id.* at 230.
140 *Id.* at 231–32.

can prove that the law at issue does not target religious practices specifically and should be applied on a general level to those it seeks to regulate. This legal doctrine arises out of *Employment Division v. Smith*.[141] In *Smith*, the Court considered the constitutionality of an Oregon law under the Free Exercise Clause, prohibiting the "knowing or intentional possession of a controlled substance unless . . . prescribed by a medical practitioner,"[142] where the law prohibited the religious use of peyote.[143]

The Court articulated the appropriate legal standard by citing language from previous holdings stating that "the right of free exercise does not relieve an individual of the obligation to comply" with a "neutral law of general applicability."[144] Thus, the Court upheld the Oregon law because the law was not shown to be "an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs," but was neutral and generally applicable.[145] However, the Court recognized that a more difficult analysis might ensue where the free exercise claim is combined with one or more additional constitutionally protected rights.[146] As a result, if a law is determined to be a neutral law of general applicability but involves one of these hybrid situations, then the law may be subject to heightened scrutiny. However, specific guidance by the Supreme Court has not been provided.[147]

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[141] Emp't Div. v. Smith, 494 U.S. 872 (1990).

[142] *Id.* at 874.

[143] *Id.* at 876. Peyote, a hallucinogen, was listed on Schedule I of the classifications of drugs considered to be controlled substances under the Oregon statute. *Id.* at 874. As part of a sacramental ritual, peyote is ingested at a ceremony of the Native American Church. *Id.*

[144] *Id.* at 879.

[145] *Emp't Div.*, 494 U.S. at 882.

[146] *Id.* at 881 (stating that neutral laws of general applicability may be barred by the First Amendment if they involve "the Free Exercise Clause *in conjunction* with other constitutional protections, such as freedom of speech . . . or the right of parents . . . to direct the education of their children . . . .") (emphasis added).

[147] *See* Combs v. Homer-Center Sch. Dist., 540 F.3d 231, 247 (3d Cir. 2008) ("[u]ntil the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta.").

IV. ANALYSIS

Having survived the constitutional challenges in *Pickup* and *King*, California and New Jersey have demonstrated that states are able to regulate SOCE and its potential harm to minors. While California was held to a rational basis standard, only having to show a legitimate state interest in protecting its minors to survive the constitutional challenges, New Jersey had to meet a higher burden, requiring a showing of a substantial state interest. California's legitimate state interest overcame challenges that it infringed on free speech and the fundamental right of parents to raise their children. The Ninth Circuit determined that the statute did not actually ban *speech* but *conduct* of the practitioners. In New Jersey, the state's interest survived challenges that it infringed on free speech rights and rights to free exercise of religion. The standard was higher in the Third Circuit because the court determined that the statute banned professional speech.

One might wonder whether certain similarities between mental health treatment and education might allow states like California and New Jersey to pass legislation protecting minors from educational harm in the same manner as the SOCE statutes. Is not the development of mental aptitude through education equally as important as mental health treatment? If so, does a state have a strong enough interest to ban harmful anti-gay education efforts? In addition to licensing standards for teachers, as well as the many other ways of regulating education, can a state ban curriculum that seeks to disparage a particular sexual orientation? The following discussion evaluates similarities between a state's interest in banning SOCE treatment and banning harmful anti-gay education, and shows how the SOCE cases in California and New Jersey provide stronger arguments to defend a state's interest in eliminating anti-gay education efforts.

A. Proposed Sexual Orientation Equality Statute

Mirroring the language from the New Jersey SOCE statute, the following hypothetical bill ("HB 1001") might be enacted by a fictitious state ("FS") legislature: "A person who is certified to teach under this state's department of education shall not administer a curriculum or course material asserting that any sexual orientation or gender identity is subpar, less moral, or less socially acceptable than any others." At the outset, the statute identifies that it will be regulating only those practitioners

licensed by FS. This is similar to both SOCE statutes discussed previously, which applied to LMHPs. Just as states have licensing requirements for LMHPs, they also have licensing standards for teachers in the education field. This will have implications for the legal arguments discussed later about whether HB 1001 regulates conduct, speech, or professional speech and accordingly, what level of review will be used by FS to determine its constitutional validity.

B. State's Interest in Protecting Minors from Harmful Education

Having enacted an education statute that prohibits anti-gay education efforts, FS will need to articulate a state interest to back up its purpose. For purposes of this hypothetical situation, the state's interest will be to protect its minors from harmful education.[148] This supposes a similar legislative purpose as that of SB 1172, the bill in question in *Pickup*, which was intended to "protect[] the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth . . . ."[149] This begs the question: Is teaching that homosexuality is socially unacceptable or immoral actually harmful to children?

1. Harm Occurring from Sexual Orientation Change Efforts

To date, empirical scientific evidence showing the harmful effects of SOCE is scarce. Although scientific data is limited, the available research includes numerous testimonials from former SOCE participants who say they have experienced psychological harm as a result of the treatment.[150] Additionally, tests and research conducted by the APA Task Force has indicated that negative effects on reparative therapy participants such as their high dropout rates could show strong support for actual harm.[151] More recent studies involve self-reported harms including "anger,

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[148] Arguably, one could think of a host of ways in which education might be harmful to minors. This article will focus on harms generated by anti-gay educational efforts; however, much of the analysis and arguments could apply to protecting minors from harmful education outside of the LGBT environment.

[149] *Pickup*, 740 F.3d at 1223.

[150] Sandley, *supra* note 8, at 254.

[151] *Id*.

depression, suicidal ideation, and sexual dysfunction."[152] The problem with finding concrete scientific evidence arises because LGBT individuals already experience many of these harms by simply being members of the LGBT community.[153] In a report about the appropriate therapeutic response to sexual orientation, the APA Task Force found that the nature of recent studies "precludes causal attributions for harm or benefit to SOCE . . . ."[154]

Having limited scientific research on the harms of SOCE, the next logical step in a legal analysis would be to look at what findings courts and legislatures have made about the harms of SOCE. Outside of *Pickup* and *King*, the Ninth Circuit, in interpreting a statutory definition of "persecution," found that attempts to "cure" or "treat" a person's sexual orientation, even with good intentions, could be considered persecution.[155] Additionally, the California legislature determined that SOCE imposes critical health risks to LGBT youth, including risks as serious as suicide.[156] New Jersey has also listed specific harms in its statutory prohibition of SOCE, such as "depression, anxiety and self-destructive behavior," which "reinforce[s] self-hatred already experienced by the patient."[157] Despite the lack of empirical evidence explicitly confirming higher depression or suicide rates in LGBT individuals subjected to SOCE, both courts in *Pickup* and *King* found a legitimate state interest in protecting minors from harmful SOCE treatment.

2. Proving Harm from Anti-gay/Hetero-normative Education.

Although many empirical studies evaluating reparative therapy have yielded little evidence to support higher depression and suicide rates in LGBT youth, other studies reveal significant correlations between negative social environments and mental

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[152] *Id*.

[153] *Id*.

[154] *Report of the Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, AMERICAN PSYCHOLOGICAL ASSOCIATION, 42 (2009), *available at* https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf (last visited May 26, 2015).

[155] *See* Pitcherskaia v. INS, 118 F.3d 641, 648 (9th Cir. 1997).

[156] S.B. 1172, 2012 Reg. Sess. (Cal. 2012).

[157] N.J. STAT. ANN. § 45:1-54(d)(2) (West 2013).

harm.[158] One study in particular compared suicide attempts for LGB youth in two separate environments, considered positive and negative environments.[159] The positive environments consisted of schools with "antibullying policies specifically protecting LGB students," "gay-straight alliances," and "antidiscrimination policies that included sexual orientation."[160] The study found that suicide attempts were only nine percent higher for heterosexual students in the negative environments while attempts for LGB students were twenty percent higher.[161]

Other studies evaluating social environments have focused on the stigmatization and victimization of LGBT youth. One study measured the victimization of students who self-identified as a sexual minority (non-heterosexual status).[162] The victimizing behavior involved teasing, bullying, hitting/beating up, treating unfairly, or calling students bad names based on actual or perceived sexual orientation.[163] The results revealed that where environments allow such victimization, LGBT students develop negative feelings about themselves. According to the study, these students "expect intolerance and rejection, which can lead to increases in depression and suicidality."[164] A similar study found that environments promoting stigma and prejudice against LGBT individuals contribute to increased stress and higher mental disorders.[165] With such research at its disposal, a state should easily be able to prove it has a strong interest in protecting LGBT

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[158] *See* Mark L. Hatzenbuehler, *The Social Environment and Suicide Attempts in Lesbian, Gay, and Bisexual Youth*, 127 PEDIATRICS 896, 896 (May 2011) ("[F]ew empirical studies have used objective measures of the social environment to examine [higher rates of suicide attempts among LGB youth]. . . . This study demonstrated that negative characteristics of the social environment increase risk for suicide attempts among LGB youth . . . .").

[159] *Id.* at 897.

[160] *Id.*

[161] *Id.* at 900.

[162] Chad M. Burton et. al., *Sexual Minority-Related Victimization as a Mediator of Mental Health Disparities in Sexual Minority Youth: A Longitudinal Analysis*, 42 J. YOUTH ADOLESCENCE 394, 394 (2013).

[163] *Id.* at 396.

[164] *Id.* at 399.

[165] Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCHOL. BULL. 674 (2003), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2072932/ (last visited March 5, 2015).

students from a harmful social environment enhanced by negative teaching about minority sexual orientations.

If a state were to pass legislation to prevent harmful education, it would need to describe and define in detail the harm it sought to prevent. The proposed hypothetical statute for FS seeks the following: "a ban on curriculum or course material asserting that any sexual orientation or gender identity is subpar, less moral, or less socially acceptable than any others." Not only might FS reference some of the studies above, but it might also consider borrowing language from the SOCE statutes. From New Jersey's statute, FS might quote a June 2012 APA position statement stating that "[a]s with any societal prejudice, bias against individuals based on actual or perceived sexual orientation, gender identity or gender expression negatively affects mental health, contributing to an enduring sense of stigma and pervasive self-criticism through the internalization of such prejudice."[166] This statement is important because it applies not only to SOCE treatment, but also to sex education courses emphasizing that homosexuality is unacceptable or immoral. Such bias and prejudice coming from one's own teacher could lead to the same stigma, self-criticism, or mental harm.

Additionally, FS could borrow from New Jersey's SOCE statute, quoting the American School Counselor Association's position statement, which provides guidance for professional school counselors. After pointing out that homosexuality is not an illness requiring treatment, the statement instructs counselors to provide service "to promote self-acceptance, deal with social acceptance, understand issues related to coming out . . . and identify appropriate community resources." [167] Although this particular statement does not explicitly mention harm, it implies that students in school need help dealing with the difficulties associated with membership in the LGBT community. Arguably, where a state recognizes the struggles LGBT students face and authorizes a school professional to help with those struggles, it has

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[166] N.J. STAT. ANN. § 45:1-54(j)(1) (West 2013). *See also* Sandley, *supra* note 8, at 263 ("The [CA SOCE] statute implicitly concludes that treating same-sex attraction as an illness or a moral wrong to be corrected must logically increase the stigma and depression experienced by LGB youth.") (citing S.B. 1172, 2011-2012 Reg. Sess. (Cal. 2012)).

[167] N.J. STAT. ANN. § 45:1-54(e) (West 2013).

an equal interest in preventing another school professional from teaching students that being gay is wrong or unacceptable.

In addition to statutory language, FS might also consider looking to case law to support the harm it is trying to prevent. The *Pickup* court is somewhat unhelpful in this regard as it defers to the governmental body to determine what should be considered harmful;[168] however, the *King* court provides some insight. In *King*, the Third Circuit stated, "[i]t is not too far a leap in logic to conclude that a minor client might suffer psychological harm if repeatedly told by an authority figure that her sexual orientation—a fundamental aspect of her identity—is an undesirable condition."[169] The court continued to explain the potential harm, asserting that if the counseling is ineffective, "it would not be unreasonable for a legislative body to conclude that a minor would blame herself if her counselor's efforts failed."[170] One can easily see the similarity between the situation described by the Third Circuit in *King* and a school teaching students that homosexuality is immoral, unacceptable, and criminal. Indeed a student's psychological well-being would be harmed if the student were repeatedly told by an authority figure, such as a teacher, that his sexual orientation is an undesirable condition.

Another way the *King* court described the harm from SOCE was in its effects on minor clients. The Third Circuit stated that "New Jersey's stated interest is even stronger because A3371 seeks to protect minor clients—a population that is especially vulnerable to such practices."[171] The court cited testimony from Douglas C. Halderman, Ph.D., "explaining that adolescent and teenage clients are 'much more vulnerable to SOCE' because their 'pre-frontal cort[ices] [are] still developing and changing rapidly.'"[172] Those young students in school are likely to be the same sort of "clients" as those receiving SOCE treatment. These children are thought to be especially vulnerable; thus, a state's interest is automatically increased. An adolescent or teenage student who is taught that homosexuality is wrong/unacceptable

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168 *See Pickup*, 740 F.3d at 1232.
169 *King*, 767 F.3d at 239.
170 *Id.*
171 *Id.* at 237–38.
172 *Id.* at 238.

would be especially vulnerable, and the harm inflicted from that teaching is exacerbated by the client's developmental stage.

C. Hypothetical Constitutional Challenges to HB 1001's Ban on Anti-gay Education

If a state determined it did have an interest in protecting children from the influence of anti-gay ideology in school, it could enact legislation such as that proposed earlier.[173] The hypothetical bill (HB) might read, "A person who is certified to teach under this state's department of education shall not administer a curriculum or course material asserting that any sexual orientation or gender identity is subpar, less moral, or more socially unacceptable than any others."[174] Presuming that such a statute would inevitably be challenged as unconstitutional, FS would have many ways to defend its asserted interest. The challenges brought would likely include claims that the bill infringes on the following rights: First Amendment right of free speech, Fourteenth Amendment parental right to make decisions regarding the care, custody, and control of their children, and religious rights under the First Amendment free exercise clause.[175]

The burden that FS would have to meet would depend in part on the level of scrutiny used by the court hearing the challenge. The highest burden comes with strict scrutiny, which would require FS to prove a compelling state interest. The next highest level of scrutiny is intermediate scrutiny, which would demand that FS show that the statute directly advances its interest without being more extensive than necessary. Finally, the lowest level of scrutiny is rational basis review, which would require only that FS prove the statute bears a rational relationship to a legitimate interest. As the following discussion will explicate, the type of review a court will use in a challenge to

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[173] The fictitious state, FS will be referred to in the following discussion.

[174] This supposes a similar legislative purpose as that of A3374, the bill under question in *King*, which is "a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth . . . ." *King*, 767 F.3d at 222.

[175] Although other claims are likely, the discussion in this note will only cover the claims discussed previously in relation to the SOCE statutes and constitutional rights relative to education and religion.

such a law is not entirely clear. Having reviewed differing rationales between the Ninth and Third Circuit in *Pickup* and *King*, FS's defenses may hinge upon which Circuit will be adjudicating the challenges. The following discussion will evaluate likely constitutional challenges to HB 1001 and will show how *Pickup* and *King* provide persuasive legal arguments for FS to defend the statute.

1. First Amendment Right of Free Speech

HB 1001 would almost certainly be challenged as unconstitutionally infringing on teachers' First Amendment free speech rights.[176] Traditionally, this right would be considered by courts as a fundamental right requiring strict scrutiny; however, as seen in *Pickup* and *King*, a court may determine that the right at issue requires a lesser standard of review. In order to have the lowest level of review applied, FS could argue that HB 1001's ban on administering certain curriculum or course material is a ban on the conduct of teachers, rather than on their speech.[177]

Using the logic and reasoning of the *Pickup* court, defenders of HB 1001 would argue that an educator's use of speech for educational purposes does not necessarily implicate the right to free speech under the First Amendment.[178] Defenders of the bill

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[176] Another First Amendment constitutional challenge brought against regulations in the education environment is the right of Academic Freedom. This challenge is not discussed because Academic Freedom does not apply to public schools and teachers. *See* Alliance Defending Freedom for Faith and Justice, *The Free Speech and Academic Freedom of Teachers in Public Schools* (Feb. 2013), *available at* http://www.alliancedefendingfreedom.org/content/docs/issues/school/Teacher-Free-Speech-and-Academic-Freedom-3.22.13.pdf.

[177] Although this argument would likely be most effective if the case were heard in the Ninth Circuit, this argument would be significant in other circuits as well, since the structure is derived from Supreme Court precedents. *See* Rumsfeld v. Forum for Academic & Inst'l Rights, Inc., 547 U.S. 47, 66 (2006) (holding that the First Amendment protection does not apply to conduct that is not "inherently expressive."). *See also* Planned Parenthood of Southeastern Pennsylvania. v. Casey, 505 U.S. 833, 884 (1992) (applying a reasonableness standard to the regulation of medicine where speech may incidentally be implicated, by a plurality of three justices, plus four additional justices concurring in part and dissenting in part).

[178] *Pickup*, 740 F.3d at 1229 (where court states that "mental health treatments require speech, but that fact does not give rise to a First Amendment claim when the state bans a particular treatment").

would point out the similarities between the professional relationships of a mental health provider and a patient and of a teacher and a pupil. Similarly, just as SB 1172 regulates conduct but does not "prevent licensed therapists from discussing the pros and cons of SOCE with their patients," the hypothetical bill also regulates conduct and prohibits educators from *teaching* that homosexuality (or other sexual orientations other than heterosexuality) is wrong, unacceptable, or cause for shame but does not prohibit a *discussion* of other viewpoints regarding sexual orientation.

If the defenders of HB 1001 are successful in persuading a court that it regulates *conduct* and not *speech*, the court would consider the bill to have an "incidental" effect on free speech, which would result in a court applying rational basis review. A court would uphold the law "if it bears a rational relationship to a legitimate state interest."[179] Just as the Ninth Circuit court did in *Pickup*, a court would likely find that HB 1001 has a legitimate interest in protecting lesbian, gay, bisexual, and transgender youth from harm, and that the bill is rationally related to achieving that purpose. Thus, the best case scenario for defenders of HB 1001 would be getting the FS court to use rational basis review in determining its constitutionality by arguing that it bans conduct rather than speech.

If a court was not persuaded that HB 1001 regulates *conduct* but instead regulates *speech*, it would likely use a higher level of scrutiny. Defenders of HB 1001 might then argue that the statute bans speech that falls "within a historically delineated category of lesser protected or unprotected expression."[180] This argument parallels the Third Circuit court's reasoning in *King*.[181] There, the court did not use strict scrutiny review, but rather found that since the speech was from a licensed professional speaking as part of his profession, it did not require "the full

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[179] *Id.* at 1231 (citing *Planned Parenthood*, 505 U.S. at 884, 967-68 (applying a reasonableness standard to the regulation of medicine where free speech may be implicated incidentally)).

[180] *King*, 767 F.3d at 229.

[181] It is unclear what level of scrutiny (rational basis or a variant lesser than strict scrutiny) might be applied under this argument outside of the Third Circuit, as the *King* court cites other circuit court decisions (including *Pickup*) to conclude that intermediate scrutiny is appropriate. *See id.* at 231–34.

protection of the First Amendment."[182] Applying only intermediate scrutiny and explaining that the prohibited speech at issue was "professional speech," the *King* court provided certain factors that led it to its decision. The court stated, "we believe 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."[183] With the descriptions of "professional speech" from the Third Circuit, one can easily see how verbal communication between a schoolteacher and his student would fall under this category of lesser-protected speech, and thus, would not receive the full protection of the First Amendment. As such, defenders of HB 1001 would argue that the lower level of scrutiny is appropriate for the schoolteacher because the speech at issue is used to provide a personalized service (education) to a client (student) based on the teacher's expert knowledge in a particular field.

Additionally, the Third Circuit described when speech is considered to have the full protection of the First Amendment, contrasting professional speech with situations where "a professional is speaking to the public at large or offering her personal opinion to a client."[184] Accordingly, teachers may argue that, in teaching a class and offering viewpoints on sexual orientation and gender identity, they are merely offering personal opinions on the issues.[185] Defenders of HB 1001 could counter the previous argument by stating that a teacher/student relationship is a professional relationship through which a teacher is imparting specialized knowledge to the students. Furthermore, defenders could point to the language in the statute that pertains explicitly to curriculum and course material rather than personal opinions.

If defenders of HB 1001 were in the Third Circuit and could convince a court that the type of speech at issue is professional speech, then the court would most likely apply intermediate scrutiny. Under intermediate scrutiny the bill would survive a constitutional analysis only if it "directly advances" the state's

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[182] *Id.* at 232.

[183] *Id.* ("a licensed professional does not enjoy the full protection of the First Amendment when speaking as part of the practice of her profession").

[184] *Id.*

[185] Because HB 1001 bans curriculum and course material, a teacher would be unlikely to argue that the statute prohibits speaking to the public at large.

"substantial interest" and is "not more extensive than necessary to serve that interest."[186] The difficulty in overcoming intermediate scrutiny (rather than rational basis as in *Pickup*) is proving that the harm the legislature seeks to prohibit is real and not based on conjecture.[187] Defenders of HB 1001 may have difficulty proving that children who are taught that certain sexual orientations are immoral or unacceptable have actually suffered a recognizable harm. Again, because the SOCE statutes are relatively new, evidence may be sparse to support a claim relating to education. Additionally, most of the evidence supporting the harms from SOCE is based on the specific treatment involved.[188] Therefore, in order to pass intermediate scrutiny, defenders of HB 1001 would need to show similarities between SOCE and teachings about sexual orientation—for instance, that a child undergoing SOCE experiences the same mental health concerns as a child who is taught in school on a regular basis that homosexuality is immoral or unacceptable. The other option would be to gather evidence that the specific teachings at issue had legitimately harmed children.

If defenders of HB 1001 are unable to have either rational basis or intermediate scrutiny applied, they would then have to defend the bill under strict scrutiny. Defenders of HB 1001 would have much more difficulty arguing the constitutionality of the bill since they would be required to show that protecting LGBT minors from harmful education is a compelling state interest and that the bill is narrowly tailored to achieve that interest.[189] Because neither the Third Circuit nor the Ninth Circuit addressed the constitutional validity of the SOCE statutes under a strict scrutiny standard, the argument that the protection of LGBT youth is a compelling state interest has not been made. Defenders of the bill might use recent decisions like *Pickup* and *King* to bolster a persuasive argument in that case. Ultimately, defenders of HB 1001 would have greater difficulty defending constitutional challenges under strict scrutiny.

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[186] *King*, 767 F.3d at 235 (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm. of N.Y., 447 U.S. 557, 566 (1980).

[187] *See id.* at 238.

[188] *Id.*

[189] *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (stating that the standard of review under strict scrutiny in the evaluation of a racial classification).

2. Fourteenth Amendment Parental Right to Care, Custody, and Control of Children

Parents might also claim that HB 1001 infringes on their substantive due process rights to raise their children how they see fit. Recently, the Supreme Court reaffirmed a previous holding, stating that "parents have a right in the care, custody and control of their children."[190] Accordingly, courts are reluctant to rule against this fundamental right and legislatures are hesitant to pass laws that interfere with this right.[191] Defenders of HB 1001 would point out the similarities between SB 1172 and the bill at issue.[192] The Ninth Circuit in *Pickup* held "the fundamental rights of parents do not include the right to choose a specific type of provider for a specific . . . mental health treatment that the state has reasonably deemed harmful."[193] In this hypothetical, presumably, the state has deemed that teaching a child that non-heterosexual sexual orientations are improper or unacceptable negatively impacts an LGBT student's mental health. Therefore, applying the reasoning of the *Pickup* court, a court would determine that parents do not have the fundamental right to subject a child to this type of teaching if the state has deemed it harmful.[194]

Another argument arising from the *Pickup* decision involves the right of parents to inform their children of life principles *outside* the school but allowing the state to regulate teaching *inside* the classroom. The *Pickup* opinion cited another Ninth Circuit Court of Appeals case, *Fields v. Palmdale School District*, where parents claimed their fundamental parental rights were infringed upon when the school distributed a survey to students with questions regarding sex.[195] The Ninth Circuit in

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[190] Tyler Talbot, *Reparative Therapy for Homosexual Teens: The Choice of the Teen Should be The Only Choice Discussed*, 27 J. JUV. L. 33, 34 (2006).

[191] *Id*.

[192] Although arising primarily out of the Ninth Circuit case, the arguments in this section defending against infringing on the fundamental rights of parents are based on Supreme Court precedents and should be equally applicable and persuasive in any circuit.

[193] *Pickup*, 740 F.3d at 1236.

[194] For a discussion of harm, see section IV.B.

[195] *Pickup*, 740 F.3d at 1236 (citing *Fields*, 427 F.3d at 1197).

Fields found that although parents have a fundamental right "to inform their children when and as they wish on the subject of sex, they have no constitutional right . . . to prevent a public school from providing its students with whatever information it wishes to provide, sexual or otherwise . . . ."[196] Using this argument, defenders of HB 1001 would argue that parents are free to exercise their fundamental right to inform their children about sexual orientation but they have no right to compel schools "to follow their own idiosyncratic views as to what information the schools may dispense."[197]

Although the *Pickup* decision referenced *Fields*, defenders of HB 1001 may not want to raise this argument, as it is easily distinguishable. *Fields* involved the dissemination of material (the surveys with sexual questions), whereas the hypothetical bill involves a ban on teaching certain tenets or distributing specific viewpoints about sexual orientation. That distinguishable characteristic of *Fields* may complicate the argument, but the holding still limits the parental rights and provides the state a certain degree of power when it comes to regulating education.[198]

The strongest argument for defenders of HB 1001 relates to the health of the children that the bill seeks to protect. A whole host of cases allow the state to intervene despite fundamental parental rights when the health of the child is at issue.[199] Because legislation protecting the mental health of LGBT youth is very new, not much exists yet to show the specific mental harm accompanying an education that seeks to teach children that non-heterosexual sexual orientations are improper or immoral. However, as seen in *Pickup* and *King*, courts may be willing to

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196 *Fields*, 427 F.3d at 1206.

197 *Id.*

198 *See id.* at 1204 (where court points out that the fundamental right of parents to make decisions concerning the care, custody, and control of their children is not without limitations).

199 *See Prince*, 321 U.S. at 166 (stating that a parent "cannot claim freedom from compulsory vaccination for the child . . . on religious grounds"); *see also* Jehovah's Witnesses v. King Cnty. Hosp., 278 F. Supp. 488, 504 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968) (holding that states may intervene when a parent refuses necessary medical care for a child); *see also* Parham v. J.R., 442 U.S. 584, 603 (1979) (recognizing that "a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized").

recognize the mental harm associated with SOCE. The argument easily extends that the harms associated with SOCE are equally apparent in an education environment that negatively influences a child's understanding of homosexuality, bisexuality, and transgender identity.

3. First Amendment Free Exercise Clause

Finally, schools, teachers, and parents will likely claim that HB 1001 infringes on their right to exercise their religion freely under the First Amendment free exercise clause.[200] As discussed by the Third Circuit Court of Appeals in *King*, rational basis is the appropriate level of review for a state regulation that does not target religious practices but "is neutral and generally applicable."[201] Accordingly, the argument for defenders of HB 1001 is that, similar to A3371, HB 1001 is a law of general applicability and does not target religiously motivated conduct.[202]

As it is stated above, HB 1001 does not explicitly reference religion or any religious beliefs. Therefore, a court will likely find that on its face, the bill is neutral. However, the bill will fail the general applicability requirement if it "burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law . . . ."[203] This standard could prove difficult for defenders of HB 1001, since many of those directly affected by the statute would be teachers whose religious convictions push them to teach and promote the

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[200] Although this article focuses on public schools, if private/religious schoolteachers are subject to licensing requirements by the state, they would also likely be plaintiffs in this challenge.

[201] *King*, 767 F.3d at 243.

[202] As discussed in section III.C.2, the requirement for rational basis review for a neutral law of general applicability is governed by Supreme Court precedent; however, what is less clear is the appropriate standard of review when the rights at issue are a combination of the First Amendment free exercise right and another protected right under the Constitution. The Third Circuit has refused to use any higher level of scrutiny until the Supreme Court gives further direction. It is unclear whether a court outside of the Third Circuit would use a higher level of review.

[203] *Id.* at 242 (quoting Blackhawk v. Pennsylvania, 381 F.3d 202, 209 (3d Cir. 2004)).

idea that homosexuality is wrong and immoral. However, as seen by some of the "no promo homo" laws, the statute will not be exempting a substantial non-religious category of conduct because it is intended to regulate conduct primarily in the public school atmosphere.[204] Thus, if a court found HB 1001 to be a neutral law of general applicability, it would receive rational basis review and would likely be found constitutional.[205]

V. CONCLUSION

Recognizing that stigma and prejudice against LGBT students can lead to increased risks for suicide and mental health issues, a state may want to protect students from this harm in the school environment. This could be accomplished by enacting a statute that bans harmful stigmatizations in course material by teaching that homosexuality is morally wrong or socially unacceptable. Upon a showing of harms from anti-gay teaching, a state can argue that its interest is sufficient to overcome alleged constitutional violations of free speech, free exercise of religion, and other claims. Particularly helpful and persuasive in its constitutional defenses will be the holdings from recent circuit court decisions upholding SOCE prohibition statutes in California and New Jersey. Although the courts used different rationales and levels of review, both statutes overcame constitutional challenges that they infringed on free speech rights, free exercise of religion rights, and the rights of parents to raise their children. Because the harms and government interests are so similar, strong arguments can be made from those cases to significantly bolster constitutional defenses, whereby states can protect minor citizens from harmful anti-gay educational teachings.

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[204] Defenders of HB 1001 might also argue that the statute is generally applicable because it condemns teaching that heterosexuality is subpar or unacceptable to the same extent that it condemns teaching that other orientations are subpar to heterosexuality.

[205] If a court is not persuaded that HB 1001 is a law of general applicability, the bill will likely be reviewed under strict scrutiny. As previously discussed, this higher standard of review will be the most difficult to overcome.